

# Sources of Law and the Australian Legal System

## **Introduction: “What is Law”**

- Social order – control & direction
- Justice
  - Achieving fairness
- Dispute Settlement
- Economics
- Process – limiting power
- Truth or Politics?
  - Point of contention
  - Political instrument – based on society of time

## **Sources in Anglo-Australian Tradition**

### Common Law

- One of many legal system
  - Alternative to
    - Traditional
    - Customary
    - Religious
    - 'the sword' – power & might
- Originates from Norman England
  - Amalgamation of common people & Cura Regis
    - Displayed in language – Latin & French
- Precedent
- Procedure & Writs – Judges & Lawyers
  - E.g. 'Habeas corpus'
    - Ancient writ to bring the individual with the body to legal jurisdiction
- Procedural law → substantive law
- Protection of property & bodily integrity

### Equity

- Created to address failings of common law
- In need for fairness & equity
- Lord Chancellor → Courts of Chancery
- Maxims of equity
  - E.g clean hands
- Introduced English
  - Latin & French no longer language of people
  - Accessible equity
- Dual Legal System – Common Law & Equity
  - Competition & *Communication*

### Statute – Legislation

- King's power to make laws
  - Limited by Magna Carta 1215
  - Civil unrest to reverse the power of kings as beneath that of the Parliament
- King-In-Parliament – symbol of the Mace
- Growth of economic power/middle class
- English Civil War

## **Australian + English Legal History**

### Colonial Australia

- Status of colonial laws depended on whether land was
  - Conquered
  - Prior inhabitants acquiesced
  - Settle colony (unoccupied)
- NSW Courts Act 1787 (Imp)
  - Enabling est. of criminal + civil jurisdictions
  - Est. Supreme Court
  - Trial by jury allowed in certain cases
  - Legislative Council est.
    - 5-7 people appointed by Crown
- Letters Patent (First Charter of Justice) 1787
  - Est. 2 courts – Civil + Criminal
  - Conflicts between Governor + Judge-Advocate
    - E.g. Ellis Bent (Barrister) vs Laclan Macquarie (Military)
- The Australian Courts Act 1828 (Imp)
  - Bestowed limited self govt. on colony
  - Declared law of England applied to NSW as at 24 July 1828
- NSW Government Act 1855 (NSW)
  - Est. constitution for NSW
  - Parliament:
    - Legislative Assembly – Lower House
    - Legislative Council
    - Governor General – Queen's Representative
- Colonial Laws Validity 1865 (Imp)
  - Power given to colonial parliaments to make own constitutions
  - Power given to colonial parliaments to override British statutes except those applying by "paramount force"
    - Where British Act expressly applied to a colony
    - Where it was a necessary implication that the British Act apply to a colony
- Commonwealth of Australia Constitution Act 1900 (UK)
  - In force on 1 Jan 1901 – opening of parliament 9 May 191
  - Created federal Commonwealth of Australia
  - Const. provides basis for full sovereign independence + embodies power-sharing between Cth. + states
- Statute of Westminster 1931 (UK)
  - Balfour Declaration 1926
  - British Parliament declared it would no longer make laws for a dominion
    - Did not include States
      - Meant Colonial Laws Validity Act still applied to States
- Statute of Westminster Adoption Act 1942 (Cth)
  - Cth. Could amend/repeal a British law whether or not law applied by paramount force
  - Colonial Laws Validity Act did not apply to Cth
    - Means states are still subject to UK contron
  - Cth could pass extra-territorial legislation

- Australia Act 1986
  - Passed in UK + Australia
  - Repeals Colonial Laws Validity Act in entirety
    - UK renounced any rights to legislate for Aust. + any parts of it
  - Gives extra-territorial effect to statute laws

## **Commonwealth of Australia**

### Constitution

- Provides basic rules of Aus. Govt.
- Any action (incl. legislative action) is invalid if contrary to Const.

### Separation of Powers

- Constitution Chapters I, II, III contain 3 bodies of authority re. law
- Legislative
  - Law makers
  - Parliaments
- Executive
  - Law enforcers
  - Bodies that administer law
    - Defence forces, govt. dept., statutory authorities
- Judiciary
  - Law interpreters
    - Apply laws
  - Courts
- In Aust., Legislative + Executive are not completely separated
  - Members of executive (govt.) are also part of Legislative (parliament)
- The separation serves as a 'check and balance' to keep powers in line

### Responsible Govt.

- As still colony of England, Aust. is a constitutional monarchy
- Representative of Queen resides over Aust.
  - Governor-General
- Acts in accordance of advice of Cth. Ministers
  - Ministers are members of + responsible to the Parliament
- Holds 'Reserve Powers'
  - Where Governor-General does not need to act in accordance to Ministers' advice
    - Appoint a Prime Minister
    - Dismiss a Prime Minister
      - E.g. 1975: Dismissal of PM Whitlam

### Representative Govt.

- Govt. are representatives chosen by people
- Const. requires regular elections + for members of Parliament to be directly chosen by people

### Cth Parliament

- Consists of the Queen + House of Representatives + Senate
- Makes up legislature
- Senate – Upper House
  - people of 6 states have same number of senators
  - regardless of state's population
  - govt. (political party in power) do not hold maj. seats in Senate often
  - have same power to block bills as House of Rep.

- House of Rep. – Lower House
  - no. of seats for each state depends on state's population
  - Each state is at least guar 5 seats
- Bills must pass through House of Rep + Senate → given Governor-General's assent
  - Whilst in House of Rep., the govt. usually wins in blocking/passing bills as they have more seats, it is equal in the Senate
    - Relies on the votes of other parties (e.g. Independents)

#### Division of Power

- Const. lays out different areas of which Federal + State Parliaments can govern
- Exclusive – Federal
  - Defence
  - Trade
  - International matters
  - Family
- Residual – State
  - Education
  - Health
  - Transport
  - Crime
- Concurrent – Federal + State
  - Federal govt. prevails when laws conflict w/ state

## **Western Legal System**

### Autonomy of Law

- Conceptually distinct from customs, morality, religion, politics
- Distinction between legal institutions vs other institutions
- Distinction between legal rules vs rules
- Law is not free from external influences
  - Context of law may even be shaped/dictated by external social forces
- However social forces + norms have to be reconstructed within legal system + accepted as law
  - E.g. theft is not illegal because it is art of the Bible's 10 commandments but have rather been reproduced + gone through the process to be stipulated in legal instruments
- Evidence of law's autonomy
  - Own profession
  - University discipline
  - Professional literature
  - Technical language
  - Peculiar etiquette
- Allows for checks to power
  - In some older traditions, monarchy was considered law
    - Society was made to follow decrees of kings w/out 'legal' standing
- Other traditions:
  - Sharia Law
  - Aboriginal Customary Law
    - Traditions are laws
    - Upheld by community + enforced by elders rather than a distinct profession

### Centrality of Law

- Means of social ordering
  - Pervades every aspect of society + primary means of control
  - E.g. business, family, education, welfare etc
- contains educative value
  - relays messages to society re. rights + wrongs
    - e.g. domestic violence
- other traditions:
  - Religious influences on social ordering
    - E.g. Islamic countries
  - Tradition + customs in Eastern countries
    - E.g. China's pursuit of '*Li*'
      - Ethics, taboos, ceremonies, customs etc. of community
      - Held in higher esteem than '*Fa*' – rules prescribed by earthly ruler
    - E.g. Japan
      - Greater respect for honour + good faith in relations as law

### Moral Authority of Law

- Holds high level of respect for law itself
  - Law as separate from law makers who may demand respect
- Not only obeyed but believed in
  - Stems from representative govt.
    - Laws are representative of public values
  - Relies on society's values
- Others?
  - Areas where law is repressive + instils fear
  - Areas where people feel alienated + disconnected from society

### Comparisons to Other Legal Traditions

- Sharia
  - Source of Law
    - God + Religious Teachings
      - Qu'ran + Hadiths
    - Still have respect for legal authority
  - Role of Lawyers/Judges
    - Legal Profession non existent
      - Contrast to Western autonomy of law = legal profession is distinct
    - Religious scholars interpret + apply law
      - Lay religion – anyone can become interpreters
  - Dispute resolution
    - Punitive
    - Follow the traditional + customary forms of punishment
      - But again open to interpretation
        - Contrasts to Western rule of law wanting consistency
- Customary Law – Case Study: South Sudan
  - Source of Law
    - Social norms
    - Tradition + Culture
  - Role of Lawyers
    - Local leaders + chiefs
      - More inquisitorial
  - Dispute resolution
    - Mediation → Maintaining social norms – peace + order
  - Written law?
    - Oral tradition
    - Still in their Const.
- Civil Law – still a form of Western Legal Tradition
  - Ultimate source of authority
    - Codified law
  - Role of lawyers/judges
    - Follow inquisitorial as opposed to adversarial
    - Smaller significance of precedence + *stare decisis*
      - Decisions made binding on other lower courts
    - Judges must go through Judicial Association
    - Lawyers have diminished role
      - Serve as advisory rather than shaping + arguing the case
  - Written law?



- Heavily codified

## **Rule of Law**

### Principles:

- All people should be ruled by law + obey it
- Law should be such that people should be able to be guided by it
  - Explicable
  - Available
  - Clear
- Based on customary law
  - Precedent + Equity
    - Consistency + equality
- J.Raz, "The Rule of Law and its Virtue" (1977) 93 *Law Quarterly Review* 195, 198.
- A.V Dicey
  - Society should be governed by law not discretionary power
  - Govts. can only act within their legal authority

### Legality

- Law must be followed
- All must act within powers conferred upon them

### Certainty

- Law should be certain + predictable
  - Ensures equality + consistency + neutral
  - Not dictated by bias + discretion
- How predictable is it practice however?

### Consistency

- Fundamental to equal treatment of all in dealings of law

### Accountability

- Rule of law provides published standard to which legality of action can be measured
  - Govt. action + discretion subject to public scrutiny

### Efficiency

- Rules clarify laws which will be applied to people
- Neutral + non-affective approach to legal decisions
  - Decision-maker alleviated pressure of constant reconsideration through consistency

### Due Process + Access to Justice

- Core elements concerning equality
- 'Natural Justice'/'Procedural Fairness'
  - Interrelated to legality
- Decision-maker must be unbiased – independent + impartial
  - Not pressured from external forces + uninterested in outcome
- Purpose to judge individuals based on existing legal standards
  - Ensures consistency