

Principles of Public Law Case List – 2016 Semester 1

LAWS1141

Case Name	Ratio	Page
1. CONSTITUTIONALISM		
<i>R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)</i> [2009]	was an example of a 'nominal constitution' - Lord Mance said in dissent "A constitution which exiles a territory's inhabitants is a contradiction in terms".	7
<i>(R v Kirby; Ex parte Boilermaker's Society of Australia</i> (1956) 94 CLR 254 (<i>Boilermakers Case</i>)	Judicial review for the enforcement of limits on governmental and legislative powers means that courts must be independent of government or legislature, both state and federal	8
2. CONSTITUTIONAL HYBRID		
Boilermakers Case	'Probably the most striking achievement of the framework of the Australian instrument of government was the successful combination of the British system of parliamentary government containing an executive responsible to the legislature with American federalism.'	14
<i>R (Jackson) v Attorney-General</i> [2006] 1 AC 262	Parliamentary sovereignty is a construct of the common law	19
<i>Marbury v Madison</i> 5 US (1 CRANCH) 137 (1803)	The Supreme Court has the authority to review acts of Congress and determine whether they are unconstitutional and therefore void	28
<i>Cooper v Aaron</i> 358 US 1 (1958)	State government officials are bound to comply with Supreme Court rulings and court orders based upon the Supreme Court's interpretation of the Constitution.	30
3. INDIGENOUS SOVEREIGNTY AND CROWN SOVEREIGNTY		
<i>Mabo v QLD (No 2)</i> (1992) 175 CLR 1	The Indigenous inhabitants had their own laws and customs which transcended common law notions of property or possession	31
<i>Milirrpum v Nabalco</i>	the Yolgnu people occupied their territory and lived their lives according to a stable and ordered legal system.	31
<i>Walker v New South Wales</i> (1994)	Mason CJ insisted the imperative need for uniformity and equality in application of criminal law, meaning that the constitutionally established law must operate to the exclusion of any other law. Indigenous people also subject to the law -> independent sovereignty not recognised.	32, 35
<i>Worcester v Georgia</i> 31 US (6 PETERS) 515 (1832)	The Cherokee Nation is a distinct community occupying its own territory, with boundaries accurately described in which the laws of Georgia have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves or in conformity with treaties, and with the acts of congress.	33
<i>McClanahan v Arizona Tax Commission</i> (1973)	the court held that reservation Indians with income derived wholly from reservation sources were not liable to State income tax since the tax would interfere with matters which the relevant treaty and statutes leave to the exclusive province of the Federal Government and the Indians themselves.	33
<i>Oliphant v Suquamish Indian Tribe</i> (1978)	Supreme Court held that the criminal jurisdiction of tribal courts did not extend to offences committed by non-Indians, even though the offences were committed on the reservation and were subversive of tribal law enforcement.	33
<i>United States v Wheeler</i> (1978)	a conviction validly obtained in a Navajo Tribal Court did not preclude a subsequent prosecution for the same offence in a United States District Court – not because the Navajo conviction was in any way inferior, but precisely because its validity depended on inherent sovereignty. The double jeopardy clause of the Fifth Amendment does not apply to successive prosecutions by separate sovereigns; and that principle was applicable because the power to punish offenses against tribal law committed by Tribe members was part of the Navajos' primeval sovereignty.	34

1. CONSTITUTIONALISM AND THE RULE OF LAW

CONSTITUTIONALISM

A CONSTITUTIONAL HYBRID

- The Commonwealth of Australia came into being on 1 January 1901
- The Constitution is a hybrid of Westminster (representative and responsible government within the framework of a constitutional monarchy) and the American system (written constitutions, federalism, separation of powers and judicial review).
- 'Representative government' means government by the people (citizens, elected representatives)
- 'Responsible government' means the executive arm of government is responsible to Parliament for its actions.
- In Britain – power distributed through one chain. People through to the Crown.
 - Crown controlled by ministry; ministry controlled by Parliament; Parliament controlled by the electorate.
- In US – unifying theme is to protect people against the power of the government, by distributing and dismembering that power in ways that ensure there is no single consolidated chain of command.
 - Separation of powers – Executive, legislative, judiciary.
 - Federalism – allocates all governmental powers (especially legislative powers) among different political and territorial units.
- Definition of 'Constitutional Law'
 - AV Dicey: Constitutional law included all rules which directly or indirectly affect the distribution or the exercise of the sovereign power in the state.
 - Sir Ivor Jennings: the constitution is a document setting out the rules governing the composition, powers and methods of operations of the main institutions of government, and the general principles applicable to their relations to the citizens.
 - Adam 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.
- Giovanni Sartori: a constitution establishes a fundamental law, or a fundamental set of principles, and a correlative institutional arrangement, which would restrict arbitrary power and ensure a "limited government".
 - A constitution dealing only with the 'formalisation of the power structure' is classified by Sartori as merely a 'nominal constitution', while a constitution that pays lip service to the principles of limited government, but in practice fails to secure them, is classified as a 'façade constitution'.
 - E.g. *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2009] was an example of a 'nominal constitution' - Lord Mance said in dissent "A constitution which exiles a territory's inhabitants is a contradiction in terms".
- Constitution can be written (e.g. US) or unwritten (UK)
 - Australia's constitutional law is both written and unwritten.
- Dicey: Constitutions could be 'flexible' or 'rigid'
 - Flexible – Parliament itself can amend the rules to remove restrictions on the Parliament's powers by exercising its ordinary powers
 - Rigid – certain laws generally known as constitutional or fundamental laws cannot be changed in the same manner as ordinary laws i.e. special and more difficult procedure
 - 'Rigid' Australian Constitution – amendments are initiated by the Commonwealth Parliament but can only be effected by a referendum; constitutions of states are more flexible.

POLITICAL AND LEGAL CONSTITUTIONALISM

- Political constitutionalism or legal constitutionalism. Adam Tomkins distinguishes the two by whether the last say, or decisive legal say, on the constitutional limits of power is given to the judiciary.
- Constitutional order
 - In the US – US Supreme Court has the last word.
 - In England – the legislature (Parliament) has the last word i.e. 'sovereignty of parliament'.
- Other English rules include:
 - Rule of law: executive must have prior legal authority before it acts

- Principle of ministerial responsibility: government's ministers are constitutionally responsible and accountable to Parliament.
- Public law provides for the institutions which exercise political power, and it seeks to hold those institutions to some form of account.
 - This can be done politically or legally – Australia is a fusion/tension of both; the “Washminister” Mutation
 - Political constitution is one in which those who exercise political power are held to constitutional account through political means, and through political institutions e.g. Parliament.
 - Ministers might be subjected to scrutiny from Parliament e.g. taking part in debates, answering questions, participating and responding to investigations of inquiry committees.
 - Legal constitution is one which imagines that the principal means, and the principal institution, through which the government is held to account is the law and the court-room i.e. sue the government in court or judicial review.

SEPARATION OF POWERS

- Judicial review for the enforcement of limits on governmental and legislative powers means that courts must be independent of government or legislature, both state and federal (*R v Kirby; Ex parte Boilermaker's Society of Australia* (1956) 94 CLR 254 (*Boilermakers Case*))
- In Australia, no strict separation between legislative (Parliament) and executive (government) power. But still need judicial independence.

BARON DE MONTESQUIEU, *THE SPIRIT OF THE LAWS* (1749)

- To prevent abuse of power, it is necessary to check it.
- Legislature enacts temporary or perpetual laws and amends or abrogates those that have already been enacted
- Executive makes peace or war, sends or receives embassies, establishes the public security, and provides against invasions.
- Judiciary punishes criminals and determines the disputes that arise between individuals
- If legislature and executive are joined, it may result in tyranny
- If judiciary was joined with legislature, the life and liberty of the subject would be exposed to arbitrary control, for the judge would be the legislator.
- If the judiciary was joined to the executive, the judge might behave with violence and oppression.

OWEN HOOD PHILIPS AND PAUL JACKSON, *CONSTITUTIONAL AND ADMINISTRATIVE LAW* (1987)

- Legislature provides laws – the words they use constitute the law
- Executive or administrative function – 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.
- Judicial function – consists in the interpretation of the law and its application by rule or discretion to the facts of particular case.
- A complete separation of powers would (even if theoretically possible) bring government to a standstill – what 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.

GERARD CARNEY, *SEPARATION OF POWERS IN THE WESTMINSTER SYSTEM* (1994)

- The strict separation of powers doctrine is only a theory and has to give way to the realities of government where some overlap is inevitable. But while permitting this overlap to occur, a system of checks and balances has developed (and needs to continue to develop).

US Constitution 1787 incorporates the doctrine of separation of powers with a system of checks and balances:

Institution	Power	Personnel	Control
Congress	Power to make laws	Elected representatives	Presidential veto; Supreme Court review of validity

President	Executive power	Elected. Cannot be a member of Congress	Senate ratification necessary for cabinet and diplomatic appointments, and treaties; Judicial review; Impeachment by removal by Congress
Supreme Court	Judicial power including review of legislative and executive activity	Appointed by President with Senate ratification	Impeachment by Congress

The Westminster system effects only a partial separation of powers:

Institution	Power	Personnel	Control
Parliament	Make laws	Representatives elected to lower house. Elected or appointed to upper house.	(Royal Assent) Supervision and/or expulsion by the House
Executive Council (Cabinet)	Executive powers	Ministers appointed by the Crown with the support of the lower House. Must be Members of Parliament	Maintain support of the lower House, Parliamentary and Judicial Review.
The Courts	Judicial Power	Judges appointed by the Executive	Superior Court justices removal by the Crown on an address from both Houses on certain grounds.

- The first 3 chapters of Australian Constitution are headed respectively 'The Parliament', 'The Executive Government' and 'The Judicature'.
- The framers of the Constitution were influenced by the American's version of 'separation of powers' and the Westminster system and the doctrine of responsible government.
- The integration of the executive into the legislature is thus expressly acknowledged in s64 of the Constitution.

LISA BURTON AND GEORGE WILLIAMS, *THE INTEGRITY FUNCTION AND ASIO'S EXTRAORDINARY QUESTIONING AND DETENTION POWERS* (2012)

- The concept of 'integrity' is a new way of conceptualizing 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.
- The concept was taken up by Spigelman CJ in 2004; he used integrity to describe both a desirable state of government and to explain the scope of judicial review and functions of other government entities.
- E.g. 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 Ombudsman and Auditor-General, for example, are now frequently referred to as integrity agencies.
- The term 'integrity' is still very unclear – refers to the absence of corruption, in the sense of using public powers for personal advantage or taking bribes.
 - AJ Brown: integrity is a state of government in 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'.
 - Spigelman: integrity is responsible for keeping all other arms of government 'healthy'.
 - Integrity supports other fundamental principles of liberal democracy, such as the rule of law. A well functioning integrity branch ought also to foster trust in government.