

Overview of the Australian System of Public Law

- UK: unwritten constitution, parliamentary sovereignty, responsible/representative government, political constitutionalism, constitutional monarchy, conventions.
- US: written constitution, federalism, separation of powers, legal constitutionalism, judicial review, bicameralism.
- Sir Ivor Jennings (1959: 33): 'constitution' = a document setting out "the rules governing the composition, powers and method of operation of the main institutions of government and the general principles applicable to their relations to the citizens."
- James Bryce (1901), adopted by Dicey (1959): flexible and rigid constitutions.
- Goldsworthy (2007): legal authority from UK Parliament, political authority from people of colonies; federalism from America, responsible government and rights from UK.
- Baron de Montesquieu (1749: 150): "Political liberty is to be found only where there is no abuse of power."
- Phillips and Jackson (1987): true distinction between powers in their procedure rather than nature; complete separation of powers not possible, rather a check of one power by another.
- Williams (2001: 376): "Judicial review involves the High Court assessing governmental action for consistency with the Constitution"; pros and cons of judicial review.
- Administrative Review Council (2012): four mechanisms for review of administrative government: internal and external merits review, administrative investigation (Ombudsman) and judicial review.

Constitutionalism and the Rule of Law

- **Political constitutionalism:**
 - o Tomkins (2003: 18): "those who exercise political power... are held to constitutional account through political means, and through political institutions."
- **Legal constitutionalism:**
 - o Tomkins (2003: 19): "the principal means and the principal institution, through which the government is held to account is the law and the court-room."
- **Rule of law:**
 - o Tamanaha (2004): definition of rule of law is contested; formal v. substantial theories of rule of law.
 - o Dicey (1959): three meanings of rule of law:
 - Supremacy of regular law cf. arbitrary power
 - Equality before the law
 - Constitution is the consequence of individual rights defined by common law courts.
 - o Tamanaha (2004): rule of law is not a legal mechanism but a political ideal.
 - o Sir Ninian Stephen (2003: 8): four principles:

- Government should be under law
- Judges independent of government
- Ready access to courts
- Laws certain, general and equal
- o Tamanaha (2004):
 - Government limited by law
 - Formal legality
 - Rule of law, not man
- o Turpin and Tomkins (2007): accountability has a link with democracy and rule of law.

A 'Washminster' Hybrid

- **UK:**
 - o 13-15th century: Anglo-Saxon kings and development of Parliament
 - o 15-17th century: Tudor period and development of parliamentary as consultative assembly
 - o 1628: "the competing demands for supremacy by King and Parliament were irreconcilable" (58).
 - o 1629-40: Eleven Years' Tyranny
 - o 1640s: English Civil War; victory of the parliamentary forces and execution of Charles I.
 - o Interregnum: failed to produce an alternative.
 - o 1660: Monarchy restored with Charles II
 - o 1688: Bloodless Revolution; Parliament as supreme law-maker; *Bill of Rights 1688* (Eng).
 - o 1701: *Act of Settlement 1701* (Eng); King compelled to govern through Parliament and accept independence of judiciary.
 - o 1867: Reform Act 1867 doubled size of electorate, centralised and modernised political parties; constitutional conventions developed.
 - o 19th century: decline of monarchical involvement, rise of cabinet, formalisation of parties → representative and responsible government.
- **US:**
 - o 1775: War of Independence
 - o 1776: Declaration of Independence
 - o 1783: Treaty of Paris 1783; colonialists win
 - o 1777-81: Articles of Confederation adopted
 - o 1787-90: Constitution of the United States of America drafted and adopted.
 - o Horizontal division of powers: "breaking up of power across the three arms of government" (80).
 - o Vertical division of powers: between state and federal governments.
 - o Burgess (2006: 57): "the significant contribution of The Federalist was 'the presentation and

justification of a new form of government, neither federal nor national, but an admixture of both characters."

Political and Legal Constitutionalism

- Dicey (1959):
 - o "Parliamentary sovereignty means that Parliament thus defined has... the right to make or unmake any law whatever, and... no person or body is recognised... as having a right to override or set aside the legislation of Parliament" (39-40).
 - o "bounded or controlled by two limitations" (76)
 - From within, because the legislature is the product of a certain social condition (81)
 - the power of imposing laws is dependent upon the instinct of subordination (81)
- Goldsworthy (1999: 234): 10 reasons for accepting Parliamentary sovereignty
- Allan (1993: 290): "The limits of legislative supremacy are to be discovered, then, in that deeper constitutional morality from which the rule of law derives its strength and virtue."
- R (Jackson) v Attorney-General [2006] per Lord Steyn: "The supremacy of Parliament is still the general principle of our constitution. It is a construct of the common law."
- Dicey (1959: 407): "The command of Parliament... always take the shape of formal and deliberative legislation."
- Judge's statutory interpretation the most effective means of reconciling Parliamentary sovereignty with rule of law (e.g. *Potter v Minahan*).
- Marbury v Madison (1803) (US) per Marshall CJ: Constitution is "the fundamental and paramount law" and courts have the power to strike down legislations repugnant to the Constitution.
- Lucas (1966): Supreme Court an effective check
- Hamilton (1987): The judiciary best suited to interpret the Constitution; "It may truly be said to have neither FORCE nor WILL but merely judgment."
- Stone (2008): rights-based judicial review v. structural judicial review.
- Gardbaum (2013): pros and cons of political and legal constitutionalism
- French (2009): Legal constitutionalism in Australia through judicial review and statutory interpretation
- Saunders and Le Roy (2003): rule of law, Parliament and courts.