

**AUSTRALIAN  
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SUMMARY  
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## **Introduction**

- **Constitution classifications**
  - **Flexible constitution:** a Constitution, which can be changed like an ordinary statute
  - **Rigid constitution:** a Constitution which cannot be changed the same way as an ordinary law, rather through some set procedure or process, like a referendum.
  
- **Written & unwritten constitutions**
  - **Written:** a constitution is said to be written when the most important constitutional laws constituting the basis of the state are specifically enacted & specified in one formal document or a series of formal documents which are binding on the courts, the executive, the legislature & the people.
  - **Unwritten:** the basic laws are given the importance of a constitution, but are not enacted as one formal set of fundamental constitutional laws (eg. Israel)
  
- **Australia's constitution**
  - Rigid constitution which can only be changed via a referendum
  - Contains both written & unwritten parts (ie. the unwritten flexible conventions & common law interpreting the constitution complements the written constitution)
  - **Function:** establishes institutions that serve as the authoritative sources of law & give them legislative power. Often accompanied by explicit & implicit limitations on power.

**From where does the constitution derive its validity?**

There are numerous theories which can explain why we obey the constitution

<p><b>Kelsen<sup>1</sup></b></p>	<p><b>Kelsen's theory</b></p> <ul style="list-style-type: none"> <li>• The entire legal order is a pyramid of norms from norms creating powers conferred by the constitution</li> <li>• The constitution is the 'Grundnorm or basis norm', its content is regarded as 'self evidence' &amp; is presupposed from the highest norm &amp; from which norms for human behaviour is logically deduced.</li> <li>• Other legal norms are not valid because it has a certain content but is valid because of the way it is created such that its content is logically deducible from a presupposed basic norm</li> </ul> <p><b>Problem with Kelsen's theory</b></p> <ul style="list-style-type: none"> <li>• Kelsen seeks to construct a systematic framework for pure theory of law characterised by hierarchy &amp; unity but in reality it is not so structured</li> <li>• One needs to make a moral judgment to believe the constitution is the Grundnorm (ie. the one you should obey). There are still cultural &amp; other influences that are simply masked by Kelsen's analysis that we simply obey it because it is an assumption.</li> <li>• Theory is too inert &amp; has not consideration of the cultural framework which contributes to the validity of the legal system<sup>2</sup></li> </ul>
<p><b>Foucault<sup>3</sup></b></p>	<p><b>Foucault's theory</b></p> <ul style="list-style-type: none"> <li>• Discourse can only ever be inconsistent &amp; ruptured &amp; that only out of such discourse can ideas originate. Power comes from all sorts of discourses eg. Cultural, political, economic.</li> <li>• Our culture is a law-bound culture, it is inherent in us to obey the law. our actions reinforce the validity of the law. Cultural assumptions &amp; the way society has shaped us leads to an unconscious conformity to the legal system.</li> </ul> <p><b>Problem with Foucault's theory:</b> lacks structures, in reality there is a need for some sort of structure for why we obey the law</p>

<sup>1</sup> Kelsen 'Pure Theory of Law' in Blackshield & Williams, *Australian constitutional Law & Theory: Commentary & Materials* (Federation Press, 2006), 5.

<sup>2</sup> Foucault 'Politics and the study of discourse' in Blackshield & Williams, *Australian constitutional Law & Theory: Commentary & Materials* (Federation Press, 2006), 8.

<sup>3</sup> Foucault above n 2.

**Judicial Review: consistency with a democratic system?**

In Australia the courts have the power to declare a statute *unconstitutional* & so invalid where the statute:

- Exceeds the powers recognised or conferred by the constitution OR
- Infringes some express or implied constitutional limitation

This idea of ‘judicial review’ is essential to ensure parliaments operate within their constitutional limits. The High Court has the final say over what is unconstitutional.

**Advantages of judicial review**

- The court would be the arm of government with the most expertise to interpret the constitution & whether a statute has violated the constitution
- The court is independent from parliament & the executive, hence enforcing the separation of power & the checks & balances of power. The separation of powers as set out in the Constitution is necessary to limit the powers of Parliament and the executive.
- The judiciary is known for their ability to solve problems objectively & dispassionately.

**Is judicial review democratic?**

Judicial review is democratic	Judicial review is <i>not</i> democratic
<ul style="list-style-type: none"> <li>• Judicial review is democratic because the judiciary are independent of electoral &amp; political pressures</li> <li>• The judiciary can only decide issues brought before them by the people &amp; not their own initiatives</li> <li>• The judiciary are known to protect minorities from unfair majority</li> </ul>	<ul style="list-style-type: none"> <li>• Since judges are appointed by the PM they may be sympathetic to the government in power &amp; so separation of power in reality may not be pure</li> <li>• The judiciary is not elected &amp; hence not representative of the people’s values</li> <li>• The judiciary is unaccountable &amp; inaccessible</li> <li>• Judicial review diminishes the concept of parliamentary sovereignty</li> </ul>

### **Judicial review operates within the constitutional limits**

*Marbury v Madison* 5 US (1 Cranch) 137 (1803), Marshall CJ (US Supreme Court)

- *Marbury* was the first case relating to judicial review & established its legitimacy
- The constitution is superior to ordinary legislation so an Act repugnant to the constitution cannot become the law of the US
- The US constitution not only organises the government & assigns different departments their respective powers but also establishes certain limits not to be transcended by those departments.
- It's the court's duty to determine whether it is the constitution or the rule conflicting with the constitution to be the valid one. The constitution is superior to any ordinary legislation, a law repugnant to the constitution is void.

### **Judicial review in Revolution (Coup d'Etat)**

- When the established legal order is overthrown through a revolution the issue arises as to which court can decide whether the new revolutionary regime is lawful. There are 2 views to this issue:
  - o **Older constitutionalist view:** the court in the original regime does not have jurisdiction to decide the issue. This is because the older court is bound to the constitution which created it. In Kelsen's terms the grundnorm has been destroyed by the revolution
  - o **Newer view:** the court does have jurisdiction to decide the issue. It's assumed that the court has a *supra-constitutional jurisdiction* exercisable in extreme revolutionary circumstances
- **Upon what principles should a supra-constitutional jurisdiction be exercised?**
  - o based on "some principles of law independent of any particular system which authorises a judge, simply by virtue of his office & irrespective of the source of jurisdiction to recognise the revolutionary regime"<sup>4</sup>

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<sup>4</sup> Brookfield 'Waitangi & Indigenous Rights: Revolution, Law & Legitimation' in Blackshield & Williams, *Australian constitutional Law & Theory: Commentary & Materials* (Federation Press, 2006), 28.

**What principle(s) must the court apply in exercising the supra-constitutional jurisdiction?**

There are numerous tests available:

<p><i>Madzimbamuto v Lardner-Burke</i> (1969) 1 AC 645<sup>5</sup>, Lord Reid</p>	<ul style="list-style-type: none"> <li>• Cannot have 2 lawful governments at the same time, therefore there must be a choice between the 2</li> <li>• <b>Test for whether the new government is lawful:</b> effective control (ie. efficacy of the change). This mean the former government cannot be striving for power because then it would be impossible to say the new government is in control because the new government is opposing the old ('lawful') one</li> </ul>
<p><i>Mokotso v HM King Moshoeshe II</i> (1989) LRC (Const) 24, Cullinan CJ<sup>6</sup></p>	<p><b>Requirements:</b></p> <ul style="list-style-type: none"> <li>• The government is firmly established and there is no other government in opposition &amp;</li> <li>• The new government's administration is effective, with the majority of the population behaving in conformity with it</li> </ul> <p>Rejected 2 other criteria used in <i>Mitchell v Director of Public Prosecutions</i> [1986] LRC (Const) 35 by <b>Haynes P:</b></p> <ul style="list-style-type: none"> <li>• The conformity of the population must not be due to coercion</li> <li>• The new regime must not be undemocratic or oppressive.</li> </ul>
<p><i>Republic of Fiji v Prasad</i> (2001) 2 LRC 743<sup>7</sup></p>	<p><b>Changed the 'efficacy test'</b></p> <ul style="list-style-type: none"> <li>• The burden of proof of efficacy lies on de-facto government seeking to establish that it is firmly in control. The proof must be of a high civil standard.</li> <li>• Overthrow of the constitution must be successful. The de-facto government need to be established administratively &amp; there is no opposition or rival Government</li> <li>• People must be conforming or obeying the new regime (need to show <i>acquiescence</i> of the people in the government not merely behaving in conformity eg. out of fear)</li> <li>• The length of time the government has been in control is</li> </ul>

<sup>5</sup> Blackshield & Williams, *Australian constitutional Law & Theory: Commentary & Materials*' (Federation Press, 2006), 30.

<sup>6</sup> Blackshield & Williams, *Australian constitutional Law & Theory: Commentary & Materials*' (Federation Press, 2006), 31.

<sup>7</sup> Blackshield & Williams, *Australian constitutional Law & Theory: Commentary & Materials*' (Federation Press, 2006), 32.

	relevant, the longer it has been in control the more likely acceptance by the people is established.
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## **Separation of powers**

### **- Separation of power doctrine**

- Was influenced by the ideas of Montesquieu<sup>8</sup> who believed political liberty can only exist if there were no abuse of power. However every man invested with power is bound to abuse it, hence to prevent this power should be a check to another power.
- the doctrine dictates that the different functions of government be vested in separate branches. The different branches will check & balance each other

### **- The 3 branches<sup>9</sup>**

- Legislative function: making new laws, alteration or repealing existing laws
- Executive/administrative function: general & detailed carrying on of government according to the law (ie. to implement the law). Include framing of policy & choice of the manner in which law may be made to render the policy possible (in recent times the scope of the executive has been very wide)
- Judicial function: interpretation of law & the application of rule or discretion to the facts of the particular cases

### **- The separation of power in reality**

- In recent times the 3 categories have blurred, particularly between the legislative & executive. There seems to be no current constitutional system which adopts a complete separation of power. Instead overlaps occur & are permitted as long as systems of checks & balances are developed to monitor this.

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<sup>8</sup> Montesquieu, 'The spirit of the laws' in Blackshield & Williams, *Australian constitutional Law & Theory: Commentary & Materials* (Federation Press, 2006), 19.

<sup>9</sup> Phillips & Jackson, 'Constitutional & Administrative Law', in Blackshield & Williams, *Australian constitutional Law & Theory: Commentary & Materials* (Federation Press, 2006), 20.

- In Australia, our Executive is drawn from the legislature and must sit in Parliament. Thus we see a fusion of the personnel in the executive and legislative branches of government. However, the doctrine of responsible government provides a series of checks and balances



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