

What is the Rule of Law?

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The concept of the 'rule of law' is one of the fundamental principles of the governance of Australia. This essay will define one version of the 'rule of law' concept and show how it interplays with major liberal values. It will also show some elements of the Australian legal and political system that purport to conform to the classic liberal definition of 'rule of law', or variations thereof. The objective is to determine what the 'rule of law' is and show a limited number of examples of it at work in the Australian legal setting.

Liberalism is an intricate and varied philosophy that includes many principles that tie in with the 'rule of law'. The concept of individualism is central to liberalism.¹ The perceived human rights that flow from individualism² largely shape the way in which western legal systems and political systems have operated in modern times. This liberal concept of individual rights is valued so highly that it is prized more than the powers of the state and the furtherance of the community.³ The importance placed on the autonomy of the individual has contributed to the ideas that have shaped the Commonwealth of Australia.

The definition of the 'rule of law' is varied depending on the lifestyle and background of the person comprising the definition. From a liberal perspective, AV Dicey stated that to be consistent with the 'rule of law', a rule system had to be consistent with three main traits.⁴ Firstly, that the law applies to everyone equally.⁵ This 'generality'⁶ concept especially includes government and its officials and agents. The United Nations have stated that having all people accountable to law is consistent with human rights.⁷ Secondly, that the law is clear and just and protects the individual's fundamental rights.⁸ Finally, that the only laws applied are previously expressly stated.⁹

One popular version of the liberal concept of the 'rule of law', again proposed by AV Dicey, involves government *through* laws.¹⁰ This concept of legal formalism, or black letter law, concerns applying the written law to the letter. Dicey went on to argue that the 'rule of law' concept also included government *under* laws.¹¹ This extrapolates the theory to include laws the government must follow to make new laws. Dworkin, in his

¹ Nickolas James and Rachael Field, *The New Lawyer* (John Wiley & Sons Australia Ltd, 2013) 64.

² Ibid 73.

³ Ibid.

⁴ Ibid 115.

⁵ Ibid.

⁶ Stephen Bottomley and Simon Bronitt, *Law in Context* (Federation Press, 4th ed, 2012) 47.

⁷ United Nations, *United Nations and the Rule of Law* (2014) United Nations
<<http://www.un.org/en/ruleoflaw/>>.

⁸ Nickolas James and Rachael Field, *The New Lawyer* (John Wiley & Sons Australia Ltd, 2013) 115.

⁹ Ibid.

¹⁰ Stephen Bottomley and Simon Bronitt, *Law in Context* (Federation Press, 4th ed, 2012) 45.

¹¹ Stephen Bottomley and Simon Bronitt, *Law in Context* (Federation Press, 4th ed, 2012) 45.

overall comments on the liberal theory of law, confirms this liberal way of thinking by stating:

“The theory of legislation must contain a theory of legitimacy, which describes the circumstances under which a particular person or group is entitled to make law, and the theory of legislative justice, which describes the law they are entitled or obliged to make.”¹²

The constitution is an example of a body of law in Australia that determines the lawmaking powers and processes of the parliament in this liberal democracy.¹³

The Australian constitution is prefaced by an overview of its function and the policies that it purports to support.¹⁴ One of the ideas mentioned is the concept of Separation of Powers.¹⁵ The concept provides for separation of the powers of government to enable the branches of government to oversee each other. This system enables one section of government to hold another to account to ensure that it is acting within its power as defined in the constitution.¹⁶ The *Australian Capital Television v Commonwealth*¹⁷ case is an example of the Judiciary constraining the power of the Parliament by invalidating laws¹⁸ that were inconsistent with the High Court’s interpretation of the constitution.¹⁹ This constraint on power ensures that the parliament is unable to make laws that are arbitrary and it follows with liberal ideals as it ensures that no group is able to impose its view of the world on others.²⁰ This individualistic notion of protection from authority is consistent with AV Dicey’s concept of government under laws and is designed to prevent corruption.

Protection from authority is further enhanced by Dicey’s second trait of the ‘rule of law’. If the separation of powers functions properly, laws that are illegal and affect the rights of citizens, will be invalidated. This will enable the liberal concept of individual rights to flourish. In practice, the competing rights of different citizens challenge the individualism that is a cornerstone of liberal thinking. The right to free speech²¹ may be weighed up with the right to privacy and protection of reputation. Defamation law in the law of tort is an example of where these rights clash and need to be tempered against one another.²²

¹² R Dworkin, *Taking Rights Seriously*, (Duckworth, 1977) viii.

¹³ *Commonwealth of Australia Constitution Act* Chapter 1.

¹⁴ *Commonwealth of Australia Constitution Act* contents page.

¹⁵ *Commonwealth of Australia Constitution Act* iv.

¹⁶ See Nickolas James and Rachael Field, *The New Lawyer* (John Wiley & Sons Australia Ltd, 2013) 119.

¹⁷ *Australian Capital Television v Commonwealth* (1992) 177 CLR 106.

¹⁸ A section of *Political Broadcasts and Political Disclosures Act 1991* (Cth) which inserted part IIID into the *Broadcasting Act 1942* (Cth).

¹⁹ The High Court construed an implied right to political communication in the *Commonwealth of Australia Constitution Act*.

²⁰ Roberto Unger as per Stephen Bottomley and Simon Bronitt, *Law in Context* (Federation Press, 4th ed, 2012) 43.

²¹ Identified as a right in: *International Covenant on Civil and Political Rights* article 19(2); *European Convention on Human Rights* article 10.

²² K Barker, P Cane, M Lunny and F Trindade, *The Law of Torts in Australia* (Oxford University Press, 5th ed, 2012) 306.

The separation of powers outlined in the Australian constitution preamble is designed to limit the power of sections of government. The constitution itself sets out the powers for each section of the government.²³ The courts and Judiciary are empowered with ‘conclusively determining legal disputes’.²⁴ The limits of this judicial power, according to French CJ,²⁵ will be determined by the constitution, community expectations and how the passage of time has shaped judicial responsibilities. French CJ goes on to state that: “precision of expression is illusionary.”²⁶ A succinct way of stating that language is ambiguous. The broad terms used in statute are open to interpretation and “must include a decision as to what justice requires in the context of the instant case.”²⁷ This ‘decision’ is arrived at by statutory interpretation, acts of parliament²⁸ and the judiciary’s own opinions of justice. Common law principles are employed, namely ‘*stare decisis*’, to ensure that each similar case is treated consistently.²⁹ It is important in the ‘rule of law’ to have the consistency and the following certainty of law that ‘*stare decisis*’ provides.³⁰ In practice, this may not always be the case. It was stated in *Nguyen*³¹ that:

“In cases where an appeal is not available or is not taken to this Court, rigid adherence to precedent is likely on occasions to perpetuate error without, as experience has shown, significantly increasing the corresponding advantage of certainty.”

These factors involved in application of the common law and judicial reasoning are variable to say the least. Brennan J has stated that the courts attempt to pursue justice, but perfect justice is an unattainable ideal.³² It is not unusual to get dissenting judgements or even accenting judgements that are inconsistent in how they apply the law.³³ This lack of consistency is misaligned with the ‘rule of law’ as it does not allow the citizens to be sure of their legal status.

Certainty is an important part of the ‘rule of law’. It ensures that the citizen is able to plan for their future and have confidence in business and economic pursuits. During his final

²³ *Commonwealth of Australia Constitution Act* ch 1-3.

²⁴ *Commonwealth of Australia Constitution Act* preamble page v

²⁵ RS French “*Judicial Activism – the boundaries of the Judicial Role*” lawasia conference 10 November 2009, Ho Chi Minh City, Vietnam.

²⁶ *Ibid.*

²⁷ *Stone Julius, Legal System and Lawyers' Reasonings* (Sydney, Maitland Publications Pty Ltd, 1964) 263,264.

²⁸ An example is the *Acts interpretation Act* 1901 (Cth)

²⁹ Nickolas James and Rachael Field, *The New Lawyer* (John Wiley & Sons Australia Ltd, 2013) 180; otherwise known as the ‘doctrine of precedent’.

³⁰ Discussed by Street CJ in *Fleming v White* (1981) 2 NSWLR 719, 725-6.

³¹ *Nguyen v Nguyen* (1990) HCA 9; (1990) 169 CLA 245, 268-270.

³² *Jago v District Court (NSW)* (1989) 168 CLR 23, 49; reiterated by Lord Carswell in *Smith v Smith* [2006] 3 All ER 907 at [79].

³³ An example of this occurred in *Magill v Magill* [2006] HCA 51.

campaign as Prime Minister,³⁴ Mr Kevin Rudd outlined a plan to reduce government spending on the Pharmaceutical Benefits Scheme. The economic statement proposed by the Government in August 2013³⁵ altered pharmacy remuneration in a way that was inconsistent with the fifth community pharmacy agreement.³⁶ The certainty of the agreement was a comforting factor for most pharmacy owners until this point. The subsequent reduction in certainty has reflected in lenders being significantly less eager to support pharmacy and lending rates have been less favourable which has further impacted on many businesses. Government actions of this nature are unusual but they show a disregard for the ‘rule of law’.

The concept of certainty is enhanced by other principles that embody the ‘rule of law’. Finnis expanded on the concept of ‘rule of law’ set down by Dicey.³⁷ Finnis’s concepts of a clear, specific set of laws that were promulgated and prospective were all concepts consistent with people knowing the law. In practice, however, knowing the law is not possible for anyone, let alone every citizen. It is the disadvantaged that are most likely to be unable to have access to the written law, legal assistance or an education with which to interpret the legislation.³⁸ The costs of interpretation and other factors such as concerns about safety in domestic violence situations, can cause a person to have issues accessing the law.³⁹ These issues propagate inequalities in how people are treated by the law. The large volume of law that is produced ensures that, even with access to the law, it is not possible to know it in its entirety.

For law to apply to everyone equally,⁴⁰ the judiciary must ensure that the processes and systems they utilise are consistent. The complex concept of a fair trial is critical in the ‘rule of law’. Fairness and procedural protections are paramount to ensure the rights of individuals and the opposing public interests to convict the guilty, are considered. Fair trials are also paramount to maintain public confidence in the legal system.⁴¹

The concepts of fairness and justice have a number of varied interpretations. They are aligned with liberal thinking and individual rights.⁴² If a court treats people without prejudice, they are removing them from the context of their life. They then provide an isolated judgment relating to the facts that the court deems relevant to making that judgment. This may seem fair from a liberal viewpoint, as procedural justice is prescribed by Dicey’s definition of the ‘rule of law’. In more recent years, this formal form of equality before the

³⁴ In September 2013.

³⁵ Chris Bowen and Penny Wong, *Economic Statement 2013*, Commonwealth of Australia 2013, 37.

³⁶ A contract signed by the government.

³⁷ P Butt and D Hamer (eds) *Concise Australian Legal Dictionary* (LexisNexis Butterworths, 4th ed, 2011) 518.

³⁸ Stephen Bottomley and Simon Bronitt, *Law in Context* (Federation Press, 4th ed, 2012) 164.

³⁹ *Ibid.*

⁴⁰ As per Dicey’s first trait of the ‘rule of law’.

⁴¹ Stephen Bottomley and Simon Bronitt, *Law in Context* (Federation Press, 4th ed, 2012) 159.

⁴² *Ibid* 20.

law has been superseded by substantive equality.⁴³ The law is evolving to assist those who are disadvantaged to enable an equal result. Politicians' attempts to provide substantive equality through legislation to give more consideration to the plight of disadvantaged groups in our society will mean that the definition of the 'rule of law' may need to be interpreted differently to maintain its relevance.

The police and other institutions must have limits on their power to comply with Dicey's concept of government under laws.⁴⁴ Chris Cunneen pointed out that: "public order and the actions which constitute disorder are broadly defined and open to constant interpretation and discretionary decisions by police."⁴⁵ The police, like the judiciary, are required to use their personal judgment in a variety of ways to enforce the law. This discretionary power is necessary, as zero tolerance policing⁴⁶ tends to alienate the police and reduce respect for the law.⁴⁷ Zero tolerance policing also enhances discrimination as disadvantaged citizens tend to be victimised under these regimes, which further perpetuates inequality.⁴⁸ Abraham Lincoln showed his support for discretion when he made the famous comment: "The best way to get bad law repealed is to enforce it strictly."⁴⁹

The significance of the 'rule of law' is evident in situations of Police misconduct. Fairness to citizens is illustrated in the rules regarding admission of evidence.⁵⁰ In the case of legitimate evidence of guilt being obtained illegitimately, the formal 'rule of law' is subjected to judicial discretion. In a series of cases, Kirby J ruled that strong evidence of guilt should not be admitted, as it was not properly obtained due to a breach of the right to silence of the accused.⁵¹ This is consistent with the second trait that Dicey outlined.⁵² Kirby J further explained⁵³ that the less intellectually endowed members of society needed protecting, as more intelligent persons would not have given up the evidence. In ruling this way, Kirby J is attempting to distribute substantive equality by not allowing the people who were intelligent enough to avoid capture, to have an advantage over those who were not.⁵⁴ This ruling and the two reasons outlined, show the 'rule of law' being applied in the High Court of Australia in current era.

⁴³ Examples of this are seen in anti-discrimination legislation such as the *Anti-Discrimination Act 1991* (Qld).

⁴⁴ In Queensland the *Police Powers and Responsibilities Act 2000* (Qld) prescribes limits of police power.

⁴⁵ As quoted in Stephen Bottomley and Simon Bronitt, *Law in Context* (Federation Press, 4th ed, 2012) 151.

⁴⁶ Police applying laws without discretion.

⁴⁷ Stephen Bottomley and Simon Bronitt, *Law in Context* (Federation Press, 4th ed, 2012) 151.

⁴⁸ *Ibid* 152.

⁴⁹ As quoted by Brendon Murphy in "Law 101 reading guide" 32.

⁵⁰ *Police Powers and Responsibilities Act 2000* (Qld).

⁵¹ *Em* [2007] HCA 46; 232 CLR 67; 239 ALR 204, [227]-[231]; *Carr v State of Western Australia* [2007] HCA 47; 232 CLR 138; 239 ALR 415, [136]-[137], [170].

⁵² Protection of the individual's fundamental rights.

⁵³ *Em* [2007] HCA 46; 232 CLR 67; 239 ALR 204, [224]; *Carr v State of Western Australia* [2007] HCA 47; 232 CLR 138; 239 ALR 415, [170].

⁵⁴ Equal treatment before the law which is Dicey first trait of the 'rule of law'.

There are a number of different facets involved in the liberal construction of the concept of the 'rule of law'. A great number of these are based on individualism and liberal human rights values. The 'rule of law' has been a central concept in the development of Australia and yet its practical application in the current context of Australian law is impossible. The initial concept that AV Dicey put forward over 100 years ago needs to be interpreted in today's context to have merit. The complexity and variation of the themes involved in interpreting the 'rule of law' have meant that any definition is purely one of perspective, so a common agreed definition is yet to be coined. Although AV Dicey's 'rule of law' is unattainable in Australia, the concept it puts forward enables this country to maintain accountability of the elected officials and allows for the peaceful transition of power through the political system. The practical application of the concepts involved mean that the concept cannot be followed exactly as the liberal theorists have prescribed, but it is valuable as a mould for a set of principles to maintain stable government and minimise corruption. The application of the 'rule of law' in this country provides a valuable contribution to the maintenance of individual rights in the liberal democracy that is Australia.

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