

AUSTRALIAN PUBLIC LAW SUMMARY



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Foundations to Public Law

Introduction

- **Constitution Classifications**
 - **Flexible Constitution:** A Constitution, which can be changed like an ordinary statute.
 - **Rigid Constitution:** A Constitution which cannot be changed the same way as an ordinary law, rather through some set procedure or process, like a referendum.

- **Written and Unwritten Constitutions**
 - **Written:** A Constitution is said to be written when the most important constitutional laws constituting the basis of the State are specifically enacted and specified in one formal document or a series of formal documents, which are binding on the courts, the Executive, the Legislature and the people.
 - **Unwritten:** The basic laws are given the importance of a Constitution, but are not enacted as one formal set of fundamental constitutional laws (e.g. Israel).

- **Australia's Constitution**
 - Rigid Constitution which can only be changed via a referendum.
 - Contains both written and unwritten parts (i.e. the unwritten flexible conventions and common law interpretation of the Constitution complements its written component).
 - Function: Establishes institutions that serve as the authoritative sources of law and gives them Legislative power. Often accompanied by explicit and implicit limitations on power.

From Where Does the Constitution Derive Its Validity?

There are numerous theories which attempt to explain *why* we obey the Constitution.

<p>Kelsen¹</p>	<p>Kelsen's Theory</p> <ul style="list-style-type: none"> • The entire legal order is a pyramid of norms which are derivative of the powers conferred by the Constitution. • The Constitution is the 'Grundnorm or basis norm'; its content is regarded as 'self evident' and is presupposed from the highest norm, from which norms for human behaviour is logically deduced. • Legal norms are not valid because they have certain content but because of the way they are created, such that its content is <i>logically deducible</i> from a presupposed basic norm. <p>Problem with Kelsen's Theory</p> <ul style="list-style-type: none"> • Kelsen seeks to construct a systematic framework for pure theory of law characterised by hierarchy and unity but in reality it is not so structured. • One needs to make a moral judgment to believe the Constitution is the Grundnorm (i.e. the one you should obey). There are still cultural and other influences that are simply masked by Kelsen's analysis that we simply obey it because it is an assumption. • Theory is too inert and has no consideration of the cultural framework, which contributes to the validity of the legal system.²
<p>Foucault³</p>	<p>Foucault's Theory</p> <ul style="list-style-type: none"> • Discourse can only ever be inconsistent and ruptured; only out of such discourse can ideas originate. Power comes from all sorts of discourses (e.g. cultural, political, economic). • Our culture is a law-bound culture; it is inherent in us to obey the law. Our actions reinforce the validity of the law. Cultural assumptions and the way society has shaped us leads to an unconscious conformity to the legal system. <p>Problem with Foucault's Theory: Lacks structure, in reality there is a need for some sort of structure for why we obey the law.</p>



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¹ Kelsen 'Pure Theory of Law' in Blackshield & Williams, *Australian constitutional Law & Theory: Commentary & Materials* (Federation Press, 2006), 5.

² Foucault 'Politics and the study of discourse' in Blackshield & Williams, *Australian constitutional Law & Theory: Commentary & Materials* (Federation Press, 2006), 8.

³ Foucault above n 2.