

JURD7141 Principles of Public Law Theory & Doctrine Book

Every topic: the rule, the cases, the critique, and a decision flowchart
· Weeks 1 to 10

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Part A: Foundations & Theory

A1. Public law and constitutionalism

THESIS

Public law is the law about **governing**. Spigelman CJ treats constitutional law, administrative law and statutory interpretation as one integrated subject, so any question about whether a government act is valid runs all three together. Three questions frame the whole course: who holds power, what limits that power, and to whom is the holder accountable.

DEFINITIONS AND THINKERS

- *Spigelman CJ* (Garrahan Oration, 2010): public law is the integrative terminology that treats the activity of governing as a distinct subject.
- *Loughlin*, *The Idea of Public Law* (2003): the assemblage of rules, principles, customs, usages and manners that condition and regulate the activity of governing (so conventions count).
- *Tomkins*: the dividing line is whether courts or political institutions have the last word on the limits of power.

Constitutionalism has two faces: a **description** of how power is distributed, and a **limitation** on power (the rule of law plus the separation of powers). The US emphasises limitation; the UK emphasises distribution; Australia is a hybrid of both.

ESSAY ANGLE

Australia is often described as 'Canada minus the Charter': a written supreme Constitution and judicial review sitting on top of Westminster responsible government and weak express rights. The recurring theme is that power is often structural, conventional or hidden, and the live question is usually 'accountable to whom': the courts (legal constitutionalism) or Parliament and the electorate (political).

A2. The rule of law

FORMAL vs SUBSTANTIVE

Formal (thin) conceptions ask only that law be public, prospective, clear, general and stable (Raz; Dicey leans here). **Substantive (thick)** conceptions fold in fundamental rights, equality and democracy (Bingham, Allan, Dworkin). Australia tends formal at the constitutional level.

DICEY'S THREE ELEMENTS (1885)

- supremacy of regular law over arbitrary power;
- equality before the law;
- rights secured through the common law and Parliament, not a constitutional bill of rights.

THE HIGH COURT TRIO

- *Communist Party Case* (1951): the rule of law is 'an assumption' of the Constitution (Dixon J); 'the stream cannot rise higher than its source' (Fullagar J).
- *Plaintiff S157* (2003): the rule of law is given operative effect through s 75(v), a 'basic element'.
- *Palmer v WA* (2021): the rule of law is 'a useful shorthand', not a freestanding ground of invalidity.

unreasonable (NSW: s 34).

Highly constrained: extrinsic materials 'cannot displace the meaning of the statutory text. Nor is their examination an end in itself' (*Consolidated Media*). Always weigh how much a given source deserves; a ministerial speech is one MP's account, not the enacted text.

ESSAY ANGLE

Intention is now openly called a 'fiction' or 'metaphor' (the legislature has 'no psychological state of mind': Gageler), but it keeps a legitimising function: it fixes attention on Parliament's choices rather than the judge's preferences, and so serves the separation of powers.

The soft spots are purpose (level of generality, judicial choice) and context (how far it extends, and what weight): each is a doorway for the judge's own view, which is exactly why the *Alcan* text-first discipline and the *Consolidated Media* limit on extrinsic materials matter.

A15. The principle of legality

The principle of legality (the 'clear statement' rule) is an interpretive presumption that Parliament does not intend to interfere with fundamental common law rights and freedoms except by **clear and unequivocal language** (*Momcilovic*; *Potter v Minahan*; *Coco*).

It is a common law rule of construction, not a limit on legislative power: Parliament can always override a right with clear enough words, so the principle sits **consistently with parliamentary supremacy**. Its modern rationale is as much about **accountability** (forcing Parliament to squarely confront the political cost of abrogating rights: *Simms*) as about fidelity to Parliament's probable intention.

THE RULE

Momcilovic (French CJ [46]; B&W [6.29]-[6.30]): the principle 'is expressed as a presumption that Parliament does not intend to interfere with common law rights and freedoms except by clear and unequivocal language for which Parliament may be accountable to the electorate'. It requires statutes to be construed, 'where constructional choices are open', to 'avoid or minimise' their encroachment on rights and freedoms.

To abrogate a right Parliament must direct its attention to it and squarely decide to override it; general words 'will rarely be sufficient' if they do not specifically deal with the question. French CJ stresses the principle **does not constrain** legislative power; it only shapes how ambiguous statutes are read.

LEADING CASES

- *Potter v Minahan* (1908) 7 CLR 277: 'immigrant' read down so as not to include an Australian-born person returning home; O'Connor J's 'irresistible clearness' (3:2).
- *Coco v The Queen* (1994) 179 CLR 427: authority to 'use' a listening device did not authorise trespass to install it; the right to exclude others from premises is fundamental; conviction quashed.
- *Re Bolton; Ex parte Beane* (Brennan J): unless Parliament makes 'unmistakably clear' its intention to abrogate a fundamental freedom, courts will not construe a statute as having that operation.

THE TWO RATIONALES

Fidelity to intention (traditional): it is simply improbable Parliament would overthrow fundamental rights inadvertently (*Potter*); the presumption is a 'working hypothesis ... an aspect of the rule of law' (Gleeson CJ, *Electrolux*), coheres with supremacy, and is displaced by 'clear enough words'.

against a future **Labor** government, so entrenchment is not neutral machinery but a way to bind one's successors.

Legal independence	Cth 1901	Cth 1942	Cth 1986	State 1901	State 1942	State 1986
Element	What it asks					
Text	What do the words mean in their ordinary grammatical sense? (the starting point, not the end)					
Context	Read in its widest sense, from the first instance (not only on ambiguity)					
Purpose	Prefer the construction that best achieves the Act's purpose or object					
Extrinsic materials	Outside material (Second Reading Speech, EM, reports, debates): confirm meaning, or resolve ambiguity / absurdity					
Categories of Commonwealth executive power (s 61)						
Category	Source / note					
Prerogative	Powers accorded to the Crown by the common law (Dicey's 'residue'); displaced by statute (<i>De Keyser</i>).					
Nationhood	Power derived from Australia's status as a sovereign nation.					
Capacities	Bare capacities to act: contract and spend money; a 'faculty', not a prerogative (Gageler J, <i>Plaintiff M68</i>).					
Statutory	Powers conferred on the executive by statute.					
Evatt's three prerogative categories						
Category	Examples					
Executive prerogatives	Powers to do acts: make treaties, declare war, make peace, coin money, incorporate by royal charter, pardon offenders, confer honours.					
Immunities and preferences	Priority of Crown debts, immunity from the ordinary process of the courts, freedom from distress for rent.					
Property rights	Royal metals, royal fish, treasure trove, ownership of the foreshore, sea bed and subsoil.					
Judicial review vs merits review						
Feature	Judicial review					
Question	Was the decision made lawfully? (<i>Quin</i>)					
Body	A Ch III court (s 75(v), ADJR, <i>Kirk</i>)					
Remedy	Certiorari / mandamus / prohibition; set aside and remit, cannot substitute					
Individual vs collective ministerial responsibility						