LAWS1141 Revision Notes

Sample Notes

Week 1B – Constitutionalism and the Rule of Law

1B CONSTITUTIONALISM AND THE RULE OF LAW

Reading:

Constitutionalism

- B&W 2-4 (Chapter 1, section 1)
- B&W 4-6 (Chapter 1, section 2)
- B&W 25-29 (Chapter 1, section 6)

The Rule of Law

- B&W 16-25 (Chapter 1, section 5)

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1. Engage with two key concepts: **constitutionalism** and **rule of law**.

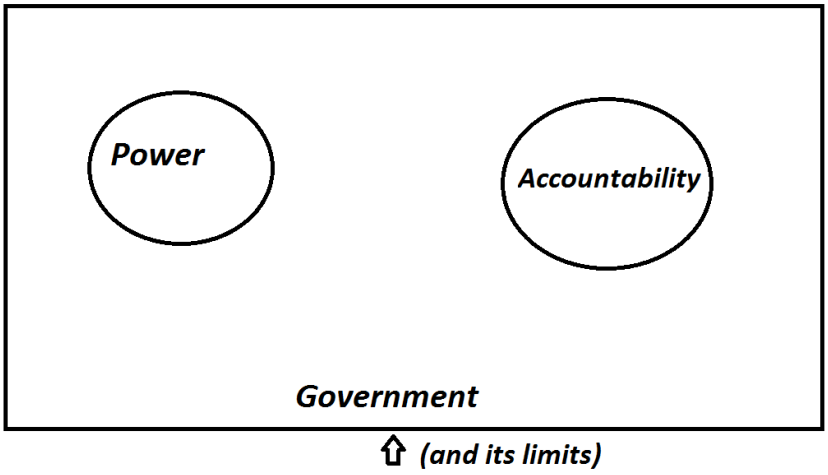
2. Explore the **applications** of these concepts within the system of Australian public law.

Australia: A Constitutional Hybrid

- Spigelman argues that public law involves three branches:
    1. Constitutional law
    2. Administrative law
    3. Criminal Law

- The constitution is the starting point to solve public law problems, rather than the endpoint because it establishes, confers and limits power of government institutions, i.e. how they are to be held accountable.

- The 'logic' of public law can be described in terms of power and accountability (and their limitations) in the government context:



'Washminster mutation' – Hybrid of UK/US models

- The Australian Constitution, often termed a 'Washminster mutation' is a hybrid of British Westminster and American influences.
- The symbolic façade of the Australian Constitution is the monarchy (incl. Governor-General) who possess important powers but have little scope to act independently of advice.

- **Representative government –** government by the people or citizens through their elected representatives.
- **Responsible government –** the executive branch is integrated into and responsible to Parliament for its actions.
    - Responsible government is significant because we don't directly elect the executive, but through its integration into the legislature they are held accountable to the people.
    - Ministers must maintain the confidence of the house (i.e. support of a majority of MPs in the lower house, where government is formed)

- While the British model can be said to focus on a single consolidated chain of command through which the power of the people is wielded; and the US model is influenced by a desire to protect people from government through institutional dismemberment and divestment – every constitutional system arguably fulfils the same functions:
    - Establish a strong governmental chain of command
    - Limiting government power
- In Australia for example, the constitutional monarchy means 'power embodied in the idea of a monarchy, but limited by the ideals and principles of constitutionalism.'

Classifications of Constitutionalism

B&W (3-4)

- Definitions of constitutional law:

- **AV Dicey** – *"all rules which directly or indirectly affect the distribution or the exercise of the sovereign power in the state"*
- **Sir Ivor Jennings –** *"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.'* (the last part is important as it is often thought that the British understanding of constitutional law confines it merely to a formal establishment of a framework irrespective of the content and principles of the law)
- **French CJ –** *'adherence in theory and practice to a system of government in which* ***governmental powers****, be they legislative, executive or judicial, are* ***limited by rules*** *which may be written or unwritten and may or may not be justiciable.'*
- **Adam Tomkins –** constitutions establish *institutions* and their inter-relationships, explain the place/role of *the people* and express political *values* to which a particular society lays claim.
- **Giovanni Sartori -** a constitution should not only formalise the power structure of a given country, but establish a fundamental law or fundamental set of principles institutionally which restrict arbitrary power and ensure 'limited government.'

- Types of constitutions:
  - **Nominal constitutions –** formalise power structure but lack any engagement with fundamental organising principles such as separation of powers, federalism, responsible government and representative government.
    - *E.g. A dictator formalising power by entrenching a hereditary system*
  - **Façade constitutions –** Only play lip service to these principles but do not ensure them.
    - *E.g. Acknowledging these principles, but not really entrenching or institutionalising them.*

  - Australia's constitution is neither façade nor nominal because it addresses these fundamental principles directly and substantially; and doesn't just ignore them as in a nominal structure.

  - Constitutions may be **written** (single solemn document) or **unwritten** (e.g. UK, where components/principles exist in a number of fundamental statutes and in judicial decisions expounding the common law.
    - The UK has an unwritten constitution secured by strong cultural and societal adherence to law.
    - Australia has an unwritten constitution consisting of the Constitution Act, Statute of Westminster, constitutional conventions and also **judicial interpretations of these acts**.

- **Constitutional conventions** – unwritten understandings developed as a matter of practical convenience or reflecting fundamental beliefs. Complement written elements.
    - *E.g. The Prime Minister is not mentioned in the Constitution, but recall that power is usually created by constitutional convention in the Westminster system. Remember that the Constitution was the starting point, not the endpoint.*
    - These conventions are not written anywhere, creating an interesting question on convention vs. constitution. Remember that the Australian Constitution is unwritten – a combination of statute, common law and unwritten conventions.

- **Flexible constitutions –** can be changed by ordinary legislation
- **Rigid constitutions –** require special procedures, e.g. referendum
    - Federal level – primarily rigid (e.g. referendum) but also includes flexible elements as it includes both written/unwritten elements, judicial review/constitutional conventions
    - State level – primarily flexible

Political vs Legal Constitutionalism

B&W (4-6)

- Constitutions also make provisions for **regulating relations between institutions**, e.g. when executive, legislative and judiciary disagree on an issue.
    - US – Supreme Court has the final word.
    - UK – Parliament, i.e. 'parliamentary sovereignty'
    - Other provisions include federalism, separation of powers, rule of law, principle of ministerial responsibility, etc.

- A constitution may either regulate government power through political or legal means:
    - **Political constitutionalism –** government held accountable through political mechanisms and institutions, e.g. Parliament, question time, debate, committees of inquiry.
    - Requires strong and vibrant politics, serious commitment to scrutiny function, independence from government and a socio-cultural commitment to the process.
    - Parts of the government are political in nature, but 'political institutions' is a broader theme encompassing bodies like the Human Rights Commission and **the people** themselves.
    - Limitations:
        - Values such as transparency, representativeness, participatory nature are harder to implement in practice.

        - Democracy is majoritarian and difficult to represent broad interests, especially minorities

    - **Legal constitutionalism –** government held accountable principally through law and courts, e.g. sue the government or seek a form of judicial review
        - Requires judicial independence, serious commitment to the scrutiny function. Relies on the law and interpretation/application of the law by courts. Must be a deeply-seated socio-cultural belief that the law is a tool of accountability.
        - Limitations:
            - Court process is notoriously expensive and access to courts is limited to the well-resourced. However, accessibility is equal, i.e. equally expensive for both majorities and minorities
            - Interpretation/application of constitution by an unelected judiciary – not accountable, nor representative of the people or their will?
            - How to enforce/implement judgment? i.e. if government found to conduct unlawful acts, what then?

    - Australian system strongly adheres to political constitutionalism, leavened by a commitment to legal constitutionalism at the federal level, i.e. **'Washminster mutation'**
    - It is a recurrent challenge for the HCA to determine the extent of dominance of either system. Over time, different ways have been found to define the appropriate balance *(B&W 6)*

Week 4A – The Path to Federation, The Acquisition of Legal Independence and Popular Sovereignty

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4A THE PATH TO FEDERATION, THE ACQUISITION OF LEGAL INDEPENDENCE AND POPULAR SOVEREIGNTY

Reading:

The *Colonial Laws Validity Act 1865* (Imp)
- B&W 98-102 (Chapter 3, section 2)

Federation
- B&W 102-107 (Chapter 3, section 3)

The Colonial Legacy and the Statute of Westminster
- B&W 107-111 (Chapter 3, sections 4 and 5 to end of para [3.52])

The Australia Act and popular sovereignty
- B&W 121-131 (Chapter 3, sections 7-8)

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1. Path to federation and legal independence

2. Popular sovereignty

Path to Federation and Legal Independence

- **1890 Melbourne Conference –** first constitutional convention where various issues were discussed and debated, the outcome being a commitment to reconvene in 1891
- **1891 National Australasian Convention: Sydney –** produced a draft constitution, however when it was put to the people it was not very popular

- **1897 –** New constitutional conventions in Adelaide, Sydney and Melbourne with further discussion and debate.

- **1898/99 –** New referenda with majorities in 3 of the 4 colonies (NSW is the exception). Draft constitution redebated and amended with new referenda held in every colony except for Western Australia and attains a majority in every colony.

- **1900 –** Request made to Imperial Parliament to pass the Constitution as statute. It does so, substantially in the same form (subject to some amendments relating to the Privy Council). The Bill is passed 9 July, 1900. On 31 July, 1900 – WA has a referendum and joins the Federation.
- **1901 –** The Australian Constitution comes into force.

- **Why did we federate?**
    - **Tariffs** – the colonies wanted a single tariff policy, although the nature of this policy was unsettled. Some colonies were pro-free trade (e.g. NSW), while others were protectionist (e.g. Victoria)
    - **Defence** – expansion of French and German colonies in the region
    - **Doctrine of extraterritoriality** – Wouldn't have had a major day-to-day impact. Sometimes a sovereign state needs to make extra-territorial laws (e.g. shipping, conduct of citizens beyond its jurisdiction, defence). Some colonies (including Fiji, New Zealand) combined to form the 'Federal Council of Australasia' in 1885 with a commitment to having mirroring legislation to provide uniformity so that judicial determination in one colony could be enforced in another.
- **Obstacles**
    - The larger colonies were resentful of having to potentially subsidise the smaller colonies. The smaller colonies were worried about representation, i.e. 'tyranny' of larger colonies.
        - Horizontal fiscal equalisation – most revenue (80%) is generated by the Federal Government while most expenditure is undertaken by the States who fund costly areas such as health and education. The States

therefore need transfer of federal revenue and the basis of redistribution is not made on the basis of contribution of costs, but on population. So in some ways, the concerns of larger colonies about subsidisation has come to pass.

- There were different ideologies on trade, the structure of Parliament and social policy (i.e. some were more progressive, others were not -> these States were concerned about having the autonomy to set their own social policies)
- The drafters were aware of other federal models – some key drafters were influenced by the American system which hadn't entirely lived up to expectations, e.g. fundamental problems led to the Civil War -> we can trace the origins of the conflict to the very different ideologies of the constituent states of the US)

- **Federation – s 25 and s 117**
  - Tasmanian Attorney-General Andrew Inglis Clark argued at the 1891 Convention for the inclusion of a range of provisions protecting civil and political rights. He did secure some rights (ss 80, 116) but he was unable to secure support for a clause based on the 14th Amendment to the US Constitution (equal protection, enshrines rights and due process) – would have explicitly guaranteed rights. The watered down version of these debates resulted in ss 25 and 117.
    - **s 25 – the 'penalty provision' on States who did not extend their voting franchise to non-whites and consequently experienced lower Federal representation.**
    - **S 117 – an anti-discrimination clause**
  - The delegates to the 1897-1898 Conventions rejected these clauses, revealing some important themes behind the drafting of the Australian Constitution – influenced by 19th century English writers such as Dicey, the framers argued that civil liberties could be adequately protected through the common law and political processes of parliament without the need for explicitly written guarantees. The clause was also rejected because the delegates wanted to maintain the power of the States to discriminate on the basis of race.
  - However, the inclusion of these clauses, however watered down, has an implication for Diceyan political constitutionalism – our system doesn't represent a pure Diceyan conception in the way the UK.