

Constitutional Law Week 1 Lecture

What is a Constitution

- 'The Constitution is no ordinary statute.' *Kartinyeri v Commonwealth* (1998) 195 CLR 337 (per Kirby J).
- 'The Constitution is no ordinary statute; it is the instrument designed to fulfil the objectives of the federal compact.' *Capital Duplicators Pty Ltd v Australian Capital Territory* (1992) 177 CLR 248 (per Brennan, Deane and Toohey JJ)
- The Australian constitution is the ultimate legislation within Australia
- **It created the institutions of government:** the legislative, the judiciary and the executive
- **It established a federal government:** governs over all states and territories. There are two levels: federal and state – this came from the US due to our similar country sizes
- **Constitutions do not need to be written:** UK & New Zealand
- The Constitution came into operation on the 1st of January 1901 (federation)
- The Constitution created the country of Australia, before this the states were separate colonies

Why Constitutional Law Matters

- The Australian constitution structures the uses of government power in Australia and determines the limits on that power.
- How the structures of government power affect everyday lives: Public Transport Victoria, VicRoads, Victorian hospitals and schools – all ruled by Victoria rather than the federal government.
- All of the federal government's powers come from sections of the Constitution, mainly from s. 51
- Most powers given in s. 51 are concurrent (both state and federal government can create laws on these areas)
- The states powers come from everything not covered within the Constitution (residual legislative power).
- Australia does not have a general Bill of Rights, instead rights are entrenched throughout the Constitution
- **5 express rights**
 - Acquisition of property on just terms s.51(31)
 - Freedom of religion s.116
 - Trial by jury s.80
 - Non-discrimination based on state of residency s.117
 - Freedom of trade between states s.92
- **1 implied right:** freedom of political communication
- **1 structural right:** right to vote

History of the Australian Constitution

- Colonies decided to Federate for defence and trade
- Colonies were afraid of being invaded and wanted protection

- Prior to federation, goods could not flow freely between colonies. Desire to make this easier (s.92)
- US Influences: similar geographic area (more practical to have a series of state governments with a Federal government in addition to this)
- Few individual freedoms in our constitution: large trust in parliament. US has many individual rights due to distrust of parliament
- Mainly white men wrote the Constitution (discluded women and indigenous people – drafted for a narrow percentage of the population)
- UK parliament passed the Constitution as a normal act of the British (Westminster) parliament. This gave them the power to make or unmake Australian laws (until the Australia Act).

Key Dates: English Constitutional History

- **1215:** Magna Carta
- **1295:** Birth of Bicameral Parliament
- **1607** and **1611:** Case of Prohibitions and Case of Proclamations
- **1640s:** English Civil War
- **1688:** Glorious Revolution (Bill of Rights)
- **1701:** Act of Settlement

1215: Magna Carta

- Emerged out of an ongoing dispute between landowners and the King
- Landowners were annoyed at the King for imposing taxes
- King kept imposing taxes to pay for international disputes (wars)
- King agreed to give up some of his arbitrator power
- First limit on some royal power – was subject to law, not above law
- Some of our earlier rights come from the Magna Carta
- First step towards parliamentary government

1295: Birth of Bicameral Parliament

- Parliament with two houses: upper and lower
- In UK: House of Commons and House of Lords
- Significant as it is unusual for one party to have control of both houses
- Anything must be passed through both houses
- Queensland only has 1 house of parliament, all of the other states have 2.

1607 and 1611: Case of Prohibitions and Case of Proclamations

- Two significant cases which established judicial independence
- These placed further limits on the King
- Significant as they were determined by judges
- Difficult to challenge the Monarchs

- 1607: Court said the Monarch cannot be directly involved with cases, must be done by the court
- 1611: Court said the Monarch cannot create new crimes, must be done by parliament

1640s: English Civil War

- Parliamentary vs Royals, Parliament won
- Parliament became the dominant constitutional actor – statute law can always override common law
- Beginning of Parliamentary sovereignty
- England became a republic for a short period (did not work very well) – The king came back

1688: Glorious Revolution (Bill of Rights)

- King and Queen returned
- English Monarch came back with an Act of parliament
- An act of parliament could now remove the King and Queen

1701: Act of Settlement

- Passed by English parliament
- Secured the independence of judges
- Judges cannot be removed unless a joint decision of parliament to show their proved misbehavior or incapacity.
- Important as judges cannot be removed due to unpopular decisions

Key Dates: Australian Constitutional History

- 1855: Victorian Constitution
- 1865: *Colonial Laws Validity Act*
- 1901: Australian Constitution Proclaimed
- 1931: Statute of Westminster
- 1986: Australia Acts

1855: Victorian Constitution

- Was established for the Victorian colony
- Was updated in 1975 by the parliament of Victoria
- Consolidation was needed as it was changed lots due to being a normal Act of parliament
- State constitutions continue to exist in the Commonwealth Constitution

1865: *Colonial Laws Validity Act*

- Colonies prior and post federation are subject to Westminster legislation
- Judge Benjamin Boothby (1860) from SA cause quite a few problems with English law
- Started invalidating SA statute as it conflicted with English common law

- Statute law is meant to prevail against common law (challenged parliamentary sovereignty)
- Westminster interviewed and passed Colonial Laws Validity Act
- Reconfirmed the original understanding of parliamentary sovereignty

1901: Australian Constitution Proclaimed

- Federation
- Established the federal parliament
- Came into operation on the 1st January 1901
- WA is not mentioned in the preamble as they were undecided as to whether they would join federation

1931: Statute of Westminster

- Commonwealth could pass wide matter of laws but if UK law conflicted, it would prevail
- Act of the UK parliament, largely driven by Canada
- Only applied to Commonwealth parliament, not the states
- No law of the Commonwealth parliament would be invalidated if it conflicted
- Gave Commonwealth full law to legislate, including beyond the boundaries of Australia
- Was enacted in Australia in 1942

1986: Australia Acts

- Gave the states the same rights that the Commonwealth had under the Statute of Westminster
- Decisions of the state courts prior to this would be appealed to the privy court until the Australia Act (abolished this). High Court became the final court of appeal in Australia.
- Extraterritorial powers were confirmed (Victorians international and off the borders)
- Passed by both the UK parliament and Federal parliament to ensure no challenges could occur.

Constitutional Fundamentals

- Federalism
- Parliamentary Sovereignty
- Representative and Responsible Government
- Separation of Powers
- Judicial Review

Federalism

- A federal government, according to William Harrison Moore, exists where:
- In a political community, the powers of government are distributed between two classes of organization – a central government affecting the whole territory and population of the Sovereignty, and a number of local governments affecting particular areas and the persons and things therein – which are so far independent of each other that one cannot destroy the

other, or limit the powers of the other, or encroach upon the sphere of the other (Hanks 38-9).

- 'None of the Constitution's framers would ever have imagined back in the 1890s or in 1901, that a century or so later the Australian states would be as emasculated as they are today: that they would be so dependent on the Commonwealth for their governmental finances; and that their policy-making capacities would be so contingent on political decisions taken by the Federal Government.' (Allan and Aroney, *Hanks* 40)

The Division of Legislative Powers in Australia

- **Exclusive powers:** Give the Commonwealth special immunity from the operation of State laws in some circumstances, and also prevent the States from making laws in certain areas (see ss 52, 90, 114 and 115).
- **Concurrent powers:** Most of s 51 powers can be enjoyed by the Commonwealth and the States (some have been found to be exclusive).
- But the Commonwealth can always pass inconsistent legislation which invalidates the State law to the extent of its inconsistency (s 109)
- **Residual powers:** states can legislate in any field left vacant by the Commonwealth

Parliamentary Sovereignty v Supremacy

- Constitution sits at the top of the hierarchy (parliamentary supremacy)
- Parliament has the power to make or unmake any law within its sphere of competence (ie authorised under the Constitution).
- 'The doctrine of parliamentary supremacy is a doctrine as deeply rooted as any in the common law. It is of its essence that a court, once it has ascertained the true scope and effect of an Act of Parliament, should give unquestioned effect to it accordingly.' (McHugh J in *Kable*, Hanks 53)
- Both Cth and States parliaments are 'supreme'.
- State parliaments' power to make laws for the 'peace, order/welfare, and good government' of those states is plenary: 'The words ... are not words of limitation' (*Union Steamship v King* (1988), Hanks 52)

Representative Government

- **The doctrine that elected members of parliament be representative of the people (i.e. their constituents)**
- The constitutional underpinnings of representative government are contained in ss 7 and 24 of the Constitution
- Contours of 'representative government' in Australia have been determined largely by Parliaments (*Mulholland*, *Hanks* 64-66). Eg:
 - Voting franchises have changed over time
 - Compulsory voting
 - Proportional representation in Senate voting