LAWS5007: PUBLIC LAW

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Topic 1: Parliamentary Sovereignty, Rule of Law and the Principle of Legality

Public law – allocation of power and authority across institutions of government, sources of these powers and also the limits on these powers.

1 Parliamentary Sovereignty

'The sovereignty of Parliament is (from a legal point of view) the dominant characteristic of our political institutions' (Dicey)

- Parliament – the House of Commons, the House of Lords, the Monarch
- In Australia: House of Representatives, Senate and the Governor General

Three key principles Dicey illustrates on Parliamentary sovereignty:

1.1 (1) 'the right to make or unmake any law whatever'

- Parliament cannot bind its successors: Parliament cannot set down one piece of legislation that cannot be repealed because this would be contrary to the continuing sovereignty of Parliament. Each Parliament is equally sovereign to make/unmake a law
- Parliament has legal omnicompetence: Parliament can pass a law on any subject it likes, how ever it likes.

1.2 (2) 'no person or body is recognised by the Law of England as having a right to override or set aside the legislation of Parliament'

- Reflects the legal omnipotence of the British Parliament: superior to any other institution and demands obedience from them. Parliament has supremacy over the Crown.
    - Parliament simply acted as the Crown's highest court of Barons and Magnates from the 13th century, and Parliament was simply an opportunity for the King to seek counsel and consent. But the King was

the person who exercised legislative power, even when he acted through Parliament.
    - Parliament grew in power, tension between Crown and Parliament… One key conflict involved the power for the King to dispense of key statutes: prerogative power.
    - Glorious revolution of 1688: parliamentarians substituted the royal James II England… James attempted to rule without Parliament. Parliamentarians placed William and Mary on the throne and passed the Bill of Rights 1689 which now affirmed the supremacy of the Crown over Parliament.
    - How did it do so? Control the royal succession. Secondly, Bill of Rights provided that the King could no longer dispense of statutes, unless the statute permitted it itself. King was bound by statutory law: Art 1
    - All taxation without the consent of Parliament was illegal; King could no longer raise taxes through his own personal power.
    - Art 9: freedom of speech in Parliament, preventing King from imprisoning Parliamentarians for libel and treason…
- Legislature understood to be superior over common law and demand obedience from courts
    - Can modify, abrogate etc.
    - Court's task is to interpret and apply legislation. Legislation cannot be held invalid unless not properly passed
- Parliament is not bound by principles of morality
    - Not possible for court to claim a law invalid as contrary to a principle of morality or as Dicey notes, contrary to principles of natural law
    - Cf Thomas Aquinas Summa Theologica I-II, q 95.2
- often appealing to the claimed need for a single authority – finality

1.3 (3) Parliament does not hold its power on trust from electors

- Not bound by the electors' views; can interfere with the electors' rights (private rights to property etc.)
- Sole legal right of electors is to elect members of Parliament

2 The Australian Context

- Parliament has supremacy over the Crown. Supreme authority to act, so long as this falls within the institution's powers.
- It is not a single authority (federalism) and does not have unlimited and omnicompetent power. The power is plenary.

2.1 The Commonwealth Constitution

Constitution: establishes and regulates a legal body – the civil institutions of a modern state

- The Commonwealth: Ch I (the Parliament), II (the Executive), and III (the Judiciary)

Sets out a structural machinery of government and relationships

- E.g. How a bill is passed; how parliament is elected, constituted, dissolved
- E.g. What happens when state and federal laws are inconsistent? (s 109)

Provides authority to adjudicate on its terms

- S 71: judicial power
- ss 73, 75, 76: jurisdiction

2.2 A Federal Constitution

Constitution establishes Australia as a polity with 3 features:

- Democratic
- Constitutional monarchy
- Federal

AV Dicey: 'constitutional law' includes 'all rules which directly or indirectly affect the distribution or the exercise of the sovereign power in the state'

- Assumes that we began with a unified sovereign

- He continues to describe federalism this way
- But federalism at the time of Australia's birth is better described as a federal compact between states (see Aroney)
    - 'a Commonwealth of commonwealths'
    - Independent states coming together…

We see this federal influence embedded in the constitution

- s106: state constitutions are to be maintained
- s107: state parliaments maintain their powers, subject to the Constitution
- s7: States' house comprising 6 senators from each State
    - Equal representation of states, even though NSW has a higher population than TAS…
- Amending the Constitution – requires (1) majority of voters (overall); and (2) majority of states with a majority of voters (s128)
- Judiciary (HCA) to adjudicate between the States and between the States and the Commonwealth (s75)

2.3 Unlimited and Omnicompetent Power?

Federal nature of the constitution is also evident in a central feature: Commonwealth is only grated Enumerated powers:

- Cf that one feature of sovereignty is the claim that the sovereign authority has unlimited and omnipotent authority to pass laws on any subject how ever it likes
- Cth power is very different. Colonies come together as a state only agree to the Cth having limited powers: s51, 52 and 122
    - 51: sets out major topics and subjects that the Cth Parliament is empowered to pass laws on: defence, quarantine, immigration and aliens
    - What's not there? No reference on education, environment, policing powers etc. all these matters have been left to the states…
    - Because Cth Parliament only has enumerated power, that raises a possible basis for constraining legislative power. Any law that the Cth Parliament passes will have to satisfy a question of characterisation: is

this law a law with respect to a head of power in the Constitution/defence/aliens etc.? If not, then it is not a valid Cth law…
    - We do not have an omnipotent legislature

2.4 Unconstrained by Morality – Plenary Power?

- Laws passed are arguably not constrained by principles of morality
- Rmb Dicey points this as a feature of modern parliamentary sovereignty: parliament's laws cannot held to be invalid because it is unjust etc.
- Colonial legislatures granted the power to make laws for the 'peace, welfare, and good government' of colony: a plenary power (R v Burah (1878 3 AC 889 (PC))
- Constitution s 51: empowered to make laws for 'peace, order and good government'
    - Crucially this does not mean that a law can be challenged for contrary to peace, contrary to order etc.
    - Rather these words are simply a traditional formula used to indicate that legislature has power to pass laws how ever it sees fit.
- When court assesses legality of law, not concerned for motives for the law. Could not and does not say that laws are invalid because it was made with bad reasons… nor is it concerned with assessing its wisdom/morality… For the Commonwealth: so long as the law is a law with respect to a head of power head of power, this is enough (e.g. Murphyores Incorporated Pty Ltd v Commonwealth (1976) 136 CLR 1)

Rights limitations?

- Some express and implied limits set out in the constitution
    - E.g. implied right to vote
    - Separation of judicial and executive power
    - Limits on when an executive can detain a person in judicial proceedings
- However, rejected bill of rights, e.g. free speech, freedom of press…
    - Structure of constitution itself would afford a break on power. Our system of government is representative and responsible. This means that we as

electors control parliament through our electoral will and the actions of the executive are always subject to the parliament's control…

- So overall we cannot challenge the fairness of laws, but we can control parliament through vote and challenge Cth laws that have exceeded the powers granted by the constitution

3 The Rule of Law

Substantive v formal conceptions (or thick v thin)
For some the rule of law offers a constraint against exercise of governmental and legislature powers that affects legal constitutionalism. Offers a way to conceptualise when a law will not be a law, thus challenging that law. Fails some inherent requirement to be good law.

Core matters

- The exercise of governmental power is subject to law (statute law and the constitution)
    - HCA can review the exercise of governmental power for legality
- The exercise of Commonwealth legislative power is subject to law (the Constitution)
    - The HC can review the exercise of legislative power for consistency with the Constitution
- Adjudication is by an independent body (the HC)

3.1 Formal Conception of the Rule of Law

Joseph Raz:

- 'the law should be capable of providing effective guidance'
- Rule by the law, rather than discretion(government under law)
- Rules should be: prospective, clear, and stable
    - Capable of guiding peoples' behaviour – promotes good of individual autonomy

- Requires an independent judiciary (interpreting the law consistently) and access to courts
- A legalistic or formal idea – compatible with tyranny?
    - "Your second child must be given to the state for work in the state factory"
    - Still fits within the formal conception of the rule of law… stable, general, knowable, clear, allows planning of life etc.

3.2 Substantive Conception

TRS Allan: rule of law is 'the value internal to law'

Allan agrees much of what Raz says, in addition to his arguments:

- If a law does not satisfy the rule of law, then in fact it is not a law. Two components to this:
    - When interpreting the law, court must examine the law with suspicion and interpret it where possible, in favour of the individual
    - Law must secure the equal liberty of individuals, in order to be understood as 'law'

3.3 The Australian Context

Although the term 'rule of law' is not explicitly mentioned in the Australian Constitution, it is accepted as part of our constitutional system and some believe that the rule of law provides authority for the Constitution itself.

Australian Communist Party v Commonwealth

- Dixon J: ours is a system of 'government under the Constitution and that is an instrument framed in accordance with many traditional conceptions ... [some] are simply assumed. Among these I think that it may fairly be said that the rule of law forms an assumption'

Although it is not entirely clear what the significance is for the rule of law to be an assumption.

It is clear however, that Allen's view (substantive conception) is not the view in Australia; that a law is not a law because it fails some principle of justice… contrary to the plenary power of the commonwealth. So long as the law fits within the head of power, that is sufficient for its validity. Qs of morality & justice are irrelevant…

- '[N]othing depends on the justice or injustice of the law in question': 262 (Fullager J)
- '[i]f the legislature directly dissolved a marriage between named parties, it would at all events be dealing with divorce, whatever the other objects might be found to the Act': 201-2 (Dixon J)

Key principle: the government operates under (is bound by, must comply with, is subject to) law; rule is not through arbitrary decision-making or unfettered discretion
Reflected in three important ways:

- Constitution, s75(iii) – ability to sue the Commonwealth
    - (see Plaintiff M68/2015 v Minister for Immigration and Border Protection (2016) 257 CLR 42, [124]-[125] (Gageler J))
- Constitution, s 75 (v) – 'constitutional writs' and judicial review of executive action
    - (see Plaintiff S157/2002 v Commonwealth (2003) 211 CLR 476, 482 and 504-8)
- Constitution, s 76(i) – accepted (not stated) judicial review of legislation;
    - the HC as interpreter of legislative power

3.4 Principle of Legality

Although Australia does not follow Allan's of substantive rule of law, it does apply an echo of this which is the principle of legality:

- The Court will not interpret Parliament as having intended to curtail fundamental rights or freedoms unless this intention is clearly manifested by unambiguous language in the statute.

This means two things:

1. The court cannot fail to apply the law. If the words of the statute are unambiguous, the curtailing of fundamental rights and freedoms is legally permissible – it is within the parliament's plenary power.
2. Where possible, the court will interpret the words of legislation as not curtailing fundamental rights or curtailing them to the minimal degree possible: 'Reading down'
    a. 'statutes [must] be construed, where constructional choices are open, to avoid or minimise their encroachment upon rights and freedoms at common law' (Momcilovic v The Queen (2011) 245 CLR 1, 46 (French CJ))
    b. For example, a law prohibits all 'disruptive speech' in public places – infringing on freedom of speech:
        i. What does 'disruptive speech' mean? Does it include insulting language or political protest? Or is it limited to, e.g. speech that precipitates violence?
    c. Another example, limiting executive action (e.g. Coco v The Queen)
        i. Whether legislation authorised Cth officers to engage in trespass: Mason, Brennan, Gaudron and McHugh JJ: 'Statutory authority to engage in what otherwise would be tortious conduct must be clearly expressed in unmistakable and unambiguous language' (436) ... 'General words will rarely be sufficient ... they will often be ambiguous on the aspect of interference with fundamental rights.' (437)

What is the rationale of the principle of legality?

- Reflecting the legislature's actual intentions? (Lim: a 'positive' rationale) [where positive means identifying a fact – here, the legislature's intention]; reflecting Parliament's intention not to curtail rights…
    - it is 'improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness' (Potter v Minahan (1908) 7 CLR 277, 304)
    - Imputed intention: Parliament' is aware of the principle and so will act accordingly

- (b) Lim's 'normative refinement':
    - 'courts should, it is claimed, prevent legislatures from abrogating rights, otherwise than by clear words, in order to enhance electoral accountability and the political process'
    - It will 'enhance the parliamentary process': Coco v The Queen ('Coco') (1994) 179 CLR 427, 437-8 Mason CJ, Brennan, Gaudron and McHugh JJ

What rights are 'fundamental'?

The 'positive' rationale:

- Those that parliament intends not to abrogate without unambiguous language: what rights fall within Parliament's 'standing commitments'? E.g. speech; association; criminal process rights; rules of procedural fairness

The 'normative' rationale: those that concern vulnerability

- Lim: 'rights claimed in circumstances where the capacity of the political process to discipline legislative action is inherently weak and curial insistence upon clear statutory language would strengthen that capacity'
- Rights concerning representative government or minority interests: 'vulnerability'

3.5 Constitutionalism

Throughout this whole topic, what is being considered is essentially constitutionalism. This entails 2 aspects:

1. How are governmental institutions empowered to act, what is their structure and what is their relationship with each other?
2. What is the scope of authority granted to different institutions, and what are the limits imposed upon authority?
    a. The legal restraint on the government's exercise of power
    b. How do public authorities operate under law, rather than arbitrary decision-making?

‘The central theme of this unit is the accountability of government to the people, under the Australian constitutional system of representative and responsible government’ (UoS)

Topic 2.1: Colonial Origins to Independence

1 Colonial Origins

NSW was 'settled' on 26 Jan 1788

- The idea that the land was settled has a distinct legal meaning. It meant that at law, the land was taken as not being occupied; no legal recognition…
- 'the land, being desert and uncultivated, is claimed by right of occupancy' (as terra nullius) Milirrpum (1971) 17 FLR 141, 201
- Reception of Imperial law – remained superior in the colonies. Imperial law was paramount
- Governor otherwise has absolute authority within the colony

First legislative body, NSW legislative council, was created 1823 through imperial statute: *NSW Act 1823* (Imp)

- 1823 – the Legislative Council created
    - Was not a parliament/legislature in a strict sense, rather the Governor was passing laws through the advice of the LC, like Kings of old…
    - LC also did not provide any supervising role over the Governor – no responsible government
    - Laws passed by Governor had to be sent back to England to be passed through the houses of parliament; could be disallowed by King/Queen
    - No separation of powers yet, CJ of the Supreme Court could advise on bills
- 1824 – the Supreme Court of NSW established
- 1825 – Executive Council
- 1829 – entire Australian continent claimed as British Territory

Australian Constitutions Act 1850 (Imp) – granted colonial legislatures power to enact own constitution

- New South Wales Constitution Act 1855 (Imp) – responsible government, bicameral legislature. This constitution presented two developments:

    - Responsible government: government operates as a cabinet of ministers, who are also members of parliament; government must maintain the confidence of the house and is responsible to the legislature
    - bicameral legislature: two houses of parliament, lower (legislative assembly) and upper (legislative council)
- This was repeated across the other colonies which each enacted their own legislature, judiciary and responsible government; each with their own autonomy… must be noted however, that each were subjected to the Imperial Parliament.
- By 1850s, colonial legislatures have plenary power: power to pass laws on any topic ('peace, welfare and good government)

2 Imperial Limits on Colonial Powers

However, the important Q was whether these colonial legislatures be described as legal sovereigns? Recall Dicey, right to make or unmake any law whenever; no person or body is recognised by the law as having a right to set aside legislature of parliament

- Colonial legislatures clearly did not have such power… their powers were determined by their constitutions, could not exceed constitutional limits… Secondly their legislative powers had imperial limits:
    - Territoriality – (arguably) legislation of colonial legislature not to operate with extra-territorial effect.
    - Reservation of bills – some colonial laws required to be reserved for royal assent (and British ministers advised the monarch in relation to reserved bills).
    - Disallowance – monarch may disallow legislation of colonial legislature, after Governor has given assent (and British ministers advise the monarch in relation to reserved bills).
    - Repugnancy - in so far as colonial law was repugnant to – inconsistent with Imperial law – it was invalid
        - Ambiguities: whether colonial legislation could be deemed inconsistent with common law in England?
        - Colonial Laws Validity Act 1865 (Imp) settled the ambiguities:

        - s2: colonial laws are void and inoperative if repugnant to an English law 'extending to the Colony'
        - s 1: 'applicable to such Colony by express Words or necessary Intendment'
        - e.g.
            - Colonial Laws Validity Act 1865 itself;
            - Commonwealth of Australia Constitution Act 1900;
            - Australia Act 1986 (UK).
    - Section 3: colonial laws are not void or inoperative for repugnancy with the general laws of England
        - However, this had some issues. General laws of England had been applied in Australia, but not could not raise the issue of repugnancy… the colony could repeal or amend it through its own legislation

3 Federation

Increasing colonial cooperation led to the colonies requesting the Queen and British Parliament to pass the Commonwealth of Australia Constitution Act 1900 (Imp) (in force, 1 January 1901)

- Created commonwealth of Australia
- Covering clause 5: 'This Act, and all laws made by the Parliament of the Commonwealth under the Constitution, shall be binding on the courts, judges, and people of every State and of every part of the Commonwealth, notwithstanding anything in the laws of any State'
- Although federation was a clear step towards independence as the commonwealth is now granted powers to make laws that bind all colonies, the lack of constitutional independence was still manifest… relying on the authority of the imperial parliament itself, arguably points to a lack of constitutional independence. Source of constitutional authority remains in imperial statute…
- Further, other imperial limits remained:
    - Imperial limits of legislative power continued
    - Colonial Laws Validity Act still applied to states and the Commonwealth

- See Union Steamship Company of New Zealand Ltd v Commonwealth (1925) 36 CLR 130
    - Provisions of the Navigation Act 1912 (Cth) regarding pay for discharged sailors were repugnant to the Merchant Shipping Act 1894 (Imp), which continued to govern such pay
- If we consider what independence means, it's hard to consider Australia as constitutionally independent

4 Independence

When then does Australia become independent?

- No definitive definition in domestic law… rather what we can track is a gradual change in which judicial, legislative and executive powers no longer is subject to UK authorities…

4.1 The Balfour Report

1926 – Report of the Inter-Imperial Relations Committee of the Imperial Conference (the Balfour Report), regarded as a key development:

- 'Great Britain and the Dominions [including Australia] ... are autonomous Communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs, though united by a common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations.'
    - Dominions refers to the nations of the former empire, now the commonwealth.
    - Balfour declaration arose from agitation from other countries, Canada, South Africa, Irish free states that were demanding more autonomy.
    - Marking Australia's independence for the purposes of international law; though Australia was not entirely keen on its terms, it does reflect the movement towards independence.
    - Australia was a signatory of treaty of Versailles, joined league of nations

4.2 Statute of Westminster 1931 (UK)

Balfour report developed such that UK legislature would only exercise its power with respect to dominions if this was requested by the dominion legislature. For some countries, that convention (embedded political practice/social agreement that shapes how we do constitutional practice) is distinguished between law.
For some countries, this convention was not enough. Canada, South Africa and the Irish free states agitated for this convention to be reflected in law. This gave rise to the statute of Westminster 1931.

- Section 2: The CLVA (doctrine of repugnancy) no longer applied to laws made by the Dominion Parliament after the commencement of the Statute of Westminster. The Dominion Parliament has the power to repeal or amend any Imperial law extending to the Dominion
- Section 3: The Dominion Parliament has the power to pass laws with extra-
- territorial effect
- Section 8: Expressly excludes the Constitution from s 2 – cannot be repealed or amended by the Dominion Parliament
    - Constitution remains an imperial statute that could not be repealed or amended by the dominion parliament, except in accordance to the amendment procedure provided for in the constitution itself

This was a step in independence but was limited in key ways:

- Section 4: UK legislation will not extend to the Dominion unless the Act expressly declares that an extension is requested by the Dominion
    - See Copyright Owners Reproduction Society Ltd v EMI (Australia) Pty Ltd (1958) 100 CLR 597
    - Q was whether the new copyright act in UK passed in 1956 passed into Australia with paramount force; previous copyright act of 1911 did, however 1956 Act did not comply with the consent and request of s 4 of the statute of Westminster. Did not contain an express statement of the Cth requesting consent. This meant that it was not law extending to Australia and so did not have paramount force.
    - Here we can see the second limitation of the statute of Westminster. Was not a complete severing of the UK legislative authority from the Cth. Still

possible for UK to pass laws extending towards the Cth so long as they contain the right statements containing consent and request from dominion parliament.

- Section 9: UK parliament does not need Commonwealth's consent to pass laws extending to the States
    - Effect: the CLVA (doctrine of repugnancy) continues to apply to State legislation
    - UK law could legally be passed without request and consent of the States (but convention)
- Section 10: Statute of Westminster did not apply to the Commonwealth unless adopted by the Commonwealth
    - Statute of Westminster Adoption Act 1942 (Cth)
    - Enacted by AU and backdated to 1931 due to outbreak of WWII; give assurance to Cth that its statutes have extraterritorial effect during the war.

Summary post SW:

For Cth:

- Clear that Cth law could operate extra territorially
- Doctrine of repugnancy (CLVA) no longer applies at Cth level
- Still possible for the UK to legislate for the Cth on a request and consent basis

For states

- Remains unclear whether States can legislate extra-territorially (though later confirmed)
- States still subject to the doctrine of repugnancy (CLVA)
- Still possible for the UK to legislate for States, without request and consent
- State governors were appointed by the Queen on the advice of British ministers
- The Queen's disallowance of State law and assent to reserved bills was still possible, and this was undertaken based on British advice

4.3 Australia Act 1986 (Cth)/(UK)