

Cambridge University Press

978-0-521-67795-0 - The Constitution of Law: Legality in a Time of Emergency

David Dyzenhaus

Frontmatter

[More information](#)

THE CONSTITUTION OF LAW

Professor Dyzenhaus deals with the urgent question of how governments should respond to emergencies and terrorism by exploring the idea that there is an unwritten constitution of law, exemplified in the common law constitution of Commonwealth countries. He looks mainly to cases decided in the United Kingdom, Australia and Canada to demonstrate that even in the absence of an entrenched bill of rights, the law provides a moral resource that can inform a rule-of-law project capable of responding to situations which place legal and political order under great stress. Those cases are discussed against a backdrop of recent writing and judicial decisions in the United States of America in order to show that the issues are not confined to the Commonwealth. The author argues that the rule-of-law project is one in which judges play an important role, but which also requires the participation of the legislature and the executive.

DAVID DYZENHAUS is Professor of Law and Philosophy at the University of Toronto. He is a Fellow of the Royal Society of Canada, and has worked in South Africa, the United Kingdom, Germany and New Zealand.

Cambridge University Press

978-0-521-67795-0 - The Constitution of Law: Legality in a Time of Emergency

David Dyzenhaus

Frontmatter

[More information](#)

THE CONSTITUTION OF LAW

Legality in a Time of Emergency

DAVID DYZENHAUS



CAMBRIDGE
UNIVERSITY PRESS

Cambridge University Press

978-0-521-67795-0 - The Constitution of Law: Legality in a Time of Emergency

David Dyzenhaus

Frontmatter

[More information](#)

CAMBRIDGE UNIVERSITY PRESS

Cambridge, New York, Melbourne, Madrid, Cape Town, Singapore, São Paulo

Cambridge University Press

The Edinburgh Building, Cambridge CB2 2RU, UK

Published in the United States of America by Cambridge University Press, New York

www.cambridge.org

Information on this title: www.cambridge.org/9780521677950

© David Dyzenhaus 2006

This publication is in copyright. Subject to statutory exception and to the provisions of relevant collective licensing agreements, no reproduction of any part may take place without the written permission of Cambridge University Press.

First published 2006

Printed in the United Kingdom at the University Press, Cambridge

A catalogue record for this publication is available from the British Library

ISBN-13 978-0-521-86075-8 hardback

ISBN-10 0-521-86075-X hardback

ISBN-13 978-0-521-67795-0 paperback

ISBN-10 0-521-67795-5 paperback

Cambridge University Press has no responsibility for the persistence or accuracy of URLs for external or third-party internet websites referred to in this publication, and does not guarantee that any content on such websites is, or will remain, accurate or appropriate.

Cambridge University Press

978-0-521-67795-0 - The Constitution of Law: Legality in a Time of Emergency

David Dyzenhaus

Frontmatter

[More information](#)

For Alexander and Sophie

Cambridge University Press

978-0-521-67795-0 - The Constitution of Law: Legality in a Time of Emergency

David Dyzenhaus

Frontmatter

[More information](#)

CONTENTS

<i>Acknowledgements</i>	page ix
<i>Table of cases</i>	xi
<i>Table of statutes</i>	xiv
Introduction	1
1 Legality in a time of emergency	17
Introduction	17
Judges and the politics of the rule of law	20
Carl Schmitt's challenge	35
Parliamentary or judicial supremacy?	54
The moral resources of law	60
2 Constituting the legislature	66
Constitutional positivism	66
The <i>Communist Party</i> case	72
Canada's common law bill of rights	87
Anxiety about judicial review of legislation	89
Disobeying Parliament	102
Evisceration	107
Reconciliation	108
Deference	118
3 Taking the administrative state seriously	121
Recognizing rationality	121
Maintaining the rule of law	129
Emerging from the shadows	149
In the black hole	160

Cambridge University Press

978-0-521-67795-0 - The Constitution of Law: Legality in a Time of Emergency

David Dyzenhaus

Frontmatter

[More information](#)

viii

CONTENTS

4	The unity of public law	174
	Introduction	174
	The <i>Belmarsh</i> decision	175
	Refuting dualism	190
	Black holes and the rule of law	196
	The rule of good law	220
	<i>Bibliography</i>	234
	<i>Index</i>	242

Cambridge University Press

978-0-521-67795-0 - The Constitution of Law: Legality in a Time of Emergency

David Dyzenhaus

Frontmatter

[More information](#)

ACKNOWLEDGEMENTS

The book is a revised version of a manuscript I prepared as a basis for the J. C. Smuts Memorial Lectures, four lectures delivered to the Faculty of Law of the University of Cambridge in November 2004. I am grateful to the Faculty of Law and especially Joanne Scott for the invitation to deliver these lectures and to those who attended.

I have incurred many other debts both in writing and revising these lectures. Robert Leckey performed the unusual research task of preparing on the basis of several of my published articles and many works in progress not only a detailed memorandum about how to organize the lectures but also a rough cut-and-paste version of how the lectures might go. While much has changed during the course of initial revisions and since, his work made it possible for me to get started during a busy term. Emily Hammond gave me challenging comments on my first set of revisions and also has sought in the past to educate me in the intricacies of Australian constitutional law. Mike Taggart provided me with comments on two successive drafts and much encouragement. Murray Hunt gave detailed answers to questions throughout the period of preparation. It would be remiss not to mention that my debt to Mike and Murray goes far beyond these lectures. They are great friends and great teachers.

As I mentioned at the start of my first lecture, much of what I write about the rule of law is inspired by Trevor Allan, whose book on the rule of law is, in my view, the most important work on this topic since A. V. Dicey. Trevor's questions at the lectures have prompted me in new directions, and Mark Walters and Amanda Perreau-Saussine also pressed me to think harder about my central claims. My colleague, Kent Roach, gave me comments on a draft. More important is that the ideas I present have been forged in discussion with him over several years, as they have been with Mayo Moran, whose work on influential authority has enriched my understanding of legality.

Geneviève Cartier gave me comments and the influence of her doctoral thesis 'Reconceiving Discretion: From Discretion as Power to Discretion

Cambridge University Press

978-0-521-67795-0 - The Constitution of Law: Legality in a Time of Emergency

David Dyzenhaus

Frontmatter

[More information](#)

x

ACKNOWLEDGEMENTS

as Dialogue' is manifest in many parts of this book. Rueban Balasubramaniam compiled an insightful memorandum on my discussion of the two wartime decisions of the House of Lords discussed here and I owe much to discussions with him about the continuum of legality. Lars Vinx has provided me with many insights about the relationship between political and legal philosophy and his interpretation of Hans Kelsen's view of legality in his thesis 'Legality and Legitimacy in Hans Kelsen's Pure Theory of Law' has greatly assisted my arguments. I owe the same kind of debt to Evan Fox-Decent, and to the ideas he developed in his doctoral thesis, 'Sovereignty's Promise: The State as Fiduciary'.

Matt Lewans, Jonathan Lewis, Sean Rehaag and Rayner Thwaites considerably helped me with either research assistance or comments or both and three reviewers for Cambridge University Press gave me very useful feedback on the manuscript of the lectures. I particularly want to thank reviewer number 3, who managed to combine encouraging comments about my work with highly critical questions about the arguments in the manuscript. Jonathan Masur, with whom I got in touch after reading his excellent article on themes similar to mine, kindly read most of the manuscript and gave me very helpful comments.

Finally, Luc Tremblay of the Faculty of Law of the University of Montreal arranged a seminar on the penultimate version of the manuscript and I thank him for this wonderful opportunity to reflect for the last time on the manuscript and in particular three people who have already figured in these acknowledgements, and who at the seminar provided at short notice insightful commentaries on my arguments: Geneviève Cartier, Evan Fox-Decent, and Robert Leckey.

I have received generous support over the years from my two academic homes, the Law Faculty and the Philosophy Department of the University of Toronto. In particular, the Law Library under the direction of Beatrice Tice and with the able help of Esmé Saulig made available a document and book delivery service that is a boon to research. I have been supported throughout this project by research funds from the Social Sciences and Humanities Research Council of Canada.

I mentioned that the first drafts of the lectures were put together during a busy term. While I did not set out to write or to revise the lectures this way, in retrospect I know that only anxiety-produced insomnia of a rather extreme sort provided me with the hours I needed. It is impossible not to disturb one's partner when one regularly begins work between 2.30 and 4.30 in the morning and it takes true love not to display impatience with such nocturnal weirdness until the very end of the process. For that, and much more, I thank Cheryl Misak.

Cambridge University Press

978-0-521-67795-0 - The Constitution of Law: Legality in a Time of Emergency

David Dyzenhaus

Frontmatter

[More information](#)

TABLE OF CASES

- A v. Secretary of State for the Home Department* [2002] EWCA Civ 1502, [2004] QB 335, [2005] 2 WLR 87 16, 31–3, 63, 165–6, 169, 174–90, 217, 219
- Abebe v. Commonwealth* (1999) 197 CLR 510 115
- Al-Kateb v. Godwin* (2004) 208 ALR 124 91–100, 113, 115, 165
- Anisminic Ltd v. Foreign Compensation Commission* [1969] 2 AC 147 102, 103, 107, 122
- Ashby, Re* [1934] OR 421 133
- Associated Provincial Picture Houses Ltd v. Wednesbury Corporation* [1948] 1 KB 223 125
- Australian Communist Party v. Commonwealth* (1951) 83 CLR 1 72–87, 92, 93–4, 97, 111, 113, 114, 195, 207
- Baker v. Canada (Minister of Immigration)* [1997] 2 FC 127, (1997) 142 DLR (4th) 554, [1999] 2 SCR 817 129, 135, 138–44, 171, 194
- Bell Canada v. Canada (Canadian Radio-Television and Telecommunications Commission)* (1989) 1 SCR 1722 143
- Bonham's Case (Dr)* (1610) 8 Co Rep 114 58, 98, 99, 100
- Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corporation* [1979] 2 SCR 227 118–19, 126, 127, 142, 144
- Chahal v. United Kingdom* (1996) 23 EHRR 413 162, 219
- Chevron USA, Inc. v. NRDC*, 467 US 837 (1984) 144–6
- Chu Kheng Lim v. Minister for Immigration* (1992) 176 CLR 1 86
- Coco v. R* (1994) 179 CLR 427 93
- Commonwealth v. Grunseit* (1943) 67 CLR 58 114
- Council of Civil Service Unions v. Minister for the Civil Service* [1985] AC 374 162, 167
- Crevier v. Quebec (AG)* [1981] 2 SCR 220 119
- Dayco (Canada) v. CAW-Canada* [1993] 2 SCR 230 120
- Douglas/Kwantlen Faculty Association v. Douglas College* [1990] 3 SCR 570 148
- Endo, ex parte*, 323 US 283 (1944) 45–7

Cambridge University Press

978-0-521-67795-0 - The Constitution of Law: Legality in a Time of Emergency

David Dyzenhaus

Frontmatter

[More information](#)

xii

TABLE OF CASES

- Fay *v.* Noha, 372 US 391 (1963) 167
- Hamdi *v.* Rumsfeld, 124 S. Cr. 2633 (2004) 48–50, 67, 182, 183, 184, 205
- Kable *v.* DPP (NSW) (1996) 189 CLR 51 86
- Korematsu *v.* United States, 323 US 214 (1944) 45–7, 63, 64, 94
- Laker Airways Ltd *v.* Department of Trade [1977] QB 643 162
- Liversidge *v.* Anderson [1942] AC 206 23–4, 26, 33, 63, 81, 86, 94, 149–56, 161, 162, 165, 167, 169, 181, 183, 219
- Lloyd *v.* Wallach (1915) 20 CLR 299 79, 94
- M *v.* Immigration Appeal Tribunal [2004] EWCA Civ 1731 30
- Marbury *v.* Madison (1803) 1 Cr 137 (2 Law Ed 118) 85
- Minister for Immigration and Ethnic Affairs *v.* Teoh (1994–95) 183 CLR 273 167, 169–70, 217
- Minister for Immigration and Multicultural Affairs *v.* Yusuf (2001) 206 CLR 323 115
- National Corngrowers Association *v.* Canada Import Tribunal [1999] 2 SCR 1324 120
- Nicholson *v.* Haldimand-Norfolk Regional Board of Commissioners of Police [1979] 1 SCR 311 127, 135
- Oppenheim *v.* Cattermole [1976] AC 249 166
- O'Reilly *v.* Mackman [1983] 2 AC 237 107
- Pearlman *v.* Harrow School Governors [1979] QB 56 107
- Pezim *v.* British Columbia (Superintendent of Brokers) [1994] 2 SCR 557 143
- Plaintiff S157/2002 *v.* Commonwealth (2003) 195 ALR 24 93, 110–17
- Polyukhovich *v.* Commonwealth (1991) 172 CLR 501 86
- Potter *v.* Minahan (1908) 7 CLR 277 93
- Prize Cases, 67 US 635 (1863), 2 Black (67 US) 635 (1863) 37
- R (Abbasi) *v.* Secretary of State [2003] 3 LBC 297 166–70
- R (G and M) *v.* SSHD [2004] EWHC 588 (Admin) 29
- R *v.* Electricity Commissioners, ex parte London Electricity Joint Committee Co. (1920) Ltd [1924] 1 KB 171 123
- R *v.* Halliday, ex parte Zadig [1917] AC 260 24–7, 33, 63, 79, 94, 151, 157–60, 161, 182, 183, 200
- R *v.* Hickman, ex parte Fox and Clinton (1945) 70 CLR 598 108, 110, 111, 112, 117
- R *v.* Home Secretary, ex parte Ahmed and Patel [1998] INLR 570 167
- R *v.* Hull University Visitor, ex parte Page [1993] AC 682 107

Cambridge University Press

978-0-521-67795-0 - The Constitution of Law: Legality in a Time of Emergency

David Dyzenhaus

Frontmatter

[More information](#)

TABLE OF CASES

xiii

- R v. Legislative Committee of the Church Assembly* [1928] 1 KB 411 123
- R v. Secretary of State, ex parte Hosenball* [1977] 1 WLR 766 160–2
- R v. Secretary of State for the Home Department, ex parte Pierson* [1998] AC 539 93
- R v. Secretary of State for the Home Department, ex parte Simms* [2000] 2 AC 115 93, 165
- Racal Communications Ltd, Re* [1981] AC 374 107
- Remuneration of Judges, Reference re* [1997] 3 SCR 3 90
- Ridge v. Baldwin* [1964] AC 40 127
- Roncarelli v. Duplessis* [1959] SCR 121 128–41, 156
- Rossouw v. Sachs* (1964) 2 SA 551 (A) 20–3, 26
- Secretary of State v. O'Brien* [1923] AC 603 167
- Secretary of State for the Home Department v. Rehman* [2002] 1 All ER 123 26, 31–3, 63, 163–6, 169, 170–1, 174–5, 176, 177, 180, 181, 182, 183, 187, 189, 219, 220
- Sprigg v. Sigcau* [1897] AC 238 25
- Suresh v. Canada (Minister of Citizenship and Immigration)* [2002] 1 SCR 3 141, 165, 166, 220
- Switzman v. Ebling* [1957] SCR 285 88–9, 90
- Toronto (City) v. CUPE, Local 79* [2003] 3 SCR 77 144
- Walsh, ex parte* [1942] ALR 359 79, 94

TABLE OF STATUTES

Australia

- Communist Party Dissolution Act 1950 82, 84
 - s. 4 73, 84
 - s. 7 73
 - ss. 5–8 73
 - ss. 10–11 73
- Constitution 74–7
 - s. 51 73, 94, 109
 - s. 61 73, 94
 - s. 71 76
 - s. 75 76, 110, 114
- Migration Act 1958
 - s. 189 91, 96
 - s. 196 91, 96
 - s. 198 91, 96
 - s. 474 109–13, 115
 - s. 476 115
 - s. 486A 110
- National Security Act 1939 108

Canada

- Charter of Rights and Freedoms 5, 64, 89
 - s. 33 98, 211
- Constitution Act 1867 87–9, 90
 - s. 96 119
- Public Service Labour Relations Act 1973
 - s. 101(1) 118
 - s. 102(2) 118
- Quebec*
 - Act to Protect the Province against Communistic Propaganda 1941 88
 - Alcoholic Liquor Act 1941 130
 - Civil Code
 - art. 1053 131

Civil Procedure Code
 art. 88 131

South Africa

Act 37 1963
 s. 17 20–1

United Kingdom

Act of Settlement 1701 90
 Anti-Terrorism, Crime and Security Act 2001 189
 s. 23 24, 175
 s. 24 175
 s. 25 175
 s. 26 175
 s. 28 176
 s. 29 176
 s. 30 176, 177
 Asylum and Immigration Act 2004 30
 Defence of the Realm (Consolidation) Act 1914 24, 157
 Emergency Powers (Defence) Act 1939 24, 27, 151
 s. 6 153
 Foreign Compensation Act 1950
 s. 4(4) 107
 Human Rights Act 1998 5, 33, 162, 167, 181, 184, 188–90, 211
 s. 4 217
 s. 14 175, 185–7
 Sch. 1 186
 Nationality, Immigration and Asylum Act 2002 28

United States

Constitution
 art. I, s. 9 82
 art. II 49