Table of Contents

1. What is public law?

Public law governs relations between states and between states and individuals. It is distinct from **private law**, which concerns relations between legal relations. **Public law** is principally concerned with powers, rights, and obligations of the state.

- Anthony Connolly: 'public law comprises the total set of legal rules which create, empower, regulate, and call to account State officials and institutions.'

The **state** operates on two planes: domestic and international.

- Anthony Connolly: 'the state' is 'the total set of public officials and institutions concerned with the creation, administration and adjudication of the rules of law.'

- Anthony Connolly: 'It is by virtue of its maintaining a monopoly on the exercise of coercive force to facilitate compliance with its commands and decisions and its distinctive capacity to generate acceptance of its authority that the State is unlike other powerful agents in a society, individual or corporate.'

Public international law regulates relations between states. The parties subjected to international law are also the ones who write it.

- Louis Henkin: 'almost all nations observe almost all principles of international and almost all of their obligations almost all of the time.'

- Thomas Franck: if international law was not obeyed '…no mail would go from state to state, no currency or commercial transactions would take place….[V]iolence, fortunately is a one-in-a-million deviance from the pacific norm'.

- Yoram Dinstein: '[t]here is a common denominator between those who try (even disingenuously) to take advantage of the refinements of the law, and those who rigorously abide by its letter and spirit. They all share a belief in the authority of the law.'

    - For instance, US claiming that killing of Soleimani was in self-defence is example of appealing to the rule to defend actions. The US's defence is not to reject the validity of the rules themselves.

2. The sovereign state

Charter of the United Nations: arts 1-2

Article 1 – purposes of the UN
- Maintain international peace and security
- Develop friendly relations between nations
- Achieve international co-operation solving economic, social, cultural, humanitarian problems
- Harmonise the actions of nations for common ends

Article 2 – Principles
- Sovereign equality of all members
- Members must fulfill obligations in good faith
- Members shall settle disputes by peaceful means

- Members refrain from use or threat of use of force against territorial integrity or political independence of any state
- Members must help UN achieve aims and not help those working against UN's aims
- Should make non-members act according to principles to ensure peace

Montevideo Convention on Rights and Duties of States

- Reflects a declaratory theory of statehood
- **NOTE THAT THIS IS CUSTOMARY INTERNATIONAL LAW**

Article 1 – a state should have:

- A permanent population;
- Defined territory;
- Government; and
- Capacity to enter relations with the other states.

Crawford's concept of sovereignty

- Plenary competence to perform acts, make treaties and so on;
- Exclusively competent with respect to their internal affairs;
- Not subject to compulsory international processes, jurisdiction, or settlement without consent;
- States are equal;
    - Note that states are not actually equal (in terms of resources, wealth, influence, etc.)
    - But they are juridically/formally equal
- Derogations from these principles will not be presumed.
    - States can voluntarily consent to agreements which diminish their sovereign powers, but any such diminishment will not be valid without explicit consent

Sovereignty shield

- States use sovereignty to protect against interferences by outside actors in their domestic affairs
- This shield is also visible in the UN Charter: "Members are to refrain from use or threat of use of force against territorial integrity or political independence of any state" (article 2(4))

Sterio on Sovereignty

- The *Montevideo Convention* defines statehood legally rather than politically. It divorces statehood from recognition. But it fails to note that a state can fail to meet those conditions and still be one, and vice versa.

- A constitutive view of statehood has some relevance: to fully enjoy the benefits of statehood, an entity must be recognised as a state by other states. Note also that the bar is far harder for non-states to enter statehood than for current states to retain statehood.

- William Thomas Worster: This flexibility in State recognition theory though, while depriving the act of any inherent legal meaning, has value in its utility for establishing lawful relationships.

3. Sovereignty and Australia

The Acquisition of Territory Pre-1945 (Pre-UN Charter)
Five ways existed:

- Accretion
    - Change in division of territory/land mass due to natural geographic processes
    - E.g., islands created by volcanic activity
    - E.g., change in course of river depositing soil in different areas, incrementally shifting a border

- Cession
    - Transfer of territory from one existing state to another existing state
    - Could be in form of a gift (France gifted Venice to Italy), or sale (US purchasing Alaska from Russia), or in response to threat

- Occupation
    - Only available when the land subject to occupation was "terra nullius" (land of no one)
    - State that was occupying had to show intention to remain on that land long-term
    - Occupation supposed to be peaceful and continuous
    - In modern world, no land is considered "terra nullius"
    - Occupation therefore can't be used to acquire territory
    - Resemblance to statehood determined availability of territory to acquisition for statehood

> ***Oppenheim**: "only such territory can be the object of occupation as belongs to no State, whether it is entirely uninhabited, for instance, an island, or inhabited by natives whose community is not to be considered a State."*
>
> ***ICJ, Western Sahara Case**: "territories inhabited by tribes or peoples having a social or political organisation were not regarded as terra nullius… in the case of such territories the acquisition of sovereignty was not generally considered as effected unilaterally through "occupation" of terra nullius by original title but through agreements created with local rulers."*

- Prescription
    - A state exists and has possession but is not really present
    - The state that comes in to claim the territory needs to occupy it for a sufficient period of time
    - First state seen to have consented to acquisition of territory by the second

- Conquest and Annexation
    - Conquest = militarily defeating a state and occupying all or part of its territory
    - In itself, insufficient for establishment of sovereignty
    - Also need to have a formal act of annexation
    - Annexation = state that has done the conquering would formally extend its sovereignty over the territory in question
    - Can no longer acquire territory through conquest and annexation (e.g., Russia in Crimea)
    - But, the longer an annexation claim exists, the harder it is to deny its validity

Common law rules on occupation

Blackman J in Milirrpum's Case (1971): 'There is a distinction between settled colonies, where the law, being desert and uncultivated, is claimed by right of occupancy, and conquered or ceded colonies. The words 'desert and uncultivated' are Blackstone's own; they have always been taken to include territory in which live uncivilized inhabitants in a primitive state of society. The difference between the laws of the two kinds of colony is that with those of the former kind all laws which are applicable to the colony are immediately in force there upon its foundation. In those of the latter kind, the colony already having law of its own, that law remains in force until altered.'

Australia: terra nullius?

Cooper v Stuart (1889): NSW was "a tract of territory, practically unoccupied, without settled inhabitants or settled land, at the time when it was peacefully annexed to the British dominion."

But growing unease with sentiment of Cooper v Stuart (1889), e.g., Murphy J in Coe, who recognised genocide, and suggested that the decision in Cooper v Stuart *"may be regarded either as having been made in ignorance or as a convenient falsehood to justify the take of aborigines' land."*

Unease with *Cooper* comes to head in *Mabo (No. 2)*
Brennan J:

- "The acquisition of territory by a sovereign state for the first time is an act of state which cannot be challenged, controlled or interfered with by the courts."
- **BUT** the High Court *can* examine the consequences of acquisition of territory as a matter of domestic common law.
- The *factual premise* of terra nullius was incorrect.
- Moreover, the concept of terra nullius itself should be abolished given its condemnation in international law. International law is recognised as an important influence on the common law.
- In the absence of terra nullius, the idea that sovereignty carried ownership must be rejected
- But need to reject this notion of sovereignty in such a way that it is consistent with basic doctrines of the common law (and does not fracture a key principle of our legal system).
- Sovereignty granted the Crown 'radical title' over land, which was capable of coexisting with native title. Radical title does not equate to full beneficial ownership.
- Radical title entitles the sovereign to take it for its own use or grant it to a third party through a positive act, thereby converting it into full beneficial ownership (in such a way that extinguishes native title). But in the absence of any such extinguishment, native title can continue to operate.

Critiques of *Mabo*

Consistently with Mabo, Mason CJ in Coe v Commonwealth rejects the notion of indigenous sovereignty:

> 'The aboriginal people are subject to the laws of the Commonwealth and of the States or Territories in which they respectively reside. They have **no legislative, executive or judicial organs by which sovereignty might be exercised**. If such organs existed, they would have no powers, except such as the law of the Commonwealth, or of a State or Territory, might confer upon them. **The contention that there is in Australia an aboriginal nation exercising sovereignty, even of a limited kind, is quite impossible in law to maintain**.'

Uluru Statement from the Heart

- Aboriginal/TSI = first sovereign people in Aus territory
- Sovereignty they discuss is a spiritual notion (not necessarily the same concept as the international law view)
- Sovereignty has never been ceded
- Indigenous sovereignty can coexist with that of the Crown

Three concrete proposals:

- Establishment of first nation voice to parliament in constitution (Voice)
- Treaty process (Makarrata Commission) (Treaty)
- Telling of reality of indigenous history to all (Truth)

Note: Different indigenous groups have different views: some see sovereignty as non-negotiable; others are more concerned with financial compensation and self-government

The Victorian Treaty Process

- Gov has committed to treaty negotiations with Aboriginal Victorians under the *Advancing the Treaty Process with Aboriginal Victorians Act 2018*
- First Peoples' Assembly of Victoria has been elected

4. Australian statehood

Report of the Imperial Conference (1926)

- Summarised discussion of interaction/relationship between dominions of the Empire and with Government of His Majesty in Great Britain
- Dominions are "autonomous Communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs, though united by a common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations.
- Governors-general are representative of the Crown, not of His Majesty's Government in Great Britain or of any Department of that Government.
- Recognised official channel of communication should be between Government and Government direct, not between Governor-General of dominion with Government.
- Legislation passed by GB parliament only binding on dominion with consent of that dominion
- Individual dominions can enter treaties so long as, before taking steps which might involve the other Governments in any active obligations, they obtain those Governments' assent
- Treaties should be made in name of Heads of States, and if treaty signed on behalf of any or all of the Governments of the Empire, treaty should be made in the name of the King as symbol of special relationship between different parts of the Empire

Australia's Status as an Independent Nation

- By federation, Australian colonies had almost complete self-government
- British parliament retained power to legislate for colonies
    - By 1900, had moved away from this - apart from on matters of imperial concern
- Privy Council remained as highest court of appeal for colonies
    - Until *Privy Council (Limitation of Appeals) Act 1968 + Privy Council (appeals from the High Court) Act 1975*
    - Appeal to Privy council from the states existed until later: 1986

- Australian Constitution removed Privy Council as option for constitutional appeals
    - It also planted seeds of full nationhood: power to legislate with respect to defence, external affairs, etc.
    - WW1 accelerated this – Australia self-represented at Peace Conference of 1919, signed treaty, became member of League of Nations

- Balfour Declaration (1926)
    - Dominions agreed to be autonomous, equal in status, in no way subordinate
    - GG no longer rep or agent of British Gov
    - UK gov wouldn't advise King on dominion matters against views of Dominion Gov
    - Dominion Gov had full power to enter treaties, appoint ambassadors etc

- WW2: Aus acted as if bound by UK declaration of war against Germany

    - But Aus made separate declaration of war against Finland, Hungary, Romania and Japan in 1941
    - Somewhere between 1926 and end of WW2, Aus achieved full independence as sovereign state

- Queen of Australia
    - As Queen of Aus, Elizabeth II holds an entirely different position from that which she holds as Queen of UK

- Remained the case that British parliament could legislate for Aus states, and State appeals could go to privy council
    - Abolished by Australia Act (1986)

- Enacting clause of Aus constitution suggests it derives authority from UK parliament

- Succession to the throne:
    - If UK changes succession laws, does not apply to Aus
    - This could mean different legal monarchs for UK & Aus
        - This is absurd
    - Commonwealth should then legislate to bring succession law in line with UK
    - But no express right for Commonwealth to legislate with respect to that
    - So should add that express right to the constitution

- Queen's reserve power to disallow Australian legislation (ss 59 and 60 of constitution)
    - Existed to ensure Imperial surveillance of colonial legislation
        - This circumstance no longer exists
    - This power threatens democracy: since queen acts on government's advice, would allow a government to advise queen to disallow a law that it is unable to have repealed by the Parliament of the Commonwealth

Cheryl Saunders, The Constitution of Australia: A contextual analysis

After Aus Fed, states remained tied to UK through governors
- States only became fully independent with Australia Acts in 1986

Executive
- Gov General appointed by Monarch on advice of British Government
- Monarch had reserved capacity to disallow Aus legislation
    - 1926+1930 agreements removed ability for British gov to intervene in decisions by either monarch or GG of Australia
    - Queen became Queen of Australia (separate role)
    - Aus Constitution (through court decisions + legislation) places all Aus prerogative powers of the Crown in hands of the GG (rather than the Queen)

Legislative
- Statute of Westminster = power to legislate inconsistently with British parliament
- 1986 Australia Acts = UK legislation could not extend or be deemed to extend to Australia

Judicial
- Appeals from HC to Privy Council limited in 1966 and 1975 through legislative power
- But until 1986, state courts could appeal to Privy Council, bypassing HC altogether

Statehood
- Australian citizenship didn't emerge until 1949
- Section 3 of statute of Westminster offered Dominion Parliaments authority to make extraterritorial laws

The States

- States took longer to become independent than did the Commonwealth
- State Governors still appointed by Monarch on advice of British Gov.
- States subject to British laws of paramount force and restricted in ability to legislate extraterritorially
- Australia Acts
    - Removed british government as source of advice in state affairs
    - Released state parliaments from overriding effect of (most) british laws of paramount force
    - Severed appeals from state courts to privy council
    - Authorised states to enact legislation with extraterritorial effect
    - State premiers can now directly advise the Monarch (bypassing British Government)

James Crawford, "Devolution" in the Creation of States in International Law

The inter se doctrine, which would appear to have been obsolete (or nearly so) for a considerable period of time in all the different fields to which it applied, asserted that relations between members of the British Commonwealth were in no circumstances international, and were incapable of giving rise to rights and duties under international law.

Devolution of States within the British commonwealth

No precise independence moment

- Separate signatures on treaty of Versailles an important step
- Political formulations in 1923/1926 also important
- Statute of Westminster also important
    - Didn't establish or recognise dominion independence in international sense
        - Expressly founded on 1926 and 1930 agreements
        - Was a measure of British internal law
        - Wasn't adopted by Australia until 1942
- Balfour declaration can properly be taken as critical date of independence of the Dominions (despite connections existing beyond this point)
- States retained link to UK until Australia Act 1986

***Sue v Hill* (1999)**

FACTS: Hill is a senator with UK citizenship. S 44(i) of constitution disqualifies from parliament those with allegiance to a foreign power.
ISSUES: For the purposes of s 44(i), is the UK a 'foreign power'?
DECISION:

- Yes it is a foreign power.
- UK has no legislative or judicial relationship with modern Australia (Australia Act, removal of Privy Council as destination of appeal)
- UK courts themselves recognise that the UK is a foreign power with respect to Australia
- Since 1986 at least, UK statutes denied efficacy as part of Commonwealth law (Australia Act)
- Privy Council (Limitation of Appeals) Act 1968 (Cth) denies Privy Council as destination for Australian appeals
- Australia Act provides that Her Majesty's Government in UK has no responsibility for Gov of any Australian state

- Queen's power to dismiss Australian law no longer exists as the circumstances for which it existed are no longer present
- Aus and UK have distinct legal personality and exercises of sovereignty, e.g., in entering military alliances, participating in armed conflicts and acceding to treaties. UK's actions in these domains have no legal consequences for Australia.

5. Sources of domestic public law

Australian Courts Act 1828 (UK)

- Laws of England to be applied in courts of NSW & Aus as far as applicable (s 24)
- Governors of colonies can declare validity of laws/statutes to their colonies
  - Can also modify them
- Supreme courts of colonies to decide application of laws/statutes in the colonies
- Subsequently made statutes would only apply to colony by 'paramount force' (expressly stated in law that it should apply in the colonies)

Imperial Acts Application Act 1980 (Vic)

> An Act to make further provision with respect to certain enactments of the Parliament of England and of the Parliament of Great Britain and of the Parliament of the United Kingdom of Great Britain and Ireland in force at the time of the passing of the Act 9 George IV. c. LXXXIII, to incorporate into the Statute Law of Victoria certain of such enactments, to amend the Imperial Acts Application Act 1922 and for other purposes.

- English acts in force at time of the passing of the Australian Courts Act repealed (s. 5)
- Specific English laws of fundamental constitutional and historical significance are preserved (s. 3)

Statute of Westminster 1931 (UK)

- Put in place agreements from Imperial Conferences of 1926 and 1930
- Dominion =
  - Canada, SA, Australia, NZ, Irish Free State, Newfoundland
- Allows dominion law to be "repugnant" to UK law (s 2)
- UK law doesn't extend to dominions post-Act unless consented to (s 4)
- Act does **not** give power to repeal Aus Constitution (s 8)
- Doesn't allow Cth gov to make laws which encroach on state law-making powers (s 10)
- Dominions have power to legislate extra-territorially

Australia Act 1986 (Cth)

- No UK laws can extend/deemed to extend to apply to Aus (s 1)
- States have power to legislate extra-territorially, also gain power the UK parliament had to legislate on behalf of that state (s 2)
- No state law can be invalidated on basis of repugnancy to UK law (s 3)
- Her Majesty can't suspend a state law that's been assented to by state governor (s 8)
- State cannot act in such a way that requires state governor to withhold assent for a particular law
  - Also can't hold that a bill requires Her Majesty's assent (s 9)

Law Reform Commission of Western Australia, Aboriginal Customary Laws: The Interaction of Western Australian Law with Aboriginal Law and Culture, September 2006, Chapter 4, pp. 61-74; p. 365 (Recommendation 5):

What is aboriginal customary law?

- Varying definitions of aboriginality

    - Threefold test
        - biological descent
        - self-identification
        - community acceptance
    - Full/half/quarter-blood
    - Membership of "aboriginal race" -> applies threefold test

- Threefold test problems
    - Stolen generation may struggle with community acceptance
    - Infants cannot self-identify

- Definition inserted into Interpretation Act 1984
    - Evidentiary/probative value granted to following factors:
        - Genealogy
        - Genetic descent from confirmed Aboriginal person
        - Evidence of self-identification
        - Evidence of community acceptance
    - Weighting to each factor is discretionary
    - Parallel test applies to Torres Straight Islanders

- Customary law
    - Governs all aspects of life: rights/responsibilities to others, land, and natural resources
    - Exists to varying degrees in different Aboriginal communities
    - No single system – different tribal groups practice different laws
    - What constitutes customary law should remain a question for members of those communities: cannot be legalistically defined/quantified

- Who should be bound by customary law?
    - Adherence to these laws is an individual choice
    - Danger of opting into laws only when individually convenient
    - Guiding principle should be voluntariness (according to the commission)

- Kinship
    - Use of biological terms of relation to refer to all people within community
    - Everyone can be called a kinship term in Aboriginal society
    - Dictates social relations. Prescribes deference, dominance, obligation or equality

- Classificatory kinship system
    - Siblings of same sex classed as equivalent in kin. E.g., brothers of my father = fathers. Sisters of my mother = mothers. Children of all "mothers"/"fathers" = brothers and sisters.
    - Social web can extend to ALL people one interacts with across life
    - Establishes obligations/responsibilities that wouldn't otherwise exist
    - Practiced by urban/rural aborigines alike; less variation in practice than in the case of customary law

Note that Kiefel CJ in *Love v Commonwealth* rejecting the notion of indigenous customary law:

> *'It is not the traditional law and customs which are recognised by the common law. It is native title (namely, the interests and rights possessed under the traditional laws and customs) which is the subject of recognition by the common law, and to which the common law will give effect. The common law cannot be said by extension to accept or recognise traditional laws and customs as having force or effect in Australia. They are not part of the domestic law. To suggest that traditional laws may be determinative of the legal status of a person in relation to the Australian polity is to attribute sovereignty to Aboriginal groups contrary to Mabo [No.2] and later cases, as has been explained.'*

Indigenous courts exist in Aus:

- Nunga Court (SA), Murri Court (Qld), Koori Court (Vic)

- Response to fact that in Vic, Indigenous Australians are 12 times more likely to be in prison than non-indigenous Australians
- Objective is to reduce alienation and ensure sentencing orders are culturally appropriate and aimed at preventing re-offending
- Note that jurisdiction of these courts is limited

Monism and Dualism - An Australian Perspective

Int law's interaction with domestic law?
- Monism = int law and common law move together. Based on natural law assumptions (international treaties automatically become domestic law)
- Dualism = int and common law operate on separate planes
- Australia is a dualist system, although most of the time when we ratify a treaty, we do pass it into domestic law

Australia has embraced but also been sceptical of int law throughout its history

- Treaties/int law -> dualist approach (treaties must be given legislative effect)
- Executive/treaties -> exec has exclusive power to enter treaties
- Judiciary/treaties -> statute must be applied even if in conflict with international law
- International law is not a part, but is one of the sources, of English law (Dixon J rejecting Blackstone)
    - Note *Mabo (No. 2)* per Brennan J at 42: "International law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal rights."
- Customary international law principles, even ones as fundamental as the prohibition of genocide, do not form part of the law of Australia
- Stat interpretation -> courts should, in case of ambiguity, favour a construction of a Commonwealth statute which accords with the obligations of Australia under an international treaty (High Court in *Chu Kheng Lim* case)
- Int. law should not affect constitutional interpretation (High Court)
    - Kirby dissented saying we should try to harmonise constitution with international law (*AMS v AIF*)

6. Sources of international public law

Statute of the International Court of Justice

Article 38
Court will apply:
- international conventions: e.g., Montevideo, Vienna, Charter of UN, Statute of ICJ, ICCPR, ICESCR
- International customs, general adherence to which signifies acceptance as law
- General principles of law recognised by "civilised" nations
- Localised teachings of law from courts/academics within individual nations

Article 59
Decision of court = non-binding except between parties of given case

North Sea Continental Shelf Cases, ICJ (20 February 1969), paras 70-78: