AUSTRALIAN PUBLIC LAW SUMMARY

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Topic 1: Foundations to Public Law

Introduction

- Constitution Classifications
  o Flexible Constitution: A Constitution, which can be changed like an ordinary statute.
  o Rigid Constitution: A Constitution which cannot be changed the same way as an ordinary law, rather through some set of procedure or process, like a referendum.

- Written and Unwritten Constitutions
  o Written: A Constitution is said to be written when the most important constitutional laws constituting the basis of the State are specifically enacted and specified in one formal document or a series of formal documents, which are binding on the courts, the Executive, the Legislature and the people.
  o Unwritten: The basic laws are given the importance of a Constitution, but are not enacted as one formal set of fundamental constitutional laws (e.g. Israel).

- Australia’s Constitution
  o Rigid Constitution which can only be changed via a referendum.
  o Contains both written and unwritten parts (i.e. the unwritten flexible conventions and common law interpretation of the Constitution complements its written component).
  o Function: Establishes institutions that serve as the authoritative sources of law and gives them Legislative power. Often accompanied by explicit and implicit limitations on power.

From Where Does the Constitution Derive Its Validity?

There are numerous theories which attempt to explain why we obey the Constitution.

<table>
<thead>
<tr>
<th>Kelsen(^1)</th>
<th>Kelsen’s Theory</th>
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<td></td>
<td>• The entire legal order is a pyramid of norms which are derivative of the powers conferred by the Constitution.</td>
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<td></td>
<td>• The Constitution is the ‘Grundnorm or basis norm’; its content is regarded as ‘self-evident’ and is presupposed from the highest norm, from which norms for human behaviour is logically deduced.</td>
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<tr>
<td></td>
<td>• Legal norms are not valid because they have certain content but because of the way they are created, such that its content is logically deducible from a presupposed basic norm.</td>
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Problem with Kelsen’s Theory

- Kelsen seeks to construct a systematic framework for pure theory of law characterised by hierarchy and unity but in reality it is not so structured.
- One needs to make a moral judgment to believe the Constitution is the Grundnorm (i.e. the one you should obey). There are still cultural and other influences that are simply masked by Kelsen’s analysis that we simply obey it because it is an assumption.
- Theory is too inert and has no consideration of the cultural framework, which contributes to the validity of the legal system.²

**Foucault's Theory**

- Discourse can only ever be inconsistent and ruptured; only out of such discourse can ideas originate. Power comes from all sorts of discourses (e.g. cultural, political, economic).
- 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 and the way society has shaped us leads to an unconscious conformity to the legal system.

**Problem with Foucault’s Theory:** Lacks structure, in reality there is a need for some sort of structure for why we obey the law.

**Judicial Review: Consistency with a Democratic System?**

In Australia the courts have the power to declare a statute *unconstitutional and 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 it unconstitutional.

**Advantages of Judicial Review**

- The court would be the arm of government with the most expertise to interpret the Constitution and to determine whether a statute has violated the Constitution.
- The court is independent from Parliament and the Executive, hence enforcing the separation of powers and the checks and 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 and dispassionately.

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³ Foucault above n 2.
Is Judicial Review Democratic?

<table>
<thead>
<tr>
<th>Judicial review is democratic</th>
<th>Judicial review is not democratic</th>
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<tr>
<td>• Judicial review is democratic because the Judiciary are independent of electoral and political pressures.</td>
<td>• Since judges are appointed by the Executive they may be sympathetic to the government in power and so separation of power in reality may not be pure.</td>
</tr>
<tr>
<td>• The Judiciary can only decide issues brought before them by the people and not as a result of their own initiatives.</td>
<td>• The Judiciary is not elected and hence is not representative of the people’s values.</td>
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<tr>
<td>• The Judiciary are known to protect minorities from unfair majority.</td>
<td>• The Judiciary is unaccountable and inaccessible.</td>
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<td></td>
<td>• Judicial review diminishes the concept of parliamentary sovereignty.</td>
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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 and established its legitimacy.
- Held that the Constitution is superior to ordinary legislation, so an Act repugnant to the Constitution cannot become a law of the USA.
- The US Constitution not only organises the government and assigns different departments their respective powers, but also establishes certain limits not to be transcended by those departments.
- It is the court’s duty to determine whether the rule in apparent conflict with the Constitution is a valid one. The Constitution is superior to any ordinary legislation; therefore a law repugnant to the Constitution is void.

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