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Understandings of the Rule of Law in various Legal Orders of the World
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Understandings of the Rule of Law in Australia

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I. Constitutional Basis of the Rule of Law

There is no explicit recognition of the rule of law in the Australian Constitution.[1] However, in *Australian Communist Party v Commonwealth* (1950) 83 CLR 1 at 193, Dixon J of the High Court of Australia recognised that the rule of law forms an unwritten 'assumption' underpinning the Australian Constitution. This does not mean that every aspect of the rule of law is constitutionally entrenched. A distinction must be drawn between 'implications' from the Australian Constitution (which are terms or concepts anchored in the text or structure of that instrument) and 'assumptions'. Only implications may be enforced as part of the Australian Constitution and, therefore, the critical question is which aspects of the rule of law may be implied from that instrument. This question has not yet been conclusively answered by the High Court. In *Kartinyeri v Commonwealth* (1998) 195 CLR 337 at 381, Gummow and Hayne JJ stated that 'the occasion has yet to arise for consideration of all that may follow from Dixon J's statement'. Leighton McDonald states:

> [A]lthough explicit references to the ideal [of the rule of law] can be found in many doctrinal areas ..., these references are rarely matched by careful examination of the rule of law's precise content, how its elements interrelate, or how doctrinal outcomes are to be determined. ... So although the ideal is accepted as a constitutional assumption, and no doubt guides the Court in its roles of interpreting and making the law, the meaning and consequences of this remain inchoate in its jurisprudence.[2]

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1 The Australian Constitution is contained in section 9 of the *Commonwealth of Australia Constitution Act 1900* (UK). Under the Australian federal system, each of the Australian States also has its own Constitution. This country report only discusses the rule of law at the federal level (i.e. under the Australian Constitution).

2 Leighton McDonald, 'Rule of Law' in Tony Blackshield, Michael Coper and George Williams (2003) *Oxford Companion to the High Court of Australia* 610.

II. Judicial Review of Legislative and Executive Action

The Australian system may be described as 'government under the Constitution'. The Australian Constitution bestows limited powers on the branches of government. In particular, the federal system established by the Australian Constitution means that the Australian parliament is only able to legislate with respect to listed subject matters (for example, naval and military defence, inter-state trade and commerce, external affairs and taxation).[3] The power to make laws with respect to any residual subject-matters is vested in the State parliaments. The Queen's representative in Australia, the Governor-General, is officially the head of the Australian parliament. However, the functions exercised by this office are almost entirely symbolic, for example, to sign off on Acts of the Australian parliament.

Critical to the notion of government under the Constitution is that the Australian Constitution not only limits the powers of the branches of government, but also *binds* the branches of government to comply with these limits. This is reflected in clause 5 of the *Commonwealth of Australia Constitution Act 1900* (UK), which relevantly provides that '[t]his Act, and all laws made by the Parliament of the Commonwealth under the Constitution, shall be binding on the courts, judges and people of every State and of every part of the Commonwealth'. The role of reviewing the exercise of governmental power for consistency with the Australian Constitution is fulfilled by the Australian courts (in particular, the High Court). This power of judicial review is nowhere set out in the Australian Constitution. However, George Williams notes that such a power can be implied from Chapter III of the Australian Constitution, which creates a strict separation of judicial power from legislative and executive power at the federal level.[4] There are two aspects to this separation of powers: (1) only federal courts may exercise judicial power; and (2) federal courts may only exercise judicial power (that is, not legislative or executive power).[5] Amongst other things, the separation of powers means that no person may be detained (at least where that detention is for a punitive purpose) except as a result of a judicial finding of guilt.[6] Textual support for the implication of a power of judicial review can also be found in section 75(v) of the Australian Constitution, which confers upon the High Court jurisdiction in all matters in which a writ of mandamus, prohibition or an injunction is sought against an officer of the Commonwealth. The jurisdiction of the High Court to require officers of the Commonwealth

3 The exception is that the Australian parliament may make any laws with respect to the Australian Territories: Australian Constitution section 122.

4 George Williams, 'Judicial Review' in Tony Blackshield, Michael Coper and George Williams (2003) *Oxford Companion to the High Court of Australia* 376, 377.

5 *The Queen v Kirby; ex parte Boilermarkers' Society of Australia*(1956) 94 CLR 254.

6 *Al Kateb v Godwin* (2004) 219 CLR 562.

to act within the law cannot be taken away by the Australian parliament.[7] Therefore, section 75(v) 'introduces into the Constitution ... an entrenched minimum provision of judicial review'.[8]

Australian Communist Party v Commonwealth (1951) 83 CLR 1 provides the clearest statement of the Australian courts' power of judicial review. The legislation at issue in this case (*Dissolution Act*) purported to declare organisations to be unlawful, and individuals to be Communists, based purely upon the opinion of the Governor-General. A declaration would result in the banning of an organisation, the forfeiture of its property and the exclusion of an individual from holding public office or working in certain industries. The key question for the High Court in this case was whether the *Dissolution Act* fell within one of the subject matters upon which the Australian parliament may legislate. In the recitals to the legislation, the Australian parliament sought to pre-empt the question of validity by stating that the legislation was 'necessary ... for the security and defence of Australia'. The High Court refused to regard this statement as conclusive, instead finding that the legislation was not proportionate to Australia's defence needs. Justice Fullager famously stated at 258 that 'a stream cannot rise higher than its source'. The High Court, and not the Australian parliament or executive, is the ultimate arbiter of the Australian Constitution and of the law generally.

In order for judicial review to be effective, it is important that the courts are independent from the legislative and executive branches of government. As noted above, a strict separation of judicial power from legislative and executive power at the federal level has been implied from the Australian Constitution. Importantly, there is no equivalent separation of powers at the State and Territory level in Australia, and the State and Territory parliaments may, for example, be invested with judicial power. In addition to the separation of powers at the federal level, federal judges also possess security of tenure (holding office until the age of 70), and may only be dismissed by a joint sitting of both houses of the Australian parliament for proven misbehaviour or incapacity.[9]

Some Australian judges and commentators have observed a weakening of judicial review, particularly in the counter-terrorism context. In *Thomas v Mowbray* (2007) 233 CLR 307, the High Court upheld the constitutionality of Australia's controversial control order regime in Division 104 of the Commonwealth *Criminal Code Act 1995*. In finding that the regime fell within the defence power, the High Court gave considerable scope to the executive to calculate the terrorist threat and the necessity for particular legislative measures to be introduced in response to that threat. The High Court also re-

7 *Plaintiff S157/2002 v Commonwealth of Australia* (2003) 211 CLR 476, [5] (Gleeson CJ).
8 Ibid [103]-[104] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).
9 Australian Constitution section 72.

jected challenges to the regime based on the separation of powers. It found that federal courts could issue control orders because this was a judicial (and not an executive) function. Furthermore, the prevention of terrorism was an exception to the general rule that a person could only be detained as a consequence of a judicial finding of guilt. Justice Kirby (in dissent) at [386]-[387] was scathing of his fellow High Court judges, saying that this case provided:

> [F]urther evidence of the unfortunate surrender of the present Court to demands for more and more governmental powers, federal and State, that exceed or offend the constitutional text and its abiding values. It is another instance of the constitutional era of laissez faire through which the Court is presently passing.

III. A Substantive Conception of the Rule of Law

Australia is unique amongst western democratic nations in not having a Bill or Charter of Rights. The Australian Constitution contains limited express rights, and the High Court has tended to interpret these in narrow terms.[10] The rule of law and the separation of powers have formed the basis for the implication of some *procedural* rights into the Australian Constitution. For example, the High Court has held that the Australian parliament may not enact a Bill of Attainder. A declaration of the guilt of a particular person or class of persons by the Commonwealth Parliament would constitute an improper exercise by the Parliament of judicial power.[11] However, to date, the High Court has stopped short of implying *substantive* rights from the rule of law and separation of powers.[12] In *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1 at 23, McHugh and Gummow JJ stated:

> In Australia, the observance by decision-makers of the limits within which they are constrained by the Constitution and by statutes and subsidiary laws validly made is an aspect of the rule of law under the Constitution. It may be said that the rule of law reflects values concerned in general terms with abuse of power by the executive and legislative branches of government. But it would be going much further to give those values an immediate normative operation in applying the Constitution.

The High Court was unable to reach a consensus in *Polyukhovich v Commonwealth* (1991) 172 CLR 501 as to whether the Australian Constitution prohib-

10 For example, the requirement in section 80 of the Constitution that '[t]he trial on indictment of any offence against any law of the Commonwealth shall be by jury' has been interpreted by the High Court as conferring on the Commonwealth Parliament the power to itself determine what offences shall be 'on indictment', and thus subject to a jury trial. See R v Bernasconi (1915) 19 CLR 629.

11 Polyukhovich v Commonwealth (1991) 172 CLR 501.

12 See Michael McHugh, 'Does Chapter III of the Constitution Protect Substantive as Well as Procedural Rights?' (2001) 21 Australian Bar Review 235.

its the Australian parliament from making retrospective criminal laws.[12] Furthermore, in *Kruger v Commonwealth* (1997) 190 CLR 1, five members of the High Court rejected the existence of an implied guarantee of general legal equality in the Australian Constitution.[13]

Further Reading

Gerard Brennan, *The Parliament, the Executive and the Courts: Roles and Immunities* (1997) 9(2) Bond Law Review 136.

Duncan Kerr and George Williams, *Review of Executive Action and the Rule of Law under the Australian Constitution* (2003) 14 Public Law Review 219.

Wendy Lacey, *Liberty, Legality and Limited Government: Section 75(v) of the Constitution* (Paper delivered at 12th Annual Public Law Weekend, Australian National University, 9 November 2007).

Andrew Leigh, *Tenure* in Tony Blackshield, Michael Coper and George Williams (2003) Oxford Companion to the High Court of Australia 664.

Leighton McDonald, *Rule of Law* in Tony Blackshield, Michael Coper and George Williams (2003) Oxford Companion to the High Court of Australia 610.

Ninian Stephen, *Independence, judicial* in Tony Blackshield, Michael Coper and George Williams (2003) Oxford Companion to the High Court of Australia 338.

George Williams, *Judicial Review* in Tony Blackshield, Michael Coper and George Williams (2003) Oxford Companion to the High Court of Australia 376.

George Williams, *Human Rights and Judicial Review in a Nation without a Bill of Rights: The Australian Experience* (2004) 23 Supreme Court Law Review (2d) 305.

George Williams, *The Constitutional Role of the Courts: A Perspective from a Nation without a Bill of Rights* (2004) 2 New Zealand Journal of Public and International Law 25.

13 Kruger v Commonwealth (1997) 190 CLR 1 44-45 (Brennan CJ), 63-68 (Dawson J, with whom McHugh J agreed at 142), 112-113 (Gaudron J), 153-155 (Gummow J).