

Constitutional Law LAW2211

Module 1- Key Concepts

1) Blackshield & Williams (8th ed): pp. 2-7, 17-32, 88-106

2) Skim the [Australian Constitution](#)

What is a Constitution?

- Rules governing the composition, powers, and methods of operation of government institutions.
- Defines relations between government and citizens.
- Can be written or unwritten.

*“The rules governing the composition, powers and methods of operation of the main institutions of government, and the general principles applicable to their relations to the citizens” Jennings, Ivor, *The Law and the Constitution* (University of London Press, 5th ed, 1959).*

What is the Purpose of a Constitution?

- Constitutions determine the rules and principles that apply to a system of government
- Allocates and limits the powers of these institutions.
- In addition, constitutions may explain:
 - ✓ the role of the public;
 - ✓ how they can be changed;
 - ✓ express a society’s political values¹
- 🔊 Parliamentary supremacy is when a parliament had right to make all laws.
- 🔊 A referendum can occur through a double majority has occurred 8/44. Last successful was the Senate Casual Vacancy Bill 1977, 1967 Indigenous Referendum. Social Services 1946,

Characteristics of Constitutions

- Constitutions bind government institutions, not private citizens
- Constitutions have superiority over statutes
- Judges interpret and apply constitutions, which refines their operation
- Often very hard to change.

Federation

- Driven by need to settle inter-colonial trade disputes.
- Commonwealth of Australia Constitution Act 1900 took effect on 1 Jan 1901.

Popular Sovereignty

- The Constitution derives status from being a statute and support of the people.
- Not all groups (e.g., women, First Nations people) could vote in 1901.
- Voting was not compulsory initially.

¹ 1 Williams George et al, *Blackshield and Williams Constitutional Law and Theory : Commentary and Materials* (Federation Press, 8th ed, 2024) 4..

Developments Since 1901

- 1901 Commonwealth of Australia Constitution Act (Imp)
- 1931 Statute of Westminster 1931 (Imp)
- 1942 Statute of Westminster Adoption Act 1942 (Cth)
- 1968 Privy Council (Limitation of Appeals) Act 1968 (Cth)
- 1986 Australia Act 1986 (Cth)

Parliamentary Supremacy

- 🔊 No institution above Parliament.
- 🔊 there are no limits to Parliamentary powers
- 🔊 Parliament has the power to reverse any action that it takes
- 🔊 However, the Australian Constitution does not adopt Parliamentary Supremacy in its entirety
- ☑ Section 51 outlines characterisation – or multiple characterisation-

Heads of Power & Characterisation

- Constitution specifies and limits Parliament's powers.
- If a federal statute is not supported by a head of power then it will be invalid
- State parliaments have 'plenary' power (subject to limits like s.109, s.92).
- Characterisation decides if a law fits under a head of power.
- Includes incidental power (s.51(39)).

Judicial Review

- Judges can interpret the constitution and invalidate legislation that conflicts with it
- Judicial restraint vs judicial activism

Federalism and the Doctrine of Separation of Powers

- Each branch of government should be limited in what it can do
- The Constitution provides:
 - a vertical separation of powers (between levels of government—states and a federal government); and
 - a horizontal separation of powers (power will be spread between executive, legislative, and a judicial branch)

Federalism & Separation of Powers

- Federalism concerns the allocation of power between the Commonwealth (National/Federal gov't) and the States
- Under the doctrine of Separation of Powers, power is also divided between three branches of government and these powers are used to provide a check on each other's power:
- Executive: Prime Minister and Cabinet (leaders of the political party that has the most seats in Parliament)
- Legislature (Parliament)
- Judiciary (High Court and subsidiary courts)

Rule of Law

- Formal concept: if a law is promulgated by a correct body with a correct procedure, it is binding
- Substantive concept:
 - laws should be consistent with human rights, natural law and fundamental fairness;
 - no one is above the law;
 - equality/equal protection of the laws
- NOT a constitutional guarantee
- Dicey is on the thin edge of the Rule of Law

Representative & Responsible Government

- Representative Government: (PM and Cabinet) Parliament is made up of representatives of the people and as such our laws are made by representatives of the people
- We don't have a "pure democracy" *we don't vote on laws- MPs make laws on our behalf*
- Responsible government: Ministers are responsible to Parliament for the decisions made in their portfolios

Constitutional Conventions

- The Constitution is unwritten as well as written
- The unwritten part consists of conventions or rules of a fundamental nature that are established through custom and practice

Rights

- No Bill of Rights in the Australian Constitution. s80 read to an indictment- is read in a way right to an trial- procedural matter- can be removed at will, the Govt just designate a summary offence- its just a procedural right of how a law rolls, not a substantive right some one has. R v Archdall and Roskrug; Ex Parte Brown (1928)

- 🔊 **s116** – freedom of religion
- 🔊 **s117** – no discrimination based on state residency
- 🔊 **s92** – free trade between states
- 🔊 **s51(xxxi)** – just terms for acquisition of property

Washminster Mutation

- Australia's system blends U.S. features (federalism, judicial review, separation of powers) with U.K. Westminster traditions (having a PM)

Ten BIG Ideas in Constitutional Law

1. Parliamentary Supremacy

- Parliament can make or unmake any law (within constitutional limits).
 - Courts cannot strike down validly enacted laws just because they are unjust or undesirable.
 - No parliament can bind a future parliament
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2. Heads of Power and Characterisation

- Parliament must link legislation to a constitutional “head of power” e.g. s 51 (39). - States do not have heads of power- plenary legislative power
 - “Characterisation” = process of deciding if a law fits within that head of power.
 - The “subject matter” test gives Parliament broad scope.
 - Usually we do not care why they are made except for purposive heads of power.
 - States have enumerated powers, but the constitution says they can make it anywhere the federal doesn't
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3. Judicial Review

- Courts decide whether laws are constitutionally valid. Those who do are activist judges
 - This ensures Parliament and the executive stay within limits. As per *Marbury vs Madison* 1803
 - Landmark cases (e.g. *Engineers*) reinforce judicial supremacy in interpretation.
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4. Separation of Powers

- Division between legislature, executive, and judiciary - Baron von Montesquieu.
 - Judicial (High Court) Legislative (House of Reps & Senate) executive (PM & Cabinet)
 - Strict in judicial power: only courts established under Ch III can exercise it.
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5. Federalism

- Power divided between Commonwealth and States. Horizontal (*Sep. of Powers*) and Vertical *Federal/ State/ Local (local govt. has no constitutional status)*
 - Tensions over financial dominance of the Commonwealth (*Uniform Tax*, s 96).
 - High Court often favours the Commonwealth in disputes.
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6. Rule of Law

- Everyone, including government, is subject to law that is formed in correct process (Dicey)
 - The rule of law is not a constitutional guarantee in Aust.
 - Protects against arbitrary use of power.
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7. Representative and Responsible Government

- Representative = Parliament reflects the will of the people (elections ss. 7 & 24)
 - Responsible = Executive accountable to Parliament in their portfolio.
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8. Constitutional Conventions

- Non-legal rules that have arisen through longstanding unbroken practice and tradition (e.g. PM must have House majority).

- Conventions make the Constitution “workable” in practice.
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9. Rights

- No Bill of Rights in Australia- Few express rights (e.g. s 116 freedom of religion, s 80 jury trial).
 - Some implied rights (*Lange* - political communication).
 - Otherwise, rights mostly left to Parliament. Racial Discrimination Act 1975
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10. Westminster Mutation

- Drawn from UK and US
- US; Federalism, Judicial Review, separation of Powers
- UK- Parliamentary model, Bill of Rights, Formal Monarchy, Conventions
- Formal change requires referendum (s 128) - difficult to achieve, 8/44 succeeded.

Module 2: The Executive