Week 1 – Key Public Law Concepts and Sources of Constitutional Law

The Nature of Law

Natural Law: focuses on the source and content of laws as the basis of their legitimacy.

- *Thomas Aqinas* – All law can be traced back to an eternal law provided by God. This law is discoverable by humans through the application of reason.
- *John Finnis* – Any legal system must uphold the following discernable basic goods: life, knowledge, play, aesthetic experience (or beauty), sociability (or friendship), practical reasonableness and religion. Thus, there are limits to what can be considered to be law that lie outside the authority of a government or a state, which act as a challenge to positive legal authority.

Legal Positivism: theorists sought a scientific explanation for law within its self-contained structures and processes. It tells us what makes a rule in the nature of law and what gives law its legal authority, however it does not state when individuals should obey the law.

- *John Austin* – Laws are simply the commands of a sovereign backed by the threat of punishment, which are habitually obeyed by most people in society. Sovereign power and the institution of law is a matter of fact that is unquestionable. (Command theory of law).
- *H L A Hart* – People obey the law for reasons other than the risk of punishment. Rather, people develop an attitude of obligation, allowing rules to be used in a positive sense as standards for the appraisal of behaviour. Hart established 'secondary' rules to provide the primary rules of obligation with coherence and legitimacy.
- *Hans Kelsen* – Developed an abstract theory of positive law that described the logical structure of legal systems. Holds that law is nothing more than a hierarchy of norms. Each normative proposition is derived from a higher normative proposition until a basic or 'grund' norm is reached. This basic norm is simply posited and must be obeyed without question.

Empowerment and Constraint

- *Cicero* – 'a commonwealth is a constitution of the entire people' showing a discernable 'public thing' (*res publica*) that propounds a notion of the common good outside the values and desires of individuals.
- *Aristotle* – saw the state as the highest form of association.
- *William Blackstone* – 'The public good is in nothing more essentially interested, than in the protection of every individual's private rights.'

Thus, advocating for the delimitation of the power of the state, with public law doctrines created and invoked for this task.

Constitutionalism is a political doctrine, which holds that the power of government can – and should – be delimited by the law.

- *Thomas Hobbes* – The role of the state is to protect individual freedom. This is because freedom is the ultimate human value. As the natural state of man is to compete with others, the individual must voluntarily sacrifice some freedom to the state to guarantee their freedom. The four purposes of laws must be:
    - To defend against external enemies;
    - To maintain peace within the state;
    - To facilitate wealth acquisition; and,
    - To promote liberty.
- *John Locke* – 'Freedom of men under government is to gave a standing rule to live by, more common to everyone of that society, and made by the legislative power erected on it… and not to be subject to the inconsistent, uncertain, unknown and arbitrary will of another man.
    - Posited 'principles of justice' as the explanation for any original agreement to live together.
- *Thomas Paine* – The role of a constitution is to constrain the government, thus the power of the government is neither unlimited nor arbitrary.

Social Contract Theory holds that autonomous individuals choose to enter a mutually binding covenant to form a government that has the power to promulgate and enforce a body of laws in the interest of preserving order.

- *Jean-Jacques Rousseau* – the benefits of a common bond with other far outweighed the loss of personal freedom that this union requires.

<u>Republicanism</u>

Republicanism is the democratic idea of rule by the people, as opposed to a monarch.

- *Philip Pettit* – Freedom as non-interference and freedom as non-domination.
    - Non-domination: regulation is not arbitrary and occurs in accordance with the established legal order.
- *Adam Smith* – 'Duties' required to ensure a 'system of natural liberty':
    - Protecting society from the violence and invasion of other independent societies;
    - Protecting every member of society from the injustice or oppression of every other member of it;

    - The duty of erecting and maintaining certain publick institutions, which it can never be for the interest of any individual… to erect and maintain.

Public Law and Private Law

Private law regulates the interaction of individuals (a horizontal relationship) and public law regulates the relationship between the state and individuals (a vertical relationship).

- *Hannah Ardent* – This division between the public and private has become blurred in the modern world.
- *Elizabeth Zoller* – The same legal principles underpin both public and private law – fairness, openness, transparency, accountability, due process, legality, rationality and efficiency.
- *Dawn Oliver* – The distinction between public and private is an unhelpful or even illusory theoretically distinction. The commonality of underlying principle requires the reconsideration of the distinction drawn between the common good and the individual good.

Constitutional Law

Constitutional Law assumes the existence of a state or a nation, and it is the law that regulates the structures and functions of government, and each and every one of government's institutions. It defines the way in which the principle institutions relate to one another, and with individual citizens. Defines the limits of freedom and of fundamental human rights.

A Constitution is a document having special legal status that sets out the framework of the principle institutions of the state, and declares the rule by which those institutions should operate. Special legal status is crucial. A Constitution is overarching law. It has a special position within the Australian legal framework because it is fundamental, meaning no law made by the Parliament, no regulation made by the government, no order made by a minister, is permitted to be contrary to the terms of the Constitution. If any such legal matter is inconsistent, the courts will strike them down. It takes precedence over every other law of the land.

Sources of Constitutional Law

- The Commonwealth and State Constitutions
- Legislation: some legislation has a special Constitutional standing because it defines the powers of government and Parliament in some specific way
- Judicial Decisions: interpretation of provisions of the Constitution
- Constitutional Conventions: the convention of collective ministerial responsibility, the convention of individual ministerial responsibility

- Academic writings

Purpose of the Constitution:

- Providing a legal framework for government
- Provides for the power and relationships between the three key arms of government

Parliamentary Supremacy

The doctrine that defines the relationship between Parliament and the Courts.

- The laws of parliament take precedence over the law made by the government or the court - Courts are under a duty to apply the law of Parliament
- Lies at the apex of a Constitutional system of government
- Courts may not strike down a law that has been made by Parliament

Grounds that a law may be struck down:

- Falls outside the powers conferred on Parliament by the Constitution
    - S 51: defines precisely the arenas in which Parliament can create legislation
- If it is inconsistent with some underlying constitutional doctrine:
    - If it interferes with the doctrine of the separation of powers
    - If it interferes with the doctrine of the rule of law
- If it transgresses any fundamental human rights guarantees provided for in the Constitution, or implied as existing within the Constitution:
    - Australia does not have any express Constitutional provision protecting freedom of speech
    - High Court has decided that we can imply a limited guarantee of free speech, because Australian democracy could not operate effectively unless there was a guarantee of public and political freedom

The Court may review subordinate legislation

- Regulations: more detailed law the implements the content of legislation

The Courts may not hold legislation invalid for inconsistency with international law

One Parliament may not bind its successors

- Exception: Constitutional Law

If there is a conflict between an Act and earlier legislation, the latter will prevail

Responsible and Accountable Government

The government is ultimately dependent on its continuing existence on the confidence of Parliament. If a government loses the confidence of Parliament, the Constitutional convention is that the government must resign, either offering the government to the opposition, or calling an early election. In particular in the House of Representatives. The government is responsible to the Parliament for all of its actions, and must hall the confidence of the Parliament in relation to most everything that it does.

Ministers of the government must have the confidence of Parliament. Ministers are responsible to Parliament for the policies they implement, and the actions of their departments and agencies in implicating those policies, administratively. Accountability is held for representatives in a similar way, depends on the House that the Minister is from. Bound to provide reasons in question time or debate for the action that they choose to take.

Government Accountability:

Collective Ministerial Responsibility: ministers are appointed on the basis that they have the confidence of the lower house of Parliament

Individual Ministerial Responsibility: the responsibility of an individual Minister for the policies they bring forth once they are in government. Ministers can be sanctioned by the Parliament or the Courts.

Responsibility to the Electorate: Responsible not only to the Parliament, but also to the people. Exercises most commonly at elections.

Government must be conducted according to law

Separation of Powers

Legislative: to create the law

- Involves the making of general rules that determine the structure and power of government departments and agencies.
- Embraces the regulation of the conduct of citizens and private organisations in their relationship with government
- Defines the rights and responsibilities of government, and individual Australians.

Executive: to implement the law

- The whole content of the government's authority to govern
- Policy making, the implementation of legislation
- The protection of national security

- The maintenance of public order
- The provision of education, health and social welfare
- Promoting economic and social wellbeing
- Tasked with determining how the laws made by the legislature will be applied

Judicial: to adjudicated disputes about the law

- The judiciary holding the government to legal account, by ensuring that the government is acting within the law
- Adjudicating on disputes between individual citizens and the government
- The judiciary as the ultimate guardian of the fundamental rights of citizens within the Western democratic tradition

<u>The Rule of Law</u>

The Rule of law operates as an underlying principle of legality, constraining government action.

Albert Venn Dicey:

1. The absolute supremacy of ordinary law over the exercise of arbitrary power
    - Officers of government may only relate to individual citizens in a manner that is permitted by law
    - If acting outside the law that official acts in an arbitrary manner
    - Law prevails over the exercise of arbitrary power
2. Equality before the law
    - No individual is above the law, and the law applies equally to all individuals
    - Everyone should have equal access to law
3. The rights of citizens are to be determined through the laws developed by parliament and the decisions set down by the courts
    - Prospective, stable, comprehensible

Key Case:

Australian Communist Party v Commonwealth (1951) 83 CLR 1

- Dixon J: described the rule of law as an 'assumption of the Constitution' (at 193).

The Universal Declaration of Human Rights

Preamble

Whereas… human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people…
It is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the ***rule of law***

- 'For the United Nations, the rule of law refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publically made, equally enforced and independently judged. These laws must also be consistent with international human rights norms and standards. It requires, as well, measures to ensure equality before the law, fairness in the application of the law, the separation of powers, and transparencycs in court. - *(S/2004/616) Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*

Principle 1: Law must be accessible

- *Lord Diplock (1975):* 'The acceptance of the rule of law as a constitutional principle requires that a citizen, before committing him/herself to any course of action, should be able to know in advance what are the legal principles that flow from it.'

Principle 2: Laws should apply equally to all

- Has been undermined in the past
    - Slavery (1864)
    - Female suffrage (1902)
    - Aboriginal Peoples (1962), (1967), (1984)
- Anti-Discrimination Law – Grounds for Discrimination
    - Freedom from Discrimination on the Grounds of sex, race, colour, ethnic or social origin, language, religion or belief, political or other opinion, property, disability, age or sexual orientation.

Principle 3: government must act in accordance with the law

- Act in Good faith
- Act fairly
- Act for the purpose for which power conferred
- Not act outside the limits of power conferred
- Not act arbitrarily

Principle 4: Adjudicative Procedures should be Fair

- Both sides in a legal proceeding given fair opportunity to present their case
- Before an independent court or tribunal
- The court or tribunal must be impartial
- Trial held in public judgment given in public
- Presumption of innocence

Principle 5: Law should afford adequate protection of human rights

- Place of Human Rights in International Law
- The Common Law and Human Rights
- *Fundamental* Human Rights
- Tyranny and the Rule of Law

Thin/Procedural Approach:

- *Friedrich Hayek* – Certainty and predictability. Government in all its actions is bound by rules fixed and announced beforehand. Thus, it is possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances and to plan one's individual affairs on the basis of this knowledge
- *Joseph Raz* – The rule of law is animated by two governing ideas. First, people should be ruled by the law and obey it. Secondly, the law should be such that people will be able to be guided by it. There is no necessary connection between law and morality. Conditions for the rule of law:
    - An independent judiciary;
    - A limited form of legislative and administrative review;
    - Open and fair hearings;
    - Accessible justice; and,
    - Laws that are prospective, open, clear, public, certain and relatively stable.
        - Must apply from the time it is enacted
        - Open and clear so the citizenry knows what it is
        - Individuals should be able to make decisions with some sense of reliability

Thick/Substantive Approach: Agrees that Raz's procedural conditions are necessary for the rule of law, but adds the further condition of morality.

- *Richard Dworkin* – The rule of law contains fundamental civil and political rights and duties that pre-exist written law. Thus, judges have the capacity and authority to not only interpret the written law, but also to fill the gaps within it.

- *Lord Tom Bingham of Cornhill* – Rejects Raz's view, stating that state sanctioned persecution or repression of an individual or minority would strip the rule of law of most of its virtue.
    - Against the arbitrary use of power
    - Protection for individual freedom
        - Freedom is secured by the predictability of the legal environment
    - Contributes to the preservation of individual human dignity
        - Underpins autonomy and intellectual independence by acknowledgeing the ability of people to act freely and securely in the knowledge that the rules that are presently applicable are those that are likely to endure.

Liberalisim is a belief in the liberty of the individual from the state and from the demands of others.

<u>Values Underpinning Public Law</u>

Freedom: Rawles states that '[it is a function of liberty that] a man lives as he likes; … insamuch as to live not as one likes is the life of a man that is a slave.'

- *John Stewart Mill* – Private space is free to the extent to which a person's actions interfered with the rights of, or 'harmed', others.

Equality: All individuals are of equal worth despite and differences in their personal attributes, their wealth and power, and their contribution to society. All are equal before the law, even those in positions of power who may have made the law. *Substantive equality* is concerned to address imbalances of opportunity.

Community: A collective sense of the common good gives rise to the possibility of liberty beyond that asserted and expressed as individual freedom.

- *Isaiah Berlin* – 'Positive liberty' is the liberty that comes from 'ruling oneself through the medium of a state which one has made one's own.'