THE IDEA OF PUBLIC LAW

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CHAPTER OVERVIEW

Introduction

We are alone in the world, making our own way; and we are part of a community, with a collective understanding of the conditions for a good and meaningful life. Our lives are a complex combination of the individual and the collective. In the 4th century BCE, the Greek philosopher Aristotle (384–22 BCE) described the organisation of humans by reference to a progression from the individual to the collective.[1] The collective nature of our existence operates at a number of levels—at the level of the family or household, the neighbourhood, and the social or political organisation; at the level of the nation-state; and, increasingly, at the global level, both regionally and across all nation-states. At each of these levels there are rules for how we interact with each other and with those who hold power. The larger and more complex the organisational unit, the more elaborate and complicated the rules for functioning within it.

For Aristotle, the level of the state was the highest form of association for human beings.[2] It differed in nature, not just in scale, from the other levels of organisation in the sense that the state was concerned not only with living in a practical sense, but in pursuing a form of living that reflected on and pursued the ideals of a good life.[3] Modern states, in general terms, are bodies of governing institutions that have legal authority over a defined territory and population.[4] States are legal constructions and, for this reason, the relationship between states and individuals cannot be a relationship of equals.

In the modern world, the public law of a state describes the system of institutions and rules that govern the relationship between the state and the people residing in its territory. One of the most important dimensions of the study of public law is the study of the laws of a state insofar as they regulate the relationship between the state and its people. These rules will have different origins: many will be contained in the constitutional text itself, and others will be found in the common law (judge-made law), in statutes and delegated legislation, and sometimes the rules will be unwritten, existing in the form of practice and convention only.

The laws of a state have a direct and powerful influence over individuals. They regulate individual conduct such as freedom of movement and speech, they determine fundamental rights such as the right to own property, they require the fulfilment of

1 Aristotle, *The Politics* (T A Sinclair trans, Penguin Books, 1992) Book 1.
2 Note that Aristotle referred to the Greek city-state of Athens as a *polis* rather than a state.
3 Aristotle, above n 1, Book 1.
4 This definition is derived from the international law of states. See, eg, the *Convention on the Rights and Duties of States*, opened for signature 26 December 1933, 165 LNTS 19 (entered into force 26 December 1934); *Charter of the United Nations*, <www.un.org/en/documents/charter/intro.shtml>.

certain responsibilities such as participation in military service in defence of the state, and they punish individuals who offend the laws of the state. But the study of public law is incomplete through this narrow, formalistic approach of considering only the public *laws* of a state. It is important to also consider the processes by which those laws are created, interpreted, applied and changed.

One school of legal thought, known as legal realism, tells us that we must look beyond the 'words or rules' of the law. One of the leading early legal realists in the US, Karl Llewellyn, explained that legal institutions needed to be understood by reference to how these rules are lived and performed.[5] Drawing on these ideas in the public law context, New Zealand judge Matthew Palmer coined the term 'constitutional realism' to emphasise the need to understand the 'complete' constitution, beyond just the words and rules, but more generally 'what factors affect the exercise of power and how'.[6] Harvard constitutional law professor Mark Tushnet believes it is important to study 'constitutional orders' or 'regimes' rather than simply constitutions in isolation. Constitutional orders or regimes go beyond words and text, and require study of the 'reasonably stable set of institutions through which a nation's fundamental decisions are made over a sustained period, and the principles that guide those decisions'.[7] A constitutional order, explains Tushnet, will be in constant evolution,[8] shifting its community's composition, identity and expectations; responding to global events and changes, whether they relate to the economy, security or the environment; and meeting challenges posed by technological advances that affect the way we live and are governed.

States govern and exercise power over individuals through their institutions, so an important dimension of public law is to understand the origin and function of these institutions, and the practice of the actors within them. States relate to individuals indirectly through their institutions. The membership and role of these institutions vary across states depending on the system of political organisation that they employ. As we explain in this chapter, in Australia that system is liberal democracy with its origins in the US and the UK. Australia has adopted its main institutions of state and its principles of public law predominantly from these two countries, but has fashioned these institutions and principles into a uniquely Australian public law.

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5 Karl Llewellyn, 'The Constitution as Institution' (1934) 34 *Columbia Law Review* 1, 17; See also Karl N Llewellyn, *The Bramble Bush: The Classic Lectures on the Law and Law School* (Oxford University Press, 1930) 4, 7, 16, 79.

6 Matthew SR Palmer, 'What is New Zealand's Constitution and Who Interprets it? Constitutional Realism and the Importance of Public Office-Holders' (2006) 17 *Public Law Review* 133, 134.

7 Mark Tushnet, *A New Constitutional Order* (Princeton University Press, 2003) 1.

8 Ibid 2.

During the 1950s and 1960s, a school of legal thought that focused public law inquiry exclusively on institutions developed in the US.[9] Legal process theory studied and analysed legal institutions—courts, legislatures, the executive, and administrative agencies—to articulate their particular institutional attributes with the ultimate objective of determining which institution was best suited to undertake particular government functions and make particular governmental decisions. Legal process theorists were particularly concerned about institutional coherence between the courts (composed of independent judges trained in legal reasoning) and the legislatures (composed of democratically elected representatives of the people). Legal process theorists were not concerned with articulating the values underpinning the legal system. If institutional settlement could be achieved, the values of the system would emerge from the institutions themselves.

While legal process theory purported to be value-neutral, critics argued that it was not possible to determine which institution was better suited for particular functions and decisions without resort to the values associated with those functions and decisions. This foundational criticism of legal process theory reveals that it is not enough to simply study the rules and institutions of a legal system. Public law requires study of the values and objectives which that system is empowered to achieve.

The predominance of states

The role of the state as the main political and legal unit, though postulated by Aristotle, did not represent a global reality until the 20th century. Since the time of Aristotle, numerous civilisations under a singular law and government have been established and dismantled around the world. In the 18th and 19th centuries, European colonial expansion brought the notion of the state, and of state law, to existing civilisations elsewhere. Lands were invaded and indigenous peoples conquered, or they entered into new power-sharing arrangements with colonisers, and new states were formed. By the 20th century, the nation-state was unrivalled as the level of political association at which communities organise themselves. All people in the world are now under the influence of the law of states as a result of their membership of a state, their residence in a state, or the control of state law over the territories in which they reside. To the extent that people are excluded from membership of a state (and are therefore 'stateless'), this exclusion is itself a product of the laws of states.

9 The most famous legal process theorists were Henry M Hart and Albert M Sacks: Henry M Hart and Albert M Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* (Foundation Press, 1994) 148 (prepared for publication from the 1958 Tentative Edition by William N Eskridge Jr and Phillip P Frickey); see also John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press, 1980).

Despite the predominance of nation-states, the legitimacy and efficacy of their public law is open to constant challenge from influences above and below. From above, the phenomenon of globalisation has to some extent broken down state boundaries and established global norms. In many parts of the world, states have joined together to form larger regional bodies, such as the European Union, with higher level rules for their organisation. In more recent times we have seen a backlash against the loss of political power and autonomy that accompanies the entry into these arrangements, most directly in the vote to exit the European Union.

In the second half of the 20th century, the phenomenon of public international law emerged as a highly developed and universal system of law, which gives rise to the notion of a world community beyond the boundaries of the state. There are non-state places where public international law is the only form of regulation, such as parts of the world's oceans, outer space and Antarctica. Public international law also includes rules and norms that overlap with the laws of states and sometimes conflict with them. A key issue for the public law of states is the extent to which international laws are capable of influencing or even controlling state law. In Chapter 13, we explain the different facets of the relationship between Australian public law and international law.

From below, the predominance of the state is challenged by local communities and their expectations from the state to govern and deliver services that align and promote their core values. This challenge often manifests in claims against the state in the form of individual rights. Segments of the community, defined by ethnicity, religion, territory or common history, might also differentiate themselves from other groups within the state in terms of their core values and allegiances. Sometimes these intra-state allegiances challenge the very existence of the state, as in the case of secessionist movements.[10] On other occasions, without challenging the existence of the state, local communities demand particular forms of recognition under the law of the state or assert a freedom from its laws. In Australia, a key challenge to the public law of the state has come from Australia's Aboriginal and Torres Strait Islander peoples claiming a freedom from state laws and asserting the right to self-determination under their systems of government and law. The relationship between Aboriginal and Torres Strait Islander peoples and public law is discussed in Chapter 3.

A perennial public law question is whether there are places in society that are free of legal regulation. That is, are communities and the places in which they live governed only by law, or are they also governed by other obligations that have a greater hold upon them? In discussing the concept of legal pluralism, US anthropologist John

10 For example, the secessionist movement of the Quebecois in Canada, or Western Australians in the early 20th century in Australia.

Griffiths argues that the concept of law needs to expand beyond its role in state legal systems to encompass other systems of obligations, such as those derived from a range of social spaces, including the home, the workplace and the place of worship. If law is so expanded, then the official law exists as just one of many influences on a person's choice of conduct.[11]

In a very different analysis of the relationship between society and law, the US and Italian philosophers Michael Hardt and Antonio Negri propose that there are social goods that *cannot* be governed by law. Their paradigmatic example is the development of language in a community. Language evolves in a space outside public and private control, in what Hardt and Negri call the 'common': 'if language were made either private or public … then [it] would lose its powers of expression, creativity, and communication'.[12] In the common, the development of language is not planned. It occurs organically. Any legal regulation of language serves only to inhibit its evolution.

In our view, social and political power necessarily influence how public law analysis should proceed. For example, to understand the character of executive power, one cannot limit oneself to an analysis of the constitutional expression of that power, but must also consider the other legal and political restrictions that operate on that power and understand the practical exercise of that power. In fact, Martin Loughlin, Professor of Public Law at the London School of Economics, goes so far as to suggest that effective public law analysis should explore the character of power first and only then derive conclusions about constitutions and public law from the nature and scope of that power, not the other way around.[13] We also recognise that the scope of public law is not fixed, that different communities conceptualise their relationship to the state and nation differently, and that, even within a particular conception of the state, the boundaries of what is inside and what is outside the state's public law is contestable.

The question of the scope of public law is resolved in legal theory through the introduction of limiting concepts such as state sovereignty, the public and the private, and a conceptual distinction between law and morality, all of which are discussed in this chapter. Since the state remains the primary unit of political organisation, the concept of public law in this book focuses on the exercise of power within states. It analyses the development and exercise of rules and principles that determine the organisation of the Australian state, and that regulate the relationship between the institutions of the state and its individual members.

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11 John Griffiths, 'What is Legal Pluralism?' (1986) 24 *Journal of Legal Pluralism* 1, 36–8.
12 Michael Hardt and Antonio Negri, *Commonwealth* (Harvard University Press, 2011) ix.
13 Martin Loughlin, *The Idea of Public Law* (Oxford University Press, 2004) 82–98.

Sovereignty and the origin of law's authority

Sovereignty is the location of absolute power in the state. It is both a legal and a political concept, and can also find expression in other ways. As a legal concept, sovereignty is concerned with the authority of the institutions of the state to make laws. As a political concept, sovereignty concerns the capacity to generate and exercise political power. The concept of sovereignty is an important foundation of the claims of indigenous peoples and in this context can be conceived in other ways. For instance, the Uluru Statement from the Heart, issued by Aboriginal and Torres Strait Islander peoples after a national First Nations Constitutional Convention in 2017, explained sovereignty as a 'spiritual notion':

> *the ancestral tie between the land, or 'mother nature', and the Aboriginal and Torres Strait Islander peoples who were born therefrom, remain attached thereto, and must one day return thither to be united with our ancestors. This link is the basis of the ownership of the soil, or better, of sovereignty.* It has never been ceded or extinguished, and co-exists with the sovereignty of the Crown.[14]

Public law is concerned with both legal and political aspects of sovereignty. If the focus is purely on the legal conception, public law will be unable to determine the practical capacity of the institutions of government to enforce laws. For example, an elected government may not have the power to enforce laws if the government has been deposed in a coup. If the focus is only on the political conception, public law will not be able to differentiate between legitimate and illegitimate exercises of power under a particular constitutional system. For example, there needs to be a body (such as a court) to test the legitimacy of a new government purporting to exercise power in a state against criteria established in a constitutional document.[15]

A key public law question is how political sovereignty is secured in a state. The legitimacy of a state's law depends on how the state was formed—through the agreement of the people to form it, through a voluntary handing over of power from one ruler to another, or through an original and unquestionable force. For the French philosopher Jacques Derrida (1930–2004), it is an original act of force—a political act—that institutes the law.[16] Derrida claimed that violence is at the origin of all

14 First Nations Constitutional Convention, 'Uluru Statement from the Heart' [2017] *Indigenous Law Resources* 1 (emphasis in original).

15 For example, in 2001 the High Court and the Court of Appeal of Fiji were called upon to declare that the Interim Civilian Government of Commodore Josia Bainimarama had not replaced the elected government of Mahendra Chaudry. See *Prasad v Republic of Fiji* [2001] 1 LRC 665; *Republic of Fiji v Prasad* [2001] 2 LRC 743.

law, and that therefore the legitimacy of the law is always in question and it requires constant reassertion and justification to maintain its legitimacy.

Although there may be a violence behind the foundation of all legal systems, the form, extent and direction of this violence affect the ethos and the legitimacy of each legal system's public law in a unique way. And so in our discussion of Australian public law we pay particular attention in Chapters 2 and 3 to how the Australian state was formed and the human consequences of its foundation.

There has been an evolution in the grounds for legitimacy of government in states. Before the 17th century, most monarchs in Europe exercised absolute power. Monarchs asserted that their appointment was directly from God, meaning that they were free of all restraints, including law. This became known as the doctrine of the divine right of Kings, which allowed monarchs to exercise the royal prerogative—to preside over cases of consequence and to suspend the law when it pleased them. The obvious problem with such unlimited power was the potential for its arbitrary exercise. Generally, monarchs recognised that it was in their best interest to be seen to conform to the law, but this self-regulation did not always work.

An important part of the evolution of government was the separation of church and state. Prior to the formation of modern states, religion provided the public law for many states. European states either aligned themselves with the Catholic Church in Rome or established themselves in opposition to it. Either way, the laws of God and the laws of the state existed together. Human law was derived from divine law through the correct application of reason. Kings expounded the human law, known as natural law, and subjects were bound to follow it. The church was highly influential in affairs of the state—it dictated what was in the common good and determined what were appropriate beliefs. With the emergence of popular sovereignty—that is, rule by the people—church and state became separated. Once the people or their representatives were the highest authority, it was their will that reflected the public good and determined the public law.[17]

The authority of government in most modern states is now premised, at least in theory, on an agreement of its people to institute a binding constitution that allocates power to governing institutions. But the agreement of the people remains forever contingent. Legal sovereignty only secures law-making power in governing institutions to the extent that political support for the constitution remains. The

16 Jacques Derrida, 'The Force of Law: The Mystical Foundations of Authority' in Jacques Derrida, *Acts of Religion* (Gil Anidjar (ed), Routledge, 2002) 230–42. The move from political force to legal authority is as true for the formation of new colonies, such as Australia, as it is for revolutions, such as in France and the US. So in *Mabo v Queensland [No 2]* (1992) 175 CLR 1, the High Court recognised the original violence of the assertion of British sovereignty in Australia, but held unanimously that the assertion of sovereignty was an 'Act of State', the legality of which could not be questioned.

17 Democracy as a form of government, and its characteristics in Australia, are discussed in Chapter 5.

German political theorist Carl Schmitt (1888–1985) argued that power cannot simply be traced to an origin. Instead, he put forward a thesis that the source of true power is revealed at the moment of its exercise in a time of crisis. In other words, the mark of sovereignty is precisely the power to make decisions outside (or create exceptions to) the regular law. As Schmitt put it, 'sovereign is he who decides on the exception.'[18] There is a tendency in public law to assert that all problems of power are resolvable within the law. This is evident in the focus of public law texts, such as this one, on the lawful limits on executive power. But as Schmitt recognised, the law cannot deal with exceptional power which, by definition, is exercised outside the law. Schmitt's analysis of the ultimate source of power itself contains a paradox. Rulers exercising exceptional power may demonstrate their sovereignty, but the very exercise of sovereign power outside the law will soon undermine public support for their legitimacy, highlighting once again that legal and political sovereignty cannot be sensibly separated and must both be considered in the study of public law.

The nature of law

A related issue to that of the origin of law's authority, albeit a conceptually distinct one, is: What makes the rules promulgated by a sovereign body in the nature of 'law'? This question is the province of jurisprudence or legal philosophy.

Two main jurisprudential theories offer competing explanations for the origin and nature of law's authority. Natural law theories focus on the source and content of laws as the basis of their legitimacy. The Italian monk and philosopher Thomas Aquinas (c. 1225–74) traced all law back to an eternal law provided by God. This law was, according to Aquinas, discoverable by humans through the application of reason.[19] Drawing on Aquinas, Oxford legal philosopher John Finnis argues that there are seven discernable basic goods that any legal system must uphold: life, knowledge, play, aesthetic experience (or beauty), sociability (or friendship), practical reasonableness and religion.[20] A legal system that does not protect these basic goods is not a legal system in its fullest sense.[21] The idea that there are limits to what can be law outside the authority of the government of a state is a direct challenge to positive legal authority. A key public law question is how these limits are drawn, and who determines them.

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18 Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (George Schwabb trans, MIT Press, 1985) 5 [trans of: *Politsche Theologie:Vier Kapitel zur Lehre von der Souveranital* (first published 1922)].

19 Thomas Aquinas, *The Summa Theologica of Saint Thomas Aquinas translated by Fathers of the English Dominican Province* (Chicago Encyclopaedia Britannica, 1982).

20 John Finnis, *Natural Law and Natural Rights* (Oxford University Press, 2nd ed, 2011) ch IV.

21 For Finnis, law in its fullest sense is not only passed by a legitimate authority, but is also consistent with the basic goods: ibid 11.

The other major theory on the origin and nature of law is legal positivism. Legal positivists sought a scientific explanation for law within its self-contained structures and processes. For the legal theorist John Austin (1790–1859), laws are nothing more than the commands of a sovereign, backed by the threat of punishment, which are habitually obeyed by most people in a society.[22] According to Austin, the explanation for sovereign power and the institution of law is a matter of fact in need of no independent justification. With no one in a position to question its authority, and with some form of legal organisation being necessary for effective human existence, unquestionable power is a sufficient explanation for an effectively constituted public law.

H L A Hart (1907–92) argued that Austin's command theory of law did not adequately explain legal authority.[23] For Hart, people obey the law for reasons other than the risk of punishment. Obligation is a distinctive attitude that people develop, and rules are used in a more positive sense as standards for the appraisal of behaviour. Furthermore, Hart argued that the command theory of law failed to explain several dimensions of law. It did not explain why the law of an old sovereign remains the law (even though the sovereign is no longer in a position to use force to command obedience), or how and when sovereignty could be transferred. The command theory also failed to explain how some laws were facultative only and not backed by force, such as laws of succession. Hart argued that such questions could only be resolved through a separate system of rules that established the criteria for the validity of laws, rules for determining the location of authority and when authority was transferred from one ruler to another, and rules for adjudication of disputes between parties. These 'secondary' rules, as Hart called them, gave primary rules of obligation coherence and legitimacy. Public law is largely focused on explaining and developing these secondary rules.

Whereas Austin's and Hart's theses were derived from their observation of what they experienced as social reality,[24] the Austrian legal philosopher Hans Kelsen (1881–1973) developed an abstract theory of positive law that described the logical structure of legal systems. Kelsen postulated that law is nothing more than a hierarchy of norms. Each normative proposition is derived from a higher normative proposition until a basic norm or *Grundnorm* is reached. This basic norm is simply posited and must be obeyed without question.[25]

Legal positivism tells us what makes a rule in the nature of law and what gives law its legal authority, but it does not tell us when individuals should obey the law. As natural

22 John Austin, *The Province of Jurisprudence Determined* (Cambridge University Press, first published 1832, 1995 ed).

23 See generally H L A Hart, *The Concept of Law* (Oxford University Press, 2nd ed, 1994).

24 This approach to developing Austin's and Hart's theories aligns them with the branch of philosophy known as empiricism or logical positivism.

25 Hans Kelsen, *Pure Theory of Law* (Max Knight trans, University of California Press, 1967), 198–204 [trans of: *Reine Rechtslehre* (first published 1934)].

law theorists recognise, law may lack legitimacy despite being passed in the regular way by an authoritative law maker. There may be a point at which the content of a rule is so contrary to principles of liberty, equality or justice, or some other principles considered fundamental, that it is not law and should not be obeyed. At several points throughout the book we ask: At what point does a rule fail the test of legitimacy, and who determines this to be the case? The 'rule of law', discussed below, offers one benchmark of legitimacy. In Chapter 6 we discuss whether there are inherent limits to the power of Parliament to make laws, in Chapters 9 and 10 we discuss the role of the courts as the final arbiters of legality, and in Chapter 12 we discuss the protection of individual human rights that are asserted by people against the legitimate authority of the state. In each of these references to the fundamental question of legality, we find decision makers striving to articulate the limits of legitimate authority within an identifiable system of principles and values.

From a broader perspective, although legal positivism and natural law theories are useful for explaining the idea of law, they are inadequate as an explanation of *public* law. Public law can only be understood in relation to both the legal and political manifestations of power. The nature of public law is inextricably connected to its social and political origins. Although legal positivists could isolate law from its political context to develop their theories on the nature of law, public law considers real government action in real political contexts, and these contexts determine both the nature and the function of public law.

Empowerment and constraint

One way to conceptualise the function of public law is as a mechanism both to empower the institutions of government to make and enforce laws, and to place constraints on the extent of this power to prevent its excessive use and thus avoid tyranny. The balance between empowerment and constraint is evident in the various conceptual frameworks underpinning public law.

The social contract

The origins of Anglo-American and continental public law are within the same conceptual framework: social contract theory, an idea that is found in the work of Thomas Hobbes (1588–1679), John Locke (1632–1704), the French political philosopher Jean-Jacques Rousseau (1712–78),[26] and more recently in the work of John Rawls (1921–2002).[27]

26 Jean-Jacques Rousseau, *The Social Contract and Discourses* (G D H Cole trans, Dent, 1923) [trans of: *Du Contrat Social ou Principes du Droit Politique* (first published 1762)].

27 John Rawls, *A Theory of Justice* (Harvard University Press, 1971).