

LAW101

Topic 1: Philosophical Foundation of Australian Law

Definitions of liberalism

- Oxford: willing to respect behaviour/opinions different to own
- LexisNexis: political philosophy with jurisprudential consequences and dimensions emphasising the rights of the individual against the community and the state and fostering theories of procedural rather than substantive justice
- Liberalism is hard to define and it is not evident that we are basing thoughts and arguments on a philosophical theory as a theory of liberalism appears natural, it is common sense and almost invisible- it's everywhere
- Theories like this are specific to a particular time and place
- Analogy of liberalism= Christians agree to certain things, though debates on whether certain elements are Christian can arise
- Liberalism is a label given to the dominant ideology of modern western society- those who favour government intervention in order to correct social inequalities
- Liberals tend to unite on the need for law to preserve the liberty of the individual from the encroachments (violations) of others
- Benefits of analysing liberalism: appreciate extent of modern legal services, contrast the ideal of law with its actuality, these ideas can give birth to modern legal debates and it exposes us to some of the concerns of the legal and political philosophy

Australian legal system:

- Grew out of the English legal system
- Long history- back to 1066
- This was a time of immense change in Western Europe as it was also the beginning of economic changes that led to the industrial revolution
- Liberalism emerged in the period of Age of reason/enlightenment

Enlightenment:

- Development of scientific method
- Religious changes shifted away from faith and onto secular powers and authority, rejection of divine and regulation
- The Monarch was historically God's interpretation of Earth and the laws- the Monarch was once appointed by divine power- by God
- Compare feudal period: age of faith, doctrine of divine rights of Kings; power of church in all areas and of all levels

Age of reason:

- Faith in the capacity of human reason to provide insight into both the natural world and human societies
- Important shift away from faith in divine revelation- once was 'world is how it is due to God'
- Philosophers debated on the correct basis for constituting the authority of the state to make and enforce law

Enlightenment and Revolution: 1550-1789/ a timeline

- Scientific revolution: Challenged geocentric theory- scientific methods developed. Scientists make discoveries in many fields- new way of thinking about the world- observing and questioning assumptions
- Enlightenment: people try to apply the scientific approach to aspects of society, philosophers advocate the use of reason to discover truths, challenged many accepted ideas about government and society
- Spread of ideas: enlightenment ideas sweep through European society and to colonial America
- American Revolution: colonists declare independent, defeat Britain and establish republic

Classical liberalism:

- Concern is primarily with limiting power of the state
- Aimed for individualism, freedom from oppressive government and laissez-faire economic development
- Individuals are the fundamental economic and moral unit of society
- Law should be a process of applying objective and value-free rules

Elements of liberalism

9: liberty, negative liberty, liberalism & morals, individualism, positive liberty, equality, justice, rights, utilitarianism

Liberty: Enter freely into obligation

- Idea that we are all born free, not into slavery and we have no obligations
- Negative liberty **can't intervene in freedom except harm principle**: freedom from interference i.e. do what you want to with as little interference as possible- state should only deal with public matters
- Economic liberty: free market- maximises happiness
- Civil liberty: freedom from concentration of power arbitrary
- Social liberty: equality before the law
- Negative liberty and the harm principle: By John Mill: state cant intervene with individuals actions unless they are causing harm to others,

What is harm?

- Direct and indirect

Liberalism and morals:

- An individual is seen as the basic moral, social, legal unit
- Today the individual is an individual of society and is dedicated to protect individual rights.
- People are seen as discrete, self-contained units- all distant from each other, don't see society as communal
- E.g. torturing is wrong- nothing justifies it: suspect morals vs society morals
- E.g. most know kidnapping is wrong- so when someone does kidnap, they are breaking community morality, thus, they are no longer entitled to the protection if liberalism
- 'Reasonable persons'- a composite of a relevant community- a judgement as to how a typical member of that community should behave.

Positive liberty:

- Communitarianism: embedded in different social practices- humans are in constant control with one another- cant divorce selves from social & moral roles
- Republicanism: Freedom is not equal to choice
- Freedom should be a supreme power of control (dominion) over one's life

Equality:

- Formal: 'like cases treated alike'
 - Laws applied to everyone in the same way regardless of who they are- focuses on procedure rather than equal outcomes
- Substantive equality: focuses on changing the procedure for individuals so that everyone achieves the same outcome

Individualism: What would a reasonable person do?

- Margaret Thatcher 'there is no such thing about society'
- All liberals would assert that it is liberty of the individual they seek to protect

Justice:

- Looks at fairness and procedures
- JUSTICE AS EQUALITY: Idea that it is unjust to treat others differently
- JUSTICE AS DESERT: retributive- held belief that you get what you deserve
- JUSTICE AS RIGHTS: human rights- a just system of laws
- Substantive justice is concerned with inequalities that impair the likelihood of just outcomes

Human rights:

- Derived from what? God? The Law? Nature of being human?
- Historical conceptions saw them being derived from God
- Modern conceptions saw human rights emerge after WWII so therefore, derived from the nature of being human

Utilitarianism: Validity of action justified by which action promotes happiness to the greatest amount of people

- Measure goodness/value in an issue on whether it makes the maximum amount of people happy
- Not based on self-interest: values general welfare over individual welfare
- Altruistic (unselfish concern for others)
- Egalitarian (believing people are equal)

The values underpinning public law:

- Freedom: Liberalism posits freedom as the foundation of the relationship between individuals and the state
- Equality: Recognises that all individuals are of equal worth despite

Topic 2: Formalism and the rule of law

Concept of the rule of law

- According to A.V. Dicey, there are three aspects
- 1) no one can be punished except for a breach of law proved in an ordinary court
 - This guarantees a hearing
 - What about detention centres?
 - What about suffering whilst being detained
- 2) no one is above the law and everyone is equal, regardless of status
 - Can be problematic for e.g. what does it mean to be equal before the law
 - 1970's indigenous harassed by police in Redfern
 - Only equal if everyone has access to legal services and knowledge on legal proceedings
- 3) rule of law includes the results of judicial decisions determining the rights of private persons
- Requires government to be executed according to rules= no arbitrary use of power, government should be limited and exercise within limits, promotes personal autonomy allowing individuals to predict whether the government will intervene in their life

History and political significance of the rule of law:

- Rule of law doesn't exist outside of history, Magna Carta 1215: important to rule of law, bedrock about democracy- some state it is an important document about the liberal rule of law
- Feudal times: property rights seemed more important than the right to life
- Writ System: led to the slow development of the doctrine of precedent (stare decisis) legal reasonings of judges developed into precedents- took over 100 years
- Bill of Rights 1689: to enforce rights set out in Magna Carta
- Women were never considered in the Magna Carta- does it therefore cater for the common person?
- James 1st of England states that 'state of monarchy is the supremest thing upon earth'
- Rule of law cannot be arbitrary
- Rule of law is a principle of justice

Legal formalism:

- Rules are rules- if the law says something, we have to interpret it as it says
- Judges are constrained by laws, if not, they could decide whatever they think is best (could be unfair, inconsistent)
- Whole point of a rule is to cut out personal thoughts
- It was once a law that women didn't have the same rights as men thus gender and race have major impacts on equality

Legal formalism and the rule of law:

- Law is not only formalistic
- Some argue you can have the rule of law outside liberal societies
- Joseph Raz states there are 2 decisions of law: 1) people should be ruled by the law and obey it and 2) the law should be such that people will be able to be guided by it

- The rule of law limits arbitrary power of government
- Laws should be retrospective
- Raz claims the rule of law is separate from the rules of values
- Raz claims that the rule of law does not rely on external values and pressures

Formal and substantive reasoning:

- Substantive reasoning is normative (law ought to be at least good if it is to be law)
- Applies morality to the law- states not equal- access to resources different between others
- Formal reasoning: rule of law provides equality
- Feminists insist the law protects men/masculine values

Analysis of the rule of law:

Constitutionalism: must be laws and conventions about how the laws should be made and there must be superior rules which say how to operate and guarantee that the government is not above the law.

This can be achieved through separation of power in order to not give one arm of government full power over individuals: legislature (parliament), executive (cabinet) and judiciary

Other notes:

- Thin procedural approach: described by Hayek as the government is bound by rules fixed and announced beforehand
 - For Hayek the key is certainty and predictability, he believes laws must be general and equally applied, laws should not single out specific persons or groups
 - Raz adopts this approach as he believes laws should be prospective, public and relatively stable and argues that since there is no connection between law and morality, the rule of law should be balanced with other values.
- The substantive/thick approach agrees with Raz's conditions for the rule of law (such as open and fair hearings) but adds for further condition of morality.
 - This approach emphasises rights
 - English judge Lord Bingham stated in 2006 that 'law must afford adequate protection of fundamental human rights
- Dicey's three key principles of the rule of law: predominance of the regular law is favoured and opposed to the influence of arbitrary power, equality before the law, laws of the constitution are not the source, but the consequence of the rights of individuals and this is defined and enforced by the courts
- Judicial independence is the notion of the judiciary being kept away from the other branches of government. Justice Brennan states 'independence is necessary not only from the political branches of government. The community looks to the courts for the protection of minorities and individuals against the overreaching of their legal interests by the political branches of government
- **The relationship between the rule of law and human rights:** strong- the rule of law can be seen as the underpinning factors to the existence of human rights, so you can look to the rule of law as a legitimate reason for human rights
 - Also, the rule of law was used in the creation of the UDHR as it was mentioned in its preamble

- Formal legality: Based on linguistic formulation of rules- judges must read and apply laws as they are
 - Formal legality ensures that laws apply to everyone, are clear with little to no ambiguity language and avoid the concept of retrospectivism.
 - Describes how governments rule, what they can and cannot do
 - Due process requires a fair hearing: right to be assumed innocent until proven guilty, rights protected, entitled to legal representation and so on
- The liberal conception of freedom related mainly to the freedom of interference from the government
- Concept of freedom was espoused by John Mill- individuals free as long as their actions do not harm others
- **Three critics of liberalism (offered by communitarians)**
 - Pursuit of liberty in society as a whole should be a significant factor, not just the principle of individual liberty
 - Liberalism ignores the fact that an individuals' social relationships are part of our identity, we are not simply independent, self-contained units
 - Individual freedom can lead to unwanted results such as environmental/social damages and even isolation from the community as a whole

Topic 3: law and equality:

Margaret Thornton: Equality book- the liberal promise

- Australia is a democratic society and we therefore assume equality between all citizens as a fundamental norm- this norm is imperfectly realised
- Women, Aborigines, migrants, disabled persons and gays continue to be the victims of discriminatory treatment by virtue of their outsider status
- Anti-discrimination legislation for people who 'fall below the benchmark figure'
- White, Anglo-Celtic, heterosexual, males are the 'normal'
- Should differences between women and minority groups be dismissed or celebrates? This sameness/different dilemma continues to worry feminists and minority groups
- The equal treatment approach has generated a significant and irresolvable tension
- Discrimination is a difficult concept- the word is used with moral overtones, namely to discriminate against someone- word carries a suggestion of unfairness
- Stigma can be associated with an ardent dislike of members of a group
- Ethnocentrism is an example of hostility
- Psychological studies= people may have a generalised hostility towards outgroups- this is associated with the authoritarian personality type
- 'new racism' involves the likelihood of whites endorsing racially egalitarian values such as equal employment opportunities, but expressing racist views such as 'they don't want work' and 'they abuse social services'

- Discrimination is endemic (widespread) and is deeply embedded within the ideology of 'otherness'
- Discrimination can be direct (most readily comprehensible to the Anglo-Australian model of adjudicating wrongs) and indirect (victim subjected to a discriminatory act by virtue of membership of the stigmatised class)
- Existence of natural differences between human beings cannot be denied- the question is whether or not natural differences between human beings constitute inequalities
- Race is an example of a 'natural' difference- racism is exemplified in the typical relationships between colonial powers and the indigenous inhabitants of the new world
- Gender/sex is another natural difference
- Gender differences have been reinforced by the nurturing process, education system, codes of dress, behaviour and every way in which male and female personality is moulded
- Capitalism is a socioeconomic system which generates rather sharp inequalities and these inequalities have very negative results for the majority of humanity
- The liberal state cannot divorce itself from legal formalism with which it is intertwined- thus, it is the concept of formal, not substantive equality which is a central tenant of liberalism
- Formal equality (or equal treatment) is inherent within the Anglo-Australian legal culture
- Equality before the law is fundamental to the notion of the rule of law which is understood to constitute a check on the arbitrary exercise of power by law enforcers
- The fact that women, aborigines and other minorities have been subjected to appalling inequalities demonstrates that formal equality is compatible with the grossest injustice
- Substantive equality recognises the hollowness of the concept of formal equality- it takes factors outside the formalistic criteria at the point of access and to make allowance for them
- Thus, the long history of abuse to which aborigines have been subjected to, together with differences in cultural factors may be considered in attempting to bring this historically disadvantaged group up to a level comparable with that of the dominant group in society
- Complaint-based anti-discrimination legislation is concerned only with equality of opportunity in respect of access to some specified public sphere benefit such as employment
- There is unavoidable tensions between advocating the ideal of equality
- The political focus has an aim to have women admitted to the high-level positions
- We can see that anti-discrimination legislation is used as a legitimating instrument of social control by which the liberal state holds out a better deal for women and stigmatised groups.
- Equality is a significant moral touchstone- for it creates a presumption that people be treated alike, and it puts the burden of proof on those who wish to impose differences in treatment

Reading two: Jennifer Nielson: 'equality before the law'

- Equality is a central concept of the mainstream legal system, based as it is upon the principles of a liberal democracy- 'equality before the law' is regarded as central to the system's capacity to produce justice
- Concept enshrined in UDHR: all are equal before the law and are entitled without any discrimination to equal protection of the law (article 7)
- The concept is contained within the common law of our legal system
- Not yet recognised as a right of citizenship within the Australian constitution- we are yet to have a bill of rights- Australia is one of the few western societies without one

- Our rights to equality are protected by separate pieces of legislation that promote features of equality, by prohibiting discriminatory conduct related to gender, race, disability and so on
- What is equality: there is no fixed meaning: most would think of equality being 'the same'- though we may argue whether this means the same accessibility or the same outcome achieved
- Substantive equality promotes a more sophisticated approach to equality as it seeks to achieve the same or similar outcomes by recognising that some experience inequality if they are simply treated 'the same'
- The substantive approach to equality is supported by international jurists who do not regard equality as an absolute concept but instead one that is relative as it requires treating 'equally' what is equal and unequal what is 'unequal'
- A significant number of government reports and inquirers have identified many features of law and the legal system that result in disadvantage for certain groups in contemporary Australia
- In the suggestion that Indigenous Australians, women and so on, have different needs, is the suggestion that there is a norm or benchmark person against whom these groups are typically judged against
- This in turn suggests that the needs of a benchmark person has been the blueprint for the construction of laws and the legal system
- Margaret Thornton concludes that there are natural differences between different human beings, but indicated that disadvantage can occur as a consequence of these differences when the dominant group 'benchmark'- defines how differences are to be valued= not every difference equates to an inequality
- Government inquiries recommend that changes are to be made to the legal system to meet the differences between groups

Reading: indirect discrimination

- Concept of indirect discrimination is fragile- emphasis on impact rather than treatment, its linkage of individual and group and its invitation to forward-looking action remains challenging
- Strongly arguable that indirect discrimination includes a duty to take pre-emptive action to address a pattern of impact, even in the absence of litigation

Formal equality:

- 'treat like cases alike'- seen as simple
- PEOPLE ARE NOT EQUAL
- Inherent inequalities: some people are more determined, intelligent, beautiful and stronger than others- in built difference are where we can see inequality
- Individual choices: could be a result of personality e.g. brought up to be a hard worker, more task focused- more merit based distinctions

- Institutional or social: some experience poverty, poor access to education, racist and sexist attitudes and so on
- Formal equality accepts that there are inequalities but aims for inequality to only be inherent/individual choices i.e. based on merit- deserve it
- Rousseau states that in order for laws to be legitimate, they must be generalised and we should all enjoy legal rights equally
- Equality before the law requires law to be applied equally to avoid arbitrary laws being applied
- If like cases are treated alike, how do we know whether they are alike? If two cases are not identical, in what sense should they be alike? Person: age, intelligence, strength, beauty and so on- what is needed?
- Formal equality isn't as mechanical as we think
- It is not a morally or politically neutral process
- If assessments are made without care and rigour, the results can be highly problematic
- Formal equality is consequent with liberalism's focus on individualism: look at individuals by stripping qualities that identify them as a member of a group e.g. race, gender, ethnicity and so on, but then, what is left?
- Treating everyone the same involves that the same expectations must apply to everyone, then make decisions based on merit
- CRITIQUES: we have a subconscious standard of what the norm is and we expect everyone to act in this way, thus we judge others against this benchmark

Reasonable person:

- A norm or benchmark that permeates law
- Used to be 'reasonable man' took gender out of equation
- Individuals compared to a fictitious figure
- This standard is stripped of individualised characteristics of race, gender, culture, ethnicity and so on= impossible to think of a person like this

Race analogy:

If we get rid of institutional inequalities at start of the race, we still have inequalities as all individuals are different and inequalities based on merit occur

Substantive equality:

- Seen as complex and subjective
- May only address institutional/social inequalities- there is concern that substantive equality measures might ignore individual choices or inherent qualities
- E.g. will ignore merit and qualifications= employ someone who is not as good and who doesn't deserve to be there
- Focus is on equality of outcomes
- Looks at impact of institutional disadvantage and the assumptions that underpin the relevant/irrelevant categories
- Tries to deconstruct characteristics people may be discriminated on e.g. looks deeper and states women have less work experience due to time taken off to look after children BUT should you take into account averages or actuals

- E.g. indigenous may not get a job due to the work force being foreign- they have less opportunity for formal education or find it alien to their worldview- is this due to racism?
- Substantive equality attempts to identify disparate impacts- looks at statistics= why can't women get a job higher up?
- Substantive equality designates criteria for jobs to include membership of disadvantaged groups and it aims to identify indirect inequality and recognises people may have to be treated differently due to the group they belong to.
- Measures could be to implement quotas e.g. every committee at UNE must have gender balance
- Criteria may not be as morally and politically neutral as we think

Topic 4: law and gender:

Public/private Dichotomy

Negative liberty and individualism:

- Sphere of non-intervention where individuals are free to determine and pursue their individual aims and morality
- Negative liberty= freedom from different kinds of oppression/state intervention
- Individualism is central to liberal philosophy- individuals are free to pursue aims and morals

Public realm:

- Based on morality
- Curfew of state legislation
- Realm for state intervention, which is legitimate and necessary

Private realm:

- Based on rationality which is characterised by freedom of interference

Feminism and the public/private Dichotomy:

- Some view the public/private dichotomy being tied to binaries- males= public, females= private
- PRIVATE: female, irrational, passive, feeling, nature, subjective personal
- PUBLIC: male, rational, active, thought, reason, culture, objective, principled
- These binaries are viewed as hierarchical- not of equal value
- Public (male) seen as more important and that women are associated with 'lesser' values
- This is a central idea of feminist theory
- Lord Denning makes the argument that women are different, but equal 'she in her sphere does work as useful as man does in his'

Equal but different- cultural feminist theory:

- States that whether by nature or nurture, women and men have different perspectives and ethics= a different 'voice'
- Different but not subordinate- should be seen as equally valid
- Carol Gilligan concluded that the test itself was skewed based on male privilege and that a women's approach isn't stunted, but different- possibly even more effective

- Law constructs people as autonomous and decontextualized- taken out of their social and relational context- and viewed as abstract entities.

Criticisms from feminists: romanticises stereotypes (suggests women are more caring), supports universalism (all women inherent caring and nurturing aspects), so called 'different voice' is constructed by patriarchal views of women as submissive

Feminism and the public/private dichotomy:

- Women have consistently been associated with the private realm of personal life
- Law traditionally refused to intervene in private family life matters e.g. marital rape, domestic violence
- though there are arguments that the law has always regulated private life, for e.g. the criminalisation of homosexuality

Masks and legitimates: the subordination of women:

- private realm matters not considered important enough for much needed state intervention
- e.g. masks domestic violence by recasting it as 'private' in 2014- 84 women were killed by a partner or ex-partner
- Jan- July, 59 women killed
- not seen as issue in society- don't know what's happening behind closed doors
- more killed from domestic violence, yet terrorism (none in Australia unless you count Lindt café) yet terrorism causes more fear
- disproportionate response as we see family relationships as private
- agree with public/private realms being binary influenced due to this example

Reconstructing the private:

- Liberals and feminists might endorse the claim that there should be a realm of private life in which the individual can determine and pursue the good life
- Transformed from negative liberty (freedom from state intervention) to a positive right to 'establish, develop and fulfil one's own emotional needs'
- Privacy as autonomy- a more positive conception of liberty

Liberalism and feminism:

- Complex relationship
- Each approach has multiple interpretations
- Liberalism pathed way for feminism due to individualism and equality and HR- gave momentum to various liberation movements, including feminism

Formal equality:

- ALRC report Equality before the law: Women's equality 1994 outlines two approaches regarded as appropriate to address gender equality:
 - The formal equality or gender neutral approach strict equal treatment between men and women
 - Differences approach: 'special treatment' for women where different experiences such as pregnancy

Pros:

- Greater popular legitimacy
- Doesn't interrupt other legal values
- Effective in combating direct discrimination
- It is straightforward in principle: no law may distinguish between men and women in any way

Cons:

- Idea that once barriers are removed, there would be no problems and everyone would be equal= NOT TRUE
- Makes affirmative action unlawful
- Historically women's struggles weren't noticed as they couldn't be compared to anything for e.g. couldn't complain about pregnancy and being discriminated in the workforce as men have never encountered this struggle

Feminist theory:

Liberal feminism:

- Argues that gender equality in a liberal society is possible and that inequality is in the past and have been brought about solely through male prejudice

Radical feminism:

- Sees political dominance by men over women as the fundamental division in societies and it is largely independent of the economic or social system

Cultural feminism:

- Refers to work by writers who argue that women have their own specific culture which has inherent value and that their distinctive voice/viewpoint must not be ignored nor undervalued

Marxist/socialist feminism:

- Seeks to reconcile a traditional Marxist analysis (takes society as comprising antagonistic (hostility) social classes) with a feminist analysis= gender rather than class is viewed as the primary division in society

Ngairé Naffine and the three phases of feminism:

1) First-Phase (male monopoly): identified with liberal feminism and has concerns on the pursuit of formal equality

2) Second-Phase (male culture of law): identified with racial and cultural feminisms and argues that male bias extends to virtually all aspects of law- unlike first phase, it refuses to accept the law on its own terms

3) Third-Phase (legal rhetoric and the patriarchal social order): identified with socialist and Marxist feminism and builds on the second phase analysis but suggests a more complex picture- this approach exposes the contradictions within it

Feminist perspectives on the public-private divide:

- 'right to privacy' late 19th century: shift in focus from the protection of physical interests (such as property) to less tangible, psychological interests (such as privacy)
- Women can now vote, own property, their own rights and participate freely in many areas of public life

Direct discrimination:

- E.g. rules that preclude women from holding a certain job
- Ansett only employed men as pilots
- Found by the Equal Opportunity Board in Victoria to have discriminated against a female applicant whose score was higher than 7 of the 14 successful candidates

Indirect discrimination:

- Can stem from rules which seem neutral on their face, but which unreasonably define a job in such a way that women are disproportionately excluded e.g. weight or height requirements may exclude women

SDA and action that can be taken

- Sex Discrimination Act 1984 makes unlawful acts of discrimination in particular areas of activity 'unlawful'= does not mean acts are criminal
- Person can complain to the Australian HR Commission and the complaint is channelled down a path of conciliation
- Some argue that these matters are private- especially when carried out in private

Affirmative action:

- Is referred to as 'positive' or reversal discrimination and is usually taken to involve a positive program of giving on advantage to people in certain groups because they have been discriminated in the past
- Affirmative action (Equal Employment Opportunity for Women) Act 1986 and the Equal Employment Opportunity (Commonwealth Authorities) Act 1987 both introduce requirements for the development of Affirmative Action programs for women in all businesses.

Topic 5: Law and Race

- **Race and terra nullius:**

What is race?

- Idea of race was significant notion from 1970-1880
- Belief that there are different human types: white (gentle, inventive), African (crafty), Asian (yellow), native American (reddish)
- Darwin stated that only strong races will survive- Europeans likely to take over due to cleverness

Critical race theory:

- Issue of race is culturally and socially constructed and structured, directly or indirectly, by relations of power

- Racism is 'ordinary'- as humans we make distinctions between people in society
- Race is a cultural construct
- Groups are racialized or have certain characteristics due to race= perception
- Sceptical of 'colour-blind; equality= everyone the same, doesn't understand how discrimination works

Australia: terra nullius?

- Cook surveyed Australia coast and though indigenous only lived on the coast, not inland
- Colonisation rationalised under the doctrine of terra nullius 'land belonging to noone'

International law:

- Territory may be acquired by conquest (warfare), cession (negotiation of treaties), discovery/occupation of land (terra nullius)

Common law: Blackstone:

- Identified two types of colonies: Occupation of land 'uncultivated' and occupation as cultivated land 'only by treaty or cession'

Cook's instructions:

- Were to try to colonise the land and if the country was uninhabited, take possession for this Majesty (1768)

Governor Phillip instructions:

- Open an intercourse with the natives and to conciliate their affections, live in kindness with them (1787)

Batman treaty:

- Not lawful, gave indigenous clothing and beads for acres of their land, it is crown land, not indigenous, thus cant enter treaties with indigenous

Question of jurisdiction:

- Whether British law applied to indigenous
- Already a system between indigenous- thus don't intervene
- British law applied in dispute

Mabo v QLD 1992 No. 2:

- Native title claim by Merriam people
- Argued that traditional property rights survived British sovereignty
- High Court majority rejected terra nullius and native title became a part of Australian law
- Sparked heated debate on whether judges had over stepped boundaries to change commonwealth laws

First Australians and the criminal justice system:

Walker v NSW 1994:

- Acted in self-defence against an officer due to fear of frequent indigenous deaths in custody

- Argued that court should recognise Aboriginal customary criminal law
- Mason CJ: it is a basic principle that all people should stand equal before the law
- Law doesn't accommodate on an alternative level

Equality before the law"

- Highest overrepresentation rates in the world
- 2.5% of population, 26% of adult prison population, 54% of juvenile population
- Explanation? Racism and discrimination, history of oppression, crime-as-resistance, cultural differences

Six puzzles of critical race theory:

- 1) why do things never seem to get better? Is this the way it is or is something going on?
- 2) Why do most persons of the majority race fail to become alarmed over the current racial scene and take action?
- 3) Black underclass? Due to oppression, favouritism
- 4) Why do members of the majority groups strongly prefer equality of opportunity over equality of results? Can't say it's a level playing field- only look at rules, not what the outcomes of these rules are
- 5) Curious alignments: things never change unless it is for the benefit of community members as a whole
- 6) 'self-defeating' underclass culture: don't want to end suffering of others due to self interest

Royal Commission into Aboriginal deaths and custody:

- Many issues for over-representation of indigenous in custody
- Disproportionate number of indigenous Australians in custody, yet still die in custody at the same rate of non-indigenous people
- **Assimilation:** removed from families with goal to 'become white person'- brought into mainstream community
- **Racism:** excluded from normal functioning of society

Factors leading to jail sentences:

- Prior record
- Short sentences to scare those from reoffending
- Jail for fine default
- Recidivism: commit more crimes and end back in court
- Alternatives to custody

Reforms to the criminal justice system:

- Decriminalise public intoxication
- Reduce arrests
- Under-policing, especially in domestic violence cases
- Bail
- Imprisonment as last resort

Recognition of first peoples law:

Recognition: criminal law:

- Double punishment: punished under indigenous law as well as mainstream law- can include banishment (loss of ties to community), spearing and so on
- Under Aboriginal law the purpose of punishment is to restore peace in community
- Assault against Aboriginal women who are minors: offence in mainstream law, but normal in culture- lower age of consent

ALRC report 31 (1986)

- Consideration that aboriginal laws must be taken into account in relation with mainstream law
- Principle of equality before the law did not rule out use of 'special measures' to give recognition to aboriginal law e.g. anti-discrimination laws promote equality

Indigenous sentencing courts:

- Impose mainstream laws and elements of aboriginal culture- victims have a say, elders conduct hearing
- Some think it is a soft option, not true, very confronting

Arguments against recognition:

- Legal pluralism v legal centralism: Multiple legal systems- how do people know which laws apply to them?
- Equality before the law: doesn't lead to equal outcomes
- Different rules for different groups- what are the outcomes
- HR: breach on one hand is a cultural practise and on the other
- If we recognise indigenous laws, we must recognise every culture in Australia. NOT TRUE as migrant choose to live here and indigenous are first peoples

Topic 7: The Australian Constitution and Federalism

Development of the rule of law in England (and prior to 17th century)

- European monarchs exercised absolute power
- Believed King was appointed by God
- Intimate connection between church and the state- believed human law was derived from the greater divine
- Natural law= source of law is God
- If King is source of law, can't be constrained by law- not bound, above the law: subject to arbitrary- doesn't have to follow the laws- though King usually would and apply laws fairly
- DIVINE RIGHTS OF KINGS: church and state bonded together, church influenced law and politics, authority of religion and divine right of Kings challenged by emergence of doctrine of popular sovereignty.

Emergence of the rule of law:

Henry VIII reign:

- Relied on parliament more than any other king as he used it to raise taxes in order to support the military
- Church slowly separated from sovereign influence- yet Stuart Kings wanted the monarch to go back to how it once was

James I ruled 1603- 1625:

- Catholic- asserted divine rights of Kings- was in opposition with Justice Coke
- Justice Coke sought to limit power of the sovereign and argued 3 cases

1) Dr Bonham's case- asserted sovereignty of common law over statute

2) case of prohibitions: only courts can decide a case, not James I, but someone of the legal profession

3) case of proclamations: King cannot exercise prerogative power to create new criminal offences

Charles I: 1625-1649

- Some of James I- also catholic
- Conflicted with parliament which was then dissolved- he ruled for 11 years until he needed the parliament back for financial support in the Civil war (1642)
- Parliament raised an army called the 'New Model Army' which was led by Oliver Cromwell- army defeated the other side and then executed James I in 1649 and called for Charles I's son to rule, Charles II

Charles II 1660-1685

- Catholic but not openly
- Restored monarchy following Cromwell's death- parliament now controlled by Anglicans
- Continued conflict over roles of monarch, parliament and common law- religion was the flashpoint for conflict

James II: 1685-1689

- Openly catholic, Charles II's brother, sought to promote interests of English Catholics
- James's son was christened as a catholic
- James had two protestant (form of Christian faith) daughters
- Eldest daughter, Mary, married to Prince William of Orange
- Parliament invited William and Mary to take the throne as James II fled parliament

Bill of Rights 1689:

- E.g. right to free speech, presumption to bail e.t.c.
- Restricted royal prerogative
- Cemented parliamentary authority
- Protected free speech
- Legalised restraints on sovereign power
- Restrained arbitrary power by branching this power into different hands- where Australia got the idea of the rule of law, which was neglected upon colonisation

Colonisation of Australia:

- 1786- decision made to establish a penal colony in NSW- Act for the Effectual Transportation of Felons and other Offenders
- Gaol were overcrowded- why? Huge increase in number of capital offences (those resulting in death penalty) for e.g. 1688: 50 capital crimes, 1820: 250 capital crimes, Reign liked capital punishment yet as these sentences increased, the number of hanging didn't- placed in prison instead
- Douglas Hay argued that criminal law was an instrument of class control= control by propertied classes over lower classes and the poor
- Douglas Hay theses:
 - Terror of law: prospect of hanging for almost any property offence
 - Majesty of law: spectacle of crimson robed judges donning the black cap to pronounce sentence of death
 - Justice and mercy of law: extensive use of pardon (commute death sentence to transportation)

Inauspicious (discouraging):

- No public law institutions, no separation of powers
- An autocratic state, rule by the governor. Governor Bligh was right in the statement 'Damn the law! My will is the law'
- Form of military law
- Blackstone states: such colonists carry with them only so much of the English law as is applicable to their own situation and the condition of an infant colony

Australian colonies:

- Gradual establishment of system of public law and separation of powers over next 100yrs
- Established local parliament which gradually increased in authority
- 1842: Australian Constitutions ACT (NO 1) introduced representative government- first act allowing parliaments to be made out of elected individuals
- 1850: Australian Constitutions ACT (NO 2) bicameral parliaments (upper and lower house), enabled legislative amendments, responsible government- executive is responsible to parliament
- Responsible government

Push to federate:

What is a federation?

- Partnership in government with a central authority to look after matters of national and international import, and localised government to deal with the differing conditions of the local communities
- Have two sets of laws and government at two levels
- States coexist with a wider sovereign = federal government e.g. England is not a federation as it is all under one law
- Being a federation can be positive as it can retain local laws and customs that are more specific to geography or can be negative as there is no uniformity e.g. in criminal law and education systems
- Constitution gives power to federal (limited) rest goes to the state

- In Australia, federal legislative government is limited to powers conferred under section 51 i.e. federal legislation must relate to the federal powers
- Conferred= states exercise power in all other areas

Australia in 1901:

- Ned Kelly hanged 20 years earlier
- Population less than 4 million
- No airplanes, only 50 cars in entire country
- Main form of transport was coastal steamers
- No UN or other international organisations

Why federate:

- Dominant sense of British identity
- Free trade: each colony had tariffs, each colony had customs, yet some believed that each individual colony needed to come together as one force against war
- Labour regulation needed especially as immigrants paid lower wages in order to 'help protect white people'

Why not federate?:

- Colonies lose identity and swamped by larger colonies
- Some want free trade, others do not
- 1899: constitution drafted: all colonies except WA approved

Commonwealth of Australia:

- Jan, 1901, 1: commonwealth of Australia comes into effect- Edmund Barton appointed the first PM.

The federal judiciary:

Judicial power and the H.C.

- High court= 'guardian of constitution
- Separation of judicial power plays a significant role in the preservation of individual liberty
- H.C. jurisdiction is partially entrenched in the provisions of chapter 3 of the constitution
- Liberty of individuals is both an assumption which chapter III rests on, as well as an objective which it serves
- Chapter III not solely concerned with federal courts and judicial power- restrains each of the 3 branches of government, also empowers the judiciary and the legislature
- Concept of judicial power is clouded by the fact that the manner in which courts quell controversies is also captured within its scope
- Idea that courts exercising judicial power must possess the 'essential attributes' or 'features of a court' is well accepted by the H.C.- but is proven difficult to apply: difficulty heightened where such laws involve the courts in authorising serious or uncommon deprivations of liberty

- If H.C gets law wrong, a principle develops that is widely rejected by the public- there is no consequence on the court
- H.C. is not concerned with reaching the best of most fair decision, but in reaching a decision based on the application of relevant law to the case at hand
- Judicial consciousness of the constitutional limits upon judicial power is evident in cases where judges have cautioned against the use of doctrines or concepts that seem to promote a judge's personal opinion in the guise of objectivity framed tests for validity
- H.C's capacity to remain independent of political arms of government and the judicially review legislative and executive action is essential to ensuring the maintenance of the constitution
- Qualities of the judiciary: fair minded, learned (appointed on merit rather than popular vote) , independent (not corruptible), objective (free from bias and impartial),

Separation of powers:

- Most effective way of protecting liberty is to divide power between different and institutionally separate bodies and to avoid the concentration of power in one governmental arm
- Executive government is determined according to whichever political party holds the balance of power in the H.O.R's

Judicial review:

- Constitutional doctrines such as the rule of law, are not expressly mentioned in the constitution but were treated as assumed, this includes the power of the judicial review itself

Judicial independence:

- Not only guaranteed through security of tenure and remuneration, but independence of judges can only be guaranteed if the courts are independent in both form and substance
- Expressly provided for in s72
- Judiciary independent from corruption of other branches of government
- Separation of judicial power provides institutional independence, courts can't perform executive or legislative roles, judges can't act in other capacities if they are inconsistent with the judicial role

Appellate jurisdiction:

- Jurisdiction of federal courts, both original and appellate is a major focus of chapter III's provisions s73 and 74 are concerned with the appellate jurisdiction
- the notion that no law can confer power upon a person to conclusively determine an issue upon which the constitutional validity of the law depends

Chapter III: the text:

- called 'the judicature' (usually referred to 'the judiciary')
- courts constituted under chapter III are referred to as 'chapter III courts'= all courts in constitution
- separation of judicial power is a key assumption of the Australian constitutional order

- it looks at the 3 branches of government to see whether they are exercised by different separate branches of government as well as personnel at each branch to see whether they overlap with personnel from other branches

s71: Judicial power of courts:

- judicial power of the commonwealth shall be vested in the H.C of Australia
- H.C shall consist of a chief justice, no less than 2, as the parliament prescribes
- Judicial power vested in H.C., other federal courts, and such other courts as it invests with federal jurisdiction
- Only a chapter 3 court can exercise judicial power
- H.C must have at least 3 judges, there are currently 7

S72: judges appointment, tenure and remuneration:

- The justices of the H.C and the other courts created by the parliament
- (i) shall be appointed by the G-G in Council
- (ii) not removed except by the G-G
- (iii) shall receive such remuneration as the parliament may fill
- Amended
- Maximum age of judge is 70= one of the 8th successful referendums

S75: original jurisdiction of the H.C.

- H.C. shall have original jurisdiction
- (v) in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the commonwealth:

S76: additional original jurisdiction:

- The parliament may make laws conferring original jurisdiction on the H.C in any matter
- (i) any constitutional dispute is heard by the H.C

Boilermaker's case:

- H.C held that the limited tenure was consistent with the exercise of executive powers, but not with the exercise of judicial powers- mixing of power involved a breach of chapter III.
- Boilermaker's doctrine is designed to preserve the independence and impartiality of Chapter III courts
- Court of conciliation and arbitration made decisions in relation to industrial disputes e.g. wages= were not chapter 3 courts
- If not chapter 3 court, can't make enforceable orders

Kable Case:

- Grey Kable convicted of wife's murder
- While in prison, wrote to ex-wife's family and threatened to kill them
- Due to be released from prison
- Due to public outcry: act introduced 'community protection Act 1994 (cth)
- Legislation directed at Kable to keep him in prison after release date
- Problem: legislation affected one person- rule of law= apply legislation to everyone equally
- Law doesn't like preventative detention- prevent someone from doing something

- Legislation wasn't made in response to a crime

Communist party case:

- Federal government passed legislation banning communist party- allowed to do this under s51 (vi)
- Yet only make these types of laws in a state of war, this was made in a time of peace
- Act invoked if G-G declared an organisation as illegal- if deemed prejudicial to security and defence of the commonwealth
- Act was not valid.

More notes:

- Through judicial review of legislative and executive action, the HC fulfils its constitutional role and is able to advance the rule of law
- Court is both empowered and restrained in the context and must act in a manner that preserves the constitutional legitimacy and recognises the distribution of powers between the 3 institutions of government
- Approach of the court shifts overtime – need for parliaments to develop innovative ways to respond to contemporary threats and issues
- Court has demonstrated its capacity to be flexible in accommodating these developments, but increasingly resilient in maintaining its own central role in exercising judicial review
- Potential for H.R consideration to also influence the future development and application of chapter III principles- arguable has the power to do both.