LAWS1141
Principles of Public Law

Lecture 2 – Constitutionalism and the Rule of Law
B&W Chapter 1 Sections 1, 2, 5

1 Foundations

1. Australia as a Constitutional Hybrid

- *Commonwealth of Australia Constitution Act 1900* (Imp) entered into force on 1st January 1901
    - Essence of Westminster system of representative and responsible government within a constitutional monarchy
    - US influence through the concepts of federalism, separation of powers and judicial review
        - These elements are unified by a desire to protect people against the power of government
        - Power is distributed and dismembered to ensure that there is no single consolidated chain of command
- Monarchy is a symbolic façade; Queen is the head of state but in reality, she and the Governor-General have little scope to act independently of advice
    - Conventionally, the Queen acts on the advice of the Prime Minister and other ministers
- Representative government = government by people
- Responsible government = executive arm of government is responsible to Parliament for its actions
- In every system of government, the basic rules of constitutional law must have both functions of establishing a strong governmental chain of command, and limiting its power
- Constitutional monarchy = power embodied in the idea of monarchy is limited by the ideals and principles of constitutionalism
- Constitutional law = all rules which directly or indirectly affect the distribution or the exercise of the sovereign power in the state (***AV Dicey***)
- Constitution = document establishing the rules governing the composition, powers and methods of operation of the main institutions of government, and the general principles applicable to their relations to the citizens (***Ivor Jennings***)
    - Constitutions establish institutions and their inter-relationships, explain the place and role of the people and express political values to which a society lays claim
- ***Giovanni Sartori's*** classifications:
    - Nominal constitution = only deals with formalisation of power structure
    - Façade constitution = pays service to the principles of limited government but fails to secure them
- UK constitution is not a singular, signed document as is in the US, however, important sections do exist in written form and others are expounded in common law
- Australian constitutional law is both written and unwritten
    - Each of the states has a written constitution supplemented by conventions and the common law
- Flexible versus rigid constitutions according to ***AV Dicey***:
    - Flexible = a constitution under which every law of every description can legally be changed with the same ease and in the same manner by one and the same body
    - Rigid = a constitution under which certain laws generally known as constitutional or fundamental laws cannot be changed in the same manner as ordinary laws; special procedure must be followed in order to effect a constitutional change

2. Political and Legal Constitutionalism

- Key differentiating factor between political and legal constitutionalism is the constitutional limits of power given to the judiciary
- ***Adam Tomkins – Public Law***
    - All constitutions must answer the question of which body of power has the "final word" in the case of disagreement on a matter of public policy
    - Public law provides for the institutions which exercise political power, and seeks to hold those institutions to some form of account
    - Political constitution = those who exercise political power are held to constitutional account through political means, and through political institutions (e.g. through Parliament)
        - Requires strong and vibrant politics
        - Those performing the scrutiny function must take that function seriously with a high degree of independence from the government
        - Relies on the rigour of the political process
    - Legal constitution = principal means and institution through which the government is held to account is the law and court room
        - Legal systems, courts and judges require independence from the government
        - Suing is expensive, access to the courts is also limited to the well-resourced
        - No inherent discrimination in the favour of the political majority
        - Judges are not democratically elected nor representative
- Australian system strongly adheres to political constitutionalism
    - American style judicial review, and capacity for courts to strike down legislation is antithetical to parliamentary sovereignty, and also shows a commitment to legal constitutionalism

Amalgamated Society of Engineers v Adelaide Steamship Co Ltd (1920) 28 CLR 129	
Reasoning	- If it be conceivable that the representatives of the people of Australia as a whole would ever proceed to use their national powers to injure the people of Australia, it is certainty within the power of the people themselves to resent and reverse what may be done - No protection of the court in such a case is necessary or proper
Held	The extravagant use of the granted powers in the actual working of the Constitution is a matter to be guarded against by the constituencies and not by the Courts

Australian Capital Television Pty Ltd v Commonwealth (1992) 177 CLR 106	
Reasoning	- Those responsible for the drafting of the Constitution saw constitutional guarantees of freedoms as exhibiting a distrust in the democratic processes
Held	Power is placed in parliament to preserve the nature of our society

Plaintiff S157/2002 v Commonwealth (2003) 211 CLR 476	
Reasoning	- In any written constitution, there must be an authoritative decision maker
Held	Under the Constitution of the Commonwealth the ultimate decision-maker in all matters where there is a contest, is this court

5. Separation of Powers

- The courts exercising judicial review must be independent of the government and of the legislature
- *Boilermaker's Case* reinforces this, holding that the institutions that exercise the judicial power of the Commonwealth must be kept strictly separate from other governmental institutions
- Under the Westminster system Australia inherited from Britain, there is no similar strict separation between legislative and executive power
- ***Baron de Montesquieu – The Spirit of the Laws***

    - In every government there are three sorts of power: the legislative, the executive in respect to things dependent on the law of nations, and the executive in regard to matters that depend on the civil law
- ***Owen Hood Phillips and Paul Jackson – Constitutional and Administrative Law***
    - Legislative function is the making of new law, and the alteration or repeal of the existing law
    - Executive or administrative function is the general and detailed carrying on of government according to law, including the framing of policy and the choice of the manner in which the law may be made to render that policy possible
    - Judicial function consists in the interpretation of the law and its application by rule or discretion to the facts of particular cases
    - A complete separation of powers with no overlapping or co-ordination would bring government to a standstill
- ***Gerard Carney – Separation of Powers in the Westminster System***
    - The strict doctrine is only a theory and it has to give way to the realities of government where some overlap is inevitable
    - A system of checks and balances has developed, but must continue to develop

Institution	Power	Personnel	Control
Parliament	Make laws	Representatives elected to lower house Representatives elected or appointed to upper house	Royal Assent Supervision and/or expulsion by the House
Executive Council (Cabinet)	Executive power	Ministers appointed by the Crown with the support of the lower house Must be members of parliament	Maintain support of lower house Parliamentary and judicial review
The Courts	Judicial power	Judges appointed by the Executive	Superior Court justices removal by the Crown on address from both houses on Certain grounds

- ***Lisa Burton and George Williams – The Integrity Function and ASIO's Extraordinary Questioning and Detention Powers***
    - Integrity branch of government should exist somewhere between the traditional three arms, dedicated to supervising the use of public power
    - In its purest form, the meaning of integrity is the absence of corruption
    - Integrity also supports fundamental principles of liberal democracy, such as the rule of law

B&W Chapter 1 Section 4

4. Rule of Law

- ***Brian Tamanaha – On the Rule of Law: History, Politics, Theory***
    - Government officials worldwide advocate the rule of law, and equally as significantly, no officials make a point to defiantly reject the rule of law
    - Explicit and implicit meanings are held:
        - Protection of individual rights
        - Democracy is part of rule of law

        - Requires laws to be set out in clear, general terms
        - Rules apply equally to all
    - Formal conceptions of the rule of law = address the manner in which the law was promulgated; the clarity of the ensuing norm and the temporal dimension of the enacted norm, do not seek to pass judgment upon the actual content of the law itself
    - Substantive conceptions of the rule of law = as formal conceptions but take the doctrine further; certain substantive rights are based on the rule of law, which distinguish between "good" and "bad" laws
- ***AV Dicey – Introduction to the Study of the Law of the Constitution***
    - No man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established before the ordinary courts
    - Every man is subject to the ordinary realm of the law
    - Rule of law means:
        - Absolute supremacy of regular law as opposed to the influence of arbitrary power
        - Equality before the law
        - Law of the constitution are not the source but the consequence of the rights of individuals, as defined and enforced by the courts
- ***Brian Tamanaha – On the Rule of Law: History, Politics, Theory***
    - Rule of law will only be effective as long as the legislator feels bound to it
- ***WI Jennings – The Law and the Constitution***
    - Absolutism never developed in English law
    - Rule of law in a liberal sense requires that the powers of the Crown and of its servants shall be derived from and limited by either legislation enacted by Parliament, or judicial decisions taken by independent courts
    - Implies the notion of liberty
- ***Julius Stone*** emphasised the importance of shared ethical convictions about the appropriate limits on the exercise of power – substantive content in arguing that the rule of law may be understood as an ethical, rather than merely a legal doctrine
    - It is artificial and confused to juxtapose the rule of law and the sanctity of human rights as if these were competing ideals
- ***International Commission of Jurists – The Rule of Law in a Free Society***
    - All power in the state should be derived from and exercised in accordance with the law
    - The law itself is based on respect for the supreme value of human personality
    - The rule of law may be characterised as the principles, institutions and procedures, not always identical, but broadly similar, which the experience and traditions of lawyers in different countries have shown to be important to protect the individual from arbitrary government and enable him to enjoy the dignity of men

R (UNISON) v Lord Chancellor [2017] 3 WLR 409	
Facts	- Previous no-fee policy recognised power imbalance between employers and employees - Introduction of fees led to a dramatic fall in the number of claims, especially lower value claims
Issue	Whether fees for accessing employment tribunals could be overturned
Reasoning	- Fees order effectively prevented access to justice without the authority from the parent statute, therefore, was unlawful
Held	- The constitutional right of access to the courts is inherent in the rule of law - Right can only be curtailed by clear statutory enactment
Outcome	Allowed; fees overturned

- ***Ninian Stephen – The Rule of Law***
    - Law should apply to Government and agencies and those given power in the community, just as it applies to the ordinary citizen

    - Those who administer the law should be uninfluenced by government in their respective roles
    - Ready access to the courts of law for those who seek remedy
    - Rule of the land should be certain, general and equal in its operation
- Widely shared political and cultural commitments remain central to the maintenance of the rule of law in Australia, particularly the protection of rights and freedoms

Lecture 3 – Acquisition of Legal Independence and the Path to Federation
B&W Chapter 3 Section 2

3 Path to Independence

2. The Colonial Legislatures

- Bicameral legislatures established under British rule were subordinate legislatures, but the notion of 'responsible government' was enough to ensure that the colonies gained powers of local self-government
    - E.g. *Constitution Act 1855* (NSW)
    - Colonial legislatures had the same powers as their legislative creator as they had been made in its image

R v Burah (1878) 3 App Cas 889	
Facts	- An Indian statute of 1869 authorised the Lieutenant-Governor of Bengal to effectively subjugate hill areas under martial law - Under this regime, Burah and his accomplice were convicted of murder
Issue	1. Whether the 1869 act took away the right of appeal to the High Court 2. Was the power given to the Lieutenant-Governor involving a delegation of legislative power violating *delegatus non potest delegare* (a delegate may not itself delegate)?
Reasoning	- Acting within those limits, it [Indian Parliament] is not in any sense an agent or delegate of the Imperial Parliament, but has and was intended to have, plenary powers of legislation as large and of the same nature as those of Parliament - If it violates no express condition or restriction by which that power is limited, it is not for any court of justice to inquire further
Held	- Indian parliament has the same powers as Parliament, so long as it does not contravene express limitations - Parliament, but has, and was intended to have, plenary powers of legislation, as large and of the same nature of those as parliament itself
Outcome	Trial: convicted of murder Appeal to Calcutta High Court: held that it had jurisdiction Crown appeal to Privy Council: jurisdiction held

- Express limitations make colonial legislatures a subordinate institution, unable to override the will of the Imperial Parliament

Hodge v The Queen (1883) 9 App Cas 117	
Facts	- Under the *Liquor License Act 1887* (Ontario), the License Commissioners had prohibited the playing of billiards in taverns
Issue	Did liquor licensing come within the list of Dominion powers or within the list of Provincial powers?
Reasoning	- Provincial legislatures are in no sense delegates of, or acting in any mandate from Imperial parliament - Within these limits of subjects and area the local legislature is supreme, and has the same authority as the Imperial Parliament, would have had under like circumstances

Held	- Came within both Dominion and Provincial Powers
Outcome	Privy Council: comes within both powers

- *Powell v Apollo Candle Company* (1885) applied *Burah* and *Hodge* to state that the New South Wales legislature 'is a legislature restricted in the area of its powers, but within that area unrestricted, and not acting as an agent or delegate'
- To what extent can local legislatures alter the common law?
    - Addressed by ***Benjamin Boothby*** and held that enactments of local colonial legislature were invalid by reason of 'repugnancy' to the laws of England
    - Slight inconsistencies found and held as invalidities
    - ***Alex Castles – The Reception and Status of English Law in Australia***
        - [Boothby's] concept of repugnancy in particular sometimes meant that local laws would be struck down even if there were only minor technical differences between South Australian enactments and the received statutory and un-enacted law
        - *Colonial Laws Validity Act 1865* was passed because of the controversial situation which had developed in South Australia
        - *Phillips v Eyre* (1870) defined repugnancy under the *Colonial Laws Validity Act 1865* as 'repugnancy to an Imperial Statute or order made by authority of such statute, applicable to the colony by express words or necessary intendment'
    - *Colonial Laws Validity Act* confirmed that statutes passed by the colonial legislatures could override received English statutes and common law, but this did not extend to colonial laws whose effect would be repugnant to the British statutes applicable by paramount force

B&W Chapter 3 Sections 4 and 5

4. The Colonial Legacy

- *Colonial Laws Validity Act* continued to apply after 1 January 1901 through the notion of repugnancy, to limit the legislative power of the Commonwealth and the States
- It may now be seen that the creation of the Constitution through S 9 may have feed the new Parliament from the repugnancy doctrine, but it was not seen as this at the time
- *Union Steamship Co of New Zealand Ltd v Commonwealth* (1925) held that the repugnancy doctrine continued to apply in the Commonwealth; this is inconsistent since the act operated to cease the repugnancy doctrine in practice, as repugnant Imperial statutes were held invalid
- Argument is that the Australian constitution overrode the particular Imperial laws which might have otherwise given rise to repugnancy
- Attempt to explain the inconsistent *Union Steamship* decision is given below in *Kreglinger*:

Commonwealth v Kreglinger & Fernau Ltd (Skin Wool Case) (1926) 37 CLR 393	
Issue	Whether S 39(2) of the Judiciary Act was repugnant to the Order in Council regulating Privy Council appeals
Reasoning	- The Order in Council in question here is wholly concerned with Australian affairs, the local administration of justice and this is a vital distinction - The instrument of responsible government must leave the will of the Australian national Parliament on the subject of civil rights in Australia, in relation to Federal matters specifically enumerated in the Constitution, free from the control of Imperial ministerial discretion

- Commonwealth and states also limited by the doctrine of extraterritoriality = extraterritorial exercise of colonial legislative power was invalid unless its operation had a sufficient connection with the geographical area of the legislating colony

- Under international law, a sovereign state may sometimes legislate extraterritorially, e.g. making laws to regulate behaviour of ships/aircraft/citizens anywhere in the world
    - E.g. *Crimes (Child Sex Tourism) Amendment Act 1994* (Cth) amended the *Crimes Act 1914* (Cth) to permit the prosecution of Australian citizens or residents in respect of offences committed outside Australia

5. The Statute of Westminster

- *Statute of Westminster 1931* (Imp) freed the Dominions from Imperial restrictions
    - S 2 excluded the operation of the *Colonial Laws Validity Act*
    - S 3 removed restrictions of the extraterritoriality doctrine
    - S 4 permitted the British parliament to legislate for Australia with the 'request and consent' of the Commonwealth parliament
    - S 10 did not automatically apply these provisions to the Dominions, it required that Australia 'adopt' the provisions of the statute
- WWI wrought major changes to the British Empire, since Canada, India and Australian contingents of 'colonial' military forces had contributed to the British war effort in a manner expressing both loyalty to the Empire and national identity
- 'Imperial Conferences' met in London from 1917 onwards to define the relationships among the major centres of British settlement
    - Australia less vocal than other settlements
    - Still needed clarity on the shift from colonial to Dominion status
- ***Balfour Report*** – 'They are autonomous Communities within the British empire, equal in status but 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'
- ***Geoffrey Sawer – The Australian Constitution***
    - Monarch directly related to the Dominion government, not through the British Government
    - Governors-General are solely representatives of the Crown
    - Surviving British legislative and executive powers directly bearing on Dominion affairs were to be used only as requested by the relevant Dominion governments
- Although the British Parliament still had power to legislate for the Dominions through paramount force, it came to be assumed that this power would never be exercised unless such legislation was requested and consented to by the Parliament of the relevant Dominion
- *Statute of Westminster Adoption Act 1942* (Cth) was backdated to 3 September 1939 to align with the outbreak of World War II
- The States were still bound by the repugnancy doctrine, and this incongruity was not dispelled until the *Australia Act 1986*

B&W Chapter 3 Sections 7 and 8

7. The Australia Act

- *Australia Act 1986* (Cth) was assented to on 4 December 1985, signalling:
    - S 1 – end of British Parliament's role in legislating for Australia
    - S 2 – end of extraterritoriality as applied to the states
    - S 3 – end of repugnancy as applied to the states
- Doubt eradicated by the legislation at every possible level
- Final step to severing LEGAL not SYMBOLIC ties to the UK

Sue v Hill (1999) 199 CLR 462	
Facts	- Heather Hill was a UK citizen who stood for the Senate in Queensland

	- Disqualified from election since she had not renounced her UK citizenship
Issue	Whether the UK was a foreign power
Reasoning	- S 1 of the *Australia Act* removes the UK ability to legislate for Australia - S 11 terminates the right to appeal to the Privy council
Held	- UK is a foreign power for the purposes of S 44(i) of the Constitution
Outcome	Appeal allowed

Attorney General v Marquet (2003) 217 CLR 545	
Issue	Attempted repeal of the *Electoral Distribution Act 1947* (WA) to replace the State electoral distribution under that act with a new and more equal distribution
Reasoning	KIRBY J (DISSENT): - S 128 reserves Australian people the power to make formal changes affecting the basic law of the nation
Held	- Attempted repeal was blocked by S 13 of the 1947 Act, as S 6 of the *Australia Act* essentially allowed 'manner and form' requirements formerly imposed by S 5 of the *Colonial Laws Validity Act* through absolute majority requirements

- In *Shaw*, Callinan J attempted to identify the 'magic date' at which Australian independence became so complete that the former status of 'British subject' no longer applied to Australia – decided that it could be no earlier than the *Australia Act*

8. Popular Sovereignty

- *Commonwealth of Australia Constitution Act 1900* (Imp) begins with 'Whereas the people of New South Wales, Victoria, South Australia, Queensland and Tasmania… have agreed to unite in one indissoluble Federal Commonwealth' – formally, Australian Constitution derives its validity from an exercise of British Sovereignty
- ***Sir Owen Dixon – The Law and the Constitution***
    - It is not a supreme law purporting to obtain its force from the direct expression of a people's inherent authority to constitute a government
    - It is a statute of the British Parliament enacted the exercise of its legal sovereignty over the law everywhere in the King's Dominions
    - This distinction has important consequences:
        - Organs of government treated as institutions established by law, and power is authorities belonging to them by law
        - American doctrine treats them as agents for the people who are the source of power
    - From this, the theory arises that powers may not be delegated; agent selected by a principal to exercise a function of government may not transfer any part of authority to some other person or body
- ***Geoffrey Lindell – Why is Australia's Constitution Binding?***
    - In 1900
        - Legal status derived from the fact that it was contained in an enactment of the British Imperial Parliament
        - Political legitimacy based on the words in the preamble to unite in a 'Federal Commonwealth'
    - Independence
        - Formal legal declarations to symbolise the attainment of independence have in the main been absent, except for the *Statute of Westminster*
- *Bistricic v Rokov* (1976) – Constitution was binding because of its continuing acceptance by the Australian people

McGinty v Western Australia (1996) 186 CLR 140