

The Constitution, sources of power

- What is a constitution?
 - A Constitution is a fundamental law which provides the source of power for the making of all other laws
 - A Constitution commonly does the following:
 - It establishes the **institutions of government** (usually a legislative body, executive offices, the bureaucracy and courts).
 - It **grants them powers and limits those powers**.
 - It defines how they interact and **their relationship with the people**
 - It deals with **finances** (raising and spending them).
 - It **grants individual rights or freedoms** (either positively or as a restriction on governmental powers) and imposes responsibilities.
 - AU and US has written constitution. UK has a constitution, but not in one doc. It's in different docs - unwritten constitution
 - Constitution in a narrow sense means the one Constitution, in broader sense includes other laws governing establishment and operation of primary institution of government
 - Flexible v Rigid Constitution
 - A Constitution may be **rigid** – i.e. it can only be amended by a special procedure and it overrides all other laws
 - Cth Cons rigid
 - Constitutions of **federations** are normally rigid so that one level of government cannot unilaterally change the rules establishing the federation (Eg, USA, Canada, Australia.)
 - A Constitution may be **flexible**. It may be able to be changed by ordinary legislation without special procedures (Eg, UK and New Zealand.)
 - NSW Cons flexible
 - A Constitution may also have a **mix of rigid and flexible provisions** (E.g, Constitutions of the Australian States)
- Why is it binding?
 - A Constitution may be regarded as binding because
 - It was **conferred and imposed from on high** (e.g by God, a Sovereign, and invading power or a **colonial master **historical reason for Cons sovereignty****).
 - It was **established by a legal process** in which existing polities took part (e.g polities coming together to form a federation).
 - People
 - It is the will of people - either directly through a referendum or indirectly through representative government.
 - People support it by obeying it
- Why is AU's Constitution binding?
 - Historical answer - by **sovereignty of the Westminster Parliament**
 - Since it is a UK Act with paramount force on AU (*Dixon, BW 126; and Lindell BW 126*)
 - Then, AU undergone some change
 - Towards independence
 - UK cannot legislate for AU any more
 - AU can amend/repeal any UK statute (But for Constitution, need to follow s128 Constitution)
 - Now: Popular sovereignty + historical answer
 - Why is historical answer still relevant?
 - Since nothing has happened which give Parliament power to change Constitution. Parliament can change other UK acts, but not Cons.
 - Popular sovereignty
 - Means: it represents the will and authority of people
 - ◆ It was the people who first approved the Constitution in each colony in a referendum before its enactment.
 - ◆ The power to amend or repeal it rests with the people, through referenda.
 - ◆ It is the continuing obedience of the people in its supremacy that gives the Constitution binding

force (Lindell, BW 126-7)

- But:
 - ◆ First, bits of it were changed after the referendums were held
 - ◆ Secondly, it was **not enacted by the vote of the people, but by the vote of the Westminster Parliament**
 - ◆ Thirdly, the proportion of the population which voted for the Constitution was **very low and large sections (such as women) were excluded** (*George Williams has noted in B&W 128-9*)
 - ◆ Little choice is given to people (those who reject the Constitution and breach the law may be punished), and **most people are unaware of what is in the Constitution, or in some cases that it even exists**
- Refining the position
 - ◆ Sovereignty of Constitution rest in the hands of people who enacted and is able to amend/repeal it
 - ◇ Who enacted it? Westminster Government, but CANNOT amend/repeal it anymore
 - ◇ Who can amend/repeal it?
 - ▶ People through referendum
 - ▶ But Parliament must firstly initiate a Bill and the Bill has to be approved by a majority overall and a majority in a majority of states.
 - This means representative government and federalism affect the people as the source of sovereignty
- Position now:
 - ◆ So, the people are sovereign through their elected representatives and as federally arranged
 - ◇ [Unions NSW v NSW (2013)] - representative government signify that sovereign power resides in the people
- HCA position
 - Before Australia Act, people's acceptance makes it binding [Bistrivic v Rokov]
 - Post Australia Act - recognised that ultimate sovereignty is in the hands of AU people
 - ◆ First favoured the notion of popular sovereignty in [Australian Capital Television Pty Ltd v Commonwealth (1992)], and [McGinty v Western Australia]
 - ◆ Since then, it went quiet on the subject.
 - ◆ Recently in [Unions NSW v NSW (2013)], French CJ, Hayne, Crennan, Kiefel and Bell JJ at [17] referred to representative government as signifying that sovereign power resides in the people and Keane J at [135] based the requirement for the free flow of political communication on the need to 'preserve the political sovereignty of the people of the Commonwealth'.
 - ◆ In [Tajjour v NSW (2014)] and [McCloy v NSW (2015)] the Court has made further references to the sovereignty of the people
- Example: Tree removal order issued by local council inspector – Client does not want to remove it
 - Questions for lawyer:
 - Did the council ordinance or by-law grant the inspector power to issue the order? – if yes
 - Did the council have power under the Local Government Act to make the ordinance or by-law? – if yes
 - Did the Parliament have power under the Constitution to enact the Local Government Act? – if yes
 - Is the Constitution valid? – not usually a 'legal' question
 - ◆ Made by UK Parliament.
 - ◆ Preamble - agree to be a united nation. States has referendum when unite. But this is not a reason of its authority.
 - ◆ To work out its authority, look at who has authority to change it.
 - ◇ S128 - referendum, go to PEOPLE to decide. Popular sovereignty.
 - ◆ Why do lawyers care?
 - ◇ Source was UK Parliament.
 - ◇ Ultimate sovereignty which belongs to AU people. Mason judgement

Aboriginal sovereignty

- NO SOVEREIGNTY - This sovereignty is a spiritual notion
 - The ancestral tie between the land, or 'mother nature'...This link is the basis of the ownership of the soil, or better, of sovereignty. It has never been ceded or extinguished, and co-exists with the sovereignty of the Crown (2017.5 Uluru Statement from the Heart)
- Courts established by Constitution, cannot overturn its sovereignty
 - [Coe v Cth (No 1)] - the acquisition of legal sovereignty over Australia is an 'act of state' which cannot be challenged in the courts

- [Wik Peoples v Queensland] - High Court was established by the Constitution and draws its legitimacy from the legal system created by that Constitution.
- Aboriginal people remain subject to Cth and state law, not 'domestic independent nations' [Coe v Cth (No 2)]
 - All people should stand equal before the law, including Aboriginals [Walker v NSW]
 - No dual system of law [Wik Peoples v Queensland]
 - [Mabo] does not suggest dual system of law. Does not suggest that general law (criminal law) does not apply to Aboriginal people.

Constitutional doctrines and structures

- Separation of powers - Legislative power, executive power and judicial power (Montesquieu BW 26).
 - Legislative - Chapter 1 s1 Cons - grant legislative power to parliament
 - Executive - Chapter 2 s61 Cons - power exercised by Queen's representative
 - Function: to frame policy, administration of laws and dealing with other nations
 - **No strict separation between this two since executive has large control over lower house, prime minister elected from lower house**
 - Judicial - Chapter 3 s71
 - Power strictly separated from other two
- Federalism
 - Two tiers, Cth and State
 - Australia drew on the US federal system in creating its own. It is sometimes referred to as a 'Washminster' system, combining responsible government from Westminster and federalism from Washington.
 - Federalism can be seen in
 - Representation (eg equal State representation in Senate and minimum of 5 in House of Representatives)
- Representative government
 - Representative government and representative democracy signifies government by the people through their representatives - Mason CJ in [Australian Capital Television Pty Ltd v Commonwealth]
 - Members of Parliament are directly chosen by the people
 - Senate s7 - The Senate shall be composed of senators for each State, directly chosen by the people of the State
 - House of Representatives s24 - The House of Representatives shall be composed of members directly chosen by the people of the Commonwealth
 - The Constitution can only be formally amended by referendum.
- Responsible government
 - Executive power is vested in the Governor-General (s.61), who ordinarily acts upon ministerial advice.
 - Ministers are responsible to Parliament for that advice and cannot hold office longer than 3 months unless they become a Senator or Member (s64)

Parliamentary sovereignty

- UK position (AV Dicey, Introduction to the Law of the Constitution (BW p 30)) - does not apply in AU
 - In the UK, parliamentary sovereignty means
 - The Parliament has full power to enact or repeal any law
 - One Parliament cannot bind future Parliaments
 - No court or other body can hold a statute enacted by the Westminster Parliament to be invalid or beyond Parliament's power
- AU position
 - Parliaments are free to legislate as they wish and courts cannot strike down laws.
 - But, courts can argue whether there are fundamental common law rights that even the Parliament cannot derogate from.
 - One Parliament cannot bind a future Parliament by entrenching certain laws
 - The Commonwealth Parliament cannot require that certain types of laws be enacted by a special majority, as this would breach s 40 of the Constitution, and it cannot require that certain types of laws be only amended or repealed if approved by the voters in a referendum, as this would constrain the legislative powers granted by the Constitution.
 - The Commonwealth Parliament could only entrench laws by amending the Constitution, but to do that, it needs the approval of the people in a referendum in accordance with s 128 of the Constitution. Without an amendment to the Constitution, the Commonwealth Parliament cannot dispense with the need for the Senate to pass a Bill or add a third House to the Parliament.
 - The powers of the Commonwealth Parliament are limited to those specified in the Constitution and the