

## Week 1: Introduction to Constitutional Law

### Part 1: Fundamental Concepts of Australian Constitutional Law

What is Constitutional Law?

Constitutional law consists of a set of legal rules and principles ascribed to the Constitution that regulate:

- **The exercise of public power** by the legislature, executive, and judiciary at both the Commonwealth and State/Territory levels.
- **Limitations to public power** to protect the rights and interests of the people.
- The **Separation of Powers** acts as a specific mechanism to protect these interests.

Core Concepts and British Origins

The Australian constitutional identity is built on abstract concepts inherited from the British legal tradition.

#### 1. Parliamentary Sovereignty

- **British Tradition:** Under the 1689 Bill of Rights, Parliament is "absolutely sovereign," with the power to make or unmake any law without any body having the right to override its legislation.
- **Australian Context:** No Australian Parliament is absolutely sovereign. Legislatures are heavily constrained by the **Commonwealth Constitution**.
- **Interpretation:** Judges will only strike down statutes if there is express or implied constitutional authority to do so.

#### 2. The Rule of Law

- Society is governed by valid law (enacted by parliament) rather than force, coercion, or arbitrary power.
- **Dicey's Three Facets:**
  1. **Supremacy of regular laws:** Prohibits arbitrariness; laws must be clear, accessible, stable, and non-discriminatory.
  2. **Equality before the law:** Government officials are subject to the same laws and courts as private citizens.
  3. **Source of rights:** Rights come from traditions and precedent (bottom-up) rather than the Constitution itself.
- **Bingham's Expansion:** Added principles including the protection of fundamental human rights, access to justice, fair adjudicative procedures, and compliance with international law.
- **Australian Implementation:** The High Court has asserted that the Constitution is "framed upon the assumption of the rule of law" (*Plaintiff S157/2002 v Commonwealth*).

#### 3. Constitutional Conventions

- These are customs or practices followed by governments under moral or political obligation.
- They are **not legally enforceable**, yet they are essential; breaching them is often considered more intolerable than breaching constitutional law.
- **Example:** The Governor-General conventionally acts on the advice of the government of the day when exercising the power to sack a government.

#### 4. Bicameralism

- Most Australian Parliaments (except QLD, NT, and ACT) have two houses.
- **Federal Level:** Includes the **House of Representatives** (lower house) and the **Senate** (upper house).
- The Senate is uniquely strong because it is elected and has the legal power to veto any bill, including money bills.

## 5. Representative and Responsible Government

- **Representative Government:** The lower house is democratically elected by the people (preferential voting at the federal level).
- **Responsible Government:** The Executive (Ministers/Prime Minister) must have the "confidence" of the House of Representatives to remain in power. Individual Ministers are also accountable to Parliament for their departments.

## 6. The Separation of Powers

- Prescribes that the **Legislative, Executive, and Judicial** arms of government remain institutionally separate to prevent the abuse of power.
- **Reality in Australia:** The distinction between the executive and legislature is blurred because Section 64 requires Ministers to be members of Parliament. However, the **separation of judicial power** remains strictly observed.

## 7. Federalism

- Constitutional power is shared between the Federal government and six autonomous State governments.
- **Demarcation:** The Commonwealth only has "heads of power" specifically enumerated in the Constitution (e.g., s 51), while States retain **residual powers**.
- **Shifting Balance:** Over time, interpretation of tax and grants powers (s 96) and the inconsistency rule (s 109) has shifted power toward the Commonwealth.

## Part 2: Overview of the Commonwealth Constitution

The Constitution is arranged into eight chapters:

### 1. Chapter I: The Parliament

- **Part 1:** Vests legislative power in the Parliament (The Queen, Senate, and House of Reps).
- **Part 2 (The Senate):** Senators are directly chosen by the people of each State; original states must have equal representation regardless of population.
- **Part 3 (House of Representatives):** The "people's house" where electorates contain roughly equal populations.
- **Part 5 (Powers):** Section 51 lists 39 concurrent legislative powers. Section 57 provides a procedure for resolving legislative deadlocks between houses via double dissolution and joint sittings.

### 2. Chapter II: The Executive

- Section 61 vests executive power in the Governor-General.
- Crucially, the roles of **Prime Minister and Cabinet** are not mentioned in the text; they exist through convention.

### 3. Chapter III: The Judiciary

- Section 71 creates the High Court and allows for other federal courts.
- Defines original (ss 75, 76) and appellate (s 73) jurisdiction.

### 4. Chapter IV: Finance and Trade

- Includes Section 90 (exclusive Commonwealth power over excise) and Section 92 (interstate trade must be "absolutely free").

### 5. Chapter V: The States

- Preserves State Constitutions and laws (ss 106, 107, 108).
- **Section 109:** Commonwealth laws prevail over inconsistent State laws.

## 6. Chapter VI: New States

- Section 122 gives the Commonwealth plenary power to govern Territories.

## 7. Chapter VII: Miscellaneous

- Covers the seat of government (ACT).

## 8. Chapter VIII: Alteration of the Constitution

- **Section 128:** Changes require a "**double majority**"—a majority of voters nationwide AND a majority of voters in a majority of States.

### Part 3: Constitutional Law and Indigenous Peoples

#### Colonisation and the Fiction of *Terra Nullius*

- British colonisation was based on the claim of *terra nullius*—land belonging to no one or practically unoccupied.
- Aboriginal peoples were considered "too primitive" to have effective possession of the land.
- **Legal Shift:** This fiction was rejected in the 1992 **Mabo case**, where the High Court established that the continent was inhabited by people with existing normative legal structures.

#### Sovereignty and Resistance

- Indigenous peoples never formally ceded sovereignty through military conquest or treaty.
- **Indigenous Resistance:** Key milestones include the **Frontier Wars**, the **Yirrkala Bark Petition (1963)** demanding land rights, and the **1965 Freedom Rides**.
- **The Tent Embassy (1972):** Established in Canberra as a symbolic stake proclaiming Australia as Aboriginal land.

#### The 1967 Referendum

- Successfully amended the Constitution with a 90.77% 'yes' vote.
- **Changes:** Removed s 127 (which prevented Indigenous people from being counted in the census) and modified the **Race Power (s 51(xxvi))** to allow the Commonwealth to make special laws for Indigenous people.
- **Unresolved Problems:** The referendum did not provide positive recognition of Indigenous rights, nor did it offer protection against racial discrimination.

#### Stolen Generations

- The "**Bringing Them Home Report**" (1997) was the result of a national inquiry into the forced removal of Indigenous children from their families, marking a pivotal moment in the healing process.