

Week 1 Lecture – Federation and Independence

- 1897-98: Composed a constitution bill – agreed to by the governments and legislatures of the colonies, and then by referendum; finally, enacted into law by the British Parliament
 - WA had not acted, but they passed a referendum before the proclamation of the Constitution
 - Popular referendum (60% of eligible voters voted)
 - Introduced *Commonwealth of Australia Constitution Act 1900* (Imp)
 - In force 1 January 1901

From Reception to Independence

- ‘The manner in which independence was achieved – gradual and pragmatic, without fanfare or symbolism – is characteristic of Australian constitutionalism and, indeed, has helped to form it.’ Cheryl Saunders, 19
- Internal developments:
 - Abandoning imperial control
 - Applicability of Imperial legislation to Australia;
 - Removing the Privy Council as the final court of appeal from colonial courts;
 - Appointing the Governor General based on advice from *Australian* government, not British.
 - Every Governor General since 1965 has been Australian
- External developments:
 - Full capacity to conduct international relations
 - Including acting extra-territorially
- *Colonial Laws Validity Act 1865* (Imp)
 - Could a colonial legislature alter the law, whether the common law or English statute, if it applied to the colony? Remember, English law was superior.
 - Colonial laws were inoperative to the extent they conflicted (‘repugnant’) with English statutes that *extended to the colony*. Otherwise, colonial legislatures were free to amend the law (legislation and common law) received in the colonies.
 - Continues to apply to the States and the Commonwealth post-federation.
- *Statute of Westminster 1931*
 - Preamble:
 - ‘And whereas it is in accord with the established constitutional position that no law hereafter made by the Parliament of the United Kingdom shall extend to any of the said Dominions as part of the law of that Dominion otherwise than at the request and with the consent of that Dominion’
 - Section 2:
 - (1) ‘The Colonial Laws Validity Act 1865 shall not apply to any law made after the commencement of this Act by the Parliament of a Dominion.’
 - (2)(a) Laws passed in the Dominion after this Statute cannot be void for repugnancy with the law of England (current or future)

- (b) The Dominion Parliament may amend any English law still applying in the Dominion
- Section 4:
 - A UK Act will only extend to the Dominion if the Act expressly declares that the Dominion has requested and consented to the Act.
- Importantly, the States' existing legal position was maintained – s 9(1).
 - I.e. UK Parliament could, legally, still extend legislation to the States.

The Australia Acts

- *Australia Act 1986 (UK) and Australia Act 1986 (Cth)*
- *Australia Act 1986 (Cth) enabled by s 51(xxxviii) of the Constitution*
 - At the request of state parliaments – exercise any power which, prior to federation, could not be exercised by the legislatures of the former colonies
- Long title:
 - 'An Act to bring constitutional arrangements affecting the Commonwealth and the States into conformity with the status of the Commonwealth of Australia as a sovereign, independent and federal nation'
- Ended the the power of UK Acts to extend to the Commonwealth, States, or Territories (s 1)
- States have all legislative power belonging to the UK Parliament excepting foreign affairs (s 2) and any laws that would repeal, amend, or be repugnant (conflict) with the Australia Act, the Constitution, or the Statute of Westminster (s 5).
- Repealed the *Colonial Laws Validity Act 1865* for States – UK laws passed after the Australia Act cannot be paramount and State Parliament may amend any law (s 3)
- Privy Council appeals terminated, and UK government no long holds responsibility in State matters (ss 10, 11)
- Can only repeal or amend the Australia Act through an Act of the Commonwealth as requested and with the concurrence of all the States (s 15)

Two Questions:

1. What is the UK repealed the *Australia Act* (UK)?
2. How does the Constitution, an Imperial statute, remain entrenched? Why can't it simply be repealed, if Australia can now repeal Imperial statutes?

Sue v Hill (1999) 199 CLR 462

Facts:

- Heather Hill stood for and won a seat in the Senate at the 1998 federal election. She was disqualified because she had not renounced her UK citizenship.
- S 44(i) of the Constitution provides a person is disqualified if they are 'under any acknowledgement of allegiance, obedience, or adherence to a foreign power ...'

Issue: Was the UK a 'foreign power' under s 44(i)?

- Hills argument was at Federation, all members of the Empire were British subjects. There was no differentiation. Britain could not be considered a 'foreign power'

Judgement:

- Majority – ‘[64] at least since 1986 with respect to the exercise of legislative power, the United Kingdom is to be classified as a foreign power.’ [48] The words [of s 44(i)] invite attention to questions of international and domestic sovereignty’.
- [51] The Constitution was to be read in light of the ‘march of history’, and was meant to endure... [52] The end of the Empire led to the rise of full Constitutional power’
 - Does the ‘march of history’ mean the Constitution’s meaning has changed?
 - [78] ‘Whilst the text of the Constitution has not changed, its operation has’... [95] This was expected by the drafter
- Pointed to changing quality of ‘the Crown’ ([56] - [57], see also Guadron J [169])
 - *Royal Style and Titles Act 1973* (Cth) – ‘Queen of Australia’
- [59] Since ‘at least the commencement of the *Australia Act 1986* (Cth)’ the Court has not been bound to recognise and give effect to exercises of legislative, executive or judicial power by UK institutions
 - Since 1986, the UK government has had no (theoretical) responsibility for the government of any state – advice was given to the Queen by the Premier of the State (basis of Executive government)
 - [77] Since 1929 – the Queen takes advice from Cth ministers in Cth matters
- Callinan J: [290] ‘The evolutionary theory is, with respect, a theory to be regarded with great caution. In propounding it, neither the petitioners nor the Commonwealth identify a date upon which the evolution became complete, in the sense that, as and from it, the United Kingdom was a foreign power. Nor could they point to any statute, historical occurrence or event which necessarily concluded the process’. [291] ‘The great concern about an evolutionary theory of this kind is the doubt to which it gives rise with respect to peoples’ rights, status and obligations as this case shows. The truth is that the defining event in practice will, and can only be a decision of this Court ruling that the evolutionary process is complete’

However:

- What is UK Parliament repealed *Australia Act* (UK) or passed inconsistent legislation?
 - William Wade, ‘The Legal Basis of Sovereignty’ [1955] CLJ 172, 174: there is one, and only one, limit to Parliament’s legal power: it cannot detract from its own continuing sovereignty.’
 - While this would present a question for UK institutions, [64] ‘Australian courts would be obliged to give their obedience to s 1 of the statute passed by the Parliament of the Commonwealth’
- How is the Constitution still binding in a context of Australian independence?
 - The Australian Constitution is an Imperial Act. After the *Australia Act 1986*, the UK no longer has a legislative role in Australia; the Commonwealth and the States can repeal or amend still existing UK law. Australia, in this sense, is independent. How, then, does the Constitution continue to be ‘entrenched’?
 - *Westminster Statute* and *Australia Act* excluded the Constitution from legal change by simple repeal

***Australian Capital Television v Commonwealth* (1992) 177 CLR 106**

- Mason CJ: [137-139] ‘The very concept of representative government and representative democracy signifies government by the people through their representatives. Translated into constitutional terms, it denotes that the sovereign

power which resides in the people is exercised on their behalf by their representatives.'

Theophanous v Herald & Weekly Times Ltd (1994) 182 CLR

- Dean J: [104, 171] The present legitimacy of the Constitution 'lies exclusively in the original adoption (by referenda) and subsequent maintenance (by acquiescence) of its provisions by the people'.

McGinty v Western Australia (1996) 186 CLR

- Gummow J: [140, 274] 'Broad statements as to the reposition of 'sovereignty' in 'the people' of Australia, if they are to be given legal rather than popular or political meaning, must be understood in light of the federal considerations outlined in s 128'

The Constitution and Constitutionalism

The Constitution

- Establishes and regulates a legal body;
- In the case of constitutional law, a constitution establishes and regulates the civil and public institutions of the modern state;
- AV Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan, 1st ed, 1885; 10th ed, 1959) 23
 - 'Constitutional law' as including 'all rules which directly or indirectly affect the distribution or the exercise of the sovereign power in the state'
- In Australia
 - The Commonwealth of Australia
 - Federation of six previously existing, self-governing colonies – separate constitutions. *Constitution Act 1902* (NSW)
- Sets out a structural relationship
 - E.g. Determining what happens when State and federal law are inconsistent – s 109

Features

- Recall – popular sovereignty?
- *Theophanous v Herald & Weekly Times Ltd (1994) 182 CLR 104, 171* Deane J: the present legitimacy of the Constitution 'lies exclusively in the original adoption (by referenda) and subsequent maintenance (by acquiescence) of its provisions by the people'
- *Bistrivic v Rokov (1976) 135 CLR 552, 566* Murphy J: The Constitution is binding because of 'its continuing acceptance by the Australian people'.
- Preamble to the Constitution Act: 'Whereas the people of New South Wales, Victoria, South Australia, Queensland and Tasmania ... have agreed to unite in one indissoluble Federal Commonwealth...
- Cf The US Constitution opens, 'We the People of the United States ...'

Mixed Government – Mixed Sovereignty

- Does sovereignty have to be unitary?
 - Post 16th century Jean Bodin view on sovereignty

- Sovereignty consisted in ‘the highest, absolute, and perpetual power over the citizens and subjects of the Commonwealth’

Australia’s Constitutional Monarchy

- The Queen is
 - Represented by a Governor-General;
 - Part of the legislature – an Act of Parliament is not an Act until the Queen gives her assent (ss 1, 58);
 - May prorogue (suspend) or dissolve Parliament (ss 5, 57);
 - Has Executive power (s 61);
 - Has command of the military (s 68).
- By **convention**, all of these powers are exercised on the advice of the Prime Minister and his or her ministers.

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Week 3 Lecture

External Affairs

Characterisation

- The process of determining whether a federal law is a law 'with respect to' a head of Commonwealth power:
- Three steps:
 - Examining the federal law in question
 - What rights and duties does it create?
 - What are its significant features?
 - Examining the head of power in question
 - What is the connotation – central characteristic (*Singh*) – what are the denotations – applications?
 - What is the 'core' meaning; what is incidental to that core, that is necessary to implement the power?
 - Is the law a law 'with respect to' the head of power?
 - Evaluating the strength of the connection – practical and legal operation
 - A 'sufficient' connection – not evaluating whether the means are necessary or desirable
- *Grain Pool of Western Australia v Commonwealth* (2000) 202 CLR 479 at 492
- Multiple characterisation
 - A law can have 'several distinct characters'
 - Falling within one or more grant of power is permissible; equally, falling outside a grant of power is permissible
 - 'So long as the remaining elements, which do not fall within any such grant of power, are not of such significance that the law cannot fairly be described as one with respect to one or more such grants of power'
- *Actors and Announcers Equity Association of Australia v Fontana Films Pty Ltd* (1982) 150 CLR 169, 192