

Federal and State Constitutional Law

Lecture Notes – LAW1027

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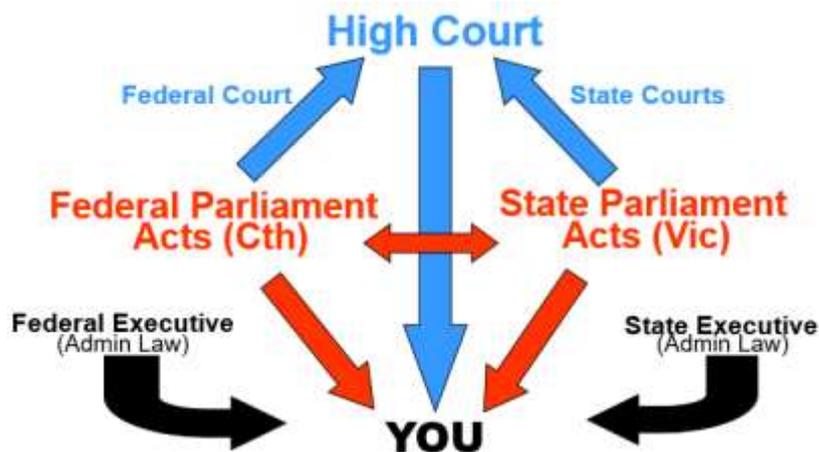
What is Constitutional Law?

- A branch of public law (along with administrative law):
 - Regulates the arms of government (the legislature, the executive and the judiciary) in their relationship with each other and with individuals
 - Regulates relationship between the citizens and the state
- Some central issues:
 - *Who* has the power?
 - *What* does that power include?
 - *What limits*, if any, are there on that power?
 - What is the *extent* of any limitation? How is it enforced?

Con Law is SEXY

- Terrorism
- Bokie gangs
- Pornography
- Cultural heritage
- Sports
- Industrial relations
- Environment
- Education
- Defence
- Alcohol
- Human rights
- Trade practices
- Immigration
- Tax
- Native title
- Criminal law
- Health

Constitutional Law is about POWER



- Con law is the law regulating the 3 arms of government - in the exercise of legislative, executive & judicial powers
- Con law governs relationship & demarcation of power between federal/Cth govt and the State govts
- Con Law studies the exercise of governmental power in the context of individual rights/freedoms

Australian Constitutional Law

- Federal Australian constitutional law consists of:
 - The text
 - The case-law
 - Constitutional conventions (unwritten, but binding by political participants, not enforceable in court): (e.g.)
 - Doctrine of responsible government
 - Distinction between legal and political constitution
 - Constitutional principles

Fundamental Anglo-Australian Constitutional Concepts

1. Parliamentary Sovereignty
2. Rule of Law
3. Constitutional Conventional
4. Bicameralism
5. Representative Government
6. Responsible Government
7. The Separation of Powers
8. Federalism
9. Judicial review

Parliamentary Sovereignty

- AV Dicey
- What is Parliament?
- How are laws made by Parliament?
 - Dicey: Parliament's power to 'make or unmake any law whatever; and further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament.'

Parliamentary Sovereignty in Australia

- Do we have true parliamentary sovereignty in Australia?

- No, as courts can strike down legislation that goes beyond the constitution
- Examples of Constraints on Australian Parliaments:
 - Section 92 Commonwealth Constitution constrains state and federal parliaments;
 - s.18(2) *Constitution Act 1975* (Vic) constrains Victorian Parliament
- s.51 sets out 39 heads of power that the parliament can legislate on

The Rule of Law

- What is the rule of law?
 - Persons should be subject to the law and *only* the law
 - You can be punished if you breach the law but you cannot be punished for anything else
 - 3 facets to the rule of law
- Must be clear, relatively stable and prospective

First of Dicey's Aspects of the Rule of Law

1. Englishmen were 'ruled by law and law alone; a man may with us be punished for a breach of law, but he can be punished for nothing else'

Second of Dicey's Aspects of the Rule of Law

2. There should be 'equality before the law' as between the governors and the governed

Third of Dicey's Aspects of the Rule of Law

3. 'with [Englishmen] the law of the constitution, the rules which in foreign countries naturally form part of a constitutional code, are not the source, but the consequence of the rights of individuals, as defined and enforced by the courts'
- Only have a charter of rights in Australia

Constitutional Conventions

- Political customs or practices that are habitually followed by governments, who are under a moral or political obligation to continue following them
- Their breach does not however attract any legal sanction
- The Australian system has a written constitution coupled with unwritten constitutional conventions e.g.
 - Who do you think is the single most important political figure in Australia?
 - Prime Minister
 - How many times is their position mentioned in the federal constitution?
 - 0
- Who is the most important single figure written into the federal Constitution?
 - The Governor-General
 - Section 5 Constitution
 - Section 58 Constitution
 - Can dissent, therefore no assent on a piece of legislation
 - Section 64 Constitution
 - Can sack the entire government
 - Section 68 Constitution
- But by convention, the GG only exercises her or his constitutional powers on the advice of the Prime Minister and Cabinet
- In practice, this makes the GG less important than the PM and Cabinet

Bicameralism (two houses of Parliament)

- Westminster System
- Two houses of Parliament

- Conventions in the lower house
- All Australian Parliament's except Qld, ACT and NT
- Federal:
 - House of Representatives (lower)
 - Represents the constituents (the people)
 - Senate (upper)
 - Represents the states (12 senators from each state and 2 from each territory)
 - Vote more along party lines than state lines
- Victoria
 - Legislative Assembly (lower)
 - Legislative Council (upper)
- The role of the Senate

Parliamentary Control of Supply

- What is 'supply'?
 - Consolidated Revenue Fund → can't get money out of the bank unless Parliament has authorised it. Parliament must pass an act that appropriates the funds out of the account. Need Appropriation Act to get money out. If the Parliament doesn't approve the Appropriation Act (usually during the budgeting period) then can't govern
- Who controls supply?
 - Parliament
- Why did this principle of Parliamentary control of supply develop?
- The Senate and supply in Australia
 - Section 53 Constitution
 - The role of convention

Constitutional Conventions and 1975

- 3 constitutional conventions that were important in 1975:
 1. That the PM should resign if a motion of no confidence is passed in the lower house;
 2. That the senate should not unreasonably block supply???
 3. That the GG should act on the advice of the PM unless the government is acting:
 - a. Despite a motion of no confidence;
 - b. Illegally and the GG has warned the PM;
 - c. The PM cannot obtain supply???
- Key players:
 - Gough Whitlam
 - Prime Minister 1972-75
 - Malcolm Fraser
 - Leader of the Opposition March-November 1975
 - Prime Minister 1975-83
 - 15 October 1975: opposition would defer passage in the Senate of the 1975-76 budget (supply bill)
 - John Kerr
 - Governor-General of Australia 1974-77
 - Tuesday 11th November 1975, 1pm: handed Whitlam letter informing him that he was 'withdrawing his commission'

The dismissal letter

- Technical words of the constitution gave him the ability to sack him



Government House,
Canberra. 2600.

11 November 1975

Dear Mr Whitlam,

In accordance with section 64 of the Constitution I hereby determine your appointment as my Chief Adviser and Head of the Government. It follows that I also hereby determine the appointments of all of the Ministers in your Government.

You have previously told me that you would never resign or advise an election of the House of Representatives or a double dissolution and that the only way in which such an election could be obtained would be by my dismissal of you and your ministerial colleagues. As it appeared likely that you would today persist in this attitude I decided that, if you did, I would determine your commission and state my reasons for doing so. You have persisted in your attitude and I have accordingly acted as indicated. I attach a statement of my reasons which I intend to publish immediately.

It is with a great deal of regret that I have taken this step both in respect of yourself and your colleagues.

I propose to send for the Leader of the Opposition and to commission him to form a new caretaker Government until an election can be held.

Yours sincerely,

The Honourable E.G. Whitlam, Q.C., M.P.

The Aftermath

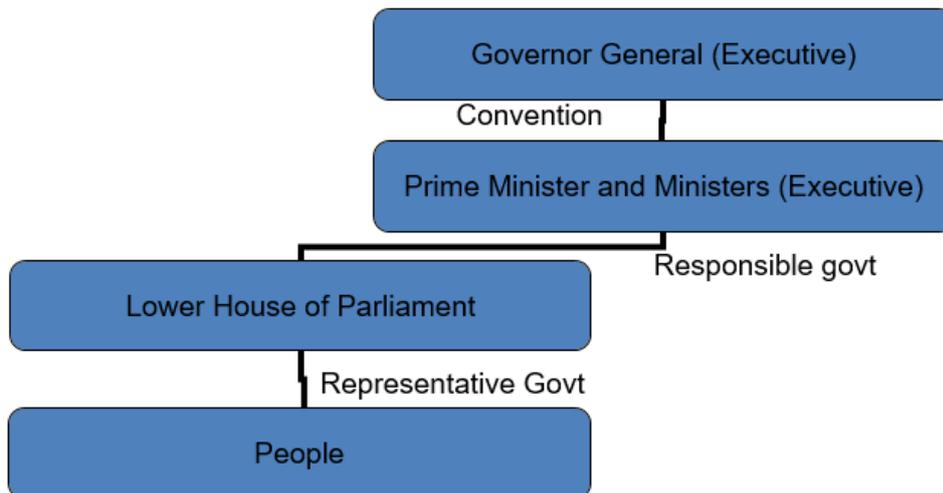
- Bob Hawke was protesting

Representative Government

- What is representative government?
 - The doctrine of 'representative government' refers to the composition of the lower house of Parliament; it means that the lower house is democratically elected
- What is preferential voting?
 - Rank preferences, system that is used in Australia
 - Led to a number of minor parties in the upper house
- What is responsible government?
 - The executive is responsible to the legislature (parliament)
 - As the power of the king/executive shrunk, the power of the parliament grew bigger
 - GG acts on advice of PM and Cabinet

- Must hold confidence of the lower house to govern, if don't hold confidence of lower house, must resign
- Is a majority in the Senate necessary too?
 - No, it is very rare to have a majority in the Senate
- Party that wins majority in the Lower house becomes the government of the day

Responsible Government - from the executive to the people



- Individual Minister responsibility → Individually ministers are all responsible for what happens in their department
- Collective responsible government → must command confidence of the majority in the lower house of parliament, if executive fails to secure majority of the lower house confidence, must resign

The Separation of Powers

- What is the doctrine of Separation of Powers?
 - Separates the 3 arms of government:
 - Executive
 - Run the Government, implement or administer the laws
 - Ministers, Prime Minister
 - Judiciary
 - Interpret the laws that are passed by Parliament
 - Legislature
 - Write laws, pass it through parliament
 - Ministers, members of Parliament
- Why do we have the principle of Separation of Powers?
 - To avoid Parliament becoming corrupt and abusing their power
- How separate are the executive and the legislature in the Westminster system?
 - Section 64 Commonwealth Constitution
- Government appoints the Judiciary to try appoint judges that they think will comply with their political leanings
- Once judges are appointed, they are protected until the age of 70, they are completely independent

Federalism

- What is a federal system?
 - A union of the states
- How many State governments are there?

- Commonwealth can completely legislate for the territories but don't have complete power over the states
- Federal-State relations are a real issue in constitutional law

Judicial Review

- What is judicial review in a constitutional sense?
 - All laws must conform to the constitution, parliament can't make every law they want
 - High court Judiciary interprets and applies the constitution in Australia
 - If law doesn't fit with the constitution you can strike down the law
- Which Court has primary power to interpret the Constitution?
 - High Court
- What is the legal basis for judicial review in Australian Constitutional Law?

Know your Justices: The Ladies...

- Susan Kiefel CJ
 - First female CJ of the High Court
 - Former High school dropout
 - Queensland's first female silk
 - Black letter judge
- Virginia Bell J
 - Former TV barrel girl, trained in the theatre, first lesbian to serve on the High Court. Claims a 'limited acquaintance with constitutional law', more expertise in criminal law
- Michelle Gordon J
 - 3rd youngest appointment to HC
 - Replaced her husband Ken Hayne J.
 - Keen surfer, passion for the arts, and weakness for antiques

The Gentlemen....

- Stephen Gageler J
 - Previously Solicitor-General
 - Black belt in taekwondo
 - Does yoga
- Geoffrey Nettle J
 - Oldest ever appointee to the HC
 - Polishes the bottom of his leather shoes
- Patrick Keane J
 - Former Chief Justice of the Federal Court
 - Constitution "only a small brown bird"
- James Edelman J
 - Youngest HC appointment (42)
 - Gen X justice
 - Youngest law professor at Oxford
 - Will serve 29 years on HC
 - Incapable of reading a map, not so good at cooking, cleaning

From colonisation to the cusp of a republic

- Self-study (J&C pp14-17 and 28-32):
 - Colonisation of Australia: Reception of British Law
 - Dictatorship to responsible government
 - Limits on the powers of Colonial Parliaments

- The advent of the Constitution
- Cutting the apron strings
- A republic in waiting?

Powers of Colonial Parliaments

- The power to make laws for 'the peace, order, and good government of the colony
- 'plenary' power: *Union Steamship v King* (1988) BUT
- Important limits on colonial Parliaments' power

The three limits to colonial parliamentary power

Colonial Laws Validity Act 1865 (UK)

1. Repugnancy
2. Territorial limits
3. Disallowance

Evolution of Independence

- Early colonial Constitutions
- Colonial Laws Validity Act 1865
- Commonwealth Constitution 1901
- Statute of Westminster 1931
- Statute of Westminster Adoption Act 1942
- Australia Acts 1986

Cutting the apron strings

- Queen Elizabeth II signs her Assent to the Australia Act on 2 March 1986 at Government House, Canberra, with David Reid, Secretary to the Executive Council and Prime Minister Bob Hawke

The Queen of Australia

- Australia is a constitutional monarchy with The Queen as Sovereign
- As a constitutional monarch, The Queen, by convention, is not involved in the day-to-day business of the Australian Government, but she continues to play important ceremonial and symbolic roles
- The Queen's relationship to Australia is unique. In all her duties, she speaks and acts as Queen of Australia, and not as Queen of the United Kingdom
- The Queen's Royal style and title in Australia is Elizabeth the Second, by the Grace of God Queen of Australia and Her other Realms and Territories, Head of the Commonwealth

The Australian Constitution

- Chapters 1, 2 and 3
 - Parliament
 - Executive
 - Judiciary

Overview of the Constitution

- Preamble The Constitution
- Chapter I. The Parliament (s.1 to 60)
- Chapter II. The Executive Government (s.61 to 70)
- Chapter III. The Judicature (s.71 to 80)

- Chapter IV. Finance and Trade (s.81 to 105A)
- Chapter V. The States (s.106 to 120)
- Chapter VI. New States (s.121 to 124)
- Chapter VII. Miscellaneous (s.125 to 127)
- Chapter VIII. Alteration of the Constitution (s.128)

Helen Irving (2007) says the Australian Constitution

- Does not mean what it says
- Does not say what it means
- Says some things without actually saying them
- Fails to say things that might be important
- Says some things that contradict each other
- BUT could say what it means and mean what it says (if we wanted it to)

Chapter 1 - the Parliament

- Part I → General
 - Section One
 - Section Two
 - Section Five
- Part III → the House of Representatives
 - Section 24
- Part II → The Senate
 - Section 7
- Section 57 - deadlocks - alternative legislative procedure

Legislative Power of Commonwealth

- s.51 spells out 39 separate legislative powers that may be exercised by the Parlt.
- The s.51 powers are held concurrently with the State Parliaments.
 - Powers that state and commonwealth both hold at the same time, where inconsistencies, the commonwealth will prevail
- s.52 spells out 3 powers exclusively held by the Cth.
- See s.51(xx) corporations, & s.51(xxix) external affairs powers

Ch II - The Executive

- Section 61
- Section 64
- Section 62

least detailed part of the constitution

most operates by convention as government keeps changing the structures and operations, there is outsourcing etc., so conventions operate to give some flexibility

Ch III - the Judiciary

- Section 71
- Section 72
- Section 73
- Sections 75 & 76

establishes the High Court

Are you familiar with the other Chapters?

- Ch IV - Finance & Trade - especially s.96
- Ch V - Colonies & States - s.106 & 107, 116 & 117

- Ch VI - new States - especially s.122
- Ch VIII especially s.128 re amendment of the Constitution