

CONSTITUTIONALISM

CONSTITUTIONALISM (p 2)

- A constitutional system of government
- Adherence to constitutional principles
- Description of how power is distributed and which institution can do something with the force of law.
- Limitation on power – SoP

Two functions of Constitutional Law:

- Stabilises and secures basis for exercise of government power
- Limits the power of government

The Constitution

- The *UK Parliament* enacted the *Commonwealth of Australia Constitution Act* on 9 July 1900, for commencement on 1 January 1901.
- **What is a constitution?**
 - Sir Ivor Jennings – a document setting out ‘the rules governing the composition, powers and methods of operation of the main institutions of government, and the general principles applicable to their relations to the citizens’
- **Classifications** include:
 - Written - *Commonwealth of Australia Constitution Act 1900*
 - Unwritten – common law and constitutional conventions.
 - Rigid – can only be amended through initiation by Parliament and referendum (s 28).

Political vs. Legal Constitutionalism - Tomkins

Those who exercise political power held to constitutional account by:

Political constitutionalism → public law and the Parliament.

- Govt held to account through political institutions / Parliament
- Relies on robust and rigour of political process, transparent, participatory, representative and deliberative politics.
- Potential concern - difficult to achieve in practice and issues w/ discrimination against minorities in democracy based on majority rule.
- Requires:
 - Interested voters, politicians who take their jobs serious / deliver what they say, frequency of term.
- Downsides:
 - Lack of dynamic culture, neglectful of minorities, politicians are not likely to change unpopular policies during their election term.

Legal constitutionalism → the law and the Judiciary.

- Judicial independence - from other branches of govt.
- Effective when judiciary take seriously the idea that law ought to be used to hold the Government to account.
- No inherent discrimination in favour of the majority.
- Downsides:
 - Court may become too politicised –
 - Judges are not elected (democratically), and not accountable, or representative (e.g. male, white, old, upper-middle class lawyers).
 - Court expense high to fund litigation to challenge legislation
 - Capacity to follow up and enforcement of decisions.
 - Equally expensive to majorities and minorities.

SEPARATION OF POWERS (p 25)

- Structure of the *Constitution* implies that functions should be vested in independent institutions to limit the **arbitrary use of power**.
 - 1) **Legislature** – Parliament makes / amends laws.
 - 2) **Executive** – Government administers laws (eg. social welfare, healthcare, public housing, education, transport, defence, social justice)
 - 3) **Judiciary** – Courts interpret and apply the law.
- **4th Integrity Branch** - forced integrity, monitoring to ensure accountability of government e.g. ICAC (commission on corruption), executive delegation of powers (e.g. privatisation of government responsibilities), increases public awareness.

RULE OF LAW

RULE OF LAW (p. 16)

- Order, certainty and predictability
- Accountable government – Parliament are responsible for their actions
- Fairness and and/or justice – all citizens are treated in the same way, just treatment of all people
- Individual liberty and freedom
- Sustainable economic development – recourse through the law that individuals can protect their rights, the right to sue and be sued, enables people to invest their money

Formal vs Substantive Concepts - Stone

Formal

- **Form of law and process by which it's made** – proper observation of forms and procedures required for valid law-making. Focus on proper sources and forms of legality.
- Qualities of law – public, general, prospective, clarity

Substantive

- **Content of the law - "good laws"** - comply w/ justice and moral principles –
- Qualities of law – just, moral, protect human rights, substantive quality or social welfare

AV Dicey's Notion of the Rule of Law

Three elements, (p 18):

- 1) **Absolute supremacy of the law**
 - No man punishable except for breach of law established in ordinary legal manner.
- 2) **Equality before the law**
 - Everyone subject to the law, inc. the King.
- 3) **Law of the Constitution**
 - Faith in capacity for rights of individuals to be secured. Rights protection inherent to operation of the system
 - Courts role in statutory interpretation.
 - Parliament makes the laws and judiciary interpret meaning of statutes (statutory interpretation).

Criticism:

- Too formalistic
- Ignores the dimension of constitutionalism concern within limits of power
- Little concern with substantive equality
- Out of date in his reference to the UK legal system and at the time of his writing.

Rule of Law in Britain

- **No written constitution** – rule of law exists due to **widely shared belief and commitment** among public and govt. officials, that govt. operates within **limiting framework of the law**.
- **The law ruled** - unquestioned belief in rule of law.
- **Development of common law** – customs and application of legal principles through reasoning of judges.
- **Accountability of Govt. officials** - to ordinary law.
- **Unwritten constitution** is comprised of the Magna Carta and key legislation (ie. Act of Settlement, Septennial Act – duration of parliament, Habeas Corpus Act) and shared complex of understandings about law and government.
- **Legal Positivism** – 19th Century, means law is product of sovereign legislative will and serves social purposes. Therefore, judges cannot override the legislation.

Tamahana – Political Cultural Norms

- Law can serve as check against abuse of power.
- Formal theories focus on proper sources and form of legality.
- Substantive theories require the content of the law to comply with justice / moral principles.
- People abide by the rules in place because of their social and political beliefs

Conclusion

- Risk that rule of law might become rule by judges
- Giving judges last say or decisive say over legal limits of power is not everyone's preference, when RoL in operation.
- Non judicial methods for making government accountable are important.

A CONSTITUTIONAL HYBRID

Types of Constitutionalism

British Constitutionalism –

- Parliamentary Sovereignty
- Responsible and representative government.
- Constitutional monarchy
- Bicameral parliament
- No Bill of Rights
- Unwritten norms – constitutional conventions (PM in Lower House and a Cabinet)

American Constitutionalism –

- Written and rigid Constitution
- Federalism (enumerated federal and residual State powers)
- Judicial Review (Constitutional)
- Separation of Powers

Australia's 'Washminster' Inheritance

- i. Responsible government
- ii. Parliamentary sovereignty
- iii. Constitutional conventions

History of development

UK History

- **No single defining 'constitutional moment'** - Britain's development of institutions, traditions and constitutional government.
- UK Constitution – a result of evolution of political, social and economic experiences.
- Comprised of statute law, common law and constitutional conventions.

US History

- **Declaration of independence (1776)**- written constitution approved after American War of Independence.
- Bill of Rights adopted 10 amendments in 1791, with addition of 17 amendments since.

British Constitutionalism

Key documents:

- ***Magna Carta (1215)***
Crown to observe and respect subjects' rights and liberties as specified in the charters; catalogue of restrictions on the power of the king. **Limited arbitrary exercise of monarchical power.**
- ***Petition of Rights (1628)***
- Parliamentary forces prevailed over the Kings, rejected taxation without Parliament's consent.
- ***Bill of Rights (renamed Parliament Recognition Act) (1689)***
Ultimate Sovereignty was vested in the King in Parliament. Fundamentals of the constitution set out – laws, taxes, defence require consent of Parliament, and formally recognised Parliamentary privileges inc. right to free speech and debate, right to regulate own proceedings free of the Crown or Courts.

- ***Act of Settlement (1701)*** established modern government-parliament relations:
 - s 4 – requires formal confirmation of advice given to King by Ministers in Privy Council;
 - s 6 – prohibited placement from sitting in Commons (ie. separation of King's Ministers from Parliament)
 - s 8 – removed possibility of Crown protection for those impeached by the Common – Ministers to maintain confidence of lower house to keep office. Secured tenure of judges.
- ***Reform Acts*** (vars.) - Extended franchise (right to vote), representative government / parliament.
- ***Parliament Acts (1911 and 1949)***
House of Lords (upper house)'s powers significantly qualified. Expected to defer to House of Commons on financial matters.

WESTMINSTER GOVERNMENT (p 60)

Representative Government

- Parliament is the sovereign power.
- Executive to rule according to the law and is responsible to Parliament.
- King appoints ministers to maintain the confidence of Parliament.

Responsible Government

- s 4 of the *Act of Settlement 1701* – powers for Parliament to ascertain on what advice / which ministers the King is acting. King cannot exercise government power on his own volition.
- Dicey – ***ministerial responsibility*** means legal responsibility of every minister for all acts of the Crown, additionally constitutional requirement of individual and collective responsibility – ministers answer to Parliament for all govt. decisions.

Parliamentary Sovereignty

AV Dicey, (p .63)

- Parliament is an absolutely sovereign legislature
- Power to make or unmake any law whatever, no entity can override the legislation of Parliament."
- Rights protection based on parliamentary drafting of legislation and common law interpretation.
- Dislikes legal codification of rights (p 1149)
- Limitations:
 - External – undesirable legislation, people may just disobey the law.
 - Internal – exercised according to its character, for example – moral and social character of circumstances.

TRS Allan's Limitations on Parliamentary Sovereignty, (p. 68).

- Parliament must remain a representative assembly.
- Parliament must not enact legislation undermining the democratic basis of established institutions.

A CONSTITUTIONAL HYBRID

TRS Allan – cont'd

- Common law is the constraint on Parliament's power through statutory interpretation.
- Legal authority of statute depends on its "*compatibility with the central core morality which constitutes the rule of law.*"
- Challenges to legal and political:
 - HR Act 1985 (UK)
 - EU treaties
- Council of Europe – European Court of HR decides on cases, many resulting in amendments to legislation.

Parliamentary Sovereignty – a threat to RoL?

AGAINST

Q Walker, (p 65).

- Absolutism, Parliament has absolute power.
- Inconsistent with fundamental constitutional rules.

WI Jennings, (p. 66-67).

- Courts have possible role in declaring legislation 'ultra vires' or beyond the powers of Parliament.
- Parliament does not actually have 'supreme' power.
- Dicey distinguishes between *legal* (parliament) and political (electors) sovereignty. But legal sovereignty is not supreme.

FOR

Goldsworth, (p 65-66)

- Practical necessity requires a single law-making power
- King exercised absolute law-making power, conferred by God
- Parliament was the highest court
- Generational change
- All subjects represented in Parliament
- Representative of collective wisdom
- Checks and balances between King, commons and lords
- Judges could not be trusted with overriding power.

Dicey, (p 64).

- Rule of law may be used to express that constitutional laws are the consequence of rights of individuals, defined and enforced by courts.

Constitutional Conventions

AV Dicey, (p 71).

- Regulate the conduct of members of the sovereign power, Ministry and officials,
- Not laws enforceable by courts.

NW Barber – Nature of Constitutional Conventions, (p. 71-72)

- Definition: non-legal constitutional rules which limit the power of the monarch, define the office of the Prime Minister and have the relationship between Westminster and the devolved institutions.
- Subject to change – new conventions can emerge.
- Conformity to constitutional rules is standard conduct

Marshall – Positive vs. Critical Morality

- **'positive':**
 - Wheare - conventions accepted as obligatory rule of behaviour.
 - Philips - rules that regarded as binding.
 - No explanation as to the value or purpose of convention required.
- **'critical':**
 - Jennings - there must be a reason for the rule.
 - Marshall - conventions are the rules that the political actors ought to feel obligated by, if they have considered the precedents and reasons correctly.

THE US CONSTITUTION (p. 77)

Three Key Mechanisms (Gagler, p 79):

1) Representative government

2) Separation of Governmental Powers

To ensure checks and balances, and achieve a balanced government.

- Vertical – allocation of funds b/w federal and state govts to ensure no one govt. completely dominates citizens.
- Vertical – bicameral legislature (federal level)
 - The House of Representatives – chosen by the people
 - The Senate – chosen by legislatures of States ensures regional representation.
- Horizontal – separation of powers across legislature, executive and judiciary.

3) Judicial review –

Power to declare void any act of legislature or executive in contravention of the Constitution: see *Marbury v Madison* (Marshall CJ).

FEDERALISM (p 232)

Dicey

Two Conditions for a Federal System

- **Close connection** - Body of countries so closely connected (by locality, history, race etc.) as to be capable becoming a common nationality
- **National unity sentiment** - certain state of sentiments among the population of the unities which it is proposed to unite.

Three Consequences of Constitutional Supremacy

- 1) Federal government is weak government
 - Distribution of powers – no one authority in charge.
 - Checks and balances – waste of energy
 - Limits powers of each dept. of administration.
- 2) Conservatism
 - Written and rigid constitution
- 3) Legalism
 - Supremacy of the Constitution (spirit of legality)

Note – Dicey's view is against federalism, in favour of parliamentary sovereignty.

A CONSTITUTIONAL HYBRID

Australian Federalism (p 238)

- Federal and State Governments (each with its own governmental institutions) – s 49 and s 52
- Enumerated federal powers and residual States powers – ss 51 (ii-iii), 88, 99 – trade & commerce, tax.
- Federal Judiciary to decide if either level of government had exceeded its L, E or J powers
- Supremacy of federal laws over State laws in case of conflict
- Rigid constitution to entrench the framework - Equal representation in Senate – s 7
- Provision for respect and fairness of each State – s 117, 118, 92, 102.

Arguments for Federalism (Anne Twomey)

- **Check and balance on power**
- **Choice and diversity** – e.g. education differs across states, State capitals enable diversity of institutions (eg. art galleries)
- **Customised policies** - to meet the different needs in different parts of the country – close to the people it affects
- **Competition amongst States** - comparative results leads to improvement by competition.
- **Creativity and innovation** – States may innovate and improve, continual improvement with ability to try out new things – if successful to be taken up by other states
- **Cooperation** – discussion and development of ideas, limits extreme economic swings due to economic policy requiring cooperation of the States, better public scrutiny results in better outcomes.

Arguments Against Federalism

- Preference for more direct and unrestrained democracy at a national level.
- Little respect for more localised democracy that State governments provide

JUDICIAL REVIEW (p 88)

Justification for JR of Constitutional Validity

- **The Constitution is a superior law** and therefore some body is needed to ensure that it is complied with - *Marbury v Madison* (Marshall CJ)
- **Courts best placed to fill role**
 - a) it involves interpretation of laws (Marshall CJ); and
 - b) the judiciary is the 'least dangerous branch' (Hamilton)
- Principle in *Marbury* treated as 'axiomatic' at federal level in Australia – *Communist Party* case.
- Framers assumed judicial review would exist – s 30 *Judiciary Act 1903* (Cth) via s 76 of the *Constitution*.
- Friedman (p 82) – Constitution created US Supreme Court w/ jurisdiction, but Congress can 'ordain and establish' inferior courts if necessary.
- Lucas (p. 86) – Supreme Court not sovereign body, can only adjudicate disputed cases, not create laws.

- *Cooper v Aaron 385 US*
 - Court can strike down parliamentary legislation to protect the constitutional fundamental rights and freedoms of citizens (eg. protection of rights of Negro children in by desegregation in schools)

Alternatives to Judicial Review

- Legislative veto on federal questions (Madison's proposal that the national legislature have power to veto laws passed by the States)
- Proposal that a 'Council of Revision' have power to exercise review of national legislation prior to enactment.
- Rely on the 4th branch – independent to ensure that all three branches are operating effectively