

Award in Constitutional Law

Lecture Title: Sources of Constitutional Law

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Diploma in Law (Malta)



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Separation of Powers

Doctrine



- One of the pillars of a constitutional democracy
- Government powers should be divided so that no single person or body can exercise unlimited power
- Montesquieu: L'Esprit des Lois The Spirit of the Laws (1748) Power must be checked by power . A system of checks and balances rather than water tight compartments
- There is agreement that in a democratic state the judiciary should be kept separate from the other two organs.
- Members of the judiciary are appointed by the President who chooses one of three candidates submitted to him by a Judicial Appointments Committee set up in 2020 where judiciary has a majority. They are removed by the Commission for the Administration of Justice in which the judiciary also has a majority. The Chief Justice however is appointed by two thirds majority of all MPs.
- The Constitutional Court may annul a law passed by the Legislature (Marbury v Madison `1803)

Executive and Legislature

- When it comes to this relationship constitutional systems differ.
- In the Parliamentary democracy , the Executive and the Legislature are close. In the UK system which we have adopted the Prime Minister and the Ministers have to be members of the legislature . Besides the President appoints as Prime Minister the member of Parliament who in his opinion is best able to command the support of a majority of MPS.
- The Ministers are then appointed by the President on the binding advice of the Prime Minister from amongst members of parliament.
- The Executive must enjoy the confidence of the legislature and if it loses that confidence then the Prime Minister must resign or hold fresh general elections. Therefore it is said the Government is collectively responsible to the legislature
- The Prime Minister also has the power to advice the President to dissolve the legislature at any moment in time.



The US Presidential System

- In the US things are exactly the opposite - the President and his Ministers (Secretaries of State) cannot be members of the Legislature.
- Nor is the Executive accountable to the Legislature. It does not need to enjoy the confidence of the legislature. Indeed there are different and separate elections for the Executive and the legislature
- This has led on many occasions to a situation where President hails from one party, but the majority in the legislature (Senate and /or House of Representatives) is in the hands of the other party.
- Still they are not completely separate. The Ministers and all federal officers including judges of the Supreme Court and other Courts are nominated by the President but they have to be confirmed by the Senate.
- The President does not have any right to dissolve the legislature. The President can veto laws passed by the legislature but such veto can be overturned by 2/3 of all members of the legislature.
- All federal officers may be impeached by HOR and removed from office in a trial in the Senate whose verdict of guilt must be confirmed by 2/3 majority of senators.
- THIS IS DIFFERENT FROM A MOTION OF NO CONFIDENCE IN PARLIAMENTARY SYSTEM
- Laws passed by legislature may be annulled by the Courts

Rule of Law

- It is desirable to be governed by rules rather than by the discretion of rulers
- Aristotle :a government of laws not men
- A politico-legal concept. *Servi Legum sumus ut libere esse possimus* *(Cicero)
- Not Rule BY Law but Of law.
- Made popular by A.V. Dicey:
 - a). Government by law. Everything has to have a source in law. Supremacy of law
 - (b) No one is above the law/equality before the law
- © The Constitution is the result of the ordinary law
- 1959 New Delhi Declaration by the International Commission of Jurists emphasized two further elements (a) regular elections electing a representative government and (b) the independence and impartiality of the judiciary.



Rule of Law cont'd

- Tom Bingham “The Rule of Law”
- Laws should be intelligible and precise enough to guide conduct
- Minimum discretion though discretion cannot be removed completely
- Apply equally to all unless differences are clearly justified
- Give adequate protection to fundamental human rights
- Machinery to solve disputes at no excessive cost
- Judicial review to ensure that decision makers act reasonably
- Fair adjudicative procedures
- State complies with International Law



Rule of Law and Maltese Constitution

- A Supreme Constitution
- A Constitutional Court which can annul anything unconstitutional
- A Chapter on fundamental Human Rights (FHR)
- An appeal to the European Court of Human Rights
- Free and Fair elections – Electoral Commission, all political parties have access, secret ballot, corrective mechanisms, elections may be annulled for widespread abuses
- An independent and impartial judiciary (a) security of tenure “*quamdiu se bene gesserint*” (b) salaries cannot be reduced (c) their salaries are a direct charge on the Consolidated Fund

