

LAWS1021 SUMMARY NOTES

1. THE CONSTITUTION: ITS STRUCTURE & ITS PRINCIPLES

1. What is Public Law?

Public Law: the legal limits of the government's authority

Constitution

- The ultimate legal authority for government to act
- Sets out our basic institutions
- Provides checks/balances
- Protects some rights
- The Australian Constitution is binding because:
 - It has legal authority (originating as a British statute)
 - Agreement of people to Federate
 - It is binding because the people are the only ones who can change it (s 128)
 - This matters because it could influence how the Courts interpret the Constitution and the legislation enacted under it

2. Separation of Powers

Separation of Powers

Requires that each type of public power (legislative, executive and judicial) be vested in a separate branch of government

- Prevents concentration of power in one arm of government
- Thus prevents tyranny
- Allows each institution to place checks and balances on the other

POWER	ROLE	COMPOSITION
Legislative	The Parliament makes and changes the law	Parliament is made up of the Queen (represented by the Governor-General), the Senate and the House of Representatives
Executive	The Executive puts the law into action and conducts the business of government	The Executive is made up of the Queen (represented by the Governor-General), Prime Minister, ministers, government departments, statutory authorities, defence forces, public servants
Judiciary	The Judiciary interprets the law and applies it to particular facts The Judiciary has the power to set aside Parliament's legislation if it's contrary to the Constitution	The Judiciary is made up of the High Court and other federal courts

Under the Westminster system of govt. (Australia inherited from UK), there is no strict separation between legislative and executive power. The executive is integrated into the legislature by the requirement that the ministers responsible for the department of governments must be Members of Parliament accountable to it through such mechanisms as question time.

Separation of Powers Reflected in the Constitution

- **Section 1 (Chapter I):** vests legislative power in Federal Parliament
- **Section 61 (Chapter II):** vests executive power in the Queen (exercisable by the GG)

- **Section 71 (Chapter III):** vests judicial power in the High Court and other Federal Courts created by Parliament

3. Federalism

Federalism

- **Divides power between the Commonwealth and the States (vertical separation)**
- The system of federalism created by the Australian Constitution involves two tiers of government in which power is divided between the Commonwealth and the States Each tier has its own institutions of government , with its own executive, parliament and judicial system
- Local Councils were created by States (third tier of law-making) but not mentioned in the Constitution, so they are dependent upon States to maintain them
- **Distribution of legislative power in the Constitution:**
 - **Section 51: concurrent legislative powers** (matters that both Cth and S can make laws about)
 - **Section 52: exclusive legislative powers** (matters that only Cth can make laws about)
 - **Residual legislative powers:** all other matters are left to S to make laws about
 - **Section 109:** if a valid Cth law is inconsistent with a S law, the valid Cth law overrides the state law to the extent of the inconsistency
 - **Section 122:** Commonwealth Parliament may make laws for the government of any territory and may allow it representation in the Houses of Parliament (thus, seats for ACT & NT)

Three levels of law-making:

- 1) Local councils
- 2) State/territory parliaments
- 3) Federal parliament

Federal Laws

- Postal and communication services
- International relations
- Quarantine
- Taxation
- Fisheries
- Currency
- Immigration
- Defence

- Marriage

State and Territory Laws

- Public transport
- Roads and railways
- Electricity, water supply, gas supply
- Fire services, housing
- Child welfare, police, prisons, ambulance services

4. The “Washminster” Model

The ‘Washminster’ Model

The Australian Constitution has inherited both British and American Constitutional ideals

British Inheritance	American Model
• Bicameral parliaments • Rule of law • Common law	• Rigid written constitution • Separation of powers • Federalism • A High Court to rule on who has what power

5. Representative and Responsible Government

Representative Government

- The government must consist of representatives of the people who are chosen by and held accountable to the people through regular elections for the HoR and Senate
- Established in the Constitution in s 7 (Senate) and s 24 (HoR)

Principle of Responsible Government

- **The Executive branch of government is responsible to Parliament (and therefore the electors too) for its actions**
- **Governor-General**
 - Executive power is vested in the GG (s 61)
 - GG generally acts on the advice of elected government Ministers
 - Ministers must be members of Parliament (s 64)
 - Ministers are responsible to Parliament for the actions of their department
- **Reserve Powers:** matters where the GG is not required to act in accordance with Ministerial advice
 - Include the powers to appoint and to dismiss a Prime Minister
 - In exercising a reserve power, the GG ordinarily acts in accordance with established rules of practice - **'conventions'** (e.g. when appointing a Prime Minister, the GG must, by convention, appoint the leader of the party with a majority of seats in the HoR)
- **Conventions of responsible government:**
 - Government retains office only so long as it commands a majority in the HoR
 - Majority required when submitting the budget

"The system called Responsible Government is based on the notion that the head of the State can himself do no wrong, that he does not do any act of State of his own motion, but follows the advice of his ministers, on whom the responsibility for acts done, in order to give effect to their volition, naturally falls. They are therefore called Responsible Ministers. If they do wrong, they can be punished or dismissed from office without effecting any change in the Headship of the State. Revolution is therefore no longer a necessary possibility; for a change of Ministers effects peacefully the desired result. The system is in practice so intimately connected with Parliamentary Government and Party Government that the terms are often used as convertible. The present form of development of Responsible Government is that, when the branch of the Legislature which more immediately represents the people disapproves of the actions of Ministers, or ceases to have confidence in them, the head of the State dismisses them, or accepts their resignation, and appoints new ones. The effect is that the actual government of the State is conducted by officers who enjoy the confidence of the people."

6. Parliamentary Sovereignty

Parliamentary Sovereignty

- **Parliament (the legislative body) has absolute sovereignty** and is supreme over all other government institutions, including executive or judicial bodies
- **It also holds that the legislative body may change or repeal any previous legislation and so it is not bound by written law (in some cases, even a constitution) or by precedent**

Dominant Characteristics of Parliamentary Sovereignty (Dicey)

- No legal limitation
- Make or unmake any law
- No person or body can override or set aside legislation of Parliament
- While judges may make law, Parliament can create legislation to override this
- If there are no legal limitations on the making of legislation, what limits are there?
 - Internal - social conditioning
 - External - possibility that enough people will rebel

Support of Parliamentary Sovereignty

- There must be a single, ultimate and unlimited law making power.
- Because it is representative, Parliament's decisions are a reflection of the collective wisdom on the community. This makes it the preferable ultimate authority.

- Parliament is also the highest court in the land, where no appeal is possible.
- If its authority was limited and not sovereign, Parliament would not be able to take extraordinary measures in cases of emergency.
- The system of checks and balances of the Parliament is the best safeguard against tyranny.
- Judges could not be trusted with the authority to strike down Parliament legislation.
- Parliamentary tyranny is thus highly unlikely, and it is the best agency to serve as the ultimate, sovereign authority.

Critique of Parliamentary Sovereignty

- Parliament is two groups of people, which need to face re-election every couple of years if they want to stay. This means they can't really make whatever law they like, because if the population dislikes it, they would not be voted again. This is not the 'supreme power over citizens and subjects unrestrained by law' which is Sovereign Power.
- Rather, the power in this case is separated into 'legal sovereignty' and 'political sovereignty'.
 - Legal sovereignty: legal ability to make laws without restriction.
 - Political sovereignty: the body whose will is obeyed by the citizens.
- Thus, Parliament enjoys legal sovereignty. The electors (the people) ultimately enjoy political sovereignty.
- However, 'legal sovereignty' isn't sovereignty at all – it is a legal concept which expresses that the courts will recognise laws made by Parliament.

7. Rule of Law

Rule of Law (Dicey):

- 1. A man can only be punished if it was proved in court that he breached a law.**
 - This means that the Sovereign cannot punish people arbitrarily.
- 2. No man is above the law, and everyone is equal before the law.**
 - This means that the law applies to everyone in the exact same way regardless of social, economic or political status.
- 3. The Constitution (the law) is the result of previous judicial decisions determining the rights of private persons.**
 - This means the constitution is not the source of the law, but the consequence of inherent rights. We don't derive our rights from the Constitution; the Constitution is the result of our rights.

Sir Ninian Stephen:

- Emphasise the importance of having access to the courts
 - 1) The law should apply equally to all people and agencies
 - 2) Those who administer the law should be independent of and uninfluenced by the government
 - 3) There should be ready access to the courts for those who seek legal remedy
 - 4) The law should be certain, general and equal in its operation

Lord Bingham:

- All persons and authorities within the state should be bound by/entitled to the benefit of laws publicly administered in the court
 - 1) The law must be accessible, intelligible, clear and predictable
 - 2) Questions of legal right and liability should be solved by application of law, not exercise of discretion
 - 3) The law should apply equally to all, save to the extent that objective differences justify differentiation
 - 4) The law must provide adequate protection of fundamental human rights
 - 5) Means must be provided for resolving bona fide civil disputes
 - 6) Public officers must exercise their powers reasonably and in good faith, for the purpose for which the powers were conferred and without exceeding the limits of such powers
 - 7) Adjudicative procedures provided by the state should be fair
 - 8) The existing principle of the RoL requires compliance by the state with its obligations in international law

Parliamentary Sovereignty v ROL (Plaintiff S157/2002 v Commonwealth (2003))

- **Facts:** P was denied a refugee visa. P claimed breach of procedural fairness. Parliament passed a privy clause (s 474 of the Migration Act) which stopped the courts from reviewing certain govt. decisions.
- **Held:**
 - The HC interpreted that s 75(v) provides the HC with an entrenched power of judicial review
 - The proposition that the judiciary entrenched role was said to be unavoidable when it was understood that one of the underlying assumptions of the Constitution was the rule of law

Reconciling Parliamentary Sovereignty with the Rule of Law

A problem arises because Parliamentary Sovereignty entails the Parliament's ability to make or unmake whatever law without restriction. This necessarily entails that Parliament is not bound by the Rule of Law, and it can exercise power arbitrarily.

Dicey tries to reconcile these two concepts:

- Parliamentary Sovereignty, unlike other types of sovereignty, favours the supremacy of the law.
- Two reasons why Parliamentary Sovereignty won't result with arbitrary power:
 - The will of Parliament can only be **expressed through an Act**. These acts are only passed after a **formal and deliberate process** involving two houses and the Queen. An act is also subject to **judicial interpretation**.
 - Parliament has never attempted (except for the revolution) to exercise executive power.

8. Principle of Legality

Principle of Legality

The principle of legality is a rule of statutory interpretation: if Parliament intends to pass legislation to interfere with fundamental rights or principles, or to depart from the general system of law, then it must express that intention by clear and unambiguous language

Ex Parte Simms [2000]

- **Held:** "Parliament must squarely confront what it is doing and accept the political cost" (Lord Hoffman)
 - The courts use a political accountability mechanism to describe the principle of legality

Lee v NSW Crime Commission (2013)

- **Held:**
 - The principle of legality not only applies to chosen common law rights, but also to fundamental principles and systematic values

The question in Lee was similar to that considered by the High Court in X7 v Australian Crime Commission [2013] HCA 29. In X7, a majority of the Court held the Australian Crime Commission Act 2002 (Cth) did not authorise the compulsory examination of a person subject to pending criminal charges.

All Judges in Lee followed X7 in holding that the right to silence is an important aspect of the criminal justice system and that its abrogation by legislation attracts the principle of legality. (I explain why the right to silence is considered so fundamental in my post on X7.) However, the members of the Court in Lee came to different conclusions on the application of the principle of legality.

The majority — comprising French CJ, Crennan, Gageler and Keane JJ — held that the Criminal Assets Recovery Act clearly disclosed a legislative intention to abrogate the privilege against self-incrimination and the right to silence, including in circumstances where the person being examined has been charged with a criminal offence. This legislative intention was apparent from the objectives and provisions of the Criminal Assets Recovery Act, which rested on the premise that recovery proceedings could be conducted at the same time as criminal proceedings. Further, the requirement that an examination take place before a court served to protect the person being examined from unfair prejudice in pending criminal proceedings and mitigated the risk of interference with the administration of justice.

Does the Principle of Legality undermine Parliamentary Sovereignty?

- Gageler and Keane JJ observed that the principle of legality is not an entrenched constitutional protection but a statutory mode of interpretation that is displaced if the legislature uses sufficiently clear/specific wording (**Lee v NSW Crime Commission**)

2. HISTORY OF AUSTRALIAN GOVERNMENTAL POWERS

Timeline Overview

1865: Colonial Laws Validity Act 1865 (Imp)

- Doctrine of repugnancy (s 2) meant that if Australian legislation was inconsistent (repugnant) to that of the UK, it was invalid

1901: Commonwealth of Australia Constitution Act 1900 (Imp)

- Did not legally facilitate Australia's independence from the British Parliament
- British Law was no longer automatically received into Australia BUT the colonial legacy continued to place limits on the act through the doctrines of repugnancy and extraterritoriality

1942: Statute of Westminster 1931 (UK) adopted

- Freed the Commonwealth parliament (but not the State Parliaments) from imperial restriction by excluding the operation of the Colonial Laws Validity Act and thereby the repugnancy doctrine and the doctrine of extraterritoriality
- Empowered the British Parliament to legislate for Australia but only with the request and consent of the Commonwealth Parliament

1986: Australia Acts

- Severed all ties with the UK
- Ended the application of Imperial laws to the Australian States
- Ended the ability of British Parliament to legislate for Australia
- Removed the doctrine of extraterritoriality for the State Parliaments
- Completely removed the ability to appeal to the Privy Council

Before 1788

- The Aboriginal and Torres Strait Islander tribes were the first sovereign Nations of the Australian continent, and possessed it under their own laws and customs

Colonial Origins

- By 1850s the colonial legislatures were considered to have, within their limits of subject and area, the same wide legislative competence as the Westminster Parliament
 - But the colonial legislatures were not really sovereign in a pure Diceyan form because the power to legislate (possessed by the colonies) was conferred by the UK and the colonies were still ultimately subject to UK law

Colonial Laws Validity Act 1865 (Imp)

- The CLVA was passed to remove any doubt that Colonial legislatures had the power to make local laws
 - **s 2:** colonial statutes were void if repugnant to British legislation that explicitly applies/extends to the colony (necessary implication = 'paramount force')
 - **s 3:** colonial statutes cannot be set aside by reason of repugnancy to common law or statutes received in the colony on settlement (i.e. British statutes passed on or before 25 July 1828)

Doctrine of Repugnancy

- The doctrine of repugnancy (s 2 in the Colonial Laws Validity Act 1865 (Imp)) meant that if Australian legislation was inconsistent (repugnant) to that of the UK, it was invalid

Doctrine of Extraterritoriality

- As colonies of the British Empire, Australian Commonwealth and State Parliaments had no extraterritorial legislative functions at all. Colonies had no international personality, and relied on the UK to conduct relations with foreign nations
 - There are two interpretations of the doctrine of extraterritoriality:
 - Broad: An exercise of colonial legislative power is invalid unless its operation has sufficient connection with the geographical area of the legislating colony.
 - Narrow: A colony's laws can never have any operation outside its territorial borders.

- Some version of the doctrine of extraterritoriality continued to applied to the Commonwealth Parliament until the adoption of the Statute of Westminster 1931 (UK), and to the State Parliaments until the adoption of the Australia Act 1986 (Cth).
 - s 3 of the Statute of Westminster 1931 (Imp) allowed the “Parliament of a Dominion has full power to make laws having extra-territorial operation”
 - s 2(1) of the Australia Act 1986 (Cth) allowed for “the legislative powers of the Parliament of each State include... laws for ... that have extra-territorial operation”

Federation

- The Commonwealth Federation of Australia Constitution Act 1900 (Imp) was passed by the UK parliament
- But Australia was not a fully independent nation, as the CLVA was still applicable
 - The Commonwealth of Australia Constitution Act applied to Australia by paramount force
 - Australia was still ultimately subject to UK law
 - The doctrine of repugnancy still applied
 - The doctrine of extraterritoriality still applied

Two Acts were created to cut colonial ties with Britain:

1) Statute of Westminster 1931 (only applied to Commonwealth)

- **Made the Commonwealth Parliament legislatively independent of UK Parliament**
- **s 1:** “Dominion” includes the “Commonwealth of Australia” (but not the states; s 9 preserved the existing position of the states)
- **s 2: (abolished repugnancy doctrine)**
 - Applies to laws made after commencement of the Act
 - CLVA shall not apply to any law by the Parliament of a Dominion
 - No Dominion law shall be void on the ground that it is repugnant to the law of England
- **s 3: (abolished extraterritoriality doctrine)**
 - The Parliament of a Dominion has full power to make laws having extra-territorial operation
- **s 4:** UK Parliament is not to legislate for a Dominion except by request and consent of the Dominion
- **s 8:** No power to repeal or alter the Constitution for Australia (or Canada) otherwise than in accordance with the law existing before the commencement of this Act
- **s 9:** CLVA has continued application in states
- **s 10:** ss 2-6 would not take legal effect until adopted by the Dominion Parliament
 - **Statute of Westminster Adoption Act 1942 (Cth)**
 - Adoption of relevant sections
 - Adoption backdated to 3 September 1939
 - Date UK declared war with Germany, with consequences for Australia

2) Australia Acts 1986 (applied to Commonwealth and States)

- **The Australia Acts were enacted by the Westminster and Commonwealth Parliaments and came into effect on 3 March 1986**
- **s 1:** no future Act of the UK Parliament could extend to the Commonwealth, State or Territory
 - Couldn't say “no Acts” because there were Imperial Acts (such as the Constitution) that Australia still needed to apply
- **s 2: (abolished extraterritoriality doctrine for states)**
 - Gave states full extraterritorial power
- **s 3: (abolished repugnancy doctrine for states)**
 - The CLVA does not apply to any law made after the commencement of this Act by a State
 - No State law shall be void on the ground that it is repugnant to the law of England
- **s 5:** preserved the Commonwealth Constitution, the *Commonwealth of Australia Constitution Act* and the *Statute of Westminster* from any inconsistent state legislation
- **s 6:** preserved the ability to entrench certain provisions (manner and form)
- **s 7:** delegated the Queen's role regarding the states to the State Governor (i.e. the Premier)
- **ss 8-9:** terminated the disallowance of state laws and the requirement to reserve state bills for royal assent
- **s 10:** terminated the UK Govt's responsibility for the states - the UK is now a ‘foreign power’
- **s 11:** terminated appeals to the Privy Council

- The only remaining possibility of a Privy Council appeal is under s 74 of the Constitution - if the High Court were to give a certificate permitting it (the HC has said it will not)
- **s 15:** states that the *Australia Acts*, the *Commonwealth of Australia Constitution Act* and the *Statute of Westminster* are entrenched, meaning they can only be amended by Cth legislation at request of all the states or by a referendum
 - All power to change constitutional documents is now in Australian hands
 - It is unlikely that s 15 could be used to amend the Constitution itself, as this would clash with s 128 of the Constitution (s 128 requires that a referendum to change the Constitution)
- The HC has focused on the Cth version of the *Australia Acts* 1986 and upheld its validity in *Sue v Hill* and *A-G (WA) v Marquet*, but the UK version remains important to support the entrenchment of the *Australia Acts*

Timeline - Legislation

Doctrine	1901 Cth (AConst)	1901 States (AConst)	1939/1942 Cth (SofWAA)	1939/1942 States (SofWAA)	1986 Cth (AA)	1986 States (AA)
Repugnancy	Applies	Applies	Doesn't Apply	Applies	Doesn't Apply	Doesn't Apply
Extraterritorial	Applies	Applies	Doesn't Apply	Applies	Doesn't Apply	Doesn't Apply

Sue v Hill (1999, HC)

- **Facts:** s 44 of the Constitution states that any person who “is under any acknowledgement of allegiance, obedience, or adherence to a foreign power, or is a subject or a citizen or entitled to the rights or privileges of a subject or citizen of a foreign power” is incapable of being elected to Parliament. Hill was an Australian and British citizen elected as a senator or member of HoR.
- **Issue:** is Britain a foreign power?
- **Held:**
 - The *Australia Act* makes it clear that Australia is independent from Britain, therefore Britain is a foreign power
 - What would happen if the UK amended its *Australia Act*?
 - The judges stated that they would rely on the Australian version of the *Australia Act*, so it doesn't matter what the UK does

3. AMENDING THE CONSTITUTION & SOURCES OF POWER/LEGITIMACY

1. The Constitution

- **What is a Constitution?**
 - Fundamental law
 - Source of law for making of other laws
- **What does a Constitution commonly do?**
 - Establishes institutions and grants/limits powers
 - Sets out how those institutions should act with people
 - Raising and spending of money
 - Grants rights; imposes obligations
- **Why is a Constitution binding?**
 - It is an Act of the Imperial Parliament
 - Imposition, legal process, will of the people, acceptance by the people/convention
- **Why is Australia's Constitution binding?**
 - It is an Act of the Imperial Parliament

Unitary v Federal States

- **Unitary State:** where sovereignty resides in the one central power
 - NSW, UK, NZ
 - May devolve power to regions but sovereignty remains with State.
- **Federation:** where individual states can make their own laws
 - Commonwealth of Australia; United States of America; Canada
 - US Constitution shifted the **meaning of Federalism** (wanted more **balance** between a powerful central govt and powerful states)
 - Burgess: "the significant contribution of The Federalist was 'the presentation and justification of a new form of government, neither federal nor national, but an admixture of both characters'"
 - Dicey saw federation as giving weak government (where there is a federation, there will need to be discussion and parliament can't just pass legislation)
 - Dicey believed the founders of a federal system wanted "desire union not unity".
 - Experimentation and diversity
 - Different states may address the same issue differently

Flexible v Rigid Constitutions

- **Flexible:** one that can be changed easily (i.e. by legislation)
 - **States**
 - **UK (no written document - is common law/statute)**
 - **NZ**
- **Rigid:** one that cannot be changed easily
 - **Australian Commonwealth (legislation passed by both houses of Parliament + referendum)**
 - **USA (ratification: 3/4 of the states)**
 - **Canada (2/3 resolutions by legislative assemblies of Provinces)**
- **Rationale of having a rigid constitution:**
 - Rights are defined (certainty; more awareness of rights)
 - But limitation - protects the rights that were raised at the time of creating the constitution
 - More constraints = less likely that Parliament can pass random Acts due to popular feeling and threaten minorities' rights
- **Rationale of having a flexible constitution:**
 - Can better reflect the current opinions/values of the people
 - Allows each generation to shape their constitution

2. Changing the Constitution

A) Commonwealth Constitution (specified by s 128 of the Constitution)

- **1) Cth Parliament must initiate bill/legislation to change the C**
 - Absolute majority of each House of Parliament, or...