



the Australia and New Zealand

School of Government

EMPA

Governing by the Rules

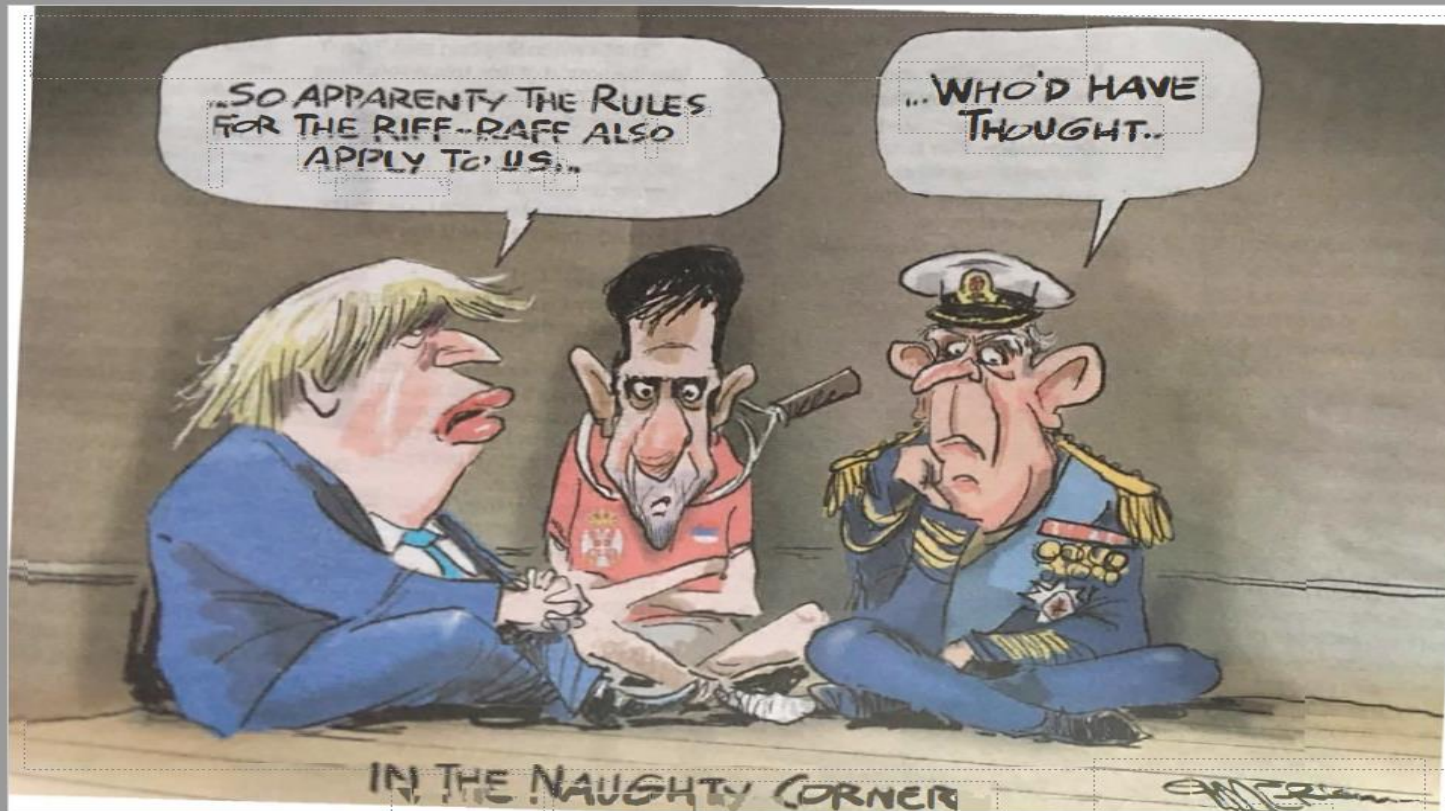
The Rule of Law

March 2022

Emeritus Professor Arie Freiberg

You hear politicians banging on about the ‘rules–based order’. There is no ‘rules–based order’. It’s dead. Putin pretends that he’s putting ‘peacekeepers’ into Ukraine, a flimsy fig leaf behind which lies the ugly reality of Putin’s ambition. Might is right. The only law that applies is the law of the jungle. The only order that matters is the order of battle.

Peter Hartcher, The Age, 22 March 2022



The rule of law

- The action of officials should be subject to the governance of rules
- ‘Law is the means by which government conducts its affairs’:
 - Cf rule of force, fear or ‘personal rule’
 - Equality before the law: governments/rulers are subject to law/rules
- Intended to prevent exercise of arbitrary power: certainty of rules
- Limits prerogative power
- Limits power against individuals
- Limits too wide discretion

Substantive issues: standards of law

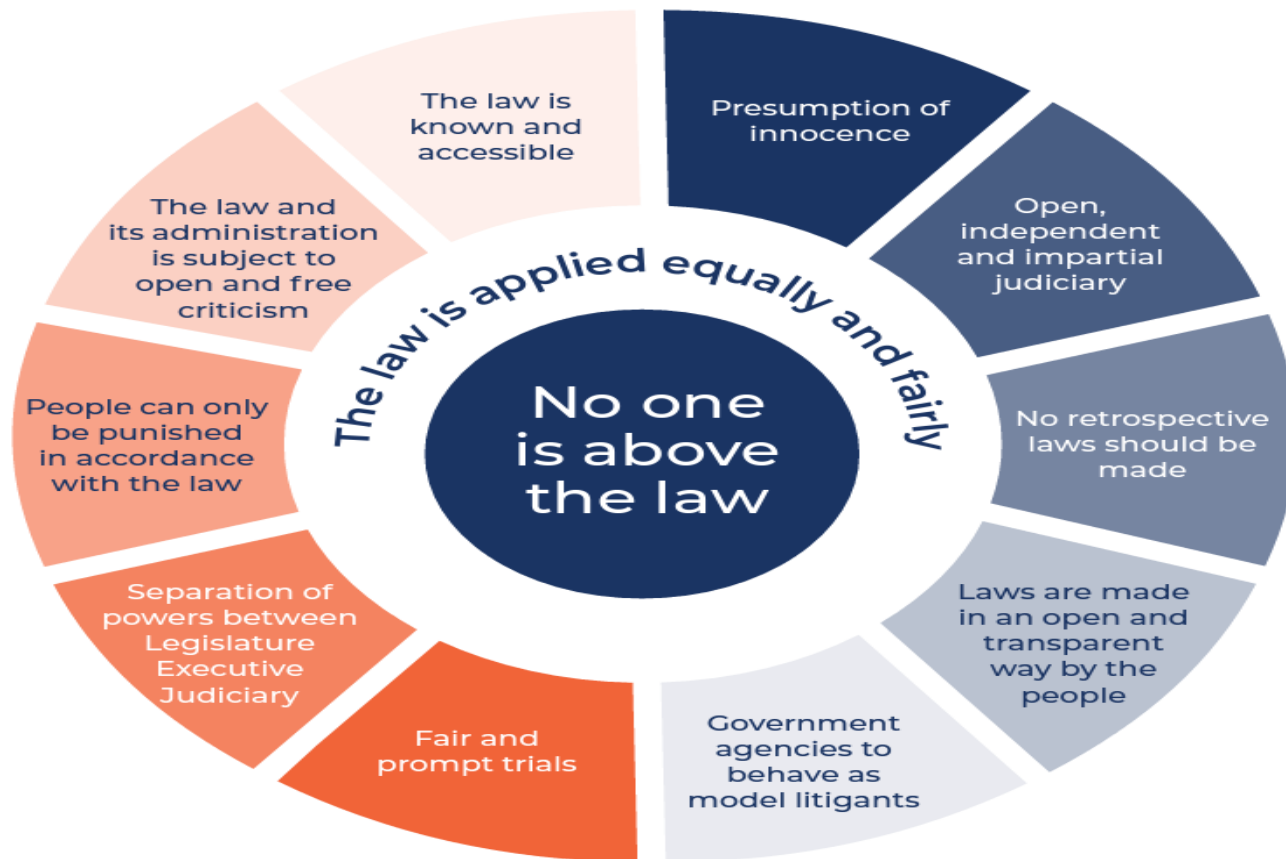
- Generality
- Equality
- Public accessibility
- Prospectivity
- Clarity
- Certainty and predictability
- Not contradictory or requiring the impossible
- Stability

Procedural issues

- Independent and impartial judiciary
- Fair adjudicative procedures:
 - Natural justice: no bias; open and fair hearing
- Constraints on arbitrary exercise of power
- Judicial review of legislative and administrative action
- Judicial decision-making bounded by legal rules
- Courts should be easily accessible
- Laws should be enforced

THE RULE OF LAW

All people should be ruled by just laws
subject to the following principles:



The rule of law must be supported by informed and active citizens

THE SEPARATION OF POWERS

A glossary and activity sheet for this poster can be found at
<http://www.ruleoflaw.org.au/education/posters/>

The Separation of Powers describes the way in which the law gives power to the arms of government in Australia. It ensures government remains fair and accountable by creating checks and balances on the use of power.

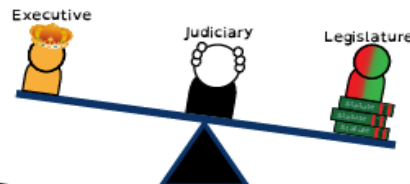
It is essential under the rule of law that the use of power is lawful, and can be challenged.

Power is balanced between the **Judiciary, Legislature and Executive**, so each can act as a check on the power of the other. See the boxes surrounded by the for an explanation of some of the checks on power which operate in Australian Government.

Definitions for words which are **bold/underlined** can be found in the glossary.

Balances

Power is balanced between the three arms of Government, so checks can operate. If power was not balanced and one arm was too powerful, checks on that arm would not be effective. This means that each arm should only use power according to the Australian Constitution.

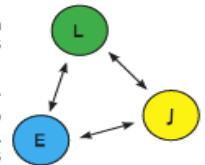


Checks

Checks are mechanisms which allow each arm of Government to review or override the actions of the other two arms.

There are many different checks on power within Australian Government. They all aim to ensure accountability, which means that legal decisions can be challenged and that all arms of Government act according to the law.

Checks are essential in maintaining the rule of law.



The Judiciary

The Judiciary can strike down laws made by the Legislature, and declare actions of the Executive unlawful. This is one of the most important checks on the power of Government because it provides a legal process in the courts for individuals to challenge the decisions of the Government.

The Judiciary includes judges and the courts which exist to interpret the law when there is a legal dispute.

Judges must make decisions based on the law and provide reasons for their decisions.

Judges have the power to make various orders to give effect to their decisions.

§§ A judge's pay cannot be reduced while they hold office §§

A High Court Justice can only be removed from office by the Governor-General after a vote in both houses of Parliament.

The High Court

The High Court of Australia provides one of the most important checks on the power of Government in Australia.



It is an independent and impartial decision making body which has the power to overrule the decisions of all lower courts and to declare laws invalid and actions of the Executive unlawful.

Justices of the High Court are appointed by the Governor-General on the recommendation of the Prime Minister.

The Executive

The Governor-General

The GG has ultimate power over the Commonwealth of Australia. This power is usually exercised on the advice of the Executive Council and its Ministers.

The GG gives royal assent to laws passed by the Legislature, and has 'reserve powers', one of which is to dismiss the Prime Minister, which are only used in exceptional circumstances.

The Federal Executive Council

Members of the Legislature are appointed as Ministers to the Federal Executive Council.



They have the power to implement laws passed by the Parliament and are in charge of Government Agencies and Departments. They have powers, defined by law, to deal with social, economic or environmental issues as they arise.

They must only use power in the way set out by law.

The Shadow Cabinet and "The Opposition"



The Shadow Cabinet are not part of the Executive, and have no official status other than being members of the Parliament. They 'shadow' relevant Government Ministers and question the actions of the Executive in Parliament.

The Opposition is another check on the power of the Executive. They are frequently critical of Government policy and legislation.

The Legislature

The Legislature, which includes the Houses of Parliament and the representatives who are elected to them, is responsible for drafting, debating and voting on new laws, and amendments to existing laws.

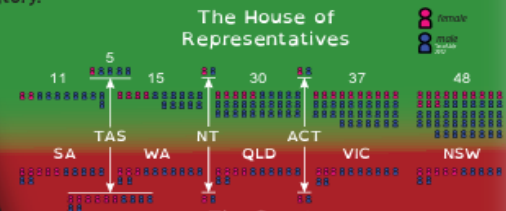
In Australia there is not a "true" separation between the Legislature and Executive, because those appointed to the Executive are also members of Parliament.

The Legislature acts as a check on the Judiciary because it can pass laws which override the decisions of the courts.

However, laws should not be retrospective, which means the legislature cannot reverse the decision of a court, only change the law from the time it is proclaimed.

The Federal Parliament which sits in Canberra is bicameral which means it has two houses: the House of Representatives and the Senate.

States and Territories are allocated seats in the House of Representatives based on the population of the State or Territory.



The Senate

The Senate provides for proportional representation of States and Territories. All States have 12 Senators and Territories 2 Senators each.

The Rule of Law Institute of Australia is an independent, not-for-profit organisation which promotes discussion of the rule of law in Australia. It supports principles such as access to justice, the presumption of innocence, fair trials as well as accountability and transparency in Government.

RoLIA

www.ruleoflaw.org.au

Rule of law principles

Eurobarometer 2019

17 MAIN PRINCIPLES OF THE RULE OF LAW EXAMINED IN THIS SURVEY

Legality, legal certainty, equality before the law and separation of powers:

This aspect of rule of law is about how laws are made, and whether they are clear, stable and apply in the same way to everyone. It also covers how state powers, such as governments, parliaments, and judicial systems, cooperate and control each other to ensure that decisions are taken in the public interest. There are five principles that fall under legality, legal certainty, equality before the law and separation of powers.

1	Equality before the law: the same laws and rules apply equally to every person, including all public authorities, irrespective of their personal circumstances, social status, wealth, political connections or origin.
2	Clarity and stability of the law: the laws applying to your everyday life, work or business are clear, stable and predictable. You understand the consequences of your actions.
3	Ease in following how parliament adopts laws: it is easy to follow how and why parliament adopts laws. Debates are public and the opposition can contribute.
4	Lawmakers act in the public interest: those who make and apply laws do so exclusively in the public interest.
5	Independent controls on laws: there are independent controls to ensure that laws can be challenged and tested.

Rule of law principles

Eurobarometer 2019

Prohibition of arbitrariness and penalties for corruption:

This is about how public authorities and politicians apply the law, and whether arbitrary decisions are prevented and corruption is punished. Six principles fall under prohibition of arbitrariness and penalties for corruption.

6	Clarity of public authorities' decisions: public authorities provide clear reasons for their decisions, for example on taxes pension, public contracts, education or healthcare.
7	Independent review of public authorities' decisions: the decisions by public authorities for example on taxes pension, public contracts, education or healthcare can be reviewed by an independent court.
8	Unbiased decisions of public authorities: public authorities take decisions for example on taxes, pensions, public contracts, education or healthcare, without favouritism or discrimination.
9	Making decisions in the public interest: public officials and politicians do not use their positions to obtain benefits for themselves or their family members but take decisions in the public interest.
10	Acting on corruption: corruption involving public officials and politicians is properly investigated and those responsible are brought to justice.
11	Codes of ethics for politicians: public officials and politicians making and applying laws should follow clear codes of ethics to avoid conflicts of interest.

Rule of law principles

Eurobarometer 2019

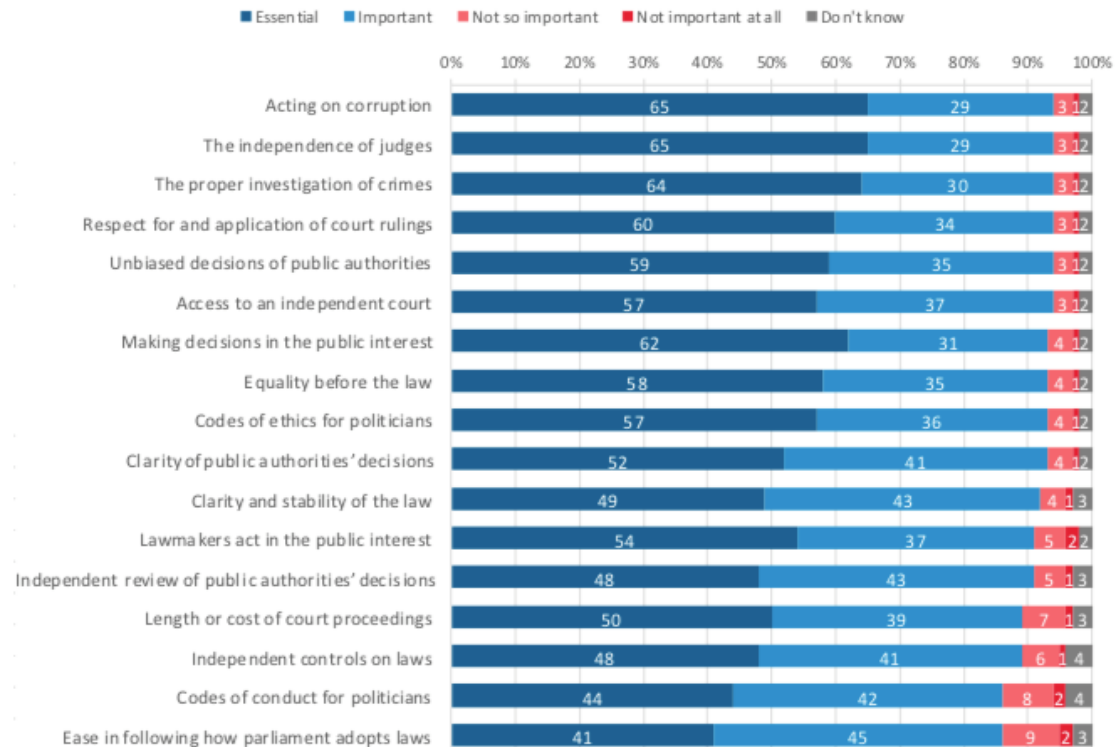
Effective judicial protection by independent courts:

This is about the independence, quality and efficiency of the judicial system, and respect for court decisions. Six principles fall within this chapter.

12	Access to an independent court: if individuals' rights are not respected, they can have them upheld by an independent court.
13	Length or cost of court proceedings: court proceedings are not excessively long or costly.
14	The independence of judges: judges are independent and are not under the influence of politicians or economic interests.
15	The proper investigation of crimes: the police and prosecution service investigate crimes properly, including those committed by politicians or influential persons, and they are not under the influence of politicians or economic interests.
16	Respect for and application of court rulings: public authorities and politicians respect and apply court rulings.
17	Codes of conduct for politicians: there are codes of conduct imposing limits on politicians criticising courts and judges.

Eurobarometer 2019

Q How important for you personally are the following points?
(% EU)



Base: all respondents (N=27,655)