

LAWS1141: Principles of Public Law

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Overarching themes of Public Law

- **Power:** How do governments get power, and what are the limits of this power?
- **Accountability:** After governments obtain this power, how do we ensure these powers are used the way they were intended?
- **Link the essay questions back to the main themes of this course**

General Tips

- Use clear, precise & economical language
- Make sure your answers are legally accurate & relevant
- Respond to the question
 - You must directly address the question in your introduction
- Your conclusion doesn't matter, what matters is how you go to it (your reasoning)

Structure

- **Plan – Have your argument before you start to write**
 - **Use subheadings?**
- Communicate the arguments and your position in the introduction
- **Support your propositions with evidence** (case law, theory, articles)
- Create logical links between paragraphs
- **Anticipate & address counter arguments**
 - Always offer a criticism
 - Always offer an alternative view
- Arrive at a clear & reasonable conclusion in response to the question
- When running out of time, write in dot points

Constitutionalism & the Rule of Law

1B – Constitutionalism and the Rule of Law

1. Australia: A Constitutional Hybrid

UK and US elements

- **Commonwealth of Australia Constitution Act 1900 (Imp)** entered into force on 1 January 1901. Constitution is a fusion of the essence of the UK Westminster system of representative and responsible government within the framework of constitutional monarchy as well as federalism, separation powers and judicial reviews from US. **(B&W, 2)**
- The queen is represented by the GG is Australia's **head of state**. Constitution doesn't mention PM or bodies like cabinet but specifies Queen + representatives' power. In reality, the Queen and GG have little scope to act independently of advice **(Convention)**
- **Representative government** is govt. of the people through elected representatives and **responsible government** is executive government responsible to parliament for its actions. Under British system there is a consolidated chain of command, power transferred people through to Crown -> ministry -> parliament -> electorate.
- From US, need to protect people against the power of government, no single consolidated chain of command, **separation of power** - distributing legislative, executive and judicial function to different institutions at least partially independent from another. **Federalism** assigns governmental power to multiple political and territorial departments, subject to checks and balances, including judicial review can remove laws that are in conflict with constitution.
- It would be a mistake to say that the British are concerned with establishing a strong governmental chain of command or that the American method is simply concerned with limiting the power; in every system of govt. the basic rules of constitution law must have both functions.
 - Constitutional monarchy – *power* embodied in monarchy is *limited* by ideals and principles of constitutionalism.

What is a Constitution?

- **Definition of Constitution Law/Constitution:**
 - "all rules which directly or indirectly affect the distribution or exercise of the sovereign power in the state." **(Dicey, B&W, 3)**
 - "the rules of 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." **(Jennings, B&W, 3)**
 - Constitution is not merely an enactment of the power structure of the country (nominal constitution) but should rather be understood as a fundamental law and set of principles and correlative institution arrangement, confining arbitrary power -> limited government – if in practice if it fails to secure principles of limited govt. --> façade constitution **(Satori, B&W, 3)**

- **Extreme example of a nominal constitution** is British Indian Ocean Territory (constitution) Order 2004, aiming to establish a government, offering commissioner with power to legislate; s 9 prevents previous inhabitants of the islands from ever returning.

Written and Unwritten Constitutions (B&W, 3)

Constitution can be 'unwritten':

Written – single official document which establishes a political society, denoting the main political institution, allocate power to them and defining a limit to those power. (U.S)

- UK never adopted a written constitution, thus sometimes it is said the constitution of UK is 'unwritten' but many important statutes are still written such as the Act of Settlement or other principles are found in judicial decisions demonstrating the common law.
- **(B&W, 4)** - However, even in written constitutions, actual workings will sometimes **depends on unwritten understandings** based on practical convenience or reflecting fundamental beliefs about how govt. *ought* to be conducted and are **constitutional conventions** ---> inescapable in any political system
- **Australian constitution is both written and unwritten**, written – '*Commonwealth of Australia Constitution Act 1900*, complemented by the *Statute of Westminster 1931 (Imp)* and *Australia Act 1986 (Cth)*' supplemented by common law and unwritten conventions, states also have written constitution + common law and conventions.

Flexible and Rigid Constitutions

Flexible constitution – “every law of every description can legally be changed with same ease and same manner by the same body”. Parliament can remove restrictions; State constitutions are regarded as flexible. **(Dicey, B&W, 4)**

Rigid constitution – “certain laws generally known as constitutional or fundamental cannot be change in same manner as ordinary laws”. More difficult procedure, rigid in Australia, Constitution can only be changed by referendum.

2. Political and Legal Constitutionalism

- Distinction can be drawn between systems of govt. based on idea of political and legal constitutionalism. **Tomkins states that key differentiating factor is whether the last say on constitutional limits is given to judiciary (Tomkins, B&W, 4)**

Political Constitutionalism (B&W, 5)

- ⑦ Those who exercise power (govt.) are held to constitutional account through political means and through political institutions (Parliament)
- ⑦ Thus ministers and civil servants are subject to regular scrutiny in Parliament
- ⑦ Scrutiny ---> debates, answering questions, investigations of committees of inquiry

Legal Constitutionalism (B&W, 5)

- ⑦ Principle means, and the principle institution, through which the govt. is held to account is the law and the court room.

Which is more effective?

Political Constitutionalism

- ❑ For this to be effective, need to have vibrant and strong politics
- ❑ Would require those performing scrutiny function to take their role seriously
- ❑ Have a high degree of independence from the govt. of the day
- ❑ Govt. are subject to endless press and media scrutiny and political opposition ---> govt. will not do things which they cannot politically get away with
- ❑ Political Constitutionalism relies on rigor and vigor in the political process.
- ❑ The more open, transparent, participatory and representative politics is, the better the model will be
- ❑ **Limitations**
 - Above values are easier said than done, most political systems fail to live up to them
 - Secondly - inescapable problem of what a democracy does with minorities (Majoritarian rule)

Legal Constitutionalism

- ❑ Judiciary will require independence from govt.
- ❑ Will be required to seriously take the idea that the law can and ought to be used as a technique of holding the govt. to account
- ❑ **Limitations**
 - Suing is notoriously expensive and access to courts is limited to the well-resourced
 - Expensiveness is applied equally to both minorities and political majority, unlike in political constitutions in which there is not inherent discrimination to the latter
 - Even if Court found that the govt. was in the wrong, what then? Need to ensure that the judgment is implemented
 - Judges are neither democratically elected, accountable, nor representative
- **(B&W, 6)** Australian exhibits strong adherence to political constitutionalism due to its British inheritance
 - ❑ However it leans towards legal constitutionalism at the Fed level and to a lesser degree at State level (Different constitutions)
 - Elayne Thompson calls it the '**Washminster Mutation**'

6. Separation of Powers (B&W, 25)

Courts must be independent from govt. and legislature if we are to rely upon them for judicial review

- In Westminster System, Executive is integrated into Legislature by requirement that Ministers be Members of Parliament accountable to it through mechanisms such as question time.
- **(Phillips & Jackson, B&W, 26)**
 - ❑ **Legislative function:** is the making of new law, and the alteration or repeal of existing law.

- ❓ **Executive or admin function:** general and detailed carrying on of government according to the law, including framing of policy and the choice of the manner in which the law may be made to render that policy possible.
- ❓ **Judicial function:** interpretation of the law and its application by rule or discretion to the facts of particular cases
- ❓ Doctrine aims to advocate the prevention of tyranny by the conferment of excessive power on any one person or body and the check of one power by another. **(Checks & Balances)**
- ❓ There is no current constitutional system, which has complete separation of powers. **(Carney, B&W, 27)**
 - The strict doctrine is only a theory – gives way to the realities of government where some overlap is inevitable.
 - Whilst this overlap exists, a system of checks and balances has developed.
 - The naming of the three first chapters of the Australian Constitution (The Parliament, The Executive Government, The Judicature) implies this separation of powers.

American Separation of Powers:

Institution	Power	Personnel	Control
Congress	Power to make laws	Elected representatives	Presidential veto; Supreme Court review of validity
President	Executive power	Elected. Cannot be a member of Congress	Senate ratification necessary for cabinet and diplomatic appointments, and treaties; Judicial review; Impeachment by removal by Congress
Supreme Court	Judicial power including review of legislative and executive activity	Appointed by President with Senate ratification	Impeachment by Congress

The Westminster system effects only a partial separation of powers:

Institution	Power	Personnel	Control
Parliament	Make laws	Representatives elected to lower house. Elected or appointed to upper house	(Royal Assent) Supervision and/or expulsion by the House
Executive Council (Cabinet)	Executive power	Ministers appointed by the Crown with the support of the lower House. Must be Members of the Parliament.	Maintain support of the lower House. Parliamentary and Judicial Review
The Courts	Judicial Power	Judges appointed by the Executive	Superior Court justices removal by the Crown on an address from both Houses on certain grounds.

Influences evident in the Aus. Constitution (B&W, 28)

- 1st 3 chapters of the Constitution are headed, 'The Parliament', 'The Executive Government', and 'The Judicature.' ---> evidently in a formal sense this shows American version of the 'separation of powers'

- However they were also influenced by Westminster system and doctrine of responsible govt --> **s 64 of Constitution requires Ministers to be Members of the House of Reps.** (If they don't have an office for longer than 3 months they are out)

Integrity as a fourth branch of Government (B&W, 28)

- Suggestion that institutions which perform a so-called 'integrity' function now collectively constitute a fourth branch of government
- 'various new integrity commissioners have been created in recent years to supervise all manner of public power (**Burton & Williams, B&W, 28**)
 - e.g. Ombudsman, auditor general etc
 - 'Integrity supports fundamental principles of liberal democracy, such as the Rule of Law'
- Burton and Williams discuss 4 components of integrity (**B&W, 29**)
 - Legality
 - Fidelity to purpose
 - Fidelity to public values
 - Accountability

'Formal and Substantive' Categories of the conceptions of the Rule of Law

Rule of Law is a notion that is accepted by a variety of nations, some of which have rejected democracy and oppose liberalism (**B&W, 16**)

- **Theories about the Rule of law can be pared down into two categories: formal and substantive versions (Tamanha, B&W, 17)**

Formal - concerned with formal legality

- Manner in which the law was promulgated (by an authorized person?)
- Clarity of the ensuing norm (sufficiently clear to guide an individual's conduct)
- Temporal dimension

Substantive conceptions

- Accept that the rule of law has formal attributes outlined above but seek to go further
- Concerns itself with the actual substance of the law itself --> is it a 'good' law or a bad one?
 - Whether the law complies with the rights based on the Rule of Law
 - Moral principles, justice etc.

Dicey's 'Thin' Conception - (same as 'formal' conception) (Dicey, B&W, 18)

- Dicey's conception is located towards the 'Thin' end of the spectrum identified by Tamanaha
- 3 conceptions of the Rule of Law
 1. 'No man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of the Rule of Law established in ordinary legal manner before the ordinary courts of the land' (**Rule of Law is known, and must be breached**)
 2. 'not only...no man is above the law, but that here ever man, whatever his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals' (**Equality**)

3. 'the law of the constitution...are not the source but the consequence of the rights of individuals, as defined and enforced by the courts" (**British interpretation**)
 - a. Principles of private law have been with us by the action of the courts and Parliament...thus the Constitution is the result of the ordinary law of the land

Social and Cultural effects on the notion of the Rule of Law - English Perspective (Tamanaha, B&W, 19)

Tamanaha highlights a crucial ingredient in the Rule of Law in the English case---> that is **changing cultural and societal attitudes to constraints on power, including among those who exercise it**

- **Coke declared in *Dr. Bonham's Case***, "common law will control acts of parliament and sometimes adjudge them to be utterly void". - Legislation is a threat to integrity and coherence of common law.
- **19th C, Hobbes and Austin – legal positivism** – law is product of sovereign legislative and there to serve current social purposes.
- ☐ England had a constitution in the sense of setting out a fundamental structure of government, however, the rule of law arose from people believing in it, the inviolability of legal restraints on government, attitudes about law provide limits to them.
 - Widely held belief among govt. officials that the govt. operates within a limiting framework of law
 - Attitudes about law provide limits, not the law itself
- ☐ Hayek observed the rule of law to be a political ideal, effective only if legislator feels bound by it; it's in moral tradition of community.
- ☐ Dicey, limits on lawmaker are political and moral not legal, unlimited lawmaker is forced in a legal framework that cannot be dismissed or changed easily. (**External and Internal Limit**)
- **Isaiah Berlin**: UK is free because it is restrained by custom or opinion, doesn't matter how restraints come in as long as they are effective.

More 'formal' conceptions of the ROL (Jennings, B&W, 20)

In the English liberal sense, the rule of law requires that the powers of the Crown and its servants be derived from and limited by either legislation enacted by Parliament, or judicial decisions taken by independent courts

'Substantive' conception on the ROL (Stone, B&W, 23) (Thicker & More Substantive)

Julius Stone emphasised the importance of ethical doctrine regarding the Rule of Law, rather than perceiving the ROL as a purely legal doctrine

- ☐ 'men conform to legal rules not only under coercion but with a sense of ethical obligation, both elements of coercion and ethical conviction being vital.'
- ☐ 'those who exercise power in democratic societies also generally recognise the rule they apply ...as ethically binding on themselves' (**Internal**)
- ☐ Dicey mainly concentrated restraints of shared socio-ethical convictions in his doctrine of the Rule of Law, but one also needs to consider the ethical component
- ☐ The central *legal* point that state officials and state organs are answerable in courts like other persons is a concrete application of the *legal* aspect of the Rule of Law

“The ROL cannot be limited to the three rather formal propositions articulated by Dicey. By reducing it those propositions, Dicey was trying to prove that ‘the rule of law’ is itself a rule of law. Today it is much more” (B&W, 23)

Lord Bingham's 8 principles of the ROL (B&W, 24)

In UK now, rule of law = procedural and substantive elements, Lord Bingham, 'The Rule of Law' (2007) 66 *Cambridge Law Journal* 67:

1. Law must be accessible and so far as possible intelligible, clear and predictable.
2. Questions of legal right and liability should ordinarily be resolved by application of law not exercise of discretion
3. The laws of the land should apply equally to all
4. Law must afford adequate protection of fundamental human right
5. Means must be provided for resolving without cost civil disputes currently insolvable.
6. Ministers and officer must exercise power conferred on them reasonably
7. Adjudicative procedures provided by state must be fair
8. Existence of rule of law requires compliance by state with its obligation with international law, whether from treaty or international custom.

ROL in the Australian Context (B&W, 24)

In Australia it is difficult to pin down the content of the rule of law. Formal/procedural ideas remain prominent

(Stephen, B&W, 24)

1. Government is under the law, it applies to all its agents and everyone in community
2. Those who play a part in the admin of law should be independent and not influenced by the government so rule of law remains a working reality.
3. There should be ready access to courts of law for those to seek legal remedy + relief.
4. Law of the land should be certain, general and equal in operation.

Cases in Australian History which has further highlighted the concept and existence of rule of law in Australia as well as its link to the constitution. (B&W, 25)

- *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 (Procedural flavour)
 - The minimum provision of judicial review for those seeking redress against administrative action by an officer of the Commonwealth in s 75(v) of Constitution secures a basic element of the rule of law
- Courts invocation of the Rule of Law is **also substantive**
 - Principle of Legality enjoys strong contemporary support in High Court, which has been described as an aspect of the Rule of Law by Gleeson CJ and French CJ ---> this indicates that broad-based rights protection is an essential part of the notion of the Rule of Law

A Constitutional Hybrid

2A – A Constitutional Hybrid 1

Australia's Westminster Constitutional inheritance: Responsible government, parliamentary sovereignty and contemporary challenges

Mat 2A (Leyland)

- Y In general, constitutions are adopted as a specific text, introduced at a decisive moment in a nation's history for obvious goals
- Y In the U.K this did not happen, as there was no single domestic event that required a comprehensive revision of the U.K Constitution. Thus U.K's constitutional text has no special significance. The constitution is comprised of a variety of sources including statute law, common law, and constitutional conventions (**Leyland, Mat 2A, 14**)

Constitutional Law: Aimed at securing the basis to exercise government power but also to limit the use of this power (**B&W, 40**)

"Perhaps the most striking achievement was the successful combination of the British System...with American Federalism" (Dixon CJ, B&W 40)

Westminster Government

a) Responsible and Representative government

These were the principles expressed in the 1689 Revolution (1. Government involved an exercise of trust, 2. Legislature exercised supreme power, 3. Executive had the duty to maintain the basic compact between state and society) (**Loughlin, B&W, 41**)

b) Parliamentary Sovereignty (Dicey, B&W, 63)

- Y Parliamentary sovereignty is a legal fact and fully recognized by English law. Acts of Parliament will override the law of judges
- Y **Alleged limitations of Parliamentary sovereignty do not exist:** The people may be the expression of power in society, but they can only be voiced by parliament. This is supported by Goldsworthy, who claimed it was a logical and practical necessity for parliament to be sovereign (**Goldsworthy, B&W, 65**)
- Y **Two limitations**
 - **Internal:** "The moral feeling of the time and the society to which he belongs"
 - **External:** "Disobey or resist his laws"
- Y **Opposition to Dicey's conception of Parliamentary Sovereignty**
 - **Walker:** Dicey's claims "fly in the face of 1000 years of talk about fundamental law...could not cite a single case to in support of his absolutist and unbalanced view". **Example:** "Kill all blue eyed babies" (**B&W, 65**)
 - **Jennings:** If Dicey's assertions are correct, it is not possible to refuse to obey the law enacted by Parliament, nor is it possible to claim that a law is ultra

vires. **According to Bodin (1576) sovereignty is** “Supreme power over citizens and subjects unrestrained by laws” **Example:** No Parliament would dare disenfranchise the Roman Catholics **(B&W, 67)**. Parliament is also subject to popular opinion, “if they wish for re-election...they must consider their actions” **(B&W, 67)**

Y **Legal Sovereignty:** “merely a legal conception...law-making unrestricted by any legal limit” **(Dicey, B&W, 67)**

Y **Limitations on Sovereign Power:** A restriction on sovereign power is that it cannot bind future parliaments to its will, as the statute may be amended or changed **(Jennings, B&W, 68)**

- **Allans:** If a law destroyed any recognizable form of democracy it could not be applied as law **(B&W, 69)**
- It is through this that the inherent tension between Dicey’s Parliamentary Sovereignty and the concept of Rule of Law is reconciled. A statute which fundamentally threatens the central tenants of democracy can derive no authority from parliament...from “deeper constitutional morality” **(B&W, 69)**
 - **1.** Command of the Parliament can only be uttered by its 3 constituent parts: Queen, House of Lords, and House of Commons **(Dicey, B&W, 1150)**
 - **2.** English parliament has never, except in revolution, exercised direct executive power **(same)**

Y **Challenges to Parliamentary sovereignty in the U.K**

- **E.U:** However, this is seen as false. The U.K could simply withdraw from the union or enact legislation which applies to domestic courts **(Goldworthy, B&W, 70)**

Y **Ultimately,** the idea that parliamentary sovereignty dominates the “political and constitutional landscape” in the U.K remains true **(Walker, B&W, 78)**

c) **Constitutional Conventions**

Y These are understandings, habits or practices, which may regulate members of a sovereign power but are not in reality laws. **(Dicey, B&W, 71)**

Y These are highly important, it is these non-legal rules which limit the power of the monarch, define the office of Prime Minister, ensure executive is part of parliament (in Aus) etc. **(Barber, B&W, 71)**

Y Although conventions are not directly enforceable, they can be judicially noticed and may influence the interpretation of statutes **(B&W, 73)**

Political Constitutionalism and Legal Constitutionalism

Y The notion of parliamentary sovereignty is typically contrasted with judicial supremacy e.g. U.S **(B&W, 1149)**

Y Dicey believed the legal codification of rights was inferior to a system of protection based on parliamentary government, common law, the formal process, private law **(B&W, 1150)**