

FUNDAMENTAL CONCEPTS, INSTITUTIONS AND INSTRUMENTS

- **What is constitutional law?**
 - The legal boundaries within which governments and legislators operate when making laws or taking action. Different boundaries apply for the Commonwealth government and for State governments.
- **Dicey**
 - Rule of Law
 - 1) Regular law is supreme, not arbitrary power
 - 2) Everyone's subject equally to it
 - 3) Laws of the constitution are not the source but the consequence of the rights of individuals as defined and enforced by the courts
 - Parliamentary sovereignty
 - 1) Result in fair law because people can vote out parliaments, parliaments are therefore held accountable
- **Constitutional law** may be described as the branch of the law which regulates the three arms of government: the legislature, the executive and the judiciary.
 - The constitution provides the source and authority of the exercise of public power, and circumscribes the limits of that power.
 - Constitutional law also governs the relationship and demarcation of power between the federal (Commonwealth) government and the regional "state" and "territory" governments.
- The legislature's prime function is to enact laws.
- The executive or administrative arm of government is to administer laws and deal with the general minutiae of legal and policy administration.
- The judiciary's function is to interpret and apply the law.

Parliamentary sovereignty

- No Australian parliament is absolutely sovereign.
- The powers of all Australian legislatures are constrained by the Commonwealth Constitution.
 - For example, s 92 prescribes that trade, commerce and intercourse between the States "shall be absolutely free". Therefore no law of any Parliament may impede that freedom
- Absolute parliamentary sovereignty may be criticised for its failure to incorporate checks and balances upon the legislature to prevent the passage of oppressive statutes.
- Parliament alone makes laws through the enactment of statutes
 - Parliament can change, amend and repeal its own laws
 - Parliament can change the common law through the enactment of inconsistent legislation
 - It is supreme over the Executive as legislation is the main source of executive power. Although the Executive has various powers that exist outside legislation, these powers can be modified or abolished by statute.
 - Supreme over the Judiciary because the courts are limited to interpreting the laws of Parliament.
 - The judicial function of interpreting the constitutional limits of Parliament's power is the one exception to Parliament's supremacy – the constitutional jurisdiction of the High Court and State Supreme Courts cannot be removed by Parliament.

Rule of Law

- Aspect 1 – society is governed according to declared laws, rather than by arbitrary exercises of power.
 - Law must be clear, accessible and predictable
 - Questions of legal right and liability should be resolved by application of the law and not the exercise of discretion
- Aspect 2 – there should be equality before the law
- Aspect 3 – ministers and public officials must exercise the powers conferred on them in good faith without exceeding the limits of such powers
- 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 legal limits.
- It aims to curtail arbitrary government action, to guarantee equality before the law and to ensure accountability to the law.
- Australian Communist Party v Commonwealth – rule of law is an ‘assumption’ of the Constitution
- Plaintiff s157/2002 v Commonwealth (2003) – Gleeson J asserted the rule of law as an interpretive principle – “[T]he Australian Constitution is framed upon the assumption of the rule of law.”
- Hayek – certainty and predictability. Laws must be general and equally applied.
- Dicey – 1) absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power; 2) equality before the law; 3) laws of the constitution are not the source but the consequence of the rights of individuals as defined and enforced by the courts.
- Raz – government should adhere to the law and be subject to it. No link between the law and morality – legal positivism.
- Dworkin – can’t just have the procedural elements, unless morality is being upheld.
- Bingham – 8 aspects: clear and accessible, limit on arbitrariness, equality before the law, judicial review, human rights, speedy and inexpensive, fair processes, comply with international law.

Constitutional conventions

- Refer to customs or practices that are habitually followed by governments, who are under a moral or political obligation to continue following them - not legally enforceable however
- For example, Governor-General acts on the advice of the government of the day
- Conventions allow for some flexibility to permit gradual, evolutionary shifts in power

Bicameralism

- Two houses of Parliament
 - Lower House – House of Representatives
 - Upper House – The Senate
- Queensland, Northern Territory and ACT Territory are unicameral

Representative Government

- Democratic form of government in which those with the power to govern have been selected from the population of a state to rule on their behalf.
- In Australia, at deferral level, a preferential voting system determines the composition of the House of Representatives
- All lower houses in the Australian States and at the federal level are democratically elected

- Democratic election also determines the composition of all Australian upper houses

Responsible Government

- Describes a means by which the executive government is held to account by the Parliament.
- The government is responsible to the Parliament in two ways:
 - Ministers of the government are individually responsible to the Parliament for their decisions and for the performance of their departments – this is through asking questions of Ministers in the Parliament and through parliamentary committees that scrutinise draft legislation and government actions.
 - The entire ministry must retain the confidence of the Parliament to remain in government.
- The doctrine of responsible government links the executive government to the Australian people. The executive government is responsible to the lower house, which is itself responsible to the electorate via the doctrine of representative government.

Separation of Powers

- Describes the division of government power between the three branches of government: the legislative, executive and judicial branches.
- Prescribes that the function of the three arms of government be clearly and institutionally separated.
 - One justification for such separation is to prevent the concentration of too much power in, and consequent abuse of power by, a single arm of government.
 - Ensures that the three arms of government operate as checks and balances upon each other so that no one governmental arm unduly harms the interests of those governed.
- Distinction between the executive and the legislature is blurred
 - Commonwealth Ministers are simultaneously members of the Executive and the legislature, as is required by s64 of the Commonwealth Constitution
- The legislature remains separate from the other arms of government.
 - Vital that the judiciary be insulated from political influences so that the law can be interpreted and applied in an independent and impartial manner.

Federalism

- Government power is shared between a central government (the Commonwealth) and sub-national governments (the States) operating in the same geographic territory.

Strengths

- The existence of multiple levels of government provides greater scope for customising policies to meet local needs and experimenting in policy and service delivery
- The existence of a range of legal systems pursuing policy outcomes in different ways increases individual freedom, as people can move to a location in the federation whose regulation best suits their beliefs and preferences
- Provide an additional level of democratic participation at the local level, thus enhancing the people's participation in government
- When there is a need for the cooperation of different levels of government to implement a national scheme, federal systems of government necessarily draw in a wider range of opinions and may provide additional scrutiny of government than exists in a unitary state
- Federal states allow the benefit of local governance to be achieved while leaving the central government to control areas of national concern such as defence, trade and commerce and immigration

Weaknesses

- The adoption of diverse policies by sub-national governments across a federation requires individuals and business to understand and comply with different regimes as they travel across a single country – e.g. workplace health and safety and tax.
- Where sub-national governments are left to develop their own policies, concerns arise that minimum levels of services such as health care and standards such as in school curricula are not being received by individuals across the federation.

Characteristics

- Federations tend to be a weak form of government as sovereign power is divided between the national and sub-national entities to the federation. As a result, there are more checks on the exercise of power at either level.
- Federalism is a conservative form of government. It is designed to maintain the status quo as much as possible in times of change. The power to amend federal constitutions is outside the control of the national or sub-national governments acting alone.
 - In the case of the Australian Constitution, constitutional amendment relies not only on parliamentary agreement but also on the agreement of the people of the Commonwealth and a majority of people in a majority of the states must approve constitutional amendments. As a result, federal constitutions are 'rigid' and difficult to amend formally.
- The judiciary has a prominent role. This is because federations rely on a written division of powers between the national and sub-national governments and it is the responsibility of the courts to determine the limits of these powers.

Referenda and Reform

- A referendum is a compulsory vote on a proposed change to the wording of the Commonwealth Constitution.
- The impact of a successful referendum is that the law-making power of the states and Commonwealth parliaments may be altered.
- Process of changing the wording of the Constitution is outlined in s28.
- Three stages involving the **parliament**, the **people** and the **governor-general**.
 - **Parliament**
 - any proposed change to the Constitution must first be passed by the Commonwealth Parliament.
 - a bill is prepared, which sets out the proposed alteration to the Constitution – it is written as a constitutional alteration bill.
 - the bill can be passed by both houses, or one house twice but must be passed by an absolute majority (over 50 per cent)
 - if either house passes the proposed change and the other house rejects it, or requires amendments which are not acceptable to the first house, after a period of three months it can be passed through the first house again
 - if it is rejected a second time by the second house, the governor-general may still submit the proposed change to the people.
 - **The people**
 - prior to the referendum being put to the people, information is sent to every household explaining the proposed change, and providing arguments for and against the proposed change.
 - all of those **electors** who are required to vote for the election of members of the House of Representatives in each state and territory must vote on the referendum.

- in the referendum, the voters are required to answer ‘yes’ or ‘no’ to the question asked.
- for the referendum to be successful, each referendum question must satisfy the **double majority provision** – a majority of voters in the whole of Australia (including the territories) must vote ‘yes’ AND a majority of voters in a majority of states must vote ‘yes’ to the proposed change—that is, the referendum must be approved by a majority of voters in at least four out of the six states before it is accepted; this provision protects the smaller states from being dominated by the larger, more populated states.
- **The governor-general**
 - if proposed change receives a ‘yes’ vote from a majority of voters in a majority of the states as well as a majority of all electors, it is presented to the governor-general for royal assent and change in the Constitution can take place.

Judicial review and constitutional interpretation

- Australian statutes must conform to the Constitution
- Judicial branch maintains the rule of law by conducting judicial review of the actions of the executive and legislature.
- High Court is responsible for interpreting and applying the principles of the Constitution
- The Judiciary undertakes two types of judicial review:
 - Guardian of the Constitution, reviewing exercises of legislative power by the Commonwealth and State Parliaments against the constraints imposed by the Constitution.
 - Ensures that executive action is exercised in accordance with the legal limits that apply to it.

From Colonisation to Federation

- **1788** – European settlement when Governor Arthur Phillip arrived in Sydney with the first fleet. He imported English law into the territory. Colony of NSW “received” all if the English law in force in England in 1788. The same was to occur in all of the Australian colonies upon their formation.
 - The alleged moral and legal basis upon which Governor Phillip could declare English law to be the law of the land was that Australia was an empty land before English settlement – it was terra nullius
 - Australia was inhabited prior to English colonisation by the Indigenous people who had their own system of laws and society
 - The terra nullius fiction was not legally rejected until the landmark High Court decision in **Mabo v Queensland (No 2) (1992)**
- **1823** – each colony developed a system of responsible government with a bicameral Parliament including a popularly elected lower house
- **Australian Courts Act 1828** – before 1828 the notion of the importation of English law stemmed from the common law only.
 - The Act asserted that English law was received by the eastern colonies in 1828, thus removing any uncertainties about the issue.
 - Confirmed the ability of the British Parliament to enact new legislation for its Australian colonies after their settlement, either by express words or necessary implication
- **Australian Constitutions Act (No1) 1842** – introduced representative government to the colony of NSW. Governor could still withhold his consent to any legislation passed by the Council. There was no responsibility of the Governor or his Ministers to the Parliament.

- **Australian Constitutions Act (No 2) 1850** – authorised the colonial Parliaments to draft constitutions for their respective colonies
- **1855** – Victoria, NSW and Tasmania adopted a system of responsible government
- **The Constitution Act 1856 for Victoria** – established a bicameral legislature and both houses were elected by the people
- Limits on the powers of colonial Parliaments
 - **Colonial Laws Validity Act 1865 (Imp)** – colonies could not pass any law which was repugnant to a law of the UK Imperial Parliament
 - Colonies could not enact extraterritorial legislation – no colony could legislate with regard to an act or event outside its territory
 - The reserve power of the English monarch to disallow a colonial law, even after the relevant Governor had given his assent. Outlined in s 59 of the Constitution, which still permits the Queen to disallow any Commonwealth law within one year of the Governor-General's assent. By convention, she does not exercise this power.
- **Commonwealth of Australia Constitution Act 1900** – independent Australian legal system

Colonial and State Constitutions

- Constitution Act 1975 (Vic)

Australian Constitution

- Commonwealth of Australia Constitution Act 1900 (UK)
- Print out Commonwealth Constitution as seen in appendix

The Imperial Connection

- **Colonial Laws Validity Act 1865** - colonies could not pass any law which was repugnant to a law of the UK Imperial Parliament and they could not enact extraterritorial legislation – could not legislate on anything outside its territory
- **Statute of Westminster 1931** – Commonwealth Parliament was free to alter received UK law. Commonwealth had full extraterritorial power. Statute of Westminster Adoption Act 1939 – the Commonwealth was legally free from the Parliament of the UK.
- **Australia Acts 1986 (Cth)** - No act of the parliament of UK would extend to the commonwealth of Australia nor its states or territories and thus Australia gained legal independence, thus severed Australia's legislative ties with UK.
- An Australian Republic?
 - Only remaining legal tie with a British institution lies in our status as a constitutional monarchy, with the Queen of England, in her capacity as Queen of Australia, as our head of State.
 - In late 1999, a proposed constitutional amendment was put to the Australian people to transform Australia into a republic by replacing the Queen and the Governor-General with an Australian President. The referendum failed in every jurisdiction except the ACT.