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INTRODUCTION: WHAT IS AUSTRALIAN PUBLIC LAW?

1 Introduction

Australian public law is a species of public law, in general. In order to properly understand the nature and role of Australian public law we need to understand the nature and role of public law *as a general matter*. Public law is the law which creates, empowers, regulates, and calls to account all those officials and institutions which comprise a modern state such as Australia. In making sense of the nature and role of public law, we need to understand the nature of those things which public law concerns – things such as the state, its officials and institutions, the exercise of state power, and the accountability of those officials and institutions for their actions. It is the purpose of this chapter to assist us in understanding these things.

Further, though, it turns out that the nature of these things – and, therefore, of public law more generally – is importantly determined by *the nature of law itself*. All legal systems are dependent for their very existence and ongoing viability upon the activities of certain kinds of human agent – lawmakers, administrators, and judges, for example – as well as the operations of certain kinds of social institutions – legislatures, government agencies, and courts, for example. Further, the viability of a legal system also demands that these officials and institutions (who, as I have just mentioned, collectively comprise the state) be governed by some set of the laws of that system – the set of laws we term public law. Consequently, understanding the nature and role of public law requires us to clarify our understanding of law, and legal systems more broadly. This is where we shall start in this chapter.

2 Individuals, societies, and social rules

Let’s start with a basic human problematic. In an important sense, we are individuals with our own beliefs, desires, and values. We have our own conception of how our life should be lived, as well as a desire to be able to pursue and realise that life with minimal interference. At the same time, though, we are not alone in the world. We are members of societies comprising other individuals who have their own beliefs, desires, and values, and their own conception of the good life which they wish to freely pursue. As the Greek philosopher, Aristotle, said many centuries ago, we are social animals.¹ It is in our nature as humans that we are born into, subsist, and, perhaps, even flourish within societies. Though humans may seek solitude at some stage of their life, solitude is not the norm and, in any event, could not constitute the totality of what we would recognise as a fully human life.

There are benefits as well as costs associated with being an individual living in a society with others. Depending on the nature of the society and our role and status within it, social life may enable us to attain certain things we aspire to but would not by ourselves be able to attain. Such benefits include those which flow from entering into cooperative and caring relationships with others (friendship, parenthood, artistic collaboration, religious fraternity, and so on), from having access to collectively generated economic and cultural resources (roads, schools, literature, medical technology, and the like), or from enjoying the personal safety and security from internal and external dangers which group solidarity often provides. For many – if not all – individuals, living in a society is better than sustained solitude.

1 Aristotle (1953) p 37.

At the same time, of course, other people, by virtue of pursuing their own personal goals, may present obstacles to my realising my own goals in life. Other people may harm me or exploit me or otherwise get in the way of my achieving not only my immediate desires but my longer-term notion of what a good life for me is. So too, the *collective* needs and ends of the society at large – its economic, military, political, and even religious needs and ends – may place demands on me which interfere with my freely pursuing the life I personally seek. Managing this tension between people’s individuality and their sociality is one of the key challenges facing both individuals and societies at large. Sometimes it seems that we can’t live with others – but, at the same time, we can’t live without them.

2.1 Social rules

A key way in which this tension has been managed in human societies has been by the operation of social rules.² One way of thinking about a social rule is in terms of a general *standard of behaviour* – a way of doing things – which a social group accepts and expects individuals to conform to or comply with. It is a characteristic feature of human societies that they develop and maintain amongst their members not only a conceptual scheme and worldview, a language, and an often distinctive set of cultural practices and artefacts, but also sets of social rules which guide or otherwise influence the thought and behaviour of those members across the range of activities they engage in.

So, for instance, there are rules governing the way we eat or dress, rules regulating our games and religious rituals, rules about how we should interact with other people in our society on a day-to-day basis, and rules about how collective decisions are to be made concerning issues affecting our society as a whole. There are rules of etiquette, of games and sports, of religious worship and ritual, of ethics or morality, of politics – and, of course, rules of law. A social rule is designed to achieve some outcome in relation to the thought and behaviour of people – an outcome which is considered by the society which maintains the rule to be of value. In Australia, for example, we have a social rule that when we are walking towards someone on a footpath we should each keep to the left so as not to bump into each other. This rule – it is not a *law* – is designed to benefit pedestrians and optimise their movement and safety. It is a good rule to have in a society such as ours.

Through the influence of such rules, the benefits of sociality to individuals may be optimised and the costs mitigated to some extent. Social rules may enable societies to sustain their collective existence over time, notwithstanding the often diverse individual interests of their members. They may also enable individuals within those societies to achieve a degree of autonomy and wellbeing they would not otherwise be able to achieve.

Social rules do this in a range of ways. The most obvious, perhaps, is through their role in maintaining societal *order and security*. Rules enable us to get along. Consider, for example, the various rules operative in our society which prohibit and deter anti-social behaviour such as interpersonal violence, theft, and vandalism. How long would a society without such norms last? More than this, social rules also enable the *coordination of collective activity* for the pursuit of a wide range of valuable ends, including the production of economic, cultural, and other resources not obtainable by individual effort. Consider here the rules regulating

2 Hart (1961).

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the activities of workers in a car manufacturing plant. None of the workers by themselves could produce a car – let alone hundreds of cars a day. But by means of a carefully designed set of rules, they may be able to coordinate their individual efforts to collectively do so.

Finally, consider the crucial role played by social rules in generating and regulating the wide variety of social *roles and relationships* which operate in our society. Think, for example, about the rules of family life which designate certain people in a family as parents, responsible for the care and upbringing of certain other people, designated by those rules as children, with all the rights that go with that role. Or, returning to our factory example, consider the rules at work in a factory which render some of the people working there as assembly-line workers and others working there as managers – each with their own distinctive role and set of responsibilities. Such rules not only articulate the set of conditions one has to meet in order to be an assembly-line worker or manager (possessing a certain skill set, for example), but also what duties one is expected to perform as part of that role.

In relation to this last example, we can see how the creation and regulation of social roles and relationships by means of rules can facilitate the coordination of the members of a society in the service of some collective end (in the case of our car factory, an economic end). Likewise, the ability of rules to assist in maintaining social order and security can make it easier for coordination rules to do their job. In counteracting widespread and regular interpersonal violence, for example, social order rules not only prevent the breakdown of societal roles and relationships but also provide a context of regularity and predictability in the general behaviour of the members of society, all of which can contribute to the effective realisation of complex long-term goals. Social coordination and the realisation of collective ends are more likely to be effective under conditions of social order than under conditions of chaos. This is all to say that the various functions that rules play in a society may be inter-related and mutually supportive.

Through the maintenance of social order, through the creation and maintenance of social roles and relations, and through the coordination of collective efforts in the pursuit of socially necessary or desired ends, social rules contribute to the long-term sustainability of a social group and enable the benefits of sociality to flow more effectively to individual members of the group. Role- and relationship-creating rules may enable individuals to formulate a richer and more rewarding self-identity and conception of the good life than would otherwise be the case. They open up possible identities and ways of living – as a spouse, as a parent, as a factory worker, as a lawyer – which would not otherwise be available.

Further, the resources made available to individuals by the operation of rules coordinating collective action may enable individuals to more effectively realise their immediate desires and longer-term aspirations than would otherwise be the case. Think of all the benefits that a rule-governed hospital sector brings to a society by way of healthcare provision. And, finally, the societal order and security generated by relevant rules may provide individuals with a safe, stable, and predictable environment in which to live and work – again, one more conducive to them planning and pursuing their longer-term goals than would otherwise be the case. Overall, the relative costs of sociality to an individual – and, therefore, the general tension between individuality and sociality – may be significantly mitigated by the operation of social rules. They make it possible for both societies and individuals to sustain themselves – and, indeed, flourish – in a way that would not otherwise be possible.

Note my use of the term ‘may’ throughout the preceding discussion. Social rules *may* provide the benefits I have mentioned to *some or all* of the members of a society. The extent to which social rules actually do so, however, depends on the nature of the actual society in question and on the content of those social rules it actually operates under. Social rules *in general* have the potential to benefit all of the members of a society, but in a given society the social rules which actually operate may not, in fact, benefit all members equally. This is an important point to keep in mind throughout the discussion that follows.

3 Law

One very effective form of social rule which societies have developed is legal rules – or *law*. A legal system is a relatively complex and largely integrated system of social rules (laws) which are better able to realise the benefits of rule-governed sociality in populous, complex, and often pluralistic societies such as Australia than any set of *non-legal* rules (such as etiquette, morality, or custom).³ As a species of social rule, law plays a key role in realising the benefits of sociality through its generic functions of maintaining societal order and security, coordinating collective action, and creating social roles and relationships.⁴ One way law in a modern society performs the first of these functions is through the operation of many of its criminal laws, which regulate a wide range of anti-social behaviour. Examples of law’s *coordinative* role are found in the traffic laws which demand that we drive on the left, or in the electoral laws which govern the complicated enterprise of a national parliamentary election. This function is also articulated in contract law and corporations law, for example, which coordinate much of the commercial activity within a society such as ours.

Finally, law enables the creation of a wide range of legal roles and relationships in both the private and public spheres. Marriage laws create and regulate the private law role of spouse, and the legal relationship known as marriage; property laws create and regulate the private law roles of landowner and tenant, and the legal relationship of tenancy; and constitutional laws create and regulate the public roles of government Minister and public servant, and the legal relationship of executive authority. Many of these roles are designed to facilitate law’s other functions. The role of police officer is formally created and empowered by police legislation in order to assist in the general enforcement of the criminal law. National elections are coordinated by laws creating the role of the electoral official, who is empowered to guide and certify voters on election day. The role of company director is created and regulated by corporations law in order to facilitate more effective and coordinated commercial activity within a society.

In addition to legal roles which are filled by *individuals* (spouse, tenant, public servant), law may also create and regulate legal roles which are filled by *collectives* of individuals. These collective or *institutional* roles are capable of performing law’s generic functions through the coordinated activity of those individuals who fill their own component roles and perform their role-specific tasks within that collective. So, for example, in the public sphere, national security legislation may create an intelligence *agency*, comprised of individuals who are collectively

3 Ibid.
4 ‘The peace and order of Australian society is built on the legal system’, said Brennan J in *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 30.

charged with assisting in the maintenance of internal security within the society. In the private sphere, corporations law may enable the creation and regulation of institutions known as *companies*, empowered to engage in certain kinds of commercial activity.

By virtue of its superior capacity to maintain societal order and security, to create and regulate social roles and relationships, and to coordinate collective action, law can better enable a modern society such as Australia to sustain itself as a society and to pursue and achieve its collective needs and goals. Further, *under the right circumstances*, law can do so without unduly interfering with the individual interests and aspirations of that society's members. Indeed, it may enrich and facilitate the pursuit of those interests and aspirations in a way other rules cannot.

3.1 The ends of a legal system

Though the functions of law in relation to order and security, social coordination, and formal role creation are common to all legal systems, different societies and their legal systems may be oriented towards the pursuit of quite different social *ends*. One society might seek to establish a universal public health care system through legislative means. Another might legislate to privatise its healthcare system. More broadly, one society might rely on its legal system to pursue the establishment in the longer term of an economically communist regime in which all property is collectively owned, whilst another may through its legal system seek to ultimately realise an economically liberal state of affairs in which private property is freely acquired and exchanged. Enabling the pursuit of social ends through creating legal roles and relations, coordinating collective action, and establishing conditions of order and security is an important function of law. Indeed, one way of thinking about a legal system is as a socially embedded and highly complex *instrument* oriented towards the pursuit and realisation of a wide variety of social ends.

As is the case with social rules generally, a legal system's capacity to realise social ends through the coordination of collective action is enhanced by its role in maintaining order and in creating and regulating formal roles and institutions. As mentioned, the pursuit of social ends is facilitated by the stability and predictability which accompany social order. Long-term economic development, for example, is unlikely to succeed under conditions of civil disorder – consider the economic situation of any number of contemporary societies riven by violent internal sectarianism. Likewise, the effective pursuit of complex social ends is often structured around and depends upon the activities of legally created roles and institutions. A healthy degree of international trade and commerce is unlikely to obtain for a society in the modern world without the activity of effective corporations, banks, and government agencies – all of which are constituted and regulated by law.

To clarify, by social ends here I mean not only ends or outcomes that are collaboratively pursued by some proportion of the members of a society, but also ends which *benefit* or serve the interests of some proportion of the members of that society, rather than a given individual. Whether the proportion of a society which benefits from such ends is the whole of the society, the majority of the society, or merely some small sector of the society depends on the nature of the society in question. The social ends pursued by a legal system do not necessarily benefit *everyone* in a society – though they might. At this early stage of our inquiry into public law, it is important to recognise the possibility that the people who actually labour under the obligations of a legal system in pursuit of some set of social ends may

not be the people who actually benefit from those ends. This is to say that a legal system may sustain a set of social arrangements in which one group within a society oppresses or exploits another group.

In the discussion to follow, I will use the term ‘law’s beneficiaries’ and its cognates to refer to those people in a legally governed society who predominantly *benefit* from the operation of the society’s legal system and the social ends that system is oriented towards realising. It is important to note that the benefits these people receive should be taken as flowing from the *system* of law, at large, and not necessarily from each and every law comprising that system. A given beneficiary of law may not, in fact, benefit from every law in the legal system, but will benefit from the operation of the system as a whole. We should also note here that not every member of the group who may be said to benefit from a legal system need do so *equally*. Some may benefit more than others. Under an egalitarian legal system the difference between beneficiaries in this regard would be limited. I will have more to say about this in Chapter 4.

Further, I will use the term ‘the subjects of law’ and its cognates to refer to those members of a society who are *subject to* the authority and regulation of a legal system, whether or not they benefit in any significant way from that system and its ends. My use of both these terms will become clearer as the discussion proceeds. One important point here, though, is that the subjects of a legal system may or may not be part of the group of people that the legal system is actually designed to serve.

3.2 The political morality of a legal system

The social ends a legal system may be oriented towards are many and varied. They may be specific or general; concrete or ideal; realisable in the short term or only in the long term; circumstantial and relatively fleeting or fundamental and historically constant. So, for example, a society, through its legal system, may be dedicated to realising the fundamental and, perhaps, long-term end of ensuring the optimal freedom and wellbeing of all its members. We might term social ends such as this the *politico-moral ends* of the legal system. They reflect a political and moral – and in some cases, even a religious – view about how, as a general matter, the people in the society should be treated and how the society as a whole should ultimately operate. The term ‘political’ here connotes ends having to do with the interests and wellbeing of the society as a whole (from the Greek term ‘*polis*’, which means city-state, body politic, or rule-governed, large-scale community). The term ‘moral’ here connotes ends having to do with the ultimate interests and wellbeing of the individuals comprising a society. Together, the two terms connote a notion of the right or just way for people to organise themselves and conduct their individual and collective affairs.

In many cases, politico-moral ends are tied up with a range of associated *values* or *principles* intended to guide the pursuit of the society’s ends through a legal system. These might include principles such as respect for the inherent and equal dignity of individuals, fairness in all dealings between people, or – in theocratic societies, for example – compliance with the tenets of a dominant religion. The particular politico-moral values of a society and of its legal system inform the way that legal system goes about performing its generic functions of maintaining societal order and security, creating and regulating social roles and relationships, and coordinating collective action. We can refer to the total set of politico-moral ends and values of a given legal system as the ‘political morality’ of that system.

CONSTITUTIONAL EXPRESSION OF A STATE'S
POLITICAL MORALITY

We often find the most overt expressions of the political morality of a society and its legal system in its written constitution.

So, for example, the legal system of the former Soviet Union was oriented towards the realisation in that society of a number of communist ends and values, which that state and its legal system claimed would ultimately realise the freedom and wellbeing of all the Soviet people. The elements of this political morality were articulated in various articles of the constitution of the Soviet Union and included a commitment to collective ownership of property, centralised Party-based control over most aspects of people's day-to-day lives, and solidarity with the workers of the world.

The Preamble to the *Soviet Constitution*⁵ stated, for example:

The supreme goal of the Soviet state is the building of a classless communist society in which there will be public, communist self-government.

The main aims of the people's socialist state are: to lay the material and technical foundation of communism, to perfect socialist social relations and transform them into communist relations, to mould the citizen of communist society, to raise the people's living and cultural standards, to safeguard the country's security, and to further the consolidation of peace and development of international cooperation.⁶

The constitution of the present-day Islamic Republic of Iran articulates an orientation on the part of its legal system towards the realisation in that society of a number of Islamic religious, cultural, and political ends and ideals, such as submission to God, the operation of Qur'anic justice, and the authoritative governance role of a priestly Council of Elders.

For example, art 2 of the *Iranian Constitution*⁷ states:

The Islamic Republic is a system based on belief in:

1. The One God (as stated in the phrase 'There is no god except Allah'), His exclusive sovereignty and the right to legislate, and the necessity of submission to His commands;
2. Divine revelation and its fundamental role in setting forth the laws;
3. The return to God in the Hereafter, and the constructive role of this belief in the course of man's ascent towards God;
4. The justice of God in creation and legislation;
5. Continuous leadership (imamah) and perpetual guidance, and its fundamental role in ensuring the uninterrupted process of the revolution of Islam;
6. The exalted dignity and value of man, and his freedom coupled with responsibility before God; in which equity, justice, political, economic, social, and cultural independence, and national solidarity are secured ...⁸

I will have more to say about the nature and role of the political morality of the *Australian* legal system in Chapter 4.

5 Constitution (Fundamental Law) of the Union of Soviet Socialist Republics, 7 October 1977 ('*Soviet Constitution*').
6 Ibid.
7 Constitution of the Islamic Republic of Iran, 24 October 1979 ('*Iranian Constitution*').
8 Ibid.

3.3 The policy framework of a legal system

As mentioned, the ends of a legal system may be more specific, concrete, short-term, and politically contingent than those elaborated in a constitution. They may comprise what we might term the ‘policy objectives’ of a society and its legal system. An example of this kind of social end might be ensuring a specified rise in the national economic growth rate or increasing adult literacy rates to some specified level by some specified date. Analogous to the values and principles at work in the politico-moral sphere, the pursuit of policy objectives may be guided by what we might term ‘pragmatic’ or ‘methodological’ values or principles, such as transparency, efficiency, and cost-effectiveness. We may term the policy objectives and methodological principles articulated within a legal system at any given point of time, the ‘policy framework’ of that legal system at that time.

Though many policy objectives and methodological values may be compatible with and even contribute to the realisation of politico-moral ends and values, the former tend to be relatively context-dependent and revisable. As such, they seldom figure expressly in a society’s constitutional documents. Rather, they find expression in statutes, regulations, policy statements and guidelines, as well as other more fluid and ‘lower-level’ official documents. So, for example, the specific policy objective of establishing a national consumption tax as part of a wider policy goal of reforming Australia’s economic and fiscal systems found expression in 1999, and continues to find expression, in a series of Commonwealth statutes and associated regulations establishing and regulating the goods and services tax (GST).⁹

3.4 The structure of law

Legal systems pursue and realise their societally specific (that is, non-generic) ends by means of those functions I have mentioned which are generic to all legal systems, namely:

- creating, empowering, and regulating a set of public and private legal roles and relationships designed to facilitate the achievement of their societally specific ends;
- coordinating the thought and behaviour of private and public agents so as to enable collective action designed to facilitate the achievement of those ends; and
- maintaining internally and externally secure conditions for the pursuit and enjoyment of those ends.

How, though, it might be asked, does a legal system actually exercise its generic functions in order to pursue its non-generic ends? The answer is to be found in the very structure of all legal systems – that is, in the operation of what are known as ‘primary and secondary legal rules’.¹⁰ The latter of these two notions is fundamental to making sense of the nature and role of public law.

A characteristic feature of all legal systems is that they are comprised of two kinds of legal rules – primary and secondary legal rules. ‘Primary legal rules’ are those rules which most directly regulate the thought and behaviour of ordinary individuals within the society. They are also the rules which the average person most commonly thinks of as law. They include, for example, the legal rules which require that people drive on the left-hand side of the road or that they not engage in unjustified violence against others.

9 Including *A New Tax System (Goods and Services Tax) Act 1999* (Cth).
 10 Hart (1961) ch 5.

We can see that the first of these two examples plays a coordinating role in pursuit of some policy objective or broader end of the legal system in question – more efficient traffic flow or the safety and wellbeing of individuals, for instance. The second of our two examples of primary rules plays a role in the realisation of law's function as order-maintaining and, again, might also be seen to serve an overarching fundamental end of the society and legal system, such as respecting the dignity and wellbeing of individuals. Overall, by virtue of their general regulation of thought and behaviour, primary legal rules play an important role in a legal system performing its generic functions of coordination and security and pursuing its non-generic ends.

However, in a complex and dynamic world, a legal system comprised solely of primary rules will not be effective in realising either its generic functions or its ends and values. In such a world, the ends and values of a society may change or the means by which its legal system pursues social ends and values may become ineffective. In order to perform its generic functions and realise its ends and values, a legal system must have a capacity to be *responsive* to internal and external changes and challenges. It must be able to both create new legal rules and readily change existing ones. In order for these things to be done effectively in a modern society, a legal system must contain additional legal rules of a special kind – rules which provide for the creation of new rules and for the amendment or repeal of existing ones. We may term this category of rules 'law-making rules' or 'rules of legislation'.

Likewise, if the functions and ends of a legal system are to be realised through a set of legal rules, there needs to be an additional category of special legal rules in place which facilitates the *implementation* of that set of legal rules – by providing for their enforcement, for example. We may term this special category of rules 'law-implementing rules' or 'rules of administration'. These rules serve to ensure the effective operation – the administration or execution – of those other rules of a legal system which directly serve the legal system's functions and ends. By virtue of this, these rules may be said to contribute indirectly to the realisation of those functions and ends.

And finally, in order for the people of a society to be able to comply with the rules of their legal system, and for that system to be able to pursue the realisation of its functions and ends, those people must have (or be able to acquire) a reasonably good idea of *what the legal rules in the society actually are* and *how those rules are to apply* to a given situation – especially where disputes arise about these things. This is, there must be a further special category of legal rules providing for the *identification* of the operative law in the society and for the *adjudication* of questions and disputes about what that law is and how it applies in a situation. We may term this kind of legal rule 'law-determining rules' or 'rules of adjudication'. Such laws provide for the authoritative identification of the operative law in the society, and for the authoritative resolution of disputes about what that law is and how it applies in the society.

Collectively, these three special kinds of rules may be termed 'secondary legal rules'. One way of thinking about them is as *legal rules which are concerned with other legal rules*. They are the rules which enable the creation (including the amendment and repeal) of other legal rules; the administration (including the enforcement) of other legal rules; and the adjudication of questions and disputes about the legal rules of the system – whether those other legal rules are primary rules or even other secondary rules. In this respect, secondary legal rules may be contrasted with primary legal rules, whose main concern is not with other legal rules but with the thought and behaviour of the ordinary person in the society.