

CONSTITUTIONALISM

The Australian Constitution is a hybrid of the UK (representative and responsible government, constitutional monarchy) and the US (federalism, separation of powers, judicial review of legislative and executive action).

The Commonwealth Constitution is both written (the actual document, established in s 9 of the *Commonwealth of Australia Constitution Act 1900* (Cth, Imp) and supplemented by the *Statute of Westminster 1931* (Imp) and the *Australia Act 1986* (Cth)) and unwritten (constitutional conventions, reflecting fundamental government practices). The Constitution establishes the institutions of government and provides their authority as well as placing limitations upon it. The Commonwealth Constitution is rigid (it can only be changed through referendum); and stable (it has only been amended 8 times). The State Constitutions are flexible (they may be changed through ordinary legislation).

Political constitutionalism: The government is held accountable for their exercise of power through political means and institutions (Parliamentary scrutiny); Parliament is the final determining branch of government. To be effective, there must be a strong political structure, governmental independence, and high public representation. Strengths of political constitutionalism are that politicians are democratically elected and hence representative and accountable; weaknesses are that democratic accountability may fail to protect minorities. Used in the UK.

Legal constitutionalism: The government is held accountable for their exercise of power through legal means and institutions (judicial review); the judiciary is the final determining branch of government. To be effective, there must be an independent judiciary with the means to carry out their orders. Strengths of legal constitutionalism is that it protects minority groups; weaknesses are that access to legal remedies is gated by financial means, judges are not democratically elected/accountable/representative, and the government may ignore the court's decisions. Used in the US.

Australia has a *mix of political and legal constitutionalism*. Judicial review is available but only in cases of constitutional inconsistency (there is no Bill of Rights in Australia); statutory law overrides common law; to some extent the courts defer to Parliament in determining the reach of governmental power; representative and responsible government exist.

RULE OF LAW

Tamanaha, p 16: Globally endorsed but difficult to define – may be either formal (concerned with legislative process) or substantive (concerned with content of law). A constitution establishes and limits the powers of a government and its relationship with citizens.

Dicey, p 18: Requires legal punishment for a breach of law but not for any other reason; requires that all persons are equal under the law; requires that the courts define and enforce rules determining the rights of the individual.

Jennings, p 20: The English liberal sense of the rule of law requires that executive power is derived from, and limited by, Parliamentary legislation and judicial decisions. The rule of law requires equality and liberty; the substantive rule of law requires an examination of how the laws affect the people.

Stone, p 22: rule of law does not have to be identical for every person, and cannot be limited to a set of formal propositions. Individual ethical considerations are required. Human rights are intrinsically connected to the legislative process and must be considered in a substantive rule of law.

International Commission of Jurists, p 23: rule of law requires that all State power be derived from and exercised in accordance with the law; and that the law is based on respect for the “supreme value of human personality”.

Bingham, p 24: substantive rule of law requires: accessibility and clarity, lack of discretionary process, equal application except for under objective differences, protection of fundamental human rights, resolution of civil disputes, reasonable exercise of executive power, fair judicial processes, and compliance by the State with international law.

Stephen, p 24: rule of law requires: the law applying to the government as well as citizens, the administrators of the law being independent from the government, accessible courts, equal operation of law, and substantive concerns.

- That the Commonwealth's appropriation and expenditure of funds under the DHFA was invalid (not considered by HCA – issues of standing, and even if money was unlawfully appropriated the executive can still enter into contract (*NSW v Bardolph*, HCA 1934)).
- That the Commonwealth lacked executive power to enter the DHFA make payments to SUQ (the issue before the Court). No statute established the NSCP or authorised payments; the funding was not provided under s 96; s 81 does not confer a substantive spending power (*Pape v Federal Commissioner of Taxation*, HCA 2009).

The Commonwealth made the following arguments:

- *Broad argument*: The Commonwealth executive government holds the same capacity to spend and enter into contracts as an ordinary legal person.
- *Narrow argument*: The Commonwealth executive government holds capacity to spend and enter into contracts on any area in which the Commonwealth Parliament has legislative capacity.

The majority rejected both arguments, struck down the DHFA and payments made to SUQ as they were not supported by actual legislation. **Heydon J** dissented, on the basis that federal executive power of contracting and spending *did* extend to any area in which the Commonwealth Parliament had legislative capacity.

Issues raised by the *School Chaplains Case* include:

- Issues with responsible government (if Commonwealth executive holds unlimited spending power, they may spend money on matters that Commonwealth Parliament have no legislative capacity on; this means that legislation regulating expenditure could not be passed and executive accountability is reduced)
- Issues with representative government at federal level (Commonwealth executive is bypassing Parliament)
- Issues with representative government at State level (Commonwealth executive is bypassing State executive)
- Issues of federalism at federal level (Commonwealth executive is bypassing State Parliament)
- Issues of federalism relating to the Senate (bypassing the Senate is bypassing State interests)
- Issues of centralisation of power (continued trend of power moving from States to Commonwealth)

Directly following the case the Commonwealth Parliament passed the *Financial Framework Legislation Amendment Act (No 3) 2012* (Cth) to provide support for federal programs in a questionable constitutional situation. The constitutional validity of this Act is uncertain but has not been challenged.

Executive Accountability

Appleby et al, Moodle extract:

Executive accountability mechanisms can be more economical, expansive, flexible, and useful than judicial review. Executive accountability mechanisms are not limited to overturning illegal decisions; they can assess the merits of a decision, and may also remake a decision rather than simply overturning it. Available mechanisms include:

- Internal review of decisions (a different officer in the same agency reconsidering the matter and making a fresh decision)
- Merits review by administrative tribunals
 - o Primarily review decisions of executive officers
 - o Either generalist (wide but non-plenary jurisdiction) or specialist
 - o Exist at state and federal levels
 - o Can review merits, not just legality, of decision made
 - o Are independent of decision-maker and government
 - o All members have security of tenure
 - o Policies of executive government considered but not blindly applied
 - o Quasi-judicial system allows flexibility of operation, lower costs and formality
 - o Decisions are not binding precedent but are “highly persuasive”
- Ombudsman schemes
 - o Ombudsman exists in Commonwealth and all States
 - o Supervises the executive and safeguards rights of individuals

- Centralising some areas of legislation increases efficiency, but States retain some power to legislate for their individual needs;
- More democratic through double democracy;
- Differences in State laws allows freedom of choice by citizens.

Disadvantages of the federal system:

- Weak government at each level and in each institution, as well as lack of coordination between governments;
- Tendency to produce conservatism and not respond to changes as needed;
- Predominance of judiciary leads to questions about democratic representation;
- States lose significant power to the federal government, and fiscal imbalances arise;
- Inconsistencies between State institutions mean some States may not meet needs of citizens;
- Public uncertainty about government responsibility and accountability.

History of Federalism:

- Coordinate federalism (1901-1920; state and federal governments were independent and equal)
- Cooperative federalism (1920-~1939; state and federal governments form agreements)
- Coercive federalism (~1939-1975; federal government coerces state governments through legislation)
- Coordinative federalism (1975-1980; state and federal governments coordinate policy)
- Collaborative federalism (1980-today; state and federal governments collaborate in a formalised, managerial approach)

Nowadays most public policy issues are addressed through *intergovernmental agreements*, signed off at COAG meetings between the Commonwealth and State governments. These are not legally binding, only politically convenient; they may require the enactment of laws by the Commonwealth or State Parliaments. Ostensibly a form of cooperative federalism; this may disguise a fundamentally coercive relationship.

Referrals of Power:

- *Public Vehicles Licensing Case* (1964, HCA): referrals of power under s 51(xxxvii) may validly include clauses that they may later be terminated by the State; the question of whether referral legislation can be ordinarily repealed is uncertain.
- *Thomas v Mowbray* (2007, HCA): referrals restricting “express amendments” to legislation to require approval by a majority of State and territory governments are invalid as they attempt to restrict the future exercise of legislative power by the federal Parliament (**Hayne J**); as they attempt to restrict the future exercise of legislative power by minority State Parliaments (**Callinan J**); and as they attempt to grant legislative power to the executive and breach the separation of powers (**Kirby J**).

Federal Financial Relations:

Vertical Fiscal Imbalance:

- Arises when the division of revenue available to the two levels of government (Commonwealth and State) is disproportionate to the division of spending responsibilities between the two levels.
- Occurs because the Commonwealth collects 80% of government taxation revenue but States perform the majority of public spending; causes the States to rely upon grants from the Commonwealth.
- *Matthews, p 279*: Vertical fiscal imbalance is caused by the concentration of financial power and flexible revenues in the federal government, as well as the rapid growth in the cost to the States of providing services. This causes financial reliance by the States upon the federal government; when this depends upon unilateral federal decisions, there is a loss of accountability and democratic control. State governments using political pressure to equalise bargaining power does not achieve vertical fiscal balance.
- The federal government may make grants to the States under s 96 of the Constitution, which allows for both general and specific payments to be made. The use of specific purpose payments in particular raises a number of issues: that the payments made may fail to accurately account for State expenditure; that the use of primarily specific purpose payments limits State autonomy and flexibility to meet community needs; that democratic accountability is lost as the link between taxation and spending decisions is broken; that Commonwealth grant

PARLIAMENTARY SOVEREIGNTY

Dicey, p 63: Responsible government requires parliamentary sovereignty (that Parliament can make or unmake any law, and that no other body can override parliamentary decisions). Voters have the right to elect Parliament, but no way of directly influencing Parliament. In this way Parliament holds legal sovereignty and the people hold political sovereignty. The existence of the common law is not inconsistent with parliamentary sovereignty, as it is subordinate to statute. There are two limits on parliamentary sovereignty: the *external limit* is that the people disobey or resist the laws made; the *internal limit* is that the legislature must pass popular laws in order to retain their position. Constitutional law includes the Constitution itself (written or unwritten) and constitutional conventions; the latter are not legally enforceable. General constitutional principles arose through the common law. Parliamentary sovereignty enforces the rule of law through manner and form requirements; courts only obey Parliamentary intention if it is properly expressed.

Walker, p 64: Dicey's claim in absolute parliamentary sovereignty is inaccurate and unsupported by legal authority and the constitution; rather, Parliament is supreme but not sovereign.

Goldsworthy, p 65: Parliamentary sovereignty was inaccurate but widely accepted. There are a number of beliefs leading to belief in parliamentary sovereignty: there must be a single and ultimate legislative power, the King exercised plenary legislative power with the consent of Parliament, Parliament was the highest court in the land, limitation of parliamentary sovereignty limited their power to react to extraordinary situations, each generation must be free to make and change laws as required by circumstance; Parliament was representative of society; within Parliament the King, Lords and Commons provide checks and balances upon one another; unelected judges could not be trusted with sovereign power, and to limit parliamentary power would be more dangerous than allowing parliamentary tyranny.

Jennings, p 66: The primary characteristic of the British constitution is parliamentary supremacy. This is in contrast with the US and other colonies who employ judicial review. Parliament does not hold supreme power (due to internal and external limits). Parliament holds legal sovereign (plenary legislative power), but not political sovereignty (electors may disobey parliamentary decisions). Parliament may also bind itself, limiting its further power.

Allan, p 68: Parliament is sovereign, and this is justified by its representative nature. Parliamentary sovereignty is limited by its adherence to democracy; judicial obedience is not required for statutes who destroy any recognisable form of democracy (the "blue-eyed babies" example). Parliament is restrained by political morality; if it ceased to be a representative legislative assembly or enacted legislation undermining democracy, the external limit would arise. The common law is the source of Parliament's power, and in turn acts as a constraint upon it.

R (Jackson) v Attorney General (2006): The supremacy of Parliament still applies in the UK; in Australia, parliamentary supremacy is limited significantly by the Constitution.

Barber, p 71: Constitutional conventions are not legal rules, but form a system of political morality underpinning constitutional order. There are two schools of understanding of conventions: positive morality (describing conventions without analysing their value or purpose) and critical morality (critically analysing the value and purpose of conventions). Under positive morality, constitutional conventions require:

- That people tend to act in conformity with the rule.
- That the rule forms part of the causal explanation for such actions.
- That a portion of the political community accepts the rule.
- That the rule is constitutional in nature.

Critical morality examines:

- The historical reason behind the rule.
- The psychological reason for why the rule is adhered to.
- The justificatory reason for why people should adhere to the rule. Sometimes there is no justification for conventions.

Note conventions are not judicially enforceable, but may be judicially noticed and influence statutory interpretation under the presumption that Parliament does not intend to breach conventions.

RIGHTS PROTECTION

History:

Williams, p 1142: Attempts to introduce a federal guarantee of rights in Australia include:

- Inglis Clark at the first Australasian Federal Convention in 1891;
- 1944 referendum – proposed temporary guarantees of free speech and expression, and to extend the s 116 guarantee of religious freedom to the States; defeated at 45% approval;
- Human Rights Bill 1973 – proposed to implement the International Convention on Civil and Political Rights in Australia through legislation; met strong opposition and was abandoned by Parliament;
- Australian Human Rights Bill 1985 – passed by the House of Representatives, withdrawn from the Senate, likely for political reasons;
- 1988 referendum – proposed to insert a new Chapter VIA: Rights and Freedoms into the Constitution; defeated nationally and in every State;
- *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) – creating an unenforceable “parliamentary scrutiny” model of human rights at Commonwealth level.

Attempts to introduce guarantees of rights at State level in Australia include:

- Constitution (Declaration of Rights) Bill 1959 (QLD) – introduced but never passed;
- NSW Standing Committee on Law and Justice rejects need for human rights law in 1999, on the basis that a Bill of Rights violates the separation of powers by granting the judiciary quasi-legislative power;
- *Human Rights Act 2004* (ACT) – creating an unenforceable “dialogue model” of human rights in ACT;
- *Charter of Human Rights and Responsibilities 2006* (Vic) – creating an unenforceable “dialogue model” of human rights in Victoria; challenged for breaching separation of powers in *Momcilovic v The Queen*, but HCA held that the power exercised was non-judicial – however, a similar national law probably could not contain a declaration of incompatibility under the stricter federal separation of powers)

Articles etc:

Henkin, p 1131: Human rights, which are defined under international instruments and conventions and are universal to all people (unalienable and need not be earned), include immunities (restrictions upon government interference with individuals) and resource claims (claims upon government action by individuals). Resource claims include liberties (both *from* detention, torture etc, and *to* free speech, free assembly etc) and rights to food, housing, and other basic needs. Human rights are claims upon society (or against the State), not against individuals. Human rights enjoy a presumption of inviolability, but are not absolutely inviolable; they may be abrogated to uphold national security or public order. The extent of the abrogation is limited to the extent absolutely required under the circumstances.

The United Nations Universal Declaration of Human Rights protects, *inter alia*:

- The right to life, liberty, and security of person;
- The right to not be held in slavery or servitude;
- The right to not be subject to torture or cruel, inhuman, or degrading punishment;
- The right for “men and women of full age” to marry and found a family, and to be entitled to equal rights before and during marriage, and during divorce; marriage requires consent of both spouses;
- The right to own property alone and in association, and to not be arbitrarily deprived of property;
- The right to freedom of thought, conscience, and religion; the right to teach, practice, worship, and observe religion;
- The right to freedom of opinion and expression;
- The right to freedom of peaceful assembly and association, and to not be compelled into association;
- The right to free fundamental education and access to higher education based on merit; the right to choose the education given to one’s children.

Complementary rights specific to indigenous peoples is set out in the UN Declaration on the Rights of Indigenous Peoples. Other rights are set out in the International Covenant on Civil and Political Rights (relating to the political and legal system, i.e. immunities), and the International Covenant on Economic, Social and Cultural Rights (relating to the