Judicial Review

→ Statutes must conform to the Constitution. Courts therefore have role of interpreting and applying Constitution principles and have power of judicial review of Acts of Parliament (Cth and State) and can strike down statutes for lack of Constitutionality.

High Court (HC) of Australia

→ Independence from exec and legislature arms of Gov must be ensured (SOP).

→ The HC is not an apolitical institution, although decisions may have political ramifications (hurdles for exec Gov).

→ Although SOP protects judicial separation the exec is given the role of appointing justices (though not removing them).

∞ CONSTITUTION s 72(i) federal justices are appointed by GG on advice of exec (A-G) (also seen in HIGH COURT OF AUSTRALIA ACT 1979 (Cth)). This is the only constitutional restraint on appointment and intrusion of independence.

∞ There have been few political appointments although even if there was there is no guarantee it will play out in the exec's favour. (Pg. 37-38 discusses political appointments and why it is not so common today with shifting Bar and Gov views).

→ There have been trends within HC interpretation of Constitution, inspired by prevailing personalities on the Bench.

∞ E.g. 1990's Mason Court's interest in HR. This was highlighted through *Mabo (No 2)*, the finding of implied right to free political communication (*Aust Capital Television v Cth (1992); Theophanous v Herald and Weekly Times Ltd (1994); Stephens v West Australian Newspapers (1994)*), finding of implied right of due process (*Leeth v Cth (1992)*) and court finding possibility of implied Bill of Rights.

∞ This ending with retirement of Mason and Deane where afterwards implied right to free political communication was weakened (*Lange v Aust Broadcasting (1997)*).

∞ Though recently an implied right to vote was found (*Roach v Electoral Commissioner (2007)*).

∞ Traditionally the HC adopted narrow interpretation of rights (*Baker v The Queen (2004)*) though a trend is being seen towards a broader scope (*Wainohu v NSW (2011)*).

Constitutional interpretation

→ Constitutional interpretation allows more flexibility and more scope for interpretive techniques to be employed due to its complexity and diversity (*SGH v Commissioner of Taxation (2002)*).

→ *NSW v Cth (Work Choices case) (2006)*: how constitution should be interpreted; strictly textually, by reference to history, purposively, as an exercise in originalism, flexibly, according to particular judge's perceptions of contemporary conditions, contextually, searching for implications emerging from text and structure or as combination of these. None has universally prevailed.

→ *WA v Cth (Territorial Senators case) (1975)* used multiple interpretation techniques in its minority and majority judgement.

∞ Facts: Cth passed a law (SENATE (REPRESENTATION OF TERRITORIES) ACT 1973 (Cth)) to allow Territorial to have a voting role and seat in the Senate. States (e.g. WA and QLD) challenged its validity. Majority held the statute was a valid exercise of constitutional power by interpreting s 27 broadly (allowing active Territorial participation in Senate) and s 7 narrowly (providing initial composition of Senate open to change).

<u>Text and context;</u>

→ Literal interpretation of text words. Interpretation is related to text of relevant provision or text of surrounding provisions.

→ Constitutional interpretation should be primarily based on express provisions of the Constitutions. Courts must read the language of the statute in its natural sense (*Amalgamated Society Engineers v Adelaide Steamship Co Ltd (Engineers case) (1920)*).

→ Interpret words contextually: construe the Constitutional as a whole. May be necessary to restrict the literal meaning of one section to render provisions harmonious with those of another part of the Constitution (*Territorial Senators case*).

→ *Territorial Senators case*;

∞ Both sides resorted to textual or literal arguments to support views. Minority interpreted s 7 words according to their natural meaning while majority interpreted s 122 words according to their natural meaning. Though text alone was insufficient as the 2 sections were fundamentally inconsistent.

∞ Therefore, each side looked at the words in the context of other provisions and read down the sections. Minority found that in other areas permission was given to Parliament to amend with social changes, however this provision didn't, therefore did not allow such change. Majority stated that it is presumed words will have the same meaning throughout the statute (Constitution) therefore representation of Territories by Cth legislation is valid. They also noted how Territories are not mentioned in s 24 (House of Reps) though they are in reality and it has been held to be valid (*Qld v Cth (Second Territorial Senators case) (1977)*).

→ *Work Choices case*: differences between textual and contextual interpretation seen. Context is important to requirements for construction of statutes. To take provisions in isolation and to ignore others is a mistake. This ensures that the purpose of the Constitution is viewed as an entire, inter-related and coherent instrument.

<u>Originalist arguments;</u>

→ Judge must attempt to give effect to intention of lawmaker (*A-G v Carlton Bank [1899]*). Statutes are to be interpreted in accordance with meaning they had on the day they were passed. The Constitution must be interpreted with the views and intentions of the drafters in mind.

→ This has been criticised for freezing values and depriving the Constitutions intention to serve future generations and represent their will. Though some say this is provided for in s 128 (*Theophanous v Herald and Weekly Times Ltd (1994)*).

→ Justices generally try to support interpretations as being manifestations of original intentions.

→ *Territorial Senators case*: the minority held that the intention of the Senate was to be a state's house, protecting the states interests and integrity. The majority though states s 122 shows Territorial inclusion was foreseen.

→ *Eastman v The Queen (2000)*: s 73; appeal should be interpreted in accordance with 1901 meaning as an appeal only on issues raised in lower court, precluding HC from hearing appeals on issues raised by fresh evidence. However, Kirby in dissent stated the Constitution should be read according to contemporary understandings of meaning to meet needs of Aust people. Why are some areas given historical significance and meaning (s 73) while other areas not (s 80)?

→ *Cth v ACT [2013]*: marriage (s 51(xxi)) has moved beyond 1901 definition; from persons of only opposite sex to persons of same sex. The court held the definition of marriage was not immutable nor was it intended to be.

→ Some consider whether Convention Debates in 1890s should be used to show intention of Constitution drafters? These are external though to the Constitution. The textual approach ensures the meaning of a law should be ascertainable and available rather than hidden in a separate source. The Debates are now to be of limited use (*Cole v Whitfield (1988)*).

→ *Singh v Cth (2004)*: the Debates reveal what some understood, knew, believed, thought or intended about the proposed instrument and circumstances surrounding events involved in its preparation. The Debates can though be helpful to throw some light on the meaning of provisions though this depends on nature of problem of interpretation that arises, nature of info gained from drafting history and relevance of history to solution of problem. It could help identify contemporary and historical meaning to help understand the context of the text. When the info is relevant and informative regard should be given to the Debates.

→ *XYZ v Cth (2006)*: majority followed precedent and found external affairs power confers plenary extraterritorial power on Cth. Interpretation facilitated by textual interpretation of words external affairs which refers to all things which are external to or outside Aust territory. It means the same as foreign affairs does to us today (matters concerning relationships and dealings with other countries).

→ Historical arguments used in construing s 51(xx), (xxxv) in *Work Choices case* and s 61, 81 & 83 in *Pape v FCT (2009)*.

<u>Comparative arguments;</u>

→ Judges often find it helpful to use comparable overseas precedent as a guideline (often from England, but also from US, NZ, Canada and India). It is not binding, but merely persuasive precedent.

→ *Engineers case*: majority criticised pre-existing judgements for diverging from English precedent in favour of US. This makes more sense though due to England not having a written constitution and our Constitution being largely based of US model.

→ *Territorial Senators case*: minority relied on US model where Territory representatives in US Congress have no voting rights. Majority showed how s 122 is a deliberate and express departure from this US model.

<u>Policy arguments;</u>

→ Judges must resort to legal rather than political reasons (maintain SOP, independence and impartiality). Policy is normally for legislature or exec however it can sometimes encourage a judge to choose one meaning over another due to its consequences.

→ *Territorial Senators case*: the minority fears territorial dominance in the Senate. The majority responded to this by showing their trust in the responsibility of Parliament and their exercise of power.

∞ Both sides were influenced by the framework of Gov. The minority were influenced by their belief in the need to preserve federalist values (maintenance of sanctity of power-sharing arrangement between Cth and States which was facilitated by preservation of Senate as a States' house) while the majority were influenced by democracy considerations (people of Territories should be entitled to representation in both houses).

→ It comes down to personal judicial preference. Broad policy preferences often underlie judicial decisions though this will not be admitted to ensure they maintain a look of impartiality (e.g. Sates rights versus centralised power; *Cth v Tas (Tas Dam case) (1983)*, respect for HR, respect for parliamentary sovereignty; *Kruger v Cth (1997)*). It is misleading to deny their relevance in judicial decision making.

<u>Stare decisis</u>;

→ Judges have a duty to follow precedent, however there is no requirement for the HC to follow its own decisions, though it will generally do so. Stare decisis has less influence however in constitutional cases.

→ Strong policy considerations of legal stability and predictability dictate that precedent should be followed. Justice often disapprove of precedent before stating they feel compelled to follow it (*Dickenson's Arcade Pty Ltd v Tas (1974)*). Most follow precedent unless they regard it as plainly wrong; a subjective test (*Aust Agricultural Co v Federated Engine-Drivers and Firemen's Association of Australasia (1913); Qld v Cth (1977)*).

→ *Qld v Cth (Second Territorial Senators case) (1977)*;

∞ Although Gibbs and Stephen JJ (part of minority in *Territorial Senators case*) disapproved of earlier decision they nevertheless followed its precedent. They held that no justice is entitled to ignore the decisions and reasoning of predecessors.

∞ It's only after the most careful and respectful consideration of earlier decision and after giving due weight to all circumstances that a justice may give effect to his own opinions in preference to an earlier decision.

∞ Plus, in this case action based on the prior decision (precedent) had been seen with Territories being elected as Senators and the people being confident that they would be represented.

∞ Change in the number of justices can never be a reason for review of a previous decision (*The Tramways Case (No 1) (1914)*). There is a strong need for consistency and continuity in judicial decisions.

∞ Minority stated: the court should not be bound in point of precedent but only conviction to prior decision. Paramount consideration goes to the maintenance of the Constitution itself. Particular held constructions long accepted is an important consideration which can be departed from if found to not truly represent the Constitution.

→ *Cheng, Cheng and Chan v The Queen (2000)*: many have felt obliged to depart from authority even if it is inconvenient and a disturbance to do so. Courts are the arbiter of the Constitution between State and individual.

→ *Shaw v Minister for Immigration and Multicultural Affairs (2003)*: obedience to precedent is not a necessary requirement for a constitutional ruling. Though justices do out of consistency. Justices consider a mixture of reason, history, principle, words, adverse risk and legal precedent.

Implication;

→ *Engineers case*: judges should primarily interpret Constitution according to express words within it. Implied meanings can only be construed where such a meaning is necessarily or logically implied from the text.

→ Some could say this rule was breached during 1990 implied rights period.

→ *Work Choices case*: (minority) limits have to be necessarily implied to scope of federal corporation power (s 51(xx)) in order to preserve federalism; a key aspect in structure and design of Constitution.

International law;

→ *Newcrest Mining (WA) v The Cth (1997)*: duty of court is to interpret the Constitution and what it says; not what individual judges think it should have said. If the Constitution is clear the court must give effect to its terms. The court should not adopt an interpretive principle as a means of introducing international treaties and law concerning fundamental rights not yet incorporated into domestic law. However international law is a legitimate and important influence on constitutional law and CL development. Therefore, where there is ambiguity it should be resolved in favour of upholding fundamental and universal rights.

→ *Polites v Cth (1945)*: judges are required to resolve ambiguity in favour of compliance with international law obligations.

→ In *Newcrest* Kirby is seen to propose an extension of this rule to constitutional interpretation. Though no other justice has endorsed this view.

∞ *Al-Kateb v Godwin (2004)*: courts cannot read constitution by reference to provisions of international law that have become accepted since its introduction. International law in 1901 may throw light on meaning of constitutional provisions but that's it. It would be a restraint of power. Most international law is of recent origin, therefore by interpreting the Constitution with respect to international law it would amend the Constitution outside the procedure of s 128.

∞ Kirby in the same case responded: it is an interpretive principle that influences legal understanding. The Constitution provides both for formal amendment and judicial reinterpretation (both heavily relied on). The developments of international law represent change requiring adaption.

Consequences of invalidity

→ When a court declares legislation or a decision to be invalid it is generally treated as void ab initio (from the beginning).

→ When a court rules on the effect of valid legislation that represents the law at the time it was made.

→ Qualifications; *NSW v Kable (Kable No 2) [2013]*: orders of superior court of record are valid until set aside. Not void ab initio. A finding of statutory invalidity may not affect legality of actions taken pursuant an earlier court order made under the legislation, when it was presumed valid.

→ A finding of constitutional invalidity means the statutory provision is void. However, techniques will be adopted to save as much of the law as possible. E.g. read down a law or sever a law.

→ *Public Service Association of SA v Industrial Relations Commission of SA [2012]*: process of reading down; if the statute is capable of bearing 2 meanings, one which would render it invalid and the other valid, the valid option is to be preferred. The words must be able to carry that meaning!

→ Severance: remaining provisions can continue to operate if offending provisions can be severed. The parliament's purpose in enacting the statute must be maintained and the provisions must still be coherent.