

# LAWS1141 EXAM SUMMARY NOTES

<b>WEEK 1:</b> Constitutionalism and the Rule of Law	<a href="#">Class 1A - Introduction and Themes</a> (page 2)  <a href="#">Class 1B - Constitutionalism and the Rule of Law</a> (page 3)
<b>WEEK 2:</b> A Constitutional Hybrid	<a href="#">Class 2A &amp; 2B - Constitutional Hybrid</a> (page 10)
<b>WEEK 3:</b> Federation, Australian Federalism, Sovereignty	<a href="#">Class 3A - Path to Australian Federalism &amp; Popular Sovereignty</a> (page 15)  <a href="#">Class 3B - Indigenous Sovereignty and Crown Sovereignty</a> (page 19)
<b>WEEK 4:</b> Indigenous People, Voting & the Constitution	<a href="#">Class 4B - Indigenous People, Voting and The Constitution</a> (page 22)
<b>WEEK 5:</b> Legislature 1 & 2	<a href="#">Class 5A - The Legislature 1</a> (page 26)  <a href="#">Class 5B - The Legislature 2</a> (page 32)
<b>WEEK 7:</b> Statutory Interpretation & Principle of Legality, Executive 1	<a href="#">Class 7A - Statutory Interpretation - The Principle of Legality</a> (page 37)  <a href="#">Class 7B - Executive 1</a> (page 43)
<b>WEEK 8:</b> Executive 2, Judiciary 1	<a href="#">Class 8A - Executive 2</a> (page 47)  <a href="#">Class 8B - Judiciary 1</a> (page 52)
<b>WEEK 9:</b> Judiciary 2, Rights Protection	<a href="#">Class 9A - Judiciary 2</a> (page 55)  <a href="#">Class 9B - Rights Protection</a> (page 58)
<b>WEEK 10:</b> Constitutional Change	<a href="#">Class 10A - Constitutional Change</a> (page 62)

## Class 1A - Introduction and Themes

### Key Themes/Focus Questions

What is public law?

- **Definitions**

- “Separate treatment of constitutional law, administrative law and statutory interpretation law remains useful in many respects. However, the integrative terminology of “public law” merges constitutional law, administrative law and the law of statutory interpretation, thereby treating the activity of governing as a distinct subject matter. In Australian jurisprudence, these three subject areas are closely interrelated.” (JJ Spigelman, ‘Public Law and the Executive’, The Garran Oration, Adelaide, 22 October 2010, 8).
- Public law has been defined as: “The assemblage of rules, principles, canons, maxims, customs, usages, and manners that condition, sustain and regulate the activity of governing.” (Martin Loughlin, The Idea of Public Law (OUP, 2003), 115).

- **Ideas about ‘Public Law’**

- No single definition, boundary of public law can be blurry
- Overlapping field of law and regulation with constitutional law, admin law, statutory interpretation
- Public law is closely related to concept of governing - role of law and politics
- Deep context of history
- Uncodified convention understandings, long accepted practices - not enforceable by law - yet are important
- Area full of value judgement
- Area of concern is about power - why it matters/who holds it/types of power/limits on power/accountability → relevant to rule of law

## Class 1B - Constitutionalism and the Rule of Law

### Key Themes/Focus Questions

- What is a constitution? What is its purpose?
- How would you classify the Australian Constitution and the constitutions of the States - written/unwritten, flexible/rigid?
- What is the difference between political and legal constitutionalism? What does each require to function effectively?
- Why have a separation of powers? In simple terms, what powers are ascribed to the three arms of government in Australia?
- What is the difference between formal and substantive conceptions of the rule of law?
- What are the three main elements of AV Dicey's notion of the rule of law? Would you call Dicey's conception formal or substantive?
- Why is the existence of the rule of law in Britain said to be a 'puzzle'?

### ● Definitions:

**Constitutional law:** '*...all rules which directly or indirectly affect the distribution or exercise of the sovereign power in the state*' (Dicey, 1885)

*A constitution should be understood as establishing a fundamental set of principles and correlative institutional arrangement which would restrict arbitrary power and ensure a "limited government"* (Sartori, 1962)

*"Formalisation of the power structure of the given country"* (Sartori, 1962)

### **Twofold function of Constitutional law:**

1. Stable and secure basis of government power - 'a strong governmental chain of command'
2. Limit that power

### ● Key Concepts

- Constitutionalism is a more or less confined and less radically contested concept
- Concept of constituting a government and empowering it
- Supporting or facilitating the exercise of power by identifying its source
- **Negative** constitutionalism = limiting the power of govt
- **Positive** constitutionalism = confirming the existence of power and provident powers
  - Therefore the competing/two fold function of Constitutional law is a) invoked by those who seek a stable and secure basis for the exercise of government power and also b) by those who seek to limit that power.
- **Written** constitutions = codified in a single written document (e.g. India, SA)

- **Unwritten** constitutions = NZ, Israel and UK
- **Constitutional conventions** = entrenched practices and understandings that are politically very influential but not legally binding on their own.

	Written/Rigid Constitution	Unwritten/Flexible Constitution
<b>Benefits</b>	<ul style="list-style-type: none"> <li>• If fundamental principles are unambiguously written in a Constitution, it makes it very <b>difficult for political actors to bypass/remove</b> (see Richard O'Connor quote about 'wave of popular feeling').</li> <li>• Similarly, the <b>difficulty of changing</b> can also serve a protective function (to stop overriding of fundamental principles).</li> </ul>	<ul style="list-style-type: none"> <li>• The fundamental principles are more <b>vulnerable to being manipulated or lost</b> – for example, if a principle is in the common law, it can be reinterpreted or overturned.</li> </ul>
<b>Limitations</b>	<ul style="list-style-type: none"> <li>• Can become difficult to <b>change and adapt to the society in which it operates</b>. The authors of the Constitution may not reflect the diversity of society.</li> <li>• Think about how outdated racist ideology has become <b>fossilised</b> in our constitution (see ss 25, 51(xxvi) of the Constitution).</li> </ul>	<ul style="list-style-type: none"> <li>• The ability to change it means it can adapt to the society it operates in, and more <b>closely reflect the diversity of the country</b>.</li> </ul>

#### ● Importance

- The need to **protect the people against the power of government**, by **distributing and dismembering that power** in ways that ensure there is **no single consolidated chain of command**.
- Giovanni Sartori - argued that a constitution is not *“only a shorthand report describing the formalisation of the power structure of the given country, but should rather be understood as establishing a fundamental law, or a fundamental set of principles, and a correlative institutional arrangement which would restrict arbitrary power and ensure a limited government”*
- Adam Tomkins – constitutions establish
  1. The **powers** that the institutions of govt have to make laws and take action
  2. The place of the **people** inside a system of govt
  3. The **values** which a particular society makes claims to.

#### ● The Australian Constitution

- Constitution came into force on 1 Jan 1901
- The Australian constitution is **both written and unwritten**, we rely on **conventions** and the **common law** to supplement our constitution.
- The constitution of most Australian states are 'flexible' → can be amended by state parliament through passing a law in both houses
- **Flexible**: “every law of every description can be legally changed with the same ease and in the same manner by one and the same body” - AV Dicey
- Even if the constitutional rules restrict powers of parliament, parliament can amend these rules to remove such restrictions by exercising its ordinary powers

- **Rigid** constitution is one that requires special and more difficult procedure to be followed if the wording of the constitution is to be changed: different process from ordinary laws

- **Political vs Legal Constitutionalism**

- Definition - whether the last say/decisive legal say on constitutional limits of power is given to the judiciary or political institutions (Tomkins, in B&W, 4- 6)
- Constitutionalism = allows institutions and means to hold them accountable (can happen legally or politically)
- Tomkins (in B&W, 5) describes two basic models of constitutionalism
  - **Political Constitutionalism** = where 'those who exercise political power ... are held to constitutional account through political means and political institutions' such as Parliament
    - This involves debates, asking questions, commissions and inquiries in Parliament
    - Govt can hold power only till it has majority- scrutiny by political opponent, media- thus the idea that politics can be a potent source of accountability
  - **Legal Constitutionalism** = where 'the principal means and principal institution through which the government is held to account' are the law and the courts (5.3).
    - Judicial review: going to court
    - That law will be taken as technique of holding govt accountable

- **Key concerns**

- How do the two models work?
- If either is to make good its claim, then what assumptions need to be fulfilled, in a practical sense, in the real world?
- What of the values these models embody?
- How to evaluate the merits and limitations of these models?

Political Constitutionalism	Legal Constitutionalism
Values - open, transparent, participative, deliberative	Values - not inherently tied to majority
Assumption - robust and vigorous political processes are assumed  e.g. question time	Assumptions - 1. Independence of judges from other branches of government is assumed  2. Willingness of judges and society to use law as tool of accountability  Example - India

Potential concern(s):	Potential concern(s):
<ul style="list-style-type: none"> <li>- Treatment of minorities by political majorities</li> <li>- Institutions may not truly function as per theory</li> </ul>	<ul style="list-style-type: none"> <li>- Expense and other to the courts issues, capacity to follow-up and enforce own decisions</li> </ul>

Vulnerabilities of PC	Vulnerabilities of LC
<ul style="list-style-type: none"> <li>- Institutions <b>may not work as per theory</b> - Parliament is supposed to act as a check/hold the govt accountable</li> <li>- <b>Executive dominance</b> in parliament-majority party in the house - career incentive of party loyalty</li> <li>- <b>Minorities</b> in a majoritarian system (p 5.10): what political/electoral levers do they have available; what political/electoral incentives are there for politicians to be responsive or accountable to minorities?</li> <li>- Rights may function as check: Rights protection is left to politicians</li> <li>- Accountability criteria <b>may not be rational</b> and enduring values or principles, may be transient and possibly rash or irrational</li> </ul>	<ul style="list-style-type: none"> <li>- Would judgements be <b>enforced</b>?</li> <li>- Democratic deficit and legitimacy-elite - <b>unelected</b> judges and lawyers: not accountable to wider community</li> <li>- Depends on formal process and <b>access to justice</b>: Suing is expensive</li> </ul>

- **Separation of Powers**

- RECAP: three arms of government – the legislature makes the laws; the executive puts the laws into operation; and the judiciary interprets the laws
  1. **Executive:** The executive is the branch of government that puts government laws and programs into effect. It is made up of the public service and government ministers. Every government department and agency and the Ministers responsible for every government department are all part of the executive.
  2. **Legislature:** the Parliament – the lawmakers

3. **Judiciary:** decides when laws have been broken (breached) based on evidence presented in court cases and on what the penalty or remedy is to be for the particular breach of the law. All people holding the position of 'judge' or 'justice' are members of the judiciary.'
- Limits on govt and legislative powers – Power of judicial review must be independent of the govt & the legislature
  - British system deliberately blurs the lines of executive and legislature for responsible govt
  - USA

Institution	Power	Personnel	Check
Congress	Power to make laws	Elected Representatives	Presidential Veto Judicial Review by SC
President	Executive Power	Elected. Cannot be member of congress	Senate Ratification necessary for some appointments and treaties/ Judicial Review. Impeachment by removal by congress.
Supreme Court	Judicial power- judicial review of legislative and executive action	Appointed by President with senate ratification.	Impeachment by Congress

- Separation of powers in Australia
  - Three institutions
  - Similar to British - not strict separation between executive and legislature in Australia
  - Responsive govt - section 64 → every member of cabinet has to be member of the legislature to ensure accountability to parliament
  - 4th branch institution?
    - Proliferation of regulatory schemes and institutions
    - Emerging branch based around the concept of 'integrity' → relates to anti-corruption, legality, fidelity to purpose, fidelity to public values, accountability

**Rule of law** = a very big idea, a political ideal. It is an exceedingly elusive notion → an abiding concern in the discipline and practice of law, especially in the field of public law.

- **Definitions:**

- Helps secure: order, certainty and predictability, accountable government, fairness and/or justice, individual liberty and freedom, sustainable economic development: e.g. contracts
- Brian Tamanaha
  - 'no other single political idea has ever achieved global political indorsement'
  - Competing formulations of the concept of RoL divided by theorists into "formal" and "substantive" versions