Sir Ninian Stephen postulates four principles to the rule of law:

1. Government should observe and be subject to the law
2. Those who administer the law should be independent of the government
3. There should be ready access to the courts for those who seek remedy and relief
4. The law should be certain, general and equal in its operation.

Formal conception vs substantive conception of the rule of law

The formal conception focuses on the form of law and the manner in which it was made (as explained by Paul Craig on pg 16 of Blackshield and Williams). It asks questions about whether the law meets certain principles of a formal and procedural character, such as,

- Was the law made by an authorised body?
- Is it set out in general terms?
- Does it apply equally to all?
- Is it clear? Is it prospective?

The substantive conception encompasses the attributes of the formal conception, but it also goes beyond to include requirements about the content of the law. It asks questions about whether the law is 'good' or 'bad'?, or is it 'moral'?

NB: Australian conception of the rule of law remains essentially procedural rather than substantive and thin rather than thick (Cheryl Saunders at Blackshield and Williams pg 24).

Why is Britain's rule of law a 'puzzle'?

Tamanaha conceptualises it as a puzzle because there is seemingly an unexplained paradox; how can the law limit itself? His conception stems from England's constitutional history, in particular, how the common law was often thought to set limits on law-makers. In this sense, the law appeared to place boundaries on the expansion of its own scope via the restrictions it provided on law-makers of what laws can be made.

Ultimately, he devises that the law does not limit itself. Rather it are the *attitudes* about the law that provide limits. He stresses the importance of institutional settings in helping us secure the rule of law, but also that we should look beyond them – a country's political and legal culture is also significant. In other words, the capacity of the law to limit government action will depend in part on the widely held acceptance that the law can and should operate in that way.

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        - reins of power, had the effect of bolstering the formation of compact and disciplined party structures (Blackshield and Williams, pg 62).
        - Constitutional conventions emerged to manage these conflicts between parties.
    - A more representative Parliament through legislative reform known as the Reform Acts in the 19th century.
        - Reform Act of 1832, extended to 14% of adult males (Blackshield and Williams, pg 63). Middle class men had a right to vote.
        - Reform Act of 1867 doubled the size of the electorate. The party system was centralised, bureaucratised and modernised as efforts were made to attract the support of this new electorate (Blackshield and Williams, pg 63).
        - Increasing democratisation created political parties that were more representative.

NB: By the 19th century, Parliament had emerged as the sovereign power, and the notion that the executive was to rule according to the law and be responsible to the Parliament was firmly entrenched (Blackshield and Williams, pg 61). By the end of the 19th century, the development of political parties in a disciplined way gave party leaders increasing amounts of control over what happened in Parliament. Thus, the Executive, led by the Prime Minister, began to dominate Parliament again (Blackshield and Williams, pg 63).

Some key background forces behind this development included:

- Religion
- International and diplomatic considerations
- Conduct of foreign wars
- Social and economic change
- Industrialisation (Peter Leyland): industrialisation, urbanisation and population growth in the 1800s were big drivers of the democratisation of the vote, and the redistribution of seats to make it more representative of the people.
- Rise of liberal ideas, supercharged by the experience of the US and French revolutions which recognised citizen rights, also created pressure in the UK of the very aristocratic form of government that evolved after 1688.

Magna Carta's significance

The Magna Carta became an enduring symbol of the rule of law subjecting the arbitrary exercise of the monarch's powers to legal limits. It also affirmed some fundamental rights by recognising that no one should be denied justice or punished except by judgment of their peers or by the law of the land (Peter Leyland). It was the early written element in the evolution of the English constitutional system.

Representative government

Representative government means 'the exercise of the political will of the electorate through the medium of its parliamentary representatives' (TRS Allan at Blackshield and Williams, pg 69).

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Responsible government

Responsible government means that the political leadership of the Executive branch is drawn from the ranks of Parliamentarians, and the government is held accountable not through direct election by the people, but by those members of the Executive being held answerable to the Parliament for their actions.

In Australia, there is a fusion of the legislature and the executive. The Prime Minister appoints ministers for his Cabinet, they have to be from Parliament.

Parliamentary sovereignty

According to Dicey, parliamentary sovereignty means two things (Blackshield and Williams, pg 64):

1. The right to make or unmake any law
2. The idea that no person or body has the right to override or set aside the legislation of the Parliament
    - Electors have no legal means of initiating, of sanctioning, or of repealing the legislation of Parliament. Their sole legal right is to elect members of Parliament. (Blackshield and Williams, pg 64).
    - Judges do not have any right or power to repeal a Statute i.e. there is no such thing as judicial review of the constitutionality of legislation, because courts do not have that power. (Blackshield and Williams, pg 64).
    - Legislation may override and constantly do override the law of the judges (Blackshield and Williams, pg 64). That is, statute law prevails over common law.

Geoffrey de Q Walker points out the weak foundations of Dicey's argument on page 65 of Blackshield and Williams. On the other hand, Jeffrey Goldsworthy, provides 10 argument to support parliamentary sovereignty (Blackshield and Williams, pg 66).

Meanwhile, Jennings posits that sovereignty is an unhelpful and exaggerated term. Bodin defines sovereignty as 'supreme power over citizens and subjects unrestrained by laws' (Blackshield and Williams, pg 67). Thus, it follows that if sovereignty is supreme power, Parliament cannot be sovereign because there are many things Parliament cannot do. Parliamentarians must always consider what the general opinion about their actions may be. This is because, if they wish to be re-elected, they may be called upon to give an account of their actions. As such, Parliament may pass many laws which the people do not want, but never any laws which any substantial section of the population violently dislikes.

NB: In Australia, the idea of parliamentary sovereignty must be understood in the context of the rigid limits and boundaries imposed by the Australian Constitution and, to some extent, by the State Constitutions as well (Blackshield and Williams, pg 71).

Limits upon the powers of a sovereign Parliament

According to Dicey, there are two limitations: internal (legal sovereignty) and external (political sovereignty). The internal limit goes to the moral character and sensibilities of parliamentary members. It is likely that members will have the same social beliefs as the citizens given they are all products of a certain/same social condition (Leslie Stephen at Blackshield and Williams, pg 65). Hence, because of that, ministers will have the same interests and morals as people, and ideally should act in their interests. The external limit is

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How does the Australian Constitution distribute legislative power between the Commonwealth and the States

Legislation power is distributed as follows (Blackshield and Williams, pg 274): The Australian Constitution assigns to the Commonwealth Parliament a specified list of powers relating to a range of subjects and purposes, s 51. Powers not thus assigned are left to be exercised by the States (s 107).

The powers listed under s 51 are not exclusively reserved to the Commonwealth. They are held concurrently with the States. Where there is inconsistency, federal laws prevail over state laws (s 109). The Australian Constitution only reserves a few powers for the exclusive use of the Commonwealth, such as those, under s 52 and s 90.

Doctrine of repugnancy and extraterritoriality

The doctrine of repugnancy describes the situation where a State (former Colonial) law is rendered invalid for being inconsistent with paramount law (Blackshield and Williams, pg 103). Paramount law refers to those laws made applicable to the colony by 'express words or necessary intendment' (Blackshield and Williams, pg 103).
This meant that local statutes could not be held repugnant to ordinary British statutes, or the common law (CLVA).

The doctrine of extraterritoriality means the Colony's laws cannot have any operation outside its territorial borders (Blackshield and Williams, pg 110). It meant that the State/Commonwealth could not legislate on certain matters outside its territory.

At the Commonwealth level, the Statute of Westminster repealed the doctrines of repugnancy and extraterritoriality via section 2 and 3 respectively. Under section 4, the UK Parliament could still legislate for the Commonwealth, though only at the Commonwealth's 'request and consent'. Hence, the doctrines stopped having effect in 1939/1942.

At the State level, after the enactment of the Statute of Westminster, the States were still bound by the doctrines of repugnancy and extraterritoriality. This only ceased to have effect after the enactment of the Australia Act in 1986. The bounds on the States by the doctrines of repugnancy and extraterritoriality were dispelled by section 2 and section 3(2) respectively.

Is Australia now a legally independent nation?

Australia is now a legally independent nation after the enactment of the Australia Act. Sue v Hill (1999) held that as a result of the Australia Act, the UK is a 'foreign power' as it no longer has the capacity to exercise legislative, executive or judicial powers in Australia.

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VOTING AT FEDERAL ELECTIONS

Who is entitled to vote in federal elections? Who is not entitled to vote?
The Commonwealth Electoral Act 1918 (Cth) sets out requirements of who IS and is NOT entitled to vote.

Section 93(1) says a person must be 18 years and an Australian citizen to be entitled to enrolment. 'Entitled to enrolment': anyone whose name is on the electoral role is, under s 4 of the Act, considered an elector, and thus entitled to vote.

Sections 93(7), 93(8), (8AA), 94 and 94A set down rules about who is not entitled to vote.

Under s 245(1), it is the 'duty of every elector to vote' at each election. What is compulsory? It is compulsory for electors to attend a polling booth and deposit their voting paper in the ballot box (Rowe v Electoral Commissioner): 'compulsory attendance'.

S 245(15) makes it an offence for an elector to fail to vote at an election. They would be subject to a $20 fine, or $210 if they bring the matter to court.

Section 245(15B) says that failure to vote is permissible if you have a 'valid and sufficient reason'. Not liking any of the candidates on the ballot paper is NOT considered a valid and sufficient reason for not voting.

To summarise: First, go to the Commonwealth Electoral Act to establish a person's right to vote. However, since a Commonwealth law cannot breach the Constitution. We need to look at the Constitution to see if it places limits on the Commonwealth's power to exclude people from the franchise.

Now, turning to federal constitutional provisions:

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The role of the judiciary is also relevant. Since Australia adopted a federal system from the US, and part of that system is an independent judiciary as the ultimate arbiter of determining the boundaries of federal division of power, the separation is needed for the judiciary to be properly independent.

In summary, the factors considered include:

- The text of Chapter III
- The text surrounding Chapter III, Chapter I, and II, and how they can be interpreted together.
- The role of the judiciary.

NB: Williams J dissented. He said:

- Accepts that Chapter III courts should be the only ones exercising judicial power,
    - This is because of Chapter III itself and its exhaustive nature.
- However, he rejects the idea that judicial power is all they can have. He sees no fear in Chapter III courts having non-judicial powers as well.
    - This is because he thinks we should be careful in applying the separation of powers that exists in the US to Australia, as our separation of powers is asymmetrical, given our Executive and Legislature are fused via responsible government.
    - Instead, he says we should turn to English constitutional history. And the English separation of powers is a much looser concept. It only requires in a broad sense for the three branches to be distinct.
    - Therefore, he rejects any rigid/precise tests that separate judicial power and the judiciary.
- He also rejects the majority's idea that the structure of Chapter I, II and III leads to a conclusion of the separate judiciary. He says that is merely a draftsman's arrangement.

In other words, Williams J accepted the majority's 1st limb, but not the 2nd limb.

SEPARATION OF JUDICIAL POWER (STATE LEVEL)

Is there a similarly strict separation of State judicial power? What did Kable decide on this point?

There is not a similarly strict separation of State judicial power. The separation of judicial power at a State level is not constitutionally entrenched in the Constitution Act 1902 (NSW).

Kable decided that the structure and provisions of the Constitution Act provide no ground for importing into it a principle of separation of powers. Unlike s 71 of Commonwealth Constitution, Pt 9 does not exclusively vest State judicial power in the courts. Pt 9 does not provide an exhaustive statement of the manner in which State judicial power should be vested.

It can be seen as being concerned with the preservation of judicial independence, but cannot be seen as reposing the exercise of judicial powers exclusively to the courts (i.e. limb 1 for Cth). They also cannot be seen as preventing courts from exercising non-judicial powers (i.e. limb 2 for Cth).

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State Legislatures

STATE LEGISLATIVE POWER

Australian States are self-governing polities with their own constitution and institutions of government. Their constitutions developed across the 19th century, authorised by Imperial legislation. Legislatures gradually developed along the lines of the Westminster model, reflecting the principles of representative and responsible government. After Federation in 1901, the colonial era constitutions were re-enacted as Acts of the state Parliament. For example, the Constitution Act 1902 (NSW). Section 106 of the Commonwealth Constitution confirms that the colonial-era constitution continued as legally effective State Constitutions after Federation in 1901. Section 107 affirms that the State Parliaments still have law-making power subject to limits imposed by the federal Constitution.

The State Parliaments are limited by Imperial limits that continued after Federation (which are now seen in s 9 of Australia Act), limits expressed in the doctrines of repugnancy and extra-territoriality (which now no longer operate, after the establishment of the Australia Act 1986), and mainly the external limits imposed by the federal Constitution (pg 332 of Blackshield and Williams).

In other words, section 106 preserved the colonial constitutions, which are now in force as State constitutions. However, it did so subject to the Federal Constitution (pg 333 of Blackshield and Williams).

NB:

- Section 106 concerns the state constitutions, whilst s 107 concerns the state Parliaments.
- Since s 106 made the state constitution 'subject to' the federal constitution. This means that State legislatures (contained in the state constitution) are subject to limitations arising from the federal constitution.

Limits upon State Parliaments by virtue of the Federal Constitution

Section 107 of the federal Constitution affirmed that the powers held by the colonial Parliament were to continue as powers exercisable by the State Parliaments subject to limitations. These external limits upon State Parliaments include:

- Areas of power **exclusively** vested in the Commonwealth Parliament in **express** terms are excised from the powers of the States.
    - For example, section 90
- So are areas of power **exclusively** vested in the Commonwealth Parliament in **implied** terms.
    - For example, section 114: a State 'shall not…impose any tax on property of any kind belonging to the Commonwealth'.
    - For example, some powers assigned to the Commonwealth in s 51 that have been made exclusive by provisions in Chapter V: s 51(xii).
- **Express** limits on what power the State Parliament has
    - For example, s 92 commands interstate 'trade, commerce, and intercourse' shall be 'absolutely free'. This means the State Parliament cannot legislate a statute obstructing such freedom.

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Hence, parliamentary sovereignty is not diminished as the substantive breadth of the future parliament's powers has not been limited. Thus procedural restrictions are not inconsistent with parliamentary sovereignty. These procedural restrictions take the form of manner and form requirements.

The legal basis for the fact that State Parliament can pass these procedural limitations is found in s 6 of the Australia Act and Trethowan's Case: the court found that the NSW Parliament has the power to establish procedural restrictions on the making of certain laws because of s 6.

State Parliaments can impose these new 'manner and form' procedures through the enactment of ordinary legislation. Where these manner and form requirements have been establish, State Parliaments must comply with them when making laws where the restrictions are of relevance (s 6). If the Parliament fails to do so, the proposed law will be of no force (s 6).

For a 'manner and form' restriction to be effective, it must demonstrate **'double entrenchment'** (Trethowan). This means that legal protection must be given to both the substantive provision and the procedural provision that purports to protect the substantive provision. For example,

1. The Legislative Council cannot be abolished except by referendum
2. The requirement that the Legislative Council cannot be abolished except by referendum cannot itself be altered except by referendum.

The presence of this manner and form requirement also ties in with the idea of popular sovereignty. That is, when it comes to constitutional amendment of certain provisions, the people get the final say although they cannot initiate any proposals. Their power is limited to vetoing proposals. Thus, their power, despite not being as powerful nor equal to that of the judiciary, legislature or executive, is still significant in their own right. This is because of the influence that they hold when it comes to carrying or defeating a proposal.

Asymmetric entrenchment

State Parliaments can enact manner and form requirements via ordinary legislation. However, the obstacles that they can put up via these requirements need not to be faced by themselves.

This power which allows for asymmetric entrenchment has been seen as problematic for some. It opens up the door for abuse because it enables one political faction, with a temporary majority in Parliament, to use ordinary legislative process to entrench legislation, making it impossible for its opponents to later amend or repeal that legislation in the same way (Goldsworthy, Roszkowski).

On balance, there is logic in allowing State Parliaments to protect fundamental features from being able to be easily amended. This is because it may well be harder to overturn that bad amendment.

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