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Definitions

Accountability – This ensures exercise of power is within legal limits or that it conforms with underlying purpose and the expectations of the community. The rule of law acts as a measure of accountability ensuring exercise of power is not arbitrary.

Constitutional Conventions – Unwritten rules of behaviour that restricts the exercise of power. Though not enforceable in courts, they are generally observed to ensure smooth running system.

Constitutionalism – A political doctrine that the law of the constitution is supreme in a legal and moral sense. Legitimacy of state is based on its exercise of power where the constitution limits.

The Crown – It may refer to the entire government structure or may be the „state“. It can be the symbol to the executive government, headed by the monarch and all his or her officers or agents.

Federalism – A constitutional design where government power is shared between a central government and sub-national governments operating in the same geographic territory. This features dispersal of powers and greater participation and ownership over government policies within a single nation-state.

Human Rights – Norms considered inherent to all human beings regardless of race, sex, nationality or religion. Considered inalienable and cannot be waived. A standard on how government should treat its population, either by acting or refraining from acting.

Judicial Review – judicial branch maintaining the rule of law by conducting review of the actions of the other two branches of government as a guardian of the Constitution reviewing exercise of legislative power, and ensures that executive action is exercised in accordance with the legal bounds that apply to it. The courts will also review exercises of judicial power through the appeal process, which allows for some accountability within the judicial branch.

Liberalism – A political theory based on ideas of freedom and equality. Liberalism is the dominant philosophy that informed constitutional development in the UK and US. Australia's system of democratic government, supporting core principles such as free and fair elections, open government, freedom from arbitrary detention, and the accountability of the Executive for the effect of its actions.

Parliamentary Supremacy – Parliament is supreme for they are most democratically responsive of all the government branches and therefore parliament alone has the power to make the law.

Representative Government – Democratic form of government in which those with the power to govern have been selected from among the population of a state to rule on their behalf. In contrast: Direct democracy – where the whole of the polity is involved in making decisions over how the polity is to be governed.

Responsible Government - Means by which executive government is held accountable by the Parliament.

Rule of Law – It means that no one is above the law and that the law binds the state. The government must at all times exercise power within limits. Rule by law – uses law as a tool for its own purpose without accountability

Separation of Powers – The horizontal division of governmental powers between the 3 government branches. The doctrine that provides limits and checks on the exercise of power by each branch.

Sovereignty – Supreme power and authority. Independent power of individual nation state (external) or within single states (internal)

The Westminster System – System of government in former British colonies, based on the UK parliamentary system. The main feature is the division of power between a head of state who is a nominal holder of executive power, and a head of government who is the leader of the Parliament who exercise de facto executive power with other senior members.

Amending the Constitution – s 128

s 128 Mode of Altering the Constitution

This Constitution shall not be altered except in the following manner:

The proposed law for the alteration thereof must be passed by an absolute majority of each House of the Parliament, and not less than two nor more than six months after its passage through both Houses the proposed law shall be submitted in each State and Territory to the electors qualified to vote for the election of members of the House of Representatives.

But if either House passes any such proposed law by an absolute majority, and the other House rejects or fails to pass it, or passes it with any amendment to which the first-mentioned House will not agree, and if after an interval of three months the first-mentioned House in the same or the next session again passes the proposed law by an absolute majority with or without any amendment which has been made or agreed to by the other House, and such other House rejects or fails to pass it or passes it with any amendment to which the first-mentioned House will not agree, the Governor-General may submit the proposed law as last proposed by the first-mentioned House, and either with or without any amendments subsequently agreed to by both Houses, to the electors in each State and Territory qualified to vote for the election of the House of Representatives.

When a proposed law is submitted to the electors the vote shall be taken in such manner as the Parliament prescribes. But until the qualification of electors of members of the House of Representatives becomes uniform throughout the Commonwealth, only one-half the electors voting for and against the proposed law shall be counted in any State in which adult suffrage prevails.

And if in a majority of the States a majority of the electors voting approve the proposed law, and if a majority of all the electors voting also approve the proposed law, it shall be presented to the Governor-General for the Queen's assent.

No alteration diminishing the proportionate representation of any State in either House of the Parliament, or the minimum number of representatives of a State in the House of Representatives, or increasing, diminishing, or otherwise altering the limits of the State, or in any manner affecting the provisions of the Constitution in relation thereto, shall become law unless the majority of the electors voting in that State approve the proposed law.

In this section, *Territory* means any territory referred to in section one hundred and twenty-two of this Constitution in respect of which there is in force a law allowing its representation in the House of Representatives.

Two mechanisms prescribed

1: Approval of a Referendum Bill in Parliament

- A proposed law for the alteration hereof must be passed by an absolute majority of each House of Parliament, and not less than two or more than six months after its passing shall be submitted in each State and Territory to the electors qualified to vote

2: Approval of Bill by the people

- Requires double majority vote
 - o In a majority of the States a majority of the electors voting to approve the proposed law, AND
 - o Majority of all the electors voting also approve the proposed law

Conduct of referendum is prescribed by the *Referendum (Machinery Provisions) Act 1984 (Cth)*

IF passed: presented to the GG for the Queen's assent

State Constitutions can ultimately be changed like any other law of parliament, but some aspects are entrenched

History

- Australia has had 44 referenda and only 8 have been successful
- High failure rate may be attributed to

- Holding it concurrently with a federal election
- Nature of the proposal put to the people
- Political party in government
- Difficulty attaining a double majority
- Ignorance about the constitution and adversity to change

An Australian Republic?

- Yes
 - Should have an Australian as our head of state
 - Australian President will represent our unique identity
 - Will reflect our growth as an independent nation
 - British monarchy irrelevant and unnecessary
- No
 - Proposed republic model will mean the President is appointed by politicians, not the people
 - Too difficult
 - Why bother

Section 51 (xxvii) The Race Power (exam)

S 51. The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:

~~(xxvi) the people of any race, other than the aboriginal race in any State, for whom it is deemed necessary to make special laws;~~

The 1967 referendum deleted the phrase 'other than aboriginal race in any State' found in s 51 (xxvi) of the Constitution

- It also repealed s 127 where the Aboriginal native were not counted in census

'The people of any race'

- The HC has said that the power cannot be used to apply to all races, it is to any race
 - o Meaning it much specify a race

Koowarta v Bjelke-Petersen (1982)

- John Koowarta challenged the QLD government in the HC as the latter blocked the transfer of land to the Aboriginal group which he was in, on the basis that such refusal of consent to transfer breached the *Racial Discrimination Act 1975 (Cth)*
- It was held that the Act was valid with respect to the 'external affairs' power under s 51 (xxix) of the Constitution
- According to the majority, the Act protected all races and not any one particular race, and thus was not a special law for the people of any race
 - o Gibbs CJ said that the power in the Constitution was not for the purpose of enabling Parliament to make laws for the special protection of people in particular races
 - o Murphy J's dissent explained that s 51 (xxvi) contained the word 'for' which means 'for the benefit of' and not 'with respect to', so to enable laws intended to affect adversely the people of any race

Commonwealth v Tasmania (Tasmanian Dams Case)

- Discussed race power
- It was said by Brennan J that the race power in its original form was to make laws discriminating adversely against particular racial groups
 - o But since the amendment, it was an affirmation that the primary object was beneficial
 - o Said 'race' is not a term of art, it is not a precise concept
- Deane J had the same view
 - o Said initially the race power was used for or against the interest of a particular race, but not general power to legislate can only be used for their benefit

What is necessary?

WA v Commonwealth (Native Title Case)

- The majority of the HC defined the scope of the race power in the Native Title Act Case by stating that, unlike the aliens or corporations power, it is not expressed to be a power to make laws simply with respect to persons of a designated character
 - o It must be deemed necessary that special laws be made for the people of any race
- The court said whether a law is necessary, is for the parliament to decide
 - o "S 51 (xxvi) can support a law only if that law is one which the Parliament has deemed necessary for the people of a race"

Katinyeri v Commonwealth

- While parliament can decide what is necessary, the court will not allow for a manifest abuse of power
- Gaudron J
 - o 'It would be ... a manifest abuse of the races power if Parliament were to enact a law requiring or providing for the different treatment of the power of a particular race if it could not be reasonably from the view that there was some difference requiring their treatment'
- Kirby J defines it as "confined to legislation that the court considers to be 'extreme' 'outrageous' or 'completely unacceptable'"
 - o Says the manifest abuse of power rule is an unworkable test because 'by the time a stage of 'manifest abuse' and 'outrage' is reached, courts have generally lost the capacity to influence or check such laws'

What are special laws?

- Special laws are not that are of their nature special to the people of a particular race
 - o *Kookwata v Bjelke-Petersen*
 - o Stephen J
- A law MAY be special even when it confers a benefit generally, provided the benefit is of special significance or importance to the people of a particular race
 - o *WA v Commonwealth (Native Title Case)*
 - o 'A special quality appears when the law confers a right or benefit or imposes an obligation or disadvantage especially on the people of a particular race'

Kartinyeri v Commonwealth

- SA had approved proposal to build bridge on Hindmarsh island to mainland
- The P applied to Minister for ATSI affairs, citing the ATSI Protection Act to prohibit the bridge
- A change in government resulted in the *Hindmarsh Island Bridge Act* being passed, which deprived the Minister of the ATSI protection Act functions
- HELD: Act was valid and within power of s51 (xxvi)
 - o Laws can be made to the detriment of a race
 - o Kirby J dissented

Benefit or Detriment?

- HC Is not yet decided on whether the law can be used to support laws discriminating against the race OR if it only allows law for the benefit

Implied Rights

Individual Liberties in Australia

- The Australian Constitution is, with limited exceptions, silent as to the rights of individuals and their relationship with the government
- Generally then, when we speak of 'freedoms' and 'rights' in Australia (such as the principle of 'free speech'), we are speaking more of inherited liberal values, rather than concrete constitutional principles
- With limited exceptions, we enjoy those rights and freedoms which we do possess, only at the pleasure of parliament
 - o Although it might answer for doing so at subsequent elections, parliament could curtail or abolish those rights in exercising its assigned powers
- The Constitution contains few express guarantees of fundamental rights or freedoms from legislative power
 - o S 92 – provides for 'freedom of trade, commerce and intercourse among the States'
 - o S 116 allows for freedom of religion
- In addition, the Constitution provides for a number of 'contingent guarantees'
 - o S 41 – The right to vote in Federal elections and states elections
 - o S 51 (xxxi) - acquisition of property by the Cth must be on 'just terms'
 - o S 80 – trial by jury

Kruger v The Commonwealth (1997)

- "In a number of recent cases it has been pointed out that the Australian Constitution, with few exceptions and in contrast with its American model does not seek to establish personal liberty by placing restrictions upon the exercise of governmental power. Those who framed the Australian Constitution accepted the view that individual rights were on the whole best left to the protection of the common law and the supremacy of the Parliament. Thus the Constitution deals, almost without exception, with the structure and relationship of government rather than individual rights ... the Framers referred to place their faith in the democratic process for the protection of individual right."

Rights by implication

- The fact that the Constitution is concerned primarily with the "structure and relationship of government" does not preclude the possibility that those structural features might, incidentally, require the protection of certain rights or freedoms for individuals
- It does however mean that, unlike in the US, the protection of those rights is not an end in itself but simply a necessary incident of the proper functioning of the governmental structure established by the Constitution
- *Nationwide News v Wills (1992)*
 - o Deane & Toohey JJ identified 3 doctrines underlying the constitution
 - 1: the doctrine prescribing a Federal system of government
 - 2: the doctrine of the separation of powers
 - 3: the doctrine of representative government