Constitutionalism and the Rule of Law

A Constitutional Hybrid

- *Commonwealth of Australia Constitution Act 1900* entered into force in 1900 and Constitution incorporated in that Act began to operate.

Westminster:

- **Representative government** means government by the people through their elected representatives
- **Responsible government** means executive arm of government is responsible to Parliament for actions.
- **Consolidated chain of command**:

![Consolidated chain of command diagram]

America:

- **Separation of powers** allocates legislative, executive and judicial functions to distinct institutions.
- **Federalism** allocates governmental powers (especially legislative powers) among different political and territory units.
- These allocations themselves are subject to checks and balances, including courts to exercise power of **judicial review** to strike down laws and government action found inconsistent with Constitution.

Definitions:

- **AV Dicey**: Constitutional law includes “all rules which directly or indirectly affect the distribution or the exercise of the sovereign power in the state”
- **Jennings**: “rules governing the composition, powers and methods of operation of the main institutions of government and the general principles applicable to their relations to the citizens.”
- **Tomkins**: Constitutions establish institutions and their inter-relationships, explain the place and role of the people and express political values to which a particular society lays claim.
Describing Constitutions:

- **Nominal**: Dealing with only formalisation of power structure (Sartori)
- **Facade**: Pays lip service to the principles of limited government but in practice fails to secure them (Sartori)
- **Written**: A single solemn document which founds a political community, defines its chief political institutions, confers their powers and circumscribes permissible limits of those powers. E.g. US, India and South Africa. Although based on written, actual workings will still depend on unwritten understandings developed as matter of practical convenience or reflecting fundamental beliefs about how government ought to be conducted (constitutional conventions)
- **Unwritten**: Multiple documents (like the UK) or does not exist at all. Many important parts of UK Constitution exist in written form, like fundamental statutes like Act of Settlement 1701 or in judicial decisions expounding the common law.
- **Flexible**: (Dicey) “Every law of every description can be legally changed with the same ease and in the same manner by one body.”
- **Rigid**: (Dicey) “Certain laws knowns as constitutional or fundamental laws cannot be changed in the same manner as ordinary laws”. A constitutional change requires legislative body following a special and difficult procedure, or mechanisms of change assigned to other body or process altogether.

Political and Legal Constitutionalism (Tomkins)
Authority to have last word

- America: Supreme Court
- UK: Legislature (parliament)

How public law regulates government

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<th><strong>Political Constitution</strong></th>
<th><strong>Legal Constitution</strong></th>
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<tr>
<td><strong>Definition</strong></td>
<td>Those who exercise political power (government) are held to constitutional account through political means, and through political institutions (e.g. parliament). Scrutiny of government ministers, etc. by taking part in debates, answering questions, participating in and responding to the investigations of committees of inquiry, etc.</td>
<td>Imagines that the principle means and the principle institution through which the government is held accountable is the law and the courtroom. If dislike what government has done or proposes to do, instead of lobbying for parliamentary scrutiny, simply sue government in court or seek judicial review.</td>
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<td><strong>Effectiveness</strong></td>
<td>• Requires strong and vibrant politics; require those performing</td>
<td>• Independence of legal systems, courts and judges from government.</td>
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scrutiny function to take function seriously, and have independence from government.
- Governments in democracies are dependent on politics: political act of election that attains legitimacy, power and continue to possess such through support of majority. Difficult to achieve as subject to endless media scrutiny and political opposition
- Governments will not do things which they cannot politically get away with as they lose power

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<th>Values</th>
<th>Seriousness surrounding that law can and ought to be used as a technique to hold government accountable.</th>
<th>Potential effectiveness not as obvious as political. Suing is expensive, and access to courts is limited to well-resourced. What is there to ensure that in implementing the judgement of court, the government does as the court wished?</th>
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<td>Relies and vigour and rigour of political process. More open, transparent, participatory, representative and deliberative politics is, better the model in practice.</td>
<td>Suing may be expensive, but equally expensive whether from majority or not. No inherent discrimination in favour for majority</td>
<td>However, judges are not democratically elected, accountable or representative.</td>
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Judicial review vs parliamentary sovereignty: Constant tension.

- *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920 28 CLR 219)

  Knox CJ, Isaacs, Rich and Starke JJ: The extravagant use of the granted powers in the actual workings of the Constitution is a matter to be guarded against by the constituencies and not by the Courts

- *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106

  Dawson J: 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 the trust in Parliament to preserve the nature of our society


  Gaudron, McHugh, Gummow, Kirby and Hayne JJ: Under the Constitution of the Commonwealth the ultimate decision-maker in all matters where there is a contest, is this Court.
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.

Separation of Powers

- R v Kirby; Ex parte Boilermakers’ Society of Australia (1956) 94 CLR 254: Held that the institutions that exercise judicial power of the Cth must be kept strictly separate from other governmental institutions
- In Australia, the executive is integrated into the legislature by requirement that the Ministers responsible for the departments of govt. must be Members of Parliament accountable to it through mechanisms like question time.

Montesquieu:

- When legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty because the senate could enact tyrannical laws
- If the judiciary was not separated from the legislative and executive; former the life and liberty of the subject would be exposed to arbitrary control because the judge would be the legislator. Latter, the judge might behave with violence and oppression.

Phillips and Jackson:

- Powers of government:
  (a) Legislative function: Making of new law, and the alteration or repeal of existing law
  (b) Executive or administrative function: The general and detailed carrying on of government according to law, including the framing of policy and the choice of the manner in which the law may be made to render that policy possible
  (c) Judicial function: The interpretation of the law and its application by rule or discretion to the facts of the particular case.
- Some hold true distinction lies not in the nature of the power themselves, but rather in the procedure by which they are exercised:
  (a) Legislation involves a formal and instantaneous act designed to establish general rules by which all disputes shall be settled
  (b) Administration is a continuing and mainly informal process aimed at preventing disputes in classes of cases and does not create rights by establish precedents
  (c) Adjudication presupposes an existing dispute in particular cases, in governed by strict rules of procedure and evidence, and tends to create rights by establishing precedents
• Others hold that the distinction is organic or formal. Thus administration consists of the operations, whatever their intrinsic nature may be, which are performed by administrators; and administrators are all state officials who are neither legislators or judges.
• A complete separate of powers with no overlapping or co-ordination would bring government to a standstill. What the doctrine should 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 the other.

Carney:
• US Constitution incorporates doctrine of separation of powers with a system of checks and balances

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<tr>
<th>Institution</th>
<th>Power</th>
<th>Personnel</th>
<th>Control</th>
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<tbody>
<tr>
<td>Congress</td>
<td>Power to make laws</td>
<td>Elected representatives</td>
<td>Presidential veto; Supreme Court review of validity</td>
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<tr>
<td>President</td>
<td>Executive power</td>
<td>Elected. Cannot be member of Congress</td>
<td>Senate ratification necessary for cabinet and diplomatic appointments, and treaties; Judicial review; Impeachment by removal by Congress</td>
</tr>
<tr>
<td>Supreme Court</td>
<td>Judicial power including review of legislative and executive activity</td>
<td>Appointed by President with Senate ratification</td>
<td>Impeachment by Congress</td>
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• The Westminster system effects only a partial separation of power

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<tr>
<td>Parliament</td>
<td>Make laws</td>
<td>Representatives elected to lower house. Elected or appointed to upper house</td>
<td>(Royal assent) Supervision and/or expulsion by the House</td>
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<tr>
<td>Executive Council (Cabinet)</td>
<td>Executive power</td>
<td>Ministers appointed by the Crown with the support of the lower house. Must be</td>
<td>Maintain support of the lower house. Parliamentary and Judicial Review.</td>
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<td>Members of the Parliament</td>
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<td>The Courts</td>
<td>Judicial power</td>
<td>Judges appointed by the Executive</td>
<td>Superior Court justices removal by the Crown on an address from both Houses on certain grounds</td>
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**Burton and Williams**

- Integrity branch of government dedicated to supervising the use of public power.
- Spigelman CJ: Integrity describe both a desirable state of govt. and to explain the scope of judicial review and functions of other govt. bodies.
- Meaning of integrity:
  (a) In simplest form, refers to absence of corruption, in the sense of using public powers for personal advantage or taking bribes
  (b) AJ Brown: The state of govt. which ‘power is exercised in a manner that is true to the values, purposes and duties for which that power is entrusted to, or held by, the institutions and individual office-holders concerned’
  (c) Spigelman: keeping all other arms of govt. ‘healthy’.

**Rule of Law**

Tamanaha:

- Two categories; formal and substantive (thin and thick)
- Formal conceptions:
  (a) address the manner in which the law was promulgated (was it by a properly authorised person)
  (b) the clarity of the ensuing norm (was it sufficiently clear to guide an individual’s conduct so as to enable a person to plane their life, etc)
  (c) the temporal dimension of the enacted norm (was it prospective)
  (d) do not pass judgement on the actual content of the law itself. Not concerned with whether it is good law or bad law
- Substantive conceptions:
  (a) Accept law has the formal attributes as above, but take the doctrine further. Certain substantive rights are said to be based on or derived from the rule of law. The concept is used as a foundation for these rights, which are then used to distinguish between good laws which comply with such rights, and bad laws which do not.
  (b) Substantive theories also include requirements about the content of the law, usually that it comport with justice or moral principle
The rule of law, in the general sense expressed by Justice Marshall of a government under law, prevailed despite the complete absence of features through to be essential (a) Montesquieu points to something deep set in the English culture and society, centuries in the making: the widely shared belief and commitment, among the public and govt. officials, that the govt. operates within a limiting framework of law. Hence the law ruled. (b) Hayek observed that the rule of law is not itself a legal rule, but a political ideal. ‘It will be effectively only in so far as the legislator feels bound by it. In a democracy this means that it will no prevail unless it forms part of the moral tradition of the community, a common ideal shared and unquestioningly accepted by the majority.

AV Dicey

• Thin conception
• Three distinct conceptions:
  (a) No man is punishable or can be lawfully made to suffer in body or goods expect for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land
  (b) Not only that with us no man is about the law but that every man, whatever his rank or condition, is subject to the ordinary law of the realm and amendable to the jurisdiction of the ordinary tribunals
  (c) A special attribute to English institutions. Say, the Constitution is pervaded by the rule of law on the ground that the general principles of the constitution are with us the result of judicial decisions determining the rights of private persons in particular cases brought before the courts
• Rule of law’s three different meanings
  (a) The absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existent of arbitrariness, of prerogative or even of wide discretionary authority on the part of the govt.
  (b) Equality before the law
  (c) The formula for expressing the fact that with us the law of the constitution is not the source but the consequence of the rights of individuals as defined and enforced by courts

Stone

• Importance of shared ethical convictions about the appropriate limits on the exercise of power. Arguing that rule of law may be understood as an ethical, rather than merely a legal doctrine, emphasised the substantive content.
• Several important truths follow from the ethical import of the rule of law notion:
  (a) It is artificial and confused to juxtapose the rule of law and the sanctity of human rights as if competing ideals.
Whatever is history, the rule of law notion is not a mere legal doctrine. That precepts as to ‘equal application’ and organisational and procedural safeguards, such as the existence of an independent judiciary and bar, the opportunity to be heard by officials not involved in day-to-day administration, the right to a reasoned decision, and the right of appeal at least on points of law, express only part of the ideal.

- Important are substantive contents of law, and existence of a responsible legislature, presupposing equality in the franchise and respect for the dignity of all individuals by legislative as well as judicial and administrative action. Dynamic responsiveness of substantive law to the needs of social and economic development.

International Commission of Jurists

- The Rule of Law: summarise a combination of ideals and practical legal experience which there is over a wide part of the world, a consensus of opinion among the legal profession
- Two ideals: Implies that all power in the State should be derived from and exercised according to law. Assumes that the law itself is based on respect for the supreme value of human personality
- Certain principles, institutions and procedures are important safeguards of the ideals underlying the Rule of Law
- Rule of Law: ‘The principles, institutions and procedures, not always identical, but broadly similar, 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 to enable them to enjoy the dignity of men’.

Lord Bingham

- The core existing principle of the rule of law is that all persons and authorities within the state should be bound by and entitled to the benefit of laws publicly and prospectively promulgated and publicly administered in the courts
  (a) Law must be accessible and so far as possible intelligible, clear and predictable
  (b) Questions of legal right and liability should ordinarily be resolved by application of law and not the exercise of discretion
  (c) The laws of the land should apply equally to all, save to the extent that objective differences justify differentiation
  (d) The law must afford adequate protection of fundamental human rights
  (e) Means must be provided for resolving, without prohibitive cost or inordinate delay, bona fide civil disputes which the parties themselves are unable to resolve
(f) Ministers and public officers at all levels must exercise the powers conferred on them reasonably, in good faith, for the purpose for which the powers were conferred and without exceeding the limits of such powers

(g) Adjudicative procedures provided by the state should be fair

(h) The existing principle of the rule of law requires compliance by the state with its obligations in international law, the law which whether deriving from treaty or international custom and practice governs the conduct of nations.

Stephen

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