

Constitutional Law Notes:

Week 1: Introduction to Constitutional Law

- Artificial law = international (treaties), regional, national, sub-national + local
- Forms of law: constitution, code, primary legislation, secondary + judgements
- Adopted concepts of federalism, separation of powers + judicial review from USA.
- Power wielded by gov institutions is expression of power of people themselves.
- Unifying theme= power to protect people against government by distributing power to ensure there is no single consolidated chain of command.
- Federalism assigns governmental powers to different political + territorial units
- Constitution: rules that directly & indirectly affect distribution or exercise of sovereign power in the state. Rules governing composition, powers & methods of operation of main institutions of gov + their relations to the citizens.
- Const law is written & unwritten. It can only be changed by referendum (s 128)
- Const. rights are designed to protect people from government + from one another
- **Political Constitution:** Those in political power (gov) are held to account through political means & institutions. Ministers etc subjected to gov scrutiny
- **Legal Constitution:** One which imagines that principal institution through which gov is held to account is law + court. If you dislike what gov has done, sue them.

Perspectives on Law- Fundamental Distinctions:

Positivism:

- Most jurists today are positivists (there is no natural law, only positive law).
- Positivism: reality consists solely of what's observable. Questions of what is + ought to be (which isn't observable) are fundamentally different. The statements cannot be derived from each other.
- Natural law doesn't exist (not observable) as it says what ought to be done.
- Positive law is all that's to be considered law.
- Specifically legal character of a positive legal norm: HLA Hart finds it in *recognition by officials* as binding (what I recognise today I can reject tomorrow.) Further character is the union of primary and secondary rules.
- Kelsen denies specific character of legal law can be found. He finds it in a combination; fact that positive-legal norms can regulate their own creation and application but this can also be found in the rulebooks of many organisations.

Liberalism:

- Robert Nozick ultra- individualistic liberalist.
- Ideology which values the liberty of individuals to engage in activities considered important for self- expression + political participation, + supports constitutional arrangements to protect those activities from excessive state intervention.
- It is individualist, egalitarian, universalist and meliorist.
- Individualist in asserting moral primacy of people against claims of social collectivity, egalitarian as it confers on all men same moral status, universalist in affirming moral unity of humans + meliorist in affirming improvability of social institutions + political arrangements.
- Link between rise of freedom of religion + liberalism. Individuals motivated by self-interest.

John Locke:

The rule of Law:

- Some believe it encompasses the social, economic, educational and cultural conditions under which man's legitimate aspirations and dignity may be realised
- Formal & substantive variations on what rule of law is. Formal address the manner in which the law was promulgated, its clarity & temporal dimension of the enacted norm. They don't judge the content of the law itself or whether its good or bad provided that the formal requirements of rule of law are met.
- Substantive conceptions go beyond formal ones & accept that law has formal attributes + distinguishes between good laws which comply with substantive rights and bad laws which do not.
- Formal focuses on proper sources + form of legality while substantive include requirements for the content of law (it must comply with moral principle) Pg 18.
- Rule of law is not to punish crime but to prevent it.
- *The Rule of Law in a Free Society*- New Delhi 1959: 2 ideals underlie this conception of ROL. Implies without regard to the content of law that all power in the State should be derived from & exercised in accordance with law. It assumes that law is based on respect for supreme value of human personality. Pg 24

Legal Order and Legal Validity:

- Hans Kelsen: "static" and "dynamic" orders of norms.
- Dynamic= someone must do something to get from a higher norm to lower norm
- Dynamic can be what Austin referred to as Sovereign
- For Kelsen every positive- legal order, i.e legal orders of international law & national (state) law is a primarily dynamic legal order.
- Distinguish legal "validity" ("valid"= authorised) from logical "validity"
- Every "dynamic" legal order" is seen downwards (a chain of authorisation), seen upwards (a chain of legal validity) and "leeways" (Stewart) at every link.

Constitution and Constitutional Law:

- s 1- 8 constitution sets out how the constitution itself can be changed
- Constitution overrides common law.
- Idea of a "common law" constitution developed & maintained by the judiciary to sustain the rule of law- Dicey.
- Is Australia moving towards a legal state like Europe?
- Types of Constitution:
 - o **Unitary/ federal:** Australia considered becoming unitary due to defence (benefits of uniting the states) but became federal so each state wouldn't lose control over each of its natural assets. (Being unitary would mean the states united and lost control of themselves.)
 - o **Federalism/ Devolution:** Devolution =Where national parliament enacts a law to hand over some of its power to regional authority. (UK Model). Federalism is an alternative to being unitary.
 - o **Principle of Subsidiarity:** Decisions of gov should be taken as close as possible to the people affected by them (state gov)

Structure of constitution:

- Division of powers:
 - o Horizontal: separation of powers- legislative, executive + judicial powers
 - o Vertical: Federal division of powers- between Commonwealth + States
- 18th Century France- Montesquieu said powers should be in 3 sets of hands to avoid tyranny- King, House of Lords + House of Commons.

Tutorial Week 2:

What do we believe the Purpose of the Constitution should be: Establish basic necessary human rights –blanket laws -regulate creation of new laws etc. Combines states + sets out hierarchy of powers (federal, state.) All powerful, set up judiciary + gov (separation of powers) – ensure consistency of treatment across board.

The purpose, drive and focus of the Commonwealth Constitution: define administrative system, separation of powers. Prior to constitution no such thing as Aus parliament, federal judiciary etc- const establishes these bodies + distribute power. Const empowers clth (to make changes) + also limits its ability to make changes in areas (e.g. defence, taxation). Const is an agreement between pre-existing sovereign states compact/ion.

Sovereignty: Who or what is the sovereign of Australia? Where does (ultimate) legal power reside? What guarantees the continuing supremacy of the Constitution? Queen + Governor General are ultimate sovereign powers- they can dissolve parliament, dismiss/ suspend government, pass legislation etc. Australian const's authority is maintained by its difficulty to amend. Some judges have argued that ongoing authority of constitution is bc we consent to it as people. Our supreme document is an imperial statute- a British act of parliament. WE continue to consent to it being a supreme authority- we underlie it (theory of popular sovereignty). This is difficult to accept as amending const requires the majority of people in the majority of states.

Theory of Popular Sovereignty is that we continually acquiesce to the constitution. WE accept it because it hasn't been challenged.

Constitutionally, how would you characterise Australia? : Democratic, a constitutional monarchy. Federal country, Westminster inheritance, US flavour.