

# TOPIC 1: FUNDAMENTAL CONCEPTS, INSTITUTIONS AND INSTRUMENTS

## THE AUSTRALIAN CONSTITUTION

The main body of law which regulates the three arms of Government:

1. The *Executive* - which administers and enforces the law (i.e. Government);
2. The *Legislature* - which drafts the law (i.e. Parliament); and
3. The *Judiciary* - which interprets the law

The *Australian Constitution* regulates the relationship between each arm, and provides authority for, and limits to, the exercise of public power.

- Found in s9 of the *Commonwealth of Australia Constitution Act 1900* (Imp);
- Ss 1-8 are 'covering clauses', which cannot be amended using s 128;
- Mostly written, supplemented by unwritten, generally accepted practices, traditions and conventions;
- The starting assumption (*grundnorm*) is that the Constitution IS binding.

## UNDERLYING PRINCIPLES

Rule of law: We live in a society governed by declared laws, rather than arbitrary exercises of power (*AV Dicey*). There are three main aspects:

1. There is to be absolute supremacy of laws, and laws alone;
2. All are equal before the law; and
3. The Constitution is to be formed with an emphasis on the rights of individuals.

Critique: Formalistic, 'thin' conception; no substantive content about the nature of laws (just/unjust).

Separation of powers: This doctrine prescribes that the functions of the three arms of Government are to be clearly separated to safeguard the integrity of the system. In Australia, there is overlap between the Legislative and Executive arms.

Responsible government: Only the person commanding the confidence of the Lower House of Parliament is entitled to form government (constitutional convention).

Representative government: Parliament (or at least the Lower House) should be made up of people freely elected by the people as their representatives.

Parliamentary sovereignty/supremacy: Parliament has the power to make and unmake any law it wants, provided it adheres to the limitations imposed by the Commonwealth Constitution (*AV Dicey*). In Australia, we have parliamentary supremacy- the key limitation is that one Parliament cannot bind a future Parliament. Limitations: Possibility for subjects to disobey or resist; the reasonable nature of Ministers motivated by duty and public service; the omnipotence paradox.

Constitutional conventions: Unwritten customs and practices that govern how legal powers are to be exercised. They are not legally binding (*Re Resolution to Amend the Constitution 1981* (Supreme Court of Canada)), because in substance, they are inconsistent with the express legal rules that the Constitution enforces.

Federalism: The sharing of power between the Commonwealth and the States. Australia is a federation, meaning power is shared between the two levels.

## AUSTRALIAN CONSTITUTIONAL HISTORY

Repugnancy Doctrine: When Australian colonies were granted legislatures by Britain, the general principle was that they would make and unmake any law they wanted, subject to British laws applicable in the colony by paramount force (express words or necessary intendment).

- Confirmed by *Colonial Laws Validity Act 1865* (Imp)
  - Continued to apply in Australia after Federation to limit the powers of Federal and State Parliaments.
- Altered by *Statute of Westminster 1931* (Imp)
  - S2: The CLVA/Repugnancy Doctrine abolished with respect to Federal laws;

## QUESTION PROCESS

Therefore, when determining whether a law validly confers a power on a person/body, there is a four stage process:

### 1. Identify whether the power conferred is an exercise of judicial or non-judicial power;

Powers that are <b>always</b> judicial in character:	
Adjudging and punishing criminal guilt	<p><b>Administrative decisions</b> about whether conduct amounting to criminal wrongdoing has occurred is <b>NOT</b> adjudging or punishing criminal guilt if that decision is genuinely administrative, and is not binding as to whether criminal wrongdoing has occurred (<i>Today FM</i>).</p> <p><b>Statutory rights</b> being revoked by new statute is <b>NOT</b> adjudging or punishing criminal guilt (<i>Duncan</i>).</p> <p><b>Military justice</b> is <b>NOT</b> adjudging or punishing criminal guilt.</p>
Secrecy	An <b>open and public enquiry</b> indicates judicial function.
Powers that are <b>never</b> judicial in character:	
Making political recommendations	<i>Wilson</i>
Issuing phone tap warrants	<i>Hilton</i>
Powers that are <b>sometimes</b> judicial in character, depending on who/what is exercising the power, and the manner in which it is exercised (indicia):	
Indicia of <b>judicial</b> power:	Indicia of <b>non-judicial</b> power:
Deciding controversies between parties (as per Griffith CJ in <i>Huddart</i> )	Ex parte?
Binding and authoritative decision (whether subject to appeal or not) (as per Griffith CJ in <i>Huddart</i> ; <i>Brandy</i> ; <i>TCL</i> )	
<p>About existing rights and obligations (as per Griffith CJ in <i>Huddart</i>) rather than creating new rights and obligations.</p> <p>However, it was held in <i>Thomas v Mowbray</i> that issuing control orders was an exercise of judicial power even though it created new obligations, because the power in question was <b>analogous</b> to a power that is traditionally understood as being judicial. In this case, it was held that issuing a control order was similar to issuing AVOs and bail orders.</p>	