

LAWS1141

Principles of Public Law

Faculty of Law, UNSW Sydney

Primary Text: Burton Crawford et al, Australian Constitutional Law and Theory (Federation Press, 7th ed, 2021)

Course Coverage

Week 1-2: Introduction, Constitutionalism and the Rule of Law

Week 2: Australia as a Constitutional Hybrid -- Westminster and US influences; responsible and representative government; parliamentary sovereignty; constitutional conventions

Week 3: Federation and Australian Federalism; Popular Sovereignty; Acquisition of Legal Independence

Week 3-4: Indigenous Sovereignty and Crown Sovereignty; Indigenous People, Voting and the Constitution; Uluru Statement from the Heart

Week 5: The Legislature -- Federal Parliament; eligibility and disqualification; voting and elections; implied right to vote; parliamentary privilege

Week 7: Statutory Interpretation -- text, context and purpose; principle of legality; reading down and severance

Week 7-8: The Executive -- the Crown; Governor-General; prerogative power; nationhood power; responsible government; constitutional writs

Week 8-9: Executive Accountability; the Judiciary -- appointment and removal; judicial power; Boilermakers Case; separation of state judicial power

Week 9-10: Rights Protection; Constitutional Change -- s 128; State constitutional amendment; manner and form requirements

WEEKS 1-2: CONSTITUTIONALISM AND THE RULE OF LAW

1.1 What is Constitutionalism?

Constitutionalism is the idea that government power must be held to account through law. It addresses two fundamental questions: how do institutions get power, and how is that power limited. A constitution -- whether written or unwritten -- organises the powers of government and prescribes limits on their exercise.

Core concerns of constitutionalism:

- Establishing and distributing governmental power across the legislature, executive and judiciary
- Limiting power through law, rights and institutional design
- Prescribing mechanisms for accountability -- elections, judicial review, parliamentary oversight
- Protecting the rights and freedoms of individuals against arbitrary state action

1.1.1 Legal vs Political Constitutionalism

Political Constitutionalism	Legal Constitutionalism
Parliament has the 'last say' -- people keep Parliament in check through voting, media and politics	Courts have the final say -- judges can invalidate unconstitutional laws
Relies on the rigour and vigour of the political process	Relies on judicial enforcement of constitutional limits
Favoured by Dicey: the electors are the 'politically sovereign power'	Favoured by Kirby J and others: constitutionalism and the rule of law require judicial enforcement
Problems: fails vulnerable minorities; political process imperfect	Problems: judges are unelected, unaccountable, not representative; historically male, white, upper class
Amalgamated Society of Engineers v Adelaide Steamship (1920): 'guarded against by the constituencies not the Courts'	Plaintiff S157/2002 v Commonwealth (2003): 'ultimate decision-maker in all matters where there is a contest is this Court'

Amalgamated Society of Engineers v Adelaide Steamship Co Ltd (1920) 28 CLR 129

Knox CJ, Isaacs, Rich and Starke JJ: [151] '[T]he 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. No protection of this Court in such a case is necessary or proper.'

Significance: This is the foundational political constitutionalism statement in Australian constitutional law. After the Engineers Case, the High Court moved away from doctrines that artificially limited Commonwealth power, and placed trust in Parliament rather than courts.

Plaintiff S157/2002 v Commonwealth (2003) 211 CLR 476

Gaudron, McHugh, Gummow, Kirby and Hayne JJ: [514] 'Under the Constitution of the Commonwealth the ultimate decision-maker in all matters where there is a contest is this Court.'

Significance: This is the paradigmatic legal constitutionalism statement. The court's power to be the final arbiter of constitutional meaning places it above Parliament when constitutional questions arise.

1.1.2 Flexible and Rigid Constitutions

Dicey's distinction (Introduction to the Study of the Law of the Constitution (1885; 10th ed 1959)):

Flexible Constitution	Rigid Constitution
Laws easily changed by ordinary parliamentary process	Certain laws (constitutional laws) cannot be changed in the same manner as ordinary laws
UK constitutional arrangements are the paradigm example	US Constitution (requiring supermajority) and Australian Constitution (requiring referendum under s 128) are paradigm examples
Parliamentary sovereignty: Parliament can make or unmake any law	Legislature's power limited by the need to comply with prescribed amendment procedures
State constitutions in Australia are largely flexible	Commonwealth Constitution is rigid

1.2 The Rule of Law

Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge University Press, 2004):

Formal Rule of Law	Substantive Rule of Law
Focuses on the manner in which laws are promulgated and applied -- were they by a properly authorized person? Applied equally? Prospective rather than retroactive?	Includes formal requirements PLUS requirements about the content of the law -- must comport with justice or moral principle
Not concerned with whether the law was 'good' or 'bad', only that it was formally valid	Government must observe substantive constraints, including fundamental rights
Positivist approach: law is law regardless of its content	Natural law approach: unjust laws may not be binding

Tamanaha's key observation: 'Rule of law is not itself a legal rule, but a political ideal. It will be effective only in so far as the legislator feels bound by it.' The rule of law does not automatically

constrain those in power -- it depends on political culture, institutional independence, and a shared commitment to legal values.

R (UNISON) v Lord Chancellor [2017] 3 WLR 409 -- Rule of Law and Access to Justice

Facts: Employment tribunal fees were introduced, leading to a dramatic fall in the number of claims brought before the Employment Tribunal.

Lord Reed: Parliament exists primarily to make laws for society. Courts exist to ensure those laws are applied and enforced. 'That role includes ensuring that the executive branch of government carries out its functions in accordance with the law. In order for the courts to perform that role, people must in principle have unimpeded access to them.' Because the fee order effectively prevented access to justice without authority from the parent statute, it was unlawful.

Significance: The case shows that the rule of law includes substantive requirements -- not just formal ones. Unimpeded access to courts is part of the rule of law because without it, the formal right to have laws applied becomes meaningless.

French CJ, 'Rights and Freedoms and the Rule of Law' (2017) 28 Public Law Review 109: 'In the end, the rule of law provides the framework within which we can protect and enjoy our rights and freedoms. It does not guarantee them.' The rule of law is a necessary but not sufficient condition for the protection of rights.

Julius Stone, *Social Dimensions of Law and Justice* (1966): There must be some sort of ethical element to the rule of law. A purely procedural conception that ignores the content of law is insufficient to prevent tyranny through formally valid laws.

1.2.1 Rule of Law and Parliamentary Sovereignty

Dicey saw parliamentary sovereignty and the rule of law as complementary rather than contradictory:

'The sovereignty of Parliament, favours the supremacy of the law, whilst the predominance of rigid legality throughout our institutions evokes the exercise, and thus increases the authority, of Parliamentary sovereignty.' The two principles reinforce each other -- Parliament can only legislate through legal forms, and courts interpret Parliament's legislation.

-- Dicey, *Introduction to the Study of the Law of the Constitution*

The principle of legality as a bridge: Dan Meagher, 'The Common Law Principle of Legality in the Age of Rights' (2011) 35 MULR 449: 'Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights... But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words.'

This principle -- examined in detail in Week 7 -- holds that courts presume Parliament did not intend to abridge common law rights unless it does so in express terms. It is a constitutional norm that limits the effective scope of Parliament's power without denying the formal existence of that power.

WEEK 2: AUSTRALIA AS A CONSTITUTIONAL HYBRID

2.1 Introduction: Two Models, One Constitution

The Australian Constitution is a hybrid document, drawing from two radically different constitutional traditions. From the United Kingdom it took the essence of the Westminster system of representative and responsible government within a constitutional monarchy. From the United States it adopted the concepts of federalism, the separation of powers and judicial review through a written constitution.

Westminster (UK) Influences	American (US) Influences
Responsible government: executive accountable to and drawn from Parliament	Written constitution: supreme law binding on all branches of government
Representative government: Parliament chosen by and representing the people	Federalism: vertical division of power between Commonwealth and States
Parliamentary sovereignty: Parliament may make or unmake any law	Separation of powers: horizontal division across legislature, executive and judiciary
Constitutional conventions: non-legal rules governing exercise of formal power	Judicial review: courts can declare legislation void as unconstitutional
Constitutional monarchy: Queen/King as formal head of state	Rigid constitution: amendment requires special procedure (referendum)

Leyland, *The Constitution of the United Kingdom* (Hart, 4th ed, 2021): The UK constitution is 'organic' -- comprising statute law, common law, constitutional conventions and constitutional monarchy from a variety of sources. It has grown through centuries of practice rather than being deliberately manufactured. By contrast, the US Constitution was 'manufactured' -- conceived in an atmosphere of fear of despotism and designed to prevent it.

2.2 Westminster Features: Responsible Government

2.2.1 The Theory of Responsible Government

Blackham and Williams, 'The Appointment of Ministers from Outside of Parliament' (2012) 40 **FLR 253**: The classic theory states that the executive should be 'chosen by, is answerable to, and may be removed by' a popularly elected Parliament. The effect of responsible government is that 'the actual government of the State is conducted by officers who enjoy the confidence of the people.'

The chain of accountability:

The Responsible Government Chain of Accountability

- People** elect Members of Parliament through regular elections
- Parliament** (specifically the lower House) confers or withdraws confidence from the government
- Executive** (Prime Minister, Cabinet, Ministers) holds office only while it commands the confidence of Parliament and is accountable to Parliament for its actions
- Public servants** are accountable to Ministers, who are in turn accountable to Parliament

Constitutional mechanism: Section 64 of the Constitution states that 'no Minister of State shall hold office for a longer period than three months unless he is or becomes a senator or a member of the House of Representatives'. This provision enforces responsible government by requiring Ministers to be members of Parliament and therefore subject to parliamentary scrutiny.

2.2.2 Two Forms of Ministerial Responsibility

Collective Ministerial Responsibility	Individual Ministerial Responsibility
Ministers must support Cabinet decisions and uphold collective government position	Each Minister accountable to Parliament for their own policies and the performance of their department
Ministers must not speak against government policy or reveal Cabinet deliberations	Ministers expected to explain actions and policies, inform Parliament of developments, correct problems and if required resign
Government must resign if vote of no confidence passes in the lower House	Described by Lindell (1995) as a 'diminished and diminishing notion' due to party politics

2.2.3 Responsible Government in Practice: Egan Cases

Egan v Willis (1998) 195 CLR 424

Facts: NSW Treasurer refused to produce documents to the Legislative Council. The Legislative Council called for papers under its powers.

Gaudron, Gummow and Hayne JJ: [447] Identified two aspects of responsible government: (1) Ministers may be members of either House of a bicameral legislature and liable to scrutiny; (2) the ministry must command the support of the lower House of a bicameral legislature upon confidence motions. The Minister's refusal to produce papers was contempt.

Significance: The Court affirmed that responsible government, though a conventional rather than legal principle, has legal implications -- including the right of the legislative council to scrutinise the executive.

Egan v Chadwick (1999) 46 NSWLR 563

Spigelman CJ: [578] Access to legal advice on which the Executive acted was 'reasonably necessary for the exercise by the Legislative Council of its functions', because it would assist 'an informed assessment of the justification for the Executive decision'. However, an exception was made for 'Cabinet documents' -- those which reveal the internal deliberations of the Cabinet, as their confidentiality is an aspect of ministerial responsibility and hence of responsible government.

2.3 Westminster Features: Parliamentary Sovereignty

2.3.1 Dicey's Account

Dicey's three propositions:

1. **Parliament has the right to make or unmake any law whatever** -- there is no subject or person beyond Parliament's reach
2. **No person or body is recognised as having a right to override or set aside the legislation of Parliament** -- no judicial or other body can 'veto' an Act of Parliament
3. **The electors are the political sovereign** -- Parliament's legal sovereignty is constrained by political accountability to the electorate

Internal and external limits:

- **Internal limit:** arises from the nature of sovereign power itself -- a Parliament cannot genuinely bind its successors in a substantive sense
- **External limit:** the possibility that subjects will disobey or resist laws -- a practical limit, not a legal one

2.3.2 Critics of Parliamentary Sovereignty

WI Jennings, *The Law and the Constitution* (5th ed, 1959): Sovereignty means supreme power without limitation, but Parliament is not truly sovereign because many things Parliament cannot do. The term 'sovereignty' better expresses the relations between Parliament and the courts than any claim to supreme power.

TRS Allan, *Law, Liberty, and Justice* (1993): The implicit assumption in Dicey's conception is that the rule of law provides a foundation of individual rights that cannot be violated even by Parliament. The equal subjection of all classes to the ordinary law serves as a practical limit on arbitrariness.

R (Jackson) v Attorney-General [2006] 1 AC 262 -- The Courts and Parliamentary Sovereignty

Lord Steyn: [302] The classic account of parliamentary sovereignty has been put in doubt by the common law's insistence that the courts will not accept certain forms of parliamentary action. This suggests there are legal (not just political) limits on parliamentary sovereignty -- a significant departure from the Diceyan model.

2.3.3 Parliamentary Sovereignty in Australian States

State Parliaments in Australia most closely approximate Dicey's concept of parliamentary sovereignty. Unlike the Commonwealth Parliament, they have a general (residual) legislative power rather than enumerated powers. However, they are subject to external limits (the Commonwealth Constitution, including s 109 supremacy) and internal limits (manner and form requirements -- discussed in Week 10).

Building Construction Employees and Builders' Labourers Federation of NSW v Minister for Industrial Relations (BLF Case) (1986) 7 NSWLR 372

Street CJ: [383] "[I]t appears to be generally assumed that these words ["peace, welfare, and good government"] confer unlimited legislative power... I prefer to look to the

constitutional constraints of "peace, welfare, and good government" as the source of power in the courts to exercise an ultimate authority to protect our parliamentary democracy.'

Kirby P: Rejected Street CJ's approach. The chief protection against an oppressive majority in Parliament is the democratic nature of parliamentary institutions and the power of judges to construe legislation. But if legislation is clear and unjust, it is not for the judge to substitute his opinion for that of elected representatives.

Rejection by the High Court: In *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1, the HCA rejected Street CJ's view that 'peace, welfare, and good government' in s 5 of the NSW Constitution Act 1902 (NSW) limits the scope of state legislative power. The words are simply the conventional formula for conferring plenary power -- not words of substantive limitation.

2.4 Westminster Features: Constitutional Conventions

2.4.1 What are Constitutional Conventions?

Barber, *The Constitutional State* (Oxford University Press, 2010): Constitutional conventions are non-legal rules that limit the power of the monarch, define the role of the Prime Minister, and govern how formal constitutional powers are exercised. They are not legally binding -- there are no legal consequences to breaching them. However, there can be socio-political consequences. They underpin the day-to-day operation of the Australian Constitution.

Australian examples of constitutional conventions:

- The Governor-General acts on the advice of the Prime Minister (convention, not law)
- Formation of government by the political party that wins a majority of seats in the lower House
- The Constitution does not mention the office or powers of the Prime Minister -- these are left entirely to convention
- Sections of the Constitution vest wide powers in the Governor-General; the doctrine of responsible government means these powers are largely illusory in practice

2.4.2 Governor-General and the Reserve Powers

Winterton, 'The Hollingworth Experiment' (2003) 14 Public Law Review 139: 'The principal lesson is that a Governor-General cannot survive in office without the confidence of the Australian people.' The Governor-General's role is primarily ceremonial, but the reserve powers remain -- the power to dismiss a Prime Minister, to refuse to act on advice in certain circumstances, or to refuse assent to legislation.

Republic Advisory Committee (1993) -- situations in which the Governor-General may dismiss a Prime Minister:

4. Where the Prime Minister has been defeated in the lower House on a vote which is regarded as a vote of no confidence
5. Where the government is persisting in illegal or unconstitutional conduct

The 1975 constitutional crisis (dismissal of the Whitlam Government by Governor-General Kerr) remains the most dramatic example of the exercise of the reserve powers. Kerr acted without warning and contrary to Whitlam's advice, demonstrating that the conventional limits on the Governor-General's formal powers are not legally enforceable.