

Class 1B — Constitutionalism; The Rule of Law

Class Notes:

-What is constitutionalism?

- Constitutionalism = a description of how power is distributed, and which institution can do something with the force of law
- Negative vs positive constitutionalism
 - Negative constitutionalism = limiting government power
 - Focus on how power is limited or contained
 - Positive constitutionalism = empowering government
 - Supporting or facilitating the exercise of power by identifying its source
- Separation of powers doctrine

-Political vs legal constitutionalism:

- Political constitutionalism = Those who exercise political power are held to constitutional account through political means and political institutions such as Parliament
 - Robust and vigorous political processes are assumed
 - Critique: treatment of minorities by political majorities
- Legal constitutionalism = The principal means and principal institution through which government is held to account is the law and the courts
 - Independence of judges from other branches of government is assumed
 - Critique: expense, capacity to follow-up and enforce own decisions
- Key indicator = does the judiciary (High Court) or political institutions (Parliament) have the 'final say'?
- **Amalgamated Society of Engineers v Adelaide Steamship Co Ltd (1920) 28 CLR 129, 151 (Knox CJ, Isaacs, Rich and Starke JJ):** "[T]he 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**. When the people of Australia, to use the words of the Constitution itself, "united in a Federal Commonwealth," they took power to control by ordinary constitutional means any attempt on the part of the national Parliament to misuse its powers... If it be conceivable that the representatives of the people of Australia as a whole would ever proceed to use their national powers to injure the people of Australia considered sectionally, it is certainly within the power of the people themselves to resent and reverse what may be done. No protection of this Court in such a case is necessary or proper."
- **Australian Capital Television Pty Limited v Commonwealth (1992) 177 CLR 106 at 186 (Justice Dawson, in dissent):** "...those responsible for the drafting of the Constitution saw constitutional guarantees of freedoms as exhibiting a distrust of the democratic process. They **preferred to place their trust in Parliament** to preserve the nature of our society and regarded as undemocratic guarantees which fettered its powers.... Their model in this respect was, not the United States Constitution, but the British Parliament, the supremacy of which was by then settled constitutional doctrine."
- **Plaintiff s157/2002 v The Commonwealth (2003) 211 CLR 476 at 513-514 (Gaudron, McHugh, Gummow, Kirby and Hayne JJ):** "Such jurisdiction exists to maintain the federal compact by ensuring that propounded laws are constitutionally valid and ministerial or other official action lawful and within jurisdiction. In any written constitution where there are disputes over such matters, there must be an authoritative decision-maker. **Under the Constitution of the Commonwealth the ultimate decision-maker in all matters where there is a contest, is this Court.**"
- **Michael Kirby, 'Judicial Review in a Time of Terrorism - Business as Usual', Johannesburg, 2005:** "Centuries of experience demonstrates that **judicial review has the enduring merit of subjecting governmental and other enthusiasms to the scrutiny of detached, independent-minded people well versed in history, including legal history....**
 - The experience of the cases that I have collected, old and new, suggests the wisdom of this form of scrutiny. That is why the message of the courts for the present age is, and should be, a simple one. Nothing fundamental has changed. Indeed, the fundamentals remain in place. Constitutionalism and the rule of law prevail. **Judicial and constitutional review are crucial attributes of liberty.** They must still apply."

-Rule of law

- Elements of the rule of law:
 - Formal elements:

- Law is clear, certain, generally applicable and prospective
 - Law is made in a way that facilitates democratic oversight
 - Substantive elements:
 - Law protects property, contractual, civil, political, economic, social and cultural rights
 - General attributes:
 - Equality before the law
 - Checks and balances on the use of power
 - Rights of the accused and victims
 - Presumption of innocence
 - Independence of the judiciary
 - Right to assemble
 - Freedom of speech
 - Access to justice
 - Knowing the law
 - **Dicey's** conception:
 - 1. Supremacy of regular law
 - 2. Equal subjection to the law
 - 3. Rights of individuals are secured through the common law and Parliament (not the Constitution) = parliamentary sovereignty
- What rule of law can help to secure?
 - Order, certainty and predictability
 - Accountable government
 - Fairness and/or justice
 - Individual liberty and freedom
 - Sustainable economic development
- How is the rule of law conceptually elusive?
 - Is democracy is part of rule of law or rule of law is part of democracy?
 - Formal vs substantive
 - Rule of law is purely formal in nature (laws are set in advance in general, clear terms, and be applied equally to all) OR broader understanding to include social, economic, cultural and educational conditions to realize man's legitimate aspirations and dignity?
 - 'No other single political ideal has ever achieved global endorsement'. Brian Tamanaha, B&W [1.29]

-Why are constitutions important?

- Adam Tomkins:
 - 1. Power of the institutions of government
 - 2. Place of the people inside a system of govt
 - 3. Values a society makes claim to

Reading Notes:

-Adherence to the rule of law is a defining feature of constitutional systems around the world (2)

- However, the concept is elusive, with no accepted understanding of what the rule of law entails.
 - **Adopting a narrow, formal approach, AV Dicey said that the rule of law includes the supremacy of the law over the exercise of arbitrary power and equality before the law.**
 - Others have suggested the rule of law encompasses more substantive obligations, including the protection of human rights.
- Interpretations of the Constitution, such as on judicial review of Commonwealth administrative action, have been influenced by understandings of the rule of law.
 - Dixon J of the **High Court in Australian Communist Party v Commonwealth (Communist Party Case) (1951) 83 CLR 1** stated that the 193] the rule of law forms an assumption' upon which the Australian Constitution is founded.

The Rule of Law:

-Brian Z Tamanaha, "On the Rule of Law: History, Politics, Theory" (2004)

- Despite there being a global unanimity in support of the rule of law, it is an "exceedingly elusive [difficult] notion and contrasting meanings are held"
 - "It is preeminent [distinguishable] political ideal ... without agreement upon what it means"
- There are TWO basic branches within legal theory that separates the "rule of law" according to the legal theorist, Tamanaha:
 - Formalist or "thin" definition
 - Substantive or "thick" definition
- "Formal" conceptions of the Rule of Law

- Focus on proper sources and form of legality within the legal system (proper procedures and a legal framework)
- Concerned with the law applying to people equally
 - Therefore, this definition does NOT make judgements about the “justness” of law itself
 - Definition does NOT include democracy and 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)
- “Substantive” conceptions of the Rule of Law
 - Whilst still concerned with the formal attributes, they take the doctrine further by including requirements about the content of the law (ethical, justice or moral principles)
 - Included are the ideas of:
 - Whether the legal system has a just and fair outcome
 - Positive obligations to human rights (ie. Takes into account individual circumstances)
 - NOTE: these rights are derived from the rule of law

-AV Dicey, “Introduction to the Study of the Law of the Constitution” (1959)

- FORMAL or THIN definition
- Dicey’s definition is based on the English Constitution (which has no written constitution)
 - His definition is very much a formal account of the rule of law -> “thin”
- There are THREE meanings of “the rule of law”, which forms a fundamental principle of the constitution:
 - 1. Allows for the absolutely supremacy and predominance of regular law (instead of arbitrary, prerogative or discretionary authority). A person can only be punished if it is proved in court that they breached a law – the sovereign CANNOT punish arbitrarily
 - 2. Equality before the law – equal subjection of ALL classes in the courts of law. There is NO exemption of officials (such as the executive) to the law
 - 3. The constitution is NOT the source of the law but the consequence of the rights of individuals, which is defined and enforced by the courts.
- We don’t derive our rights from the constitution, instead the constitution is the result of our rights
 - The constitution establishes basic powers, limits of government and the relationship between a government and its citizens

-WI Jennings, “The Law and the Constitution” (1959)

- SUBSTANTIVE or THICK definition
- It mandates a separation of powers as a key attribute of the rule of law
 - 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
 - “It’s an attitude, an expression of liberal and democratic principles, in themselves vague when it is sought to analyse them, but clear enough in their results.”
- Jennings also highlights that most systems aspiring to the rule of law incorporate more substantive 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)
- It’s built on very lofty ideals of liberty and equality

-Julius Stone, “Social Dimensions of Law and Justice” (1966)

- SUBSTANTIVE or THICK definition
- 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 ‘wielded and tolerated only subject of the restraints of SHARED socio-ethical convictions’
- When rule of law is defined from an ethical viewpoint, then the following must be true:
 - Substantive law must respond to needs of social and economic development.
- The rule of law does not demand a uniform rule on all matters for everyone.
- 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, “Report of the International Congress of Jurists, New Delhi” (1959)

- SUBSTANTIVE or THICK definition
- 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.’

-Lord Bingham, “The Rule of Law” (2007)

- 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 publically administrated in the courts”
- His definition was broken into EIGHT 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)

- Defines “The Rule of Law” as FOUR concepts:
 - 1. Government should observe and be under law
 - 2. Those who administer law (judges and lawyers) should be independent of Government
 - 3. There should be ready access to the courts for those who seek legal remedy and relief
 - 4. The law should be certain, general and equal in operation

-Lisa Burton Crawford

- Rule of law left to parliament [common law rights are in a rebuttable not entrenched form – K-Generation] and not standards of Australian constitutional validity
 - in Australia, remains procedural rather than substantive(thin rather than thick)
- Rule of law is thin on a purely judicial level but made thick by Parliament/social expectations.

-Robert French, “Rights and Freedoms and the Rule of Law”

- Measures to restrain power to avoid death by a thousand cuts – eg sunset clauses, scrutiny of laws, publicly know
 - Rule of law is the framework within which we can protect and enjoy our rights and freedoms but does not guarantee them. The strongest guarantee is in a spirit of liberty in the people
- First: the Rule of Law is key to freedom
- Second: penal populism can erode this Rule of Law
- Third: the rule of law is an ideal but not a guarantor, the guarantor is “to be found in the spirit of the people”

Class 2A — A Constitutional Hybrid 1

Class Notes: Australia’s Westminster Constitutional Inheritance: Responsible Government, Parliamentary Sovereignty and Contemporary Challenges

-What model does Australia’s constitution endorse?

- **R v Kirby; Ex parte Boilermakers Society of Australia (1956) 94 CLR 254, Dixon CJ, McTierman, Fullagar and Kitto JJ (39):** “Combination of the British system of parliamentary government containing an executive responsible to the legislature with American federalism is ‘probably the most striking achievement of the framers of the Australian instrument of government.’”

-Inheritance from the Westminster system:

- Responsible Government
 - Responsible and representative government is one of the key features of the Australian constitutional system
- Parliamentary Sovereignty
 - UK: Parliament is supreme
 - Why?
 - Historical evolution;
 - Centuries-long power-struggle with the Crown;
 - Bill of Rights of 1689; Act of Settlement of 1701; 1832 (Reform Act) and the subsequent development of representative and responsible government
 - Modern challenges:
 - Human Rights Act

- European Court of Human Rights
 - Brexit
- **Dicey's** concept of Parliamentary sovereignty
 - Legal fact fully recognised by the law of England
 - Legal limitations on the sovereignty of Parliament are alleged only and do not exist. Parliament is an absolutely sovereign legislature
 - Power to make or unmake any law whatever; no person or body can override the legislation of Parliament
 - There are TWO limits to parliamentary sovereignty:
 - The **external limit** to the exercise of sovereignty consists of the possibility that the people who elected the parliament may disobey or resist the laws of Parliament
 - The **internal limit** to the exercise of sovereignty arises from the sovereign power itself and the ethical feelings of those who sit in Parliament. It is based on moral feelings of the time and society to which they belong
 - For example, members of parliament would NOT legislate against a specific race because they themselves consider it morally wrong, based on societal norms of the time.
 - Subject to critique
 - **TRS Allan:** 'deeper constitutional morality' limits parliamentary sovereignty
 - Parliament must remain a representative assembly
 - Parliament must not enact legislation undermining the democratic basis of established institutions
 - Statutes which ignore these requirements cannot derive authority from the doctrine of sovereignty
- Constitutional Conventions
 - Flexible, unwritten constitutional law
 - Political rather than legal rules (constitutional morality as per Dicey)
 - No single defining constitutional moment = result of evolution, not revolution
 - Subject to change; New conventions can emerge.
 - Issues:
 - How to identify the existence of a convention?
 - Why should convention be followed?
 - Are they directly enforceable?
 - Perspectives:
 - Dicey: English constitutional law = law of the constitution and conventions of the constitution
 - Barber on the nature of constitutional conventions
 - A convention operates when:
 - People act in conformity to the rule
 - The rule forms part of their casual explanation of their conduct
 - The political community accepts the rule as a valid standard for conduct
 - Must be constitutional in nature
 - Marshall: 'Positive Morality'
 - Conventions accepted as obligatory rule of behaviour (per Wheare) or rules that regarded as binding (per Phillips).
 - No explanation as to the value or purpose of convention required.
 - Jennings: 'Critical Morality':
 - There must be a reason for the rule.
 - Conventions = 'the rules that political actors ought to feel obliged by in they have considered the precedents and reasons correctly' (per Marshall)
- No Bill of Rights
- Constructional Monarchy

If Parliament ceased to be a representative assembly, in any genuine sense of that idea, or if it proceeded to enact legislation undermining the democratic basis of our institutions, political morality might direct judicial resistance rather than obedience. No comfortable distinction between legal doctrine and political principle can ultimately be sustained. Such questions about the proper relationship between the courts and Parliament cannot be settled by resort to competing formulations of some supposed pre-existing legal rule: it is the scope and content of that rule - its meaning and application - which are themselves in issue. Answers can only be supplied as a matter of political theory - in terms of the values which we regard as fundamental of the constitutional order ... (p62)

Class 2B — A Constitutional Hybrid 2

Class Notes: Australia's American Constitutional Inheritance: Federalism and Judicial Review

-Elements of American Constitutionalism

- Unique to America when introduced and in the 1890s (Australia's drafting)
- Written and rigid constitution
 - Australia's constitution is significantly more rigid (referendum)
- Federalism: Federal government is circumscribed powers by subject matter
 - Enumerated federal powers and residual state powers
 - Limited power (not plenary)
 - Requires a great nation to be split into states/ territories
- Separation of powers:
 - Horizontal: executive, judiciary, legislative
 - Vertical: National/ federal, state/ territory and local
 - As opposed to a unitary centralised government
 - E.g. England is a pseudo-unitary government (Westminster/ national and local governments)
- Highest court (Supreme Court/ High Court) and judicial review
 - Highest court in the country has the power to declare legislation as invalid
- US Constitutionalism: underlying ideology
 - Reflects the fear of despotism by a ruling elite ignorant of the needs of the people
 - A strong belief that government should promote the general welfare
 - **The new meaning of federalism:**
 - **Federation: The body of countries that are closely connected (by locality, history, race, etc.) as to be capable of becoming a common nationality**
 - **A certain state of sentiments among the population of the unities which it is proposed to unite**
 - E.g. Referendum to federate in Australia
 - **New features added to the traditional understanding of the federal state**
 - **Separate parliament, executive and judiciary at the national level AND state level**
 - Strong sense of nationalism
 - Dicey on US Constitutionalism: Parliamentary sovereignty
 - The federal system is weaker
 - Challenge through judicial review
 - Parliament has the collective wisdom of the people and thus should not be overridden
 - Tension between the vertically separated powers = possibility of State/ Federal disputes
 - Dislikes written constitutions = plenary legislatures are more powerful
 - The constitution must be rigid and extreme
 - Difficulty of making significant changes = tendency towards conservatism

-Development of the US Constitution:

- Continental Congress: Delegates from 13 US colonies met in Philadelphia and voted for independence from Britain (1776)
 - Adopted the Declaration of Independence
 - Culminated in the War of Independence
- Articles of Confederation (ratified between 1777 and 1781)
 - Federalist Papers: Need for a stronger union and national government
 - Philadelphia Convention (1787): The draft of the Constitution replaced the Articles of Confederation
 - In Australia, an invasion occurred in 1788 as England sought to replace their penal colony

-Australian Federalism: Federal and state governments

- Each has its own institutions
- Considerable tension between state and federal governments
 - s 109: Inconsistency doctrine = supremacy of federal laws over State laws
- Enumerated federal powers and undefined residual State powers (plenary state powers)
 - Federal judiciary to decide if either level of government had exceeded its powers
 - E.g. s 92: Trade, commerce and intercourse amongst the states should be free = binds state and federal governments
- Equal representation in the Senate
- Written, rigid constitution (s 128)

- Judicial review
- Origins of judicial review (US): **Marbury v Madison**
 - Midnight Judges Act: John Adams appoints Federalist judges in the last few hours of his presidency
 - Jefferson refused to deliver these judicial commissions to the judges, including Marbury
 - Writ of Mandamus: SCOTUS can mandate
 - Congress suspends SCOTUS for a full year = threatens SCOTUS to decide the case in favour of Democratic-Republicans (rather than Federalists)
 - Chief Justice John Marshall's decision found this was an expansion of original jurisdiction under the Constitution
 - Thus, he strikes down the Writ of Mandamus/ s 13 of the Judiciary Act of 1789 as unconstitutional = established precedent for judicial review

Reading Notes:

-Changing understanding of US Federalism:

- **Michael Burgess, Comparative Federalism: Theory and Practice (Routledge, 2006)** (78)
 - The proposed constitution that The Federalist strove so fiercely to defend contained a mixture of republican, federal and national elements
 - The great teaching of The Federalist is not how to be federal in a better way, but how to be better by being less federal'

-According to Gageler, what were the three key mechanisms adopted by the framers of the US Constitution?

-**Stephen Gageler, 'Foundations of Australian Federalism and the Role of Judicial Review' (1987)** 17 Federal Law Review 162 (75)

- Intention of the framers:
 - Conceived in an atmosphere of fear of despotism by a ruling elite unresponsive to the needs of the people
 - The intention of the framers was to establish institutions to contain these tendencies and to ensure that government would act to promote the general welfare
- 1. Representative government
 - The system of republican government established by the Constitution was to involve 'the delegation of the government...to a small number of citizens elected by the rest.
 - This would make it possible to refine and enlarge the public views by passing them through the medium of a chosen body of citizens' whose wisdom and virtue would lead them to be least likely to be motivated by factional or sectarian considerations.
 - 'Greater security' would be 'afforded by a greater variety of parties, against the event of any one party being able to outnumber and oppress the rest.'
- 2. Separation of powers
 - Establishment of separate organs of government each with the power to check the other
 - The aspiration was thus towards a form of 'balanced government' in the classical eighteenth century sense of checking 'interest with interest, class with class, faction with faction, and one branch of government with another in a harmonious system of mutual frustration.
 - Vertical: On a vertical plane, the allocation of functions between federal and state governments would ensure that no one government would be in a position completely to dominate its citizens
 - Subdivided legislature: At the federal level, there was to be a bicameral legislature, consisting of a House of Representatives and a Senate exercising co-ordinate powers.
 - Only members of the House were to be chosen by 'the People' Senators were to be chosen by the legislatures of the States, as much to filter popular passions as to ensure regional representation.
 - Finally, the President, in whom was to vest the executive power of the United States and who himself was to be elected through the indirect means of an electoral college, was to be given power to veto legislation.
 - Horizontal: On a horizontal plane, the diffusion of governmental power among legislature, executive and judiciary would further moderate its exercise
- 3. Judicial review
 - The federal judiciary was to have power to declare void any act of the legislature or executive in contravention of the Constitution = fundamental law
- Of the three features of the United States Constitution identified by Gageler, only representative government was a discernible feature of Westminster constitutionalism by the time the representatives of the Australian colonies began to draft a constitution in the 1890s.