

CONSTITUTIONAL LAW

**Alecia Jennings
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CONTENTS

TOPIC 1: FUNDAMENTAL PRINCIPLES	5
Nature of Constitutional Law	5
Fundamental principles/concepts	6
THE JUDICIARY	7
Commonwealth / Federal Courts	7
The Role of the High Court	7
State Courts	7
TOPIC 2: PARLIAMENT	9
Structure of Parliament	9
State Parliaments	9
Commonwealth Parliament	9
Duration of Parliament	10
Membership of Parliament	10
Distribution of Seats	10
TOPIC 3: LEGISLATIVE PROCEDURES	Error! Bookmark not defined.
Introduction	Error! Bookmark not defined.
Cth Legislative Procedures	Error! Bookmark not defined.
State Legislative Procedures	Error! Bookmark not defined.
Summary	Error! Bookmark not defined.
TOPIC 4: THE EXECUTIVE	Error! Bookmark not defined.
Commonwealth Executive	Error! Bookmark not defined.
Dismissal of Whitlam Government	Error! Bookmark not defined.
Sources of Cth executive power	Error! Bookmark not defined.
Scope of Cth executive power	Error! Bookmark not defined.
State Executive Power	Error! Bookmark not defined.
TOPIC 5: CHARACTERISATION	Error! Bookmark not defined.
Characterisation	Error! Bookmark not defined.
Constitutional Interpretation	Error! Bookmark not defined.
History of Characterisation Approach	Error! Bookmark not defined.
The Current approach	Error! Bookmark not defined.
Characterisation Process	Error! Bookmark not defined.

Purpose

Error! Bookmark not defined.

Non-purposive power

Error! Bookmark not defined.

Purposive power

Error! Bookmark not defined.

Proportionality

Error! Bookmark not defined.

TOPIC 6: FINANCIAL AND ECONOMIC POWERS

Error! Bookmark not defined.

Introduction

Error! Bookmark not defined.

REVENUE POWERS

Error! Bookmark not defined.

SPENDING POWERS

Error! Bookmark not defined.

Appropriations Power

Error! Bookmark not defined.

CORPORATIONS POWER

Error! Bookmark not defined.

TOPIC 7: EXTERNAL AFFAIRS AND EXTRATERRITORIALITY

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EXTERNAL AFFAIRS OF CTH

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Matters external to Australia

Error! Bookmark not defined.

Relations with other countries

Error! Bookmark not defined.

International treaty implementation

Error! Bookmark not defined.

Matters of international concern

Error! Bookmark not defined.

STATES EXTRATERRITORIAL COMPETENCE

Error! Bookmark not defined.

TOPIC 8: INCONSISTENCY AND IMMUNITIES

Error! Bookmark not defined.

INCONSISTENCY

Error! Bookmark not defined.

Tests

Error! Bookmark not defined.

Commentary on Tests

Error! Bookmark not defined.

INTERGOVERNMENTAL IMMUNITIES

Error! Bookmark not defined.

A. States' legislative power over the Cth

Error! Bookmark not defined.

B. Cth legislative power over the States

Error! Bookmark not defined.

Presumptive Immunity of the Crown

Error! Bookmark not defined.

TOPIC 9: RIGHTS AND FREEDOMS

Error! Bookmark not defined.

Introduction

Error! Bookmark not defined.

EXPRESS RIGHTS

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Acquisition of property on just terms (s51(31))

Error! Bookmark not defined.

Trial by Jury (s80)

Error! Bookmark not defined.

Freedom of religion (s116)

Error! Bookmark not defined.

Freedom from interstate discrimination (s117)

Error! Bookmark not defined.

IMPLIED RIGHTS

Implied freedom of political communication

Implied rights from separation of powers

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Error! Bookmark not defined.

Error! Bookmark not defined.

TOPIC 10: SEPARATION OF POWERS

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SEPARATION OF COMMONWEALTH JUDICIAL POWER

Error! Bookmark not defined.

Not Ch III courts

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Federal Courts may not exercise non-judicial power

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Exceptions to the principles

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SEPARATION OF STATE JUDICIAL POWER

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Kable Principle

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Essential integers of judicial function from Kable principle

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Delegation of judicial powers

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TOPIC 1: FUNDAMENTAL PRINCIPLES

Nature of Constitutional Law

- **The Constitution:**
 - Provides framework for law
 - Provides source and authority for exercise of public power and circumscribes the limits of that power
 - Is the primary source for legal authority
 - Government must have authority from the Constitution
 - Sources of power:
 - Legislative powers
 - Prerogative powers
 - Inherent executive powers
 - Governs the relationship and demarcation of power between two levels (Cth and State)
 - Australia is a federation (cf no separate states eg NZ)
- **Constitution law:**
 - Sets out principles that define the institutions of government, assign and set limits on their functions, establish their interrelationships, and prescribe right and obligations of people and governments in a society.
 - Has remained relatively immune from reform
- **Three types of powers**
 1. Concurrent powers: Shared by Cth and States (enumerated in s51) (but if inconsistency Cth prevails: s109)
 2. Residual powers: Held exclusively by States (includes powers not explicitly or implicitly conferred on the Cth)
 3. Exclusive powers: Held exclusively by the Cth (includes s52, s90 and defence power)
- **Formation**
 - From the UK: Responsible Government (RG) and the Crown
 - From the US: Federalism, separation of powers and the significance of judicial review
 - Peaceful; no revolution. Put to the Australian people for its approval (cf the US)
 - **Goals of the Constitutional government**
 - To establish a political system that is democratic and stable
 - Based on rule of law so the legal system is independent and not corrupt; so society is included
 - Society's involvement should have been extensive to protect citizens (eg South Africa after the Apartheid)
 - We had Constitutional conventions in 1890s with reps from each colony. But only select groups (male, white, protestants with property). But we had a referendum (but this was questioned was voting was voluntary, large section excluded eg woman and aboriginals). So only a small part of Australians voted.
- **Systems an Institutions of Government**
 - Three arms of government – legislature, executive and the judiciary
 - Federal system with power allocated between Cth and states
- **Bill of Rights in our Constitution?**
 - No Bill of Rights but rights scattered through Constitution
 - US formed Constitution through War of Independence so mindful of government abuse which shaped what should be in the Constitution
 - We took this for granted; it was argued we had responsible government, election of representatives and the common law together with a federal structure so the drafters of the Constitution believed these safeguards (didn't need Bill of Rights)
 - But have rights in relation to religion, trial by jury, compulsory acquisition of property on just terms, the right to vote and implied rights.
 - Implied and not explicit so High Court retains power
- **Constitutional Monarchy (not republic)**
 - Queen is still head of state
 - Monarchy controlled by Constitution but we have hereditary head of state (Queen)
 - Integral: Monarchy forms part of legislature (parliament made up of house of reps, senate and G) and executive
 - S61: Executive power in Cth vested in the Queen and exercisable by GG
 - Difficult to unravel if go to Republic

Fundamental principles/concepts

- **Federalism**
 - The idea that power is to be shared between two levels of government.
 - Under s107, the States retain their colonial powers unless otherwise removed by the Constitution.
 - Cth exercises plenary power over the Territories (s122) but only enumerated powers over the States (s122)
 - Cth cannot pass laws unless it is Constitutionally authorised to do so (under a Head of Power)
 - States and the Cth have concurrent powers (s51) but Cth will prevail if state inconsistent (s109)
 - States retain residual powers (not expressly or implicitly conferred by the Cth)
 - Provides for decentralisation of power and a check on abuse of power
- **Parliamentary Sovereignty**
 - Legislative arm is supreme because it is made up of elected people, but it is not sovereign because of the Constitution acting as umpire (sharing power)
 - Parliament has the power to make or unmake any law whatsoever. No parliament has the power to bind a successor parliament. In Australia, no parliament is absolutely sovereign and must instead adhere to the constraints of the Constitution.
- **Representative Government**
 - Members of the Lower House are to be democratically elected.
- **Responsible Government**
 - The Westminster Principle: Executive is responsible to parliament who is responsible to the people.
 - By convention, the Crown (represented by GG) acts on advice of its Ministers. Ministers in turn, including the PM, may only remain in government while their party has the confidence of the majority of the HoR. If not they should resign.
 - The Efficient Secret: Members of Parliament are selected based on the Leader of the party with the most votes/seats, who select members of cabinet. Legislation will pass because they have more votes (efficiency).
- **Parliamentary control of supply**
 - Supply must be authorised by P
 - This principle is ensured by the Constitution:
 - All moneys collected are stored in Consolidated Revenue (s81)
 - Parliament needs to pass an Act to release money (s83)
 - Senate cannot amend but can reject money bills (block supply) (s53) but shouldn't by convention
 - 1975 constitutional crisis: Whitlam govt's budget failed to pass through Senate.
 - Two views:
 - Senate breached convention by blocking supply
 - Whitlam govt breached convention by failing to resign when it could not guarantee supply
 - GG 'resolved' crisis by sacking Whitlam govt and forcing a DD
- **Judicial Review**
 - Power that permits a court to review and determine the Constitutionality of legislative and executive or administrative action.
 - Enables the High Court to strike down a Cth or State law if it offends or is not supported by the Australian Constitution
- **Rule of Law**
 - Developed by Magna Carta 800 years ago
 - The idea that society is governed according to declared laws rather than arbitrary exercises of power.
 - Includes notions of transparency, accountability, democracy and stable governments.
 - It is implicit in the Constitution (covering clause 5)
 - S75(5): Any actions against officers of the Cth, HC has original jurisdiction (executive is subject to the law and HC has jurisdiction to make sure members of the executive comply with the law)
 - As Parliament is supreme (not sovereign) it is subject to the rule of law
 - Three aspects to the rule of law:
 - Englishmen were to be ruled by law and law alone. A person can only be punished for a breach of law.
 - Equality before the law as between the governors and the governed. Officials were to be subjected to the same rules as ordinary citizens.
 - The Constitution is not the source but the consequence of individual rights

THE JUDICIARY

Commonwealth / Federal Courts

- **The constitution (71) vests federal judicial power in:**
 - The High Court
 - The Family Court
 - The Federal Court
 - Federal Circuit Court
- **State Supreme Courts have been vested with federal jurisdiction under s77(iii) and s39 JA**
 - Eg if there is family law dispute covering both jurisdictions, the State can deal with both
- **High Court has original jurisdiction (s75) and appellate jurisdiction (s73)**
 - These are entrenched and can only be changed by a referendum
 - Constitutional guarantee
 - S75(v): Government is also subject to the law
 - Parliament can determine the jurisdiction of any other Federal Court apart from the High Court (s77(i))

The Role of the High Court

- **Jurisdiction**
 - S76(1) jurisdiction to interpret the Constitution
 - S73 of the appellate jurisdiction allows the HC to achieve a unified common law
- **Appointment to the High Court**
 - Under s72 HC judges are appointed by GG in Council up until 70 (s72(1)) and cannot be removed except on the ground of proved misbehaviour or incapacity (s72(2))
 - This is important for stability as they cannot be influenced by executive pressure
 - CJs and AGs of various courts members of the HC nominate then AG makes recommendation to cabinet who vote on it and then GG in Council makes a decisions.
- **Appointment to the Federal Court**
 - For appointment to the Federal Court, the A-G does place advertisement on websites and has nomination committee (AG then makes final decision with cabinet)
- **Appointment to Victorian Supreme Court**
 - Senior judicial positions in Victoria are now advertised (A-G seeks expressions of interest)
 - From time to time there is debate about how they should be appointed and how transparent the process is, and what the selection criteria are (UK have setup separate body)
- **Appeals**
 - Appeals to the Privy Council from the High Court ended in 1968 and in 1975 from all state matters
 - 1986 all states were abolished
 - No appeals to the PC and HC is ultimate court
 - Viro: HC no longer considered itself bound by PC decisions

State Courts

- Supreme Court of Victoria is established under s75 Vic Con
- **Jurisdiction**
 - Federal jurisdiction is limited under s38 and s39 JA
 - Unlimited jurisdiction (connection with Victoria no matter the subject matter) (s85(1))
- **Amending jurisdiction**
 - Jurisdiction can be altered by Parliament
 - Restrictive procedures (s85) plus statement giving reasons (s85(5))
 - Subject to s18(2A) that it must be passed by an absolute majority
 - Manner and form is not binding but usually followed (Collingwood; Daqi)
 - Part III cannot be amended unless passed by absolute majority (s18(2A))
- **Exercise of judicial and non-judicial powers**
 - There is no separation of powers in Vic Con at State level so P can vest powers in State courts that is not judicial (and P and executive can exercise judicial power)

- This is subject to the restriction in *Kable*
- **Cross vesting of jurisdiction**
 - State Courts can exercise federal jurisdiction
 - But federal courts cannot exercise State jurisdiction
 - *Wakim*: Not covered in Cth Con about federal courts vested with state jurisdiction. Chapter III is not about judicial power of the states and is exhaustive. Cth jurisdiction expressly set out in s75 and s76 so states are vested in Cth courts.

TOPIC 2: PARLIAMENT

Structure of Parliament

- **Government is a combination of representative and responsible government**
 - Membership of Parliament is decided by the democratic process
 - Legislative power exercised on behalf of the people (cf Executive is responsible to P)
 - So purpose of P is so the people can control the Executive
- **Which Parliament?**
 - 6 State Parliaments, 1 Commonwealth Parliament and 2 Territory Parliaments
 - Focus is on the Commonwealth
- **Relationship between Cth and State parliaments**
 - State Ps are independent of UK Ps (Australia Act)
 - Queensland is unicameral (one house); all the others have bicameral
- **Relationship between Cth and Territory parliaments**
 - Territory Ps can be altered by the Constitution at any time (s122)

State Parliaments

- Establishment of Victorian Parliament (s15 Vic)
- Legislative power vested in P consisting of Her Majesty, Council and Assembly (s16 Vic)
- State Constitution is subject to Commonwealth Constitution (s106 Cth) (plenary powers)
- Each State P is to retain all legislative powers except those expressly withdrawn by Constitution (s107 Cth)
- **Victorian Parliament**
 - Legislative Assembly
 - Voting by preferential voting system, 1 representative from each of 88 districts (s34, s35)
 - Legislative Council
 - Voting by a proportional system, 40 members total (s27)
 - Both Houses elected for a set 4 year term (ss28,38) unless:
 - Vote of ‘no confidence’ in majority in Legislative Assembly (ss 8(3)(a), 8A)
 - Premier is the Leader of the House with the most seats in the Lower House and will win any vote
 - To test the majority, vote of ‘no confidence’ in the Premier
 - ‘Deadlocked bill’ (ss8(3)(b), 65E(2)): Disagreement over legislation by the two houses

Commonwealth Parliament

- **Legislative power and Parliament established under Constitution (s1)**
- **Senate is the ‘State’s House’**
 - To represent the states and protect smaller states from dominant states (Vic, NSW)
 - Equal representation from each State “directly chosen by the people of the State” (s7)
 - Currently 12 Senators per State + 2 per Territory (76 Senators)
 - Proportional voting which means vote is weighed more in Tasmania than NSW (may not be democratic)
 - Senators not always elected due to casual vacancies (new rep has to be from same party) (s15)
- **House of Representatives**
 - To have as nearly as practicable twice the number of members as the Senate “directly chosen by the people of the Cth” (s24)
 - Currently 150 members with preferential voting
- **Territory Representation**
 - House of Representatives and Senators: NT and ACT gradually had voting rights
 - First Territorial Senators case
 - Whitlam Government passed legislation to increase the Senate to allow Territory representation in the Senate. Legislation challenged (s7 Senate is only to do with the states vs s122 P allows territory representation). Court held 4:3 Territory representation permitted (s122 prevailed). Legislation supported by s122 on democratic lines (democracy means rep in P). When Constitution was developed they foresaw it would be changed (or frozen in time). HR has twice the number of members than the Senate anyway.
 - Second Territorial Senator’s case: Qld and WA challenged the legislation. 5:2 majority legislation still valid.

Duration of Parliament

- **Commonwealth:**
 - HR: Maximum term is 3 years (s28)
 - Senate: 6 years (1st group 3 years, 2nd group 3 years) (s7)
- **Victoria:**
 - LA: 4 years fixed term (s38) (some exceptions – vote of no confidence or deadlock bill)
 - LC: 4 years (s28) (until dissolution or other lawful determination of the Assembly)
- **Terms regarding duration of Parliament:**
 - Adjournment: Short suspension by a particular house
 - Prorogue: P dismissed from further sitting until the same P is reconvened (all bills lapse)
 - Dissolution: Irrevocably end current P (eg Tony Abbott calls election, so new P after)
 - Double Dissolution: Dissolves both houses completely (full Senate election)

Membership of Parliament

- **5 grounds for disqualification:**
 - Allegiance to a foreign power
 - Found guilty of treason or convicted for an offence punishable by jail for a year or longer
 - Undischarged bankrupt
 - Hold office of profit under the Crown; or
 - Direct/indirect pecuniary interest in an agreement with public service
- **Victoria**
 - S44: Qualified to be a member if on register to vote and principal place to vote is Victoria. Disqualified if a judge, member of Commonwealth P, undischarged bankrupt, convicted or guilty of an indictable offence for 5 years jail or life.
 - S61: Exception of holding office of profit under the Crown
 - S61A: House can pass a resolution to excuse the disqualification (ceased to have effect, arose by mistake)
- **CASE: Sykes v Cleary (s44)**
 - Cleary elected for HR. Victoria school teacher who held office under Victorian Crown whilst running for Commonwealth position. Gone on leave without pay to run for P so Sykes argued under s44(4) any person holding office under the crown can't run. Court held Cleary disqualified as he should have resigned before nomination. It was still an office under the Crown not just Victoria, so even though ok under Victorian Constitution, not under Commonwealth Constitution. Concern about Executive's control over P – making sure Executive power does not get out of hand. 2% of P is Executive (responsible government). If you allowed normal people elected to P also holding office under the Crown, ie Executive then this disrupts the balance of Executive in P which affects responsible government.

Distribution of Seats

- **CASE: McKinlay**
 - HC heard a challenge to CEA that the HR in Vic, NSW and Qld had a different number of electors. Argument was that s24 Cth required that HR had same number of electors (ie 'one vote one value' – same as US). HC rejected argument, and held that s24:
 - Requires that members of HR are chosen directly by the people (popular vote) not by electoral college
 - Variations in the number of electors in the electorates could become so grossly disproportionate as to breach the requirement members are "directly chosen"
 - Requirement members chosen in proportion to respective numbers of their people means that the "proportion" is to exist on each occasion when the members are chosen (ie each time election held)
 - ss7 and 24 do not require one vote one value although if the variation between electorates became 'grossly disproportionate' it may contravene the Constitutional requirement. Also electoral distribution must be based on the latest statistics for each election and brings you to the current arrangements outlined in the sections of the text above.