

1.1 - Fundamental Concepts and Institutions

What is Public Law?

- Individual v The state
- Essentially it is 'government law'.
- About the citizens and the state (Vertical relationships)
- Determines the scope of public power
- Confers/allocates public power
- Determines which branch of government can exercise power
- Amalgam of systems of the government underpinning concept and principles, fundamental processes, basic institutions and core values
- Sub-divisions of public law:
 - constitutional law
 - administrative law
 - statutory construction
 - human rights
- Public law is a label that is often used in contrast to 'private law'
 - Areas of Private Law include:
 - Contract
 - Tort
 - Property
 - Trusts
 - Intellectual Property

State

- Entity which controls territory and effectively governs the people within it
- Natural law (inherent rights) vs positivism (law = social construct)

What is the Rule of Law?

- Came into international prominence at the end of the 20th century
- No one is above the law and that law binds the state
- Government must at all times exercise power within legal limits
- It aims to prevent arbitrary government action, to guarantee equality before the law and to ensure accountability to the law.

Requirements of the Rule of Law

- *Procedural protections (thin version):* laws need to be made via particular processes
- *Substantive protections (thick version):* law needs to meet content requirements

Authorities on the Rule of Law

<p>Hayek (main proponents of the procedural approach): Laws must:</p> <ul style="list-style-type: none"> • certain and predictable • general and equally applied • Not single out specific persons (<i>ad hominem legislation</i>) or even groups based on ethnicity or race • Anti-terrorism legislation would not be able to target non-citizens • the state has a critical function to perform as civil libertarians however understands the rule of law is limited 	<p>Dicey (procedural): Largely conceptual</p> <ul style="list-style-type: none"> • the rule of law is an "assumption of the constitution." <ol style="list-style-type: none"> 1. Supremacy of Law: Society needs to be governed by a system of laws, not arbitrary abuses of power 2. Equality before the law: Everybody must be subject and bound by the law 	<p>Raz (slightly more procedural): Largely conceptual</p> <ul style="list-style-type: none"> • No necessary connection between law and morality the rule of law should be balanced with other values and should not always trump them <p>Conditions for the rule of law</p> <ul style="list-style-type: none"> ○ Independent judiciary is necessary ○ Judicial review is necessary ○ Fair and open hearings ○ Accessible justice
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to constraining the state and not empowering it	3. Must be clear, accessible and stable – enforced by the courts	<ul style="list-style-type: none"> ○ Law that is prospective ○ Clear, open, public and stable
<p>Dworkin (slightly more substantive):</p> <ul style="list-style-type: none"> ● Fundamental civil and political rights and duties pre-exist in written law. ● Courts interpret written law and find gaps or ambiguity in doing so they consider civil, political pre-existing rights and duties. ● judges have the capacity and authority to interpret written law & fill in gaps. <ul style="list-style-type: none"> ○ Law requires morality - but doesn't break down aspects of morality ○ Agrees with Raz's list, but includes the need for morality ○ Fundamental rights need to be reflected in Law 	<p>Bingham (detailed substantive): A country can be seen as upholding Rule of law if the laws produced meet all eight criteria</p> <ul style="list-style-type: none"> ● Necessary connection between law and morality ● In contrast to Raz, Bingham sees a necessary connection between law and morality. <ul style="list-style-type: none"> ○ He believed that the rule of law related to good law, an not just any law that is procedurally good. <p><i>Lord Bingham's 8 Principles of the Rule of Law</i></p> <ol style="list-style-type: none"> 1. The law must be accessible and so far as possible, intelligible, clear & predictable - to avoid judicial activism. 2. Questions of legal right and liability should ordinarily be resolved by application of the law and not the exercise of discretion 3. The laws of the land should apply equally to all, save to the extent that objective differences justify differentiation 4. Ministers and public officers at all levels must exercise the powers conferred on them in good faith, fairly, for the purpose for which the powers were conferred, without exceeding the limits of such powers and not unreasonably 5. The law must afford adequate protection of fundamental human rights 6. Means must be provided for resolving without prohibitive cost or inordinate delay, bona fide civil disputes which the parties themselves are unable to resolve 7. Adjudicative procedures provided by the state should be fair 8. The rule of law requires compliance by the state with its obligations in international law as in national law 	
<p><i>Which is the most satisfactory definition of the rule of law?</i> Dacey's was the most influential at the time of the Australian constitution, he has influenced the view of law more so than the other legal theorists.</p>		

How does the Rule of Law apply in Australia?

- In *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 492 Gleeson CJ asserted the rule of law as an interpretive principle:
[T]he Australian Constitution is framed upon the assumption of the rule of law.
- The Chief Justice cited Brennan J from *Church of Scientology v Woodward* (1982) 154 CLR 25 who said at 70:
Judicial review is neither more nor less than the enforcement of the rule of law over executive action; it is the means by which executive action is prevented from exceeding the powers and functions assigned to the executive by law and the interests of the individual are protected accordingly.

The Rule of Law is assumed to underpin our system

- The majority in *Plaintiff S157/2002* at 513 cited Dixon J in *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 193, who referred to the Constitution as:
An instrument framed in accordance with many traditional conceptions, to some of which it gives effect, as, for example, in separating the judicial power from other functions of government, others of which are simply assumed. Among these I think that it may fairly be said that the rule of law forms an assumption.
- Essentially saying that judicial review is an enforcement of the rule of law over executive action. That is, the means by which executive action is presented from exceeding the powers assigned to it by law and the interests of indivual are protected accordingly.