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LAWS1205 Australian Public Law 1st Semester 2006

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Question 3

80/100

In Australia there is a predominant trend towards constitutional principles having strong application at the Commonwealth but not at the state level. This is in part due to the creation of separate state constitutions, which have different attributes compared to the Commonwealth Constitution. The separation of Judicial Power and principle of representative democracy are two examples of doctrines, which have (*do not have a strong*) non fundamental basis at state level. The high level of interconnectedness between state and commonwealth bodies means that these inconsistencies make good governance difficult. Courts should apply the rationale in *NWN* to other areas to facilitate good governance in Australia. No SOJP at state level leads to a loss of confidence in the judiciary generally and no representative democracy at state level could lead to gross disparities in electoral franchises.

An example of one such constitutional principle is the separation of powers doctrine. At the commonwealth level this is justified by the separate chapters of the constitution devoted to the legislature, executive and judiciary. In addition each of these chapters set out a specific role for each of these sectors. This SOP acts as a check and balance on arbitrary power, it preserves individual liberty *R v Quinn* and protects judicial independence. However there is no such separation at state level. This is attributed in part to the different structure of state constitutions which is not like that of the Commonwealth. In *Kable* it was held that the structure and composition of the NSW Constitution provided no basis for importing a SOP doctrine. Another factor for why states do not have a s SOP is because the provisions which would provide for it would be un-entrenchable because they don't relate to CPP of parliament. Hence inconsistent legislation could easily, expressly or impliedly repeal such provisions *McCawley v R*.

It has also been held that the right to vote at elections and equality of voting power would not necessarily apply to states (if it were to, possibly present when gross disparities in electoral franchise) because the constitution contains no implications affecting such disparities at state

level (*Brennan J in McGuinty*) this leads to a conclusion that there is no protection for representative democracy at state level. At Commonwealth level representative democracy can be gleaned among other things from s7 and s24 of the Constitution. However, even when such provisions were inserted into the WA constitution it was held that this did not confer representative democracy as there was no history of it as such in the state's constitutional structure.

These discrepancies between state and commonwealth principles undermine good governance in Australia. The constitutional judicial system which requires supreme courts in each state which a right of appeal to the HCA cannot be seen as separate from Chapt III courts. As McHugh J's strong dissent in *Kable* states a state court should not take on a non-judicial function because it might lead the ordinary person to believe the court was no independent of the executive therefore undermining public confidence in the Chapt III courts. Can it really be said that the view of one Australian court whether state or federal, could not impact on the overall confidence of the judicature in Australia. It is questionable whether the average lay-person would make such a distinction.

The application of the freedom of pol com doctrine is a good example of how the courts have come to recognise that Australian federal system must have come together and operate under the same principle. In *NWN Deanne and Toohey JJ* commented on how it is unrealistic to see the levels of government as operating in isolation. The strength of the interconnected relationships between the state and commonwealth mean that their principles must coincide in order to facilitate good governance. They are connected in the judiciary ie. the path of appeal. The legislatures are also connected, for one the commonwealth is connected in making grants of money to the states. Inconsistencies in principles just make communication and operation of these different governmental levels harder to achieve.

In conclusion the difference between state and Com application of constitutional principles has detrimental....

Good ref to cases

You have a clear writing style