

Human Rights and the Rule of Law

Matthew S R Palmer

Address to “Bill of Rights Act: Legacy and Lessons – Where to Now?” Conference

University of Canterbury, 2 October 2025

E ngā mana, e ngā waka, e ngā reo. Tēnā koutou, tēnā koutou, tēnā koutou katoa

The value of this session will be in the dialogue. But to help kick things off, I offer some comments about the relationship between the rule of law and human rights. Provocatively, I want to advance a narrow or thin version of the rule of law; but also to call for a more sophisticated understanding of the relationship between the rule of law and human rights.

Human rights

First, it is important for what follows that I set one particular stake in the ground. I accept the orthodox account of human rights as basic entitlements or fundamental moral guarantees that individuals and groups of individuals possess by virtue of their humanity. Human rights are, I believe, grounded in recognition of universal human dignity, equality and worth. They include negative and positive conditions necessary for human flourishing. Human rights exist independently of, but are protected by, political and constitutional doctrines, structures, processes, and design. What I explore briefly today is their relationship with the rule of law.

The rule of law

There is no one definition of the rule of law and not even one generally accepted version. There are many. That is because it can be invoked by both sides of most political or legal debates in which it arises.¹

Professor Brian Tamanaha groups rule of law theories as formal or substantive, thick or thin.² Formal or thin conceptions focus on necessary conditions without passing judgment on the content of the law. Substantive or thick concepts focus on the morality of laws passed, over

¹ Jeremy Waldron “Is the rule of law an essentially contested concept (in Florida)” (2002) 21 Law & Philosophy 137.

² Brian Z Tamanaha *On the Rule of Law: History, Politics, Theory* (Cambridge University Press, Cambridge, 2004).

and above their formal character. Tamanaha identifies three “themes” that run through the rule of law tradition – interrelated clusters of meaning which revolve around distinct ideas:³

- *Government limited by law*: officials must operate within a limiting framework of the law; and even when government officials wish to change the law, they are not entirely free to change it in any way they desire.
- *Formal legality*: laws are public and prospective, with qualities of generality, equality of application, and certainty and the availability of a fair hearing within the judicial process.
- *Rule of law, not man*: not subject to the unpredictable vagaries of other individuals, whether monarchs, judges, government officials or fellow citizens.

I have written about my own personal conception of the rule of law in various publications but originally in my doctoral work in the 1990s.⁴ My conception derives from text, context and purpose. If law is to rule, there must be some distinctly separate or objective meaning to law that is independent of the human interests of those involved in, and operating, the legal system. Law should rule, rather than those who make it, apply it, or interpret it. For that to be so, interpretations of the law must ultimately be anchored in the words of the law, as we understand them in our interpretive communities.⁵ For me, as an ideal, the rule of law says that the meaning of law as it is applied, is

- independent of the interests of those who originally made the law;
- independent of the interests of those who apply the law;
- independent of the interests of those to whom it is applied; and
- independent of the time at which it is applied.

This is an abstract ideal; approached in the limit, but never achieved, as in differential calculus.

³ Chapter 9.

⁴ Matthew S R Palmer *Constitutional Design and Law: The Political Economy of Cabinet and Congressional Government* (unpublished JSD dissertation, Yale Law School, 1993). And see Matthew S R Palmer “Constitutional Dialogue and the Rule of Law” (2017) *Hong Kong Law Journal* 505.

⁵ Stanley Fish *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (Duke University Press, Durham & London, 1989) at 4.

The context within which, and the purpose for which, I conceive of the rule of law in this way is one of constitutional design. That, I suggest, is to avoid arbitrariness and caprice in the exercise of the state’s monopoly over coercion in a society. This is consistent with Gerald Postema’s impressive 2022 book, which states:⁶

The rule of law imposes a moral demand upon political communities and their governments. It demands that they be structured in such a way that those who are subject to power, from whatever quarter, are provided protection and recourse against its arbitrary exercise through the law’s distinctive features, tools, and modes of operation. In sum, when law rules in a political community, it *provides protection and recourse against the arbitrary exercise of power through law’s distinctive tools*.

It is also consistent with the three “themes” Tamanaha identifies as running through the rule of tradition.

The rule of law does not include human rights

What a thin formalist conception of the rule of law does not include, is human rights per se. Of course, any system of constitutional design that aims to constrain the abuse of the government’s monopoly over coercive power must afford adequate protection to fundamental human rights. But I suggest it does not do so because it is part of the rule of law.

This is, of course, a fault line in the debate over the meaning of the rule of law. Well respected jurists espouse a thick version of the rule of law which includes human rights.⁷ Other well respected jurists espouse a thin version, which does not.⁸

In my view, human rights stand on their own feet in constitutional design. They represent the moral imperative that defines and stands against the abuse of the coercive power of the state against individuals and groups of individuals. That may often happen when power is exercised arbitrarily or capriciously. But they are not implicated just because of the way in which coercive power is exercised. Human rights are implicated because of the substantive outcome of the use of coercive power. They set a minimum set of substantive standards which the coercive power of the state must not breach; not necessarily because of the process of *how* power is exercised.

⁶ Gerald J Postema *Law’s Rule: The Nature, Value, and Viability of the Rule of Law* (Oxford University Press, Oxford, 2022) at 18.

⁷ See, for example: Tom Bingham *The Rule of Law* (Penguin Books, London, 2010); Susan Glazebrook “The Rule of Law: Guiding Principle or Catchphrase?” [2021] *Waikato Law Review* 2 at 12.

⁸ See, for example: Phillip Sales “What is the rule of law and why does it matter?”, Robin Cooke lecture, Victoria University of Wellington/Te Herenga Waka, 12 December 2024 at 2.

Power can be exercised arbitrarily and not implicate human rights. And human rights can be implicated by the use of power, through law, that is focussed and intentional, not arbitrary or capricious. This is my fundamental point. Viewed, at least in light of the purpose of constitutional design, human rights and the rule of law are different, separate, concepts. Each fulfils their own separate function in preventing the abuse of individuals and groups of individuals by the coercive power of the state, in different ways.

I suggest that there is value in these different constitutional functions of human rights and rule of law being recognised and distinguished. A thin version of the rule of law focusses on its core common essence. A thin version can be more simply and coherently stated, understood and applied. A thin version is more capable of being understood and accepted by all those constitutional actors who should be bound by it. And a thin version is more capable of attracting consensus – constitutional legitimacy, if you like.

Mushing up different concepts, with different constitutional design purposes, lacks clarity, and inhibits agreement. And compellingly, mushing these concepts together opens the door of legitimacy to those who say that they are being used to mean whatever a particular author wants it to mean; which is, after all, fundamentally inconsistent with the rule of law. As Joseph Raz stated:⁹

... the rule of law is just one of the virtues by which a legal system may be judged and by which it is to be judged. It is not to be confused with democracy, justice, equality (before the law or otherwise), human rights of any kind or respect for persons or for the dignity of man.

Achieving consensus about the core meaning of the rule of law has value in our constitutional discourse. That is particularly so in the present state of our world. I suggested some years ago that the rule of law is a vulnerable constitutional norm in New Zealand.¹⁰ Dean Knight and I held to that view in 2022.¹¹ This year, a study by the Helen Clark Foundation found that 32% of those surveyed were open to having “a strong leader who does not have to bother with Parliament and elections” and only 43% thought courts make fair decisions most or all of the time.¹² The strength of the rule of law, supported by the separation of powers, depends on the judiciary’s retention of support of the New Zealand public in a very real sense. I think of it as

⁹ Joseph Raz “The Rule of Law and its Virtue” (1977) 93 LQR 195 at 196.

¹⁰ Matthew S R Palmer “New Zealand Constitutional Culture” (2007) 22 NZULR 565 at 589.

¹¹ Matthew S R Palmer and Dean R Knight *The Constitution of New Zealand: A Contextual Analysis* (Hart Publishing, Oxford, 2022) at 19.

¹² Shamubeel Eaqub and Rosie Collins, *Social Cohesion in New Zealand: Is New Zealand’s social fabric fraying?* (Helen Clark Foundation, 2025).

a limited stock of reputational constitutional capital.¹³ If we were ever to experience a clash between branches of government, as international examples including in the Pacific demonstrate, each branch's stock of reputational constitutional capital – legitimacy – would be crucial to the outcome.

Human rights and a thin conception of the rule of law

Finally, I want to suggest that there is a *relationship* between human rights and even a thin formalist version of the rule of law, seen in terms of constitutional design. But we need to take a more sophisticated approach to the issue than the binary thick/thin debate which has become just competing assertions.

The rule of law as an abstract ideal must manifest in constitutional doctrine, structure and processes. In particular, in western liberal democracies, it manifests in the doctrine of the separation of powers and, in particular, judicial independence. The separation of political and judicial powers is a necessary but not sufficient condition for the rule of law. If the same person both makes and interprets or applies the law, then the meaning of the law that is applied will more likely reside in the lawmaker's intention at the time of application rather than the words of the law when it was made. That enables retrospective justification of "what I meant" even if that was not evident to anyone in the legal text at the time.

If the separation of powers is a constitutional corollary of the rule of law, then so are other constitutional protections that serve to make the separation of powers effective. In New Zealand, the usual focus is on provisions of the Constitution Act 1986, safeguarding the independence of the judiciary. Those are, indeed, crucial to preserving the rule of law, as we see overseas. But, in addition, I suggest that some human rights may also be essential to maintaining the separation of powers.

Which brings us back to the New Zealand Bill of Rights Act 1990, which is why we are here at this conference. I will explore this in more depth on another occasion. But, in essence, I think particularly of some, but not all, of the core rights of life and security of the person, and democratic and civil rights in part 2 of the Act:

- the right not to be deprived of life, or subjected to torture or cruel, degrading or disproportionately severe treatment, or medical or scientific experimentation;

¹³ Matthew S R Palmer, "Open the Doors and Where are the People?: Constitutional Dialogue in the Shadow of the People" in Claire Charters and Dean R Knight (eds) *We, The People(s): Participation in Governance* (VUW & NZCPL, Wellington, 2011) at 73.

- the right to freedom of thought, conscience and religion, including the right to adopt and hold opinions without interference, the right to freedom of expression, including to seek, receive and impart information and opinions of any kind in any form; and
- the right to freedom of peaceful assembly, the right to freedom of association, the right to freedom of movement.

For the purposes of debate, I suggest, without further analysing now, that egregious or systematic breaches of these particular democratic and civil rights are capable of directly undermining, obviating, or rendering pointless judicial independence. If so, that means they are essential to maintaining the separation of powers and their maintenance is required as a corollary of the rule of law. Exploring this further offers the promise of better understanding the relationship between the rule of law and human rights than the currently entrenched thick/thin binary options.

Conclusion

So, I do agree that there is a relationship between human rights and a thin version of the rule of law. But it is important, I humbly suggest, to be clear about the nature of that relationship. For me, that flows from the constitutional implications of the manifestation of the rule of law in the separation of powers and judicial independence, rather than a theoretical confusion between two concepts with different constitutional functions.