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CONSTITUTIONALISM.

Public Law: the relationship between the state and individual.

Private Law: the interactions between individuals, organizations, firms etc.

Constitutionalism: a doctrine that the law of the constitution is supreme in a legal and moral sense.

THE RULE OF LAW

Rule of Law: no one is above the law. The law binds the state i.e. The Government (or any other authority) cannot exercise power outside or inconsistent with the law/constitution (supremacy of law/constitution)

The Divine Right of Kings: [pre-constitutionalism] The King's authority is granted by God; the King is answerable only to God

The United States of America

- The Rule of Law (1): The law applies equally to everyone

'Freedom of men under government is to have a standing rule to live by, common to everyone of that society, and made by the legislative power erected in it: ... and not to be subject to the inconstant, uncertain, unknown and arbitrary will of another man'

- The Rule of Law (2): Constitutional Supremacy

'in America, THE LAW IS KING. For as in absolute governments, the King is law, so in free countries the law *ought* to be King; and there ought to be no other'

Great Britain

- The Rule of law (3): Subordination of the Executive to Law

Entick v Carrington (1765):

Executive warrant to search and seize papers to prove seditious libel held invalid

Australian Communist Party v Commonwealth (1951) 83 CLR 1:

Executive government cannot do anything that does not find its source in some legal power, at 187 (Dixon J). 'A stream cannot rise higher than its source,' at 258 (Fullagar J).

- The Rule of law (4): Subordination of the Executive to Law (2)

A v Hayden (1984) 156 CLR 532

A fake hostage was conducted in a Melbourne. Hotel (i.e. What to do in an emergency), No one was warned of this in advance, People in hotel got shocked, they ran outside and into police, no law to do this fake hostage – court said the hotel could not do this, Parliament did not allow as no law was made; rule of law.

"The Executive power of the Commonwealth must be exercised in accordance with the Constitution and the laws of the Commonwealth. ... every officer of the Commonwealth [is] bound to observe the laws of the land. ... astonishingly one of the plaintiffs asserted ... that it is not beyond the executive power ... to order one of its citizens to kill another person. Such a proposition is inconsistent with the rule of law. It is subversive of the Constitution and the laws" - at 562 (Murphy J).

Case Law

- Early constitutionalism

Magna Carta (1215)

- Rather than replace the king, there was an attempt made to limit his powers; an idea essentially behind constitutionalism. Although not successful there was extensive reiteration through subsequent centuries

Prohibitions del Roy (1607) (Coke CJ)

- even royal power must be under the law and controlled by the courts; the principle that the law applies equally to everyone and will determine disputes; not the judge, king or anyone else. Although not a victory for the court, Coke staked a claim for the rule of law.

Petition of Right (1628)

- restatement of Magna Carta involving the assertion of parliament's power over the king (Charles I)

Bill of Rights 1688

- proclaimed sovereignty of Parliament; 'the pretended Power of suspending the Laws, or the Execution of Laws, by regal Authority, without consent of Parliament, is illegal,' *Fitzgerald v Muldoon* (NZ, 1976)
- Great Britain

Vanhorne's Lessee v Dorrance (1795) (Paterson J):

- 'In England...The power of Parliament is absolute and transcendent; it is omnipotent in the scale of political existence. ... In America, the case is widely different: ... The Constitution is certain and fixed; it contains the permanent will of the people, and is the supreme law of the land; it is paramount to the power of the Legislature ... every act of the Legislature, repugnant to the Constitution, is absolutely void.'

Marbury v Madison (1803) (Marshall CJ):

- 'The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written. ... all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void'

THE AUSTRALIAN CONSTITUTION

Australian Federation

1. Social and economic unity

'The crimson thread of kinship runs through us all' (1890)

'New South Wales divided from Victoria by a narrow stream and a line of Custom-house officers' (1891) – Sir Henry Parkes

2. Geographical unity

'For the first time in history, we have a nation for a continent and a continent for a nation' – Edmund Barton, 1983

3. Immigration restriction

Would assist in the maintenance of racially discriminatory laws i.e. White Australia Policy

4. Defence

Larger navy/ army

- Diversity
- Liberty
- Diffusion of power
- A common understanding
 - 'the powers and privileges and territorial rights of the several existing colonies shall remain intact, except in respect to such surrenders as may be agreed upon as necessary and incidental to the power and authority of the National Federal Government': Sir Henry Parkes
 - 'the essential condition-the preliminary condition-that the separate states are to continue as autonomous bodies, surrendering only so much of their powers as is necessary to the establishment of a general government to do for them collectively what they cannot do individually for themselves, and which they cannot do as a collective body for themselves': Sir Samuel Griffith

Constitution of Australia: how laws work and the way the country is governed. The Government cannot go outside the Constitution. It is governed by the people.

The ‘Washminster’ Model: The Australian Constitution has inherited both British and American Constitutional ideals

British Inheritance	The American Model
<ul style="list-style-type: none"> ○ Evolution of Representative Government in Australia ○ Grant of Responsible Government in 1850s (1890 for WA) ○ Bicameral (two-house) Parliaments ○ Rule of Law ○ The Common Law ○ Judicial review of Administrative Action <ul style="list-style-type: none"> - Courts would enforce the limits of the powers of the executive government ○ Faith in parliaments <ul style="list-style-type: none"> - Human rights largely ignored ○ Parliamentary Supremacy in the States <ul style="list-style-type: none"> - ‘Subject to’ the Constitution ○ The Crown 	<ul style="list-style-type: none"> ○ Federalism ○ Separation of Powers ○ Judicial Review of Legislation ○ The Senate <ul style="list-style-type: none"> - Proportional representation (currently)

Essential Elements of the *Australian Constitution*

- Representative Government

Sections 7 and 24 of the Australian Constitution

- a democratic form of government in which the members of parliament are elected among the state and Commonwealth populations.
- a form of indirect democracy
- the elected MP’s are held accountable to the voters/people
- Responsible Government
 - The executive government is held accountable to Parliament
 - The Executive Government is the majority in the lower house
 - The executive is made to act within reason when they have the power through:
 - Votes of confidence
 - Members of the lower house voting against executive decisions
 - Scrutiny of bills between upper and lower houses
 - Members of the executive voting along party lines
 - Executive being responsible to the people (will get voted out if they don’t comply with their demands)
- Federalism
 - Division of powers (vertical separation)
- Separation of Powers
 - Legislative (parliament), Executive (authoritative bodies), Judiciary (courts)
 - Scrutinize each other (judiciary reviews executive and legislature)
 - Upholds the rule of law so that there is no abuse of power
- Rule of Law
 - The law is superior to all power
- Judicial Review of Legislation

- So that parliament cannot breach the constitution with their law making powers
 - o Judicial Review of Administrative Action
- Enforcing the constitution and laws and rights against the executive government (if the executive goes against the law, the judiciary can dispute it)
- o Faith in Parliaments
 - The democratic voting system ensures citizens can vest their faith in parliaments
 - o Division of Powers
 - Between the state and the commonwealth (specifically, exclusive, concurrent and residual)
 - o The Crown
 - Constitutional government with a monarchy (the queen, the governor general her representative)

THE SOUTH AUSTRALIAN CONSTITUTION

Reception of the Common Law

- o *Australian Courts Act 1828* (9 Geo IV, c 83) s 24.

All English statutes ‘so far as [they] can be applied’ were received as law in the Australian Colonies

- As at 25 July 1828 (for NSW, Tas, Vic, Qld)
- As at 1 June 1829 (for WA)
- As at 28 December 1836 (for SA)

‘Common’ in the sense that it was of general application, the idea of one law applying throughout Britain arose after the Norman Conquest of 1066

- o *Skelton v Collins* (1966) 115 CLR 94, 134 (Windeyer J)

‘Our ancestors brought the common law of England to this land. Its doctrines and principles are the inheritance of the British race, and as such they became the common law of Australia.’

- o William Blackstone, *Commentaries on the Laws of England* (1773) vol I, 107.

Doctrine of *terra nullius*: land belonging to no one (what happened in Australia, as the Aboriginal People’s customs and law were not recognised as laws at the time):

“if an uninhabited country be discovered and planted by English subjects, all the English laws then in being, which are the birth right of every subject, are immediately there in force” OR

“in conquered or ceded countries, that have already laws of their own, the king may indeed alter and change those laws; but, till he does actually change them, the ancient laws of the country remain”

- o *Cooper v Stuart* (1889) 14 App Cas 286, 290 (Lord Watson)

How does the distinction apply to Australia?

- ‘acquired by conquest or cession, in which there is an established system of law’ OR
- ‘practically unoccupied, without settled inhabitants or settled law’
- NSW was the latter; Common law of England inherited on settlement
- o *Mabo v Queensland [No 2]* (1992) 175 CLR 1

Native Title: ‘Native title has its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory.’

Existing position: As the Aboriginal people had ‘no settled law’ at that point, ‘the English common law became the law of the colony;’ terra nullius at 37-8 (Brennan J).

The solution: We can deter from the theory of arrival in Australia and why it occurred at 38.

The result: There was an argument that traditional Aboriginal law still applies and not about English sovereignty; common law of Native title was created (land can co-exist) at 52.

Means of losing Native Title:

- Loss of historical connection: “when the tide of history has washed away any real acknowledgment of traditional law and any real observance of traditional customs, the foundation of native title has disappeared.”
- Inconsistent Crown Grant: “Where the Crown has validly alienated land by granting an interest that is wholly or partially inconsistent with a continuing right to enjoy native title, native title is extinguished to the extent of the inconsistency.”
- Extinguished by valid State law or proclamation

The Legislative Powers of South Australia

- o *Constitution Act 1934* (SA) s 5

‘The Legislative Council and House of Assembly shall have and exercise all the powers and functions formerly exercised by the Legislative Council constituted pursuant to section 7 of the Act of the Imperial Parliament, 13 and 14 Victoria, Chapter 59, entitled "An Act for the better Government of Her Majesty's Australian Colonies".’

- o *Australian Constitutions Act 1850* (Imp) s 14.

‘Authority to make Laws for the Peace, Welfare, and good Government of the said Colony’

- o *Hodge v The Queen* (1883) 9 App Cas 117, 132.

‘powers not in any sense to be exercised by delegation from or as agents of the Imperial Parliament, but authority as plenary and as ample ... as the Imperial Parliament in the plenitude of its power possessed and could bestow.’ (can pass whatever bill it likes)

- o *Australia Act 1986* (Cth) s 2(1)

‘It is hereby declared and enacted that the legislative powers of the Parliament of each State include full power to make laws for the peace, order and good government of that State.’

- o Is ‘peace, order and good government’ a limitation?

Yes

- POGG should ‘not be treated as “a jingle”’
- Protection against ‘tyrannous excesses’

Building Construction Employees and Builders’ Labourers Federation of New South Wales v Minister for Industrial Relations (‘BLF Case’) (1986) 7 NSWLR 372, 385, 387 (Street CJ) (see also Priestley JA).

- The courts have full/plenary power

No

- Kirby P and Mahoney JA in *BLF*.
- ‘If the court could substitute its own opinion for the Parliament’s opinion as to what is a law for the peace, welfare and good government of the State ... we would not be living under the rule of law but in a state of chaos.’

Grace Bible Church v Reedman (1984) 68 SASR 200, 210 (White J).

- parliament is a democratic institution and should decide POGG laws

The Restrictions on the Legislative Powers of the State of South Australia

- o Unanimous High Court in *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1, 10.

1. *The Australian Constitution*
2. Principle of Territoriality
3. Manner and form requirements
4. Fundamental Common Law Principles

- Restrictions not applicable

1. NO separation of powers (limited *Kable* incompatibility principle)
2. NO MORE repugnancy

LIMIT	EXPLANATION
Constitutional express	<ul style="list-style-type: none"> - ‘The Constitution of each State of the Commonwealth shall, subject to this Constitution, continue as at the establishment of the Commonwealth’: <i>Australian Constitution</i>, s 106 - ‘Every power of the Parliament of a Colony which has become or becomes a State, shall, unless it is by this Constitution exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State, continue as at the establishment of the Commonwealth’: s 107 - ‘Every law in force in a Colony which has become ... a State, and relating to any matter within the powers of the Parliament of the Commonwealth, shall, subject to this Constitution, continue in force in the State’: s 108 - Inconsistency: ‘When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid’: s 109 - Exclusive Commonwealth legislative powers: Seat of government, Commonwealth public service: s 52 Customs, excise, bounties: s 90 <ul style="list-style-type: none"> - Express prohibitions: Naval and military force; tax on Commonwealth property: s 114 - Express freedoms: Coin money: s 115 <ul style="list-style-type: none"> - Express freedoms: ‘trade, commerce, and intercourse among the States ... shall be absolutely free’: s 92 ‘A subject of the Queen, resident in any State, shall not be subject in any other State to any disability or discrimination which would not be equally applicable to him if he were a subject of the Queen resident in such other State’: s 117
Constitutional implied	<ul style="list-style-type: none"> - Implied freedoms: Political communication – <i>ACTV</i> Political participation – <i>Roach, Rowe</i> - Implied restrictions: State Courts must be suitable receptacles of federal judicial power: <i>Kable (topics 10-13)</i> Intergovernmental immunities
Extraterritoriality	<ul style="list-style-type: none"> - Requirement for a ‘sufficient nexus’: <i>Union Steamship Co v King (Gibbs CJ)</i> ‘a law is valid if it is connected, not too remotely, with the State which enacted it ... the test should be liberally applied ... legislation should be held valid if there is any real connexion – even a remote or general connexion – between the subject matter of the legislation and the State.’ <i>Pearce v Florenca (1976) 135 CLR 507, 517-8 (Gibbs J).</i> ‘The relation may consist in presence within the territory, residence, domicile, carrying on business there, or even remoter connections. If a connection exists, it is for the legislature to decide how far it should go in the exercise of its powers.’

	<p><i>Broken Hill South v Commissioner of Taxation (NSW) (Dixon J)</i></p> <ul style="list-style-type: none"> - Presumption against extraterritorial operation: ‘In the interpretation of general words in a Statute there is always a presumption that the legislature does not intend to exceed its jurisdiction. Most statutes, if their general words were taken literally in their widest sense, would apply to the whole world, but they are always read as being <i>prima facie</i> restricted in their operation within territorial limits.’ <p><i>Jumbunna Coal Mine NL v Victorian Coal Miners’ Association (1908) 6 CLR 309, 363 (O’Connor J).</i></p> <ul style="list-style-type: none"> - Ability to legislate extraterritorially: ‘It is hereby declared and enacted that the legislative powers of the Parliament of each State include full power to make laws for the peace, order and good government of that State that have extra-territorial operation.’ <p><i>Australia Act 1986 (Cth) s2(1)</i></p>
Manner and form	<ul style="list-style-type: none"> - Provisions ‘respecting the constitution, powers procedure of the Parliament of the State’ can be put beyond Parliament’s power to alter: <i>Australia Act 1986 (Cth) s 6</i> - Must be double-entrenched to be effective - Most of the <i>Constitution Act 1934 (SA)</i> is ‘flexible’ - ‘Manner and form’ requirement in SA is a referendum (ss 10A (2), 88) or absolute majority of both Houses (s 64A(3))) - ‘Manner and form’ limited <p>does not apply if the provision ‘relates to the substance of the law-making power, not to the manner and form of its exercise’</p> <p><i>West Lakes Ltd v South Australia (1980) 25 SASR 389, 398 (King CJ)</i></p> <ul style="list-style-type: none"> - Entrenched provisions: - no abolition of either House or change in powers of Legislative Council (s 10A), no change to ‘deadlock’ provision (s 41) <p>‘a system of local government in this State under which elected local governing bodies are constituted’: s 64A (1)</p> <p>Electoral Districts Boundaries Commission: Part 5</p> <ul style="list-style-type: none"> - Issues: <p>One of these provisions is not double-entrenched One arguably does not relate to the ‘constitution, powers or procedure of the Parliament of the State’</p>
<p>Double Entrenchment</p> <p>Ineffective example:</p> <ul style="list-style-type: none"> - Section 1: Matthew is entitled to walk into the House of Assembly any time he would like to. - Section 2: Section 1 can only be removed by a referendum. <p><i>Ineffective, because you can repeal section 2, then repeal section 1 without the referendum.</i></p> <p>Effective example:</p> <ul style="list-style-type: none"> - Section 1: Matthew is entitled to walk into the House of Assembly any time he would like to. - Section 2: No provision of section 1, or of this section, can be repealed or amended without a referendum. <p><i>Effective: because you need the referendum to get rid of section 2, so it is effective in protecting itself and section 1.</i></p>	

Fundamental common law rights	<ul style="list-style-type: none"> - Highly unlikely that they limit the state parliaments: <i>Durham Holdings</i> - An idea that will not die out, but which has no strong basis <p>Put at its highest: not utterly rejected</p> <ul style="list-style-type: none"> - ‘Whether the exercise of that legislative power is subject to some restraints by reference to rights deeply rooted in our democratic system of government and the common law ... is another question we need not explore’ <p><i>Union Steamship Co of Australia Pty Ltd v King (1988) 166 CLR 1, 10 (the Court)</i></p> <ul style="list-style-type: none"> - ‘whatever may be the scope of the inhibitions on legislative power involved in the question identified but not explored in <i>Union Steamship</i>, the requirement of compensation which answers the description “just” or “properly adequate” falls outside that field of discourse’ <p><i>Durham Holdings Pty Ltd v New South Wales (2001) 205 CLR 399, 410</i></p>
Repugnancy	<p>No longer applicable</p> <p>Removed:</p> <ul style="list-style-type: none"> - For Commonwealth by <i>Statute of Westminster 1931</i> (UK) (adopted from 1939 by <i>Statute of Westminster Adoption Act 1942</i> (Cth)). - For SA by <i>Australia Act 1986</i> (Cth) s 3 and <i>Acts Interpretation Act 1915</i> (SA) s 22B.
POGG? Peace, order and good government	No. <i>Union Steamship</i>