

IPL Notes

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1 Nature of Constitutional Law in Australia

1.1 Parliamentary Sovereignty

Dicey's first pillar

- Australia - not absolutely sovereign because of Constitution (as opposed to UK)
- Parliament is representative of the people. According to Dicey, it is better to have the elected representatives in power. They are answerable to the people and if they do not legislate for the people they will be voted out.
- Issues:
 - Parliament is representative of the people. According to Dicey, it is better to have the elected representatives in power. They are answerable to the people and if they do not legislate for the people they will be voted out.
 - Undemocratic. If Parliament was absolutely sovereign they could abolish elections;
 - Theory fails to incorporate checks on power and can result in unjust laws. Parliament can be swayed by popularism (“tyranny of majority”) – views of majority can be used to circumscribe minority or unpopular groups; and
 - Parliament = Executive. Executive formed from party with most seats in Lower House of Parliament.
 - Parliament work along party lines. Thus Executive arguably has control over Parliament, and not vice versa, so wishes of Executive prevail. So it would be Executive Sovereignty and not Parliamentary sovereignty, which works against original purpose.

1.2 Rule of Law

Dicey's second pillar

- No arbitrary power

- Equality before the law: *Green v The Queen* [1997] HCA 50 - homosexual provocation case - everybody entitled to equality before law - objective standard of human self-control rather than subjective standard as then people could define their own standard of self-control.
- May not be precisely defined but constituent elements: *Sagar v O'Sullivan* (2011) 193 FCR 311
- Due process: *Adler v District Court of New South Wales* (1990) 19 NSWLR 317
 - Priestley JA said that the Due Process Acts were designed to ensure that persons would be tried for crimes only in the courts of common law and only by recognised procedures. His view was referred to with apparent approval by Mason CJ and McHugh J as well as Dawson J in *Dietrich v The Queen* (1992) 177 CLR 292.

1.3 Separation of Powers

1.3.1 Constitutional Basis

- Implied
- Literally/necessary inference from 3 Chapters of constitution
 - Fundamental in Australian Public Law: *Australian Capital Television Pty Ltd v Commonwealth* (1992)
- Weak between executive and legislature: no pure separation of powers since:
 1. Under Responsible government there is a clear link between the Legislature and Executive (Executive drawn from Lower House, PM is also an MP- member of Parliament)
 2. Undermined by Executive making regulations as delegated law-maker;