

## (1) INTRODUCTION

### (1) Outline of Constitutional Documents and their History

#### (I) THE COLONIAL ORIGIN OF STATE CONSTITUTIONS

##### (a) NSW: 1788 to the 1820s

- Australia was initially established as a penal colony.
- This meant that the only laws that were developed in New South Wales were criminal laws – in all other situations, English law was to apply.
- Additionally, the Governor of each colony initially had absolute power and control (especially with regards to regulation).
- In 1823, the Legislative Council of New South Wales was established by English law.
- Two interesting observations of the Legislative Council can be made:
  - The laws passed by the council also had to be passed by the English Government.
  - The Chief Justice of the Supreme Court had the responsibility of ensuring that laws passed by the council were not “repugnant” (contrary to) to British Laws of “paramount force” (Enacted specifically for the colony)
  - Since the Chief Justice had an advisory role to the legislature, this breached the doctrine of the separation of powers.
- In 1825, the Executive Council (more commonly known as The Cabinet) was established by English law.
- An interesting observation of the Executive Council at both the State and Federal level is that, although in practice, politicians represent Australia’s Head of Government, State and Federal Constitutions place the Governor and Governor-General as the country’s Head of Government.

##### (c) NSW: The 1850s to the 20<sup>th</sup> Century

- In 1855, English Parliament and the Legislative Council enacted the NSW State Constitution.
- This constitution:
  - Incorporated the principles of Responsible Government.
  - Introduced a Bicameral Legislature (two Houses of Parliament – the Legislative Council and the Legislative Assembly).
- However, the Constitution still required State laws to be passed by English Parliament.
- In 1865, the English Parliament enacted the *Colonial Laws Validity Act*.
- This Act enabled the Colonies to enact laws that were inconsistent with English Law.
- However, complete legal independence was not established at this point in time, because certain Colonial laws still had to comply with English laws that clearly (and expressly) applied to a colony.
- In 1902, the *Constitution Act* (NSW) was passed.
- This Act made no major improvements or developments on the 1855 Act.
- Moreover, the Act did not establish legal independence from England – the English Parliament still had a ‘veto power’ over NSW laws.
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## **(II) THE HISTORY OF THE COMMONWEALTH CONSTITUTION**

### **(a) The 19<sup>th</sup> Century**

- In 1850, the *Australian Constitutions Act* was passed in order to promote inter-colonial co-operation.
- However, notwithstanding that there were numerous issues on which inter-colonial co-operation was necessary or desirable, 1850 was still far too early for the colonies to consider federation.
- There were several issues which prevented federation at that time:
  - Customs tariffs continued to be a source of friction between the colonies.
  - The smaller colonies did not want to lose their identity and power by being 'dominated' by New South Wales.
  - The larger colonies did not want to relinquish power to the smaller colonies, nor subsidise their struggling economies.
- Nevertheless, there were factors which drew the colonies closer together, one of which was the fear of common enemies was one cause of co-operation, given the increasing presence of German and French forces in the South-Pacific.
- This fear led to the establishment of the Federal Council of Australasia in 1885, which was the first major form of inter-colonial co-operation.
- Nevertheless, the Federal Council only really dealt with foreign affairs issues, such as quarantine standards, immigration and defence.

### **(b) The 1891 Convention**

- Sir Henry Parkes instigated the National Australasian Convention in 1891 – this Convention was the first step towards federation.
- However, the process of federation encountered a few hurdles:
  - Tariff policies and customs duties were again a major friction point.
  - There was indecisiveness on how to structure and the relationship between the lower and upper houses of Parliament
- A draft constitution was constructed at the Convention, but this draft did not gain widespread support in the various colonies, including the all important New South Wales.

### **(c) The 1897 Convention**

- Another Convention was held in 1897. It too produced a draft constitution.
- However, this draft also produced several areas of concern:
  - The method in which deadlocks between the upper and lower houses of Parliament would be resolved.
  - The ability to appeal from the High Court to the Privy Council.
- These issues were resolved in the following manner:
  - Only an overall majority in a joint sitting of both Houses of Parliament could resolve deadlocks.
  - The High Court was the final court of appeal in matters of constitutional interpretation, but all other cases in other areas of law could be taken to the Privy Council.
- In its final version, the draft constitution was submitted to the electors in each colony to be ratified in a referendum.

- Thereafter, the draft constitution was enacted by the Queen in the Westminster Parliament – this was necessary, for only by an Act of the Imperial Parliament could there be any legal basis for the federation of a group of colonies.
- Finally, the *Commonwealth of Australia Constitution Act* was passed by the British Parliament in 1900 and came into effect on the 1<sup>st</sup> of January, 1901.

#### **(d) Human Rights in the Constitution**

- The Australian Constitution only contains a few provisions that protect human rights (see s80 and s116).
- A Bill of Rights was not included in the Constitution for two main reasons:
  - The framers of the Constitution did not want a Bill of Rights to infringe on the ability of the States to enact racially discriminatory legislation against the aborigines, the Chinese, and the Pacific Islanders.
  - The framers of the Constitution were mainly concerned with the financial and trade issues arising from federation and how best to weigh the interests of the small States against those of the more populous States in the new federal Parliament.
- Nonetheless, it is clear that the framers of the Constitution were influenced by the work of AV Dicey.
- Dicey, who was sceptical of the need to expressly guarantee rights in a written constitution, argued that civil liberties can be adequately protected through the common law and political processes.
- Indeed, the failure to include a Bill of Rights in the Australian Constitution is consistent with the Diceyan notion of parliamentary sovereignty – that parliament has the right to make or unmake any law whatsoever, and that no person or body is recognised by the law as having a right to override or set aside the legislation of Parliament.

### **(III) THE STATUTE OF WESTMINSTER**

- The *Statute of Westminster* 1931 (Imp) freed the Dominions (including the Commonwealth) from Imperial restrictions:
  - s2 of the *Statute of Westminster* provided that the *Colonial Laws Validity Act* (and, consequently, the doctrine of “repugnancy”) did not apply to Australia.
  - s4 of the *Statute of Westminster* stated that the British Parliament could only legislate for Australia with the request and consent of the Commonwealth Parliament.
- The Statute also removed any restrictions upon Commonwealth legislative power arising under the extra-territoriality doctrine.
- However, the crucial provisions of the *Statute of Westminster* did not automatically apply to Australia. At the request of the Dominions, it was left to them to ‘adopt’ these provisions under s10 of the Act – this Australia did in the *Statute of Westminster Adoption Act* 1942 (Cth).
- The Statute marked an important step in Australian legal independence – the Commonwealth Parliament could now enact laws that were inconsistent with British Legislation.
- However, the Statute only applied to the Commonwealth Federal Parliament – it did not apply to the States, who were still bound by the repugnancy principle.
- Therefore, at this point in time, Australia was not *completely* legally independent from England.

### **(IV) THE AUSTRALIA ACTS**

- The *Australia Act* 1986 (Cth) was the final step in the severing of legal ties with the UK.

- The passing of the Act signalled the end of the power of the British Parliament to legislate for Australia (s1) and removed the doctrines of extra-territoriality (s2) and repugnancy (s3) insofar as they applied to the States.
- Similarly, by terminating any remaining appeals from Australian courts to the Privy Council, the Act had ensured that no institutions of government of the United Kingdom exercised any judicial powers with respect to this country – (the same conclusion was also reached in respect of executive power).
- The Australia Act was also passed in England and every Australian State – this ensured that the Act brought a complete end to the continued application and paramountcy of Imperial laws in Australia.

*Sue v Hill*

- In the present case, it was held that, with the passing of the *Australia Act*, the United Kingdom was to be considered a 'foreign power' under s44(i) of the Constitution.
- Indeed, the United Kingdom now has a distinct legal personality and its exercises of sovereignty have no legal consequences for Australia.

*Shaw v Minister for Immigration and Multicultural Affairs*

- The *Australia Act* was a formal declaration that the Commonwealth of Australia and the Australian states were completely and constitutionally independent of the United Kingdom.

(2) The Constitution, Its Structure and Themes
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(I) WHAT IS A CONSTITUTION

- A Constitution is the 'fundamental' or 'primary' law of a nation – it is the highest authority of law, which regulates all the other laws of a country.
- The constitution also regulates the three different arms of government – the constitution limits the functions and power of each arm and restricts the way in which they operate.
- There are two basic types of constitutions:
  - A written Constitution (such as the United States model)
  - An unwritten Constitution (such as the English model).

## (II) THE SOURCE OF POWER FOR A CONSTITUTION

### (a) Historical Sovereignty and Legal Legitimacy

- The historical sovereignty of the Constitution is necessarily reliant on Australia's colonial past.
- The *Commonwealth of Australia Constitution Act* 1900 (Imp) was enacted by the British Imperial Parliament.
  - Therefore, formally, the Australian Constitution derives its validity and legal legitimacy from an exercise of British sovereignty.
- Unlike in the United States, the Australian Constitution is not a supreme law purporting to obtain its force from the direct expression of a people's inherent authority to constitute a government. Rather, it is a statute of the British Parliament, enacted in the exercise of its legal sovereignty.
- As such, the Constitution is legally binding because of the status accorded to British statutes as an original source of Australian law, and also because of the supremacy accorded to such statutes.

### (b) Popular Sovereignty and Political Legitimacy

- An additional way of explaining the reason for the legally binding and fundamental character of the Constitution can be found in the words of the preamble, which refers to the people of the Australian colonies having agreed to unite in a Federal Commonwealth.
- The words in the preamble draw attention to the political reason for the Constitution's enactment, the document having been, in large measure, approved by the people of Australia in a referendum.
- The importance of the role played by the Australian people is further underlined by the ability given to them to amend the Constitution in accordance with s128, as well as their acquiescence in the continued operation of the Constitution as fundamental law.
- According to this approach (popular sovereignty), the Constitution now enjoys its character as a higher law because of the will and authority of the people.
- Additionally, the notion of popular sovereignty as the main source of power for the Australian Constitution is further emphasised by case law:

#### *Bisricic v Rokov*

- Murphy J stated that the Constitution was binding because of its continuing acceptance by the Australian people.

#### *Australian Capital Television Pty Ltd v The Commonwealth*

- Mason CJ stated that the Australia Acts marked the end of the legal sovereignty of the Imperial Parliament and recognised that ultimate sovereignty resided in the Australian people.

#### *Theophanous v Herald Weekly Time Ltd,*

- Deane J argued that the present legitimacy of the Constitution lies exclusively in the original adoption (by referenda) and subsequent maintenance (by acquiescence) of its provisions by the people.