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AN INTRODUCTION TO AUSTRALIAN CONSTITUTIONALISM (TOPIC 1):

Fundamental concepts:

Federalism:

- Federalism refers to the fact that the power to govern publicly is divided between two levels of government, State and Commonwealth.
- Federalism is unique to Australia which was not adopted from the UK system.
 - The UK is a Unitarian state insofar as legal power is centralized in the English Parliament in Westminster.
 - Ultimate sovereignty resides in the Westminster parliament, and they retain the constitutional and legal power to revoke the limited grants of power given to Scotland, Wales and Northern Ireland.
 - In Australia, however, the States retain some powers which are constitutionally invested and therefore cannot be interfered with by the Federal parliament.
 - EG: s92, which guarantees that trade between the states will be free of federal interference.
 - US system provided the most influential precedent in establishing a federal system in Australia.
 - EG: a US-style upper house designed to protect the States, also called the Senate, was adopted.
 - The US system of distributing power whereby enumerated powers were conferred on the central government, and the residual powers left to the regional governments, was also incorporated.
 - The US system was therefore a much more influential factor than that of the UK system.
 - Early constitutional decisions tended to favour the preservation and enhancement of the powers of the States: **R v Barger**.
 - Now, however: the balance of power between the federal partners has for a long time swung inexorably in favour of the Commonwealth.
 - The prevailing interpretations of the tax power, the grants power, and the prohibition of States' powers to impose excise duties in s90 have left financial resources and powers disproportionately in the hands of the Commonwealth.
 - It could therefore be argued that while Australia remains a federation, the States' abilities to meaningfully exercise their powers are increasingly dependent on a good faith attitude to practical federalism on the part of the central government.

Separation of powers:

- This doctrine prescribes that the functions of the three arms of government be clearly and institutionally separated.
 - These three 'arms' are the executive, legislature, and the judiciary.
- The separation of powers 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 the governed.
- The distinction between the executive and the legislature has become increasingly blurred.
 - S64 of the Constitution requires that Commonwealth ministers (ie the executive) are drawn from the legislature, therefore mandating some degree of institutional merger between these two arms of government.

Responsible government:

- Under this doctrine, the executive is responsible to the legislature.
 - This is implicitly recognized under s64 whereby the Government ministers must be drawn from and accountable to the Parliament.
- The government will only remain in power if their party commands a majority in the lower house (ie confidence of the House).
 - In this respect the doctrine links the executive 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.
- There is also a degree of collective responsibility, ministers are also individually responsible to Parliament for the activities of the administrative departments that they head.
 - In this way, public service accountability is ensured; public servants are responsible to their Minister who is responsible to Parliament.

Judicial review:

- The High Court is the ultimate guardian of the Constitution, and has the power to review and determine the constitutionality of a legislative and executive or administrative action.
- While the judiciary is protected by the doctrine of separation of powers, the executive government still has one avenue of intrusion into the independence of the High Court, in that it is effectively in charge of appointments to the Bench: s72(i).
 - There are no constitutional constraints upon appointment, and the justices are still presently chosen by the Cabinet.
- The personalities of the justices on the Bench of the High Court have a large effect on the prevailing trends of interpretation.
 - EG: the 'Mason Court' took an unprecedented interest in the protection of human rights.
 - The retirement of the Justices Mason and Deane in 1995 and 1996 respectively signalled the end of this radical period of constitutional interpretation.

The Rule of Law:

- Relates to the fact that our society is governed by laws, and not by arbitrary exercises of power.
- Albert Venn Dicey argued that the 'rule of law' had three main facets:
 1. The law is absolutely supreme.
 2. There is equality before the law.
 3. The law should reflect the fundamental rights of the individual.
- The Australian Constitution implicitly recognizes the rule of law in clause 5 where it states that "*this Act, and all laws made by Parliament of the Commonwealth under the Constitution, shall be binding on the courts, judges and people of every State and every part of the Commonwealth*".

Parliamentary sovereignty:

- No Australian parliament is absolutely sovereign.
 - The powers of all Australian legislatures are constrained by the Commonwealth Constitution.
 - This contrasts with the UK position whereby the parliament is absolutely sovereign and has the power to 'make or unmake any law whatever' and, further, that no person or body is recognized by the law of England as having a right to override or set aside the legislation of Parliament.

- Parliamentary supremacy relates only to the fact that the legislature is supreme over the other two arms of government.
 - As long as the law it enacts is constitutional, a Parliament can legislatively abrogate the effect of the judicial decision.
 - Moreover, as the executive is linked inherently to the legislature, no area of executive action is beyond its reach.
- The fact that Parliament is the supreme arm of government in Australia is consistent with the authority it derives from its democratic mandate.

Sources of constitutional law:

The Constitution:

- The most significant source of constitutional law is the Constitution itself. Drafted in the 1890's and formally given legal status by the UK in the [Australia Constitution Act 1900 \(UK\)](#), it created a new political and legal entity.
- It has often been said that Australia is 'constitutionally frozen' in that the process for altering the constitution itself, under [s128](#), is highly restrictive and has prevented any major evolution in the primary document itself.

State Constitution Acts:

- Each individual State also has a Constitution Act which defines the basic formal institutions of government; the executive governments and, in some cases, the state Supreme Courts (Victoria has a separate Supreme Court Act).
 - The state Constitution Acts also define the location of executive power, in the Governor, representing the Crown, and the Executive Council of each state, which the latter body consisting of current ministers, who are appointed to their offices by the Governor.
 - The constitutional powers of the executive government are defined in the state Constitution Acts: (the summoning and dissolving of parliament, the appointment and dismissal of ministers and assent, in the name of the Crown, to legislation passed by the Houses of Parliament).
 - The State Constitution Acts are ultimately concerned with the mechanics of the institutions of government.
 - They are much narrower in content than the federal document and make no attempt to construct a framework for economic activity or to spell out a location of fiscal power.

Statute of Westminster:

- The [Statute of Westminster 1931 \(UK\)](#) was the first major emancipating step Australia took.
- After a series of 'Imperial Conferences' amongst the UK and its dominions from 1917 and throughout the 1920's, at which it became clear that these dominions were factually if not legally independent, the Statute was enacted in 1931.
- The Statute did not apply in Australia until it was adopted by the Commonwealth Parliament ([s10](#)), which occurred with the passage of the [Statute of Westminster Adoption Act 1942](#) (adoption backdated to September 3rd 1939).
- The Statute effectively solidified Australia's position as an independent country.
 - [S2 \(1\)](#) declared that the [Colonial Laws Validity Act 1885 \(UK\)](#) did not apply anymore.
 - This Act effectively stated that if the dominion's laws were repugnant to the UK law relating to that colony then they would be deemed void.
 - [s2 \(2\)](#) confirmed that no law of a dominion would be held to be invalid for the reason of repugnance to any law of the UK.

- [S2 \(2\)](#) also gave the Commonwealth the power to repeal or amend any UK Act which had previously applied to it.
- [S3](#) stated that the Commonwealth had full extraterritorial power.
- Thus, as of the 3rd of September 1939, the Commonwealth was legally free from the UK Parliament.

The Australia Acts:

- Despite the passing of the Statute of Westminster (SoW), the States remained subservient to the UK. EG: **China Ocean Shipping v SA** HC found SA legislation invalid due to its inconsistency with a 1984 UK merchant shipping law.
- The Australia Acts 1986 were therefore passed, giving the States complete independence from the UK.
 - The legislative scheme of [the Australia Act 1986 \(Cth\)](#) with regard to the States was very similar to that applied to the Commonwealth by the SoW.
 - Most appropriately, [s1](#) terminated the power of the UK Parliament to legislate for any of the States.
- [S15](#) entrenched the Australia Act and the SoW by stating that they could only be amended under [s128](#) (referendum) or with the consent of all of the States.
 - A return to British rule was therefore effectively made impossible.
 - The Australia Acts were thus given constitutional status under [s15](#).
- The Australia Acts made HC the highest court of appeal in Australia.
 - The Privy Council was no longer a part of our legal system and was not binding on our courts: [s11](#).
 - The HC has indicated that they will never issue such a certificate: **Kirmani v Captain Cook Cruises**.
- The Act was validated under [s51 \(xxxviii\)](#) allows the Commonwealth Parliament to legislate in areas of UK power if they gain the consent of all of the States.
 - The consent of the States was evidently given.
- The Australia Acts gave both the Commonwealth and States complete legal independence from the UK.