

Parliamentary Sovereignty and Judicial Review in Australia The High Court's Role in Protecting Implied Constitutional Rights

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Abstract

This paper explores the tension between parliamentary sovereignty and judicial review in Australia, focusing on the High Court's role in protecting implied constitutional rights. Unlike the UK, where Parliament's legislative power is supreme, Australia's Constitution allocates powers between the Commonwealth and states, and judicial review plays a key role in limiting Parliament's authority. The paper examines three significant High Court cases—*Australian Capital Television Pty Ltd v Commonwealth* (1992), *Coleman v Power* (2004), and *Mabo v Queensland [No 2]* (1992)—which highlight the Court's power to strike down unconstitutional laws and protect unenumerated rights, such as freedom of political communication and expression, and Indigenous land rights. These rulings emphasize the High Court's function in safeguarding constitutional principles, ensuring that legislative actions do not infringe on implied rights. Through these judicial interventions, the paper argues that the High Court strengthens the constitutional framework and limits parliamentary sovereignty, contributing to the protection of democracy and individual rights in Australia.

Keywords: Judicial Review, Parliamentary Sovereignty, Constitutional Rights

I. Introduction

Parliamentary sovereignty in Australia differs from the English tradition due to its federal structure and constitution, which allocates powers between the Commonwealth and states.¹ While the framers of the Australian Constitution imposed few legislative restrictions, the High Court's power of judicial review allows it to overturn unconstitutional legislation, thereby limiting parliamentary sovereignty.²

¹ Saunders, Cheryl, and Katy Le Roy. "Commonwealth of Australia." *Constitutional origins, structure, and change in federal countries* [2005]: 12–47.

² Elliott, Mark. *The constitutional foundations of judicial review*. Bloomsbury Publishing, [2001].

II. Body

The Australian Parliament's powers are limited by the Constitution and the High Court, unlike the British Parliament's unlimited legislative power. Scholars differ on the High Court's role: some advocate strict adherence to the Constitution's text, others support active protection of rights and freedoms, and a third group seeks a balance between parliamentary sovereignty and constitutional rights. This debate highlights the complexity of constitutional interpretation and the interplay between checks and balances, democracy, and the rule of law.

Below are three High Court decisions that show how the Supreme Court has undermined this principle.³

1. **Australian Capital Television Pty Ltd v Commonwealth, 1992.**

Australian Capital Television Pty Ltd v Commonwealth (1992) was a landmark judgement of the High Court of Australia confirming an implied constitutional right to freedom of political communication.⁴ With this judgement, the High Court effectively demonstrated its ability to strike down federal legislation that contravened an implied constitutional right, thereby affecting the sovereignty of Parliament.⁵

In 1991, the Australian Federal Parliament passed the Political Broadcasting and Political Disclosure Act, which prohibits paid political advertising during elections.⁶ The aim was to reduce the proliferation of political advertising during elections and to promote a fairer electoral environment. ⁷However, this legislation has sparked widespread controversy as restricting the freedom of political expression.

The Court recognised the existence of a freedom of political communication implicit in the Constitution, which it considered essential to guarantee the representative democracy required by

³ George, Tracey E., and Lee Epstein. "On the nature of Supreme Court decision making." *American Political Science Review* [1992] 86.2,323-337.

⁴ Donald Speagle, 'Australian Capital Television Pty Ltd v Commonwealth' (1992) 18 *Melbourne University Law Review* 938.

⁵ Young, Alison L. "Parliamentary Sovereignty and the Human Rights Act." [2008]: 88-200.

⁶ Miskin, Sarah, and Richard Grant. *Political advertising in Australia*. Department of the Parliamentary Services, [2004].

⁷ Kaid, Lynda Lee. "Political advertising." *Handbook of political communication research*. Routledge, [2004] 155-202.

the Constitution. ⁸The Court did not base this affirmation on the express provisions of specific articles, but rather on a holistic reading of the text of the constitution and the inferences drawn therefrom⁹. And the Court held that Articles 7 and 24 of the Constitution, which provide that Parliament must be elected by the people, ¹⁰imply that the Constitution implicitly requires that voters should be well informed and have free political communication during the election process. ¹¹Therefore, the law restricting political advertisements was contrary to this implied constitutional right.¹²

In this case, the Supreme Court's High Court, through its ruling, acknowledged the implied rights not explicitly listed in the Constitution.¹³ This approach means that the court can recognize more implicit rights by interpreting the constitution and impose more restrictions on parliamentary legislation. The recognition and protection of implicit rights further strengthens the power of the judicial institution. ¹⁴By overturning federal legislation, the High Court demonstrated its powerful judicial review power. Although the legislature has legislative power, the court also has legislative power.

2. Nard Coleman (Coleman v Power, 2004)

Nard Coleman (Coleman v Power, 2004) is an important High Court of Australia judgement dealing with the constitutionality of section 7 of the Police Policing Ordinance in Queensland.¹⁵ This section makes it an offence to use abusive or offensive language. ¹⁶The case arose when Patrick Coleman was charged with breaching the Act after distributing leaflets accusing a police

⁸ Kirk, Jeremy. "Constitutional implications (II): doctrines of equality and democracy." *Melbourne University Law Review* [2001] 25.1,24-57.

⁹ Wald, Patricia M. "The rhetoric of results and the results of rhetoric: Judicial writings." *The University of Chicago Law Review* [1995] 62.4,1371-1419.

¹⁰ Eskridge Jr, William N., and John Ferejohn. "The article I, section 7 game." *Geo. Lj* [1991]80, 523.

¹¹ Thompson, Dennis F. *Just elections: Creating a fair electoral process in the United States*. University of Chicago Press, [2002].

¹² Post, Robert. "The Constitutional Status of Commerical Speech." *UCLA L. Rev.* [2000] 48,1.

¹³ Collins, Michael G. "Economic Rights, Implied Constitutional Actions, and the Scope of Section 1983." *Geo. LJ* [1988] 77,1493.

¹⁴ Helfer, Laurence R. "Redesigning the European Court of Human Rights: embeddedness as a deep structural principle of the European human rights regime." *European Journal of International Law*[2008] 19.1 ,125-159.

¹⁵ Twomey, Anne. "The Prerogative and the Courts in Australia." *The Journal of Commonwealth Law* [2021] 3 ,55-101.

¹⁶ Culpeper, Jonathan. *Impoliteness: Using language to cause offence*. Vol. 28. Cambridge University Press, [2011].

officer of corruption during a protest in Queensland.

The High Court ruled by a 5-2 majority that this Queensland law was unconstitutional.¹⁷ The Court held that the law unduly restricted the constitutionally implied right to freedom of expression, which is an essential component of Australia's representative democracy.¹⁸ The Court recognised that, although the Australian Constitution does not expressly provide for freedom of expression, this right is implicit in the Constitution and is particularly relevant to representative democracy under sections 7 and 24 of the Constitution.¹⁹ Freedom of expression underpins public participation in the democratic process.²⁰ And the Court assessed whether Queensland law restricts freedom of expression within reasonable limits. The Court found that, while the importance of protecting the public from insulting or offensive speech could not be ignored, the restriction in the law was too broad and went beyond what was necessary to protect the public interest, and was therefore not in accordance with the principle of proportionality.²¹

By declaring Queensland laws unconstitutional, the High Court exercised judicial review, limiting parliamentary authority by ensuring laws align with constitutional rights.²² The Court recognized freedom of speech as a fundamental constitutional right, taking precedence over legislative acts. This approach promotes interpreting the Constitution to impose greater restrictions on parliamentary legislation.²³ The protection of unenumerated rights has increased the Court's role in constitutional interpretation, restricting Parliament's legislative power and emphasizing that laws upholding public morality must respect implicit constitutional rights, thus limiting parliamentary sovereignty.²⁴

¹⁷ Sawyer, Geoffrey. "The Supreme Court and the High Court of Australia." *J. Pub. L.* [1957]6, 482.

¹⁸ Patmore, Glenn. "Making Sense of Representative Democracy and the Implied Freedom of Political Communication in the High Court of Australia: Three Possible Models." *Griffith L. Rev.* [1998] 7,97.

¹⁹ Twomey, Anne. "Compulsory voting in a representative democracy: Choice, compulsion and the maximisation of participation in Australian elections." *Oxford University Commonwealth Law Journal* [2013] 13.2, 283-312.

²⁰ Barnes, Marian, et al. "Constituting 'the public' in public participation." *Public administration* [2003]81.2, 379-399.

²¹ Ristroph, Alice. "Proportionality as a principle of limited government." *Duke LJ* [2005]55, 263.

²² Feldman, David. "Democracy, the rule of law and judicial review." *Federal Law Review* [1990] 19.1, 1-30.

²³ Macey, Jonathan R. "Promoting public-regarding legislation through statutory interpretation: an interest group model." *Columbia Law Review* [1986]86.2, 223-268.

²⁴ Goldsworthy, Jeffrey. *Parliamentary sovereignty: contemporary debates*. Vol. 1. Cambridge University Press, [2010].

3. Mabo v Queensland [No 2], 1992

Mabo v Queensland [No 2] (1992) marked a historic event in Australia by overturning the legal doctrine of terra nullius.²⁵ The High Court, in a 6-1 decision, recognized Aboriginal land rights, acknowledging that Indigenous Australians had lived on and ruled their lands long before European settlement.²⁶ This case, concerning the land ownership of the Murray Islands, affirmed the rights of Aborigines to claim their ancestral lands.

In the Mabo case, the Court agreed with the doctrine of terra nullius and stated that Australia was terra nullius in the history of the arrival of the colonizers in Britain; hence, it belongs to the British.²⁷ The Court noted that the rights of Aboriginal people concerning land must be reflected in the land justice system and should be fully observed. And the Court confirmed this right, which is the right of all Aboriginal Australians to live on their traditional lands only. ²⁸The recognition of these entitlements did not terminate with the beginning of the British domination and would remain a part of the authoritative customs and laws as long as they were not cancelled or outlawed. ²⁹For the record, Australian law and the superiority of this law take into consideration and even put into practice the traditional laws of the indigenous. This, in other words, means that Aboriginal land rights initiatives undergone their traditional procedures and protect their designs by the Australian judiciary system.³⁰

While Mabo case had the audacity of court to remedy the indigenous land rights, it signalizes judicial dominance over legislatures and they can also be corrective mechanisms for the historical wrong traditions.³¹ By this determination, the Court too shows an overdose of check and balance power, implying that Aboriginal people inherit claims which must be taken into consideration

²⁵ Simpson, Gerry. "Mabo, international law, terra nullius and the stories of settlement: an unresolved jurisprudence." *Melb. UL Rev.* [1993] 19,195.

²⁶ Goodall, Heather. *Invasion to embassy: land in Aboriginal politics in New South Wales, 1770-1972*. Sydney University Press,[2008].

²⁷ Buchan, Bruce, and Mary Heath. "Savagery and civilization: from Terra Nullius to the 'Tide of History'." *Ethnicities* [2006]6.1 ,5-26.

²⁸ Meyers, Gary D., and John Mugambwa. "The Mabo decision: Australian Aboriginal land rights in transition." *Envtl. L.* [1993]23,1203.

²⁹ Daniels, Ronald J., Michael J. Trebilcock, and Lindsey D. Carson. "The Legacy of Empire: The common law inheritance and commitments to legality in former British colonies." *The American Journal of Comparative Law* [2011] 59.1 ,111-178.

³⁰ Behrendt, Larissa. *Achieving social justice: Indigenous rights and Australia's future*. Federation Press, [2003].

³¹ Palmer, Kingsley. *Australian native title anthropology: Strategic practice, the law and the state*. ANU Press, [2018].

whenever all land laws are passed and upheld. Other than upholding the negativity of discrimination and hoping to uphold democratic values and social justice, and undermines the parliamentary sovereignty by limiting its power in the land legislation area.³²

VI. Conclusion

The highest Australian Court has overturned parliamentary supremacy, emphasizing judicial review to protect implied fundamental values, federalism, and citizens' rights. Legislation allows curtailment of parliament, ensuring constitutional supremacy and individual rights. This judicious limit on power fosters a durable democracy and legitimate governance.

³² Hellum, Anne, and Bill Derman. "Land reform and human rights in contemporary Zimbabwe: Balancing individual and social justice through an integrated human rights framework." *World Development* [2004]32.10, 1785-1805.