

LAWS1141 – Full Course Content (Summarised)

CONSTITUTIONALISM

Constitution	<p>The <i>Commonwealth of Australia Constitution Act 1900</i> (Imp) entered into force on 1st January 1901, establishing a constitutional monarchy, with the Monarch as head of state.</p> <ul style="list-style-type: none">• The Australian constitution is a written and rigid point-in-time document.<ul style="list-style-type: none">• S 128 of the <i>Constitution Act 1900</i> provides that the Constitution may only be changed by a double majority referendum.• State constitutions are flexible.• The constitution outlines the relationships between the institutions of power and Australian people. <p>Other Constitutions</p> <ul style="list-style-type: none">• UK = unwritten• USA = written• Canada = written• South Africa = written <p>Perspectives</p> <ul style="list-style-type: none">• <i>AV Dicey</i> – constitution includes all rules which directly or indirectly affect the distribution or exercise of the sovereign power in the state.• <i>Sir Ivor Jennings</i> – setting out the rules governing the composition, power, methods and operation of the main institutions of government and the general principles applicable to their relations to the citizens• <i>Adam Tomkins</i> – express political values to which a particular society lays claim; all constitutions must answer the question of which body of power has the “final word” in a case of disagreement in matters of public policy
Political versus legal constitutionalism	<p>Political Constitutionalism</p> <p>Those in power are kept accountable by the Constitution, political process and means of public scrutiny. According to <i>Adam Tomkins</i>, Australia’s system strongly adheres to political constitutionalism.</p>

<p><i>Adam Tomkins</i> raises the notion of separating ‘political’ and ‘legal’ constitutionalism.</p> <p>The key difference between political and legal constitutionalism is the Constitutional limits of power granted to the judiciary.</p>	<ul style="list-style-type: none"> • <i>Amalgamated Society of Engineers v Adelaide Steamship Co</i> (1930) reinforced that the extravagant use of the granted powers in the actual working of the Constitution is a matter to be guarded against by the constituencies and not by the Courts. • If an elected government oversteps their power, it is ‘up to the people to reverse what they have done’ by electing them. <p><i>Requires:</i></p> <ul style="list-style-type: none"> • Vibrant, robust political process • Independent body to perform scrutiny – <i>Australian Electoral Commission</i> • Elections <p><i>Strengths:</i></p> <ul style="list-style-type: none"> • Twin mechanisms of electoral accountability and structural ‘checks and balances’ adheres to principles of democracy, ensuring that government is representative and responsible • Legislative reasoning may encompass a wider variety of perspectives than judicial reasoning, ensuring that constraints on power reflect the views of the majority, since our judiciary lacks diversity <p><i>Weaknesses:</i></p> <ul style="list-style-type: none"> • Minority groups may be discriminated against • Governments are subject to endless media and political scrutiny • Requires an independent, unelected body to perform public scrutiny that is external to the established arms of power • Strong risk of understating the government’s constitutional limits, particularly individual rights as a result of ‘blind spots’ to which electorally accountable legislatures may be unaware <p>Legal Constitutionalism</p> <p>Those in power are kept accountable by the judicial process, courts and the law.</p> <p><i>Requires:</i></p> <ul style="list-style-type: none"> • Independent judiciary <p><i>Strengths:</i></p> <ul style="list-style-type: none"> • Minorities are not discriminated against, as the rule of law reinforces that the law applies to all equally
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	<ul style="list-style-type: none"> Helps to protect against the under-enforcement of rights resulting from the ‘blind-spots’ of accountable legislatures <p><i>Weaknesses:</i></p> <ul style="list-style-type: none"> Justice through the courts is inaccessible to large segments of the population due to its cost; access to the courts is limited to only the well-resourced Judges are not democratically elected, thus consequently, do not represent the people nor are they accountable to them The judiciary have a limited capacity to effect change upon the executive and parliament Implementation of judicial recommendations is difficult to measure, and the government may choose to evade court strictures May result in an over-enforcement of constitutional limits of the government by repeatedly taking a narrow interpretation of statutes – e.g. narrowed interpretation of S 51 in <i>Williams v Commonwealth</i> (2012)
<p>Separation of Powers</p> <p>Chapter I – Legislature Chapter II – Executive Chapter III – Judiciary</p>	<p>The Constitution proscribes that power in the Australian system is separated into three arms of government, known as the doctrine of the separation of powers.</p> <ul style="list-style-type: none"> First theorised by Baron de Montesquieu, stating that “in every government there are three sorts of power: the legislative, the executive in respect to things dependent on the law of nations, and the executive in regard to matters that depend on the civil law” The people themselves are not represented in the separation of powers, but their interactions with the branches of government is critical to ensuring a stable system of government <p>The horizontal separation of powers aims to diffuse power among the three arms of government. The vertical separation of powers distributes various powers and functions between the Federal and State systems.</p> <p>Perspectives</p> <ul style="list-style-type: none"> Owen Hood Phillips and Paul Jackson <ul style="list-style-type: none"> Legislative function is making of new law, alteration or repeal of existing law Executive function is the general and detailed carrying on of government according to law Judicial function is the interpretation of the law and its application by rule of discretion to facts Lisa Burton and George Williams – propose an integrity branch of government; should exist somewhere between the traditional three arms, dedicated to supervising the use of public power

	<ul style="list-style-type: none"> • COUNTER • <i>Does the need for an integrity branch suggest that the SOP is not functioning effectively to self-regulate the use of power in the Australian political and legal system?</i> • <i>Meaning of integrity itself is unclear</i>
<p>Rule of Law</p> <p><i>AV Dicey's Concept</i></p> <ol style="list-style-type: none"> 1. No man is punishable except for a distinct breach of law established before ordinary courts (people can only be punished by the law) 2. Every man is subject to the ordinary realm of the law 3. Laws of the constitution are not the source, but the consequence of the rights of individuals <p><i>R (Unison) v Lord Chancellor [2017]</i> – the constitutional right of access to the courts is inherent in the rule of law</p>	<p>Formalist Rule of Law</p> <p><i>Rule by law → formal legality → democracy and legality</i></p> <ul style="list-style-type: none"> • Rule bound order • Equality in the application of the law • Legitimacy of institutions • Procedural focus of how laws are passed; manner in which the law is promulgated • Legal positivism = a law is a law; if it has surpassed procedural hurdles, it is a law • Does not seek to pass judgment on the content of the law itself, therefore, there is more room to breach or compromise societal values <p>Substantive Rule of Law</p> <p><i>Individual rights → right to dignity and justice → social welfare</i></p> <ul style="list-style-type: none"> • Content of the law itself • Justice and moral principles • Human rights, context and history <p>Perspectives</p> <ul style="list-style-type: none"> • Brian Tamanaha – the rule of law is only effective so long as the legislator feels bound to it • WI Jennings – the rule of law implies the notion of liberty, since the powers of the Crown are both derived from, and limited by, Parliament and the Courts • Julius Stone – rule of law may be understood as an ethical doctrine rather than a legal doctrine; artificial to juxtapose the rule of law and sanctity of human rights as if they were competing ideals • International Commission of Jurists – principles, institutions and procedures which the experiences and traditions of lawyers in different countries have shown to be important to protect the individual from arbitrary government and enable him to enjoy the dignity of men

ACQUISITION OF LEGAL INDEPENDENCE

<p>Path to Federation</p> <p><i>R v Burah</i> (1878) held that colonial legislatures, had, and were intended to have, plenary powers of legislation, as large and of the same nature of those as parliament itself.</p>	<p><i>Colonial Laws Validity Act 1865 (Imp)</i></p> <ul style="list-style-type: none"> • Clarified the position of the state legislatures enacting laws independently for the governance of the state • The doctrine of repugnancy required that state legislatures could pass acts repugnant to English statutes, unless they were repugnant to those statutes which were applicable in the Colonial legislature by paramount force <ul style="list-style-type: none"> • <i>Phillips v Eyre</i> (1870) defined repugnancy under the <i>Colonial Laws Validity Act 1865</i> as ‘repugnancy to an Imperial Statute or order made by authority of such statute, applicable to the colony by express words or necessary intendment’ • The doctrine of extraterritoriality restricted the operation of colonial legislatures to their geographical borders, unless operation had sufficient connection with the geographical boundary <p>Time of Federation</p> <ul style="list-style-type: none"> • Australia was not legally independent at the time of Federation • At the time of Federation, the doctrines of repugnancy and extraterritoriality still applied as the <i>Colonial Laws Validity Act 1865 (Imp)</i> was not repealed by the <i>Commonwealth of Australia Constitution Act 1901 (Imp)</i> • Privy Council was the highest court of appeal in the Australian jurisdiction • The Constitution established the Monarch as Australia’s head of state
<p>Colonial Legacy</p>	<p><i>Statute of Westminster 1931 (Imp)</i></p> <ul style="list-style-type: none"> • Freed the dominions of Imperial restrictions; however, the Imperial Parliament retained the power to legislate for Australia by paramount force <p>o S 2 excluded the operation of the <i>Colonial Laws Validity Act 1865 (Imp)</i></p> <ul style="list-style-type: none"> • S 3 removed restrictions of the extraterritoriality doctrine • S 4 permitted the British parliament to legislate for Australia with the ‘request and consent’ of the Commonwealth parliament • S 10 did not automatically apply these provisions to the Dominions, it required that Australia ‘adopt’ the provisions of the statute à <i>Statute of Westminster Adoption Act 1942 (Cth)</i> was backdated to align with the outbreak of WWII

	<ul style="list-style-type: none"> • Australia appeared legally independent at this point, however: <ul style="list-style-type: none"> • While the Commonwealth was free from imperial restriction, the States were still bound by the repugnancy doctrine • British parliament could still legislate for Australia by paramount force • As an Imperial Act of the UK parliament, rather than a Commonwealth statute, the Constitution could not be altered • Privy Council was still the highest court of appeal <p><i>Australia Act 1986 (Cth)</i></p> <ul style="list-style-type: none"> • The <i>Australia Act 1986</i> (Cth) definitively marked Australia's functional legal independence from Britain <ul style="list-style-type: none"> • S 1 – end of British Parliament's role in legislating for Australia • S 2 – end of extraterritoriality as applied to the states • S 3 – end of repugnancy as applied to the states • <i>Sue v Hill</i> (1999) held that the UK was a foreign power (with regards to S 44(i) of the Constitution)
Impact of Federation	<p>Benefits</p> <ul style="list-style-type: none"> • Australian states were now united in the face of common enemies pursuing interests in the Pacific, namely France and Germany • A federal system was more applicable to international dealings in the new world order forming after the Industrial Revolution • Federation facilitated the necessary step allowing Australians to fashion their own unique political order, adapted to Australia's unique circumstances • <i>Patrick Parkinson</i> – a number of independent colonies had already formed, with their own independent legislatures and systems of governance <p>Obstacles</p> <ul style="list-style-type: none"> • Smaller states such as South Australia were feared the loss of their unique features and independence by being subsumed under the larger states of NSW and Victoria • Financial and trade issues arose considering the various capacities of the colonies and how best to weigh the interests of larger states against smaller ones

	<ul style="list-style-type: none"> • Issues in Constitutional drafting: <ul style="list-style-type: none"> • Whether appeals should continue to the Privy Council • Whether Inglis Clark's proposed Clause 110 for the protection of civil and political rights should be adopted
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