Constitutional Law

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Problem Solving

1. Issue
2. Heads of Power
   - For a federal law to be valid, the law must be supported by one of the legislature’s head of powers.
   - Or is it plenary? (Union Steamship Co of Australia Pty Ltd v King)
3. Scope and limitations of power
4. Operative
   - For a law to be valid, it must also be operative (Butler v Attorney-General of Victoria)
5. Characterisation
6. Other heads of powers
7. Inconsistency (Issue)
8. Direct Test
9. ‘Cover the Field’ Test
   - Two questions
     - First one 3 parts, 7, 7, 6 marks.
     - Second part is one of two choices.
10. Don’t need to know aliens.
    Grants, what we know (conditional, States can accept or refuse)

Fundamentals of Constitutional Law

- A constitution is the basic law of a state, containing the fundamental rules that govern the interaction between the organs of government, and between the government and the people.
- It grants, limits and defines the powers available to entities within the state.
- Doctrine of constitutionalism
- Constitutionalism usually is referred to imposing limits on legislative, executive and judicial powers (Waluchow, 2001).
  - In Australia, constitutionalism is not embedded within the constitution as an implied norm. Instead, it can be shaped by the political process (including taking away fundamental rights).
  - For example, the AC does not prevent passing retrospective criminal laws because the AC did not emerge from climates of mistrust of colonial powers and because the interests of citizens were regarded as adequately protected by parliamentary representation and responsible government (Kruger v Commonwealth).
- The AC has no ‘supremacy clause’ unlike the Canadian Constitution (e.g. s 52) or South African Constitution (s 2) except:
  - Section 5 of the Preamble (covering clause 5 of the Constitution)
  - Ss 106-7- preserves the constitutions and the powers of the states ‘subject to this Constitution’
  - Ss 108-109, Constitution trumps state legislation if inconsistent
- Unlike Canada, the AC was put to the Australian people in a referenda for acceptance
- Binding power:
  - The Australian Constitution gains its legal and political authority from popular sovereignty, as inscribed in the Preamble the fact that the AC was passed because the people agreed to federate and be governed by that document (Australian Capital Television Pty Ltd v Commonwealth). The Constitution therefore is ‘higher law because of the will and authority of the people’ (Lindell 1986).
  - Sections 7, 24 (Parliament members are directly chosen by the people) and 128 (amendment only possible by the consent of the populace) also support this.
- Characterising a law:
  - Judges will consider ‘the nature of the rights, duties, powers and privileges which [the law] changes, regulates or abolishes’ (Fairfax v Federal Commissioner of Taxation at 7 per Kitto J)
- Effect of unconstitutionality
  - The infringing law becomes a nullity (‘invalid’ ab initio)- as if it had never been made.
  - There is no such thing as a voidable law or government action except:
    - If a state law is consistent with a federal law, the state law remains inoperative until the federal law is repealed or amended to remove the inconsistency (s 109)
- The common law must be moulded to be constitutional (Lange v Australian Broadcasting Corporation)
- State constitutions:
  - State Constitutions were created through s 106 of the Constitution.
  - Can be repealed or amended easily
  - If a state legislation is inconsistent with a state Constitution Act, it may simply be amended rather than seen as breaching it.
  - However, they are very important in some respects, e.g. the role of the Crown, that they cannot be repealed without Commonwealth assistance (Taylor v Attorney-General (Qld))
  - The territories do not have a Constitution
- Sources of Constitutional Law:
  1) The Constitution
3) The Common Law

4) Constitutional Conventions

- Constitutional Conventions
  - Political practices which are regarded as obligatory. They regulate the way constitutional powers are exercised.
  - A breach of a convention may be regarded as unconstitutional but not unlawful. However, because they are not unlawful, they are unenforceable by the courts (Mazimbamuto v Lordner-Burke)
  - The effects of breaching a Constitutional convention include political outcry (if the convention was important),
  - For example, s 58 of the AC states that the Governor-General has the discretion whether to assent to the Bill being passed. However, convention is that the G-G always assents.

- Amending the Constitution:
  - Set out in s 128:
    - 1) Must be passed by both houses of Parliament by an absolute majority. If that isn’t achieved, then by one house, on two occasions at least three months apart.
    - 2) A majority of votes supporting it in all States (this doesn’t include Territories)
    - 3) A majority of all voters in the country

- Section 51 (xxviii) contains the power to request the Commonwealth Parliament to exercise any power which the UK Parliament could, at the time of the Constitution becoming effective, have exercised. Because at the time the UK Parliament could have repealed the first 8 sections of the Commonwealth of Australia Constitution Act, Australia could gain the exact some power over its own Constitution.

- Important sections:
  - Covering Clause 5 states that the Constitution, and all laws made under the Constitution, shall be binding on all courts, judges and Australian people notwithstanding any law.
  - Section 1 states that the legislative power shall be vested in the Federal Parliament which consists of the Queen, a Senate and a House of Representatives.
  - Section 6 states that the Parliament must convene at least once a year.
  - Section 7 states the Senate shall be compromised of senators of each state, directly chosen by the people of the State as one electorate. There should be at least 6 senators from each Original State.
  - Section 13 states that senators are to be split up as evenly as possible, so that half of them expire in 3 years and the other half expire in 6 years. The election to fill vacant spaces shall be made within one year before the places begin to become vacant.
  - Section 24 states that the House of Representatives shall be chosen directly by the people of the Commonwealth and should be twice as large as the Senate. The number of people representing a state shall be in proportion to the state’s population.
  - Section 25 states that if an entire race is disqualified from voting, those people shall not be counted in the population.
  - Section 28 states that the House of Representative cannot last longer than 3 years, but may dissolve sooner by the Governor-General.
  - Section 41 states that anyone who had, or acquired, a right to vote under State law for the most numerous house of the State Parliament (lower house) could not, while that State right exist, be denied the right to vote for the Federal Parliament.
  - Section 44 states that the following category of people cannot becoming senators or members of the House of Representatives: (i.) is under any acknowledgement of allegiance, obedience, or adherence to a foreign power, or is a subject or a citizen or entitled to the rights or privileges of a subject or citizen of a foreign power: or (ii.) Is attained of treason, or has been convicted and is under sentence, or subject to be sentenced, for any offence punishable under the law of the Commonwealth or of a State by imprisonment for one year or longer: or (iii.) Is an undischarged bankrupt or insolvent: or (iv.) Holds any office of profit under the Crown, or any pension payable during the pleasure of the Crown out of any of the revenues of the Commonwealth: or (v.) Has any direct or indirect pecuniary interest in any agreement with the Public Service of the Commonwealth otherwise than as a member and in common with the other members of an incorporated company consisting of more than twenty-five persons:
  - Section 51 lists all the categories which the Commonwealth may make laws to. The words ‘peace, order and good government’ are not words of limitation, but words which describe a power to make and unmake laws that is ample and plenary (Union Steamship Co of Australia Pty Ltd v King)
  - Section 61 provides that the executive power of the Commonwealth is vested in the Queen and her representatives. This power extends to the laws of Australia and the Constitution.
  - Section 71 states that the judicial power of the Commonwealth is vested in the High Court and other federal courts. The High Court shall consist of a CJ, and so many other justices, not less than 2, as the Parliament prescribes.
  - Section 72 states that the justices of the High Court must be appointed by the Governor-General. They also may only be removed by the Governor-General on address from both Houses of the Parliament due to misbehaviour or incapacity. Judges must retire at 70.
  - Section 73 states that the High Court can hear any case but if it is an Inter-State Commission, it will only hear a question of law. The High Court’s decision is final and conclusive. Doesn’t guarantee the right to an appeal, but confers High Court jurisdiction.
  - Section 75 states that the High Court has original jurisdiction for matters:
    - Arising under any treaty:
Affecting consuls or other representatives of other countries:
- In which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party:
- Between States, or between residents of different States, or between a State and a resident of another State
- In which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth

- Section 76 and 77 enables the Commonwealth to vest Federal jurisdiction in the 'other federal courts' the parliament may create under s 71.
- Section 80 states that trial on indictment of any offence against any law of the Commonwealth shall be by jury.
- Section 109 states that any inconsistency between a State law and Commonwealth law shall be resolved with the Commonwealth law prevailing and the State law, to the extent of the inconsistency, becomes invalid.
- Section 122 provides the Commonwealth with the power to make laws for any countries which the Commonwealth acquires.
- Section 128 is the amendment section

The failed Preamble amendment:
- Page 290-291 of Hanks.

The Westminster System (coined by Elaine Thompson):
- From the Westminster System, the AC incorporated the doctrines of constitutional monarchy, parliamentary sovereignty (i.e. unlimited power of the legislature) and responsible government (answerability of the executive to the legislature).
- From the US model, the AC incorporated federalism (including a Senate elected on a states' franchise), a rigid constitution and judicial review of legislative action by a separate supreme court

Rule of Law:
- The British Constitution is heavily influenced by A V Dicey's three fundamental principles of the Rule of Law:
  1) Ruled by law- The supremacy of the law over arbitrary power
  2) Equality before the law- Equal subjection of all classes to the ordinary law of the land
  3) Power comes from the people- The rights of individuals is the source of law
- Some definitions include the regulation of society by:
  - Laws that are democratically made in a process which the people are familiar with
  - Laws that protect and enforce universal human rights
  - Laws that are certain, being prospective, open, clear and relatively stable
  - Laws that apply equally to all, including the government as far as possible
  - Laws that can be applied impartially, honestly and fairly whose effects are subject to review by independent authorities.

Judicial Review:
- The first time a court has invalidated a law because it was unconstitutional was in Marbury v Madison.
- This became known as 'judicial review' and referred to the process of the judiciary having the final check on the validity of laws created by the legislature.
- There is no parliamentary supremacy in Australia because of 'judicial review' (Chu Kheng Lim v Minister for Immigration)

Difference to other nations:
- It doesn't have a supremacy clause and is predominately an organisational document with little focus on the rights of the citizen.

Ties to UK:
- Whilst they can never legislate for us again due to the Australia Act 1986 (UK and Cth)
- However, the Queen and the Governor-General still remain the source of executive power (e.g s 2)

Hickman principle:
- The High Court affirmed the Hickman Principle as a method of resolving inconsistencies, 'if there is an opposition between the Constitution and any such provision, it should be resolved by adopting [an] interpretation [consistent with the Constitution if] that is fairly open' (Plaintiff S157/2002 v Commonwealth)

Legislative Structures:
- Bicameral legislatures (except Queensland).
- The Statute of Westminster Adoption Act 1942 (Cth):
  - Provided for the adoption of ss 3-6 of the Statute of Westminster 1931 which provided the Colonial Laws Validity Act would no longer apply.
  - This allowed Australia to legislate repugnantly to UK legislation applying to them (s 2).
  - Australia could legislate with extraterritorial effect (s 3)
  - The UK Parliament would not legislate for Australia except at their request (s 4)

Australia Act 1986 (Cth):
- The UK Parliament no longer has the power to legislate for the Commonwealth or the States, even at their request (s 1)
- The States have extraterritorial legislative capacity (s 2)
- The States are no longer subject to the Colonial Validity Act and can legislate repugnantly to the UK Statutes applying to them except for the Commonwealth Constitution, the Statute of Westminster and the Australia Act itself (s 5).

Attorney-General (WA) v Australian National Airlines commission (1976) 138 CLR 492:
- The main issue was whether the Commonwealth was able to make laws (s 19B) concerning transport between two destinations within the single state. Section 51 (xxxix) allows the Commonwealth to make laws concerning trade and commerce between states and other countries, and amongst states. There is no mention of within a state. Section 122 allows the Commonwealth to make laws governing any territory.
- Held s19B was valid due to s 122 of the Constitution.
The Right to Vote and Representative Government

- **Entick v Carrington** (1765) 19 St. Tr. 1030:
  - Entick was an anti-government pamphleteer. Carrington, a Secretary of State (MP), ordered troops to raid Entick’s house and take all documents without a warrant. Entick sued for trespass. Carrington argued that being an MP was a defence.
  - Held government and its agent are just as much subject to the law as everyone else in the absence of statutory or common law authority authorising their acts.

- **Madzimbamuto v Lardner-Burke** [1969] 1 AC 645:
  - The government of Southern Rhodesia (colony of England), unilaterally declared independence from the UK. The United Kingdom Parliament enacted legislation declaring the Rhodesian Government’s actions unlawful, using provisions in the Southern Rhodesia Constitution Act 1961 (UK) which expressly stated the UK could enact legislation for Southern Rhodesia. However, there was a Constitutional Convention that the UK would not exercise this legislative power without the consent of Southern Rhodesia. Madzimbamuto was a political activist who was detained under provisions declared unlawful by the UK legislation.
  - Held that a Constitutional Convention is not a law, therefore could not be enforced. Resultantly, the UK did have the power to pass laws for Southern Rhodesia.

- **Plaintiff S157/2002 v Commonwealth** (2003) 211 CLR 476:
  - Plaintiff applied for a visa under the Migration Act 1958. The Minister responsible for immigration denied it. The Refugee Review Tribunal affirmed the minister’s decision. Sections 474(1) and 486A of the Migration Act stated that the High Court will not hear these cases after 35 days have expired. The plaintiff sought leave to the High Court invoking the Constitutional right given in s 75(v) of the Constitution which states that where an injunction is sought after a Commonwealth Officer, the High Court has original jurisdiction. Plaintiff contended those two sections were invalid.
  - Held the sections are valid. It would only become invalid if it tried to oust the jurisdiction of the High Court.
  - Followed the Hickman principle which stated “if there is an opposition between the Constitution and any such provision, it should be resolved by adopting [an] interpretation [consistent with the Constitution if] that is fairly open’.

- **Singh v Commonwealth** (2004) 209 ALR 355:
  - The female Australian-born plaintiff has Indian parents. Neither of the parents had Australian citizenship or PR. The plaintiff is also a citizen of India. Thus, she’s Australian born but not a citizen. Under s 10(2) of the Citizenship Act 1948 (Cth), the plaintiff is an Australian citizen by birth if one of her parents were Australian citizen/PR or were ‘ordinarily resident in Australia’ for the first 10 years of the plaintiff’s life. The plaintiff’s father lodged for protection visas for himself, his wife and his son. These were rejected. The plaintiff commenced proceedings relying on the fact that she was born in Australia so she won’t be removed as an ‘unlawful non-citizen’ pursuant to s 198 of the Migration Act 1958. The respondents claimed that she is not immune from s 198 of the Migration Act because it only applied to Australian citizens. Plaintiff argued that ‘aliens’ did not mean, at the time of federation, people born within Australia.
  - Held the plaintiff was an ‘alien’ according to s 51(xix) of the Constitution. This only applies to Australian citizens, not citizens of a foreign state. This is because a central characteristic of ‘aliens’ is, and always have been, owing obligations to a sovereign power other than Australia.
  - Held the legal and historical context of the word ‘aliens’ does not support or require s 51(xix) excluding the plaintiff. Per Kirby J, the word ‘aliens’ is not fixed to forever be defined in its context.
  - Held therefore the Parliament can decide who is an alien, but does not mean the Parliament can decide it to mean ‘whatever it wants it to mean’ (per Gleeson CJ at 36).

The Right to Vote and Representative Government

- **History**:
  - Initially only white males who met property-owning qualifications were allowed to vote.
  - Women enfranchised in all Australian jurisdictions by 1908, ATSI by 1960s.

- **Implied right to vote**
  - There is only an implied right to vote by s 41. That section basically states that the qualifications to vote for the Federal Parliament could not be any narrower than they were for State Parliaments.

- **Denying a right to vote**:
  - However, this does not mean the Parliament can disenfranchise the population because there is always an implied right to vote (Roach v Electoral Commissioner). This is clear from ss 7 and 24 which require the Parliament houses to be ‘directly chosen’ by the people.
  - Courts use a proportionality test (Roach v Electoral Commissioner; Rowe v Electoral Commissioner) to determine whether the denial of the right to vote is reasonable. Must be ‘appropriate and adapted’ to a system based on representative government.
  - Currently, prison sentences longer than 3 years will deny the prisoner the right to vote (Roach).
  - No particular electoral system is mandated, expressly or impliedly, by the constitutional provisions (Roach v Electoral Commissioner)

- **Representative Government**:
  - Laws are made with the consent of those who are subject to the law, through their representatives.
  - Section 7 provides for the Senate being composed of senators being chosen by the people, and section 24 with a similar provision dealing with the House of Representatives. The Preamble of the Constitution begins with ‘...the people of’ as well as section 128 which allows the amendment of the Constitution only with the majority consent of the people.
  - The Australian legal system does not strive to pursue a ‘representative government’ in its most ideal form, but instead is constrained by the meaning and content of the text and structure of the Constitution (McGinty v Western Australia).
-Underlying or overarching doctrines (such as ‘representative government’) may help illuminate the meaning or structure of the Constitution but it is not an independent source of power and authority.

- **Rowe v Electoral Commissioner [2010] HCA 46:**

  - Two plaintiffs missed out on an opportunity to vote. Section 102(4AA) of the Commonwealth Electoral Act stated that the claims of enrolment cannot be considered after 8pm on the day of the issue of writs (22 July 2010). The first plaintiff had just turned 18 and lodged her completed enrolment form on the 23 July 2010. The second plaintiff had changed his address therefore changed his voting electorate, and lodged his form in after 22 July 2010. By virtue of s 102(4), his form was not considered. The plaintiffs claimed these sections were unconstitutional.
  
  - Held those sections were invalid because the purpose of those sections were primarily to prevent fraud, with a smoother and more efficient electoral system as a secondary reason. Evidence suggested that the AEC had no difficulty in processing the volume of late enrolments. Therefore the cost of denying the plaintiffs their constitutional right to vote was disproportionate to having a ‘smoother and more efficient electoral system’. It was not for a ‘substantial reason’ that the constitutional imperative was denied.

- **Sue v Hill (1999):**

  - Held British citizens are no longer automatically presumed Australian citizens. Thus Hill was a citizen of a foreign power pursuant to s 44(i) of the Constitution.
  
  - Held the UK is just an ordinary foreign power.

**Responsible Government**

- Responsible government means the executive relies on the support of the legislature to stay in office.

- This doctrine is a set of rules- partly statutory, partly conventional- designed to ensure that the government is answerable to the legislature and holds office only so long as it has majority support in the legislature.

- **History:**

  - Arose during the 18th C, where the monarch withdrew from active participation in government and chose a leader of the government to head the ministry on his behalf.
  
  - First ‘Prime Minister’ (although term wasn’t used then) was Sir Robert Walpole.
  
  - It was recognised that to be effective in governing, the ministry had to retain the support of Parliament and was ‘responsible’ to it.
  
  - A prime minister who cannot maintain a majority, because some MPs have turned against him/her, would either have to resign (leaving the GG to appoint a new PM), or ask the the monarch to dissolve Parliament so that an election could be held.
  
  - In the 18th Century, to ensure support, there was a lot of bribery and underhand tactics by the PM because there was no formality and party discipline.
  
  - This changed in the 19th and early 20th century. Parties became formalised and rigid, and could use the threat of disendorsement and withdrawal of financial support to MPs who do not vote for Cabinet policies.

- **Responsibility Government- Commonwealth:**

  - Section 61 of the Constitution states that executive power vests in the Queen and is exercisable by the GG as her representative.
  
  - Section 64 states that the GG may appoint officers to administer departments of state, and that such officers are members of the Executive Council. Section 62 states that the function of the Executive Council is to advise the GG in the exercise of his or her executive powers.
  
  - The combined effect of these two sections is the Executive Council consists of all the ministers of the Crown plus the GG.
  
  - Although formally the Executive Council only advises the GG in the exercise of executive power, the reality by convention is that the GG always follows this advice.
  
  - By virtue of s 64, members of the Executive Council must be members of either House of Parliament or will be so in 3 months from appointment. So if an MP loses his seat in an election, the MP can rejoin if he was elected in a by-election and there was a spare seat (if another MP resigns).
- Although s 64 allows the GG to choose his/her own Executive Council, by convention he/she must choose as Prime Minister whoever is able to command a majority in the House of Representatives and act on the PM’s advice as to who the other members of the Executive Council should be.
  - By convention, the GG can only dismiss a minister only if advised to do so by the PM.
  - By convention, the PM holds office as long as he/she has the support of a majority in the House of Representatives. They do not need a majority in the Senate because governments frequently do not have a Senate majority.

  - Lack of support is shown by a successful vote of no confidence or if the government failed to obtain passage through the house of legislation.
  - Section 28 states that the House of Representatives can last for a maximum duration of 3 years. However, the PM has the power to advise the GG to dissolve the house and call an election at any time. By convention, the GG must act on this advice. Thus, the PM determines the timing of elections.

• No support by the House of Representatives:
  - The PM must either:
    1) Advise the GG to dissolve Parliament and call for an election or
    2) Resign, allowing the GG to invite whoever can command a majority in the house to form a government. If no one exists, then an election is called.
  - If the PM refuses to adopt either course of action, convention would allow the GG to dismiss the PM using a ‘reserve power’ given in s 64.

  ➔ ‘Reserve powers’ are powers which convention allows the GG to exercise on his or her own initiative, not someone’s advice.

Separation of powers

➤ History:
  - This doctrine developed during the 18th Century Enlightenment. French theorist Baron de Montesquieu identified the three branches of government:
    1) Legislative- creates laws
    2) Executive- implements laws
    3) Judiciary- construes laws
  - He argued that two types of separations needed to be observed
    • Functional separation: no branch of government should exercise a function belonging to other branches
    • Physical separation: no individual should be able to be a member of more than one branch of government at the same time.

➤ United States:
  - The drafters of the US Constitution of 1787 were strongly influenced by Montesquieu and produced a strict form of the separation of powers:
    Executive: President  Legislative: Congress  Judiciary: Judges and courts
  - The Congress (consisting of the House of Representatives and Senate), and the head of the executive (President) are directly elected by the voters.
  - Members of the House of Representatives serve 2 year terms, while Senators serve 6 years.
  - The President holds office for 4 years.
  - Judges are appointed by the President and enjoy security of tenure.
  - The President is not responsible to Congress for his or her tenure in office. The President can also select anyone to be a member of the Cabinet.
  - Unlike the responsible government system, any Cabinet members must resign from the legislative branch. In the responsible government system, the members of the Cabinet are required to be members of the legislature.
  - President stays in office regardless of whether his/her party holds the majority in either houses.
  - The balance of power is far more even in the American system because the President cannot dissolve the Congress. Also, not being present in the Congress, the President and Cabinet have less influence over the Congress. This has the effect of MPs of the President’s party not always voting for the Cabinet’s policies.
  - Legislation that has passed the Congress may not be assented to by the President by a veto. However, the President’s veto can be overridden if the legislation obtains a 2/3 majority in each house.
  - Therefore a legislation is a product of negotiation between the Congress and the President.
  - The President appoints the Cabinet and Supreme Court judges but these appointments must be approved by the Senate.

➤ Australia:
  - Separation of powers only applies to the judicial branch:
    ➔ The members of the Cabinet (executive) are required to be part of the legislative branch and hold office only if they have the majority of the House of Representative’s support.
    ➔ Only judges enjoy the security of tenure.
  - Parliament frequently delegates legislative power to the executive because the legislative cannot cover all details. The Parliament has the implicit ability to delegate legislative power to the executive without contravening the Constitution and the doctrine of separation of powers (Victorian Stevedoring and General Contracting Co Ltd v Dignan)

  ➔ § 38 of the Legislative Instruments Act 2003 (Cth) requires that delegated legislation must be tabled before each House of