

# Rule of Law

By Kelly Eliot for LAW102 Foundations of Australian Law B

## Introduction

Rule of law is a concept that is relevant to a degree that is ‘unparalleled in history’. Advocated by many governments, regardless of their systems of government, it has become something of a global ideal.<sup>1</sup> But what is the rule of law and how is it carried out in Australia?

In Western countries, the rule of law is one of the ‘hallmark features of all liberal societies’. This is often connected with the English Jurist AV Dicey<sup>2</sup>, who was the first to create a ‘prominent modern formulation and analysis of the rule of law in a liberal democratic system’<sup>3</sup>. According to Dicey, the rule of law contains three important characteristics:

- a. ‘The law is applied equally to everyone, regardless of their social status, culture, religion or political beliefs’.
- b. ‘No person may be punished other than for conduct that is expressly made illegal’.
- c. ‘The courts uphold the rights of the citizens, including the right to personal freedom’.<sup>4</sup>

Although rule of law is considered a feature of liberal societies, when interpreted narrowly, it ‘has no necessary connection to liberal societies’.<sup>5</sup> It is for this reason that it has gained support in countries which reject democracy and individual rights.<sup>6</sup> This section will largely focus on the basic, formal version of the rule of law.

## Equality

‘All persons shall be equal before the courts and tribunals’.<sup>7</sup>

Legal equality is a fundamental liberal value, which has a place in both the *Universal Declaration of Human Rights* and the *International Covenant on Civil and Political Rights*; and for Dicey, it was a primary concern that special immunities and privileges were not provided to public officials (monarch excluded).<sup>8</sup> Equality before the law, however, can be interpreted in different ways, which affects whether or not there is true equality, or if it even

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<sup>1</sup> Brian Tamanaha, *On the Rule of Law: History, Politics and Theory*, (Cambridge University Press 2004) <[www.cambridge.org/9780521843621](http://www.cambridge.org/9780521843621)> 2-3.

<sup>2</sup> Stephen Bottomly & Simon Bronitt, *The Law in Context*, (The Federation Press 4<sup>th</sup> ed. 2012) 42-45.

<sup>3</sup> Tamanaha, above n 1, 63.

<sup>4</sup> Nickolas James & Rachael Field, *The New Lawyer*, (John Wiley & Sons Australia 2013) 115.

<sup>5</sup> Bottomly & Bronitt, above n 2, 42.

<sup>6</sup> Tamanaha, above n 1, 2.

<sup>7</sup> *International Covenant on Civil and Political Rights*, art 14(1).

<sup>8</sup> Tamanaha, above n 1, 64.

exists. Methods for creating equality can be divided into two categories: formal and substantive.<sup>9</sup>

Formal equality, also known as procedural equality, is concerned with the form of the legal rule and is the method of applying the same laws to everyone, regardless of any qualities the person may have. This does not recognise situations of prolonged inequality, which has been brought about by political, social and economic inequality and can prevent equal opportunities. Using formal equality to interpret the first characteristic, it means that everyone should be dealt with in the same manner, and there should be no special rules or courts when dealing with officials who are acting outside of legal justification.<sup>10</sup>

Substantive equality focuses on the results or effects the rules have and takes into account differences in people's backgrounds to try and avoid situations that would be unfair.<sup>11</sup> Without these factors taken into account, it would result in people being affected differently, despite having them applied evenly. For instance, if all people were taxed the same amount, either people would only pay tax to a level that everyone would be able to pay, or people would be in situations where they are unable to pay their tax, which could result in penalties, due entirely to external factors. This could affect the rights of persons, such as their right to personal freedom. By using a 'sliding scale' tax system, this attempts to even out the burden of tax on individuals, to create substantive equality, rather than procedural equality.<sup>12</sup> Substantive equality has received some criticism by Friedrich Hayek, as he believed it was 'inherently inconsistent with the rule of law'<sup>13</sup> and 'that to produce the same result for different people it is necessary to treat them differently'.<sup>14</sup>

## Laws

One of the central elements of the rule of law 'governmental authority can only be exercised in accordance with written, publicly disclosed laws, that have been adopted and are enforced in accordance with standard procedure'.<sup>15</sup> These laws should be 'general, promulgated, clear, specific, prospective, practicable and stable'.<sup>16</sup> In Australia, the standard procedure for government made laws is to make them in accordance with the relevant constitution. For example, Section 51 of the *Australian Constitution* allocates the Federal Parliament power to make laws, but only if the law is in regards to the 39 sections allocated in the constitution, such as: marriage; external affairs and quarantine.

The principle, that laws must be expressed, conflicts with the idea of retrospective laws, which are law that are considered to have commenced before the date of assent.<sup>17</sup> The

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<sup>9</sup> James & Field, above n 4, 78.

<sup>10</sup> Hon Kevin Lingren AM QC, Rule of Law Institute of Australia, *The Rule of Law: its State of Health in Australia* (2012) <<http://www.ruleoflaw.org.au/wp-content/uploads/2012/10/Lindgren-Rule-of-Law-Its-State-of-Health-in-Australia-2012.pdf>> 4.

<sup>11</sup> James & Field, above n 4, 78-9.

<sup>12</sup> *Ibid*, 79.

<sup>13</sup> Tamanaha, above n 1, 68.

<sup>14</sup> Friedrich Hayek, *The Road to Serfdom* (University of Chicago Press 1944) 87-88.

<sup>15</sup> James & Field, above n 4, 520.

<sup>16</sup> Bottomly & Bronitt, above n 2, 46.

<sup>17</sup> James & Field, above n 4, 154.

effect of these laws mean that a person can be charged with having committed an offence that was not illegal at the time the act was performed. This could make the law very difficult, if not impossible to comply with, and the results would unjustly punish and disadvantage people for breaches of those laws.<sup>18</sup> The stance against retrospective laws has been affirmed in the *International Covenant on Civil and Political Rights*, where it states, '[n]o one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed'.<sup>19</sup>

One example of a retrospective law in Australia is the New South Wales *Community Protection Act 1994*. In this legislation a person can continue to be detained as long as there was, on the balance of probabilities, a more likely than not possibility the person would commit a serious act of violence, making it appropriate to extend the person's custody 'for the protection of a particular person or the community'.<sup>20</sup> This was challenged in the High Court,<sup>21</sup> succeeding in the first instance, as it was held by the majority to be unconstitutional. Further, the law was seen as incompatible with the 'integrity, independence and impartiality required of the courts with federal jurisdiction'. The United Nations Human Rights Committee also ruled the Act 'violated Article 9 of the *International Covenant on Civil and Political Rights* because [it] provided further penalty for same offence' and operated retroactively.<sup>22</sup>

The *Community Protection Act* also failed on the grounds that it is too specific. According to Hayek, generality was one of the three attributes of all rule of law systems. The legislation specifically targeted 'Gregory Wayne Kable is the person if that name who was convicted in New South Wales on 1 August 1990 of the manslaughter of his wife, Hilary Kable'.<sup>23</sup> As it is unlikely there is any relevant difference between Kable and another person convicted of the same or similar offence, it could be considered the law was created to treat Kable unequally,<sup>24</sup> even though the same law can be applied to others.

## Rights

Rights are individual entitlements,<sup>25</sup> which can be divided into four categories: privileges; claims; powers; immunities. A privilege is the right to do something; however, it is only a privilege if you can choose not to do it. A claim is 'that someone does something, if and only if, that person owes a duty to you to do that thing'. Powers are the ability to alter your rights or the rights of another, but only if you are given the ability according to a set of rules. An immunity is when another lacks the ability to alter your rights, in accordance to a set of rules.<sup>26</sup> Many of these rights can be found in the *Universal Declaration of Human Rights* and the *International Covenant on Civil and Political Rights*; however, in Hayek's opinion, using the rule of law as a test for valid legislation as it would prevent legislation from favouring

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<sup>18</sup> Bottomly & Bronitt, above n 2, 48.

<sup>19</sup> art 15(1).

<sup>20</sup> Lingren, above n 5, 25-6.

<sup>21</sup> *Kable v Director of Public Prosecutions for New South Wales* (1996) 189 CLR 51.

<sup>22</sup> Lingren, above n 5, 26-7.

<sup>23</sup> *Community Protection Act 1994* (NSW) s 3.

<sup>24</sup> Bottomly & Bronitt, above n 2, 47.

<sup>25</sup> James & Field, above n 4, 520.

<sup>26</sup> *Ibid*, 72.

specific groups and would be ‘the “most effective protection” against the violation of individual rights, superior even to an explicit Bill of Rights’.<sup>27</sup>

One right the courts must uphold is ‘[t]he right of an accused to receive a fair trial according to law’, which is considered a ‘fundamental element of our criminal justice system’.<sup>28</sup> This means persons are ‘entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law’ and have a ‘right to be presumed innocent until proven guilty according to law’.<sup>29</sup> A few of these standards were also identified by Joseph Raz as mechanisms to enforce “the basic intuition” underlying the rule of law’.<sup>30</sup>

In Australia, these rights are upheld in multiple ways, such as the ‘presumption of innocence, standard and burden of proof [and] the right to remain silent’.<sup>31</sup> The standard of proof in a criminal trial is ‘beyond reasonable doubt’ rather than on the ‘balance of probabilities’, as it is in civil trials<sup>32</sup>. Combined with the treatment of a defendant as innocent until proven guilty, the burden of proof, in most cases, is placed on the Crown to prove guilt, without the defendant being required to establish or prove any explanation or defence. It is not enough to prove it is more probable than not, the accused committed the crime, but it does not have to be beyond any doubt, only a reasonable doubt.<sup>33</sup>

Returning to the *Community Protection Act*, by making the standard of proof on the balance of probabilities,<sup>34</sup> rather than, beyond reasonable doubt, it places a burden of proof on the defendant to disprove the prosecution’s case. If not, they risk receiving an extra six months to their sentence due to the belief they are ‘more likely than not to commit a serious act of violence’.<sup>35</sup> This does not comply with the principle of fairness, as it would mean the person would not receive the same, complete benefit of being considered innocent until proven guilty, as they would if they were on trial for actually having committed an act of violence.

## Alternative Interpretations

*‘A non-democratic legal system, based on the denial of human rights...may, in principle, conform to the requirements of the rule of law better than...Western*

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<sup>27</sup> Tamanaha, above n 1, 71.

<sup>28</sup> *Dietrich v The Queen* (1992) 177 CLR 292 at 299.

<sup>29</sup> *International Covenant on Civil and Political Rights*, art 14.

<sup>30</sup> Tamanaha, above n 1, 93.

<sup>31</sup> Terese Henning & Kate Warner, ‘The Criminal Process and Sentencing’ in Andrew Goldsmith, Mark Israel & Kathleen Daly (eds), *Crime and Justice: a Guide to Criminology* (Thomson Lawbook 3<sup>rd</sup> ed. 2006) 317 [15.65].

<sup>32</sup> Adam Sutton and Fiona Haines, ‘White Collar and Corporate Crime’, in Goldsmith, Israel & Daly, above n 29, 160 [8.10].

<sup>33</sup> Brian Martin CJ, ‘Beyond Reasonable Doubt’ (paper presented at the Annual conference of Supreme and Federal Court Judges, 26 January 2010)

<[http://www.supremecourt.nt.gov.au/media/documents/Beyond\\_Reasonable\\_Doubt.pdf](http://www.supremecourt.nt.gov.au/media/documents/Beyond_Reasonable_Doubt.pdf)>.

<sup>34</sup> *Community Protection Act* s 15.

<sup>35</sup> *Ibid* s 5.

*democracies...It will be an immeasurably worse legal system, but it will excel...in its conformity to the rule of law'.<sup>36</sup>*

Reading the rule of law narrowly, Raz, claims it 'says nothing about fundamental rights, about equality or justice'. This claim is supported by the fact the 'USA adhered to the rule of law even when slavery was legally enforced, and racial segregation legally imposed.<sup>37</sup> It is due to this variety of interpretations that the rule of law has been accepted in countries, such as Russia, Afghanistan, Zimbabwe and China.<sup>38</sup> There is a danger, however, that some societies may interpret rule of law as being rule *by* law, as opposed to rule *of* law.<sup>39</sup>

Rule by law is a part of the formal version of the rule of law, where the law is an instrument of government action. The formal conception focuses on how a law was promulgated, its clarity, how it was expressed and prospective, without being concerned about if the law is good or bad, due to justice or moral principle. In rule by law, there is a notion that whatever government does should be done through law and this places very little limitations on the government. Chinese legal scholars have, however, claimed this interpretation as the preferred understanding by the government.<sup>40</sup>

## Conclusion

Although rule of law is a prominent legal theory, there is no single agreed upon definition of what it means. Dicey's three characteristics of the rule of law: that people are treated equally, their rights are upheld by the courts and they cannot be punished for crimes other than which has been expressly made illegal; have been widely accepted in liberal societies, however, even Dicey's definition depends on interpretation and contains flaws in terms of application.

- In the first characteristic, it would need to be determined if equality would be formal or substantial equality, or a combination of both. By their nature, however, it is one or the other, since law would not be able to take into account variations of circumstance while treating everyone the same. Hayek has also expressed a rejection of substantive equality as being inconsistent with the rule of law.
- The second characteristic is that people can only be punished for crimes which have been expressly made illegal. This comes into conflict with retrospective laws, such as the *Community Protection Act 1994*. This law failed on the basis that it was unconstitutional and was considered a violation of *International Covenant on Civil and Political Rights*. It would also fail on the basis of being too specific, which Hayek considers one of the three attributes of rule of law systems.
- The third characteristic is the courts must uphold the rights of citizens. Rights are individual entitlements which have four categories and many of these can be found in *Universal Declaration of Human Rights* and the *International Covenant on Civil and Political Rights*. One right the court must uphold is the right to a fair trial, which is expressed in multiple ways, including presumption of innocence and burden of proof.

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<sup>36</sup> Joseph Raz, 'The Rule of Law and Its Virtue', in *The Authority of Law* (Oxford: Clarendon Press 1979) 212-13.

<sup>37</sup> Tamanaha, above n 1, 93.

<sup>38</sup> *Ibid*, 2.

<sup>39</sup> Bottomly & Bronitt, above n 2, 43.

<sup>40</sup> Tamanaha, above n 1, 91-2.

The *Community Protection Act* fails to meet these standards, as it takes away the complete benefit of the presumption of innocence.

Finally, though the rule of law can be interpreted in many ways, there is a danger of it being misinterpreted as rule by law, as it has in China, which would result in the government using the law as a tool, rather than society using it as protection against government oppression.

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