

INTRODUCTION:

AUSTRALIAN CONSTITUTIONALISM AND THE ROL

Public law is a system of laws that governs the relationship between people and state.

A HYBRID SYSTEM: The Australian constitution framework is influenced from the UK and US models.

Carney: The naming of the first three chapters of the Constitution; The Parliament, The Executive, The Judicature, formally indicates American influence on the separation of powers. Integration of the Executive into the Legislature in s 64 shows influence of the Westminster system.

UK Westminster system: Representative government (a people elected government); and responsible government (the executive is responsible to Parliament for its actions).

- This creates a system of control: People check Parliament, Parliament checks Ministry, Ministry checks Crown.
- Westminster principles are an example of political constitutionalism (debatable whether this is stronger than legal constitutionalism in Australia).
- The system is within the framework of a constitutional monarchy. S 59 provides that the Queen, through the GG, is able to disallow/annul laws made by federal parliament.
- By convention the GG (and the Queen) act on advice from the Parliament.

USA system: This system is based on the diffusion of power to protect the people from government.

- Written constitution where the constitution is written in a primary document (CAC 1900 Imp).
- From this model we took the concept of federalism (government power is allocated among different political and territorial units), the SOP (powers allocated between the Executive, Judicial and Legislative) and judicial review (where the judicature can strike down laws and governmental action inconsistent with the constitution).

CONSTITUTIONALISM

Constitutional law is “all rules which directly or indirectly affect the distribution or the exercise of the sovereign power in the state” - *Dicey*.

- Jennings: a document setting out rules governing the composition, powers and methods of operation of main institutions of government, and general principles applicable to their relations to the citizens
- Tomkins constitutions perform three tasks
 - 1. Establish institutions of the State
 - 2. Regulate their relationships between these institutions
 - 3. Regulates the relationships between the institutions and the citizens
 - Constitutions explain the political values that underlie the particular society.
- Satori explains the two types of constitutional systems
 - Nominal: a constitution dealing with the formalisation of a power structure, eg. Bancoult where the formalised State’s authority over the land detailing that no residents were allowed to live on the land.

- Façade: a constitution that mentions principles of limited government but fails to secure them in practice.

Written (USA) and unwritten (UK) constitutions: Written: usually a single document established institutions, conferring their power and describing limits. Unwritten: constitutional conventions and customs govern the interactions of institutions. Even written constitutions depend on conventions and legislation.

- Australia has a written constitution, supported by the Statute of Westminster 1931, the Australia Act 1986, CL and conventions. The Australian Constitution came into being through the Commonwealth of Australia Constitution Act 1900 (Imp), a UK act of Parliament.
- The UK has an unwritten constitution. It “does not exist at all” – *Tocqueville*.

Flexible and Rigid Constitutions: Flexible is where all laws (including the constitution) can be changed by ordinary acts of Parliament. Rigid where constitutional law cannot be changed in the same manner, and it is often more difficult.

- The Australian constitution is rigid and amended by referendum as per s 128: a double majority: majority in Parliament (passed by both houses), majority of people, in majority of states (double majority).
- Individual state constitutions are flexible

Separation of Powers from the USA: In the Constitution the three arms, Legislature, Executive and Judiciary are the first three chapters. Australia’s ‘Washminster’ system means there is no strict separation between the Legislature and the Executive. It does have an independent judiciary, necessary to conduct JR.

The idea of SOP, draw on accountability under the ROL → to prevent and limit the arbitrary exercise of power by its distribution between various independent and strictly separate institutions: *Boilermakers Society of Australia 1956*

Montesquieu: Power must be a check on power. Joint powers render the judge the legislator and the judge the executive giving rise to potential violence and oppression.

Phillips and Jackson: Three categories become blurred when applying them to the details of a constitution. A complete SOP would halt government. The doctrine should advocate limiting the conferral of powers and allocating checks by another.

Burton and Williams: The concept of an integrity branch of government to supervise the use of public power to ensure it is being exercised in a manner true to values, purposes and duties. Proposed components: legality, fidelity to purpose and public values and accountability.

Washminster: UK PS and Responsible Government

- The Magna Carta 1215 placed restrictions on the power of King. This meant the King could not levy taxes and ensured basic liberties eg. trial by jury in s 29.
- During the Tudor period, Parliament was developed. It provided greater legitimacy for the changes the King wanted to make for society. This authority was shared.
- 1628 BOR and Acts of Settlement in 1701 (regulated succession to throne, security of judicial tenure and necessity of King to appoint ministers to maintain parliamentary

confidence) cemented Parliament as supreme law making body. Parliamentary privilege (free speech in parliament) was achieved.

- By 1900, representative Parliament was sovereign and executives rules according to Parliament.
- Australia adopted responsible government, Parliament and the Monarchy.

POLITICAL AND LEGAL CONSTITUTIONALISM

Political and legal constitutionalism is determined based on who has the final decision making power on constitutional limits. Public law does two things, provides the institutions, which exercise political power and seeks to hold those institutions to account – **Tomkins**.

A political constitution: those who exercise political power are constitutionally held to account through political means and institutions → e.g. by Parliament → subject to scrutiny through Parliament. This sustains Westminster's PS. Eg. UK.

- **Tomkins**:
To be effective:
 - Strong and vibrant politics.
 - Those providing scrutiny would need independent from government
- **Means of accountability**
 - Scrutiny in Parliament: question time, debates, investigations.
 - Media, press, political opposition
 - Elections: Democratic governments possess power only as long as they have majority support → they will only do things they can politically get away with
- **Problems**
 - Transparency and accountable government is difficult to establish.
 - Legitimacy is based on the majority, what is done with the minority?

A legal constitution: government is held accountable through the law and the courts → an independent judiciary conducts Judicial Review eg. USA.

- **Tomkins**
To be effective:
 - Strong and independent judiciary from government.
- **Benefits**
 - It is equally expensive for all
 - No inherent discrimination from the majority
- **Disadvantages**
 - Judges are not democratically elected or representative (old, white, male)
 - Accessibility is limited to the wealthy

In Australia, there is a strong adherence to political constitutional, levied at Federal level by legal constitutionalism (to a lesser extent at State level). **Tension** in the HC exists as to the extent it should defer to Parliament to define the reach of government.

- *Plaintiff S157/2002 v Commonwealth*: In any written constitution where matters are constitutionally disputed, there must be an authoritative decision maker. Under the Commonwealth Constitution, that is the courts.
- *Australian Capital Television Pty Ltd v Commonwealth*: The framers of the Constitution preferred to place trust in Parliament.

RULE OF LAW

The **rule of law** is the principles that law should govern a nation, as opposed to arbitrary decisions by individual government officials. It is endorsed in diverse societies, some having rejected democracy and individual rights, eg. Russia, China, Zimbabwe, Indonesia, Iran and Mexico.

Three themes to conceptions of the ROL.

- **Government limited by law** → the underlying principles that arbitrary exercise of government power is restrained. Historically, very important.
- **Formal legality** → It emphasises a rule bound order established and maintained by government. It allows one to foresee how “authority will use its coercive powers” to an extent it allows planning of “individual affairs”.
- **Rule of law, not man** → Law is reason and objective, man is subjective.

Tamanaha categorises formulations as formal/thin or substantive/thick.

- **Formal** conceptions are concerned with the manner in which the law is made, not the content. It focuses on the law being predictable, clear and prospective. It is made in accordance with proper processes and authorities → fewer criteria to meet: thin.
- **Substantive** conceptions satisfy formal elements *and* consider the content of the law with a focus on morality and rights → more criteria to meet: thick.

<p>Form./ Thin</p>	<p>Dicey: Law is supreme. (Pre- WWII)</p> <ul style="list-style-type: none"> • No man is punished except for breach of law. • Equality before law means every man is subject to it • Rules are not the source but the consequence of individual rights. <p>Constitutional principles are the result of judicial decision, not a written constitution.</p> <p>NB: the law’s supremacy is closely connected to the maker of that law and PS. Substantive ROL arguments reflect the need for checks on arbitrary power (PS).</p>
<p>Subs./ Thick</p>	<p>Tamaha: ROL reflects cultural and societal attitudes to constraints on power. The English model was based on an understanding that government operated within a limiting framework of law. It was a unique model. Attitudes provide limits, not the law itself. <i>Montesquieu</i> an independent judiciary is central to ROL → less about public confidence, more about preventing the E from imposing powers on J.</p> <p>J is the “most direct confrontation between the government, law and the individual, and it can therefore serve as the best barrier against lawless government actions” → More American culture.</p> <p>The government should be constituted ensuring “power is a check on power”.</p> <p>Jennings: (1959 Post WWII)</p> <ul style="list-style-type: none"> • Dicey’s conception is not enough, the doctrine involves considerable limitation on political powers

	<ul style="list-style-type: none"> • The rise of liberalism and despotic rule requires this. It is a democratic attitude → the law alone ruled for Hitler and Mussolini. • It requires limitation and separation of powers <p>Stone: argues it is an ethical, not legal doctrine. Substantive inequality should be dealt with affirmative action, formal equality alone does not satisfy the ROL.</p> <ul style="list-style-type: none"> • ROL lies in rulers understanding their laws needs to meet ethical standards: <ul style="list-style-type: none"> ○ Necessarily imports the sanctity of human rights. ○ There should be substantive equality, respect of dignity and response to social and economic needs. • Equality has to combine with these values, not just for uniformity but conviction of justice • Mere conformity to the law in the English system is not enough • The rigid Australian system is subject to limitations such as the SOP.
	<p>Hayek observed that the rule of law itself is not a legal rule, but a political idea – “<i>the rule of law will not prevail unless it forms part of a moral tradition of the community.</i>” → substantive viewpoint</p>
Elements	<p>Lord Bingham</p> <ol style="list-style-type: none"> 1. Law must be accessible, clear and predictable 2. Question of law answered by application of law not discretion 3. Laws should apply equally 4. Laws must protect fundamental human rights 5. Means to resolve civil disputes unresolvable by parties 6. Ministers/public officials exercise of power without exceeding the limits 7. Adjudicative procedures provided by the state should be fair 8. ROL requires compliance by the state to international law obligations <p>Stephen: Four cardinal principles of the rule of law</p> <ul style="list-style-type: none"> • The law should apply to and be observed by governments and their agencies • Those who administer the law should be independent of government • There should be ready access to the courts of law to seek legal remedy and relief • The law should be certain, general and equal

WESTMINSTER GOVERNMENT

Parliamentary sovereignty means Parliament has the right to make or unmake any law and no person or body can override it – *Dicey*.

Dicey

- Parliament’s authority is limited internally and externally:
 - External limits: there is the possibility subjects to the sovereign power will disobey or resist their laws.
 - Internal limit: power is exercised in accordance social condition and surrounding circumstances, including the moral environment.
- Stephens identifies that a legislature would go mad before legislating that all blue-eyed babies should be murdered, and subjects idiotic before submitting to it.

Goldsworthy: PS was accepted for a number of reasons – logic and practicality of requiring only one law making power, the King has absolute power. A Parliament with limited powers may not adequately protect the community. While Parliament reflected community, judges could not be trusted. Parliament's decision reflected the collective wisdom of the entire community.

Class – This gives courts a power it otherwise should not have in a Westminster system.

Challenges to Diceyan PS

- Walker: sovereignty has no secure legal foundation. It is not present in the fundamental and long lasting constitutional rules that dominate the British system.
- Jennings: Dicey's distinction between legal and political sovereignty render legal sovereignty not sovereign at all, as courts will always recognise Parliament's laws.
 - If Parliament is sovereign, it is different from any other legislative body. This likens town council to US Congress.
 - The utility of the theory is questioned, as no Parliament truly have unlimited power.
 - Legal and political sovereignty – legal sovereignty is a merely conception, means simply the power of law-making unrestricted by any limit. Whereas 'that body is politically sovereign or supreme in a State the will of which obeyed by the citizens of the State'. The Parliament is the legal sovereign and the electors the political sovereign.
 - Non-sovereign legislature – if sovereignty is merely for legal authority to pass any sort of laws, it is not entirely ridiculous to say that a legislature is sovereign in respect of certain subjects