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KOREAN JUDICIARY  
SEOUL ADMINISTRATIVE COURT  
SEOUL, SAC, 9 JUNE 2016

THE RULE OF LAW, DEMOCRACY AND  
CONSTITUTIONALISM: AUSTRALIAN  
EXPERIENCE – FOUR CONTROVERSIAL  
CASES

The Hon. Michael Kirby AC CMG

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The Hon. Michael Kirby AC CMG\*\*  
Past Justice of the High Court of Australia

*INTRODUCTION*

The High Court of Australia, upon which I served until 2009, is the Supreme Federal Court of Appeal and Constitutional Court for Australia. The Court was honoured in 2015 by a visit by Judges of the Supreme Court of Korea.

The subject of the rule of law in a democracy is a very large one. In these remarks I will address three particular issues relevant to that subject. First, I will say something about the Australian judiciary, its position within the constitutional arrangements of the nation, the modes

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\* Some parts of this paper are derived from an address given on 12 September 2013 to the Constitutional Court of Thailand, in Bangkok Thailand.

\*\* Past Justice of the High Court of Australia (1996-2009); Past President of the Court of Appeal of New South Wales (1984-96); Past Chair of the United Nations Human Rights Council Commission of Inquiry on Human Rights Violations in DPRK (North Korea) (2013-14).

of appointment and removal of judges and some changes that have occurred in recent years. Secondly, I will relate some of the controversies that have existed about the ambit of the rule of law, both in Australia and in the wider world. Thirdly, I will describe some controversial cases that have arisen in the High Court of Australia, in which attributes of democracy and the rule of law have been examined and resolved.

### *A CONSTITUTIONAL JUDICIARY*

Australia is a constitutional democracy which observes the rule of law. It is a constitutional monarchy. The form of the Constitution was enacted in 1900, to take effect in 1901, by a statute of the Imperial Parliament at Westminster, then the supreme legislature of the British Empire. Nowadays, it is generally accepted, following reasoning in the High Court of Australia, that the basic foundation of the Constitution is the will of the Australian people, first evident in their endorsement of the text of the Constitution in the votes held throughout Australia in the 1890s.<sup>1</sup>

Australia's modern history had an unpromising start. Having lost the American colonies in 1776, the British Government searched for a remote place to send shiploads of its prisoners. Those prisoners had been convicted and sentenced by courts in the United Kingdom. Eventually Sydney was chosen for the penal settlement. From there British colonial rule spread to the entire length and breadth of the continent. With British rule came the common law of England, many British statutes and its legal traditions, legal practitioners and an

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<sup>1</sup> See *Kirmani v Captain Cook Cruises Pty Ltd* [No.2] 159 CLR 461; *Leeth v The Commonwealth* (1992) 174 CLR 455 at 485-486; *McGinty v Western Australia* (1996) 186 CLR 140 at 230

independent judiciary. Learning from the American colonial mistakes, the British created elected parliaments for the Australian colonists after 1856. When those colonists, late in the Nineteenth Century, moved to establish a national form of government, they basically followed British principles of governance so far as the law was concerned. However, the constitution that they adopted had several features that were different from that of the United Kingdom:

- \* It was expressed in a comprehensive written document, although one that is remarkably short;
- \* It adhered to the constitutional monarchy but provided for its representatives (the Governor-General of the Commonwealth as also the Governors of the States) to have high local autonomy, rarely if ever interfered with;
- \* It followed the American (and Canadian) precedent and embraced a federal system of government;
- \* It created a nationwide economic common market;
- \* It provided for an integrated system of federal and state courts, and;
- \* It created a new court, a “Federal Supreme Court”<sup>2</sup> to be known as “The High Court of Australia”. Unlike the courts of the United Kingdom, this court was to follow the American precedent, with the power to invalidate statutes, although enacted by a Parliament, which the court held to be inconsistent with the Constitution.

Formal amendments of the Australian Constitution necessitate securing a majority of the electors voting nationwide and a majority in most of the

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<sup>2</sup> *Australian Constitution*, s71.

states.<sup>3</sup> This provision makes it extremely difficult to secure formal amendment of the Constitution. In 102 years, only 8 such amendments have been approved by the people at referendum. Thirty six have been rejected.

Constitutionally speaking, therefore, Australia is a very stable parliamentary democracy, with elected legislatures both nationally and in each of the States and self-governing Territories. However, all of their legislation is subject to challenge and scrutiny in the courts and ultimately in the High Court of Australia. A particular provision of the Constitution makes it relatively simple and quick to bring constitutional challenges before the High Court. This is s75(v) of the Constitution which has been described as an assurance of the rule of law.<sup>4</sup> In *Plaintiff s157/2002 v The Commonwealth*<sup>5</sup>, five Justices of the Court (including myself) described how this provision operated:

The reservation to this Court by the Constitution of the jurisdiction in all matters in which the named constitutional writs or an injunction are sought against an officer of the Commonwealth is a means of assuring to all people affected that officers of the Commonwealth obey the law and neither exceed nor neglect any jurisdiction which the law confers on them. The centrality, and protective purpose, of the jurisdiction of this Court in that regard places significant barriers in the way of legislative attempts (by privative clauses or otherwise) to impair judicial review of administrative action. Such jurisdiction exists to maintain the federal compact by ensuring that propounded laws are constitutionally valid and

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<sup>3</sup> *Australian Constitution*, s128.

<sup>4</sup> *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1.

<sup>5</sup> (2003) 211 CLR 476 at 513-4 [104] per Gaudron, McHugh, Gummow, Kirby and Hayne JJ.

ministerial or other official action lawful and within jurisdiction. In any written constitution, where there are disputes over such matters, there must be an authoritative decision-maker in all matters where there is a contest, is this Court. The Court must be obedient to its constitutional function. In the end, pursuant to s 75 of the Constitution, this limits the powers of the Parliament or of the Executive to avoid, or confine, judicial review.

So long as a party has the necessary “standing” (or legal interest) to bring a challenge, that party can bypass lower courts and proceed directly to the apex court. That court may, however, remit the matter to a lower court, federal or state.

Increasingly, in recent years, the requirement of “standing” has been given a broad ambit in Australia. But it is not unlimited and generally necessitates the existence of a financial or other special or personal stake in the outcome of the legal challenge which the party wishes to bring.<sup>6</sup> The extent to which an individual citizen, as an elector or taxpayer, has sufficient interest to raise a constitutional challenge, is a matter of controversy.<sup>7</sup> Sometimes, the absence of “standing” has been a way by which final courts can avoid deciding controversial political decisions which they feel are better left to the democratic processes and the legislature.<sup>8</sup>

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<sup>6</sup> See eg *Croome v Tasmania* (1997) 191 CLR 119 at 125-6, 132-3. See also A.R. Blackshield and G Williams, *Australian Constitutional Law and Theory* (3rd Edition) 2002, 1301-1308; and M.D. Kirby, “Deconstructing the Law’s Hostility to Public Interest Litigation” (2011) 127 LQR 537 at 560.

<sup>7</sup> *Combet v The Commonwealth* (2005) 224 CLR 494 at 616 ff [295].

<sup>8</sup> This was the response of the majority of the Supreme Court of the United States recently in the case challenging the constitutional validity of state legislation on marriage equality for same sex couples.

Not only is Australia very stable from the constitutional point of view (it has the sixth oldest continuously operating constitution in the world: after the unwritten constitution of the United Kingdom and the written constitutions of the United States of America, Sweden, Canada and Switzerland). The rest of the Australian legal system is also relatively stable. Australia has never had a revolution or *coup d'état*. Its legal system has evolved gradually from that inherited from Britain. Many old statutes, applicable to the circumstances of the colonies, were inherited from the United Kingdom and applied in Australia. Some still are. Nowadays, however, statute law, which is made in democratically elected parliaments, predominates. The judge-made law, decided by courts in resolving particular legal disputes, must give way if a parliament enacts a valid law on the subject. Decisions on whether such law is valid are left to the courts.

In Australia, courts have the final word on constitutionalism; not the legislature. By the same token, courts are respectful of the democratic legitimacy of the parliaments. They do not needlessly hold legislation to be unconstitutional. Yet when that happens, the decision is always accepted by the institutions of government, just as the peaceful changes of government at the ballot box are accepted, once elections are concluded. People are entitled to criticise judges and any other officials and to agitate for change, even basic change – whether of the monarchy, the legislatures or the courts – without fear of punishment or retaliation.

Australia has a robust media (although the print media is in relatively few hands) that thrives on criticism and controversy. Although there is no comprehensive bill of rights in the Australian Constitution, the High Court

of Australia itself has upheld, as an implication from the provisions in the constitution establishing electoral democracy, that purported restrictions on the public discussion of the matters of political concern can only be valid if they do not inhibit the operation of the democracy for which the Constitution provides.<sup>9</sup>

With a division of powers between the Federal Parliament and those of the States and self-governing Territories, it is necessary to have an independent umpire to resolve contests as to the law-making power. In Australia, that umpire is provided by the courts. Unlike some democracies, there is no special constitutional court, such as the Constitutional Courts of Germany and South Africa. Every court in the land is obliged to apply the constitution as part of the law. Constitutional arguments may be raised, and must then be determined, in the courts: from the lowest to the highest. When I was young, there was a provision by which any constitutional argument relating to the respective powers of the Federal and State Parliaments had to be referred immediately to the High Court of Australia for its consideration. This had the consequence of stopping a legal case mid-stream until that court determined whether it would take the issue for decision, refer it elsewhere; or allow the matter to proceed.<sup>10</sup> However, that inconvenient provision has now been repealed. The Constitution therefore permeates the legal system. Most Australians are content with that arrangement, although occasionally criticisms are voiced on the footing that the skills that make for accurate decision making on criminal law, insolvency or contract law are not necessarily the same as those philosophical and political insights essential to wise decisions of a constitutional character.

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<sup>9</sup> *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 559, and cases there cited.

<sup>10</sup> *Judiciary Act* 1903 (Aust.) s38A, 40A (now repealed).



The Australian judiciary is divided in several ways. First, there are State and Federal courts and judges. The latter include the High Court of Australia; the Federal Court of Australia; the Family Court of Australia; and the Circuit Court (formerly the Federal Magistrates Court). Originally, there were relatively few federal courts and judges in Australia. By an innovative provision of the Australian Constitution, federal jurisdiction could be invested in any court of a State.<sup>11</sup> This provision generally worked well until the 1970s when creation of federal courts became common. Alongside the federal system of courts are the State courts. These range from State Supreme Courts (successors to the colonial courts originally created in the Nineteenth Century by Royal Charter); State District or County courts; and Magistrates Courts (or Courts of Petty Sessions). The last mentioned courts deal with police, traffic and small or minor cases, civil and criminal and process about 90% of the cases coming before courts in Australia. In all, federal, State and Territory courts comprise about 1000 judicial officers for a population of 23 million. The courts are assured by the federal Constitution of their independence (and hence, it is expected, their impartiality, integrity and neutrality).<sup>12</sup>

Generally speaking, I believe, the courts are respected by the Australian people. Judges, like other human beings, have faults and make errors (some of which can be corrected on appeal or review). There have been relatively few cases of judicial corruption that have come to light. When

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<sup>11</sup> *Australian Constitution*, s77(iii).

<sup>12</sup> The principle is applied to State Courts in Australia, as an implication derived from the provision of the Australian Constitution obliging them to receive federal jurisdiction. See *Kable v Director of Public Prosecutions* (NSW) (1997) 189 CLR 51.

they do, they are truly shocking.<sup>13</sup> Judges, federal and state, enjoy guaranteed tenure. In the case of superior court judges, they cannot be removed from office at the will of the government or parliament. They hold office during the term of their appointment (usually up to the age of 70 years). They cannot be removed except by a resolution of parliament which is based on “proved misbehaviour or incapacity”.<sup>14</sup> In the history of the Australian Commonwealth, no federal judge has ever been removed in this way and only one State Supreme Court Judge (Queensland) was so removed. Independent institutions that receive and investigate complaints of misconduct and corruption by officials have recently been established. However, these have been mainly concerned with the conduct of politicians and other officials.<sup>15</sup>

The appointment of the judiciary in Australia, follows the traditional British tradition. Judicial officers are appointed by the elected government of the day. There is no requirement for a legislative vote or approval. Nor is there provision for legislative questioning or participation in appointments. Increasingly, in recent years, and especially with lower courts, judicial positions have been advertised; interviews of candidates have been conducted; and recommendations are made which the elected government normally (though not invariably) follows. In the highest courts, particularly in the High Court of Australia, there are no advertisements and governments rightly prize their power of appointment. They realise how important judicial philosophy and attitudes can be to decision-making in controversial cases, especially constitutional cases.

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<sup>13</sup> Since the Australian Constitution came into effect in 1901, no federal judge has been removed from office. Only one State judge (Justice Vasta in the State of Queensland) has been removed from office under equivalent provisions in State Constitutions.

<sup>14</sup> *Australian Constitution*, s72(ii). There are similar provisions in State Constitutions.

<sup>15</sup> *Judicial Commission Act 1986* (NSW).

In the case of the High Court of Australia since 1979, there has been an obligation, by statute, for the elected federal government to consult all State governments, which are also democratically elected, before appointing a Justice to the apex court.<sup>16</sup> However, consultation does not control appointment. The justification for such a direct participation of the elected government in the appointment of judges is that the work of judges is not purely technical: certainly in the highest courts and particularly in constitutional courts. Perceived (or hoped for) philosophical attitudes of appointees are unquestioningly significant for the discharge of judicial duties. This role of elected governments in appointments is generally seen as appropriate in a democracy, so as to reflect, over time, the ever-changing civic attitudes. However, there is a strong tradition that, once appointed, judges have little or nothing (including socially) to do with the members of the other branches of government and especially politicians. They keep their distance. They must explain their reasons publicly. They also perform their court duties in public under scrutiny. Judicial reasons are open to scrutiny, commentary and criticism.

Judging, as every judge knows, is hard work. It is increasingly examined with critical and realistic appraisal. Most governments, because they are themselves elected and ultimately judged by the electorate, are careful and responsible about judicial appointments and avoid appointing those who will not have the inclination or capacity to perform at a very high level. This is especially so in the highest court. For my own part, I would not favour appointment of judges by committees especially if such

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<sup>16</sup> As provided by the *High Court of Australia Act 1979* (Aust.), s6 (“Consultation with State Attorneys-General on appointment of Justices”).

committees were mostly comprised of judges and lawyers. Often, as experience has taught in Australia, elected politicians have a better sense of who should (or should not) serve in the judiciary. It is a way, at the coming in and going out of judicial office, that appointees are subject to a democratic imperative. To change significantly the present constitutional arrangements in Australia, certainly in the federal sphere, would require a referendum. One change that was made at a referendum in 1976 requires Australia's federal judges to retire from office. They lost life tenure. In the case of the High Court of Australia the 1976 change fixed a retiring age of 70 years. Some judges and lawyers were, and still are, critical of this change. However, I supported it (and still do) because it ensures turnover in the judiciary and new generational and legal perspectives.

I have said nothing in these remarks about the many specialised courts that now exist in Australia to deal with such topics as the environment; industrial relations; drug offenders and indigenous people. Nor of the introduction (once thought unnecessary) of procedures for judicial education. Workshops are now common, although they have to be conducted in a way that respects the independence of the judicial participants. They are not, so far, addressed to the highest court, most of whose members are very long term judicial officers. Administrative cases are dealt with in federal, State and Territory Courts. They are also decided by specialised independent tribunals, including the Administrative Appeals Tribunal and the Refugee Review Tribunal.

Independence of the judiciary includes independence from one another as well as from external influences. Each country's judiciary reflects its constitutional and political realities. In Australia, this means that the

judiciary is generally apolitical, is generally relatively invisible, hardworking, somewhat distant, rather conservative and removed from influence and corruption. The apolitical character of the judiciary does not mean that the judges are neutered. They are robust individuals and their place on the liberal/conservative spectrum is constantly studied by lawyers, scholars and media. This examination leads to speculation and predictions – often quite accurate – on the judicial reactions to particular cases. Judicial values inevitably have an impact on judicial decisions.

### *RULE OF LAW AND LAW OF RULES*

The rule of law in Australia is a protean concept. It is not expressly written as a principle in the Constitution. However, in 1951, in the *Australian Community Party v The Commonwealth*<sup>17</sup>, Justice Dixon asserted that it was an unwritten, yet fundamental assumption of the Australian Constitution. It was the bedrock justification for the High Court's work (especially in the resolution of constitutional controversies) and an essential guarantee of the democratic character of the government for which the Constitution provides.

Most observers conceive of the rule of law as a protection for observance of the constitutional text and for the survival of its central institutions – the Parliament, Executive and Judiciary.

The role of the federal judiciary, and ultimately the High Court of Australia, in upholding the Constitution and the laws made under it, is implicit in the division of the powers expressed in the Constitution. That division is not only as between federal and State (sometimes Territory)

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<sup>17</sup> *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1.

powers, but also as between the organs of federal government themselves. Most especially, the courts have assumed the role and duty to say what the law is. Once the Court has done this, the other organs have the duty to obey the courts' rulings. This is why the High Court of Australia has been especially defensive of its own role, and of the role of the courts, in performing the tasks of the constitutional arbiter. The judicial power under the Australian Constitution must not be assumed by any other organ. And the courts must not perform what are essentially legislative or executive powers. Whilst the separation of legislative and executive powers is not strict in Australia, the separation of the judicial power *is* strict. Naturally, this principle has given rise to many borderline decisions about exactly what *is* a judicial function and therefore one exclusively reserved to the courts. In an age of complex public administration, drawing these lines has often proved difficult and controversial.

It is important to recognise that a constitutional court must constantly draw lines and declare what the law is. These lines will often be contested in the law, the judiciary and society. It is therefore important for a constitutional court to justify its decisions with persuasive reasoning, impartial conduct and a high degree of manifest political neutrality. Because politics is an exciting and contested business, it is natural for politicians to criticise court decisions, especially those that appear inconsistent with past rulings or those which seem damaging to their political interests and desires. Judges in constitutional courts normally have to endure, and be above, such criticism. Punishing people for such criticism used to be a feature of the Australian legal system through the law of contempt of court. But in recent years, much

criticism has been accepted as a burden that constitutional judges just have to carry without complaint.

A major controversy has been raised in international circles in recent years concerning the ambit of the rule of law. Is it limited in its operation solely to insisting that courts give effect to the *texts* that are laid down by the lawmakers? Or are there deeper *principles* that need to be observed, relating to the fundamental values of the law and society? Some lawyers in Australia suggest that it is a mistake for the law to become entangled with broader questions. They say that law should confine itself to enforcing the rules laid down, so that is enough. However, the experience of recent times has caused critics of this narrow view of the notion of the rule of law to suggest a wider ambit for the operation of the principle of the rule of law.

Germany, under the Nazi Third Reich and South Africa under apartheid were in many ways, rule of law societies. Judges continued to perform their normal duties in cases about contracts, wills and taxation. But there were 'black holes' when it came to enforcing the law upon, or for, certain disadvantaged people in the state. The people could not look to the law to protect them. This reality has led scholars and jurists to contrast the true notion of the 'rule of law' with the narrower notion of a 'law of rules'.<sup>18</sup> The narrower notion is not, for them, sufficient. It is regarded as too formalistic and prone to deal with the appearances rather than with actuality of the rule of law.

One great English judge, Lord Bingham, suggested that, in contemporary circumstances, the rule of law included not just

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<sup>18</sup> M.D. Kirby, "The Rule of Law Beyond the Law of Rules" (2010) 33 *Aust. Bar Rev* 195.

enforcement of *rules* but also observance of certain *basic principles* in society<sup>19</sup>:

- 1) The law must be accessible and, so far as possible, intelligible, clear and predictable for the citizens;
- 2) Questions of legal rights and liability should ordinarily be resolved by application of the law and not by the exercise of discretion;
- 3) The law must apply equally to all, except to the extent that objective differences explain and justify a relevant differentiation;
- 4) The law must afford adequate protection for fundamental human rights;
- 5) Means must be provided for resolving, without prohibitive costs or inordinate delay, genuine civil disputes which the parties themselves are unable to resolve;
- 6) Ministers and public officials at all levels must exercise the powers conferred on them reasonably, in good faith, for the purpose which the powers were confined and without exceeding the limits of such powers;
- 7) Judicial and other adjudicative procedures must be fair and independent; and
- 8) There must be compliance by the state with its international legal obligations.

I am sure that there are similar controversies about the ambit of the rule of law principle in the Republic of Korea. As in Australia, I have no doubt that the notion of observing the rule of law – and of expecting a constitutional court to uphold that notion – will bring forth controversies and debates. In a democracy, this is a healthy characteristic. Usually

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<sup>19</sup> Lord Bingham, “The Rule of Law” (2007) 66 *Cambridge Law Journal* 67 at 81.



the resolution of such conflicts will be achieved by the democratically elected organs of government (the legislature and executive). But some core notions of the role and functions of the courts have to be left to the courts themselves to decide. Between the democratic elements in society and the unelected elements, there will always be vigorous and sometimes heated, differences that will invoke vigorous debates in the media, political parties and civil society. This is not unusual. It is healthy. Only in a country like North Korea is such open debate forbidden and feared.

I now wish to turn to four cases which, when decided by the High Court of Australia, were extremely controversial at the time of their decision. Some still are. They illustrate the type of differences that can exist; the legitimacy of contested viewpoints; and the necessity of having an arbiter (such as a constitutional court) that will authoritatively decide such questions, at least for a time, until they are raised again as often they are.

#### *FOUR CASES*

##### 1. *The Communist Party Case of 1951:*

Amongst the most controversial decisions of the High Court of Australia was that reached in March 1951 concerning the constitutional validity of legislation enacted by the Australian Federal Parliament to ban the Australian Communist Party and to remove the civil rights of its leadership and its members. The *Communist Party Dissolution Act 1950 (Aust.)* was enacted by the Australian Parliament pursuant to an express mandate given to the incoming conservative Coalition government at the general election held in

December 1949. A long preamble to the Act recited the suggested revolutionary purposes of the Communist Party “to seize power and to establish a dictatorship of the proletariat”. The legislation relied for its validity chiefly on several powers granted by the Constitution to the Federal Parliament, namely the defence power;<sup>20</sup> the executive power<sup>21</sup> and the express incidental power,<sup>22</sup> i.e. that the law was justified by matters incidental to the preservation of the Constitution and the form of government that it provided for. In his reasons upholding the validity of the law, Chief Justice Latham quoted the words used by Oliver Cromwell in England three centuries earlier: “Being comes before wellbeing”.

In other words the basic justification advanced was that the Federal Parliament was entitled to defend the Constitution and to use for that purpose the powers granted to it for “defence”. Legislation had earlier been enacted in the United States and upheld by the Supreme Court of the United States in *Dennis v United States*<sup>23</sup> just a few months earlier. Accordingly, the Australian Government was very confident that it would succeed before the High Court. In the result, however, all of the other participating Justices (5 of them), led by Justice Dixon, surprised the nation and shocked the Government by declaring that the law was constitutionally invalid. It was thus totally ineffective and a legal nullity. The case was fought in the High Court of Australia by the lawyer politician who had formerly been a Justice of the High Court, Dr H.V. Evatt KC. This fact added to the tensions about the decision.

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<sup>20</sup> *Australian Constitution*, s51(vi).

<sup>21</sup> *Australian Constitution*, s61.

<sup>22</sup> *Australian Constitution*, s51 (xxxix).

<sup>23</sup> 341 US 494 (1951).

The Court held that it was not lawful for the Australian Parliament, by a preamble enacted in the law, to “recite itself into power”. In effect, the Court said that the Federal Parliament could deal with acts of subversion. However, it could not use its constitutional powers to suppress the advocacy by communists of their political views and doctrines about society.

Stunned by the decision (which came when Australia had servicemen fighting with the United Nations in the Korean War) Prime Minister R.G. Menzies proposed the amendment of the Constitution to overcome the decision and to make the federal legislative power clear. However, in a referendum held later in 1951, the double majority required for amendment of the Constitution was not achieved. There was no majority in the overall vote of the citizens, although the result was close. Moreover, there was no majority of States favouring change to the Constitution.

In retrospect, the decision in the *Communist Party Case* was a strong assertion by the Court on the limits of the power of the Federal Parliament to change a basic feature of the liberal democracy envisaged in the constitutional document. People might disagree with communists, even strongly. But the way that such disagreements were envisaged to be expressed and resolved was through the parliamentary debate and ballot box; not by imposition of a legal ban. The Australian Constitution had no express bill of rights, with provisions guaranteeing freedom of expression and freedom of association. Most of its judges at the time would not have been seen the Constitution as particularly civil libertarian in nature. Most were

conservative commercial lawyers. However, Justice Dixon stated that “history and not only ancient history” had showed that restrictions on liberty were often proposed by executive government. The role of the Court was to ensure that any such restrictions were always consistent with the federal constitutional charter: its text, its implications and structure.

Most commentators today regard the *Communist Party Case* as a high point in the history of the Australian court.<sup>24</sup> Nevertheless, critics (sometimes within the judiciary itself) have contended that the Court took an overly narrow view of the “defence” power and that its decision was unsuitable to the modern age in shaping the national response in Australia to acts of terrorism.<sup>25</sup>

## 2. *The Mabo Case: Aboriginal Land Rights:*

A second case with great reverberations was the decision of the High Court of Australia in *Mabo v Queensland [No.2]* in 1992.<sup>26</sup> When the Australian continent was settled in colonial times, the British administrators regarded it as basically unoccupied, certainly by any civilised society. They therefore did not recognise any Aboriginal laws, nor the laws of any other indigenous group living in the Australian territory. They, and the colonial courts, treated Australia as, legally speaking, an empty continent: *terra nullius*.

This doctrine was challenged in the 1980s and 90s by Mr Eddie Mabo, an indigenous man from the Murray Islands in the Torres Strait, situated off the northern coast of Queensland. His argument

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<sup>24</sup> G. Winterton, “Dissolving the Communist Party” in Evatt Foundation, *Seeing Red*, 1992.

<sup>25</sup> *Thomas v Mowbray* (2007) 233 CLR 307, esp per Callinan J..

<sup>26</sup> *Mabo v Queensland [No.2]* (1992) 175 CLR 1.

rested on the proposition that the legal doctrine, earlier declared by the judges, was factually incorrect and inconsistent with the equal treatment of all Australian citizens before the courts. The factual evidence relied on was that of anthropologists. They gave evidence on the record that, before British settlement, Australia's indigenous peoples had developed extensive laws on communal ownership of land. However, the arguments for Mr Mabo were also advanced by reference to international law guaranteeing protection of all persons against the inequalities of racial discrimination.

Although the *Mabo Case* was not a constitutional one, in the sense of involving the interpretation of the Australian Constitution itself, it certainly challenged certain basic assumptions about the state and nature of the law in a country governed under that Constitution. Generally speaking, land law is an area of legal regulation that is only altered for a very good reason, and then only by the elected parliament. However, for 150 years the elected parliaments of Australia had not altered the old principle of *terra nullius*. They had failed to protect the minority of indigenous Australians.

When the High Court of Australia announced its decision in the *Mabo Case* in 1992, it came as big shock to federal, State and Territory governments, to the mining industry, pastoralists and many other people, including some lawyers and academics. However, a majority of the High Court (with Justice Dawson alone dissenting) upheld both the factual and legal arguments advanced for Mr Mabo. Justice F.G.

Brennan wrote the principal reasons for the majority. In the course of his reasons, he said:<sup>27</sup>

“The expectations of the international community accord... with the contemporary values of the Australian people. The opening up of international remedies to individuals pursuant to Australia’s accession to the Optional Protocol in the International Covenant on Civil and Political Rights... brings to bear on the common law the powerful influence of the Covenant and the international standards it imports. The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially where international law declares the existence of universal human rights. A common law doctrine founded on unjust discrimination in the enjoyment of civil and political rights demands reconsideration. It is contrary both to international standards and to the fundamental values of our common law...”

The result of the *Mabo Case* was to oblige the enactment of federal legislation in the form of the *Native Title Act* and the adoption of detailed provisions for the assessment of indigenous claims to title to land. Where such title had already been granted as effective ownership of the land in question (freehold), it was not disturbed by the decision. But where it was possible to reconcile the continuance of native title with some other title provided by the law of Australia, the law was to uphold native title to that extent. In legal terms this was a revolution. Significantly, it was achieved as a result of a decision of the apex court; not as a result of legislation, democratically arrived at.

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<sup>27</sup> *Ibid* 175 CLR 1 at 42.

### 3. *Roach v Electoral Commissioner: Prisoners' Voting Rights:*

Those who have been following recent decisions of the European Court of Human Rights will know that that court has repeatedly held that the United Kingdom cannot simply deprive all prisoners, as a class, of the right to vote in general elections. Under the *European Convention on Human Rights*, prisoners remain human beings and citizens entitled to vote unless deprived of voting by proportionate legislation.<sup>28</sup> Mr David Cameron, Prime Minister of the United Kingdom, has said that these decisions “sicken” him. He asserts that the United Kingdom Parliament must have a right to decide who can vote and thereby to deprive convicted prisoners of that entitlement, at least while they are still in prison. For him, this is the essence of parliamentary democracy. Objectivity of this kind have led to calls for reduction or abolition in the United Kingdom of the jurisdiction of the European Court of Human Rights and even the movement for BREXIT now before the British people. There is no equivalent to the European Court in the case of Australia

In Australia, voting is, by federal law, not only a right of citizens. It is compulsory in federal elections. This has been so since 1923. An amendment to the federal electoral statute was enacted by the Australian Parliament in 2006, purporting to deprive all Australian prisoners of the right to vote. This amendment was challenged by a prisoner serving a sentence for a dishonesty offence in Victoria<sup>29</sup>. Following an earlier ruling in Canada,<sup>30</sup> and the foregoing ruling of the European Court, the prisoner contended that the Australian Constitution protected her right to vote and that the law purporting to

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<sup>28</sup> *Hirst v United Kingdom* [No.2] (2005) 42 EHRR 41.

<sup>29</sup> *Roach v Electoral Commission* (2007) 223 CLR 162.

<sup>30</sup> *Sauvé v Canada* [2002] 2 SCR 519 (SCC); cf *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181.

disqualify her was invalid because disproportionate and excessive. Evidence was placed on the record before the High Court of Australia indicating that some prisoners serve a sentence in custody for a very short time because they cannot afford to pay a fine. Until the 2006 amendment, prisoners serving only 2 years imprisonment were entitled (and obliged) to vote, if they were citizens. Only non-citizens and those citizens serving longer sentences were disqualified from voting.

In the result, a majority of the High Court of Australia upheld the prisoner's challenge. It concluded that the pre-existing law (disqualification for imprisonment of 2 years or more) was proportionate. The amending statute of 2006 was unconstitutional. It was supported by the Australian government of day, led by Mr John Howard. However, that government lost office in the ensuing federal election in 2007 and the law has remained the same ever since. A Professor of Law, Professor James Allan, has been intensely critical of the decision of the High Court in this case:

[This is a] prime example... of judicial activism... [A] rather blatant example... of illegitimate judging techniques or interpretive approaches taken by the majority justices. The fact that the outcomes achieved in both instances are likely to be seen by many (me included) as, on balance, a good call in cost-benefit terms... does not in some magical, ineffable way make the illegitimate interpretive approaches of the majority judges thereby acceptable or legitimate... [They are] implausible and farfetched...”<sup>31</sup>

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<sup>31</sup> J. Allan, “The Three ‘Rs’ of Recent Australian Judicial Activism: *Roach*, *Rowe* and [No] “Riginalism”” (2012) 36 *Melbourne University Law Review* 743 at 745.



Two Justices of the High Court of Australia (Justices Hayne and Heydon) dissented from the majority opinion, of which I was part. However, the majority decision was written by reference to the history of the interpretation of the *Australian Constitution*; an analysis of its textual provisions; a reference by analogy to the earlier decisions in other jurisdictions on like issues of principle; and close attention to the arguments of the parties.

The critics of the decision in the *Roach Case* suggested that it was for the elected parliament, not the judges, to decide who should enjoy the right to vote. However, the fallacy of this argument could be seen when it was remembered in Australia, that at different times in the past, the applicable statute law of England had forbidden Roman Catholics from taking part in public life; and Aboriginals and Chinese citizens from voting. So there had to be some implied constitutional limitations or the entitlement to vote would be hostage to self-interested majority political decisions. The limitations were as declared by the nation's constitutional court. In the nature of such declarations there will be differences and disagreements. However, the court has the responsibility of being the final umpire. The decision of the majority judges will decide the outcome and express the governing law.

#### 4. *Minister for Immigration v B: Refugee Rights:*

Many decisions in recent years in Australia have examined the power of the Federal Parliament to make laws in respect of refugees.<sup>32</sup> A

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<sup>32</sup> See e.g. *Plaintiff M47/2012 v Director General of Security* (2012) 86 ALJR, 1372; *Plaintiff S10/2011 v Minister for Immigration* (2012) 86 ALJR 1019.

number of those decisions have disallowed provisions in such laws, holding them to be unconstitutional. Those laws might have been popular with some politicians and even the electorate or sections of it. But the duty of the Court was to uphold the Constitution in a neutral and impartial way.

One illustrative case came to decision in 2003 concerning two young boys. They were known by the description “B”.<sup>33</sup> The boys claimed to be refugees from Afghanistan who had arrived in Australia with their parents but without entry visas. They were thereupon detained in a camp situated in the middle of the desert in South Australia. They asserted that the provisions of the *Migration Act* 1958 (Aust.), obliging the universal detention of refugee applicants until granted an entry visa, amounted to a misinterpretation of the Act in their case. They contended that the Act applied only to adults who could be expected to know and comply with the obligation to secure a visa. Children were innocent of any error. So the Act should be held not to apply to them. That approach was upheld in the lower courts.

One of the provisions of the United Nations *Convention on the Rights of the Child* states that, in the instance of children, detention must only be for the shortest possible time and as provided by law. Arguably, Australia was in breach of this obligation because it had accepted the Convention by ratifying it and subscribing to its terms.

I was sympathetic to the arguments for the children. When I left the courtroom, at the conclusion of submissions, I was inclined to uphold their arguments and the decisions below. Yet, when I undertook the

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<sup>33</sup> *Minister for Immigration v B* (2003) 219 CLR 365.

necessary close analysis of the applicable laws, it soon became clear that I could not do so. First, it was made plain in the record that federal officials had warned the Australian Parliament that, if they went ahead with a law obliging detention of all children, such law would probably be in breach of the *Child Convention*. So this was not some mere oversight of international law which the court could cure by reading the statute narrowly. Moreover, there were specific provisions in the Act that were inconsistent with the boys' submissions, for example in respect of searching children in detention. If the Act did not apply to children at all, why would such provisions have been adopted?

In the result, I was obliged to rule against the children and to require them to return to detention. They were immediately deported. Of course, this was a painful decision to have to make. However, it illustrates the duties that fall upon judges in accordance with the principles of the rule of law. Judges enjoy no authority simply to do, as judges, what they consider to be right or just. Within the Constitution, rightness and justice had to be decided by parliament. Australia had no human rights provisions in its Constitution that we could call upon to invalidate the parliamentary law. We were required to give effect to the law, no matter what our private opinions might be about it.

In a sense the rule of law matters most when judges are called upon to rule in favour of an outcome that they personally disagree with. That was my case in the position of "B".

## *CONCLUSIONS*

It follows that, in every country, and certainly in Australia, the rule of law is greater than the individual judge. Constitutionalism cannot simply depend on the whims and preferences of the individual judges. Their duty is to the letter of the law but also to the purpose and spirit of the law. There are legal limits upon them that they must obey. If, on analysis, a law is clear and, if it valid under the Constitution, a judge's duty is to give effect to it.

This notwithstanding, many laws are not clear. Many constitutional provisions themselves are unclear. In that lack of clarity lie choices to be made. The duty of the judges is then to make those choices as clearly as they can and to provide persuasive reasons: striving for legal accuracy, constitutional consistency and (where possible) justice and fairness. These are heavy and sometimes mutually inconsistent responsibilities. Especially in a national constitutional court, they demand scholarship, devotion to duty, respect for the democracy but insistence of the separate protective power and responsibility of the judiciary.

What is appropriate in any given case has to be determined by those who are familiar with the applicable laws; knowledgeable about their texts and history; and alert to the considerations of justice operating in society. The judge is therefore controlled by law. But the law will itself afford the judge inescapable obligations of choice. So long as such choices are made with clarity, honesty, integrity and supported by appropriate reasons, the judge will have done his or her duty.

In the international community, the *Bangalore Principles of Judicial Conduct*<sup>34</sup> have been adopted to express the expectations imposed upon those who hold judicial office. Those expectations are summed up in 5 basic concepts:

- \* Independence;
- \* Impartiality;
- \* Integrity;
- \* Propriety;
- \* Equality; and
- \* Competence with diligence.

If, in deciding each case, a judge observes these basic values of judicial conduct, that judge will earn, and deserve, the love and respect of the people. And the requirements applicable to judges of the higher and general courts also apply, and should apply in this respect to judges and decision-making members of administrative courts and tribunals.

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<sup>34</sup> United Nations Office on Drugs and Crime, *Commentary on the Bangalore Principles of Judicial Conduct* (UNODC, Vienna 2007), 39 ff. The author is the rapporteur of the Judicial Integrity Group which devised, revised and helped implement the Bangalore Principles.

