



Unit 8: Australia's legal system, the Courts and the Australian Justice System
– Years 7-9 - Strand: Laws & Citizens

Topics 7.2 & 9.4: Key features of Government & the Australian Justice System: Separation of Powers and the Judiciary

Separation of Powers - Why Parliament can no longer convict you of treason and order that you be beheaded (Student Resource)

In Australia we have a 'separation of powers' that ensures that Parliaments exercise legislative powers and courts exercise judicial powers. This means that Parliament can make a general law about what acts are criminal offences and what the maximum penalty for that offence may be, but it is the courts that judge whether or not a person has committed a criminal offence and what sentence they receive. This protects the individual from being persecuted, convicted and punished for political purposes. But it was not always so.

Bills of Attainder and beheadings

In earlier times, in England, before the separation of powers was developed, Parliaments did sometimes intervene to convict and punish people, without the need for evidence or a trial. For example, in Tudor England, people who had fallen out of favour with the King were at risk of having a 'bill of attainder' enacted against them by the Parliament. This was a bill that, if passed by Parliament, found them to be guilty of treason or another serious crime and sentenced them to a punishment, such as beheading or being hung, drawn and quartered. It avoided the need for a trial or for evidence that would stand up in court.

Amongst those convicted and beheaded as a result of Parliament passing a bill of attainder, were Catherine Howard, who was Henry VIII's fifth wife, and Thomas Cromwell, who was Henry VIII's chief minister.

A person convicted by Parliament under a bill of attainder was described as 'attainted'. This meant that their blood was treated as 'tainted' or 'corrupted' so that their heirs could not inherit their property or noble titles. These instead went to the King once the attainted person was executed. So Henry VIII obtained many valuable properties from Thomas Cromwell when he was beheaded.

Sometimes Parliament passed a bill of attainder against a man even though he was dead, as a symbolic act and to terminate any inheritance of titles or property by his heirs. For example, even though Richard III died in action at the Battle of Bosworth Field, the victor, Henry VII, ensured that Parliament still passed a bill of attainder against Richard III, including for the "shedding of Infants' blood", which was a reference to the alleged killing of the young princes in the Tower of London.



King Henry VIII reigned from 1509-1547
Source: Wiki Commons

Another example occurred when the monarchy was restored after the end of a period of republicanism. Oliver Cromwell (a descendant of Thomas Cromwell's nephew was convicted by a bill of attainder in 1660, which was back-dated to 1649. Despite being long dead, his body was dug up, symbolically executed and his head put on display on a pike as a warning.

Parliament could also pass a 'bill of pains and penalties' against a person to deal with lesser offences. This resulted in punishments other than death. But these days the term 'bill of attainder' is used loosely to cover all instances in which Parliament passes a law that is directed at punishing particular people for perceived offences, without the matter being proved and decided by a court.

Bills of Attainder in Australia

Bills of attainder, understandably, have been regarded as unfair and objectionable. While the US Constitution expressly prohibits them, the Australian Constitution says nothing about them. But it does separate powers, by giving the Parliament legislative power and the courts judicial power. Is this enough to make bills of attainder constitutionally invalid?

Yes, it is, as the High Court decided in the case of *Polyukhovich v The Queen* in 1991. Ivan Polyukhovich was alleged to have aided the Nazis in committing war crimes in Ukraine during World War II. He later migrated to Australia and lived in Adelaide. In 1988 the Commonwealth Parliament passed a law making certain acts 'war crimes' if they occurred in Europe between 1 September 1939 and 8 May 1945. While the law applied retrospectively, it covered things, such as murder, that were already criminal acts at the time they were done, so it was not a case of innocent acts being made criminal by a retrospective law.

The High Court decided that the Commonwealth Parliament could not enact a bill of attainder, because this would involve Parliament exercising judicial power in breach of the separation of powers in the Constitution.

But a majority of the Justices said that this war crimes law was not a bill of attainder. It was a retrospective criminal law. It did not convict or punish a person. Instead, there still needed to be a trial before a judge. The accused person could still dispute the evidence brought against him or her, cross-examine the witnesses, and argue that defences applied. A jury would still have to decide guilt beyond reasonable doubt.



Burial place of Oliver Cromwell in Westminster Abbey.

Source: Wiki Commons

Two of the Justices disagreed. They thought that all retrospective criminal laws were unconstitutional. They were worried that once a past act is made criminal by a later law, most of the court's role has been removed by the Parliament's action. The role of the court would just camouflage the action of the Parliament, which was really deciding that people who had done things that were not unlawful at the time, had committed criminal offences.

Imagine that tomorrow, Parliament were to pass a law that says that anyone who attended your school today, is guilty of a criminal offence, with a mandatory penalty of five years' imprisonment. That would certainly be extremely unfair, but would it be unconstitutional?

A big difference with the Polyukhovich case is that the acts he was alleged to have committed would have been known by him, at the time, to be criminal. Whereas no one could know that attending school today would later be turned into a criminal act by a retrospective law.

The High Court has not had to decide whether a retrospective criminal law of that kind would be invalid, because fortunately no Australian Parliament has ever made such a law. But if it did, the High Court would consider what the role of a court would then be.

Would it simply be a venue for proving that a person committed the Act (eg by presenting the class roll or getting the teachers to give evidence about who was at school that day)? If so, the law might be undermining the separation of powers by preventing the courts from acting judicially and exercising their full judicial independence and fairness.



High Court of Australia
Source: High Court of Australia

The High Court might well find such a law to be a breach of the separation of powers and unconstitutional, but hopefully no Australian Parliament would ever make it, so we will never know.

What happened to Mr Polyukhovich? He was tried in a court. He was 'acquitted' (i.e. found not guilty) because the jury could not be satisfied beyond reasonable doubt, on the evidence placed before it, that he had committed the crimes. The courts had fulfilled their judicial role and the separation of powers had not been breached.



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Separation of Powers - Why Parliament can no longer convict you of treason and order that you be beheaded (Teacher Resource)

The doctrine of the separation of powers developed in the United Kingdom over many centuries. The idea of protecting people from tyranny by separating different types of power so that they were exercised by different institutions, was later taken up in the United States and imposed much more rigidly. The Commonwealth Constitution is also based upon the idea of the separation of powers, but because it uses a system of responsible government, the separation between legislative and executive power is not as strong as in the United States.

One aspect of this doctrine, is that legislatures can only exercise legislative power, not judicial power. The conviction and punishment of a person for committing a crime is regarded as an exclusive judicial power, and therefore can only be exercised by the courts. This ensures that while Parliaments make general criminal laws that set out what acts are offences and what type of punishment should apply for committing them, only courts can judge someone's guilt of a criminal offence and impose a punishment on them.

Bills of Attainder and beheadings – live and dead

But in the times before this doctrine was developed, Parliaments did sometimes intervene to convict and punish persons, without the need for evidence or a trial.

For example, in Tudor times, persons who had fallen out of favour with the King could find that a 'bill of attainder' was brought against them in the Parliament. This was a bill that, if passed by Parliament, found them to be guilty of treason or another serious crime and imposed a punishment upon them, such as execution. This avoided the need for a trial or for evidence that would stand up in court.

Amongst those convicted and beheaded as a result of Parliament passing a bill of attainder, was [Thomas Cromwell](#), who was the chief minister to Henry VIII. He fell out of favour after promoting Henry's unsuccessful marriage to his fourth wife, Anne of Cleves. A copy of the Bill of Attainder against Cromwell is [here](#). Henry VIII married his fifth wife, [Catherine Howard](#), on the day that Thomas Cromwell was beheaded. Catherine was also the subject of a bill of attainder passed by Parliament and was beheaded less than two years later.

A person convicted by Parliament under a bill of attainder was described as 'attainted'. This meant that their blood was 'tainted' or 'corrupted' in a way that carried on through their family line. Accordingly, their heirs could not inherit their property or noble titles. These instead went to the King upon the attainted person's execution. So Henry VIII obtained many valuable [properties](#) upon the attainting of Thomas Cromwell.

Sometimes Parliament passed a bill of attainder against a man even though he was dead, as a symbolic act and to terminate any rights or property that would otherwise be inherited by his heirs. For example, after Richard III died in action at the Battle of Bosworth Field, the victor, Henry VII, ensured that Parliament passed a [bill of attainder against Richard](#), including for "shedding of Infants' blood", which was a reference to the alleged killing of the young princes in the Tower of London.



King Henry VIII reigned from 1509-1547
Source: Wiki Commons

Another example occurred when the monarchy was restored after the end of Oliver Cromwell's republic. Oliver Cromwell (a descendant of Thomas Cromwell's nephew) had ruled the Commonwealth of England, Scotland and Ireland as Lord Protector from 1653 to 1658, after the English Civil War. He died of natural causes in 1658 and was buried with great ceremony in Westminster Abbey.

After the restoration of King Charles II to the throne, a bill of attainder was passed by Parliament in 1660, and back-dated to 1649. Cromwell's body was then dug up on 30 January 1661, which was the 12th anniversary of the execution of the previous King, Charles I. Cromwell's body was then posthumously [executed](#), hung in chains as a traitor at Tyburn and thrown into a pit. His head was cut off, dipped in tar and displayed on a [wooden pike](#) on the roof of Westminster Hall until 1685. In a storm, the pike snapped and Cromwell's head rolled into the gutter. It was found by a soldier who took it home and hid it in his chimney. It was later sold to various people, and shown as a [curiosity](#) to house guests after breakfast, before eventually being buried in Cromwell's old college in Cambridge.

Parliament could also pass a 'bill of pains and penalties' against a person to deal with lesser offences. This resulted in punishments other than death. In 1820, King George IV attempted to use a [bill of pains and penalties](#) to deprive his wife, [Princess Caroline](#), of the 'title, prerogatives, rights, privileges and exemptions of Queen Consort of this Realm' and to divorce her. It was passed in the House of Lords, but the Government withdrew it after strong public support was shown for Caroline.

These days the term 'bill of attainder' is used loosely to cover all instances in which Parliament passes a law that is directed at punishing particular people for perceived offences, without the matter being determined by a court.

Bills of attainder in the United States

Bills of attainder, understandably, have been regarded as unfair and abhorrent. When the United States Constitution was enacted in 1787, the framers thought this was such an important issue that they included, in Article 1, section 9 of the Constitution, a clause stating that 'no bill of attainder, or ex post facto law, shall be passed'.

Instead, the framers established a strict constitutional 'separation of powers' which means that the Congress only has the power to legislate, and cannot convict and punish a person. Only courts, exercising judicial power, can convict a person of a criminal offence and punish them.

Because of this express constitutional prohibition on bills of attainder in the United States, there has been occasional litigation about it. Claims are sometimes made that a law is unconstitutional because it is intended to punish a person, or even a business, and is therefore a bill of attainder.

For example, after Richard Nixon resigned as President of the United States, he argued that a law that made his presidential records public property, rather than his own private property, was a [bill of attainder](#) that punished him for the Watergate scandal. He [failed](#) in his argument.



High Court of Australia
Source: HCA

Bills of attainder in modern times – dealing with coups d'état

These days the term 'bill of attainder' is used in relation to laws that are *ad hominem* (i.e. they are directed at particular persons or groups) which impose some kind of punishment upon them.

In modern times, attempts by Parliaments to exercise judicial power are more subtle. They may involve altering the law so that it adversely affects particular groups.

An example occurred in what was then known as Ceylon (now Sri Lanka) in 1962. There had been an attempted coup d'état. Two statutes were enacted by the local Parliament, which were directed at making it easier to convict those believed to have been involved in the attempted coup. The laws validated their arrest without warrant. They validated their detention. They redefined the offences so that convictions could easily be achieved. They changed the penalties for those offences and altered the laws of evidence so that the offences were easier to prove. Finally, they provided for trial without jury.

The validity of the laws was challenged and they were struck down by the Privy Council in the case of [*Liyanage v The Queen*](#). The Privy Council expressed concern about criminal laws that are directed at specific people, rather than applying generally, although it noted that not every law that is *ad hominem* or applied ex post facto (i.e. with retrospective effect) will necessarily infringe the judicial power.

Their Lordships added:

'The pith and substance of both Acts was a legislative plan ex post facto to secure the conviction and enhance the punishment of those particular individuals. It legalized their imprisonment while they were awaiting trial. It made admissible their statements inadmissibly obtained during that period. It altered the fundamental law of evidence so as to facilitate their conviction. And finally it altered ex post facto the punishment to be imposed on them'.

The Privy Council concluded that:

'These alterations constituted a grave and deliberate incursion into the judicial sphere. Quite bluntly, their aim was to ensure that the judges in dealing with these particular persons on these particular charges were deprived of their normal discretion as respects appropriate sentences. They were compelled to sentence each offender on conviction to not less than ten years' imprisonment and compelled to order confiscation of his possessions, even though his part in the conspiracy may have been trivial... If such Acts as these were valid the judicial power could be wholly absorbed by the legislature and taken out of the hands of the judges.'

The Privy Council held both Acts to be invalid.

Bills of attainder and retrospective criminal laws in Australia

Are bills of attainder or retrospective criminal laws (also known as ex post facto criminal laws) invalid in Australia? Under a bill of attainder, it is Parliament that convicts and punishes, without a court judging guilt. Under a retrospective criminal law, there is still a court proceeding, usually with a jury determining guilt and innocence, and the defendant may produce evidence in his or her defence and dispute the evidence put by the prosecution. This difference is important.

But what if the law turns an act, which was innocent at the time it was committed, into a criminal one? If it was already known who had done such an act, innocently, at the earlier time, then the law would cause known people to be convicted of a crime, with a court having little role other than to determine whether that act occurred.

For example, imagine that tomorrow Parliament passes a law that says that anyone who attended your school the day before, is guilty of a criminal offence, with a mandatory penalty of five years' imprisonment. Would such a law be valid?

Fortunately, Parliaments (at least in Australia) do not enact laws like that. One of the closest examples, however, is the case of [The Queen v Kidman](#) from 1915. During World War I, a law was enacted to prevent war profiteering. It made 'conspiracy to defraud the Commonwealth' an offence. The law received royal assent on 7 May 1915, but applied with retrospective effect back to 29 October 1914. The High Court upheld this retrospective criminal law as valid, but it also noted that the law merely gave statutory effect to what was already a common law offence. It was not a situation where the person did the act innocently at the time. So it remained unclear whether a law that turned an innocent act into a criminal one, with retrospective effect, would be valid.

The issue did not arise again in Australia until the case of [Polyukhovich v The Queen](#) in 1991. Earlier, in 1988, the Commonwealth Parliament enacted a law making certain acts 'war crimes' if they occurred in Europe between 1 September 1939 and 8 May 1945. Those acts that it deemed a war crime, such as genocide, would have been criminal acts at the time they were committed (eg murder), so again it was not a case of innocent acts being made criminal by way of retrospective laws.

The High Court considered whether this war crimes legislation breached the separation of powers required by Chapter III of the Constitution, which gives judicial power to courts, not Parliament. Six Justices held that the Commonwealth Parliament could not enact a bill of attainder, because this would involve Parliament exercising judicial power contrary to sections 1 and 71 of the Commonwealth Constitution, which confer legislative power on Parliament and judicial power on the courts.

However, of those six judges, three of them (Chief Justice Mason and Justices Dawson and McHugh) considered that a bill of attainder was different from a retrospective criminal law which applies generally. The latter type of law still allows a court to determine whether the person charged has engaged in the conduct complained of and whether that conduct is an infringement of the law. They held that the law in this case was not a bill of attainder. It was a criminal law that applied retrospectively to acts that were already criminal. Justice Toohey thought in some cases a retrospective law might be invalid, but only if it operated so as to require a court to act contrary to accepted notions of judicial power, which was not the case here. All four Justices upheld the law's validity, as did Justice Brennan who did not address the issue of bills of attainder and retrospective criminal laws.

Justices Deane and Gaudron, however, dissented. They thought that both bills of attainder and retrospective criminal laws breached the separation of powers and were therefore invalid. They considered that once a past act is made criminal by a later law, most of the court's role has been ousted by the Parliament's action. Justice Deane thought that the role of the court would be mere camouflage for the act of the Parliament in taking over the exercise of judicial power. Both Justices Deane and Gaudron held that the law was invalid.

Mr Polyukhovich stood trial under the law, but was later [acquitted](#).

The Polyukhovich case makes it clear that a bill of attainder, in which the Parliament legislates to determine guilt and punishment, will be unconstitutional because it breaches the separation of powers. Whether a retrospective criminal law would be invalid, if it turned an act that was innocent at the time it was done into a criminal act, is still the subject of some uncertainty. If it forced a court to act in a way that was inconsistent with accepted notions of judicial power, it would most likely be held to be invalid.

Laws in Australia that might have a punitive effect

More recently, the issue arose again in relation to the legislative response to findings made by the Independent Commission Against Corruption (ICAC) in New South Wales. There had been an inquiry by ICAC which showed that the grant of certain mining exploration licences was tainted by corruption. Those licences had been transferred to other holders. The New South Wales Parliament responded to the scandal by cancelling the licences. The current holders of the licences argued that this was a 'legislative exercise of judicial power' by the Parliament, similar to a 'bill of pains and penalties'.

In *Duncan v New South Wales* (2015), the High Court unanimously rejected that argument. Chief Justice French and Justices Hayne, Kiefel, Bell, Gageler, Keane and Nettle said:

'Some functions of their nature pertain exclusively to judicial power. The determination and punishment of criminal guilt is one of them. The non-consensual ascertainment and enforcement of rights in issue between private parties is another. The termination of a right conferred by statute is not of that nature. That is so even where the basis for termination is satisfaction of the occurrence of conduct which, if proved on admissible evidence to the criminal standard, would constitute a criminal offence.'

They thought that if rights can be granted by Parliament, they can also be altered or withdrawn by Parliament. The Parliament was not exercising any judicial power. It simply decided in the public interest that these licences, which were the products of a tainted process, should be cancelled. While that might have resulted in detriment for the holders of the licences, this could not be 'equated with legislative punishment'.

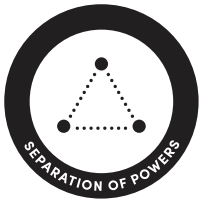
Conclusion

The separation of powers in the Commonwealth Constitution ensures that only courts, not Parliament, can convict people of crimes and impose punishment upon them.

Parliaments in Australia can still enact laws that have a retrospective effect. But if a criminal law was enacted with a retrospective effect, questions would arise as to whether this breached the separation of powers, particularly if it left the courts with a merely formal role of convicting people for acts that were already known to have taken place. This may undermine the decisional independence of the courts and prevent them from fulfilling their role in exercising judicial power.

The mere fact that a law disadvantages one group or another does not make it a bill of pains and penalties or in any way unconstitutional. Many laws are enacted that may alter existing rules or rights in a way that disadvantages people. It is only when the legislature starts exercising judicial power, or interferes with the law in such a way as to prevent the courts from properly exercising their judicial power, that a breach of the separation of powers in the Constitution will occur.





Topic 7.2 & 9.4: Lesson Two

Why Parliament cannot exercise judicial power



AUSTRALIAN
CONSTITUTION
CENTRE

Time/Lesson	Learning Goal
<ul style="list-style-type: none">1 hour	To understand that Parliament cannot judge and punish people as this is exclusively a judicial power.
Rationale	Success Criteria
Students need to understand why Parliaments are denied the power to judge and punish people and why such matters are left exclusively to the courts.	Students can <u>explain</u> the separation of powers and why judging and punishing people is a matter for the courts and not for Parliament.
Teaching Reference Document	
<ul style="list-style-type: none">TRD 70: <u>Why Parliament can no longer convict you of treason and order that you be beheaded</u> Separation of powers (Student Resource)TRD 71: <u>Why Parliament can no longer convict you of treason and order that you be beheaded</u> Separation of powers (Teacher Resource)	
Resources	
Access to the internet	
Tuning In	
<ul style="list-style-type: none">Think/Pair/ShareShould Parliament be able to make laws that apply retrospectively? Does it make a difference if the law is to fix a mistake or unintended consequence as opposed to a law that makes something that was done innocently in the past a criminal offence?Remember and revise topic 6.3 & 7.1, Unit 7: TRD 56 'Separation of Powers -Overview: the three institutions or branches of government'.	
Teacher Instruction	
<ul style="list-style-type: none">EXPLAIN: Many students will be aware from 'Horrible Histories' about the Tudors and the beheading of two of the wives of Henry VIII. Place this in the context of the separation of powers. Katherine Howard, Henry's fifth wife, was beheaded after Parliament passed a bill of attainder finding her guilty of treason, and condemning her to death. Bills of attainder have been used by Parliaments to condemn and punish people without the need to apply all the rules of fairness and evidence that a court would use. The use of political power can be unfair.DISCUSS: Why did the people who wrote the United States Constitution insert a provision that prohibits bills of attainder and retrospective criminal laws? Did they have good reason to distrust government? Did the people who wrote the Australian Constitution show greater trust in governments because they did not include the same express provision? Or did they believe that the separation of powers they created both in the text (sections 1, 61 and 71 of the Constitution) and the structure of the Constitution (the first three separate chapters) was enough to prevent Parliament from behaving in such a way?	

Group/Independent Learning

- **Read:** CEFA TRD 'Why Parliament can no longer convict you of treason and order that you be beheaded' (Student Resource).
- **QUESTIONS:**
 - What is a bill of attainder?
 - Which branch has the power to judge and punish people for wrongdoing?
 - Why is it better for courts to have this power?

Wrapping It Up

- **HYPOTHETICAL:** Imagine the class chooses a group of four students to decide on classroom rules. The rules that they set include the following:
 1. Anthea is really annoying so she must always sit at the back of the class so we don't have to look at her.
 2. Everyone who has used a glitter pen in class this year shall be punished with detention.
 3. Anyone who has stolen money from a classmate must pay it back and apologise.
- Which of these rules is like a bill of attainder? Is the group of four going beyond its power in making any of these rules? Which rules apply to things that have happened in the past? Are they unfair? Does it matter that when a person stole money in the past they knew it was wrong, but they couldn't have known that using a glitter pen was wrong?

Differentiation/Enrichment

Students debate whether it is always wrong to apply a law with retrospective effect or whether sometimes it is appropriate to do this when it is necessary for a particular purpose such as keeping people safe or to righting a wrong. Students think of examples of hypothetical retrospective laws that might be acceptable and others which seem to be unfair and wrong.

Assessment Strategies

Teacher assesses the capacity of students to identify and distinguish between different examples.

Extension Lessons and Activities

- Students research the history of someone who was subject to a bill of attainder (eg Thomas Cromwell, Katharine Howard, Richard III, Oliver Cromwell, the Duke of Monmouth, Archibald Cameron or Lord Edward FitzGerald). Why was a bill of attainder passed against them? What had they done? How were they punished? Was it fair? Why does such action no longer occur?
- During World War II, Winston Churchill suggested that Nazi leaders, such as Hitler, if captured, should be immediately executed rather than being put on trial. He said that it could be done legally if Parliament passed a bill of attainder. His colleagues persuaded him that war crimes trials before a court were necessary, and that the Americans and Russians would insist upon it. Churchill then changed his mind. The Nuremberg Trials were held after the war ended. Should a bill of attainder be used as a quick and decisive way of dealing with war criminals or is it better to obtain evidence and show fairness?