PUBLIC LAW - LAWS1141

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Class 1 + 2 – Constitutionalism and the Rule of Law

Readings – Chapter 1 Section 1,2,5 & Chapter 1 Section 4

Constitutionalism

Australia: A Constitutional Hybrid

- Commonwealth of Australia formed when Commonwealth of Australia Constitution Act 1900 (Imp) came into force on 1 January 1901 – The Constitution is a hybrid of ideas and model – of the Westminster system of representative and responsible government and from the US System adopting concepts of federalism, separation of powers and judicial review.
- Constitution is a document about the people, and how institutions interact with each other and how these powers/rules impact upon the people
    - Its purpose is to establish the rule of law
- Queen is Head of State – represented by Governor-General – has power to disallow or annul laws made by the federal parliament (s 59) – but is obsolete, little scope to act independently of advice – by convention, acts on advice of Prime Minister and other Ministers.
- **Representative government** – government by the people (citizen) through their elected representatives
- **Responsible government** –the executive arm of government is responsible to Parliament for its actions.
    - The Parliament is the **central institution** through which all disparate elements of the system of government, are consolidated into a chain of command
        - Crown – controlled by the ministry
        - Ministry – controlled by the Parliament
        - Parliament – controlled by the electorate
    - Thus, the power of the government can be seen as an expression of the power of the people themselves
    - Used to protect the people against the power of government – by distributing and dismembering that power in ways that ensure ether is no single consolidated chain go command.
- Powers of government divided by – **a separation of powers** – allocates **legislative** (the parliament passes laws), executive(the government & public servants carry out the law) and judicial (the courts interpret the law) functions to distinct institutions (partially independent of each other)
- **Federalism** – allocates government (legislative) powers among different political and territorial units (that are subject to checks and balances, power to exercise power of judicial review for laws in consistent to Constitution) – State and Federal Government Power
- **AV Dicey (1959) –** Defines Constitutional law as "**all rules which directly or indirectly affect the distribution or the exercise of the sovereign power in the state "**
- **Sir Ivor Jennings (1959)** – Defines Constitutional law as "the rules governing the composition, powers and methods of operation of the main institutions of government, and the general principles applicable to their relation to the citizens"
- Constitution should be understood as establishing 'a fundamental law, or a fundamental set of principles, and a correlative institutional arrangement, which would restrict arbitrary power and ensure a 'limited government'' (**Sartori**)
- Nominal constitution - deals only with the formalisation of the power structure
    - British Indian Ocean Territory (Constitution) Order 2004, considered by the House of Lords in *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2009] 1 AC 453
        - Purports to establish a system of government for the islands of the Chagos Archipelago
        - Provides for the appointment of a Commissioner with power to legislate and appoint subordinate officers
- **Written constitution** – a solemn document which founds a political community, defines its chief political institution, confers their powers and circumscribes the permissible limits of those powers (USA – ratification in 1788, India – 1949, South Africa – 1996)

- **Unwritten constitution** – practical convenience or reflecting fundamental beliefs about how a government ought to be conducted – not adopted a single document – but important principle-s written in statutes, judicial; decisions in common law (United Kingdom – but has important statutes Act of Settlement 1700 and Parliament Act 1911), NZ, Israel
    - **Unwritten actually fosters progressive interpretation**
- **Constitutional conventions** – understanding which supplements or contradicts the written rules.
- **Australian Constitution** is both written (s 9 of Commonwealth of Australia Constitution Act 1900 – complemented by Statute of Westminster 1931 (Imp) and Australia Act 1986 – supplemented by common law and unwritten conventions) and unwritten – Each state also has a written constitution supplemented by conventions and the common law.
- AV Dicey- between 'flexible' and 'rigid' constitutions
    - '**Flexible'**- every law can legally be changed with the same ease and in the same manner by on and the same body
    - '**Rigid'**- one under which certain laws generally known as constitutional or fundamental laws cannot be changed in the same manner as ordinary laws
        - Double majority referendum is needed
            - Absolute majority in parliament (passes in both houses)
            - Majority of people, in a majority of states (double majority
        - E.g. must be changed by mechanisms such as a referendum
- Under the 'Rigid' Australian Constitution, amendments are initiated by the Commonwealth Parliament, but can only be affected by referendum satisfying the requirements of **s 128**
    - By contrast, the constitutions of AUS states are for the most part flexible

Political and Legal Constitutionalism

- A distinction can be made between systems of government built on the idea of political constitutionalism and those which contain strong elements of legal constitutionalism
- As Adam Tompkins explains, a key differentiating is whether the last say, or at least the decisive legal say, on the constitutional limits of power is given to the judiciary

Adam Tomkins, Public Law - 2003

- In addition to merely creating the institutions of State, a constitution will also make some provision for regulating the relations between the institutions
- The question remains, which institution has the authority to have the last work in the event that they disagree
- All constitutions answer this question in a different way
  o US- the US Supreme Court has the last word
  o English law- Parliament
- The rule which confers this status on Parliament is known as the 'sovereignty of Parliament'
- A constitutional distinction which is of rather more significance than the distinction between 'written' and 'unwritten' constitutions is that between political and legal constitutions
- **Public law does two things** – It provides for the institutions which exercise political power, and It seeks to hold those institutions to some form of account
- Thus, public law regulates the enterprise of government
  o E.g. the purpose of a constitutions to find ways of allowing the government to get away with less
- There are two ways in which this may be acquired: **politically** or **legally**
  o A **political constitution** is one in which those who exercise political power (government) are held to constitutional account through political means and through political institutions (Parliament)
  o A **legal constitution** is one which imagines that the principal means, and the principal institution, through which the government has done or is proposing to do, instead of lobbying for parliamentary scrutiny, you simply sue the government in court or seek some form of judicial review - **system in which the final say on the constitutional limits of power is given to the course and judiciary**
- Political Constitutionalism
  o To be effective, a **political constitution** would require strong and vibrant politics – it would require those performing the scrutiny function to take that function seriously, and to have a high degree of independence from the government of the day
  o Governments in democracies are entirely dependent on politics and maintaining legitimacy and the majority support

- Politics is a good source of accountability- subject to endless media security and opposition from parties
- Political power can be used in self-interested way- corruption
- However, these values are far easier to articulate than they are to follow in practice
- Issues with this model as integrity is not always evident

- Legal Constitutionalism
  - For **a legal constitution** to be effective legal systems, courts and judges will **require independence** from the government of the day, and will be required to take seriously the idea that law can and ought to be used as a technique of holding the government to account
  - Suing is notoriously expensive, and access to the courts is limited to the well-resourced
  - With its British inheritance, the Australian system exhibits a strong adherence to **political constitutionalism**

Amalgamated Society of Engineers v Adelaide Steamship Co Ltd (1920) 28 CLR 129
- The extravagant use of 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 it be conceivable that the representatives of the people of Australia as a whole world ever proceed to use their national powers to injure the people of Australia, it is certainly within the power of the people themselves to resent and reverse what may be done

***Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106**
- Those drafting the constitution preferred to place their trust in Parliament to preserve the nature of our society an regarded as undemocratic guarantees which vetted its powers

***Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476**
- Under the Constitution of the Commonwealth the ultimate decision-maker in all matters which there is a contest, is this Court (legal constitutionalism)

Michael Kirby, 'Judicial Review in a Time of Terrorism - Business as Usual' (2006)
- Judicial review subject's government to scrutiny of detached, independent-minded people well versed in legal history

Separation of Powers

- Under the Westminster system of government which Australia has inherited from the UK, there is no strict separation between legislative and executive power
- First 3 chapters of the Constitutions separates these 3 branches
- On the contrary, the executive is integrated into the legislature by the requirement that the Ministers responsible for the departments of government must be Members of Parliament accountable to such mechanisms such as question time
- The idea of a differentiation between the three different functions of government—legislative, judicial and executive- is as old as Isaiah 33.22 ('The Lord is our judge; the Lord is our lawgiver; the Lord is out King')
- **Legislature:** makes law – passes legislation
- **Executive:** administrating the law, ensuring law is obeyed
- **Judiciary:** interprets the law

Baron de Montesquieu, The Spirit of the Laws
- **Political liberty is to be found…only when there is no abuse of power** - Even good people - once they have been given absolute power are bound to abuse it – by virtue of having that power - To prevent this abuse, it is necessary from the very nature of things that power should be a check to power - When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty, because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner - Political liberty is found where there is no abuse of power – constant experience shows every an vested with power is apt to abuse it and to carry this authority as far as it will go - To prevent this abuse the power should be a check to power - **Legislative** – the prince or magistrate enacts temporary or perpetual laws and amends or abrogates those that have already been enacted

- **Executive** (dependent on the law of nations) – he makes peace or war, send or receive embassies, establishes the public security and provides against invasions
- **Executive** (civil law) – (judiciary power – executive power of the state) he punishes criminals, or determines the disputes that arise between individuals
- If joined – no liberty – exposed to arbitrary control – judge be the legislator – judge might behave with violence and oppression

Owen Hood Phillips and Paul Jackson, Constitutional and Administrative Law

- **(i) The legislative function –** is the making of new law and the alteration or repeal of existing law – legislation as formation of law and actual words part of the law, not only contain law but constitute law itself – without legislative body, state cannot provide law readily enough to meet modern conditions
- **(ii) The executive or administrative function** – is the general and detailed carrying on of government according to law (including the framing of policy and the choice of the manner which the law may be made to render that policy possible)
    - scope is extremely wide – include provision and administration/regulation of a vast system of social services (public health, housing, assistance for sick and unemployed, welfare of individual workers, education and transport), supervision of defence, order and justice and finance required – which were the original task of organised government
- **(iii) The judicial function –** consist in the interpretation of the law and its application by rule or discretion to the facts of particular cases – involves the ascertainment of facts in dispute according to the law of evidence
- **Legislation** involves a formal and instantaneous act designed to establish general rules by which all disputes shall be settled
- **Administration** is a continuing and mainly informal process aimed at preventing disputes in classes of cases and does not create rights by establishing precedents
- **Adjudication** pre-supposes an existing dispute in a particular case, is governed by strict rule of procedure and evidence and tends to create rights by establishing precedents
- What the doctrine must be taken to advocate is the prevention of tyranny by the conferment of too much power on any one person or body and the check of one power by another
    - Blackstone 1765: 'In a tyrannical Governments ... the right of making and of enforcing the laws is vested in one and the same man, or the same body of men; and wheresoever these two powers are untied together there can be no liberty'

Gerard Carney, *'Sepration of Powers in the Westminster System*

- The basic control adopted is to vest the three types of governmental power, legislative, executive and judicial in three separate and independent institutions – the legislature, the executive and the courts – with the personnel of each being different and independent of each other.
- The United States Constitution 1787 incorporates the doctrine of separation of powers:
- The Westminster system effects only a partial separation of powers:
- The integration of the executive into legislature is acknowledged in s 64 of the Constitution: 'no Minister of State shall hold office for a longer period than three months unless he is or becomes a senator or a member of the House of Representatives'

Lisa Burton and George Williams, 'The Integrity Function and ASIO's Extraordinary Questioning and Detention Powers'

- Burton and Williams express the The concept that '**integrity; is a new way of conceptualising the standards expected of those exercising public power**
- The idea that there should be an **'integrity branch' of government, existing somewhere between the traditional three arms and dedicated to supervising the use of public power**, was suggested by Bruce Ackerman in the US in 2000
- For example, integrity has been used as a rubric to assess the comparative health of government systems
- Various new 'integrity commissioners' have also been created in recent years to supervise all manner of public power
- The meaning of integrity is still unclear: in its simplest form, it refers to the absence of corruption, in the sense of using public powers for personal use

Further paragraph

- Former **NSW Chief Justice, James Spigelman (2004)** further commented that a "fourth branch" could include the media or even the people
    - However, there is no textual or structural basis for a "fourth branch" within the Australian Constitution

Rule of Law

Overview

- The concept of the rule of law has salience well beyond the shores of one country, or even of the West
- In basic terms, the "rule of law" underpins how the constitution operates as it **implies that every citizen is subject to the law (including law makers themselves)**
- The "rule of law" stands in contrast to an **autocracy, dictatorship or oligarchy** (where rulers are above the law)
- Brian Tamanaha notes its endorsement by current and recent leaders of diverse societies, including Russia, China, Zimbabwe Indonesia, Iran and Mexico

Brian Z Tamanaha, On the Rule of Law: History, Politics, Theory

- This apparent unanimity in support of the rule of law is a feat unparalleled in history
- No other single political ideal has ever achieved global endorsement
- Notwithstanding its quick and remarkable ascendance as a global ideal, the rule of law is an exceedingly elusive notion
- Explicit or implicit understandings of the phrase suggest that contrasting meaning are held
- Some believe that the rule of law includes protection of individual rights
- Some believe that democracy is part of the rule of law
- The rule of law thus stands in the peculiar state of being the preeminent legitimating political ideal in the world today, without agreement upon precisely what it means
- This idea is too important to contemporary affairs to be left in confusion
- **Formal theories** focus on the proper sources and form of legality (rule of law suggests you must obey the legal rules and operate in accordance with the law- not one is above the law)
  o Therefore, this definition does not make judgements about the "justness" of the law itself and does not include democracy or human rights – Tamanaha justifies this definition by stating that including it would be contrary to the tenants of liberalism itself (it would suggest that only liberal democracies have the rule of law)
- While **substantive theories** also include requirements about the content of the law (usually that it must comport with justice or moral principle)
  o Included the areas of whether the legal system has a just and fair outcome and the positive obligations to human rights (these rights are derived from the rule of law)

AV Dicey, Introduction to the Study of the Law of the Constitution

- Definition of the rule of law is based on the English constitution which has no written aspect and is very much a formal account of the rule of law ('thin' definition)
- Three meanings/three different points of view: (p 18)
  o A man can only be punished if it was proved in court that he breached a law
  ▪ The Sovereign cannot punish people arbitrarily.
  o No man is above the law, and everyone is equal before the law.
  ▪ The law applies to everyone in the exact same way regardless of social, economic or political status.
  o The Constitution (the law) is the result of previous judicial decisions determining the rights of private persons.
  ▪ The constitution is not the source of the law, but the consequence of inherent rights. We don't derive our rights from the Constitution; the Constitution is the result of our rights.
- No man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land
- Every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals
- A man may be punished for a breach of law, but he can be punished for nothing else

WI Jennings, The Law and the Constitution
- In a liberal sense, the rule of law requires that the powers of the Crown and of its servants shall be derived from and limited by either legislation enacted by Parliament, or judicial decisions taken by independent courts

- Governmental powers shall be determined and distributed by reasonable precise laws - those acting on behalf of the State cannot exercise a power unless they can indicate a specific rule of law authorising their act
- Rule of Law means a limitation of power on every authority, except perhaps a representative legislature
- A sovereign or any person acting on behalf of a state can only exercise a power as long as he can authorise his act through an existing law.
- Equality before the law is flawed – many legislations apply only to special classes, minor's have different laws.

- **Jennings** disputes Dicey's view of the Rule of Law that *'Englishmen are ruled by the law and the law alone'* [1] – this is because this idea is true, even in the most despotic State
    - For example, **Hitler, Napoleon I, Louis XIV** derived their powers from the law since the law allowed the leader to do and order what he pleases
- Jennings also highlights that most systems aspiring to the rule of law incorporate more s**ubstantive elements of constitutionalism –** 'thick' view
    - For example, whilst certain parts of the law, including **contracts, torts and crimes apply to every person** who is NOT incapacitated mentally or physically, there is a large discretion in its application.
    - The courts inflict punishment according to the **particular circumstances of the criminal**, NOT according to the nature of the crime (the purpose of judicial administration is not to punish crime but prevent it)
-

Julius Stone, "Social Dimensions of Law and Justice" (1966)
- Argues that the 'rule of law' is an **ethical doctrine**, rather than merely a legal doctrine (thus, a substantive definition) - An important aspect of this doctrine is that those in power must recognise that their power is '**<u>wielded and tolerated only subject of the restraints of SHARED socio-ethical convictions'</u>** - When rule of law is defined from an **ethical viewpoint**, then the following must be true: o Substantive law must respond to needs of social and economic development. o The rule of law does not demand a uniform rule on all matters for everyone. o The Rule of Law should not be limited to three tightly defined principles. The Rule of Law is a broad concept which prevents arbitrary power in any form.

International Commission of Jurists, The Rule of Law in a Free Society - Report of the International Congress of Jurists, New Delhi 1959
- All power in the State should be derived from and exercised in accordance with the law - Law itself is based on respect for the supreme value of human personality - **<u>The rule of law can be characterised as 'the principles, institutions and procedures, …which the experience and traditions of lawyers in different countries of the world, often having themselves varying political structures and economic backgrounds, have shown to be important to protect the individual from arbitrary government and enable him to enjoy the dignity of men.'</u>**

- **Lord Bingham** (Lord Chief Justice of England until 2008), argued that *"the core of the existing principle is, I suggest, that all **persons and authorities within the state**, whether public or private, should be **bound by and entitled to the benefit of laws** publicly and prospectively promulgated and **publicly administrated in the courts**"*
- His definition was broken into 8 sub-rules:
    1. Law must be accessible, intelligible, clear.
    2. Legal rights and liabilities should be resolved by application of the law, not discretion.
    3. Laws of the land should apply equally to all.
    4. **Laws must afford adequate protection to human rights**.
    5. Means must be provided for resolving civil disputes.
    6. Ministers and public officers should exercise the powers conferred on them reasonably and without exceeding their limits.
    7. Adjudicative procedures provided by the state should be fair.
    8. Compliance by the state with international law.

Sir Ninian Stephen, 'The Rule of Law' (2003)
- Rule of law not uniform – not one simple ideal but group of vital principles – descriptive of what should not occur, should not be done, in any democracy which has regard for human rights and is respectful of the liberties of its people

- Cardinal principles of rule of law;
    1. Government should be under law: law should apply to and be observed by Government and its agencies – those given power in the community - just as it applies to the ordinary citizen
    2. Those who play their part in administering the law (judges and other lawyers alike) should be independent of and uninfluenced by Government in their respective roles so as to ensure that the rule of law is and remain a working reality and not a mere catch phrase
    3. There should be ready access to the courts of law for those who seek legal remedy and relief
    4. The law of the land should be certain, general and equal in its operation

- Australian Communist Party v Commonwealth (Communist Party Case) 1951:
    - Dixon J: some traditional conceptions 'are simply assumed' in the Constitution where 'rule of law forms an assumption'
    - The principle of legality is a common law precept of statutory interpretation – holds that absent clear language, Parliament is presumed not to intend the infringement of numerous common law rights and freedoms – strong support within the contemporary High Court – within the aspect of the rule of law (Gleeson CK and French CJ in K-Generation Pty Ltd v Liquor Licensing Court 2009)

Robert French, 'Rights and Freedoms and the Rule of Law

- The rule of law provides the framework within which we can protect and enjoy our rights and freedoms – it does not guarantee them
- The strongest guarantee is to be found in a spirity of liberty in the people

Class 3 (Online) – Acquisition of Legal Independence & Path to Federation

FROM MODULE

The Colonial Legislatures and The Colonial Legacy

- Before 1901 when Australia became a nation, the continent consisted of six British colonies which were partly self-governing, but subject to the law-making power of the British Parliament. Each colony had its own government and laws, including its own railway system, postage stamps and tariffs (taxes).
- Each colony had their own colonial legislatures, which came into existence the operation of a 'higher law' – an Act of British Parliament.
- The colonial legislatures had the same wide legislative competence as the British Parliament. Consider the following statements:
    - *R v Burah (1878)* – B&W, p 99
        - The Indian legislature, when acting within the limits established by the Imperial statute that created it…'…is not in any sense an agent or delegate of the Imperial Parliament, but has, and was intended to have, plenary powers of legislation, as large, and of the same nature, as those of Parliament itself.'
    - *Hodge v The Queen (1883)* – B&W, p 99
        - 'Within these limits of subjects and area the local legislature is supreme, and has the same authority as the Imperial Parliament … would have had under like circumstances…'
- During the latter half of the 1800s, there was uncertainty as to the precise relationship between the Australian colonies and UK laws, namely whether the colonial legislatures could enact laws contrary to the laws of England.
- A South Australian judge, Boothby J, handed down numerous decisions that invalidated enactments by the colonial legislatures on the basis that the enactments were 'repugnant' to UK laws – As a result of these legislative difficulties, the UK Parliament passed the *Colonial Laws Validity Act 1865* (Imp).
- The **doctrine of repugnancy** describes the situation where a State (former Colonial) law is rendered invalid for being inconsistent with paramount law.
- **Paramount law** emanates from the original source of State (former Colonial) legislative power.
- This, in the case of the Australian States (former Colonies), is the United Kingdom Parliament, in the past referred to as the Imperial Parliament.
- Paramount laws in relation to the States (former Colonies) are United Kingdom or imperial laws intended to extend to the States (former Colonies).
- Consequently, where a State (former Colonial) law is inconsistent with the terms of an imperial paramount law, the State (former Colonial) law is void for repugnancy at common law.
- **Doctrine of extraterritoriality** means the Colony's laws cannot have any operation outside its territorial borders. As colonies of the British Empire, the Commonwealth and State Parliaments had no extraterritorial legislative functions at the time of Federation.

The Statute of Westminster

- After WW1, the British colonies started to adopt their own national identities. A series of conferences known as the 'Imperial Conferences' were held to discuss the new relationship between Britain and the colonies. As a consequence, the UK Parliament passed the *Statute of Westminster 1931* (Imp).
- **The Statute of Westminster 1931 was adopted by Australia in 1942 retroactive to 3 September 1939, when Australia entered World War II.**
- **Section 2**
    - (1) The Colonial Laws Validity Act, 1865, shall not apply to any law made after the commencement of this Act by the Parliament of a Dominion.
    - (2) No law and no provision of any law made after the commencement of this Act by the Parliament of a Dominion shall be void or inoperative on the ground that it is *repugnant* to the law of England ... and the powers of the Parliament of a Dominion shall include the power to repeal or amend any such Act...
- **Section 3**

- It is hereby declared and enacted that the Parliament of a Dominion has full power to make laws having *extra-territorial operation*.

- **Section 4**
  - No Act of Parliament of the United Kingdom passed after the commencement of this Act shall extend, or be deemed to extend, to a Dominion as part of the law of that Dominion, unless it is expressly declared in that Act that that Dominion has *requested, and consented to*, the enactment thereof.
- **Section 8**
  - Nothing in this Act shall be deemed to confer any power to repeal or alter the Constitution or the Constitution Act of the Commonwealth of Australia...

Readings – Chapter 3 section 2,,4,5 7, 8, & section 3

Acquisition of Legal Independence

The Colonial Legislatures

- The bicameral legislatures (two houses) were subordinate – they had only **achieved legal and institutional presence** from an Act of the British Parliament.
- However, by 1850s- colonies gained real powers of local self-government
  - Since legislation was derived from British parliament, then it was believed that colonial legislation should have the same **omnicompetence**

R v Burah (1878) 3 App Cas 889

- An Indian statute was passed in 1869 which authorised the Lieutenant-Government to remove hill areas from the jurisdiction of the courts, thus would subject the Bengal tribes to **martial law (military authorities)**
- In 1878, Burah was convicted of murder
- Burah appealed to the Calcutta High Court – Court held that it had jurisdiction
  - Crown then appealed to the Privy Council
- **Questions of Legal significance:**
  - **1. Had the act of 1869 taken away the right to appeal to the High Court (since it removed jurisdiction from the courts)?**
  - [Their Lordships] held that it had
  - **2. Can the Indian legislation validly do this?**
  - It was held that there was NO inconsistency with the ***Indian High Courts Act 1861 (Imp)***
  - **3. Did the power given to the Lieutenant-Governor involve a delegation of legislation power, violating the '*maxim delegatus non potest delegare*' (a delegate may not itself delegate)?**
  - It was held that there was NO delegation of power
  - This was because the Indian Legislature was NOT a 'delegate' of the Imperial Parliament
- **Summary of Result:**
  - Whilst Indian legislature is limited by the Act of Imperial Parliament, when **acting within those limits, it has plenary powers of the same nature as Parliament itself**.
  - This was still a reminder that a **colonial legislature was still a subordinate institution**
  - Colonial and provincial legislatures were NOT delegates of the Imperial Parliament
  - However, **within the powers conferred**, they had the SAME authority as the Imperial Parliament
  - The *'delegatus non potest delegare'* could not therefore not apply as they were in no sense delegates
  - However, the legislatures themselves could confer legislative powers on other authorities, without requiring authorisation from Imperial Parliament.

Hodge v The Queen (1883) 9 App Cas 117
- Privy Council repeated the same doctrines as above - The License Commissioners had prohibited the playing of billiards in taverns under the *Liquor License Act 1877 (Ontario)* - Hodge (plaintiff) was charged with permitting billiards to be played in his tavern - Argued that the province legislature could NOT delegate law-making powers to the Boards of Commissioners - Questions of Legal Significance   - **1. In relation to the federal distribution of powers in Canada (*British North America Act 1867 Imp),* did liquor licensing come within the list of Dominion powers (s 91) or within provincial powers (s 92)?**

(repugnancy), and that Australia could not legislate on certain matters outside its territory (extraterritoriality).

The Colonial Legacy

- The birth of the Commonwealth of Australia might be seen as a sign that Australia was becoming independent from Britain. However, **legally,**
    - Commonwealth created by the Imperial Parliament in England (*s 9)*
    - Not free from legislation passed with **paramount force by the British Parliament** – this links to the ***Colonial Laws Validity Act 1865 (Imp)***
        - However, each grant under s 51 of the constitution (Part V – Powers of the Parliament) might have been regarded as freeing the parliament from the repugnancy doctrine

Doctrine of Repugnancy

- This doctrine is highlighted in **s 2** of the ***Colonial Laws Validity Act 1865 (Imp)***
    - It meant that **if Australian legislation is inconsistent (repugnant) to that of the UK, it is invalid**
- It was of the belief that this doctrine would no longer apply after the passing of the Constitution – the ***Commonwealth of Australia Constitution Act*** impliedly repeals the ***Colonial Laws Validity Act 1865*** when there is an **inconsistency**

Cases Involved

Union Steamship Co v New Zealand Ltd v Commonwealth (1925) 36 CLR 130
- High Court held that the repugnancy doctrine continued to apply to the Commonwealth
- Provisions of the *Navigation Act 1912 (Cth)* were **invalid by reason of 'repugnancy"** to the ***Merchant Shipping Act 1984 (Imp)***
  o Despite ***s 98*** of the constitution which reads, *'The power of the parliament to make laws with respect to trade and commerce extended to navigation and shipping'*
- This was an odd decision, since six months earlier, the Court took a different view in:
 	
Commonwealth v Limerick Steamship Co Ltd (1924) 35 CLR 69
- It was held that **s 39 (2)** of the of the ***Judiciary Act 1903 (Cth)*** was valid
- It was **NOT** repugnant to **Judicial Committee Act 1844** or the **Australian Courts Act 1828 (Imp)**
  o This was because the ***Commonwealth of Australia Constitution Act*** overrode the repugnancy doctrine of the ***Colonial Laws Validity Act***
- Applied the law of "assuming two imperial enactments conflict, the later must prevail".
- This ruling meant that whenever there is an Imperial statute which gives rise to repugnancy, it will be impliedly repealed (to the extent of its inconsistency with the grants of power in the Commonwealth Constitution).
  o Effectively, this meant that the **repugnancy doctrine had ceased to apply to Australia**.
- To reconcile the differences in the court's decision, it was explained in the following case:
 	
Commonwealth v Kreglinger & Fernau Ltd (Skin Wool Case) (1926) 37 CLR 393
- The different reasoning used was explained by **Isaacs J (1926)** in this case:
  o *In regard to the Union Steamship Case*
  ▪ Regulations dealt with in ***Merchant Shipping Act 1894 (Imp)*** applied to non-Australian ships o Thus, substantive rights of OTHER parts of the Empire were involved
  o *In regard to the Limerick Steamship Case*
  ▪ The issue of s 39(2) is concerned with purely AUSTRALIAN affairs

Doctrine of Extraterritoriality

- Two interpretations of the doctrine of extraterritoriality:
    - **Broad** – An exercise of colonial legislative power is **invalid** unless its operation has sufficient connection with the geographical area of the legislating colony.
    - **Narrow** – A colony's laws can never have any operation outside its territorial borders.
- As colonies of the British Empire, Parliaments had **no extraterritorial legislative functions at all**.
- Some version of the doctrine of extraterritoriality continued apply to the:

- Commonwealth Parliament until the Statute of Westminster 1931 (UK)
- State Parliaments until the Australia Act 1986 (Cth)

Hodge v The Queen (1883) 9 App Cas 117

- This case highlighted the **orthodox view** regarding extraterritorial power
  - **Local legislature is supreme** within its limits of subjects. It has the same authority as the Imperial Parliament would have under similar circumstances.
- Therefore, the question is **how far** the law-making power can extend beyond its geographical borders.
- Under **international law**, a state can sometime **legislate extraterritorially**
  - For example, the ***Crimes (Child Sex Tourism) Amendment Act 1994 (Cth) –*** permits the prosecution of Australian citizens/residents in respect of offences committed outside Australia
  - s 51 of the Constitution impliedly **confers the power to legislate extraterritorially** (for example, s 51 (i) provides a power to make laws regarding "trade and commerce with other countries").

- Reconciling this idea with Parliamentary Sovereignty
  - The concept of 'Parliamentary Sovereignty' would imply that its law-making power has NO territorial limit
  - On the basis of **Dicey's view** – a British law regulating littering on the streets in Paris would be legally valid since Parliament is the supreme law-making body (in reality, it would be ineffective)
    - Some authorities on Imperial law suggested that British colonies had NO extraterritorial power at all
      - The 'plenary' (unlimited) legislative power given to colonies by Imperial parliament could ONLY be exercised by each colony **within its own territorial borders**
      - Exemplified in the case ***Macleod v Attorney-General (NSW) [1891] AC 455***
        - Macleod could NOT be persecuted for bigamy under NSW laws since it had taken place outside the territorial limits of NSW

<u>The Statute of Westminster</u>

- The ***Statute of Westminster 1931 (Imp)*** freed Dominions (including the Commonwealth of Australia) from **imperial restrictions**
- This was done by:
  - Excluding operation of the ***Colonial Law Validity Act*** – thereby the **repugnancy doctrine** was removed
  - Removing restrictions on Commonwealth legislative power arising under the **extraterritoriality doctrine**
- Thus, Australia's status was changed from **colonial dependency to that of national independence** (**shift from Colonial to Dominion status**)
- Established in 1917 at the 'Imperial Conferences' (London) – redefined the relationship among the major centres of British settlement
  - Canada, South Africa and the Irish Free State – demanded greater autonomy
  - Australia – far less vocal

Geoffrey Sawer, *"The Australian Constitution" (1988)*
The Balfour report (1926) identified **FIVE conflicting areas** when shifting status from colonial dependent to independence: 1. **Royal style and titles** (the Monarch related to Dominion Govt. and NOT to the British Govt.) 2. **Position of governors-general** (regarded as representatives of the crown and NOT answerable to the British Govt.) 3. **Operation of Dominion legislation** (reservation and disallowance powers of the Crown, effect of the *Colonial Laws Validity Act 1865* and extraterritorial operation) 4. British merchant shipping legislation 5. Privy Council judicial appeals

Provisions of the Statute of Westminster 1931 (imp)

- **s 1** – Colonial Laws Validity Act shall NOT apply