

# Week 1

## 1.1 Pre-recorded Lecture – Interview with Prof Carlos Bernal-Pulido

Discussion around career history, differences of the role of a constitutional judge in different countries.

## 1.2 Introduction to Constitutional Law

### This lecture

- Introducing the teaching team
- What is a 'Constitution'?
- Introducing the Australian Constitution
- Foundational concepts in Australian constitutional law
- Introducing the High Court of Australia and recent interesting developments

### What is a 'Constitution'?

- Creation of the state
- Rules that constitute the State and by which power is used
  - All public power comes from the constitution
  - An exercise of power outside of the Constitution is invalid

### Constitutions

- Political and legal constitutionalism
  - Political constitutionalism – UK and NZ, no entrenched written constitution
  - Legal constitutionalism – have courts that exercise the power of judicial review (legal system has the final say as whether it breaches the constitution) – US, Australia
- Written vs unwritten?
  - Australia is a written constitution
    - Australia still has unwritten constitutional norms
- Flexible vs rigid?
  - Bills of rights
  - If it is too easy to amend how do you protect minority rights?
  - If it is too rigid, does it make it difficult to remain in line with changing views?
    - E.g., dual citizenship exclusions?

### Constitutional Law: a critical and reflective unit

1. Doctrinal understanding of Australian constitutional law
  - a. What the current analytical framework/ test - Need this in notes
2. Normative reflection on what Australian constitutional law should be

### The Australian Constitution

#### Framing and Adoption

- The Constitution records a deal made between the 6 former independent colonies (the States)
  - Late 1800s, the colonies moved towards Federation with the approval of the UK government
  - Emphasis was on what powers would be given to the new Commonwealth Government

### Australian Constitutional Law – Sources and documents

- Commonwealth Constitution
  - Section 9 of the Commonwealth of Australia Constitution Act 1900 (Imp) [imperial]
    - If its authority was created in the UK courts, does it have authority now?
- State Constitutions

- E.g., Constitution Act 1902 (NSW)
- Statutes
  - Statute of Westminster
  - Australia Acts
- Supplemented by common law and unwritten constitutional conventions
- Constitutional conventions
- Common law

### **Preamble**

- WA missing from the preamble which has been included in the constitutional power, there was some talk that the pacific islands might join as well (this did not eventuate)

### **Structure**

- 8 Chapters
- Chapters I, II, and III – The Parliament, The Executive Government and The Judicature
  - This structural separation of the document is taken as an implied separation of powers

### **Constitutional Actors**

1. The Legislature
2. The Executive
3. The Judiciary  
& the people!

### **The Legislature**

- Voters elect Parliamentarians
- Bicameral: Two houses of Parliament
  - House of Representatives – proportional representation
  - Senate – two senators per state or territory

### **Section 51: Legislative Power**

Gave way for the federation, the federal parliament and the state parliament. One of the first things that are looked at with legal violations under the constitutional law, with whether the constitutional legal system has legislative power over the broken law.

Is this covered by the head of power (section 51)

Broadly interpreted provisions – giving way to the centralisation of federal power.

- Subsection 20 – the corporation's power
- Subsection 29 – external affairs

### **The Executive**

- The leadership of the Executive Government – Prime Minister and Ministers – are drawn from the elected Parliament (= responsible government)
- S 64: requirement that the ministers responsible for the developments of government must be members of Parliament

### **Judicial Power**

- Our courts exercise the power of judicial review. The courts ascertain what the interpretation of the law is.
- In the Australian system the principle of [Marbury v Madison] is accepted as axiomatic – Communist Party Case per Fullagar J p 263

- In cases like the US and Trump handing down all these executive orders, some district and intermediate courts are saying that these aren't constitutional. What if Trump doesn't abide by the court orders, and court rulings. What if executives don't abide by judicial orders.

### **Amendment?**

- Requirement for referendum (section 128)
  - Need a majority in a majority of states
  - This is more on the rigid side in terms of difficulty to amend
  - More likely to pass if you have bipartisan support.

### **Australia: A Constitutional Hybrid**

#### **Constitutional Hybrid**

- Influence of the British and American constitutional traditions
  - Elaine Thompson – the “Washminster” Mutation (Westminster and Washington)
- What concepts were “borrowed” from each of these models?

#### **Rule of Law**

- A. V. Dicey
- Ivor Jennings
- The idea that everyone should be equal before the law and under the law, this has strong UK origins

#### **Australia: Responsible Government**

- S 64
- Largely governed by constitutional conventions (although note s 64)
- Prime Minister, Cabinet etc
- Collective and individual ministerial responsibility
- The constitution does not refer to the prime minister

#### **United Kingdom: Parliamentary Sovereignty**

- “Parliament means, in the mouth of a lawyer (though the word has often a different sense in conversation) the King, the House of Lords, and the House of Commons: these bodies acting together may be aptly described as the “King in Parliament”, and constitute Parliament. The principle of Parliamentary sovereignty means neither more nor less than this, namely that Parliament thus defined has, under the English constitution, the right to make or unmake any law whatever. And, further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament”
  - A. V. Dicey, Introduction to the Study of the Law of the Constitution (1885) (emphasis added)

#### **Example: Miller (No 2)**

- R (on the application of Miller) v The Prime Minister; Cherry and Others v Advocate General for Scotland [2019] UKSC 41 (24 September 2019)
  - “[41] two fundamental principles of our constitutional law are relevant to the present case. The first is the principle of Parliamentary sovereignty: that laws enacted by the Crown in Parliament are the supreme form of law in our legal system, with which everyone, including the Government, must comply.”

#### **Relevance in Australian Context?**

- To what extent does this principle apply in the Australian context?
  - Parliament's power is constrained by the Commonwealth Constitution
  - NOTE: Judicial review of legislation/ power of invalidation

## Summary: Westminster Influence

Which features of the Australian constitutional system were essentially borrowed from the UK

- Rule of Law
- Responsible Government
- Constitutional monarchy
- Constitutional conventions
- Not parliamentary sovereignty

## American influence

- USA has a written constitution while the UK does not

## Australian: Federalism

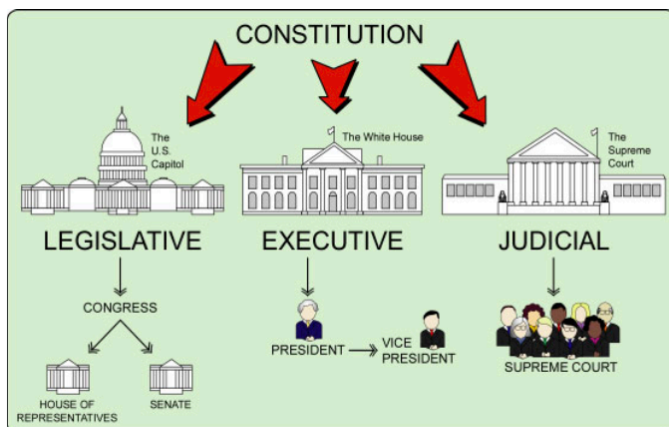
- Powers are distributed between a central government and regional government
- In Australia, the constitution establishes a federal system of government with powers distributed between the Commonwealth and the States
  - Section 51
- Canada – takes a different approach where they dictate the powers of the provinces and leave out the federal power.

## CF United States Constitution – Article 1, Section 8

- Section 51 heads of power, we had the reference to trade and commerce between the states – this was borrowed from the US constitution.
  - Regulating commerce with foreign nations amongst the state, etc.

## US: Strict separation of powers

- “the accumulation of all powers, legislative, executive and judicial in the same hand, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny” (James Madison, Federalist No. 51, 1788).
- Checks and balances between the different branches of government to avoid a centralisation of power



## E.g., Impeachment

- U.S. Constitution, Article II, Section 4 – “The President, Vice President and all Civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanours.”
- Attempts to impeach Trump is an example of this

## Australia: A partial separation of powers?

- Note relationship between Executive and Legislature (responsible government)