

Overview

Introduction and constitutionalism (1A and B)

- What is public law?
- Constitutions and constitutionalism
- Rule of law

Australia as a constitutional hybrid (2A and B)

- History of principles as developed in UK and US, and as borrowed by Australia at federation
- US: judicial review, separation of powers, federalism
- UK: parliamentary sovereignty, responsible and representative government

The Constitution and Indigenous people (3A and B)

- Ideas of Sovereignty
- History of voting rights
- the Constitution – 1967 referendum, 2012 Expert Panel report
- Role of High Court – other options to recognise indigenous sovereignty – treaty?

Federation and Popular Sovereignty (4A)

- Constitutional landmarks from colony to independent nation
- Statute of Westminster Acts; Australia Acts 1986
- Idea of popular sovereignty

Statutory Interpretation (4B and 5A) – principle of legality

Three branches of government

The Legislature (7A and B)

- Composition of parliament and representativeness
- Disqualifications from election – s44 Constitution
- Distribution of legislative power s51, 52, 109
- Right to vote

State Constitutions (8A)

- Limits on states under federal constitution
- 'peace, welfare and good government' as a limit on power of state legislature – debated
- Rights deeply rooted in the common law that even a sovereign parliament cannot override them?

Federalism (8B)

- Intergovernmental agreements
- Referrals of power by states to commonwealth s 51(xxxvii)
- Referrals can be limited by time
- S96 – Cth financial assistance to states

The Executive (9A and B, 10A)

- Who is executive? What is source of executive power? What is role and function of executive?
- Governor general – role; reserve powers
- Prerogative powers
- Responsible government – Egan v Willis; Egan v Chadwick
- Administrative review – judicial review in courts; merits review in tribunals, ombudsman

The Judiciary (11A, 11B)

- Selection and appointment, diversity
- Principles of judicial power
- Chapter III courts can only exercise judicial power; and judicial power can only be exercised by chapter II courts
- Defining judicial power

Rights Protection (12A and B)

- Role of courts v parliament
- Charters of rights (ACT, Vic)
- Human Rights (Parliamentary Scrutiny) Act 2011 (Cth)
- Constitutionally entrenched rights (eg USA)
- Existing protection of rights in the common law

Constitutional Change (13A)

- How constitutions change
- Formal constitutional amendment
- Successful amendments in Australia – but mostly history of failed amendments
- Factors that have contributed to success and failure of proposed amendments
- 1999 referendum on republic

Text : **George Williams, Sean Brennan and Andrew Lynch, *Blackshield & Williams Australian Constitutional Law & Theory: Commentary and Materials* (6th ed, Federation Press, 2014)**

CONSTITUTIONALISM

- A Constitutional Hybrid
- Characteristics of the Constitution
- Political and Legal constitutionalism
- Separation of powers
- Constitutional Change – an Australian republic?

Australia: A Constitutional Hybrid (2-4)

- *Commonwealth of Australia Constitution Act 1900* (Imp) - 1 January 1901 = Commonwealth of Australia
- **Hybrid of ideas and models**
 - **UK - Westminster system** of representative and responsible government within framework of a constitutional monarchy
 - **US/ other nations with written constitutions** - concepts of **federalism**, the **separation of powers** and **judicial review**
- Façade - **monarchical government**
 - Queen/Governor-General as head of state and the constitution states the Queen possesses a range of important powers e.g. s 59 to disallow or annul a law made by parliament but in practice is obsolete as they have little scope to act independently of advice from the Prime Minister and other ministers
- **Representative government** - government by the people through their elected representatives
- **Responsible government** - executive arm of gov is responsible to parliament for its actions
 - British model - Power of the Crown controlled by the ministry -> the ministry is controlled by the Parliament -> Parliament controlled by the electorate
 - Power is conceptualised as an expression of the power of the people themselves
- US elements - need to protect the people against the power of government by distributing that power in ways to ensure there is no single consolidated chain of command
 - Separation of powers - legislative, executive and judicial functions to institutions at least partially independent of one another
 - Federalism - allocates governmental powers among different political and territorial units
 - Subject to checks and balances - courts have power of judicial review to strike down laws and governmental action inconsistent with the constitution
- AV Dicey (*Introduction to the Study of the Law of the Constitution*) - 'constitutional law': **including all rules which directly or indirectly affect the distribution or the exercise of the sovereign power of the state**
- Sir Ivor Jennings (*The Law and the Constitution*) - **a document setting out 'the 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'**
 - Establishes the places of the people and their relationship with the government
 - Key human rights e.g. US Bill of Rights
- Adam Tomkins (*Public Law*) - **constitutions establish institutions and their inter-relationships, explain the place and role of the people and express political values to which a society lays claim**
 - Dividing the power between different bodies
- Giovanni Sartori ('Constitutionalism: A Preliminary Discussion' (1962) -
 - **Nominal constitution** - a constitution dealing only with the 'formalisation of the power structure'
 - Lacking key features, nothing more than a shell
 - Difference between what a document says and what it does in practice
 - E.g. North Korea, Stalin's constitution in Soviet Russia (also a façade constitution but nominal because it didn't do anything it was meant to do)
 - **Façade constitution** - a constitution that pays lip service to the principles of limited government (restricted arbitrary power) but in practice fails to secure them
 - Australia - suggests a certain thing but isn't reality or consistent with the actual case
- Binds together groups of people and states separated by geography in a single document, constituting power bringing about a nation
- Sets values and aspirations that were determined in 1901 (relevant current day or not)
- Gives you a widely accepted way of resolving disputes as vague as it is - high court, escape valve instead of wars etc. in the past

- **Written constitution** - a single solemn document which founds a political community, defines its chief political institutions, confers their powers and circumscribes the permissible limits of those powers
 - Preserved aspects in a written, physical document
 - Constitutions meant to be enforceable and interpreted but without written rules it could produce enormous uncertainty but words can also evolve and change over time
 - Essential for limiting power and creating checks and balances on parliament
 - Consistency, uniformity across the nation - people know what the rules without subjective, personal interpretation
 - UK & NZ - unwritten constitution but a multitude of written acts instead, long term adherence to the rule of law and other general principles that are unthinkable to defer from (conventions, traditions, values that shaped their system)
 - **Constitutional conventions** - Actual workings still depend on unwritten understandings developed as a matter of practical convenience or reflecting fundamental beliefs about how government ought to be conducted
- Australian constitution - s 9 of the *Commonwealth of Australia Constitution Act 1900*
 - Complemented by the *Statute of Westminster 1931* and the *Australia Act 1986* (Cth)
 - + common law and unwritten conventions

Ease of change -

- **Flexible constitution** - every law of every description can legally be changed with the same ease and in the same manner by one and the same body - parliament can amend rules to remove their restrictions of power by exercising their ordinary powers
 - Constitutions of Australian states are for the most part flexible but very rarely change it due to the high political price, maintaining faith and accountability in parliament
- **Rigid constitution** - certain laws known as constitutional or fundamental laws cannot be changed in the same manner as ordinary laws - to effect a constitutional change, the legislature must follow a special and more difficult procedure
 - Amendments initiated by the federal parliament can only be effected by a referendum that meets s 128
 - If its meant to endure largely unchanged you have to introduce procedures
 - Born out of a federal compromise

Political and Legal Constitutionalism (4-6)

- Distinction between systems of government built on idea of **political constitutionalism** vs **legal constitutionalism**
 - Whether or not the decisive legal say on the **constitutional limits of power is given to the judiciary**
- Constitutional order of USA - US Supreme Court has the last word
- English law - the legislature/ parliament i.e. the 'sovereignty of Parliament'
- Public law: 1) provides for the institutions which exercise political power and 2) seeks to hold those institutions accountable
- Political constitution - governments are held to constitutional account through political means and through political institutions (e.g. parliament)
 - Subject to scrutiny in parliament through debates, q&a, committees of inquiry etc. - responsible government
 - Parliament is accountable to the people, chain of accountability and responsibility
 - Privileges powers of the majority whereas everyone can get their say in court (resource dependant)
 - Political corruption and misdeeds
- Legal constitution - principal and means and institution government is held to account is the law and court-room
 - Judicial review
 - Courts are limited to cases brought before them, they can only hear matters that are taken to the high court
- Australian system exhibits a strong adherence to political constitutionalism (particularly given the lack of bill of rights) but leavened at the federal level and to a lesser degree at state level by a commitment to legal constitutionalism 'washminister' hybrid combination
 - Availability of American-style judicial review is antithetical to parliamentary sovereignty
 - Juxtaposition creates a dynamic tension
 - Challenges of the high court is to determine the extent to which it should defer to politicians and political processes in defining the reach of government power