

## Index

<b><i>Constitutional Interpretation Principles:</i></b> .....	<b>2</b>
<b><i>Key Constitutional Principles:</i></b> .....	<b>4</b>
<b><i>Characterisation:</i></b> .....	<b>5</b>
<b><i>External Affairs Power:</i></b> .....	<b>7</b>
<b><i>Defence Power:</i></b> .....	<b>9</b>
<b><i>Trade and Commerce Power:</i></b> .....	<b>12</b>
<b><i>Corporations Power:</i></b> .....	<b>14</b>
<b><i>Taxation Power:</i></b> .....	<b>16</b>
<b><i>Grants Power:</i></b> .....	<b>19</b>
<b><i>Races Power:</i></b> .....	<b>20</b>
<b><i>Implied Freedom of Political Communication:</i></b> .....	<b>23</b>
<b><i>Melbourne Corporations Principle:</i></b> .....	<b>25</b>
<b><i>Freedom of Interstate Trade:</i></b> .....	<b>27</b>
<b><i>Inconsistency:</i></b> .....	<b>29</b>
<b><i>Judicial Power &amp; Detention:</i></b> .....	<b>32</b>

## External Affairs Power:

<b>Overview</b>	<ul style="list-style-type: none"> <li>Under <b>s 51(xxix)</b>, the Cth can make laws w.r.t 'external affairs'. There are three elements to the 'external affairs' power: <ol style="list-style-type: none"> <li>1) Relations with other countries (subject-matter element)</li> <li>2) Matters external to Australia (subject-matter element)</li> <li>3) Implementing treaties (purposive element)</li> </ol> </li> <li>The government can rely on any one of these three dimensions of external affairs.</li> </ul>								
<b>Relations with Other Countries</b>	<ul style="list-style-type: none"> <li>This element of 'external affairs captures relations of Australia with all countries outside of Australia (<b>R v Sharkey</b>). This includes: <ul style="list-style-type: none"> <li>○ <b>International Persons</b>: Relations with international organisation such as the UN and other agencies – <b>Koowarta (Brennan J)</b></li> <li>○ <b>Unfriendly Relations</b>: Limb can also extend to unfriendly conduct, such a violation of international law – <b>Seas and Submerged Lands</b></li> <li>○ <b>Assertions of Sovereignty</b>: Assertions of sovereignty over Australia's sea and continental shelf – <b>Seas and Submerged Lands</b></li> <li>○ <b>International Comity</b>: Passing laws so that there is global uniformity on a particular topic – <b>Thomas v Mowbray</b></li> </ul> </li> <li><u>Issue</u>: Due to lack of cases, it's unclear how HC will determine which matters have capacity to affect Aus' relationships with other pays.</li> </ul> <table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 20%;"><b>R v Sharkey</b></td><td> <ul style="list-style-type: none"> <li>S 24A <i>Crimes Act</i> made it an offence to 'excite disaffection' against the govt of the day in any of the Kind's Dominions.</li> <li><b>Held</b>: Fell within external relations power because it preserved friendly relations with other countries.</li> </ul> </td></tr> <tr> <td><b>Seas &amp; Submerged Lands</b></td><td> <ul style="list-style-type: none"> <li>Cth legislation asserted sovereignty over Australia's territorial seas and continental shelf.</li> <li><b>Held</b>: External affairs also includes matters which are not consensual – extends to matters that affect other countries, even if in violation of 'international comity' – <b>Stephen J.</b></li> </ul> </td></tr> <tr> <td><b>Thomas v Mowbray</b></td><td> <ul style="list-style-type: none"> <li>Part 5.3 Criminal Code provided for control orders to combat terrorism.</li> <li><b>Held</b>: Fell within s 51(xxix) – immaterial that the law is purely domestic in operation. Terrorist acts are connected to relations with other countries because terrorism is a global phenomenon (local act may have international focus).</li> </ul> </td></tr> </table>	<b>R v Sharkey</b>	<ul style="list-style-type: none"> <li>S 24A <i>Crimes Act</i> made it an offence to 'excite disaffection' against the govt of the day in any of the Kind's Dominions.</li> <li><b>Held</b>: Fell within external relations power because it preserved friendly relations with other countries.</li> </ul>	<b>Seas &amp; Submerged Lands</b>	<ul style="list-style-type: none"> <li>Cth legislation asserted sovereignty over Australia's territorial seas and continental shelf.</li> <li><b>Held</b>: External affairs also includes matters which are not consensual – extends to matters that affect other countries, even if in violation of 'international comity' – <b>Stephen J.</b></li> </ul>	<b>Thomas v Mowbray</b>	<ul style="list-style-type: none"> <li>Part 5.3 Criminal Code provided for control orders to combat terrorism.</li> <li><b>Held</b>: Fell within s 51(xxix) – immaterial that the law is purely domestic in operation. Terrorist acts are connected to relations with other countries because terrorism is a global phenomenon (local act may have international focus).</li> </ul>		
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<b>Matters External to Australia</b>	<ul style="list-style-type: none"> <li><u>Overview</u>: The external affairs power extends to anything 'which in its nature external to Australia' – <b>Seas and Submerged Lands Case</b> <ul style="list-style-type: none"> <li>○ Mere externality is sufficient - <b>Polyukhovich</b></li> </ul> </li> </ul> <table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 20%;"><b>Polyukhovich</b></td><td> <ul style="list-style-type: none"> <li>Trial in Australia of people who committed war crimes overseas in WWII under s 9 War Crimes Act. <b>Held</b>: s 9 applied to matters external to Australia, therefore, within power. This is even though there was no direct connection to Australia.</li> </ul> </td></tr> <tr> <td><b>Horta v Cth</b></td><td> <ul style="list-style-type: none"> <li>Legislation passed pursuant to a bilateral treaty between Australia and Indonesia (joint exploration of the Timor Gap).</li> <li><b>Held</b>: The area of the Timor Gap, and exploring for petrol within that area, is geographically external to Australia.</li> </ul> </td></tr> <tr> <td><b>XYZ</b></td><td> <ul style="list-style-type: none"> <li>The plaintiff faced prosecution for sexual offences allegedly committed in Thailand, contrary to the <i>Crimes Act</i>. Ss 50BA and 50BC made it an offence for Aus citizens to commit indecent acts overseas. Plaintiff challenged legislation.</li> <li><b>Held</b>: Affirmed the mere externality principle and upheld the legislation on that basis.</li> </ul> </td></tr> <tr> <td><b>Pape v FCT</b></td><td> <ul style="list-style-type: none"> <li>Whether the fiscal stimulus package, made in response to the GFC, could be supported on the ground that the origins of the crisis were external to Australia. <b>Held</b>: Law which relates to internal matter is not justified by a perceived external need. Causes of the GFC may be external but package directed at Aus economy, which is an internal matter.</li> </ul> </td></tr> </table>	<b>Polyukhovich</b>	<ul style="list-style-type: none"> <li>Trial in Australia of people who committed war crimes overseas in WWII under s 9 War Crimes Act. <b>Held</b>: s 9 applied to matters external to Australia, therefore, within power. This is even though there was no direct connection to Australia.</li> </ul>	<b>Horta v Cth</b>	<ul style="list-style-type: none"> <li>Legislation passed pursuant to a bilateral treaty between Australia and Indonesia (joint exploration of the Timor Gap).</li> <li><b>Held</b>: The area of the Timor Gap, and exploring for petrol within that area, is geographically external to Australia.</li> </ul>	<b>XYZ</b>	<ul style="list-style-type: none"> <li>The plaintiff faced prosecution for sexual offences allegedly committed in Thailand, contrary to the <i>Crimes Act</i>. Ss 50BA and 50BC made it an offence for Aus citizens to commit indecent acts overseas. Plaintiff challenged legislation.</li> <li><b>Held</b>: Affirmed the mere externality principle and upheld the legislation on that basis.</li> </ul>	<b>Pape v FCT</b>	<ul style="list-style-type: none"> <li>Whether the fiscal stimulus package, made in response to the GFC, could be supported on the ground that the origins of the crisis were external to Australia. <b>Held</b>: Law which relates to internal matter is not justified by a perceived external need. Causes of the GFC may be external but package directed at Aus economy, which is an internal matter.</li> </ul>
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<b>Implementing Treaties</b>	<ol style="list-style-type: none"> <li><b>Treaty: Does it enliven the power of the Constitution (s 51(xxix))?</b> <ul style="list-style-type: none"> <li>○ It can be on <u>any subject matter</u> (not just topics of 'international concern' per old law) – <b>Tasmanian Dams (Majority)</b></li> <li>○ It must impose <u>real and identifiable/precise</u> obligations (rather than 'mere aspirations') – <b>Industrial Relations Case (IR Case) (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ)</b> <ul style="list-style-type: none"> <li>▪ Examples of mere aspirations: 'to promote full employment'; 'combating climate change'; 'promoting peace'.</li> </ul> </li> </ul> </li> </ol>								

## Trade and Commerce Power:

<b>Overview</b>	<ul style="list-style-type: none"> <li><u>Overview</u>: S 51(i) – The Cth can make laws w.r.t “trade and commerce with other countries and among the States”.</li> <li><u>Application</u>: S 51(i) enables the Cth to both regulate and to participate in trade and commerce with other countries &amp; among the States. Therefore, it has two areas of power: (1) ‘trade and commerce with other countries’; and (2) ‘trade and commerce among the States’.</li> </ul>	
<b>Process</b>	<ol style="list-style-type: none"> <li><u>Constitutional Interpretation (Scope of T&amp;C Power)</u>: Outline the wide scope of the T&amp;C Power (see below).</li> <li><u>Characterisation</u>: Determine the subject matter of the law by reference to the ‘rights, powers, liabilities, duties and privileges which it creates’ – <b>Re Dingjan</b> (McHugh J) <ul style="list-style-type: none"> <li>Legal test not related to the motive or policy of the law – do not consider motives at all – <b>Bank Nationalisation Case</b></li> </ul> </li> <li><u>Sufficient Connection</u>: Decide whether the law so characterised is sufficiently connected to the T&amp;C power – <b>Re Dingjan</b> <ul style="list-style-type: none"> <li>Here, the practical and legal operation of the law must be considered – <b>Re Dingjan</b> (McHugh J)</li> <li>‘Connection must be more than <i>insubstantial, tenuous or distant</i>’ – <b>Melbourne Corp</b></li> </ul> </li> <li><u>Limitations</u>: Cth law cannot regulate INTRAstate T&amp;C (see below) – <b>W&amp;A McAuthur</b></li> <li><u>Incidental Aspect</u>: However, Cth may be able to regulate intrastate T&amp;C if it falls within the physical safety or export exceptions (see below).</li> <li><u>Dual Characterisation</u>: It will be sufficient if the law falls within T&amp;C power even if it can also be characterised as a law w.r.t another HOP.</li> <li><u>Policy Irrelevant</u>: If a sufficient connection with a head of power exists, this is sufficient. Policy = irrelevant - <b>Murphyores</b></li> </ol>	
<b>Scope of ‘Trade &amp; Commerce’ under s 51(i)</b>	<ul style="list-style-type: none"> <li><u>Question to Ask</u>: What is “trade and commerce” and how far back into production does it extend? <ul style="list-style-type: none"> <li>These terms have been construed very widely and are taken as terms of ‘common knowledge’ – <b>W &amp; A McAuthur Ltd v QLD (Knox CJ)</b></li> <li><b>Wide Import</b>: “The mutual communings, the negotiations, verbal and by correspondence, the bargain, the transport and the delivery are all, but not exhaustively, part of... ‘trade and commerce’”. – <b>W &amp; A McAuthur Ltd v QLD (Knox CJ, Isaacs &amp; Starke JJ)</b>.</li> <li><b>Includes Employees</b>: Extends to ‘conduct of persons employed in those activities which form part of trade and commerce with other countries and among the States’ – <b>Re Maritime Union (The Court)</b></li> <li><b>Participation in Trade and Commerce</b>: The power allows the Cth to participate in trade and commerce (eg. Cth established the Australian National Airlines Commission which was authorised to operate an airline service interstate) – <b>ANA Case</b></li> <li><b>Export</b>: Extends to all matters that might beneficially or negative affect the export trade of Australia – <b>Noarlunga (Fullagar J)</b></li> </ul> </li> </ul>	
<b>Limitations</b>	<ul style="list-style-type: none"> <li><u>Overview</u>: This power doesn’t allow for regulation of INTRAstate T &amp; C (T&amp;C occurring solely within the boundaries of a State). This limit is strict (<b>Wragg – Dixon CJ</b>): <ul style="list-style-type: none"> <li>If the legislation does not clearly distinguish between interstate and intrastate T&amp;C (eg. A general provision for ‘air navigation in the Cth’), it will be invalid (<b>R v Burgess</b>), unless it can be characterised under another HOP – <b>Bourke v State Bank of NSW</b></li> <li>The commingling theory (that interstate and intrastate trade are so commercially interdependent that the power to regulate one necessarily means the power to regulate the other (see, eg, <b>Souther Railway Co v US</b>)) of the US has been rejected by HC – <b>R v Burgess</b></li> <li>This distinction might be ‘artificial and unsuitable to modern times’ but it remains a distinction that the constitution requires – <b>Dixon CJ</b> in <b>Wragg</b>. Further, ‘considerations of wisdom or expediency... control the natural construction of statutory language.’ – <b>R v Burgess (Latham CJ)</b></li> </ul> </li> </ul>	
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## Taxation Power:

<b>Overview</b>	<ul style="list-style-type: none"> <li>S 51(ii) allows the Cth to make laws w.r.t 'taxation, but so as not to discriminate between States or parts of States'.</li> </ul>	
<b>Process</b>	<ol style="list-style-type: none"> <li><u>Is it a Tax (Characterisation)?</u> If an exaction is a tax (see features below), then the law that imposes it can be characterised as a law w.r.t the taxation power.</li> <li><u>Limitations?</u> <ol style="list-style-type: none"> <li>Constitutional Limits (see above)</li> <li>Cannot be a fee for service; penalty or a licence.</li> </ol> </li> </ol>	
<b>Is It a Tax?</b>	<ul style="list-style-type: none"> <li><u>Starting Point</u>: 'A Compulsory exaction of money by a public authority for public purposes, enforceable by law and is not a payment for services rendered' – <b>Latham CJ in <i>Matthews v Chicory Marketing Board</i></b></li> <li><u>Not Exhaustive</u>: More recent cases have held that while this is a good starting point, this definition is not exhaustive – <b><i>Air Caledonie</i></b></li> <li><u>General Approach</u>: <ol style="list-style-type: none"> <li><b>Compulsory exaction of money?</b> <ul style="list-style-type: none"> <li>Where the amount of the exaction has no discernible relationship with the value of what is acquired → likely to be a tax – <b><i>Air Caledonie</i></b></li> </ul> </li> <li><b>Identify whether a public authority is exacting the money</b> <ul style="list-style-type: none"> <li><u>Not entirely necessary</u>: <b><i>Air Caledonie</i></b> and <b><i>Tape Manufacturers</i></b> expand the definition of tax in <b><i>Matthews</i></b> to include compulsory exactions of money by non-public authorities. However, exactions by public authorities is still a relevant consideration.</li> <li>Moreover, that a charge is exacted by a public authority does not automatically make it a tax – <b><i>Luton v Lessels</i></b></li> </ul> </li> <li><b>Determine whether it has been enacted for a public purpose</b> <ul style="list-style-type: none"> <li>Public purpose = for the public interest (broad definition) – <b><i>Tape Manufacturers (Majority)</i></b></li> <li>Exaction of money from one group to another is permissible if it is a solution to a necessary problem of public importance – <b><i>Tape Manufacturers (Majority)</i></b></li> <li><u>CRF</u>: Payment into the Consolidated Revenue Fund is conclusive of it being for a public purpose (<b><i>Tape Manufacturers</i></b>), however, this does not always mean that it will be a tax – <b><i>Luton v Lessels</i></b></li> <li><u>Cth as Intermediary</u>: Unlikely to be for a public purpose where payment to the Cth is merely for the Cth to act as an intermediary in a payment process - <b><i>Luton</i></b></li> <li>It is unlikely that it will be for a public purpose where the beneficiaries of the scheme are of a limited class - <b><i>Luton</i></b></li> </ul> </li> <li><b>Demonstrate that the exaction is compulsory and enforceable by law</b></li> </ol> </li> </ul>	
	<b><i>Air Caledonie</i></b> (fees v taxes)	<ul style="list-style-type: none"> <li>Amendment to Migration Act (S 34A) imposed a 'fee for immigration clearance' for passengers entering Australia, collected by airlines and passed to the government. <b>Held</b>: Court held s 34A was a 'tax' as the fee was compulsory as the amount bore no relationships to the service rendered. Therefore, as the Migration Act dealt with matters other than tax, held that the amendment was held to infringe s 55 (therefore, invalid).</li> </ul>
	<b><i>Tape Manufacturers</i></b> (not public authority)	<ul style="list-style-type: none"> <li>S 135 Copyright Act provided that when people bought blank tapes, they paid extra money (to deal with widespread practice of people taping sound recording in breach of copyright). Payment didn't go to CRF, but to Collecting Society whose members were the copyright owners. <b>Held</b>: Majority held s 135 to be a tax even though it was not collected by a public authority. This was because it was compulsory and for a public purpose (to remedy copyright breaches).</li> </ul>

## Races Power:

Overview	<ul style="list-style-type: none"><li>S 51(xxvi) is the power to make laws w.r.t. ‘the people of any race, <del>other than the aboriginal race in any State</del>, for whom it is deemed necessary to make special laws’.</li><li>History &amp; Development:<ul style="list-style-type: none"><li><b>Convention Debates:</b> The intention behind the clause was to give the Cth power to pass special legislation for non-European races, both beneficial and detrimental. Therefore, in its original formulation, the Races Power was undeniably racist.</li><li>Exclusion of Aboriginals was mainly aimed at leaving the regulation of ‘aboriginal affairs’ to the States.</li><li><b>Referendum:</b> In 1967, the reference to the aboriginal race in the Races Power and s 127 (non-counting of Aboriginals in the census).</li><li><b>Post Referendum Meaning:</b> The meaning of s 51(xxvi) after 1967 is unclear: did deletion simply re-instate Cth’s power to legislate on Aboriginal affairs, or did it also remove the discriminatory intention behind the clause? (See below)</li></ul></li></ul>		
Process	<ol style="list-style-type: none"><li>Is the law with respect to people of “any race”?</li><li>Is the law a “special law” for the people of the race concerned?</li><li>Is the law “deemed necessary” as a special law for the people of that race?</li><li><b>Benefit/detriment consideration?</b></li></ol>		
“Any Race”	<ul style="list-style-type: none"><li>“‘Race’ is not a term or art nor a precise concept... It has a wide and non-technical meaning” – Brennan J in <b>Tas Dams</b>. Some attempted definitions include:<ul style="list-style-type: none"><li><u>Brennan J in Tas Dams:</u> There is an essential biological element, although also includes other characteristics: physical similarities, a common history, a common religion or spiritual beliefs and common culture are factors that tent to identify people as a race.</li></ul></li><li><u>Has to be a specific race:</u> Cannot be all races – <b>Koowarta</b></li><li><u>Can be a sub-section of a race</u> – <b>Tas Dam Case</b> (Deane J: “the words ‘people of any race’ can be read to refer to both ‘all Australian Aboriginals collectively’ and to ‘any identifiable racial sub-group’ among them.”)</li></ul>		
“Special Law”	<ul style="list-style-type: none"><li><u>Differential Operation Test:</u> “The special quality of a law must be ascertained by reference to its differential operation upon the people of a particular race... A special quality appears when the law confers a right or benefit or imposes an obligation or disadvantage especially on the people of a particular race.” – <b>Native Title Case (Mason CJ, Brennan, Dean, Toohey, Gaudron &amp; McHugh JJ)</b>.<ul style="list-style-type: none"><li><b>General Application Law:</b> A law that applies equally to the people of all races is not special – <b>Koowarta</b> (eg. A law directed toward the elimination of all racial discrimination).</li></ul></li><li><b>NB:</b> The requirement that the law be ‘special’ is distinct from the question of whether it was ‘necessary’.</li></ul>		
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## Implied Freedom of Political Communication:

<b>Overview</b>	<ul style="list-style-type: none"> <li>• <u>Overview</u>: There's an implied freedom of political communication – <b>Lange; Nationwide</b></li> <li>• <u>Source</u>: <ul style="list-style-type: none"> <li>○ <b>Doctrinal Source</b>: Originally, the source of the implied freedom was conceived as coming from the general conception of representative govt that is included in the Constitution (<b>Nationwide News</b>). However, this received significant criticism (<b>McGinty (McHugh J)</b>).</li> <li>○ <b>Textual Source</b>: More accepted authority outlined that the freedom is found from ss 7, 24, 64 and 128 of the Constitution (<b>Lange</b>). This is because ss 7 and 24 enshrine the notion of representative govt: the House of Reps and the Senate to be chosen 'directly by the people'; while s 128 allows for referenda to change the Constitution.</li> </ul> </li> <li>• <u>Application</u>: The freedom applies across all States/Territories and the Cth and at all levels of govt – <b>Unions v NSW (2013)</b></li> <li>• <u>This freedom is not a personal right</u>: You couldn't use it as a defence in a defamation suit – it is best understood as a constitutional restriction on legislative power – <b>McCloy v NSW (2015)</b></li> <li>• The freedom does not only exist during election time (necessary all the time for the electors and elected) – <b>Lange</b></li> <li>• Laws have no rule in 'civilising' public debate - <b>Coleman v Power</b></li> <li>• <u>Current test</u>: Drawn from <b>Lange, Coleman v Power</b>, and <b>McCloy</b>.</li> </ul>
<b>Test</b>	<ol style="list-style-type: none"> <li>1. <u>Burden</u>: Does the law burden freedom of communication about government or political matters, either in its terms, operations or effect? (if the answer is no – stop here – no infringement) <ul style="list-style-type: none"> <li>• <b>Real Effect</b>: The effect on political communication must be significant, not trivial – <b>Monis</b></li> <li>• <b>Audience</b>: Not directed towards an individual but to the community as a whole – <b>Unions v NSW</b></li> <li>• <b>What is Political Communication?</b> <ul style="list-style-type: none"> <li>○ <b>ACTV (Mason J)</b>: Extends to all matters of public affairs and political discussion and applies equally to States and the Cth. <ul style="list-style-type: none"> <li>▪ <b>NB</b>: Burdens that are targeted at political content rather than mode of communication will be more difficult to justify than other burdens – Mason J.</li> </ul> </li> <li>○ <b>Lange</b>: Anything that could conceivably impact on a matter of national concern is protected.</li> <li>○ <b>Rebelais (French J)</b>: Said a guide to shoplifting was not political communication, although French J said it might be political because of argument against capitalism.</li> </ul> </li> </ul> </li> <li>2. <u>(a) Compatibility</u>: If yes to Q1 – is the law reasonably appropriate and adapted to advance that legitimate object in a manner that is compatible with the maintenance of the constitutionally prescribed system of representative govt (ie. <b>Does it have a legitimate purpose</b>)? <ul style="list-style-type: none"> <li>• <b>Examples of Legitimate Purposes</b>: <ul style="list-style-type: none"> <li>○ Protection of public peace – <b>Coleman v Power</b> (a law prohibiting abuse of police officers in public places)</li> <li>○ Restriction of political donations by property developers – <b>McCloy</b> (to reduce corrupt influences)</li> <li>○ Preventing misuse of postal services – <b>Monis</b> (stop a person receiving offensive material at their home or workplace)</li> </ul> </li> <li>• <b>Not Examples</b>: Simply trying to protect the civility of the public discourse – <b>Monis (French CJ)</b></li> </ul> </li> <li>2. <u>(b) Structured Proportionality</u>: If yes to Q2(a), is the law <b>reasonably appropriate and adapted</b> to advance the legitimate object in a manner that is compatible with the maintenance of the constitutionally prescribed system of representative govt (ie. <b>Is it proportionate</b>)? <ol style="list-style-type: none"> <li>i. <b>Suitable</b> – it must have a rational connection to the purpose of the provision; and <ul style="list-style-type: none"> <li>▪ An impugned provision will rarely fail on this limb – the Court is only asking whether there is a rational connection with the purpose, not if there is a better means of achieving this purpose.</li> </ul> </li> </ol> </li> </ol>