

Understanding of the Rule of Law in the Antipodes

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Abstract

Understanding the rule of law in the Antipodes, that is in the Commonwealth of Australia and New Zealand, as a legal value is clear to both of these societies. The rule of law, oftentimes called the state of law, is the basis of the system of values, as well as legal culture, which determines which social values are legally protected and how high their position *de facto* and *de iure* is. The hierarchy of the rule of law in the Antipodes shows undoubtedly how various legal norms, unwritten and those codified ones, protect the democratic system with all its principles, along with the rights and freedoms of citizens and persons residing in these two countries.

Keywords: rule of law, state of law, law, Antipodes, Australia, New Zealand

Introduction

This article focuses on the legally protected value of the rule of law in the legal systems of Australia, or the Commonwealth of Australia, as the title of the state in accordance with the constitution of 1901, and New Zealand.¹ Importantly, there are no major custom differences between the two countries on the Australian continent. After all, they belong to the circle of Western culture based on the Judeo-Christian values. In both countries, which are spatially relatively close, human rights, attitude to the state and law, and finally, the rule of law are understood in a similar way. The rule of law is the fundamental legal concept in both Australian and New Zealand societies. Both these societies are based on the legal system of their former colonial ruler Great Britain, because the present legal systems of these independent states were created upon the British common law. Australia gained independence on January 1, 1901, and New Zealand on December 10, 1947. Additionally, countries in the Pacific region such as Australia, Fiji, Kiribati, Nauru, New Zealand, Papua New Guinea, Samoa, Solomon Islands, Tonga, Tuvalu and Vanuatu are members of the intergovernmental organisation called the Commonwealth of Nations.² The states gathered in the Commonwealth maintain full independence both in internal and external politics, but they recognise the British monarch as their head of state. The Charter of the Commonwealth of Nations was signed in 2013 in order to emphasise the legal values of its members, such as democracy, the separation of powers, the rule of law, and the concept of good governance, also known as the principle of good administration in the public sector.³

Understanding the rule of law in the Antipodes,⁴ that is Australia and New Zealand, as a legal value is clear to both of these societies.⁵ The rule of law, oftentimes

¹ New Zealand does not have a constitution understood as a single written act of the highest rank among the sources of national law. In fact, its system of constitutional sources consists of numerous documents dating back to the subordination of the British Empire, modern laws passed by the Parliament in Wellington, and British common law, including constitutional mores. Cf. Siekiera 115–121.

² Previously, this organization, bringing together the former dominions and colonies of the British Empire, was called the British Commonwealth of Nations. Commonwealth of Nations. Web. 23 November 2021. <http://thecommonwealth.org/member-countries>

³ Charter of the Commonwealth signed by Her Majesty Queen Elizabeth II, Head of the Commonwealth, Commonwealth Day 2013 of March 11, 2012. The heads of governments of the Commonwealth countries adopted the Charter earlier, on December 14, 2012.

⁴ Simplified terms will be used intentionally in this article in order to emphasize the fact that the legal systems and societies in Australia and New Zealand are very similar, and often patterned after each other.

⁵ The author discovered this both in her academic and personal life during her doctoral studies at the Faculty of Law of the Victoria University of Wellington in New Zealand in 2015–2016.

called the state of law, is the basis of the system of values, as well as legal culture, which determines which social values are legally protected and how high their position *de facto* and *de iure* is. The hierarchy of the rule of law in the Antipodes shows undoubtedly how various legal norms, unwritten and those codified ones, protect the democratic system with all its principles, along with the rights and freedoms of citizens and persons residing in these two countries. The lawmakers are required to ensure such a level of the rule of law that, inter alia, the person brought to court was to be judged in an impartial, transparent and fair manner; every person, regardless of their characteristics, such as age, sex and gender, sexual orientation, origin, nationality, religion, philosophy or the lack of it, health condition, party or professional affiliation and financial status, was treated in an equal manner by any of the state institutions. Such treatment ought to uphold the protection of the rights, freedoms of the individual person, as well as guarantee consistent, fair and impartial decision-making of administrative decisions and court judgments in accordance with the applicable law, which is available to read, understand and obey.⁶

Regional leaders

Australia and New Zealand are the largest countries in the South Pacific: they are the largest in area, the most developed, and therefore prosperous. They are taking back from one another the right to be called the leader of the Pacific. Australia has long been mentioned as a regional leader, a role model for Oceania⁷ micro-states, but New Zealand is more and more often seen as a champion and the global supporter of the interests of the Pacific islands on the international arena. Historically, there has always been a strong link between the governments of Canberra and Wellington and the rest of the Pacific Island Countries and Territories (PICT).⁸ Thanks to the positive image of Australia and New Zealand in the South Pacific Ocean, these countries have gained numerous supporters and trading partners from both Pacific and Asia.

Over time, thanks to such international approach, Australia began to be treated as a supportive, highly developed guardian, regularly providing humanitarian aid

⁶ Rule of law: Web. 23 November 2021. <https://www.ruleoflaw.org.au/guide/index.html>

⁷ The term "Oceania" is not a scientific concept hence it is in vain to find its definition in legal acts. It is the collective name for the islands of the Central and Southwest Pacific Ocean. It includes both sovereign states and dependent territories.

⁸ This is because not all entities located in the Pacific region have full legal personality, often remain legally dependent on Great Britain or they have decided to remain in close legal and political ties with other, larger countries, such as the USA, or New Zealand, in order to reap the benefits of international aid and financial infrastructure that they would not be able to provide for themselves.

to the people of the Pacific islands. *A contrario* the Oceania micro-states have become used to receiving the humanitarian aid from the Australian government. Such help has been delivered through the Australian Aid program.⁹ PICT made their existence dependent on the regional policy of Australia, without which they would be doomed by any humanitarian and economic disaster. A good example, illustrating the annual increase in spending from the Australian budget on aid to micro-states, as well as Canberra's growing commitment to a permanent presence in the region, and thus the real political influence on them, is the development subsidy for Papua New Guinea of USD 436 million, as well as USD 175.8 million sent in 2003–2004, and already USD 383.1 million in 2004–2005 to PICT. It should not be forgotten that Australia perceives the South Pacific as “its natural sphere of influence” (Herr and Bergin).

From the beginning of its independence, Australia has decided to create its own image of the advocate of the rule of law, democracy, and national values. Such national principles result, after all, from the Anglo-Saxon mentality combined with the Protestant ethics and morality, which requires helping the weaker and sharing prosperity, but also spreading education and the values of democracy with the rule of law in the lead. One can therefore agree with the Australian status of the “regional power” as its regional policy has become “an essential element of the regional architecture of relations” (Fijałkowski 301). The profitability of integration, or rather the initiation of projects to strengthen bilateral ties with New Zealand and PICT, in the case of Australia, lies in the conduct of the mutually beneficial regional policy. For micro-states in Oceania, this *de facto* means huge sums of money for their underdeveloped economies for the development of primary education, road infrastructure and health care. While for the government in Canberra the most crucial aspect here is to maintain a stable, safe and prosperous neighbourhood, which will not constitute any potential threat, but rather become a possible source of co-operation, and later also meaningful economic partners.

Australia, however, is accused of using a so-called “neo-colonial policy” whereby trying to strengthen democratic values in the poor and underdeveloped PICT, the government in Canberra tries to impose its own rules and norms in return for financial aid (Sprenzel 308). Currently, in the third decade of the 21st century, it is indicated that the Commonwealth of Australia has adopted a wait-and-see position in its own region. In addition, five potential functions that Australia will take in its regional policy can be identified as follows: the function of the initiator of changes in the region; the conciliator-mediator; the soft power superpower through the promotion and transmission of information and its own national cultural, political, social and legal values, educational and cultural exchange as the main tools; structural promoter of the formalisation of integration in the Pacific region; and finally

⁹ Australian Aid. Web. 23 November 2021. <https://australianaid.org>

the regional leader by virtue of own competences and manager of the sustainability of the standards created by the Federal Parliament in Canberra (Kozielski 224, 245, 294–295; Murray 29–37).

Thanks to such a controversial regional leadership stance as practised by Australia, New Zealand has gained the status of the new Pacific role model, not being considered as a superior element but an equal entity in regional relations. The promotion of the principles of the democratic rule of law by the government in Wellington is perceived quite differently, and thus much more positively, by PICT than Australian regional policy. It is New Zealand that has repeatedly emphasised and still emphasises the long period of identification with its region. The national interests of the New Zealand government and its foreign activities have been focusing solely on its neighbouring islands in the Pacific Ocean. Importantly, the regional policy of this country, already independent from Great Britain, was not beneficial only to New Zealand itself. All unilateral acts, bilateral and multilateral agreements in the Pacific took into account the problems and needs of the island populations of PICT. After all, the remaining micro-states in the South Pacific achieved the status of independence relatively recently after New Zealand, during the two waves of decolonisation movement (1962–1970 and 1974–1980), closely observing New Zealand's independent aspirations.¹⁰

Such a way of conducting foreign policy was dictated by a clear vision for the region, the calculation of profits and losses, in which direction regional integration should be conducted so that New Zealand could benefit from it. The efforts race against Australia for the position of the Pacific leader is not without significance too (Baker 138). It is New Zealand, not Australia, that has a longer history of political commitment to its region, through the promotion of its own values as a democratic society, the rule of law and equality of all before the fair law. New Zealand politicians, scientists and social activists proudly emphasise this fact, somehow legitimising such a policy and showing the necessity of further intervention by New Zealand in the internal affairs of countries in the South Pacific.

Along with the political and legal development of the process of decolonisation of the entities in Oceania, the unrest that characterised the region with the French, British and American nuclear tests (1946–1994), doubts about the Australian initiative of the South Pacific Community,¹¹ the New Zealand Department of Foreign Affairs decided to adjust the existing framework for regional co-operation. In 1971 a new regional organisation was established. This time this IGO was composed

¹⁰ The process of decolonization was not over when the 23 territories were still under colonial rule, absorbed within someone else's borders, or in the form of negotiated free associations with their own former administrators (Quanchi 18).

¹¹ This organization has been operating continuously since 1945, currently under the name of the Pacific Community, whose Secretariat possesses the international legal personality: Pacific Community. Web. 23 November 2021. <https://www.spc.int>

exclusively of local governments, while not the former metropolitan states.¹² New Zealand's interest in forming an entirely new regional grouping was dictated in part by the implementation of a new foreign policy that took greater account of domestic interests due to the shift in New Zealand's geopolitical centre and its distancing from the USA and Australia (Baker 138).

An interesting and legitimate memory is the idea of creating a Pacific Federation, a supranational organisation in the shape of the then European Communities. Although this vision was created during the Frank Corner administration (1967–1972) being the Minister of International Affairs, it has its prototype in the perception of own country's role in the region by the 19th century Prime Minister of New Zealand, Richard Seddon. According to this philosophy, New Zealand would be the decision-making centre of regional policy, reflecting its due geopolitical position in the region. This state should conduct a realistic, coherent and effective foreign policy, especially at the regional level, in order to promote the good values of the rule of law, obedience to the law and ensure the prosperity and stability of citizens for the benefit of all participants of this policy.

However, the culmination of New Zealand's policy-making in the region, and the consequent declassification of Australia as the regional leader, turned out to be the intervention in the Papua New Guinea civil war, the so-called Bougainville crisis (1988–1998). Australia could not act as an impartial mediator at the time, as it officially supported the government in Port Moresby, sending the military aid against the rebels.¹³ It was New Zealand that was much more accepted by the participants of the war along with the Pacific observers as a fair moderator of peace talks and the leader of the first team supervising the implementation of the terms of the truce.

In the third decade of the 21st century, New Zealand is also more favourably perceived by PICT heads of state rather than Australia due to the policies of Jacinda Arden's Labour Party government. From 2017 the Prime Minister has been pursuing a policy of strengthening political and legal co-operation with the countries in the Pacific, presenting New Zealanders as part of Oceania, supporting the micro-states in international legal efforts to reduce the effects of anthropogenic climate change, presenting New Zealand as a progressive state, based on secular values, promoting same-sex marriage, consent to the adoption of children by such couples, as well as liberalisation of the abortion law.¹⁴

¹² Pacific Islands Forum. Web. 23 November 2021. <https://www.forumsec.org>

¹³ That is against the Bougainville Revolutionary Army.

¹⁴ *Parliament removes abortion from Crimes Act* (18.03.2020), the official website of the New Zealand Government. Web. 23 November 2021. <https://www.beehive.govt.nz/release/parliament-removes-abortion-crimes-act>

Close bilateral co-operation – Trans Tasmanian partnership

Australia is New Zealand's closest partner in defence, security as well as economic co-operation and trade. Both countries share historical ties from the times of the British Empire, including the formation of joint troops during World War I and World War II.¹⁵ Due to their high position in the South Pacific region, the governments of Canberra and Wellington have a strong influence on the activities of other countries; therefore, they shape a unique system of regional co-operation based on the adoption by micro-states of principles and legal norms prevailing in the Australian and New Zealand legal systems.

New Zealand and Australia belong to the same cultural and religious circle, that is to the Anglo-Saxon countries, shared with, among others Great Britain, the USA and Canada, a similar legal system, including the political system, language and customs in public or private spaces. From a broader perspective, these countries are part of the civilisation of the "Western world" which definitely distinguishes them from the Asian countries in the North Pacific or micro-states in Oceania. The functioning of the latter group of states is still based, despite the European (colonial) system being previously imposed, on the tribal structure, traditional values passed down by successive generations, attachment to land, shared use of ocean goods regardless of the boundary lines enforced by the colonial states. Often in the literature, bilateral relations between Canberra and Wellington are referred to as the Tasman Partnership (trans-Tasman relations) due to the Tasman Sea dividing these countries (Robinson 43–51).

At this point, reference should be made to the significant movement of people, mainly workers and students, right from the beginnings of settlement in the Antipodes until the present day, where considerable border traffic between the countries in question still exists. The constantly increasing ties, or rather economic interdependence, as well as tourism exchange in the Tasman Sea expressed this statement by the Australian politician back in the 1960s: "We want economic integration, we want military integration, but also integration in the sphere of diplomacy. We want to act together as much as possible, even if we are two separate nations." As Sir John McEwen, the representative of the Australian House of Representatives in May 1965, later the Australian Prime Minister (1967–1968) pointed out, both countries saw great potential in strengthening bilateral co-operation. It was the aforementioned social homogeneity that was the starting point for building political and legal relations, so strongly supported by the politicians of both countries. An example of this is the trade unions of Australia (the Australian Council of Trade Unions, ACTU) and New Zealand (the New Zealand Federation of Labour, NZFOL) joined in mutual co-operation under the name "trans-Tasman world of work" (Harford 133–149).

¹⁵ Australian and New Zealand Army Corps (ANZAC).

One of the first bilateral agreements between Australia and New Zealand, finally autonomous from Great Britain, was the 1944 Canberra Pact signed during the war against Japan.¹⁶ This bilateral agreement was a response to the growing imperialist ambitions of the United States in the Pacific. None of the remaining island states participated in the consultations, which confirmed the speculations that the close Australia-New Zealand alliance had (and has today) the real power to shape the geopolitical image on behalf of and for the benefit of the entire South Pacific (Bennett 45–53). The main assumptions of the bilateral agreement were to tighten co-operation but also to establish broader local co-operation which was a novelty in foreign relations, where the governments in Wellington and Canberra officially opposed locating military bases on the territories of the former British dominions (McIntyre and Gardner 10–22).

The second, no less significant, factor that held the bilateral co-operation together was the Japanese policy of spreading international peace towards the countries of the Pacific. *De iure* political agreements between Tokyo and Washington referred to the peaceful settlement of disputes in the Pacific Ocean, although it *de facto* divided the spheres of influence of these two powers.¹⁷ Importantly, the third major player in the region, the then Soviet Union, was reluctant to allow the US-Japan alliance to penetrate the area economically (Kukułka 309–310, 591). It should be remembered that military and defence coordination was the main area of co-operation between countries in the Pacific so far.

Currently, however, Australian-New Zealand co-operation mainly relates to combat the effects of climate change and ocean changes, such as sea-level rise, soil erosion, warming of and ocean acidification, which all in turn lead to a decline in biodiversity and weakening food chains, and finally the real danger of food security for the inhabitants of submerged islands in Oceania, doomed to migrate and leave their homes. The most severe from the legal point of view is the actual threat of losing statehood by the submerged islands, which in fact has become the main integration factor in regional policy in the South Pacific in the 21st century.¹⁸

¹⁶ Signed on January 21, 1944.

¹⁷ United States Note to Japan, November 26, 1941, Dept. of State Bulletin, vol. V, no. 129, Dec. 13, 1941.

¹⁸ The author currently works at the Faculty of Law of the University of Bergen, and as a legal advisor at the Bergen Pacific Studies Research Group, where she is responsible for analyzing legal documents regarding legal solutions to the effects of climate change in the South Pacific region. Web. 23 November 2021. <https://pacific.w.uib.no>

Rule of law in the system of values

The rule of law is both a value in itself but is most often understood as a set of values, goods and legally protected terms that can be referred to by individuals regardless of their characteristics, such as age, sex, education, status, origin, nationality, religion or its absence, etc. Equality before the law and the state of law are also synonymous terms for the rule of law.

In addition to the difficulties in defining the term of the rule of law, which, as can be seen in the above paragraph, is a rather broad, vague term, there is also the issue of the axiological interpretation of whether the rule of law supports “moral good” (Rule of law). Most of the lawyers accept the thesis that the rule of law supports basic human rights, those listed in the Universal Declaration of Human Rights of 1948. Considered as a universal source and affirmation of human rights, the Declaration puts the rule of law in the first place: “(...) human rights should be protected by the rule of law.”¹⁹ Also, the legal order of Australia and New Zealand is based on respect for human rights, where the human individual is placed at the centre of decision-making, law-making and governance, unlike in Eastern civilisations, mainly Asian countries, where the community has the first place as the highest good, as the individual must adapt to it well and take care of it.

There are four main principles in the Australian legal system. These are equality before the law, fairness, the right to representation and transparency.²⁰ These features, which at the same time are also legally protected values, can then be defined by their function or real impact on citizens. Hence, to the extensive catalogue of the rule of law in the Antipodes, one should also add commonly emphasised values, such as mutual control of three types of power and the tripartite division of powers; respect and observance of the rights of accused and victims; presumption of innocence; independence of the judiciary; right of assembly; freedom of speech; access to justice, transparency of the public authorities and public administration; understanding of the law, which is a novelty in the context of comparative legal studies, where the rational legislator is required to create such provisions that their norms are understandable, legible, consistent and unambiguous for their addressees.²¹

The New Zealand legislator understands the rule of law in a similar way, dividing it, however, into other factors: powers exercised by the members of parliament and

¹⁹ Preamble of the Declaration. Web. 23 November 2021. <https://www.un.org/en/universal-declaration-human-rights>

²⁰ Legal translations. Web. 23 November 2021. <https://legal-translations.com.au/australian-legal-system>

²¹ Australian Parliament. Web. 23 November 2021. https://www.aph.gov.au/About_Parliament/House_of_Representatives/Powers_practice_and_procedure/00_-_Infosheets/Infosheet_23_-_Basic_legal_expressions

officials are based on legal authority given to them by the law; there are minimum standards of fairness, including transparency, openness and reasonableness of regulations; the law should impose protection against the abuse of wide discretionary powers, and thus limitations on the freedom of action of state organs; discrimination on any ground is unfair and therefore illegal; no person should be deprived of his or her liberty, status or other vital interest without being able to be fairly heard before an impartial court or tribunal.²²

The rule of law, both in the legal systems of Australia and New Zealand, is derived from the old English document Magna Carta Libertatum, the Great Charter of Freedoms from 1215. Although *de iure* it is not a legally binding and therefore obligatory source of law, it is included in the canon of the constitutional sources of Australian and New Zealand law. Its basic assumption, which gave the basis for the functioning of a just system of the rule of law, was that the English King John Lackland undertook not to take action against a person other than on the basis of a lawful sentence. For the first time in modern history, the Magna Carta pointed out that no one, not even a king, is above the law (Australian Parliament).

In the context of the rule of law, an important principle is that laws may not be enforced, abandoned or suspended without the consent of the parliament, which upholds the rule of law. Also, prerogative powers (the monarch's prerogatives) were limited by the rule of law. It should be remembered that *de iure* the British monarch is the head of state of both Australia and New Zealand, and the *de facto* real representative of the monarchy in the Commonwealth of Nations member states is the governor-general (Bożyk 2001; Bożyk 2009).

Conclusions

The primal meaning of the rule of law in both of Australian and New Zealand legal systems means the principle according to which the nation should be subject to law, including state officials and the legislators themselves, where every person is accountable and treated equally before the law, regardless of his or her innate or acquired characteristics, and no one can be punished, unless the court finds a violation of the law. Australia and New Zealand are secularised countries where the role of the church is relatively insignificant, the number of people belonging to religious communities is decreasing every year, and the values of the liberal society are gaining stronger support. This is reflected in the laws, mainly in the matter of the permissibility of abortion, same-sex marriage, and the equalisation of their rights with two-sex couples, including the adoption of children, subsidies from the state budget for gender reassignment operations or participation of transgender

²² New Zealand Ministry of Justice. Web. 23 November 2021. <https://www.justice.govt.nz/about/learn-about-the-justice-system/how-the-justice-system-works/the-basis-for-all-law>

people in public life, which is expressed by financing the activities of associations run by these groups, or introducing a separate legal category that recognises the existence of more than two biological genders.

As countries that are in the orbit of the culture of the Western legal order, whose economic index is on one of the highest in the world rankings and whose standards of living are one of the highest, Australia and New Zealand continue to be a role model for other states and dependent territories in the South Pacific region. Oceania micro-states depend almost entirely on fixed funding for humanitarian and economic development, but this is supported by the explicit expectation of the political support for the interests of the governments in Canberra and Wellington. Promotion of Western values with democracy, equality and the rule of law is also an essential part of this. Thus, the perception of the rule of law will, therefore, with a high degree of probability, be incorporated into the legal and social systems of states and dependent territories in the South Pacific.

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