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1a. Reception of English Law in Australia

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Introduction

- **Private law**: governs relationships between people

- **Public law**:
  - "The system of institutions and rules that govern the **relationship** between the state and the people residing in its territory"
  - **Legal realism**: "we must look beyond the 'words or rules' of the law"
  - "Australia has **adopted** its main instructions of State and it's principles of public law predominately from [UK and US], but has **fashioned** these institutions and principles into a uniquely Australian public law"
  - "Requires study of the **values and objectives** which that system is empowered to achieve"
  - **Sovereignty**: location of absolute power in the State (political and legal aspects)
  - Derrida (2002): an original act of **(political) force** that institutes the law, **violence** is at the origin of all law and therefore the **legitimacy** of the law is always in question

  - **Values underpinning public law:**
    - **Freedom**: foundation of the relationship between individuals and the State (e.g. Make political choices, movement, residence, occupation, expression and association, beliefs and opinions)
    - **Equality**: all individuals are of equal worth despite difference in personal attributes, all are equal before the law (but substantive equality invariably affects the freedoms of others)
    - **Community**: democracy, collective sense of the common good (e.g. Extraordinary sacrifice expected of individuals in times of war)

- **Parliament supremacy:**
  - Constitutional theory: people of a nation **can't irrevocably bind their successors**
  - A **legislative body** is supreme to all other government institutions, including any executive or judicial bodies
  - Generally, the **courts can't overrule** its legislation and no Parliament can pass laws that future Parliaments cannot change

- **Popular Sovereignty**:
  - The **people's acceptance of a law's authority** gives it its authority
  - Sovereignty of the peoples' rule: authority of a state and its government is created and sustained by the **consent of its people**, through their elected representatives, who are the source of all political power

Reception of English Law in Australia

- **Settlement:**
  - **International law:** land could only be occupied by conquest, cession (treaty making) or settlement
  - **Settlement**: the land, being **uninhabited**, automatically inherited all English laws already in force
  - This method of colonisation was later held **invalid** in the historic **Mabo** case

- William Blackstone:
  - **Birthright of all English people** to English laws

    - **Caveat**: "only laws applicable to a colony"
    - English people carried the law with them, but not all of these laws would be **applicable to the colony** (only those that could be applied to the conditions.

- Australian Courts Act 1828 (9 Geo 4, c83):
    - **Supreme court**: authority to determine what exactly was 'applicable' and what was not
    - Australian Courts Act: explicitly provided what Blackstone had stated applied implicitly
    - All laws and statues in force in England on **25 July 1828** which were applicable to the conditions in New South Wales and Van Diemen's Land were deemed to be in force there with the Supreme Court given authority to make that determination

- Instructions to Governor Philip by Letters Patent: “endeavour by every possible means to open an intercourse with the **natives** and to conciliate their affections, enjoining all our subjects to live in **amity and kindness** with them”
- **Traditional methods** of starting at Captain Cook **discredits** the Aboriginal legal system that operated before English Law

- **Problems** with inheriting English laws:
    - Most English laws **unsuitable** for colony in its early stages
    - Laws not **easily available** over Austlii to check they were correct
    - Not a multitude of **lawyers**/legal professionals available with detailed knowledge/understanding of the law
    - Didn’t carry with them **libraries** of law books
    - Took a long time for **news** of new laws to be brought to the shores
    - To ask **assistance** on a question to England took some time

- William Blackstone (1791): "it hath been held that if an **uninhabited country** be discovered and planted by English subjects all the English laws then in being, which are the birthright of every English subject, are immediately then in force. But this must be understood with very many and very great restrictions. Such colonists carry with them only so much of the English law as is applicable to their **new situation** and the **condition** of an infant colony"
- **Colony arrived:** legislation in place to establish a **military court**
- Much later **trained legal professionals** were sent (power struggle beginning between democracy and independence of judiciary)

- **Imperial restraints and dependence:** brief history:
    - New South Wales Act 1823 (Supreme Court, Legislative Council): gave same **security** as English judges, created small legislative council, laws couldn't be repugnant of the laws of England (but "repugnant" vague), governor had to consult legislative council unless urgent etc.
    - 1825 Commission: established **Executive Council** that governor had to consult with on certain matters, trial, expired 1828
    - Australian Courts Act 1828 s 24: explicitly stated what **Blackstone** stated, all laws enforceable in England on 25 July 1828 enforceable in Australia if applicable, supreme courts to enforce, all legislation after this date only applicable by "**paramount force**"
    - **Unity of the Common Law**: each state's CL developed TOGETHER (not separately), effected by common appeals to Privy Council, not frozen in form received in 1928

    - Colonial Laws Validity Act 1865: **lists acts** received by Australian states, no colonial law invalidated by repugnancy unless inconsistent with legislation extended to the colony (express words or necessary intention)
        - Philip v Eyre 6 QB 1: **narrow test** (little judicial discretion as to whether applied)

- **Federation**

- **Statute of Westminster 1931**: British parliament will **stop making legislation** for its dominions unless requested to do so by dominion themselves (didn't apply to Australia until 1942)
- Statute of Westminster Adoption Act 1942: **abolished repugnancy** for Federal laws
- Australia Act 1986: abolished **remaining repugnancy**, abolished appeals to Privy Council

- **Key institutional concepts:**
  - Representative and responsible **government**
  - **Judicial** independence

Key Case

- Cooper v Stuart (1889): **inapplicable laws**:
  - **Issue**: whether law of **perpetuities** existed in NSW or whether inapplicable to colony
  - **Held**: **inapplicable**
  - Grants were about attracting **colonists** and not pecuniary profit
  - Impossible to foresee what public uses would be needed for such land (although rule was later adopted)
  - Lord Watson: "very great difference between the case of a Colony acquired by conquest or cession, in which there is an established system of law, and that of a Colony which consisted of a tract or territory practically unoccupied, without settled inhabitants or settled law, at the time when it was peacefully annexed to the British dominions. The Colony of NSW belongs to the latter class"

- State Government Insurance Commission v Trigwell (1979): **later adoption**:
  - **Issue**: rule in Searle v Wallbank (1947) held that there was no duty of care to prevent sheep from staying on the highway, did this CL rule apply in SA?
  - **Held**: CL not frozen in time, just because it wasn't adopted at settlement doesn't meant it can't be found applicable at a later date
  - **Inverse not true**: "the court is neither a legislature nor a law reform agency"
  - Gibbs J: "legislation passed **after** [date of reception] will of course **not be applicable**… But the CL which was adopted is **not frozen in the form** which it assumed in 1836. It is the common law rules as expounded from time to time that are to be applied…if it is not right to say that the principle of Donoghue v Stevenson [1932] became part of the law of SA in 1836, it is at least true to say that a body of principles, including those that developed into the rule subsequently expressed in that case, formed part of the law of SA from 1836 onwards [this] means that parts of the CL which are suitable to a more advanced state lie dormant until occasion arises for enforcing them"

- Union Steamship Co of New Zealand v Cth (1925): **repugnancy**:
  - **Issue**: did the repugnancy doctrine continue to apply after federation?
  - **Held**: **Yes**, Constriction didn't repeal Colonial Laws Validity Act (not implied)
  - **Later**:
    - Statute of Westminster: **Federal Government** unrestrained
    - Australia Acts: **states** unrestrained

- Bistricic v Rokov (1976): **later amendments**:
  - **Issue**: compensation claim in NSW waters - Merchant Shipping Act (imperial legislation) applied but later amendments to Act were made in 1958 - did the amendments to that act apply in NSW? (did they have "**paramount force**" an extension to the colonies), didn't expressly state paramount force, but did extend to colonies (Australia was part of the

dominions)
    - **Held**: Act applied but amendments did not apply
    - Mason J:" "the legislative policy which underlines s 11 of the Statute of Westminster is as important as the language of that section. This policy, which has evolved over the long history of constitutional development leading to responsible government, legislative autonomy and Australian nationhood, is that a stature of the UK Parliament, if it is indented to apply to an Australian State, while be **expressed to apply** to that State"
    - Jacob J: "UK made the amendments to fulfil a **treaty obligation** that Australia is not a party to"

    - ~~Murphey J~~: executive/legislative authority **incompatible** with integrity of Australian nature
        - **Popular sovereignty**: "powers of government belong to, and are derived from, the people" (Nationwide News (1992))
        - **Radical view**? (NOTE: before Australia Act)
        - Australian Capital Television v Cth (1992): "**ultimate sovereignty** resides in the Australian people (BUT not until after Australia Act: "the end of the legal sovereignty of the Imperial Parliament"
        - **Original authority** of Constitution: British parliament
        - **Ongoing authority**: Australian people
        - **Questioned** whether original act applicable

- China Ocean Shipping Co v SA (1979): **paramount force**:
    - **Issue**: applicability of Merchant Shipping Act, use of Murphey J's argument of **popular sovereignty**
    - **Held**: British Statues continued to apply in the States through **paramount force** (Murphey J dissenting)

Sue v Hill (1999): Foreign Power

- **Facts:** H Australian citizen but had UK citizenship, H elected as a senator, and subsequently, relinquished her UK citizenship (only after election)
- **Argument**: H still had UK citizenship at the time of election, not eligible for election by virtue of s 44(1)
- **Issues**: **independence** as a result of the Australia Act, is the UK a '**foreign power**'?

- **Five judgments**: Gleeson CJ and Gummow and Hayne JJ writing a joint judgment, and Gaudron, McHugh, Kirby and Callinan JJ writing individual judgments

- Gleeson CJ, Gummow and Hayne JJ: majority/joint judgement:
    - Different senses is the term '**The Crown**':
        1. **Body politic**
        2. **Holder of the office** representing the body politic
        3. **The Government** (executive)
        4. The **paramount power** of the UK in relation to the colonies
        5. The **Queen**

    - UK IS a **foreign power**
    - Use Australia Act to **mark** English law no longer applicable
    - **Evolutionary theory approach**: meaning of words (in legislation) can **change over time**

    - **Violation** of s 44 (1):
        - Since Australia Act 1986 (Cth) UK is considered a **foreign power** – it has no legislative, executive or judicial influence over Australia

        - s 1: UK **cannot legislate** to Australia
        - s 11: **terminated** the possibility of appealing to the Privy Council
        - UK has admitted that it would be against **constitutional practice** for British ministers to tender advice to the Crown for the appointment of Australian ministers (as was once the custom) – no executive influence
        - **Executive UK decisions**, such as entering military alliances and acceding to treaties have no legal consequence on us. Therefore, no executive influence
        - UK is a '**foreign power**', despite the fact it was not so when the Constitution was written
        - "Constitution speaks to the **present** and its interpretation takes account of and moves with these developments"

    - **Capacity**:
        - HC does have the **jurisdiction**
        - This can be done either through a **petition** or a **parliamentary referral**
        - Parliament did have the power to **disqualify members** of parliament, yet it is unclear whether they still do

- Callinan J (dissent):
    - Critiques the **evolutionary theory** of the UK becoming a foreign power due to the concern of the doubt it creates in respect of people's rights, status and obligations
    - Can't divorce **history/context** from the meaning of the words
    - **Originalist approach**: always means what the authors intended