

The rule of law and the Constitution – a short overview

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The phrase “the rule of law” has about it a rhetorical appeal which means that it is frequently invoked to justify actions or underwrite certain outcomes or analyses. Its meaning can vary greatly depending on who is using the expression and in what context. As Lord Bingham has noted:

“Jeremy Waldron, commenting on *Bush v Gore*, in which the rule of law was invoked on both sides, recognised a widespread impression that utterance of those magic words meant little more than ‘Hooray for our side!’.”¹

Lord Sumption recently described the expression “the rule of law” as being “one of the clichés of modern life”.² Whether clichéd or not, for present purposes, as Edelman J noted, surely correctly, in *Graham v Minister for Immigration and Multicultural and Indigenous Affairs*,³ the precise content of the concept of the rule of law is “hotly disputed”.⁴ In Sir Anthony Mason’s words, it is a “concept which has defied definition”.⁵

Insofar as it is associated with AV Dicey, the phrase “the rule of law” is constitutional but, of course, in the small “c” sense of the word. It is not an expression used in Australia’s Constitution. The publication of Dicey’s *Introduction to the Study and Law of the Constitution* occurred in 1885 and was referred to in passing during the Convention Debates of 1891, 1897 and 1898 including by Barton, Inglis Clarke and

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¹ Thomas Bingham, ‘The Rule of Law’ (2007) 66(1) *Cambridge Law Journal* 67, 68, citing *Bush v Gore*, 531 US 98 (2000).

² Jonathan Sumption *Trials of the State: Law and the decline of politics* (Profile Books, 2019) at 6.

³ (2017) 263 CLR 1.

⁴ *Ibid* 38 [82] (Edelman J).

⁵ Sir Anthony Mason “The Rule of Law in the Shadow of the Giant: The Hong Kong Experience” (2011) 33 *Sydney LR* 623 at 623.

Isaacs albeit not in the context of the rule of law per se but, rather, in relation to Dicey's views of federalism and the role of the judiciary in a federal system. There can be little doubt, however, that many of the participants in the Convention Debates were familiar with his work. Dicey's conception of the rule of law, however, was one articulated in the context of his thesis of parliamentary sovereignty which, of course, was rather different from the federal compact being given effect to by the framers of the Australian Constitution with its quite deliberate and structurally embedded separation of powers.⁶

Most discussions of the rule of law in and under the Australian Constitution commence with the famous passage from Sir Owen Dixon's judgment in the *Communist Party Case*⁷ in 1951 where he said:

"[T]he Constitution ... is an instrument framed in accordance with many traditional conceptions, to some of which it gives effect, as, for example, in separating the judicial power from other functions of government, others of which are simply assumed. Among these I think that it may fairly be said that the rule of law forms an assumption."

The dichotomy apparently drawn in this passage between the separation of powers as a traditional concept *given effect to* in the Constitution, on the one hand, and the rule of law as an *assumption* of the Constitution, on the other hand, is an interesting one which perhaps gives some (but not much) insight into what Sir Owen did and did not think the rule of law entailed. The first point is that Dixon J evidently did not consider that the Constitution *gave effect to* the traditional conception of the rule of law. The dichotomy is also interesting because, as shall be seen, it is in and through the separation of powers that many later justices have seen the rule of law being given effect to in the Australian Constitution. Dixon J's dictum has, to quote from the second sentence of Lisa Burton Crawford's excellent monograph *The Rule of Law and the Australian Constitution*, "cast a long shadow".⁸

Before I endeavour to cast a modicum of light on that shadow, it is perhaps surprising that one does not see many earlier references to the concept of the rule of law in the High Court's jurisprudence than that of Sir Owen in the *Communist Party Case*. One

⁶ The importance of political and constitutional context for discussion of the rule of law is illustrated in D Kinley "Constitutional Brokerage in Australia: Constitutions and the Doctrines of Parliamentary Supremacy and the Rule of Law" (1994) 22 Fed LR 194.

⁷ *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 193.

⁸ Lisa Burton Crawford, *The Rule of Law and the Australian Constitution* (Federation Press, 2017).

case in which it was referred to was *Victorian Chamber of Manufactures v Commonwealth (Women's Employment Regulations)*⁹ in which Sir Edward McTiernan, a justice not frequently cited in academic forums such as this one, referred to Isaacs J's statement in *Farey v Burvett*¹⁰ that the defence power is limited in war-time only by the requirements of self-preservation, and said:

“The statement postulates the inquiry being made in circumstances of grave national peril where no rational person would doubt that the co-operation of every individual and a co-ordinated effort in every department are necessary to save the Commonwealth. **To raise that question in those circumstances is indeed a remarkable manifestation of the rule of law.**” (emphasis added)¹¹

McTiernan J's point, I think, was that it was a mark of our constitutional arrangements that even at the height of terrible war, when all hands were to the deck as it were, the High Court would entertain and rule on a challenge to the validity of an Act and regulations whose purpose were undoubtedly genuinely directed to the war effort, the point being that, even in occasions of *extremis*, our system accepted and accommodated such a challenge to government power before the High Court. That challenge, incidentally, was successful in part.

In *Church of Scientology Inc v Woodward*,¹² Brennan J famously said that:

"Judicial review is neither more nor less than the enforcement of the rule of law over executive action; it is the means by which executive action is prevented from exceeding the powers and functions assigned to the executive by law *and the interests of the individual are protected accordingly*".

Most but not all of the relief that had been sought in the initiating process in this case was declaratory, and Brennan J's observations were not made with specific reference to the constitutional writs. Two years later, in *A v Hayden*,¹³ his Honour was to say that “[n]o agency of the Executive Government is beyond the rule of law.” And, as

⁹ (1943) 67 CLR 347.

¹⁰ (1916) 21 CLR 433.

¹¹ *Women's Employment Regulations* (n 6) 383.

¹² (1982) 154 CLR 25, 70 (emphasis added). See also *R (on the application of Evans) and another (Respondents) v Attorney General (Appellant)* [2015] AC 1787; [2015] UKSC 21 at [52]-[54].

¹³ (1984) 156 CLR 532 at 588. Brennan J also said at 591 that “Though the courts must interpret the law, they are bound by the law they interpret and the notion that they might grant a dispensation from the law affecting the investigation of criminal offences subverts the very purpose of their being. More, it subverts the rule of law upon which our system of government depends.”

was subsequently stated in *Plaintiff S157*,¹⁴ section 75(v) of the Constitution secures this basic element of the rule of law under the Constitution.

In 1998, in *Kartinyeri v Commonwealth*,¹⁵ Brennan CJ and McHugh J, referring to the famous passage from Dixon J's judgment in *Communist Party Case*, observed that "the occasion has yet to arise for consideration of *all that may follow* from Dixon J's statement" (emphasis added).

Some attempt to pursue that lead was made in *APLA Ltd v Legal Services Commissioner (NSW)*¹⁶ where one of the questions raised by the special case was whether or not the legal profession regulation proscribing advertising of legal services "impermissibly infringes the requirements of Ch III of the Constitution *and of the principle of the rule of law as given effect by the Constitution*". Whilst it is fair to say that the argument focussed not so much on the rule of law but on the implied freedom of political communication, what was put in argument by then Mr Gageler SC was that "[i]t is fundamental to the rule of law that the subjects of the law know, or are able to ascertain, their rights and duties."¹⁷ Whilst that might or might not be true, just because the Constitution may rest on an assumption of the rule of law, it does not follow that every possible aspect or element of the rule of law is thereby constitutionalized.

The argument based on the rule of law in *APLA* did not gain any traction with the Court. It did, however, give Gleeson CJ, in a joint judgment with Heydon J, an opportunity to address clearly what role he considered the rule of law played under the Constitution. Citing Dixon J in the *Communist Party Case*, their Honours said:¹⁸

"The rule of law is one of the assumptions upon which the Constitution is based. It is an assumption upon which the Constitution depends for its efficacy. Chapter III of the Constitution, which confers and denies judicial power, in accordance with its express terms and its necessary implications, gives practical effect to that assumption."

¹⁴ *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476.

¹⁵ (1998) 195 CLR 337, 381 [89].

¹⁶ (2005) 224 CLR 322.

¹⁷ *Ibid* 326.

¹⁸ *Ibid* 351 [30]. See also *Thomas v Mowbray* (2007) 233 CLR 37, 342 [61] (Gummow and Crennan JJ).

Gleeson CJ, in his Boyer Lectures entitled “The Rule of Law”,¹⁹ described the separation of powers as the most effective restraint upon power, and thereby a necessary element of the rule of law.²⁰ The Chief Justice said that the separation of powers achieved by the Constitution means that a citizen cannot be subject to the exercise of certain powers except by a court; although the precise nature and content of judicial power may be unclear, at the very least this denies to Parliament or the Executive the capacity to administer civil or criminal justice.²¹

Chapter III gives effect to the rule of law in at least three ways.

First, it enacts and entrenches, subject to s 128, the federal judiciary’s ability, pursuant to s 75(v), to engage in judicial review of Commonwealth executive action through the constitutional writs. As Gaudron, McHugh, Gummow, Kirby and Hayne JJ said in *Plaintiff S157/2002 v Commonwealth*:²²

“[T]he issues decided in these proceedings are not merely issues of a technical kind involving the interpretation of the contested provisions of the Act. The Act must be read in the context of the operation of s 75 of the Constitution. That section, and specifically s 75(v), introduces into the Constitution of the Commonwealth an **entrenched minimum provision of judicial review**. There was no precise equivalent to s 75(v) in either of the Constitutions of the United States of America or Canada. The provision of the constitutional writs and the conferral upon this court of an irremovable jurisdiction to issue them to an officer of the Commonwealth constitutes a **textual reinforcement** for what Dixon J said about the significance of the rule of law for the Constitution in *Australian Communist Party v Commonwealth*.” (emphasis added)

So too in *Re McBain; Ex parte Australian Catholic Bishops Conference*,²³ Hayne J said that “[a]t the risk of over-simplifying the matter, this Court, with its central place in the Australian judicial system, must be able to ensure the rule of law by granting relief against Commonwealth officers who act without, or in excess of power, or who refuse to perform a public duty.” It may also be observed that the imperative in *Kirk v Industrial Court (NSW)*²⁴ to ensure that “islands of power” were not permitted to remain

¹⁹ Murray Gleeson, ‘The Rule of Law and the Constitution’ (ABC Books, 2000).

²⁰ *Ibid* 60.

²¹ *Ibid* 63.

²² (2003) 211 CLR 476, 513 [103].

²³ (2002) 209 CLR 372, 465-6 [263].

²⁴ (2010) 239 CLR 531 at [99].

“immune from review” manifested an unstated but keenly felt concern for and enforcement of the rule of law.

More recently, in *Smethurst v Commissioner of Police (Cth)*,²⁵ Gageler J identified two traditional conceptions underlying s 75(v) of the Constitution which he described as aspects of the rule of law. These were that the holder of a constitutional or statutory office cannot do anything in an official capacity except that which is authorised by the Constitution or by statute and that the holder of a constitutional or statutory office is bound by the common law when doing anything in an official capacity except to the extent that non-compliance with the common law is specifically authorised or excused by statute.

The second way in which Chapter III may be seen to give effect to the rule of law is that it reposes in an independent and secure judiciary, in the exercise of federal judicial power, the ability to hold Parliament to its proper constitutional limits in the enactment of legislation. Importantly this precludes Parliament from determining the limits of its own powers. This was of course the *Communist Party Case*. As Kirby J put it in *White v Director of Military Prosecutions*,²⁶ “the separation of the judicial power in Ch III of the Constitution [is] an institutional means essential to securing the effectiveness of the rule of law in Australia”.

Thirdly, insofar as it *denies* judicial power to non-Chapter III courts, Chapter III prevents certain exclusively judicial tasks such as the adjudication of criminal guilt from being exercised other than by courts. Thus, having quoted Dicey, Brennan, Deane, Dawson JJ in *Chu Kheng Lim v Minister for Immigration*,²⁷ said it was:

“beyond the legislative power of the Parliament to invest the Executive with an arbitrary power to detain citizens in custody notwithstanding that the power was conferred in terms which sought to divorce such detention in custody from both punishment and criminal guilt.”

²⁵ [2020] HCA 14, [111].

²⁶ (2007) 231 CLR 570, 634 [178].

²⁷ *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 27.

In the previous year, in *Polyukovich v The Commonwealth*,²⁸ four members of the Court, without deploying the phrase “the rule of law”, nevertheless gave effect to an aspect of it insofar as they held that the separation of powers would invalidate a law which inflicted punishment upon specified person without a judicial trial on the ground that it would involve a usurpation of judicial power.

More recently, in *Benbrika*,²⁹ Gordon J said that adherence to the rule of law in Australia “includes the maintenance of the system of law and government prescribed by the Constitution of the Commonwealth; with a judiciary, as the ‘bulwark of freedom’, which traditionally and historically adjudges the most basic of rights upon the determination of criminal guilt”.

It is very important to appreciate that, insofar as the rule of law is given effect to and embedded in the Constitution, including but not limited to s 75(v) and through the separation of powers more generally, aspects of the rule of law are regularly given effect to, as in *Polyukovich*, without that highly rhetorical expression being invoked. This, I think, is probably a good thing as the expression is at the same time protean and somewhat elusive, and capable of misuse and distortion.³⁰ It is, as Edelman J observed in *Graham*, a concept whose precise content is “hotly disputed”.

That having been said, most recently, in *MZAPC v Minister for Immigration and Border Protection*,³¹ a decision of 19 May 2021, Gordon and Steward JJ used the expression “the rule of law” 13 times in as many paragraphs in their discussion of public power. Their Honours, having noted that the Constitution “is framed upon the assumption of the rule of law”, accepted that the precise meaning of the rule of law may be, and often is, contested but then went on to say that:

“what is in issue in this appeal takes the content of the rule of law at its narrowest. That one ‘cardinal principle’ of the rule of law, the irreducible minimum about which there is not and cannot be any debate, is ‘that Government should be under law, that the law

²⁸ (1991) 172 CLR 501.

²⁹ *Minister for Home Affairs v Benbrika* [2021] HCA 4, [103].

³⁰ See, for example, M Krygier “The Rule of Law: an Abuser’s Guide” University of New South Wales Law Research Paper No 2007-4.

³¹ [2021] HCA 17, [91]-[104].

should apply to and be observed by Government and its agencies, those given power in the community, just as it applies to the ordinary citizen'.³²

So much may be accepted. What I expect may be significantly more contentious, at least insofar as it is said to stem from or be rooted in any constitutional assumption, is their Honours' reference at [99] of their judgment to "rule of law values" which they said provided "principled support for the view that if an individual establishes error in an administrative decision, it should be for the Executive to establish that, even without the error, the same outcome would have been reached."

If the concept of "the rule of law" is hotly contested, debate as to what "rule of law values" entail is likely to be even more contentious and problematic.³³ Questions which arise include "What exactly are 'rule of law values'" and "where does one find them?" Is it suggested that there should be a principle of interpretation, required by the Constitution, that Commonwealth statutes are to be interpreted in accordance with the rule of law?³⁴ Does the principle of legality, as an aspect of the rule of law,³⁵ have some basis in the Constitution itself?³⁶ In short, are the "rule of law values" to which Gordon and Steward JJ referred, once identified, to be constitutionalized in reliance upon Dixon J's observation in the *Communist Party Case*?

My own view is that Dixon J would have answered that question with a very firm "no". It can also be said that McHugh and Gummow JJ would have expressed the same view. In *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam*,³⁷ in a passage to which Edelman J made reference in the dissenting part of his judgment in *Graham*,³⁸ their Honours said:

"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

³² *Ibid* [91].

³³ The potential breadth of this concept was explored by Allsop CJ in "The Rule of Law is not a law of rules" (FCA) [2018] FedJSchol 22.

³⁴ Cf *R v Secretary of State for the Home Department, Ex p Pierson* [1998] AC 539 at 591.

³⁵ See *Electrolux Home Products Pty Ltd v Australian Workers Union* (2004) 221 CLR 309 at [21].

³⁶ *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252, [2010] HCA 23 at [15]

³⁷ (2003) 214 CLR 1, 23 [72].

³⁸ *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1, 49 [107].

legislative branches of government. But it would be going much further to give those values an immediate normative operation in applying the Constitution.”

Not only do I agree with what their Honours said but judicial restraint in this regard is important for the rule of law itself. Most fundamentally the rule of law requires respect for and confidence in the judiciary, given the critical role it plays in holding the legislature and executive to account under the Constitution.³⁹ Such respect and confidence may be undermined if the judiciary itself makes too ready resort to what it itself has identified as a concept whose content is hotly disputed, just as the legitimacy of judicial review itself depends on self-denial where the merits of an administrative decision are involved.⁴⁰

Over-enthusiastic resort to or invocation of the “rule of law” is, in my view, particularly and paradoxically problematic for the rule of law the broader the conception of the rule of law invoked. To paraphrase Lord Sumption in his Reith Lectures, the rule of law should not become, as some cynics have suggested, no more than a euphemism for the rule of lawyers.⁴¹ The rule of law does not mean “every human problem and every moral dilemma calls for a legal solution.”⁴² My distinguished predecessor, Keith Mason AC QC, was on the mark more than 25 years ago when he wrote that “[t]he irony of overt judicial activism is that is that many see the judiciary, once the guardian of the rule of law, as its greatest threat.”⁴³

This has necessarily been a brief overview of the rule of law in and under the Australian Constitution. It is difficult not to agree with Lisa Burton Crawford’s assessment that “it is not quite right to say that the rule of law is *not* given effect by the Constitution – but nor is it quite right to say that it is.”⁴⁴ To the extent it is, my view, at least, is that the judiciary should be extremely cautious about using what Dixon J described as a

³⁹ In *Hobson v Hansen* (1967) 265 F Supp 902, 923, 931, quoted by Gummow J in *Kable Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, 132-3, it was said that public confidence in the judiciary is indispensable to the operation of the rule of law

⁴⁰ *Attorney General (NSW) v Quin* (1990) 170 CLR 1 at 37-38.

⁴¹ Sumption (n 2) at 4.

⁴² Sumption (n 2) at 6.

⁴³ K Mason “The Rule of Law” in P Finn (ed) *Essays on Law and Government Part I* (1995) at 116. See also at 139-140.

⁴⁴ Crawford (n 8) 75. One who does disagree is Jamie Blaker “The Hard Problem of Legality” (2019) 46 *University of Western Australia Law Review* 1 who argues that Burton Crawford’s thesis is tied to an originalist conception of the Constitution and that, on other conceptions, the Constitution is capable of being understood as giving effect to a comprehensive conception of the rule of law.

constitutional assumption, namely the rule of law, as a platform for constitutional interpretation by reference to potentially amorphous values, still less as a source of substantive or fundamental rights.⁴⁵

⁴⁵ cf *Leeth v Commonwealth* (1992) 174 CLR 455 at 485-486 per Deane and Toohey JJ.