

Principles of Public Law
LAWS1141

Week 1

Class 1A - Introduction and Themes

Public Law is 'Law about Government': about the roles, powers, obligations, relationships and workings of the various branches of the State.

- Public Law is essentially about power.

The Australian Constitution

An Imperial Act of Parliament

Enacted by the British Parliament and commenced operation on 1 January 1901.

What constitutional requirements apply in seeking to make an amendment to the Constitution?

Has to be passed by an absolute majority in Parliament and a Referendum with the majority of the states in favour - s128

What is the compulsory retirement age for judges of the High Court of Australia?

Age of 70 - s72

What is the term of the House of Representatives?

3 years - s28

What is the term of the Senate?

6 years - s13

Does a federal minister have to be a member of the federal Parliament?

Yes, they do - s64

What powers does the Constitution grant the Prime Minister?

The position of the Prime Minister is not recognised by the Constitution.

Is there a Bill of Rights in the Australian Constitution? List the human rights that are protected by the Constitution.

No there isn't.

- The right to vote s41
- Freedom of religion s116
- The right to trial by jury s80
- Prohibition of discrimination s117
- Protection against acquisition of property on unjust terms s51

Class 1B - Constitutionalism and The Rule of Law

Reading: Public Law Textbook- Australian Constitutional Law & Theory

Constitutionalism

Constitutionalism: A description of how power is distributed, and which institution can do something with the force of law.

Negative Constitutionalism: Limiting Government Power

Positive Constitutionalism: Empowering Government

Constitutionalism's dual character:

1. A focus on how power is limited or contained; and/or
2. Supporting or facilitating the exercise of power by identifying its source

Why are constitutions important?

1. Power of the institutions of government
2. Place of the people inside a system of government
3. Values a society seems to claim

Adam Tomkins

Australia: A Constitutional Hybrid

The Australian Constitution is a hybrid of ideas and models.

From the United Kingdom, it took the Westminster system of representative and responsible government within the framework of a constitutional monarchy, while from the United States, it adopted the concepts of federalism, the separation of powers, and judicial review.

The facade is the monarchical government.

The King, as represented in Australia by the Governor-General, is Australia's head of state. While the Constitution does not mention the Prime Minister or the Cabinet, it specifies that the King and his representative possess a range of important powers,

Australia's constitutional system incorporates representative and responsible government.

Representative government means government by the people through their elected representatives.

Responsible government means that the executive arm of government is responsible to Parliament for its actions.

Parliament is the central institution through which all the disparate elements of the system of government, from the people through to the Crown, are welded into one consolidated chain of command.

The power of the Crown is controlled by the ministry; the ministry is controlled by the Parliament; and the Parliament is controlled by the electorate.

In the elements borrowed from the US, the unifying theme is the need to protect the people against the power of government.

Constitutionalism requires the creation of an effective and competent set of state institutions' able to safeguard and promote community wellbeing.

Australian constitutional law is both written and unwritten.

The written document known as the Australian Constitution' is set out in s9 of the

Commonwealth of Australia Constitution Act 1900 (Imp).

It is complemented by the *Statute of Westminster 1931* (Imp) and the *Australia Act 1986*.

Constitutions can be described as 'flexible' or 'rigid'.

Flexible constitutions can be amended by Parliament by exercising its ordinary powers to make new laws.

By contrast, changing a rigid constitution requires a different and more onerous process, perhaps by way of a supermajority of Parliament or, in the case of the Australian Constitution, referendum of the people.

Political and Legal Constitutionalism

Every constitutional system includes elements of political and legal constitutionalism.

Political Constitutionalism suggests that disputes about power and matters of policy should be resolved by the political process, most notably in parliament.

Legal Constitutionalism favours resolution of such matters in the courts by independent judges.

Political constitutionalism or Legal constitutionalism?

Case:	<i>Amalgamated Society of Engineers v Adelaide Steamship Co Ltd (1920) 28 CLR 129</i>
Key takeaways:	Knox CJ, Isaacs, Rich and Starke JJ: 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. - The court ruled that the answer is political constitutionalism.

Case:	<i>Australian Capital Television Pty Ltd v Commonwealth (1992) 177 CLR 106</i>
Key takeaways:	Dawson J: Those responsible for the drafting of the Constitution saw constitutional guarantees of freedoms as exhibiting a distrust of the democratic process. They preferred to <u>place their trust in Parliament</u> to preserve the nature of our society and regarded as undemocratic guarantees which fettered its powers. - The court is still saying that the answer is political constitutionalism.

Case:	<i>Plaintiff v The Commonwealth</i>
Key takeaways:	Under the Constitution of the Commonwealth, the ultimate decision-maker in all matters where there is a contest, is this Court. - The court is still saying that the answer is legal constitutionalism

Public Law - Adam Tomkins (2003)

Governments will not do things which they cannot politically get away with, as they will lose power. Therefore, imposing on governments systems which allow them politically to get away with less seems to make good constitutional sense.

Separation of Powers

Distributing power in ways that ensure there is no single consolidated chain of command.

Legislative, Executive, and Judicial functions to distinct institutions independent of one another.

- Ensures checks and balances

The Spirit of the Laws - Baron de Montesquieu (1949)

Political liberty is to be found only where there is no abuse of power.

There would be an end of everything, were the same man or the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals.

Constitutional and Administrative Law - O Phillips and P Jackson (1987)

Legislative:

The making of new law, and the alteration or repeal of existing law.

Executive:

General and detailed carrying on of government according to law, including the framing of policy - social services such as public health, housing, etc...

Judicial:

Interpretation of the law and its application by rule or discretion to the facts of a case.

Separation of Powers in the Westminster System - Gerard Carney (1994)

The Strict doctrine is only a theory and it has to give way to the realities of government where some overlap is inevitable. But while permitting this overlap to occur, a system of checks and balances has developed.

**The Integrity Function and ASIO's Extraordinary Questioning and Detention Powers - L
Burton and G Williams (2012)**

Suggestion that institutions performing a so-called 'integrity' function now collectively constitute a fourth branch of government.

- e.g. ombudsman

The Media as a fifth branch?

- Keeps politicians in check, Gives the 'people' a voice

The Rule of Law

No one is above the law and everyone is equal under the law.

On the Rule of Law: History, Politics, Theory - Brian Tamanaha (2004)

Formal

Formal conceptions of the rule of law focus on the proper sources and form of legality.

- How the law is made

Substantive

Substantive conceptions include requirements about the content of the law (conforming with justice or morals).

- Content of the law

Introduction to the Study of the Law of the Constitution - AV Dicey (1959)

1. No man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts.

- Englishmen are ruled by the law, and by the law alone.

2. Not only that no man is above the law, but that here every man, whatever his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals.

- Equality before the law.

3. The constitution are with us the result of judicial decisions determining the rights of private persons in particular cases brought before the courts.

- The constitution is the result of the ordinary law of the land.

On the Rule of Law: History, Politics, Theory - Brian Tamanaha (2004)

A constitution establishes the basic powers and limits of a government and the relationship between a government and its citizens.

Hayek observed that the 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. In a democracy this means that it will not prevail unless it forms part of the moral tradition of the community, a common ideal shared and unquestioningly accepted by the majority'.

Social Dimensions of Law and Justice - Julius Stone (1966)

Arguing that the rule of law may be understood as an ethical, rather than merely a legal, doctrine.

Men appear to conform to legal rules not only under coercion but with a sense of ethical obligation.

The Rule of Law in a Free Society - Report of the International Congress of Jurists, New Delhi 1959 (1959)

It assumes that the law itself is based on respect for the supreme value of human personality.

Case:	<i>R (UNISON) v Lord Chancellor (2020) AC 869</i>
Judgement:	The unanimous Court said that the '[896] constitutional right of access to the courts is inherent in the rule of law and can only be curtailed by clear statutory enactment, which was absent here.
Key takeaways:	Lord Reed: - At the heart of the concept of the rule of law is the idea that society is governed by law. - The administration of justice is more than a mere public service. It serves a function above and beyond the resolution of purely private claims. - In order for the courts to perform their role, people must in principle have unimpeded access to them. Without such access, laws are liable to become a dead letter, the work done by Parliament may be rendered nugatory, and the democratic election of Members of Parliament may become a meaningless charade.

The Rule of Law - Sir Ninlan Stephan (2003)

Cardinal principles of the rule of law:

1. Government should be under law.
2. Judges and lawyers should be independent and uninfluenced by the Government.
3. There should be ready access to the courts of law for those who seek legal remedy and relief.
4. The law of the land should be certain, general, and equal in its operation.

Case:	<i>Palmer v Western Australia (2021) 274 CLR 286</i>
Key takeaways:	No operative limitation arises from the rule of law.