

Topic 1 – Introduction and History

1. Introduction

- **Public law** is the law relating to the relationship between institutions of government and the relationship of each of those institutions with the people
- **Constitutional law** – is concerned with the civil or public institutions of the modern state.
 - These governing institutions of modern states exercise various legal powers:
 - the power to make laws,
 - the power to executive the law, and
 - the power to resolve disputes over the meaning and application of the law.
 - Thus, three separate institutions: the legislature, the executive and the judiciary, have these powers vested in them respectively.
 - A fundamental role of the constitution is to prevent the arbitrary use or abuse or government power through constitutional limits.
 - Thus, it is closely tied with the idea of **the Rule of law** (police officer scenario) and Separation of powers, two underlying principles of Australian Public Law.
 - E.g. Police officer asks for fine → no discretionary powers
 - If dispute on the fact of the matter → independent judge (e.g. fines you for speeding as evidenced by his speed camera, you were certain you were under limit - police officer will issue a ticket, but cannot force you to pay – you can take it to court where if you are found guilty, you will be compelled, legally, to pay.)
 - That ‘check and balance’ executive power → judiciary protects those governed, and separation of powers, and constitutionalism.
 - Thus, separation of powers – when it is operating properly- is a very important way in which liberty from the exercise of arbitrary power by government be preserved and protected
 - A healthy constitutional system depends upon the relationship between constitutional law and the exercise of duly defined and limited powers of government

2. History

- **Timeline:**
 - Pre 1788 – Indigenous Australians, their laws and customs
 - **1850** – Earl Grey proposed a Bill which later became the *Australian Constitutions Act 1950*
 - **1885 – Establishment of the Federal Council of Australia**
 - However, NSW remained outside the council and limited the effectiveness
 - **1890** – Australian Federation Conference in Melbourne → proposal for a further meeting and a real convention
 - **1891** – National Australian Convention in Sydney:

- Basic Q – how to structure a federation within the Westminster tradition of govt
- Canadian constitution was considered but gave too much power to the central government
- US constitution – an example of a model that protected states' rights.
 - Provided that the senate should consist of an equal number of members from each State while the HoR should reflect the national distribution of population
- Second issue: How to deal with excess customs duties from the central government to the States?
- Third issue: How to structure the relationship between the lower and upper house
- Draft constitution for the Australian Commonwealth but lack of popular support
- Several colonies debated the bill!
- **1897 - 1898** – Sydney convention
- **1898** – Melbourne convention
- **June 1898 – Referendum**
 - in all colonies but WA and QLD
 - NSW has concerns
- Second referendum
- Delegates take the proposal to Britain – debate and amendment
- The Constitution Bill received royal assent – 9 July
- 1900 – WA joins
- **1 Jan 1901** – Federation/Constitution
 - After Federation:
 - New Commonwealth limited by doctrine of extraterritoriality
 - CLVA continued to apply through notion of repugnancy

3. Key Legislations

- The legal independence of Australia was not a revolution; it was an evolution as it occurred over several decades and legislative changes.
 - **Colonial Laws Validity act 1865 (Imp)** –
 - The purpose of CLVA was to clarify any doubt about the inconsistency between imperial and colonial (now states) laws and the **Doctrine of Repugnancy**
 - 'States', or Colonies back then, were bound by British statutes which applied to them by paramount force (intended by parliament to be effective in colony – the legislation indicates that it applies to colonies)
 - **Effect:**
 - The CLVA allowed the states/colonies to make laws that have full effect within the colony.
 - The Act enabled the colonies to enact laws that were different to British laws, however, it was limited to any repugnancy with any act of the British

Parliament which extended beyond the boundaries of UK and included to the colonies by paramount force

- Thus, states now had the power to amend or repeal received English law – but not those that were applicable by paramount force
- This strengthened the position of colonial legislatures
- **Prior to CLVA:** several acts of colonies were struck down on the grounds of repugnancy and significantly constrained colonies' legislative powers.

○ **Federation, 1901**

- The Commonwealth Federation of Australia Constitution Act 1900 was passed by the UK parliament
 - it was assumed that the CLVA (UK) was still applicable.
- Thus, it was also assumed that the UK parliament could legislate for Australia.
 - By this interpretation, Australia was not 'independent' at 1900 Federation, but a self-governing colony within the British Empire.
- The Commonwealth was also limited by the **doctrine of extraterritoriality** → not allowed to make laws to apply to anything outside its borders

○ **Statutes of Westminster 1931 (UK) –**

- The act had multiple effects in limiting the legal connections of Australia and limitations on the commonwealth placed by British laws previously.
- Adopted by Australian Commonwealth in 1942, Statute of Westminster Adoption Act 1942
- **Effects:**
 - The Act removed imperial restrictions from self-governing Dominions (such as Cth of Australia) and excluded the operation of the **CLVA from them**.
 - This mean the **doctrine of repugnancy** no longer applied to the Commonwealth and
 - imperial law would no longer triumph Commonwealth Legislations
 - Thus, the Commonwealth could pass laws repugnant to British laws, even those that applied previously through 'paramount force'
 - Declared that the Commonwealth had **full extraterritorial power**
- UK could still legislate for the Commonwealth in limited circumstances → only by request and consent of the commonwealth parliament
- **Excluded States:**
 - Section 9 of the Statute allowed CLVA to have continued application in Australian states → thus UK could still legislate for the states (in accordance with constitutional practice/conventions)

○ **The Australia Act 1986 –**

- Identical legislations enacted in Australia and UK (and the state parliaments)
- **Effects:** Broke the final legal links with the UK.
- Eliminated any remaining possibilities for:
 - The UK to legislate with effect in Australia
 - States were freed from the CLVA and thereby the doctrine of repugnancy no longer applied to states as well.

- The UK to be involved in Australian government
- An appeal from any Australian court to the Privy Council.
- Because the UK can no longer exercise any power over us – at this point at least, Australia was definitely legally independent from the UK
- **Source of power:**
- The Australia act was enacted pursuant to the power under s 51 (xxxviii) (*Marquet's Case*)
 - The Australia Act 1986 is also traced to its Australian source- the Constitution of the Commonwealth and takes its force and effect from reference to s 51 (xxxviii) (*Marquet's Case*)
 - Essentially, after this point, constitutional norms, whatever may be their historical origins, had to be traced to Australian sources (e.g. Manner and form- which was previously from CLVA)
- **Sue v hill (1999)** (Qld Senator – British Dual citizen – foreign?) confirms it
- **Facts:** Hill ran for Senate in Queensland in the 1988 Federal election.
- **The issue** for the court was whether, as a dual citizen holding both Australian and British Citizenship, Heather should be disqualified under section 44(i) of the constitution for being a “citizen of a foreign power”.
- **Result:** Britain was considered a “foreign power”
- Reasoning:
 - The majority held that the **Australia Act** was validly enacted under section 51 (xxxviii) of the Constitution.
 - The UK would not be considered a foreign power if Australian courts were bound to recognise and give effect to the exercise of legislative, judicial or executive power by the institutions of the government of the UK.
 - Legislatively, the effect of the Australia Acts was to deny the efficacy of the laws of Westminster as part of the law of the Cth, states and the territories
 - Judicially, the termination of any remaining appeals from Australian courts to the privy Council ensured that no judicial power of Britain remained effective in Australia
 - Executively, while the Queen remains the monarch of Australia, she may be considered the Queen of Australia and Britain as separate entities. It was also noted that while the text of the constitution had not changed, its operation had, reflecting the changed identity upon whose advice the sovereign accepts that he or she is bound to act in Australian matters.
 - Conversely, no specific date was selected for when Australia became an independent nation. The majority cite Gibbs J's in describing independence as ‘the result of an orderly development – not.. the result of a revolution’. Australia was at least **definitely** independent by 1986 with the enactment of the Australia Acts.

- This was troubling to Callinan J who felt that the evolutionary theory created doubt in respect to peoples' rights, statues and obligations and perhaps the uncertainty regarding the date of independence suggested that it had not yet transpired (though he did not need to come to a conclusion on this point)

4. Introduction to the Constitution

- The Australian Constitution is a very short document that focuses on the governmental institutions of Australia and the relationship between them and the people
- **Commonwealth:**
 - The commonwealth of Australia is a federation of 6 colonies, now called states, and was brought about by the **Commonwealth of Australia Constitution Act 1900 (UK)**.
 - The last of the 9 sections in the act contains the 'Constitution of the Commonwealth of Australia' – this is what we mean by the constitution
 - The Commonwealth Constitution is a **higher form of law** → everything is subject to the Constitution, including parliamentary legislations
 - **Written constitution** – however influenced by the English Common Law system which has no written constitution
 - **How did it come about?**
 - The six colonies/states initiated to bring the Commonwealth government
 - Each colony sent representatives to two federal conventions: 1891 and 1897/98 where the constitution was drafted. The second constitution succeeded in composing a constitution bill which satisfied the governments and legislatures of the six colonies and was ultimately submitted to and approved by the **voters**
 - After approval in Aus, it was sent to the British Parliament here it was enacted
 - **Significance:**
 - The states mutually consented to give **specific and limited** powers to the commonwealth government because it was understood that the states would continue to function as self-governing political communities.
 - Thus, the states can make laws in general while the Commonwealth government's laws are limited to specific matters agreed by the people.
 - **Amendment:** can only be amended by a referendum, not legislations, thus it ensures that any potential, tyrannical parliament cannot amend it → power ultimately with the people. Thus a safeguard against potentially abusive governmental power

5. Key Principles:

Separation of Powers

- It is the idea that the three arms of government, the legislature, the executive and the judiciary, are kept separate. This is to prevent concentration of power and abuse as the:

- Legislature makes the law
- Executive administers the law
- Judiciary enforces and interprets/applies the law
- This is important because the concentration of these powers into a single person or institution can lead to potential abuse of power and infringe the fundamental rights of many citizens.
- **Separation of powers in Australia**
- A concept borrowed from the US model of government, Separation of power is not strictly applied in Australia.
- While the Judiciary is said to be generally independent of the other two branches, the doctrine seems to collapse between the Legislative and Executive branch of government in Australia.
- **Legislature and the Executive:**
 - **Same personnel:** Ministers of parliament are in the executive
 - The legislature = Queen, HoR and Senate
 - Executive = Queen, GG and ministers from the parliament and other officials
 - This collapse of the separation of power doctrine, with the executive members also exercising legislative powers, is justified on the basis of **responsible government**.
 - **Delegated Legislations**
 - The executive not only administers law, but it also makes an abundance of laws → parliament cannot possibly keep up due to the volume and specialisation required
- Judiciary
 - Judiciary makes laws, not only interprets → **Judicial Activism**
 - Judges are appointed by executive

Responsible government

- **Responsible government** is a system of government in which the Executive Arm is responsible to the Legislature (**Brown v West**), and the members of the Legislature are in turn responsible to the people at elections (**Egan v Willis**)
- This reflects The Westminster system, inherited from the UK
- A principle of convention more than constitutional rule, although the constitution requires ministers to come from the parliament
- Justifying collapse of SoP/Advantages:
 - Firstly, by requiring the executive to be in the parliament, we achieve **accountability and transparency** → Ministerial responsibility
 - The executive's actions are directly scrutinized in the parliament and by extension, are held accountable to the people. People can scrutinize on the parliament floor, senate committee etc
 - Secondly, ministers have to be elected to be in the parliament and thus are unlikely to totally abuse their powers because they will be voted out if they enact too many unpopular laws by the time of the next election

Parliamentary sovereignty

- **UK: Parliamentary sovereignty →**
 - The parliament has the constitutional power to make or unmake any law... no person or body is recognised by the law of England as having a right to override or set aside the legislation of parliament (Dicey). Statutes override the common law.
- **Australia: Parliamentary Supremacy**
 - No parliament is absolutely sovereign → the written constitution in Australia limits and constraints the powers of the parliament – S 51 heads of power. The parliament cannot amend the constitution as it wishes and if any law of the parliament conflicts with the constitution, it can effectively be struck down.
 - Thus in Commonwealth Australia, it is **Parliamentary SUPREMACY** rather than parliamentary sovereignty that holds.
 - Parliament is still the supreme law making body although they do not always have the last say (Judiciary)
 - **State Parliaments**
 - The state parliaments are not bound by the constitution and can make or unmake law as they wish and thus is similar to parliamentary sovereignty. However, they are subject to manner and form provisions that make it more difficult to amend laws relating to the constitution, power and procedures of the parliament (CLVA s 5 and Australia Acts s 6)
 - Thus, while today's state parliament cannot limit tomorrow's parliament, they can make it more difficult to amend some laws through valid manner and form provisions (e.g. require a referendum)