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Week One: Introduction and basic concepts

The constitution

- ❖ Written document that provides the source and authority for the exercise of public power and circumscribes the limits for that power.
- ❖ Regulates relationship between state and federal governments.
- ❖ Not a document for civil rights.

Fundamental concepts

Parliamentary sovereignty	<ul style="list-style-type: none"> - British law → parliament is absolutely sovereign, power to make or unmake laws. - Parliament is democratically elected by the people and the people can expect them to make such laws. - Previous parliament cannot bind a current parliament due to the current parliament having the current will of the people. - No Australian parliament is absolutely sovereign → powers constrained by the constitution. <ul style="list-style-type: none"> ○ Statutes will only be struck down if there is constitutional allowance for such action, will not be struck down because they are perceived to be unjust or immoral (<i>Union Steamship Co of Australia Pty Ltd v King</i>). ○ Words 'for the peace, order and good government' are not words of limitation.
Rule of law	<ul style="list-style-type: none"> - Constitution is framed on the assumption of the rule of law (<i>Plaintiff S157/2002</i>). - A modern statement of the rule was offered by Lord Bingham, who identified that <u>'all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts'</u>. He went on to explain eight key principles: <ul style="list-style-type: none"> (a) Law must be 'accessible and so far as possible intelligible, clear and predictable'. (b) Caution against arbitrariness → 'questions of legal right and liability should ordinarily be resolved by application of the law and not the exercise of discretion'.

	<p>(c) Equality before the law is fundamental. Whilst ‘objective differences justify differentiation’, the law should generally apply equally.</p> <p>(d) ‘Ministers and public officers at all levels must exercise the power conferred on them in good faith, fairly, for the purpose for which the powers were conferred, without exceeding the limits of such powers and not unreasonably’.</p> <p>(e) ‘The law must afford adequate protection of fundamental human rights’.</p> <p>(f) The state must provide a way of ‘resolving without prohibitive cost or inordinate delay, bona fide civil disputes which the parties themselves are unable to resolve’.</p> <p>(g) ‘adjudicative procedures provided by the state should be fair’.</p> <p>(h) ‘compliance by the state with its obligations in international law as in national law’.</p>
Constitutional conventions	<ul style="list-style-type: none"> - Conventions = customs or practices that are habitually followed by governments - Under a moral or political obligation to continue following them - Convention that the GG acts on the advice of the government of the day - No definitive list - Allow for some flexibility to permit gradual, evolutionary shifts in power
Bicameralism	<ul style="list-style-type: none"> - Two houses of parliament
Parliamentary control of supply	<ul style="list-style-type: none"> - Supply (budget for the ordinary annual services of government) must be authorised.
Separation of powers	<ul style="list-style-type: none"> - Three arms of government be clearly and institutionally separated - Ensures that the three arms operate as checks and balances on each other - Distinction between executive and legislature is blurry
Federalism	<ul style="list-style-type: none"> - Power shared between the two levels of government.
Representative government	<ul style="list-style-type: none"> - Legislature directly represents the interests of the constituency as the lower house is democratically elected (s 24).
Responsible government	<ul style="list-style-type: none"> - Executive is responsible to the legislature. - Government stays in power while their party commands a majority in the House of Reps. - Collective responsibility → Ministers are individually responsible to the parliament - Principle is upheld through the executive maintaining the confidence of the majority of the legislature. - Ministerial responsibility → individual ministers accountable for the actions of the departments.

Overview of the constitution

Chapter 1 – The Parliament

Part 1 – General

❖ Section 1 → legislative power

- The legislative power of the Cth shall be vested in a Federal Parliament, which shall consist of the Queen, a Senate and a House of Reps.

❖ Section 2 → Governor-General

- A Governor-General appointed by the Queen shall be her Majesty's representative in the Cth and shall have and may exercise in the Cth during the Queen's pleasure, but subject to this Constitution, such powers and functions of the Queen as Her Majesty may be pleased to assign to him.

Part 2 – The Senate

❖ Section 7 → the senate

- The Senate shall be composed of senators for each State, directly chosen by the people of the State, voting, until the Parliament otherwise provides, as one electorate. ...
- Until the Parliament otherwise provides there shall be six senators for each Original State. The Parliament may make laws increasing or diminishing the number of senators for each State, but so that equal representation of the several Original States shall be maintained and that no Original State shall have less than six senators.
- The senators shall be chosen for a term of six years, and the names of the senators chosen for each State shall be certified by the Governor to the Governor-General.

Part 3 – the House of Representatives

❖ Section 24 → constitution of house of representatives

- The House of Representatives shall be composed of members directly chosen by the people of the Commonwealth, and the number of such members shall be, as nearly as practicable, twice the number of the senators. The number of members chosen in the several States shall be in proportion to the respective numbers of their people, and shall, until the Parliament otherwise provides, be determined, whenever necessary, in the following manner:
- But notwithstanding anything in this section, five members at least shall be chosen in each Original State.

❖ Section 41 → right of electors of state

- No adult person who has or acquires a right to vote at elections for the more numerous House of the Parliament of a State shall, while the right continues, be prevented by any law of the Commonwealth from voting at elections for either House of the Parliament of the Commonwealth.

❖ Section 44 → disqualification

- Any person who: (i) is under any acknowledgment of allegiance, obedience, or adherence to a foreign power, or is a subject or a citizen or entitled to the rights or privileges of a subject or a citizen of a foreign power; or

Part 5 – powers of the parliament

- ❖ Section 51 → legislative powers of the parliament
 - 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: ...
 - This section contains an extensive list of the matters the Parliament can legislate in regards to.
- ❖ Section 52 → exclusive powers of the Parliament
 - (i) the seat of government of the Commonwealth ...
 - (ii) matters relating to any department of the public service ...
- ❖ Section 53 → powers of the houses in respect of legislation
 - Except as provided in this section, the Senate shall have equal power with the House of Representatives in respect to all proposed laws.

Chapter 2 – The Executive

- ❖ Section 61 → executive power
 - The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth.

Chapter 3: The Judiciary

- ❖ Section 71 → judicial power and courts
 - The judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia, and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction. The High Court shall consist of a Chief Justice, and so many other Justices, not less than two, as the Parliament prescribes.
- ❖ Section 71 → judges appointment, tenure and remuneration

Chapter 4: Finance and Trade

- ❖ Section 81 → Consolidated Revenue Fund
 - All revenues or moneys raised or received by the Executive Government of the Commonwealth shall form one Consolidated Revenue Fund, to be appropriated for the purposes of the Commonwealth in the manner and subject to the charges and liabilities imposed by this Constitution.
- ❖ Section 83 → Money to be appropriated by law
 - No money shall be drawn from the Treasury of the Commonwealth except under appropriation made by law.

- ❖ Section 96 → Financial Assistance to States

Chapter 5: States

- ❖ Section 109 → Inconsistency of laws
 - When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.
- ❖ Section 117 → Rights of residents in States
 - A subject of the Queen, resident in any State, shall not be subject in any other State to any disability or discrimination which would not be equally applicable to him if he were a subject of the Queen resident in such other State.

Chapter 6: New States

- ❖ Section 121 → New States may be admitted or established
 - The Parliament may admit to the Commonwealth or establish new States, and may upon such admission or establishment make or impose such terms and conditions, including the extent of representation in either House of the Parliament, as it thinks fit.
- ❖ Section 122 → Government of territories
 - The Parliament may make laws for the government of any territory surrendered by any State to and accepted by the Commonwealth, or of any territory placed by the Queen under the authority of and accepted by the Commonwealth, or otherwise acquired by the Commonwealth, and may allow the representation of such territory in either House of the Parliament to the extent and on the terms which it thinks fit.

Chapter 7: Miscellaneous

- ❖ Section 125 → Seat of Government
 - The seat of Government of the Commonwealth shall be determined by the Parliament, and shall be within territory which shall have been granted to or acquired by the Commonwealth, and shall be vested in and belong to the Commonwealth, and shall be in the State of New South Wales, and be distant not less than one hundred miles from Sydney.
- ❖ Section 127 → Aborigines not to be counted in reckoning population
 - This section has been removed.

Chapter 8: Alteration of the Constitution

- ❖ Section 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.

Timeline of constitutional development

From colonisation to federation

Colonisation of Australia: the first settlements

- ❖ European settlement dates from 1788 with the arrival of Governor Arthur Phillip to Australia with the first fleet.
- ❖ As of this time, the colony of NSW received suitable English law in force in England.
- ❖ The original form of government of the colonies was government by *phreat*, which means 'let it be done'.
- ❖ The governments were headed by a sole Governor, who established the laws.
- ❖ The moral and legal basis provided for by Arthur Phillip for the reception of English law was that Australia was an empty land before settlement, being terra nullius.
 - Therefore, no Indigenous law could have existed.
- ❖ This terra nullius fiction was not legally rejected until *Mabo v Queensland (No 2)*.
- ❖ The question of the legal validity in English law was treated as settled by the *Australian Courts Act 1821*, which asserted that English law was received by the eastern colonies in 1828.
 - It also provided that British Parliament could make laws for the Australian colonies and to extend British laws to the colonies by express words or necessary implication.
 - This Act was held to be unquestionably the law of the UK and thus operated regardless of detrimental impacts on Indigenous Australians.

Dictatorship to responsible government

- ❖ Before 1823, NSW was essentially ruled by the Governor as a form of military dictatorship.
 - After this, the powers of the governor slowly diminished and were delegated, until eventually a system of responsible government developed.
 - NSW, VIC, and TAS adopted a system of responsible government in 1855, SA in 1856, QLD in 1859 and WA in 1890.
- ❖ The *Australian Constitutions Act (No 2) 1850* authorised the colonial parliament to draft constitutions for their respective colonies.

Limits on the powers of colonial parliaments

- ❖ The constitutional grants of power to each colonial legislature were similar. They generally had the power to make laws 'for the peace, order and good governance' of their colony. There were, however, limits on this power.

Repugnancy	<ul style="list-style-type: none"> - The colonies could not pass any law which was <u>repugnant to a law of the UK Imperial Parliament</u>. - This was defined by the <i>Colonial Laws Validity Act 1965</i>. <ul style="list-style-type: none"> ○ <i>s 2</i> provided that laws enacted by colonial legislatures were void if repugnant to the provisions of any UK law that extend to that colony.
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	<ul style="list-style-type: none"> ○ s 3 declared that, in the absence of such conflict, no colonial law could be impugned by reason of its 'repugnance to the laws of England', thus drawing a distinction between received and extended laws.
Territoriality	<ul style="list-style-type: none"> - Colonial legislatures were presumed to have <u>territorial limits</u> to their jurisdiction. <ul style="list-style-type: none"> ○ They <u>could not enact extraterritorial legislation</u>. - This presumption was enforced by the Privy Council in <i>MacLeod v Attorney-General (NSW) [1891]</i>. However, this presumption eroded during the 20th century. - States now have some extraterritorial powers, provided that there is <u>sufficient nexus between the state and the extraterritorial matter</u>.
Reserve powers	<ul style="list-style-type: none"> - The English Monarch had a reserve power to <u>disallow a colonial law</u>, even after the relevant Governor had given their assent. - This stems from s 59 of the Constitution. <ul style="list-style-type: none"> ○ This section still allows the Queen to disallow any Commonwealth law within one year of assent. She does not exercise this power by convention. - The case of <i>R v Burah [1878]</i> later confirmed the <u>competence of colonies</u> to pass whatever laws they wish.

The advent of the constitution

- ❖ The desire of the Australian colonies to form a federal Commonwealth was primarily due to issues of commerce and defence.
 - Inter-colonial co-operation and the development of uniform policy was thought to be a benefit to all colonial economies.
 - Further, the expansion of the French and the Germans into the South Pacific provoked fears of invasion which encouraged co-operation.
- ❖ The terms of federation, embodied in the constitution, were hammered out by colonial delegates in Constitutional conventions held in the 1880s.
- ❖ The draft Constitution was approved in referenda in all colonies except WA in 1899.
- ❖ The Imperial Parliament passed the *Commonwealth of Australia Constitution Act* in 1900.
 - The Constitution is contained in s 2.

From federation to the Australia Acts

Statute of Westminster

- ❖ The passing of the *Statute of Westminster 1931* was a major emancipating step.
 - This act did not apply to Australia until it was adopted by the Commonwealth Parliament with the passage of the *Statute of Westminster Adoption Act 1942* which was backdated to the beginning of WWII in 1939.
- ❖ *s 1* of the State declared that it applied to the UK and all dominions, which included the Commonwealth of Australia, but not the states.
- ❖ *s 2(1)* provided that the *Colonial Laws Validity Act 1865* had no effect on any law of the Commonwealth after the date of adoption.
- ❖ *s 3* provided that the Commonwealth Parliament had full extraterritorial power.
- ❖ *s 4* removed the power of the UK to extend laws to Australia, except when requested.
- ❖ Thus, as of 3 September 1939, the Commonwealth was legally free from the parliament of the UK.

The Australia Acts

- ❖ The States remained legally subservient to the UK until 1986.
 - For example, in *China Ocean Shipping v SA (1979)*, the High Court found that SA legislation was invalid due to inconsistency with an 1894 UK merchant shipping law. In 1986, a series of Acts were passed to fix this legal position.
- ❖ In 1986, the Parliament passed the *Australia Act 1986 (Cth)*, which was authorised by the head of power found in *s 51(xxxviii)*.
- ❖ In 1986, all states passed the *Australia Acts (Requite) Act 1986* which constituted legislative requests and consent by all states for the Commonwealth to terminate UK power over them.
- ❖ The legislative scheme of this act regarding the states was very similar to the *Statute of Westminster*.
- ❖ *s 1* terminated the power of the UK Parliament to legislate for the states.
- ❖ *s 2(1)* confirmed that the states have extraterritorial powers.
- ❖ *s 2(2)* confined the plenary power of the states found in their own Constitutions.
- ❖ *s 3(1)* terminated the *Colonial Laws Validity Act 1865* and *s 3(2)* granted each state power to repeal or amend any UK law extended to it.
- ❖ Two more acts were also passed to ensure the severance of legal ties.
 - The Commonwealth passed the *Australia Act (Request and Consent) Act 1986* which constituted a legislative request by the Commonwealth to the UK Parliament to cut its legal ties with the state and the UK Parliament subsequently enacted the *Australia Act 1986 (UK)*.
- ❖ There were significant doubts about the *Australia Act 1986 (Cth)* at the time of its enactment as *s 51(xxxviii)* had never been interpreted and its scope was uncertain.
 - However, in *Attorney-General (WA) v Marquet (2003)* the majority confirmed the validity of the enactment.