

Midsemester Notes

Topics Overview

1. Topic 1: Ngara and Foundations of Anglo-Australian Public Law
 - a. Ngara
 - b. Constitutional history of Commonwealth and states
2. Topic 2: Intro to key ideas of Anglo-Australian Public Law
 - a. rule of law, constitutionalism, representative gov, federalism, separation of powers, responsible gov...
3. Topic 3: Power to amend constitutional arrangements
 - a. Parliamentary sovereignty and the Constitution
 - b. Amending the Constitution
 - c. State law-making: Manner and Form Restrictions
4. Representative Parliament and Popular Sovereignty
 - a. Universal Adult Citizen Franchise as 'constitutional bedrock'
 - b. one vote one value?
 - c. Popular Sovereignty
5. Ngara (1): Constitutional Amendment **[essay topic]**
 - a. aboriginal sovereignty and unresolved relationship with the *Constitution*
 - b. 1967 Referendum
 - c. 2023 Referendum

Topic 1: Nguru and Foundations of Anglo-Australian Public Law

Topic 1.1 Nguru

Historical background of Aboriginal Australia

- Back before British Colonisation, Australia was divided among numerous independent nations (by the aboriginal peoples)
- there was system of law that governed relations between each nation

First Nations Law

- sophisticated and complex system of gov
- gov hv offices of legal and political authority – combines both judicial and legislative powers
- holder of the office teaches the law to young people

Ngura

- source of the law is land, defined as ‘Country’
- A place specific and coherent complex system of interconnected processes
- Law is taught and learnt on Country
- Nguru law underpinned by principles of relationality, reciprocity and responsibility

Ngara

- ‘An understanding of Aboriginal and Torres Strait Islander Peoples knowledges and perspectives, including the ongoing effects of colonisation, and an ability to reflect on the colonial specificity of law.’

ngarra

- collective gov institution that declares and enforces the law
- comprised of the dalkamirri (highest political and legal office)
- similar to both a Parliament and a Court

Back in the colonial days (women’s edition)

- women were seen as essential
- marriage encouraged between british convicts in Aus
- aboriginal women often abducted as sexual partners but not marriage

Topic 1.2 Constitutional History of Commonwealth and States

Constitutional History

1. Reception of British Law
 - a. *Australian Courts Act 1828* by Imperial Parliament (confirms reception of British Law into Australian states)
2. Evolution of Colonial Gov
 - a. initially: all powers concentrated in the powerful Governor
 - b. subsequently (as more free settlers arrive), colonial gov transformed to be more representative:
 - i. Parliament system established (with at least one house elected)
 - ii. representative government system – Governors required to exercise powers on advice of local Ministers (members of and accountable to Parliament)
 - c. These colonial parliament has plenary power to even introduce their own colonial constitution
3. Powers and Limits of Colonial Parliament

a. Repugnancy

Imperial Limits on Colonial Powers (Legislations)

- territoriality – colonials legislations cannot operate with extra-territorial effect
- reservation of bills – some colonial laws required to be reserved for royal assent
- disallowance – monarchs may disallow legislation of colonial legislature, even after Governor/Governor-General has given assent
 - technically, this can still occur now (Legislations enacted in Aus still requires assent of King/Queen or his/her representatives)
 - BUT now established convention that that assent will never be withheld
- ***repugnancy** – colonial statutes are rendered void and inoperative if inconsistent with British law

Imperial Limits on Colonial Powers (Judicial)

- Privy Council was the apex court in relation to appeals from Australian courts
- Courts of Australia subordinate to authority of Privy Council
- ^abolished later on.

*Repugnancy Doctrine (Timeline)

1. *Colonial Laws Validity Act (CLVA)* ss 2 and 3
 - a. s2 → Colonial laws void for repugnancy
 - i. Colonial laws void for repugnancy only inconsistent with a British Legislation EXPRESSLY extending to that colony
 - b. s3 → clarifies the repugnancy doctrine (previously Common law doctrine)
 - i. clarified that the repugnancy doctrine operates if and only if triggers the s2 conditions, but not otherwise (aka British legislation that expressly extended to that colony) – replacing prev common law interpretations
 - c. (background info: CLVA ss 2 and 3 are in response to that annoying Australian judge that took an overly restrictive view of repugnancy doctrine and struck down most of the colonial legislations)
 - d. Comments:
 - i. ss 2 and 3 draws distinction between ‘received’ and ‘extended’ laws
 - ii. s2: expressly/deliberately ‘extended’ laws have a ‘paramount force’ status (overrides colonial legislations)
 - iii. s3: whereas ‘received’ laws (laws not expressly extended/laws originally received by settlement) do not have ‘paramount force’ and can be replaced/amended/repealed by colonial legislations
2. Statute of Westminster 1931 → **ENDED repugnancy doctrine** (except the constitutional documents)
 - a. s2(2): “no law...shall be void or inoperative on the ground that it is repugnant to the law of England”
3. Australia Act 1986
 - a. s2(3) and s5: preserves repugnancy doctrine / superior status of Aus Act, Commonwealth Constitution, and Statute of Westminster

Federation and Australian Constitution

Federation

- Before Commonwealth, the Australian states were self-governing colonies. However, these colonies operate in very different legal systems, and have self-identities → this resulted in a lot of inefficiencies and inconvenience (e.g. different standards used) between colonies, impeding trade and economic development.
- Motivations:
 - Proponents proposed merger of colonies into a commonwealth that could benefit all colonial economies with uniform customs policy and increased inter-colonial co-operation
 - Defence concerns: Colonies increasingly concerned of risks of invasions from French and Germans that expanded near the Pacific as well → central gov would be better placed to defend Aus territory
 - National Identity → more people born in Aus, sense of National identity and patriotism
- 1899: All colonies (except WA which joined later) passed referendums for the draft Constitution
- 1901: *Commonwealth of Australia Constitution Act* passed in 1900 by Imperial Parliament and took effect on 1 Jan 1901

Australian Constitution (and critiques)

- Pragmatic Nature
 - Reflected realities and motivations for federation → not to be free from colonial master (UK), but rather to promote trade/commerce and defence...
 - big contrast with US's constitution → much greater emphasis on personal freedom...
- Critiques
 - drafters were white wealthy men → emphasis on trade and commerce rather than freedom/equality goes in favour of their personal agendas
 - Constitutional Silence → Constitution did not include any acknowledgement of Indigenous law or prior custodianship of land (continue exclusion of indigenous ppl from Aus polity)
 - Women excluded from process → women only had right to vote for convention delegates in one colony – SA, and at time of federation, women only had right to vote in SA and WA.
 - Constitution silent on this issue of women voting
 - However, HCA found that Constitution constrains Parliament's ability to prevent certain segments of society from voting.

Statute of Westminster Adoption Act 1942 (Cth)

- Background
 - Recognised that UK and Dominions are 'autonomous communities within the British Empire, equal in status' (Balfour Declaration 1926)
 - Statute of Westminster 1931 (UK) enacted in UK, but not take effect until it was adopted by Australian Commonwealth
 - Aus Cth finally adopted the Statute of Westminster in 1942, and backdated the date of enactment to 3 September 1939 (start of WW2) – as they were concerned with British martial laws in WW2 which were harsher than Aus ones.
- s1: Application of statute to **Commonwealth of Australia [BUT NOT to the States]**
 - has no effect on States' legal relationship with UK
 - → repugnancy doctrine etc. still applicable to state-made laws after this statute's enactment
- s2: Ended repugnancy doctrine
 - s2(1): ended application of CLVA for laws enacted after this statute's enactment
 - s2(2): gives Cth the power to repeal/amend any UK act that prev applied to it (otherwise they are forever bound by prev UK acts)
- s3: Ended restriction on extra-territorial power of parliament

- s4: Ended Imperial parliament's power to pass laws that extend to its dominions **unless** it is expressly declared in that act that the Dominion has **requested, and consented to**, the enactment...
 - **NB: this section repealed by Australia Act later on**
- s8 [**savings provision**]: Preserved repugnancy / superior status of Commonwealth Constitution
 - ensured that nothing in Statute authorised Commonwealth to override the Commonwealth Constitution → preserves sanctity of s128 of Constitution
- s9: confirms Cth not authorised to make laws in areas of exclusive state power (as given in Constitution?)
- THEREFORE: Aus legally free from Parliament of UK on 1939 3 Sept

The Australia Acts 1986

- Background
 - since Statute of Westminster only applied to Commonwealth of Australia, states are still subservient to UK (with restrictions like repugnancy, extraterritorial limitations... still in place)
 - Aus Act 1986 (Cth) made under heads of powers of s51(xxxviii) – exercise within Cth at request and with concurrence of all states, exercise of powers which at establishment of this Constitution (in 1901) can only be exercised by Imperial Parliament
 - 1985 → all states passed Australia Acts (Request) Act 1985, and Cth Parliament enacted Australia Act
- s1: Termination of UK Parliament power
 - no law of UK Parliament could extend to states
- s2(1): State Legislative Powers
 - confirmed states have extraterritorial power (but s2(2): not inter-country relations)
 - (did no more than confirm preexisting law tbh)
- s3:
 - s3(1): terminated CLVA as it applies to States
 - so as of 1986, no state laws can be void for reason of 'repugnance' to British Law
 - s3(2): granted states power to repeal/amend any prev UK laws that has been extended
- s5 [**savings provision**]
 - preserves superior status of Commonwealth Constitution, Statute of Westminster, and Australia Act
- s12: repealed parts of Statute of Westminster – particularly s4: residual British power to legislate for the Commonwealth
- s15 [amendment procedure / entrenching]
 - Entrenches both Australia Act 1986 and Statute of Westminster (as amended by s12)
 - Neither act could be amended except by
 - s128 Constitutional Amendment; OR
 - with request or concurrence of parliaments of all the states

Australia's independence

- Aus was finally independent no later than 3 March 1986 (date when Australia Acts took force) (Shaw v Minister for Immigration and Multicultural Affairs)

Sue v Hill (1999) 199 CLR 462

- UK no longer considered
- Facts