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

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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.

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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

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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

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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

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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

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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]

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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).

The social contract is an idealised explanation of the state's authority to regulate the lives of individuals in its territory. It contends that life without law (that is, in the state of nature) is both insecure and prone to disputes. To keep the peace, an authoritative law and unbiased law enforcers (judges) are required. Autonomous individuals choose to enter a mutually binding covenant to form a government that has the power to promulgate and enforce a body of laws in the interest of preserving order. People limit their natural freedom so as to live under a system of law. What makes this arrangement legitimate is the consent of these autonomous individuals. Effectively, an unspoken bargain is made between individuals, meaning that they sacrifice a measure of their personal freedom in order to set up a government with limited but necessary power over them.

In the 17th and 18th centuries, Hobbes, Locke and Thomas Paine (1737–1809) argued that the role of law was to provide protection from the potential abuse of arbitrary and unlimited power. As Locke stated:

> Freedom of men under government is to have a standing rule to live by, more common to everyone of that society, and made by the legislative power erected in it … and not to be subject to the inconstant, uncertain, unknown and arbitrary will of another man.[28]

Hobbes also described the role of the state as being to protect individual freedom.[29] Hobbes posited freedom as the ultimate human value. However, he argued that humans could not attain it on their own, as their natural state was to compete with others, and through this competition individuals would destroy their freedom and the freedom of others:

> amongst masterlesse men, there is perpetuall war, of every man against his neighbour; no inheritance to transmit to the Son, nor to expect from the Father; no propriety of Goods, or Lands; no security.[30]

To guarantee their freedom, he continued, humans must voluntarily give up some of their freedom to the state:

> But as men, for the atteyning of peace, and conservation of themselves thereby, have made an Artificial Man, which we call a Common-wealth; so also have they made Artifciall Chains, called Civill Laws.[31]

Hobbes was acutely aware that the submission of power to a state comes at a cost to the individual freedom that he so cherished, thus his description of laws as

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28   John Locke, *Two Treatises of Government* (Cambridge University Press, first published 1689, 1988 ed) ch IV, s 22.
29   Note that Hobbes referred to the state as the 'Commonwealth'.
30   Thomas Hobbes, *Leviathan*, (A R Waller (ed), Cambridge University Press, first published 1651, 1935 ed) pt ii, ch 21, 151.
31   Ibid 149.

'chains'. For Hobbes, humans should only confer the power required to achieve four purposes: to defend against external enemies; to maintain peace within the state; to facilitate wealth acquisition; and to promote liberty.[32] If the state took more than was required to achieve these purposes, this was an abuse of its authority.

Paine, who crossed the Atlantic and influenced the US Revolution, stated that, 'in America, THE LAW IS KING'.[33] Paine proposed that the role of a constitution is to *constrain* the government, and that when the government acts outside constitutional limitations it is exercising 'power without a right'.[34] The basic idea is that the government is bound by law; that power is neither unlimited nor arbitrary. In this, Paine drew on English traditions, in particular the idea that the King was bound by the law and that there was a law higher than that of the King.[35]

Generally, constitutional limits arise through a separation of the powers of the different arms of government, but they can also take the form of individual or group rights, or the division of power into different levels of government in a federal system. In Australia, limits on power are entrenched by the text and structure of the Australian Constitution,[36] and adjudicated by the judiciary. Australian courts have assumed the role of adjudication under our Constitution.

In his discussion of the social contract, Rousseau emphasised the positive benefits of entering such a contract. For Rousseau, the benefits of a common bond with others far outweighed the loss of personal freedom that this union required:

> The passage from the state of nature to the civil state produces a very remarkable change in man. … Although, in this state, he deprives himself of some advantages which he got from nature, he gains in return others so great, his faculties are so stimulated and developed, his ideas so extended, his feelings so ennobled, and his whole soul so uplifted, that, did not the abuses of this new condition often degrade him below that which he left, he would be bound to bless continually the happy moment which took him from it for ever, and, instead of a stupid and unimaginative animal, made him an intelligent being and a man.[37]

The giving of consent, then, *strengthens* the individual's liberty by providing a higher purpose for living.

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32   Ibid ch 21.
33   Thomas Paine, *Common Sense* (Project Gutenberg, first published 1776, 2009 ed).
34   Thomas Paine, *Rights of Man: Being an Answer to Mr Burke's Attack on the French Revolution* (Penguin Books, first published 1791, 1984 ed) pt II, ch IV.
35   For example, under the reign of Henry III, the jurist Henry de Bracton famously asserted that England is 'not under the King but under God and the law': Henry de Bracton, *On the Laws and Customs of England* (Samuel Thorne trans, Harvard University Press, 1968) vol II, 33 [trans of: *De Legibus et Consuetudinibus Angliae*].
36   Hereafter, the 'Constitution'.
37   Rousseau, above n 26, Book I, ch 8.

Constitutionalism

The idea of constitutionalism provides a mechanism for limiting the power of the state. Constitutions allocate and limit the exercise of power, and the legitimacy of the state is conditional upon the limits provided by the constitution. In UK public law the focus is on the political levers for limiting power, 'political constitutionalism'. As the name implies, 'political constitutionalism' suggests that the constraints on government must predominantly be found in the political system. The most fundamental safeguards to maintain the state lie in empowering citizens in their choice of representatives. If the system of choosing the government is truly democratic and representative, then a government so chosen is empowered to pursue the objectives for which it was elected, and there is little scope for courts to question the exercise of power in the fulfilment of the government's mandate from the people.

The founders of the American State were also sceptical of government and government power. Indeed, their independence was defined in opposition to a British Government that they felt had exploited them. Although government was necessary, it needed to be small and tightly controlled. The big ideas in US constitutional law were the innovative use of principles to constrain government, in particular the principle of federalism, in which sovereignty is divided between different levels of government; the principle of the separation of powers, in which the main institutions of each level of government have clearly defined and limited powers; and the idea of rights that protected individuals against certain exercises of government power.

Legal limits such as these form the basis of the doctrine of 'legal constitutionalism'. Legal constitutionalism is a political doctrine which holds that the power of government can—and should—be delimited by the law and not just through political levers such as elections. In a system governed through legal constitutionalism, the courts have the final say on whether government actions and decisions are authorised under the constitution and the laws. This responsibility will often place the judiciary in opposition to the political branches of government, and can raise questions about the legitimacy of judicial review. These concerns are most acute in legal systems in which there is judicial review of contestations between the pursuit of government objectives and the enjoyment of individual rights. Under a system of political constitutionalism, such contestations are resolved entirely at the political level, so that the government will be politically responsible for how it balances individual rights claims against government objectives. In contrast, legal constitutionalism directs at least some of the responsibility for the resolution of these disputes to the law and the courts. This can place the non-elected judiciary in conflict with the objectives of the democratic branches of government.

While the constitutional theories of political and legal constitutionalism emphasise the role of formal, institutionalised political and legal constraints on power, in any

community there will be a myriad of non-institutionalised ways by which power is constrained and brought to account. Most well known among these non-institutional actors are the media, but academics and non-government organisations (NGOs) also perform important roles in strengthening more formal accountability mechanisms. We discuss these in Part II.

Australia has developed its own unique combination of political and legal constitutionalism. Stephen Gageler, justice of the High Court of Australia and former Solicitor-General of the Commonwealth, explains that in Australia, where representative and responsible government act as the fundamental political accountability checks on government, the role of legal limits should be restricted. He argues that under the Australian system, 'political accountability provides the ordinary constitutional means of constraining governmental power'.[38] Therefore, where political mechanisms of accountability are strong, the judiciary should be deferential in its review of the legality of government decisions and actions. However, where political mechanisms of accountability are weak, the judiciary must be 'vigilant' in enforcing legal protections against the government. Applying his theory, for example, Gageler argued that the judiciary should be especially vigilant in enforcing the constitutionally protected right to vote and freedom of political communication.

The unique Australian combination of political and legal constraints manifests itself particularly sharply in relation to the protection of rights. Historically, the protection of rights in Australia has been a political matter; the extent of rights protection is resolved by the parliaments as there are few rights that have constitutional protection. However, there are a few rights-like protections expressly protected in the Constitution (such as the freedom of interstate trade and commerce, or the right to be free from discrimination based on state residency) and, since the 1990s, the High Court has implied a series of democratic-based limitations on power that protect the right to vote and the freedom of political communication. These limits must be judicially enforced against the executive and the legislature. Nonetheless, Australia's long tradition of political resolution of rights disputes has had a significant impact on our public law. It has proven difficult to shift, with many failed campaigns to extend the constitutional protection of rights or to introduce a comprehensive legislative bill of rights. Further, it has meant that the Australian judiciary has been reluctant to embrace rights-based tools of adjudication, such as the proportionality analysis, that would require it to review and scrutinise the balancing of competing values that has been undertaken by the political branches. It is only in the last decade that Australia's High Court has

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38   Stephen Gageler, 'Beyond the Text: A Vision of the Structure and Function of the Constitution' (2009) 32 *Australian Bar Review* 138, 152.

started to consistently adopt the test and language of proportionality when it enforces limitations against the government.

Constitutional change

An important aspect of any system of public law is how the fundamental rules of the legal system can be amended. Two principles of sovereignty need to be reconciled in relation to changes in the law. The first principle is that one sovereign cannot bind a future sovereign (and thereby diminish its sovereignty). This principle is at play in basic rules of the operation of legislation. In cases of conflict between laws, statute law overrides the common law, and a more recent statute law overrides an earlier statute. These rules are important for ensuring that the most recent Parliament has full legislative capacity and is able to carry out the will of the people.

However, in a constitutional system of government, there need to be special rules for changing the fundamental constitutional rules that establish the powers of the institutions of government and the operation of the system of government. These special rules guard against a sovereign Parliament entrenching its own power by eliminating the constitutional constraints on its power. For example, if a government, through its majority in the Parliament, were able to amend the Constitution to remove the requirement for periodic elections, it would be able to remove all democratic scrutiny of its actions for the future. The government of the day would be able to use its parliamentary supremacy to transform our constitutional democracy into a dictatorship. In Chapter 2, we discuss special manner and form provisions in colonial and state constitutions, and in Chapter 6 we discuss the process for amending the Commonwealth Constitution.

The scope of public law

Although the public law of all countries is premised on an understanding of law as a constraint on the arbitrary exercise of power, there is a distinction between public law in civil law countries, such as France and Germany, and public law in countries from the common law tradition, such as the UK, the US and Australia. In civil law countries there is a greater focus on public law as the source of empowerment. Public law provides the sense of common enterprise of the people in a state, and articulates core common values. There is a discernible 'public thing' (*res publica*) that propounds a notion of the common good outside the values and desires of individuals. The ideals of public law were articulated in this way by the Roman writer Cicero (106–43 BCE):

> *A commonwealth is a constitution of the entire people.* … The first cause of this association is not so much the weakness of man, as the spirit of association which naturally belongs to him—For the human race is not a race of isolated individuals,

wandering and solitary; but it is so constituted for sociality, that even in the affluence of all things, *and without any need of reciprocal assistance, it spontaneously seeks society*.[39]

Aristotle, in describing the state as the highest level of association, recognised that it was also the level at which the highest expression of what is good occurs:

> in all their actions all men do in fact aim at what they think good. Clearly then, as all associations aim at some good, that association which is the most sovereign among them all and embraces all others will aim highest, that is, at the most sovereign of all goods. This is the association which we call the state.[40]

The UK and US notions of public law are narrower than those of continental Europe. The dominant Anglo-American political theory is liberalism. Liberalism espouses the virtues of limited government and the separation of government from society because it views society as separate from its government. However, liberals are still concerned with happiness and the common good in society, although these ideals are not seen to be best served by the activities of government.[41] Societies, made up of individuals and any number and type of groups, strive for what is good through their own rules and conventions outside the laws of states. Liberals are concerned that these other non-state mechanisms of regulation operate free from government interference. This narrow understanding of liberal constitutionalism is often contrasted with republican constitutionalism in which there is a greater focus on civic virtue and the role of government to promote the common good. In classic republican theory, the individual's freedom may be partly compromised to serve the needs of the state.

In the political discourse of the UK, the pursuit of happiness is predominantly the preserve of the private sphere, and the common good is achieved through protecting this sphere from interference. As the English jurist William Blackstone (1723–80) stated: 'The public good is in nothing more essentially interested, than in the protection of every individual's private rights.'[42] British public law is, then, predominantly concerned with delimiting the extent of the power of the state, and public law institutions and doctrines were created and invoked for this task.

Elisabeth Zoller, Professor of Public Law at the University of Paris, has stated that because of the emphasis on the control of government through law in the

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39   Marcus Tullius Cicero, *Treatise on the Commonwealth* (Francis Barham trans, Edmund Spettigue, 1841–42) [trans of: *De Republica* (first published 54–51 BCE)] Book 1 (emphasis in original).

40   Aristotle, above n 1, 54.

41   Mitchell Dean and Barry Hindess, 'Introduction: Government, Liberalism, Society' in Mitchell Dean and Barry Hindess (eds), *Governing Australia: Studies in Contemporary Rationalities of Government* (Cambridge University Press, 1998) 1, 4–7.

42   William Blackstone, *Commentaries on the Laws of England* (Clarendon Press, first published 1765–69, 1827 ed) 101.

Anglo-American heritage, 'all countries sharing [this] legacy have no public law and no state in the sense that these terms are understood on the European continent.'[43] Zoller's dismissal of Anglo-American public law is, in our opinion, too sweeping.

Since Hobbes, Locke and Paine were formulating their theories, there has been a dramatic change in the reach and capacity of governments. States have at their disposal much greater resources and more precise knowledge of matters relevant to effectively governing their people. They know the size, distribution and earning capacities of their people. They know the economic potential of their territories. Consonant with this knowledge, state economies have much greater productive potential. They are able to raise vastly greater amounts of revenue through taxation, and have greater control over their economies through monetary and fiscal policy. As a result, modern states have been able to expand dramatically their range of activities. They are not only concerned with the safety and freedom of their people, but also with their health, welfare and education. As Martin Loughlin has put it:

> At the beginning of the nineteenth century, government was mainly concerned with law and order, external affairs, and raising revenue to finance these activities. By the end of the twentieth century, there were few areas not only of public but also personal life in which government performed no role.[44]

For this reason, we argue in this book that, despite the grounding of the Anglo-American heritage in liberalism, there remains a rich concept of public law to be accounted for—a concept that includes a role for public institutions and a pursuit of the public good.

The theory of republicanism encompasses the public-minded sentiments in Anglo-American public law. At its core, republicanism is the democratic idea of rule by the people, as opposed to a monarch. Republican popular sovereignty invokes a public-spirited citizenship.[45] It involves civic virtue and pursues a notion of the common good. The US republic emerged from a war of independence and survived a civil war, both of which required great sacrifice and a strong sense of nationalism. It maintained a deep suspicion of government power. At the same time, it required a sense of unity and a strong central government to hold the union together.

In a discussion of republicanism, Philip Pettit draws a distinction between two concepts of freedom that might underpin republican states—freedom as non-interference and freedom as non-domination. If the state is underpinned by freedom as non-interference, then the focus is on limited and constrained government for its own sake—a government that does not interfere with its citizens. However, if the state

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43   Elisabeth Zoller, *Introduction to Public Law: A Comparative Study* (Martinus Njjhoff, 2008) 112.
44   Loughlin, above n 13, 11.
45   John Dryzek and Patrick Dunleavy, *Theories of the Democratic State* (Palgrave Macmillan, 2009) 214.

is underpinned by freedom as non-domination, there is scope for the state to regulate the lives of its citizens, for it is possible to restrict freedom in a 'non-dominating way', as long as regulation is not arbitrary and occurs in accordance with the established legal order.[46]

As 'domination' is a contestable concept, it allows for a more dynamic relationship between the state and its people. The prospect of domination is ever present, and people must remain ever vigilant against its manifestation. On the other hand, as the principle of freedom as non-domination allows the state to interfere in people's lives in a non-dominating way, there is greater scope for the state to articulate and defend a concept of the public good. As Pettit puts it: 'The republican state must be concerned with what the state is as well as what it does: with the forms as well as with the aims of the state.'[47]

Where Pettit uses a rich concept of freedom to justify a form of government that is based on empowerment and not just constraints, Martin Krygier, Professor of Law and Social Theory at the University of New South Wales, finds scope within the concept of the rule of law for a positive role for government. Krygier suggests that, rather than a blunt object for restraining and controlling power, the rule of law should have as its objective a more subtle 'tempering' of power. 'Tempering', Krygier explains, encompasses the idea that the rule of law and constitutionalism have at their core not only a concept of constraint, but also of the strengthening of power and the 'harnessing of power to good purpose'.[48]

The Scottish political economist Adam Smith (1723–90) identified three 'duties' that a sovereign must attend to in order to ensure what he described as a 'system of natural liberty':

> first, the duty of protecting society from the violence and invasion of other independent societies; secondly, the duty of protecting … every member of the society from the injustice or oppression of every other member of it, … and thirdly, the duty of erecting and maintaining certain publick works and certain publick institutions, which it can never be for the interest of any individual … to erect and maintain.[49]

Smith's third duty of the state directly connects with Pettit's focus on what the state *is*. The development of public institutions may still be to promote individual liberty, but even if one accepts this narrow premise, as Smith does himself, there

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46   Philip Pettit, *Republicanism: A Theory of Freedom and Government* (Clarendon Press and Oxford University Press, 1997) 273.

47   Ibid 276.

48   Martin Krygier, 'Tempering Power' in Maurice Adams, Ernst Hirsch Ballina and Anne Meuwese (eds), *Constitutionalism and the Rule of Law. Bridging Idealism and Realism* (Cambridge University Press, 2017) 34.

49   Adam Smith, *An Inquiry into the Nature and the Causes of the Wealth of Nations* (Clarendon Press, first published 1776, 1976 ed) 687.

are important questions about the exercise of public power in the establishment of the institutions necessary for effective living in the liberal state. That is, there is a dimension to the law that is at the very least concerned with *public* means to *private* ends, which must be accounted for in any theory of Anglo-American public law.

There are several reasons, both principled and strategic, for emphasising empowerment in addition to the traditional emphasis on control in Australian public law. First, emphasising the positive role of government leads to a focus on the theoretical justification for the state and its laws, as we have discussed in this chapter. If it is accepted that government has a positive role in upholding the common good, then legal constraints on government cannot be simply accepted—they must be justified explicitly. Throughout this book, there are examples of governments exercising power and the courts being asked to review this exercise of power. The people turn to the government for leadership and will often elect governments specifically to achieve particular policy objectives. At the same time, the people rely on the courts to constrain the bounds of this government power, or even to require government action where none is forthcoming. As a result, there is an evident tension between empowerment and constraint in the exercise of judicial review.

Second, an emphasis on empowerment turns the focus to the most powerful institution of government in the state, the executive. Despite its central role in government, executive power is the least clearly defined of the powers of the three branches of government.[50] While administrative law has increased the discussion of the executive in the law, its focus is on control of the executive, rather than the depth and the breadth of its power. In Australia, the Constitution explains the source and extent of federal executive power in a single sentence, and until recently constitutional law courses and textbooks gave less attention to the executive than they did to legislative and judicial power.

Third, key public law doctrines—federalism, separation of powers, and responsible and representative government—are traditionally discussed narrowly as mechanisms of control. A focus on public law as providing for the common good through empowerment as well as constraint allows a broader consideration of these doctrines. The separation of powers, for example, can be seen not only as a mechanism of constraint, but also as a positive allocation of power to institutions whose attributes are designed to ensure the exercise of that power promotes the common good. Federalism is not only a means for dividing and thereby limiting power, but also a positive way to promote diversity and experimentation within the Commonwealth. We believe that a positive, facilitative role of public law is inherent

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50   Paul Craig and Adam Tomkins, 'Introduction' in Paul Craig and Adam Tomkins (eds), *The Executive and Public Law: Power and Accountability in Comparative Perspective* (Oxford University Press, 2006) 1.

in its principles, and must not be obscured by placing too heavy a focus on constraint for its own sake.

Constraint of government, however, remains a crucial theme in public law. The modern state's enhanced capacity to govern, discussed above, has included an unprecedented level of economic and social power. States fund and manage large-scale, well-organised police and military forces. Governments in stable democracies have little fear of alternative power bases within the state threatening their supremacy. They are, then, free to govern in the knowledge of their superior strength. The constraints on this power to govern must, therefore, come from constraints on the legal exercise of powers within the system of public law.

Public law and private law

In addition to the dichotomy of empowerment and constraint, the breadth of public law is delimited by a distinction between the public and the private. One conceptual way of distinguishing between private and public law is that private law regulates the interaction of individuals (a horizontal relationship), and public law regulates the relationship between the state and individuals (a vertical relationship). In ancient Greek society, the division between the public and private related not only to the level of social organisation, with the private being at the lower levels such as the household, but also to the type of activities that occurred in each realm. What were considered the mundane necessities of life—such as food production, childrearing, the disciplining of slaves and the rules of economic activity—were matters for the private realm, where women and slaves were confined. The public realm was the realm of freedom and equality enjoyed by non-slave men, where there was no necessary activity, where there was no hierarchical authority, where everything was decided through 'words and persuasion and not through force and violence',[51] and where what had to be decided related to the ideals of the common world, such as courage and honour. It was a condition of entering the public realm that men were free of their practical concerns.[52]

The philosopher Hannah Arendt (1906–75) argued that this division between the public and private has become blurred in the modern world. What is considered a matter of common concern has expanded dramatically. The public sphere is now concerned with individual economic, social and even cultural well-being through its administration of the affairs of the state. The expansion of the public sphere has led to a blurring of the distinction between public and private law: 'we see the body of peoples

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51   Hannah Arendt, *The Human Condition* (University of Chicago Press, 1958) 26–7.
52   Ibid 22–78.

and communities in the image of a family whose everyday affairs have to be taken care of by a gigantic, nation-wide administration of housekeeping.'[53] At the same time the division between the public and private has been blurred by women's formal entry into, and acceptance in, the public sphere since the beginning of the 20th century. The expansion of public concerns has meant that archetypal examples of private law— such as torts, contract and company law—are overlaid with laws that have public aims, such as anti-discrimination laws, laws of fair trading, laws for the disclosure of information and, paradoxically, laws protecting privacy. Also, governments regularly operate in the private sphere, engaging in commercial activities and entering into contracts with private individuals.

There is a separate body of public law regulating the operation of institutions that are largely private in nature. For example, employment relations are regulated by labour law, which sets down minimum wages and conditions for workers. The financial sector is highly regulated, and even more so in the wake of the 2008–09 economic downturn triggered by the collapse of financial markets in the US and Europe. In addition, consumer laws protect consumers against aggressive marketing, misleading advertising, and unsafe or faulty products. There are also laws—such as the laws of evidence—that are required for the effective operation of the legal system, and are therefore of importance in both the public and private realms.

The blurring of the public and private spheres is not only a result of the public sphere encroaching on the private sphere. Hobbes's primary justification for public law—saving individuals from the chaos of unregulated individual desires—is most obviously evident in the criminal law. In the criminal law, the state takes on the responsibility for punishing individuals who have harmed others. The Director of Public Prosecutions decides whether there is a case to be brought against an individual according to the prescribed law, and prosecutes the case on behalf of both victims of crime and the community at large. The state takes on this responsibility for responding to crime to prevent private retribution. Judges apply the criminal law consistently to all accused persons, and impose punishments that fit the crime equally and dispassionately. There is no clearer example of the exercise of public law. And yet the concerns of private individuals are still reflected in criminal law, as victims are able to communicate their suffering to courts through victim impact statements, and even their views as to appropriate punishments. Furthermore, there now exist concurrent private law remedies available to victims of crime, such as actions in criminal negligence, which operate in addition to the criminal law.

Clearly, the criminal law is a very important component of any society's public law system. The intricacies of the subject in the Australian context, including the

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53   Ibid 28.

different offences and the principles of sentencing, are beyond the scope of this book. We do, however, discuss the fundamental principles on which the criminal justice system traditionally rests, and how the criminal law jurisdiction fits within the broader public law framework. These broader principles have been developed by the common law over centuries and operate to protect the rights of individuals accused of crimes against the power of the state. The power to prosecute and punish criminal actions on behalf of the community is the state's largest and most coercive power, and is unparalleled in the private sphere.[54] The potential for abuse of this power against individuals has led to the development of a number of legal safeguards for individual rights. These include the presumption of innocence, the right to hear and respond to the prosecution's case, the burden of proof being on the prosecution, the right to legal representation, the right to a trial by jury, and the right not to be detained unless a competent court has found the person guilty of a designated offence and has sentenced them to a term of imprisonment. To some extent, these principles have been implied in the Australian Constitution through the exclusive vesting of judicial power in the courts, to be exercised in accordance with normal judicial process.[55] The traditional focus of criminal law has been on the detection of criminal behaviour, as defined by the legislature, and the prosecution and punishment of culpable individuals in accordance with safeguards that ensure a balancing between the rights of the individual and the obligation of the state to protect society.

Zoller has suggested that the same legal principles underpin both public and private law—fairness, openness, transparency, accountability, due process, legality, rationality and efficiency.[56] Dawn Oliver, Emeritus Professor of Constitutional Law at University College London, goes so far as to argue that the distinction between public and private is an unhelpful or even illusory theoretical distinction. The commonality of underlying principle requires the reconsideration of the distinction drawn between the common good and the individual good.[57] The two are not, evidently, mutually exclusive.

The rule of law

In Australian public law, the rule of law operates to constrain arbitrary government action. There is an ongoing debate over whether the rule of law operates only as a constraint on arbitrary exercise of government power or whether it contains within

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54   Private parties may bring criminal prosecutions, but these are limited to particular types of offences and are always subject to being taken over by the Attorney-General or Director of Public Prosecutions.
55   See Chapters 9 and 10.
56   Zoller, above n 43, 167.
57   Dawn Oliver, *Common Values and the Public–Private Divide* (Butterworths, 1999) 56.

it substantive values to be upheld by the law. The concept of the rule of law can be traced back to ancient Greek times,[58] and has been part of the Westminster tradition since at least the 17th century.[59] Oxford scholar Albert Venn Dicey (1835–1922) used the term at the end of the 19th century,[60] and it has since enjoyed a meteoric rise.

At a broad level, in order for a state to be able to enjoy the rule of law, there needs to be a culture that respects the idea of law. According to Austrian scholar Friedrich Hayek (1899–1992):

> [The rule of law] will be effective only in so far as the legislator feels bound by it. In a democracy this means that it will not prevail unless it forms part of the moral tradition of the community, a common ideal shared and unquestioningly accepted by the majority.[61]

Although the term 'rule of law' is not explicitly mentioned in the Australian Constitution, it is an accepted part of our constitutional system and some believe that the rule of law provides authority for the Constitution itself. In *Australian Communist Party v Commonwealth*,[62] Dixon J famously described the rule of law as an 'assumption' of the Constitution.[63] Since this time, the rule of law has been invoked by the High Court on a few occasions, but the Court has never fully extrapolated its significance and there has been much disagreement among commentators regarding its meaning and content.[64] However, given the centrality of this concept to Australian public law, it is important to consider how we should understand it.[65]

There are two main analytical approaches to the rule of law that can assist in elucidating its meaning. These are known as the thin or procedural approach, and the thick or substantive approach. Hayek is one of the main proponents of the procedural approach. He offers the following definition:

> Stripped of all technicalities, this means that government in all its actions is bound by rules fixed and announced beforehand—rules which make it possible to foresee with

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58   See, eg, Aristotle, above n 1, 3.16.
59   Samuel Rutherford, *Lex, Rex, or the Law and the Prince* (Portage Publications, first published 1644, 2013 ed); see also Locke, above n 28.
60   Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan, 10th ed, 1995).
61   Friedrich Hayek, *The Constitution of Liberty* (University of Chicago Press, 1960) 206.
62   (1951) 83 CLR 1 ('*Communist Party Case*').
63   Ibid 193. This case concerned legislation enacted by the Federal Parliament to dissolve the Australian Communist Party and to make communist organisations illegal on the basis that it was 'necessary' for the defence of Australia. The High Court struck the legislation down on the ground that the Parliament was acting outside the Constitution in that there was insufficient evidence available that the legislation was 'necessary' for the defence of Australia, given that the nation was not at war. Here, Dixon J noted in his judgment that 'it is a government *under* the Constitution' (emphasis added).
64   See, eg, Lisa Burton-Crawford, *The Rule of Law and the Australian Constitution* (Federation Press, 2017). Burton-Crawford argues that the rule of law is not a judicially enforceable doctrine in the Australian system, but, rather, a political ideal that is partly implemented in the Constitution.
65   In *Kartinyeri v Commonwealth* (1998) 195 CLR 337, Gummow and Hayne JJ enigmatically stated in regard to the above-mentioned statement by Dixon J that 'the occasion has yet to arise for consideration of all that may follow from [it]': 381 [89].

fair certainty how the authority will use its coercive powers in given circumstances and to plan one's individual affairs on the basis of this knowledge.[66]

For Hayek, the key is certainty and predictability, as these allow people to plan their affairs. Hayek believes that laws must be general and equally applied. Laws should not single out specific persons (*ad hominem* legislation) or even groups (for example, based on ethnicity or race) for adverse treatment. On the flipside, legislation would not be able to single out women or even the blind for beneficial treatment. While Hayek believes the state has crucial functions to perform, as a civil libertarian he understands the rule of law to be limited to constraining the state and not to empowering it.

Dicey expounded a three-part definition of the rule of law:

> The 'rule of law' … means, in the first place, the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power; …[second] equality before the law; … [third] the law[s] of the constitution are not the source, but the consequence of the rights of individuals, as defined and enforced by the courts.[67]

Dicey believed that law provides the most secure means of protecting each citizen from the arbitrary will of every other, and that the law forms a bulwark between those who govern and those who are governed. In particular he was worried that decision makers have too much discretion, and that too much discretion leads to arbitrariness.

Joseph Raz, Professor of Legal Philosophy at Oxford University, sets out a list of conditions for the rule of law. His list includes the following mechanisms as important: an independent judiciary, a limited form of legislative and administrative review, open and fair hearings, accessible justice, and laws that are prospective, open, clear, public, certain and relatively stable.[68] Raz's conditions for the rule of law are all procedural. In his view, there is no necessary connection between law and morality. He argues that '[the rule of law] says nothing about how the law is to be made: by tyrants, democratic majorities, or any other way. It says nothing about fundamental rights, about equality or justice.'[69] He states:

> a non-democratic legal system, based on the denial of human rights, on extensive poverty, on racial segregation, sexual inequalities, and religious persecution may, in principle, conform to the requirements of the rule of law better than any of the legal systems of the more enlightened Western democracies.[70]

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66   Friedrich Hayek, *The Road to Serfdom* (Dymock's Book Arcade, 1944) 54.
67   Dicey, above n 60, 202–3.
68   Joseph Raz, 'The Rule of Law and its Virtue' in Joseph Raz (ed), *The Authority of Law* (Clarendon Press and Oxford University Press, 1979) 210.
69   Ibid 210.
70   Ibid 211.

Raz argues that because there is no necessary connection between law and morality, the rule of law should be balanced with other values and should not always trump them.

The second approach, the substantive approach, agrees that Raz's procedural conditions are necessary for the rule of law, but it adds a further condition, that of morality. This element of morality is evident in the 2004 definition of the rule of law offered by the UN for its own working purposes:

> [The rule of law is a] principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and *which are consistent with international human rights norms and standards.* It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.[71]

This approach emphasises rights. Two exponents of the substantive approach are US legal philosopher Ronald Dworkin (1931–2013), and former English House of Lords justice Lord Bingham of Cornhill (1933–2010).

Dworkin believes that the rule of law contains fundamental civil and political rights and duties that pre-exist the written law. This means that when courts interpret the written law and find gaps or ambiguity in it, they should interpret the law in light of these underlying rights and duties in order to fill the gaps. Thus, Dworkin assumes that judges have the capacity and authority not only to interpret the written law, but also to fill the gaps within it.[72]

In late 2006, Bingham gave a speech setting out eight sub-rules of the rule of law.[73] His fourth sub-rule states that the 'law must afford adequate protection of fundamental human rights', which he acknowledges 'would not be universally accepted' as a part of the rule of law.[74] However, he points out that the preamble to the 1948 *Universal Declaration of Human Rights* states that: 'It is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law.' Bingham rejects Raz's contention that a state which represses or persecutes sections of its people could be regarded as observing the rule of law, even if the persecution of the minority were the subject of detailed laws duly enacted and scrupulously observed. In his view, this would strip the

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71 *The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies—Report of the Secretary General*, 58th sess, Agenda Items 37 and 156, UN Doc S/2004/616 (23 August 2004) 5 [11] (emphasis added).

72 See generally Ronald Dworkin, *Taking Rights Seriously* (Duckworth, 1977).

73 Lord Bingham, 'The Rule of Law' (2007) 66 *Cambridge Law Journal* 67.

74 Ibid 75.

rule of law of most of its virtue. He does not set down what rights in particular must be protected by the rule of law, but somewhat vaguely leaves this up to each society. In contrast to Raz, Bingham sees a necessary connection between law and morality. He believes that the rule of law relates to good law, and not just any law that is good procedurally.

Unifying these two approaches to the rule of law is the concept that they are all versions of Western liberalism. The ideology of liberalism is dominant in Australia: it has shaped our political, social and legal system. Every version of liberalism reserves a place for the rule of law as it requires that every interference with liberty is done through lawful means. At the heart of liberalism is a belief in the liberty of the individual from the state and from the demands of others. Liberalism is focused on the rights of the individual as opposed to the broader interests of the community and the individual's responsibility to the community.[75] In this sense there is tension between the rule of law and public law because, as discussed above, public law should be about public good—what is good for the community—rather than simply preserving the rights of the individual. Western liberalism also shows a preference for law and legal rules, which is not the case in some non-liberal societies where a resort to rules is alien and considered distasteful because relationships and the natural order regulate the resolution of disputes.

In the West, the rule of law has been found deficient on a number of grounds. For example, socialist political theories generally lament the fact that the rule of law pays too little attention to true equality between persons and too much attention to the protection of property rights. A Marxist critique of the rule of law goes much further: it argues that the rule of law is a mask for structures of inequality and that the law serves not to restrict government and protect individual rights, but rather to conceal the injustices of the capitalist system. Hence a Marxist view is that the rule of law represents no more than a false idealisation of law designed to reinforce political structures and the economic status quo in society. These Marxist critiques, which were carried forward by the Critical Legal Studies movement from the late 1970s,[76] hold that the law is not neutral but represents the interests of the powerful within society.

While Australian public law has secured effective and accountable government for more than a century, it has not always upheld the substantive rights and values that underpin the Western liberal ideal. In particular, as Chapter 3 shows, Australian law has often failed to protect Aboriginal and Torres Strait Islander peoples from

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75   In non-liberal societies that exist in regions such as Asia and Africa there is a greater emphasis on group rights and the responsibility of the individual towards the community.

76   Critical Legal Studies was a movement begun by American scholars to critique the dominant legal ideology on the basis of its conservatism and disengagement from politics.

grave injustices and, on occasion, has itself been responsible for perpetrating injustices against them in the name of upholding liberal values. The suffering of Australia's First Nations peoples, among others, is a warning against complacency in the development of Australian public law, which requires constant reflection on the values that underpin the law.

The values underpinning public law

There is no point creating a state with a body of laws if those laws do not protect and promote the values that are of importance to the people. A good deal of political theory is devoted to articulating the core political values that underpin states and provide states with a reason to exist. The US political philosopher John Rawls (1921–2002), building on the liberal tradition of Hobbes and Locke, posited 'principles of justice' as the explanation for any original agreement to live together. Principles of justice are those principles that:

> free individuals concerned to further their own interests would accept in an initial position of equality as defining the fundamental terms of their association. These principles are to regulate further agreements; they specify the kind of social cooperation that can be entered into and the forms of government that can be established.[77]

To base public law on a concept of justice is to express a commitment to some form of public morality. However, there are no objective standards of justice. From one perspective, a legal system might be considered 'just' if it ensures due process and procedural fairness. From another, a legal system might only be considered 'just' if its provisions uphold particular substantive moral values.[78] Furthermore, the notion of justice begs the question to whom is justice owed—to the individual, or to the community as a whole?

While there will always be contestation when articulating political values, there are generally three values that are commonly described as providing the justification for liberal democratic states: freedom, equality and community. These have been formulated in different ways and the values of freedom and equality are often associated with a meta-value of human dignity. For instance, T R S Allan, Professor of Jurisprudence and Public Law at the University of Cambridge, argues that liberal constitutionalism is based on commitments to 'the equal dignity of citizens'.[79] In different ways each of these values are all concerned with pursuing a concept of justice.

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77   Rawls, above n 27, 11.
78   See generally Tom Campbell, *Justice* (Palgrave Macmillan, 3rd ed, 2010).
79   T R S Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford University Press, 2001) 2.

Freedom

Liberalism posits freedom as the foundation of the relationship between individuals and the state: '[It is a function of liberty that] a man live as he likes; … inasmuch as to live not as one likes is the life of a man that is a slave'.[80] Liberty extends to a whole range of freedoms, including freedom of belief and opinion, freedom of expression and association, freedom to make political choices, freedom of movement and residence, and freedom of occupation.

In his influential work, 'On Liberty', John Stuart Mill (1806–73) described a sphere of individual thought and action—a private space that the state could not regulate. The boundary of this private space was determined by the extent to which a person's actions interfered with the rights of, or 'harmed', others. Mill recognised that, in exercising their freedom, people can make highly misguided and self-destructive choices, and in doing so can affect society indirectly. But this is a price that society must be willing to pay to maintain the fundamental principle of individual autonomy.[81]

Mill makes a strong case for a substantial degree of individual freedom *from* state interference. The individual autonomy of which Mill speaks assumes that people have the capacity to exercise real choices. This capacity depends upon individuals having the basic necessities of life, such as good health, shelter and education. Some branches of liberalism, such as liberal egalitarianism, focus therefore not only on individual freedom from state interference, but also the role of the state in ensuring that citizens have the freedom to exercise meaningful choices for their lives.[82] Here liberty overlaps substantially with the other fundamental values of equality and community.

Equality

The concept of equality recognises that all individuals are of equal worth despite any differences in their personal attributes, their wealth and power, and their contribution to society. All are equal before the law, even those in positions of power who may have made the laws. Beyond this formal equality, substantive equality is concerned to address imbalances in opportunity. A difficulty with pursuing substantive equality is that it invariably affects the freedom of others, and thus conflicts with the principle of liberty.

An important way in which equality is expressed in public policy is through the concept of non-discrimination. It is universally accepted—at least within Western

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80   Aristotle, above n 1, Book 6, 1317b.
81   John Stuart Mill, 'On Liberty' in Conrad Johnson (ed), *Philosophy of Law* (Macmillan, 1993) 168.
82   See, eg, Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Clarendon Press and Oxford University Press, 1995).

liberal democracies and in international human rights law—that it is illegal and, in most states, unconstitutional to discriminate between people on a whole range of bases, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.[83] The elimination of these grounds for discrimination provides an equal platform for people to flourish, but it does not eliminate deeply entrenched historical disadvantages, which may require more than formal equality to combat them into the future. Hence, in some democracies, there is also constitutional or legislative provision for affirmative action, or positive discrimination, to overcome entrenched disadvantages arising from past inequalities.[84]

A further major cause of inequality is the disparity of wealth between people. There can be no doubt that with wealth comes opportunity—opportunity for, among other things, better education, better work, better housing and better access to a range of material possessions. There have been political systems that have attempted to redress inequalities of wealth, such as communism, but these have largely failed because of the excessive burden they have placed on personal freedom. Nevertheless, the principle of equality within a democracy cannot simply ignore the differences in opportunity that exist as a result of disparities in wealth. In fact, there is research to suggest that there are strong reasons to address inequality beyond the need to pursue justice for individuals. One study has found that disparities in wealth have a powerful effect on the psychological well-being of both rich and poor people in large societies, and that the most effective way to improve well-being and happiness across the socio-economic spectrum is not to increase overall wealth, but to decrease inequality.[85]

Community

The idea of community is particularly strong in continental expressions of democracy. The French republic is famously built on not only liberty and equality, but also 'fraternity'.[86] Fraternity encapsulates a sense of community and common bond which the state is to protect and foster. A collective sense of the common good gives rise to

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83   This list of grounds is taken from s 9(3) of the *Constitution of the Republic of South Africa Act 1996* (South Africa).

84   See, eg, s 9 of the *Bill of Rights* in the South African Constitution, which states: '(1) Everyone is equal before the law and has the right to equal protection and benefit of the law. (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken'.

85   Richard Wilkinson and Kate Pickett, *The Spirit Level: Why Equality is Better for Everyone* (Allen Lane, 2009).

86   For the most recent official use of this triad, see *La Constitution du 4 Octobre 1958* [French Constitution of 4 October 1958] Preamble.

the possibility of liberty beyond that asserted and expressed as individual freedom. It is a liberty that comes from 'ruling oneself through the medium of a state which one has made one's own'.[87] Isaiah Berlin describes this concept of liberty as 'positive liberty'. It recognises that individuals are not capable of the full expression of freedom without a community to assist the individual in escaping their immediate desires and discover their higher selves.[88] Berlin contrasted this 'positive liberty' with that of 'negative liberty', more closely associated with liberalism and the freedom from state interference.

In the 1970s, a new branch of liberal political theory, communitarianism, tried to provide a new emphasis on the place of community in liberalism based on this idea of collective freedom.[89] Communitarians offered three main critiques of liberalism. First, they argued that the pursuit of individual liberty was not the only rationale for states and their political institutions. They pointed to non-Western societies in which other principles underpin legal systems, such as loyalty to family and social harmony. Second, communitarians questioned whether the individual was necessarily the only, or even the main, expression of the self. People have a range of attachments to others which can be as important to their identity as their experience as individuals. This, communitarians argued, needed to be reflected in any political theory of the state and its laws. Third, communitarians argued that societies based on liberal political theory are far from ideal. The idea of liberty has, for example, been responsible for individual alienation from political processes, excessive consumption, the failure to take collective responsibility for the natural world, and isolation and loneliness.[90] The idea of community was drawn on powerfully by President Barack Obama in his famous victory speech in the US presidential election of 2008: 'So let us summon a new spirit of patriotism; of service and responsibility where each of us resolves to pitch in and work harder and look after not only ourselves, but each other. … in this country, we rise or fall as one nation; as one people.'[91]

There is a major assumption in any discussion of community and the common good that what is held in common is coherent and identifiable. The possibility of identifying common national values has, however, been challenged by the phenomenon

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87 Maurice Cranston, 'Liberalism' in Paul Edwards (ed), *The Encyclopaedia of Philosophy* (Macmillan, 1967) 458, 459.

88 Isaiah Berlin, 'Two Concepts of Liberty' (1958) in Isaiah Berlin, *Four Essays on Liberty* (Oxford University Press, 1969) 150.

89 See Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (Basic Books and Martin Robertson, 1983); Michael Sandel, *Liberalism and the Limits of Justice* (Cambridge University Press, 2nd ed, 1988).

90 These critiques are discussed in general terms by Daniel Bell: Daniel Bell, *Communitarianism* (21 March 2016), Stanford Encyclopaedia of Philosophy, <http://plato.stanford.edu/entries/communitarianism>.

91 Barack Obama, 'Victory Speech' (Speech delivered at Grant Park, Chicago, Illinois, 4 November 2008).

of globalisation. Modern societies contain many cultural groups, with a wide range of beliefs and aspirations. In Australia in the 1990s, the Hawke/Keating Government introduced a policy of multiculturalism to capture the breadth of Australian identities. The Howard Government dismissed multiculturalism as a slogan, preferring to emphasise an Australian identity associated with its Anglo-Celtic, colonial roots. The debate over national identity took an ugly turn in 2005 when a series of racially motivated riots occurred in the Sydney beach suburb of Cronulla.[92]

The ultimate expression of community in the state occurs when the very existence of the state is under threat—in times of war. At such times, extraordinary sacrifice is both expected and required of citizens. At such times, executive power expands in order to protect the state, and this expansion of power comes at the expense of a degree of personal freedom. In Australia, the story of the ANZACs in Gallipoli has become one of the most potent and enduring symbols of community in Australia—one that has been embraced by young and immigrant Australians, as well as those who have been more personally affected by war. Some commentators, however, have raised concerns about the desirability of building a national identity around a military event of such violence.[93]

Conclusion

Australian public law is not simply a set of rules. It is an amalgam of systems of government (such as monarchies and republics), underpinning concepts and principles (such as sovereignty and the rule of law), fundamental processes (such as social contracts and democracy), basic institutions (such as states and local political communities) and core values (such as freedom and equality). In the Australian state, the public rules are both informed by the interaction of these systems, processes, concepts, principles, institutions and values, and determine how they develop in the pursuit of the common good.

In this book we explore closely the unique dimensions of public law in the Australian state. There is no one right way to organise such an exploration. It is a rich tapestry of ideas and concepts to facilitate understanding of the relationship between us, the people, and the state in which we reside.

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92   See generally Gregory Noble (ed), *Lines in the Sand: the Cronulla Riots, Multiculturalism and National Belonging* (Institute of Criminology Press, 2009).
93   Marilyn Lake and Henry Reynolds with Mark McKenna and Joy Damousi, *What's Wrong with ANZAC?: The Militarisation of Australian History* (University of New South Wales Press, 2010).

In this book, we have chosen to draw on organising ideas that represent the many dimensions of public law. In this first Part, we introduce foundational narratives and concepts of Australian public law. Chapter 2 uses a historical analysis to discuss the development of Australian public law that gives the context to understand the modern public law institutions, rules and issues. Chapter 3 addresses the foundational fact of Australia's colonial establishment, and the various dimensions of the ongoing relationship between Australia's first peoples—Aboriginal and Torres Strait Islander peoples—and the Australian state. Chapter 4 introduces the core organising principle and value of federalism. Parts II to IV (Chapters 5 to 11) are organised according to the functions and powers of the core Australian public law institutions of government. Chapters 5 and 6 explain the principles of democracy and representative government, and the processes of parliament, their powers and their limitations; Chapters 7 and 8 outline the actors that constitute the executive and the different forms of executive power and how this is brought to account; Chapters 9 and 10 turn to judicial power and its separation from the other government powers, and how this separation has operated in practice to protect fundamental rights. Chapter 11 addresses the judiciary's important role in interpreting statutes, and the principles and public law doctrines that influence this. Part V concludes the book with a consideration of the external influences on Australian public law. Chapter 12 explains how the expectations of the community shape public law in the form of government protection and promotion of human rights, while Chapter 13 considers the influence on Australian public law of international law and institutions.

DISCUSSION QUESTIONS

1   Does public law now reach into all aspects of our life, or is there still a private sphere untouched by public law?

2   What is the purported distinction between public law in civil law countries and public law in the common law tradition? Is the distinction convincing today?

3   Is the idea of public law dependent on the existence of nation-states, or could there be a global public law?

4   Explain the core distinction between the theories of political constitutionalism and legal constitutionalism. Where are the strengths and weaknesses of each theory and how might any weaknesses be addressed?

5   How different are the procedural and substantive approaches to the rule of law? Which is more useful for protecting human rights?

FURTHER READING

David Feldman (ed), *English Public Law* (Oxford University Press, 2004)

Michael Hardt and Antonio Negri, *Commonwealth* (Harvard University Press, 2009)

Martin Loughlin, *The Idea of Public Law* (Oxford University Press, 2004)

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

Martin Smith, *Power and the State* (Palgrave Macmillan, 2009)

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Elisabeth Zoller, *Introduction to Public Law: A Comparative Study* (Martinus Njihoff, 2008)