

# CONSTITUTIONAL LAW NOTES:

---

## BASIC CONCEPTS:

### *WHAT IS CONSTITUTIONAL LAW?*

---

- Constitutional law is the branch of the law that regulates the three arms of government:
  1. Legislature = enacts laws;
  2. Executive = administers laws or puts them into practice; and
  3. Judiciary = interprets and applies the law
- The Constitution provides the source and authority for the exercise of public power, and circumscribes the limits of that power
- Constitutional limits concern things such as:
  - The scope of authority. E.g. division of power between the federal and state governments;
  - The mechanisms used in exercising the relevant power. E.g. procedural requirements governing the form and manner of legislation; and
  - Civil rights. E.g. in a Charter or Bill of rights
- In Australia, constitutional law also governs the relationship and demarcation of power between the two levels of Australian government:
  1. The federal or Commonwealth government; and
  2. The state and territory governments

### *FUNDAMENTAL CONCEPTS IN AUSTRALIAN CONSTITUTIONAL LAW:*

---

#### PARLIAMENTARY SOVEREIGNTY:

- Parliamentary sovereignty represents one of Dicey's twin pillars
- Parliamentary sovereignty = the Parliament has the ultimate law-making power and ability to override the common law
- In the UK, the Parliament is absolutely sovereign
- In Australia, the Parliament is not absolutely sovereign because the powers of all Australian legislatures are constrained by the Commonwealth Constitution
- Even though Australia is not absolutely sovereign, the judiciary will only strike down statutes in Australia if there is constitutional authority for such disallowance, either by express words or necessary implication: see *Union Steamship v King*
- Arguments for = Parliament is the only arm of government elected by the people. Ultimate power should therefore vest in the representative government as it is the only arm that is representative of the will of the people
- Arguments against:
  - Undemocratic. If Parliament was absolutely sovereign they could abolish elections;

- Theory fails to incorporate checks and balances upon the legislature:
  - Parliament may be swayed by populist majoritarianism – views of majority can be used to circumstances the minority and unpopular groups; and
  - Parliament have realistic scope to pass laws in breach of human rights because of an absence of a bill of rights;
- Voter's may forgive and forget the passage of unjust legislation in time to re-elect a government;
- The agenda's of major parties do not necessarily correspond to majority wishes; they may be disproportionately influenced by powerful yet non-representative institutions and lobby groups; and
- The limited choice of leaders and policy platforms may pre-ordain the passage of legislation if there is dual support in favour of such legislation

### THE RULE OF LAW:

- The rule of law represents the second of Dicey's twin pillars
- According to Dicey, the rule of law has three main facets:
  1. Supremacy of law as opposed to arbitrariness = the law should be clear, easily accessible, comprehensible, prospective, stable, predictable, consistent and non-discriminatory;
  2. Equality = there should be equality before the law as between the governors and the governed; and
  3. Individual rights = the rules which form part of the Constitution, are not the source, but the consequence of the rights of individuals, as defined and enforced by the courts
- Lord Bingham explained eight key principals, which expand on the Diceyan explanation:
  1. Laws must be accessible and so far as possible intelligible, clear and predictable;
  2. Arbitrariness = judges must exercise discretion in each individual case, but such discretion should not amount to arbitrariness;
  3. Equality = equality before the law is fundamental;
  4. Judicial review = Ministers and public officials must exercise the powers conferred on them in good faith, fairly and for the purpose for which the powers were conferred, without conceding limits of such powers and not unreasonably;
  5. Human rights = the law must afford adequate protection of fundamental human rights;
  6. Access to justice = the state must provide a way of resolving without excessive cost or inordinate delay
  7. Fairness = bona fide civil disputes which the parties themselves are unable to resolve and adjudicative procedures provided by the state should be fair; and
  8. Compliance by the state with its obligations in international law as national law
- The Australian Constitution is framed upon the assumption of the rule of law: see *Plaintiff S156/2002*
- Problems:
  - Retrospective law making does occur;
  - Discretion = there has been a growth in the amount of executive discretion available, discretion allows Parliament to exercise power arbitrarily;
  - Parliamentary sovereignty = if Parliament can legislate about anything it cannot be bound by the rule of law, and can exercise power arbitrarily;

- The legislature is not an adequate constraint on executive power, as the executive is usually guaranteed the allegiance of a parliamentary majority;
- The common law has on occasion failed to protect human rights; and
- Access to justice issues are common

### CONSTITUTIONAL CONVENTIONS:

- Constitutional laws = laws written in the Constitution that are enforceable in a court
- Constitution conventions = customs or practices that are habitually followed. However, they do not attract any legal sanction
- Conventions generally govern the exercise of legally conferred discretions
- E.g. it is a convention that the Governor-General acts on the advice of the government of the day
- Advantages:
  - Allows the Constitution to develop in accordance with new ideas and events without strict legal constraint;
  - It is impossible to codify all of the rules surrounding the processes of government;
  - Allows for flexibility to permit gradual evolutionary shifts in power;
  - Their continuous breach may prove more intolerable for the population than a breach of a constitutional law; and
  - Some conventions are best not fixed in law to permit exercise by that person of emergency powers in unforeseen circumstances
- Disadvantages:
  - No definitive list of conventions, so their content is sometimes controversial; and
  - Not enforceable

### BICAMERALISM:

- Bicameralism = the practice of having two houses of Parliament:
1. Lower house:
    - Members are elected using the preferential voting system → represents the will of the individual
    - Has the most power
    - At the Commonwealth level the lower house is called the House of Representatives
    - At the state level the lower house is called the Legislative Assembly
  2. Upper house:
    - Members are elected using the proportional voting system → represents the interests of the states
    - Has less power than the lower house
    - At the Commonwealth level the upper house is called the Senate
    - At the state level the upper house is called the Legislative Council
- Each house acts as a check and balance on the other
  - In Australia, most parliaments are bicameral, except for QLD, the NT and the ACT

### REPRESENTATIVE GOVERNMENT:

- Representative government requires that members of parliament be popularly elected
- Section 7 and 24 of the Constitution embed the idea of representative government by requiring members of the Senate and House of representatives to be chosen by the people respectively
- The Commonwealth Constitution does not limit the power of the states to regulate their own electoral systems. The states can have systems that are quite undemocratic

### RESPONSIBLE GOVERNMENT:

- Under the doctrine of responsible government, the executive is responsible to the legislature, and the legislature is responsible to the people
- Two elements:
  1. Collective aspect = collectively, the whole executive must maintain the confidence of the lower house – the government will only stay in power while their party commands a majority in the House of Representatives; and
  2. Individual aspect = Ministers are individually answerable to the Parliament for the activities of their department
- The doctrine of responsible government does not apply to the upper houses. The government need not command the support of a majority of senators. This exclusion of the upper houses in Australia is uncertain given their representative nature

### PARLIAMENTARY CONTROL AND SUPPLY:

- Supply (the budget for the ordinary annual services of government) must be authorised by Parliament
- In the UK, the House of Lords can only delay a supply bill for a period one month
- In Australia, the Senate is not required by any express constitutional or statutory law to allow the passage of a supply bill. However, the Senate cannot initiate or amend supply bills: see s 53

### THE SEPARATION OF POWERS:

- The doctrine of separation of powers prescribes that the functions of the three arms of government be clearly and institutionally separated
- Rationale:
  - Prevents the concentration of too much power in, and consequent abuse of power, by a single arm of government; and
  - Ensures the three arms of government act as a check and balance on each other so that no one arm harms the interests of the governed
- Problems:
  - Executive and legislature:
    - Commonwealth Ministers are simultaneously members of the executive: see s 64; and
    - The executive has the authority to enact delegated legislation
  - Judiciary:

- High Court judges are appointed by the Governor-General: see s 72(i); and
- The Parliament controls the courts money: see s 72(ii)

### FEDERALISM:

- A federal government exists where constitutional power is shared between two levels of government – a central government affecting the whole population, and a number of local governments affecting particular areas and persons therein
- There are seven autonomous governments in Australia: the federal government and six regional state governments
- The Territorial governments of the NT and ACT are not autonomous. They remain under the thumb of the Commonwealth Parliament
- Australia's federal system is modeled off the US not the UK as the UK is a unitary state
- Arguments for:
  - Brings the self-governing colonies together rather than ceding all power to a central government;
  - Acts as a check against abuse of power and development of unwieldy bureaucracies;
  - Allows for more local participation in decision-making; and
  - Preserves the rights and preferences of local communities as well as minorities who are confined to certain territories
- Arguments against:
  - No Australian state can be described as one that protects one type or minority; and
  - Some of the more notorious government excesses have arisen at state level
- The specific authorisations for federal power are known as the heads of power
- Concurrent powers = shared between the Commonwealth and state Parliaments: see s 51
- Exclusive powers = powers that are granted only to the Commonwealth Parliament: see s 52
- Residual powers = those that aren't expressly or implicitly conferred on the Commonwealth, the state retains exclusive authority over
- Where the Commonwealth and states have legislated in the same area under s 51, s 109 yields supremacy to the Commonwealth laws

### OVERVIEW OF THE CONSTITUTION:

---

#### KEY CHAPTERS:

- Chapter I – The Parliament:
  - Part I – General
  - Part II – Senate
  - Part III – House of Representatives
  - Part IV – Both Houses of Parliament
  - Part V – Powers of the Parliament
- Chapter II – The Executive

- Chapter III – The Judicature
- Chapter IV – Finance and Trade
- Chapter V – The States
- Chapter VI – New States
- Chapter VII – Miscellaneous
- Chapter VIII – Alteration of the Constitution

### APPRAISAL OF THE CONSTITUTION:

- The Australian Constitution is a pragmatic rather than inspiring document
- The Australian colonies wished to federate for practical rather than revolutionary reasons like the US → absence of a bill of rights
- The Constitution reflects the views and attitudes of the drafters: white, wealthy men
- Indigenous Australians had no input into the drafts and are virtually absent from the document
- Women were also largely excluded from the drafting of the document and concerns of women are not addressed by the Constitution

### TIMELINE OF CONSTITUTIONAL DEVELOPMENT:

---

#### FROM COLONISATION TO FEDERATION:

##### **The first settlement:**

- 1788 = the colonies of NSW and Tasmania received all of the UK law in force
- The legal basis upon which Governor Phillip declared UK law to apply to Australia was terra-nullius
- *Mabo v Queensland (No 2)* (1992) = rejected the legal fiction of terra nullius. However, court did not question the validity of English law in Australia
- *Australian Courts Act 1828* (Imp) = asserted that English law was received by the colonies in 1828 and confirmed the ability of the British Parliament to enact legislation for its Australian colonies after their settlement

##### **From dictatorship to responsible government:**

- Before 1823, NSW (then the only Australian colony) was ruled by the Governor as a form of military dictatorship
- After 1823, the powers of the Governor were slowly diminished until each colony developed a system of responsible government with a bicameral Parliament including a popularly elected lower house
- NSW, Vic and Tas adopted a system of responsible government in 1855, South Australia in 1856, Queensland in 1859 and Western Australia in 1890
- *Australian Constitutions Act (No 2) 1850* (Imp) = authorised the colonial Parliaments to draft constitutions for their respective colonies

##### **Limits on the powers of colonial parliaments:**

- Upon the respective dates of adoption of responsible government within the various colonies, those colonies were regarded as self-governing
- *Colonial Laws Validity Act 1865* (Imp) = laws enacted by colonial legislatures were void if repugnant to the provisions of the UK legislation extending to that colony: see s 2
- *R v Burah* (1878) = colonial Parliaments had total competence to pass whatever laws they wished so long as they were not repugnant to a law of the UK Parliament
- *MacLeod v Attorney-General* (1891) = no colony could legislate with regard to an act or event outside its territory
- The English monarch reserved the power to disallow a colonial law even after the Governor had given his or her assent. This rule finds its descendant in s 59 of the Constitution, which still permits the Queen to disallow any Commonwealth law within one year of the Governor-General's assent. By convention she does not exercise this power

### **The advent of the Constitution:**

- The desire of the colonies to form a federated Commonwealth was based on three reasons:
  1. Commerce = inter-colonial co-operation and the development of a uniform customs policy would benefit all colonial economies;
  2. Defence = the expansion of the French and German in the South Pacific provoked fears of invasion and encouraged greater cooperation amongst the colonies; and
  3. A greater feeling of nationalism/patriotism amongst people born in the colonies
- The advantages of federating were hammered out by colonial delegates in Constitutional Conventions conducted in the 1890s
- 1898 = referendums were held in NSW, Vic, SA and Tas to approve the Constitution. It was endorsed by all but NSW
- 1899 = a draft constitution was approved in all colonies except WA. However, WA eventually approved
- *Commonwealth of Australia Constitution Act 1900* (Imp) = the Imperial Parliament passed the Act, s 9 of which contained the document to be called the Constitution, on the 9 July 1900
- 1901 = the *Commonwealth of Australia Constitution Act* came into force on 1 January 1901

### **FROM FEDERATION TO EMANCIPATION:**

- Upon federation, the new Commonwealth entity and the colonies (the renamed states), remained subordinated to the Westminster Parliament under s 2 of the *Colonial Laws Validity Act*

### **Statute of Westminster:**

- *Statute of Westminster 1931* (Imp):
  - Applied to the Commonwealth of Australia but not the states: see s 1
  - Removed the application of the *Colonial Laws Validity Act* to any law of the Commonwealth after its adoption: see s 2(2)

- Gave the Commonwealth the power to repeal or amend or repeal any UK Act which had previously been applied to it: see s 2(2)
- Declared that the Commonwealth had full extraterritorial colonial power: see s 3
- Removed the power of the UK to extend legislation to the Commonwealth unless the Commonwealth passed an Act requesting and consenting: see s 4
- Removed the ability to appeal to the Privy Council: see s 11
- *Statute of Westminster (Adoption Act) 1942* (Imp) = applied the *Statute of Westminster 1931* to Australia retrospectively from 1939 because of WWII

### **The Australia Acts:**

- *China Ocean Shipping v SA* (1979) = a state Act was found invalid due to inconsistency with a UK Act
- *Australia Act 1986* (Cth):
  - The relevant head of power was s 51 (xxxviii) of the Constitution
  - Terminated the power of the UK to legislate for any of the states: see s 1
  - Confirmed the states have extraterritorial power: see s 2(1)
  - Confirmed the plenary power of states found in their Constitutions: see s 2(2)
  - Terminated the *Colonial Laws Validity Act*: s 3(1)
  - Granted each state the power to repeal or amend laws of the UK that had been extended to it: see s 3(2)
  - Declared both ss 2 and 3 to be subject to the Commonwealth Constitution and the *Statute of Westminster*: see s 5
  - Entrenches both the *Australia Act* and the *Statute of Westminster*: see s 15
- *Australia Acts (Request) Act 1986* (Cth) = constituted legislative requests and consents by all states for the Commonwealth to terminate the UK
- *Australia Act (Request and Consent) Act 1986* (Cth) = constituted a legislative request by the Commonwealth to the British Parliament to cut legal ties with the states as under s 4 of the *Statute of Westminster* the UK could enact legislation for the Commonwealth by their request and consent
- *Australia Act 1986* (Imp) = virtually identical in terms to the Commonwealth Act but sought to harmonise the legal position of Australia and the UK
- *Attorney-General (WA) v Marquet* (2003) = confirmed the validity of the *Australia Act 1986* (Cth)

### **FROM EMPANCIPATION TO A REPUBLIC:**

- Australia's only remaining legal tie to Britain is their status as a Constitutional monarchy with the Queen of England being their head of state with the Governor-General as her representative
- 1999 = a referendum was held for a republic society with an Australian president but was rejected in every jurisdiction except the ACT. Australians cannot decide what model of republic Australia should adopt therefore until a consensus is reached Australia will retain the Queen as their head of state

### **JUDICIAL REVIEW:**

---



- Australian statutes must conform to the Constitution
- Australian courts have the role of interpreting and applying Constitutional principles. In doing so they have the power of:
  - Judicially reviewing Commonwealth and state Acts of Parliament; and
  - Striking down statutes for wants of constitutionality

### THE HIGH COURT OF AUSTRALIA:

- The High Court is the ultimate guardian of the Constitution
- It is important that its independence from the legislature and executive arm are ensured by the doctrine of the separation of powers
- The High Court is not an apolitical institution, although its decisions have political ramifications as they constitute a hurdle for executive government agenda's
- Although the separation of powers doctrine protects judicial separation, the executive government is given the role of appointing justices to the Bench: see s 72(i)
- There have been few political appointments. However, even if there was there is no guarantee it will play out in the executives favour as the executive is not in charge of the removal of judges
- Historically, the training for High Court justices tended to be conservative. Therefore, conservative parties did not need to make obvious political appointments to appoint someone with non-labour views. However, Labor appointments looked political as the candidate often reflected left wing views
- Today, it is not easy to characterise the 21<sup>st</sup> century bar and judiciary, the pool from which future High Court justices will be drawn, as natural supporters of conservative politics
- The High Courts interpretation of the Constitution is often inspired by the personalities of the judges. E.g. traditionally the High Court adopted a narrow interpretation of rights: see *Baker v The Queen*. However, now this trend has been given broader scope: see *Wainohu v NSW*

