

# CONSTITUTIONAL DIALOGUE AND THE RULE OF LAW

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Key Note Address to Constitutional Dialogue Conference  
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9 December 2016

Tēnā koutou, tēnā koutou, tēnā koutou katoa.

## Introduction

The Court often provokes consideration of the most intricate issues of principle by the other branches, engaging them in dialogues and "responsive readings"; and there are times also when the conversation starts at the other end and is perhaps less polite. Our government consists of discrete institutions, but the effectiveness of the whole depends on their involvement with one another, on their intimacy, even if it often is the sweaty intimacy of creatures locked in combat.

That is a quotation from American constitutional doyen Alexander Bickel. In his writing (as I see I agree with Kent Roach)<sup>1</sup> can be seen the roots of what we call constitutional dialogue.<sup>2</sup> But, as a New Zealander, I hope I can be forgiven for taking pride in the contribution to constitutional dialogue of another New Zealander, Peter Hogg. His 1997 article, written with Allison Bushell,<sup>3</sup> sparked a creative Canadian and then international academic debate sufficient to be marked ten years later by a special issue of the *Osgoode Hall Law Journal*.<sup>4</sup> Almost twenty years later, today's excellent conference program, attended by eminent constitutional theorists from around the world, testifies to a continuing vibrant academic interest in a range of dimensions of the dynamic functioning of constitutions that are encompassed by the

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\* Judge of the High Court of New Zealand. Nothing in this article should be taken to represent the views of the New Zealand judiciary.

<sup>1</sup> Ken Roach "Dialogical Remedies" (paper presented to the Constitutional Dialogue Conference, University of Hong Kong, 9 December 2016).

<sup>2</sup> Alexander Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (2nd ed, New Haven, Yale University Press, 1962) 261.

<sup>3</sup> Peter Hogg and Allison Bushell "The Charter Dialogue Between the Courts and Legislatures (Or Perhaps the Charter of Rights Isn't Such a Bad Thing After All)" (1997) 35 *Osgoode Hall L J* 75.

<sup>4</sup> Peter W Hogg, Allison A Bushell Thornton, and Wade K. Wright, "Charter Dialogue Revisited - or "Much Ado About Metaphors"" (2007) 45 *Osgoode Hall Law Journal* 1.

phrase. I commend Po Jen Yap and the other organisers of the conference for assembling such a constellation of stars.

To kick things off today, I start by outlining my understanding of the essence of constitutional dialogue. I then explore two aspects of constitutional dialogue – only two: first, what is “constitutional” and, second, what is “dialogue”. I offer some additional bells and whistles of my own that I suggest provide additional explanatory power in making extended use of the dialogue metaphor in characterising constitutional dynamics. These are:

- the importance of having a broad and realistic view of what is “constitutional”; and
- unpacking the notion of “dialogue” by identifying how loudly each branch of government speaks and the different languages in which they speak.

I illustrate these thoughts with examples from my own jurisdiction of New Zealand. Finally, I explore what the extended metaphor of constitutional dialogue tells us about the separation of powers and the rule of law.

## **Constitutional Dialogue**

My understanding of constitutional dialogue involves judges, legislators, and officials of the executive government performing their proper constitutional functions of issuing judgments, passing legislation, and making and executing policy decisions. In so doing in relation to the same topic of law or policy, each branch of government reacts to and interacts with the decisions of other branches. I agree those interactions can usefully be characterised as “dialogue”.

For me, the value of the dialogue metaphor is that it persuasively counters the old and arid debate in Westminster systems about the relative merits of Parliamentary or judicial supremacy or sovereignty. I’d have to say that I regard the strong form versus weak form judicial review debate, advanced particularly by Mark Tushnet and

Stephen Gardbaum,<sup>5</sup> as a more nuanced and sophisticated continuation of that old Parliamentary versus judicial supremacy debate using other labels. Ros Dixon's paper at this conference persuasively demonstrates the flaws in treating that binary dichotomy too formalistically – formal classification risks the strength or weakness of substance in reality being inverse to its form.<sup>6</sup>

The old Parliamentary or judicial supremacy debate was the context in which Hogg and Bushell were originally writing, as indicated by the title of their 1997 article: “The *Charter* Dialogue between Courts and Legislatures (Or Perhaps the *Charter of Rights* Isn't such a Bad Thing After All)”. I see their article adding a welcome dose of reality to what had become a formalistic debate by examining what actually happened when the Canadian Supreme Court exercised its relatively recently acquired right to strike down statutes as unconstitutional. Contrary to the fears of Parliamentary supremacists, that was not the end of the story. From 1982 to 2007 Hogg and Bushell, together with Wade Wright in a second article, found that, in 67 of 89 instances of such invalidity, the Canadian Parliament responded by re-enacting another statute to address its legislative objective in a different way.

Rather than a static, one-shot, zero-sum game seeking to determine the location of “final” sovereignty between two binary alternatives, dialogue theory provides a richer, interactive, more dynamic and more realistic view of the development of constitutional law and policy. Each branch of government initiates and reacts to each other – as if they were in conversation or dialogue, through their Acts, judgments and policies. I do not agree with those legal constitutionalists who argue that dialogic models risk undermining the judicial role – they simply characterise how judges perform their judicial role.<sup>7</sup> In so doing they, along with the other branches of government, are engaged in a collaborate enterprise, in the terminology used by

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<sup>5</sup> Mark Tushnet *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton University Press, Princeton, 2008); Stephen Gardbaum *The New Commonwealth Model of Constitutionalism: Theory and Practice* (Cambridge University Press, Cambridge, 2013).

<sup>6</sup> Rosalind Dixon “Responsive Judicial Review” (paper presented to the Constitutional Dialogue Conference, University of Hong Kong, 9 December 2016).

<sup>7</sup> Roach, above n 1.

Philip Joseph and Aileen Kavanagh.<sup>8</sup> In this way the different branches of government authoritatively explore and clarify the meaning of law and policy iteratively, over time. As, in reality, they do.

I should make clear that I do not advocate freighting the metaphor of constitutional dialogue with normative meaning.<sup>9</sup> I admit I'm rather attracted to Aileen Kavanagh's metaphor of the judge as a lone ranger, certainly more so than to her alternative of a judge as akin to a quality control inspector in an automobile plant.<sup>10</sup> But I aspire to neither. The value of the metaphor, to me, lies in its offer of a way of characterising the relationships between the branches of government. It is a positivist means of description. This can be particularly useful in comparative debates, as this conference illustrates. It does not provide the answers to normative debates about whether the judiciary or legislature *should be* more or less strong. Those differences are typically heavily influenced by the experience and culture of the constitution in question, and of the constitutionalists who differ. And the answers lie deeper in principle and theory rather than in a metaphor, to echo Aileen Kavanagh again.<sup>11</sup> But I do believe the metaphor can provide a common terminology and framework within which those debates can occur and which can, itself, clarify the differences between the protagonists. And, as you will see at the end of my address, I also consider extending the metaphor provides an insight into where we should look for the normative justification for judicial review.

## **“Constitutional”**

My first proposal will be nothing new to this audience but is something of which sight can be lost. The papers by Scott Stephenson and Po Jen Yap and others recognise it. It is simply a demand that we take a broad, contextual view of what a constitution is. Doing so informs our understanding of the subject and extent of the dialogue

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<sup>8</sup> Philip Joseph “Parliament, the Courts, and the Collaborative Enterprise” (2004) 15 Kings College L J 321; Aileen Kavanagh, “Judge as Partner” (paper presented to the Constitutional Dialogue Conference, University of Hong Kong, 9 December 2016).

<sup>9</sup> See Christine Bateup “The Dialogic Promise: Assessing the Normative Potential of Theories of Constitutional Dialogue” (2006) 71 Brooklyn Law Review 109.

<sup>10</sup> Kavanagh, above n 8, at 1.

<sup>11</sup> Aileen Kavanagh “The lure and limits of dialogue” (2016) 66 University of Toronto Law Journal 83 at 85.

about it. And it resolves one of the criticisms of dialogue theory by incorporating it into the metaphor.

But, for constitutional scholars from New Zealand and, perhaps again now, post-Brexit United Kingdom, the point is a necessary not an optional one. In New Zealand we have no written constitution. We have a document, labeled the Constitution Act 1986, which replaced the scattered remaining clauses of the Imperial New Zealand Constitution Act 1852. We also have the New Zealand Bill of Rights Act 1990 which is un-entrenched and s 4 of which prohibits the striking down of legislation for inconsistency. But we have not, since the 1860s, regarded any single document as our “constitution”. Neither of these has any supreme law status, though several provisions of electoral law, including one in the Constitution Act, is entrenched against easy amendment. They may be amended by an ordinary majority of the one House of Representatives – as they have been, rather summarily, in one instance.<sup>12</sup>

Instead, New Zealand constitutional scholars are nurtured on the Westminster orthodoxy that our constitution is “unwritten”. It is contained in a variety of Imperial and New Zealand statutes, constitutional conventions, judicial decisions in the common law, international treaties, and doctrines or principles and instruments of the branches of government. I have previously identified 80 such elements in New Zealand’s constitution; 45 are Acts of Parliament, only nine come from the common law.<sup>13</sup>

Although this may be thought a strange point for someone who is now a judge to make, my analysis of the New Zealand constitution suggests we should take a much less judicial-centric view of what the constitution is, and who makes it, than lawyers might conventionally think. My call is for “constitutional realism”. Legal realist Karl Llewellyn recognised in 1934 that “a working constitution is an institution” – “the interaction of the quite different ways and attitudes of three diverse categories of

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<sup>12</sup> Matthew S R Palmer “New Zealand Constitutional Culture” (2007) 22 NZULR 565 (“Palmer, Constitutional Culture”).

<sup>13</sup> Matthew S R Palmer, “What is New Zealand’s Constitution and Who Interprets it? Constitutional Realism and the Importance of Public Office-holders” (2006) 17 Public Law Review 133.

people”.<sup>14</sup> I follow American legal realism in its use of candour to penetrate the form and fiction of a law or a constitution to understand the reality of what is going on in the underlying human interactions.<sup>15</sup> I say that a constitutional realist seeks to identify and analyse all those factors which significantly influence the generic exercise of public power. A complete view of a constitution includes all the structures, processes, principles and even cultural norms that significantly affect, in reality, the generic exercise of public power.

My reference to culture resonates with Rosalind Dixon’s reliance on political and legal culture in order to determine whether judicial review is truly weak de facto.<sup>16</sup> And perhaps my view of what is constitutional and what is not is also the reason for the marked divergence between my view of constitutional dialogue and that of members of the Australian High Court in *Momcilivic v The Queen*, as analysed by Kent Roach.<sup>17</sup> A legalistic approach to a constitution searches for a legal remedy; mine searches for an effect in reality. A declaration can surely have an effect in reality.

I do not confine my broad view of a constitution in context to New Zealand or to the few other unwritten constitutions in the world. The written United States Constitution does not contain all the rules that significantly affect the generic exercise of public power there, to the consternation of law students looking for a clause empowering the United States Supreme Court to strike down Acts of Congress. Larry Tribe and Akhil Amar’s books demonstrate the breadth of the unwritten United States constitution.<sup>18</sup> And, of course, the written Canadian and Australian constitutions do not encompass the doctrines of collective Cabinet responsibility and individual ministerial responsibility which are fundamental to the operation in practice of those systems of government.

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<sup>14</sup> K N Llewellyn “The Constitution as an Institution” (1934) 34 *Columbia Law Review* 1 at 21.

<sup>15</sup> Neil Duxbury, *Patterns of American Jurisprudence* (1995) at 71.

<sup>16</sup> Dixon, above n 6.

<sup>17</sup> *Momcilivic v The Queen* [2011] HCA 34 per Roach, above n 1.

<sup>18</sup> Akhil Reed Amar *America’s Unwritten Constitution: The Precedents and Principles We Live By* (Basic Books, New York, 2012); Laurence H Tribe *The Invisible Constitution* (Oxford University Press, Oxford, 2008).

My point for present purposes is that taking a broad, constitutionally realist, view of the nature of a constitution has implications for what we look for and consider as constituting constitutional dialogue. I identify two aspects of this in particular.

*Any decision affecting the generic exercise of public power*

First, constitutional dialogue does not concern only the consistency of Acts of Parliament with supreme law. Po Jen Yap proceeds on this basis in relation to Hong Kong in his paper for this conference, and in relation to Hong Kong, Malaysia and Singapore in his impressive book.<sup>19</sup> Being from a jurisdiction that has no supreme law makes that clear. So, in New Zealand I identify specific instances of constitutional dialogue despite a lack of supreme law. They concern, particularly, the Treaty of Waitangi and customary rights and the Bill of Rights Act. In the interests of time I will go through only four of them with you now:

- *The Treaty of Waitangi*:<sup>20</sup> In 1975 Parliament enacted the Treaty of Waitangi Act 1975 which established the Waitangi Tribunal to interpret, and make recommendations about breaches of the Treaty of Waitangi of 1840 between Māori and the Crown. In 1986 Parliament enacted a savings clause that became the foundation for judicial review of a proposed transfer of assets from the Crown to State-Owned Enterprises.<sup>21</sup> That gave us the seminal Court of Appeal interpretation of a legislative reference to the Treaty. The Court of Appeal confirmed the reinterpretation of the meaning of the Treaty then recently offered by non-binding recommendations of the Waitangi Tribunal. For Kent Roach's interest in particular, I should explain that the remedy offered by the Court was to invite the executive to negotiate with the Māori Council a regime to safeguard Māori interests to which the Court then consented. The deal was implemented by Parliament in enacting the Treaty of Waitangi (State

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<sup>19</sup> Po Jen Yap "Statutory Rights and De Facto Constitutional Supremacy in Hong Kong" (paper presented to the Constitutional Dialogue Conference, University of Hong Kong, 9 December 2016); Po Jen Yap *Constitutional Dialogue in Common Law Asia* (Oxford University Press, Oxford, 2015), at chapter 5.

<sup>20</sup> Matthew S R Palmer *The Treaty of Waitangi in New Zealand's Law and Constitution* (Victoria University Press, Wellington, 2008).

<sup>21</sup> *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA).

Enterprises) Act 1988, giving the Waitangi Tribunal binding power to order the resumption of land owned by State enterprises. No such resumptions have been ordered but the threat of them created a fiscal risk that, together with executive government policy, impelled a significant programme of settlements of historical Treaty grievances.

- *Damages for Breach of the Bill of Rights Act*: When Parliament passed the Bill of Rights Act in 1990 it considered and decided against providing for remedies. But in 1994 the Court of Appeal found public law damages were potentially available as a remedy for breach of the Bill of Rights despite that not being explicit in the Act.<sup>22</sup> The Law Commission advised against legislative action. The executive government considered it but initiated none.<sup>23</sup> In 2004, in *Taunoa v Attorney-General*, the High Court found that the Department of Corrections had breached prisoner's rights under the Bill of Rights Act for which they were awarded damages pursuant to *Baigent's Case*.<sup>24</sup> Parliament responded by imposing restrictions on the compensation courts are able to award prisoners, in the Prisoners' and Victims' Claims Act 2005. In August 2007, in its appeal, the Crown accepted and did not seek to revisit the availability of public law damages for breach of the Bill of Rights Act according to *Baigent's Case*. In its judgment the Supreme Court elaborated on the considerations relevant to setting the quantum of such damages, narrowing them.<sup>25</sup> In September 2011, in *Attorney-General v Chapman* the Supreme Court constrained the potential scope of *Baigent's case* to acts of executive government, by accepting the Crown's argument that there is no right to claim public law damages for judicial breaches of rights.<sup>26</sup> There was no legislative reaction.

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<sup>22</sup> *Simpson v Attorney-General (Baigent's Case)* [1994] 3 NZLR 667 (CA).

<sup>23</sup> Law Commission, *Crown Liability and Judicial Immunity: A Response to Baigent's Case and Harvey v Derrick* (1997).

<sup>24</sup> *Taunoa v Attorney-General* (2004) 7 HRNZ 379 (HC) (on liability) and *Taunoa v Attorney-General* (2004) 8 HRNZ 53 (HC) (on relief).

<sup>25</sup> *Taunoa v Attorney-General* [2007] NZSC 70, [2008] 1 NZLR 429.

<sup>26</sup> *Attorney-General v Chapman* [2011] NZSC 110, [2012] 1 NZLR 462.

- *Declarations for Breach of the Bill of Rights:* The Bill of Rights was explicit that New Zealand courts could not strike down legislation. But in 2000 a unanimous Court of Appeal found the Court had the power “and on occasions the duty” to indicate a statutory provision is inconsistent with the Bill of Rights, though it did not do so.<sup>27</sup> The Court of Appeal subsequently reinforced the point in another case later in 2000.<sup>28</sup> In 2000, on the basis of an advisory report from legal experts, the executive government decided to initiate legislative amendment to provide for declarations of inconsistency in relation to the right to freedom from discrimination. Parliament did so in the Human Rights Amendment Act 2001. At first instance, it is the Human Rights Review Tribunal that has jurisdiction to grant declarations of inconsistency. In February 2007, in *Hansen v R*, several of the judgments in the Supreme Court made comments supportive of the possibility of declarations, or findings, of inconsistency with the Bill of Rights Act.<sup>29</sup> In 2015, for the first time, Heath J in the High Court clarified matters by issuing such a declaration, relying on the Attorney-General’s own negative s 7 report to Parliament about prisoners’ voting rights in doing so.<sup>30</sup> Even so, the Crown has appealed and we await appellate authority.
- *Aboriginal and customary rights:* In 2003 the Court of Appeal found, in response to a case stated at the initiative of the Attorney-General, that it was within the jurisdiction of the Māori Land Court to examine Māori claims of customary rights to the foreshore and seabed.<sup>31</sup> The executive reacted swiftly, initiating legislation to overturn the Court’s judgment and to provide for a lesser form of title or right to be negotiable between Māori and the Crown. Parliament accordingly passed the Foreshore and Seabed Act 2004. But the concomitant political tensions generated a new

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<sup>27</sup> *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 (CA) at [19]- [20].

<sup>28</sup> *R v Poumako* [2000] 2 NZLR 695 (CA).

<sup>29</sup> *Hansen v R* [2007] NZSC 7, [2007] 3 NZLR 1 at [8], [24] (Elias CJ), [254] and [259] (McGrath J) and [267] (Anderson J). Claudia Geiringer, *On a Road to Nowhere: Implied Declarations of Inconsistency and the New Zealand Bill of Rights Act* 40 VUWLR 613 at 646 (2009).

<sup>30</sup> *Taylor v Attorney-General* [2015] NZHC 1706.

<sup>31</sup> *Ngati Apa v Attorney-General* [2003] 3 NZLR 643 (CA).

political party, the Māori Party. The Marine and Coastal Area (Takutai Moana) Act 2011, overturning the previous legislation, was introduced by a new government, supported by the Māori Party, and passed by Parliament. The new Act provided for negotiation over rights or title with scrutiny by the courts.<sup>32</sup>

In three of these four instances the judicial decisions stuck and the other branches of government decided not to react. In the fourth, the reaction by the political branches engendered its own further political reaction, the effects of which moved the law further back towards the Court's decision.

I also note a point Swati Jhaveri remarks on<sup>33</sup> – there is no reason why constitutional dialogue must be initiated by the judiciary. The constitutional dialogue about the Treaty of Waitangi in New Zealand was not initiated by the judiciary. It was initiated by Parliament in passing the Treaty of Waitangi Act 1975 and the State-Owned Enterprises Act 1986.

It could be said that the Treaty of Waitangi, aboriginal rights, and the Bill of Rights Act are quintessentially constitutional instruments despite not being supreme law. And in Hong Kong it would not be difficult to view the Bill of Rights Ordinance as constitutional, though I take Po Jen's point that it was the judiciary which formally made it so.<sup>34</sup> But I suggest that *any* decisions that affect the generic exercise of public power qualify as constitutional. A series of such decisions by Parliament and the judiciary constitute constitutional dialogue.

So, sequences of decisions by the New Zealand Supreme Court and Parliament regarding parliamentary privilege, the legal position of public servants and the extent of Police surveillance powers constitute constitutional dialogue:

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<sup>32</sup> The 2011 Act includes in its preamble one of only four references to the rule of law in New Zealand legislation – as having been transgressed by the 2004 legislation

<sup>33</sup> Swati Javeri "Optimising Constitutional Dialogue in India and Singapore: The Role of the Executive and the Legislature" (paper presented to the Constitutional Dialogue Conference, University of Hong Kong, 9 December 2016).

<sup>34</sup> Yap, above n 19.

- In September 2011, in *Attorney-General v Leigh*, the Supreme Court found public servants' communications with Ministers, for the purpose of answering parliamentary questions, may be occasions of qualified privilege as a defence against defamation but not absolute privilege.<sup>35</sup> In 2013 the Privileges Committee of the House of Representatives recommended legislative amendment on the basis that *Leigh* was not consistent with Parliament's previous understanding of the scope of parliamentary privilege.<sup>36</sup> The Parliamentary Privilege Act 2014 reformed the law of parliamentary privilege more comprehensively. It also reverses the effect of the 2005 Privy Council decision in *Buchanan v Jennings* that effective repetition of defamatory statement made in Parliament is not protected by privilege.<sup>37</sup>
- In March 2010, in *Couch v Attorney-General*, a majority of the Supreme Court found s 86 of the State Sector Act 1988 did not, as the Crown had understood, confer immunity from tortious liability on individual public servants for negligent acts committed in good faith.<sup>38</sup> The Crown introduced, and Parliament passed, the State Sector Amendment Act 2013 which restored the previously understood position. Also, in September 2011, in *Hamed v R*, the Supreme Court rather unsurprisingly found that the Police had no power to undertake unreasonable surveillance from a public place through covert filming to obtain evidence of suspected criminal activity, and had no power at all to undertake surveillance that involved trespass.<sup>39</sup> Within a month, the executive government introduced a Bill intended retrospectively to validate substantial amounts of such surveillance activity. Under urgency, and after much gnashing of political teeth, Parliament passed the Video Camera Surveillance (Temporary Measures) Act 2011 which had prospective legalising effect only (other than on past convictions). More

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<sup>35</sup> *Attorney-General v Leigh* [2011] NZSC 106, [2012] 2 NZLR 713.

<sup>36</sup> Privileges Committee, *Question of privilege concerning the defamation action Attorney-General and Gow v Leigh* AJHR I.17A (2013).

<sup>37</sup> *Buchanan v Jennings* [2004] UKPC 36, [2005] 2 All ER 273 (PC).

<sup>38</sup> *Couch v Attorney-General* [2010] NZSC 27, [2010] 3 NZLR 149.

<sup>39</sup> *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305.

comprehensive law reform in the Search and Surveillance Act 2012 clarifies the law relating to surveillance.

There are a variety of other examples as well. One with which I have become familiar as a judge, but will not delve further into now for lack of time, is a series of court decisions and Amendment Acts regarding the threshold for judicial review of immigration decisions.

*Any institution exercising public power*

So the first bell I add to constitutional dialogue is that it is not only consistency with supreme law that constitutes constitutional dialogue. The second bell is that a Supreme Court and a Parliament are not the only two institutions that engage in constitutional dialogue. No doubt these are usually the most significant players in any particular jurisdiction. But constitutional cases reach a Supreme Court through lower courts. And they don't always progress. There is no guarantee the declaration of inconsistency case in New Zealand, *Taylor v Attorney-General*, will reach the Supreme Court. The Treaty of Waitangi and Bill of Rights examples I have given from before 2004 usually involved the Court of Appeal rather than our then highest court, the Judicial Committee of the Privy Council.

Furthermore, sometimes, other institutions participate in the exercise of governmental functions. In New Zealand, the most obvious example is the Waitangi Tribunal. The Tribunal has the powers of a standing Commission of Inquiry. It has the power to self-initiate inquiries. But it usually considers complaints, only able to be brought by individual Māori, that the Crown has breached the principles of the Treaty of Waitangi of 1840. I have mentioned the constitutional dialogue that effectively reinterpreted the meaning and status of the Treaty of Waitangi which I analysed in a book in 2007.<sup>40</sup> That dialogue was initiated by the Waitangi Tribunal in a series of four decisions from 1983 to 1986 that offered a new meaning of the Treaty. That meaning was largely confirmed by the Court of Appeal, and the Privy Council, endorsed by Parliament and actioned by the executive branch of

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<sup>40</sup> Palmer, *Treaty of Waitangi*, above n 20.

government. It was truly a product of constitutional dialogue among the institutions exercising the powers of the state.

Other such institutions can also be identified. In New Zealand, the Ombudsman is the primary interpreter of the meaning of the Official Information Act 1982. The Human Rights Review Tribunal has an important first instance role in relation to human rights cases. Perhaps there are examples of other institutions affecting the generic exercise of public power in other jurisdictions that are not strictly one of the three branches of government.

Having added two bells to “constitutional” I now consider “dialogue”.

### **“Dialogue”**

Ordinarily, “dialogue” is a conversation between two or more people. I suggest we can usefully extend the metaphor of constitutional dialogue by considering two further aspects of ordinary dialogue. These might be whistles rather than bells.

#### *Dialogue in different volumes*

First, we can conceive of each branch of government speaking more or less loudly or strongly than the others. This provides a way of characterising the strength of voice of one branch of government relative to the others or relative to its own strength in the past, or in a comparative sense, with relative strengths of voice in other countries. Again, I am explicit that this is a positivist metric, rather than a normative claim about some essential meaning to the word “dialogue”. In constitutional dialogue in a particular jurisdiction, simply speaking, some branches will speak more loudly than others.

So we can characterise the United States judiciary as having developed a relatively loud speaking voice. It tested the proposition in *Marbury v Madison* that its voice was stronger than those of the Congress and President in constitutional dialogue.<sup>41</sup> By the twentieth century it was clear that the other branches indeed accepted the

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<sup>41</sup> *Marbury v Madison* 5 US 137 (1803); 1 Cranch 137.

Court's voice was loudest. Then it asserted it was the *only* branch of government that could interpret the Constitution.<sup>42</sup> The voice of the Canadian judiciary was greatly amplified by the Canadian and Imperial Parliaments through the Constitution Act of 1982 and it has been speaking relatively loudly since then. The UK House of Lords and then Supreme Court acquired a vaguely European accent in recent times though I confess I am unsure about assessing its current volume setting. By comparison Po Jen Yap's explanation of the relative vocal characteristics of the judiciary in Singapore, Malaysia and Hong Kong suggest they are relatively muted in different ways.<sup>43</sup>

In New Zealand, the voice of the judiciary is also relatively muted. Alternatives have been mooted but rejected at various times:

- In 1963 a weak New Zealand Bill of Rights Bill, modeled on the 1960 Canadian Bill of Rights, was introduced, opposed, and failed.
- In 1985 my father, as Deputy Prime Minister and Minister of Justice, proposed a new Bill of Rights which, together with the Treaty of Waitangi, would be accorded supreme law status.<sup>44</sup> As Professor Paul Rishworth said, “[s]everal distinct strains of objection emerged, but foremost among them was that a constitutional bill of rights would elevate judicial power over parliamentary power, and be anti-democratic.”<sup>45</sup>
- In 2005 a specially formed Select Committee of the House of Representatives, the Constitutional Arrangements Committee, had the opportunity to review this situation. It concluded that “public

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<sup>42</sup> L D Kramer *The People Themselves: Popular Constitutionalism and Judicial Review* (Oxford University Press, Oxford, 2004).

<sup>43</sup> Yap, above n 19.

<sup>44</sup> I should mention that my father remains unconvinced. This year he has published, with another constitutional scholar Andrew Butler, book proposing draft text for a supreme law constitution with a legislative override clause. Geoffrey Palmer and Andrew Butler *A Constitution for Aotearoa New Zealand* (Victoria University Press, Wellington, 2016).

<sup>45</sup> Paul Rishworth, *The New Zealand Bill of Rights* in *THE NEW ZEALAND BILL OF RIGHTS* (P Rishworth et al, eds., 2003) at 7. The Select Committee heard 438 submissions up and down and New Zealand over two years

dissatisfaction with our current arrangements is generally more chronic than acute.<sup>46</sup>

- At the end of 2013, the Constitutional Advisory Panel's report was published.<sup>47</sup> The Panel stated:<sup>48</sup>

Granting courts the power to strike down legislation has support but is explicitly rejected by a significant grouping. Support can be seen for exploring increased judicial powers that preserve parliamentary sovereignty, new means of public participation and improving parliamentary scrutiny to ensure legislation is consistent with the Act.

The voice of the New Zealand Parliament in constitutional dialogue is reasonably loud, though that too has changed somewhat in the last twenty years. I agree with Scott Stephenson's point that political parties make a difference to constitutional dialogue.<sup>49</sup> But the point that follows from that is the electoral system which has a direct effect on the number of parties can also have a direct effect on constitutional dialogue, as it has in New Zealand. The move from first past the post electoral system to a mixed member proportional system in 1993 effected a fundamental restructuring of constitutional dynamics in New Zealand. The executive branch no longer unilaterally wielded the megaphone of Parliament's constitutional voice through dominance of a single party majority government. And the executive's speech became mediated through coalition and minority governments.<sup>50</sup>

The point is that, irrespective of the formal status of a judiciary or a legislature as weak or strong in terms of its institutional arrangements, it may speak more or less

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<sup>46</sup> Constitutional Arrangements Committee, *Inquiry to review New Zealand's existing constitutional arrangements: Report of the Constitutional Arrangements Committee* [2005] AJHR 1.24A at para 6. I should disclose I was an expert adviser to the Committee.

<sup>47</sup> Constitutional Advisory Panel, *New Zealand's Constitution: A Report on a Conversation, He Kotuinga Korero mo Te Kaupapa Ture o Aotearoa* (2013).

<sup>48</sup> At 56.

<sup>49</sup> Scott Stephenson "Is the Commonwealth's Approach to Rights Constitutionalism Exportable?" (paper presented to the Constitutional Dialogue Conference, University of Hong Kong, 9 December 2016) at 16.

<sup>50</sup> Matthew S R Palmer, *Open the Doors and Where are the People? Constitutional Dialogue in the Shadow of the People* in *We, The People(s): Participation in Governance* (Claire Charters & Dean R Knight eds, Victoria University Press, Wellington, 2011) 50 ("Palmer, Constitutional Dialogue").

loudly in constitutional dialogue in reality. Through such a characterisation we can escape the formal classification of a system of review that Rosalind Dixon demonstrates is inadequate.<sup>51</sup> How loudly a branch of governments speaks in constitutional dialogue with others in reality, may or may not reflect the formal classification of its system of judicial review.

I am inclined to think, also, that Kent Roach's concerns about how frequently or specifically or generically courts speak to legislatures can be managed through reference to the dialogue metaphor. We have all been in conversations with a strong silent type who doesn't say much but when she does it's worth listening to. And in conversations where an interlocutor makes his points resolutely at a level of generality that avoids pointed criticism of others. The flexibility of such options as features of judicial decision-making can be characterised using the dialogue metaphor – though I suspect that, at some point, it loses its bite.

But I do not consider that dialogue ceases to become dialogue just because one party speaks more loudly, or more effectively, than another. That certainly occurs in New Zealand as it seems to in Singapore and other Asian common law jurisdictions Po Jen Yap has analysed. Though it seems that in Singapore the judiciary has tested and raised its voice in recent years there.

### *Dialogue in different languages*

As a second whistle, I suggest we should consider the languages in which each branch of government speaks.<sup>52</sup> I could alternatively present these as accents or cultures rather than languages. But I think the metaphor of languages in relation to dialogue makes my point more clearly.

I start with the uncontroversial proposition that different disciplines have different biases, assumptions and prejudices built into their methods of reasoning and

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<sup>51</sup> Dixon, above n 6.

<sup>52</sup> Palmer, Constitutional Dialogue, above n 50.

analysis.<sup>53</sup> So, the disciplines of law and public policy are very different in their forms of reasoning or disciplinary methodology.

The paradigm of the discipline of law in a common law system is defined by the methodology of the common law. Paradigmatically, common lawyers and judges approach an opinion, an argument or a judgment by identifying the issue, identifying the material facts, outlining the relevant law, examining the arguments from both (i.e. two) sides and applying the law to the facts. This is an inductive form of reasoning – from the particulars of individual cases towards the general rule. It pays attention to specific factual context of particular cases. It looks to past precedents for guidance.

The paradigm of the discipline of public policy analysis is quite different. Policy analysts typically start with the government's general objectives. They identify the problem to be resolved. They identify not just two arguments but all possible options for addressing the problem. They analyse, or should analyse, all the options in terms of which will best achieve the general objectives, in terms of financial implications, and all other sets of implications. This is deductive reasoning – from the general to the particular. It is more abstract. It is less interested in factual circumstances. Its evidence derives from general social science analysis rather than anecdotes from a particular fact scenario. It looks to the future, not the past.

My point is not that either policy or legal analysis is better than the other – just that they are different. And, if they are undertaken for long enough they affect the mindsets of their practitioners. Each imparts to its practitioner different biases, presumptions, prejudices and tendencies – different perspectives. I conceive of them as different “languages” and even different cultures. Lawyers are good at problem identification but can forget about objectives. They revel in factual context but get impatient with generalisations. Policy advisers are good at identifying all possible options but can forget to test their analysis in practical applications to specific scenarios. They theorise and get impatient with anecdotes.

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<sup>53</sup> Matthew S R Palmer “Thinking about Law and Policy: Lessons for Lawyers” (presentation to Crown Law Office & Law Commission, Wellington, December 2006). Available at: [http://works.bepress.com/matthew\\_palmer/10](http://works.bepress.com/matthew_palmer/10).

I have previously also described politics as a third language.<sup>54</sup> It is the activity of persuasion, through negotiation, coercion and/or argument in order to achieve an end. It typically involves bargaining, negotiating and logrolling, persuasion, compromise and pragmatism.

Then I say that the three branches of government with which we are generically familiar think and speak in different languages – they use different methodologies and perspectives – when they discharge their functions. This must differ somewhat in different jurisdictions. But there are sufficient commonalities in common law systems that I feel able to offer this to you all to consider in relation to your own. So:

- The judiciary interprets legislation and makes common law in the language of the common law – by focusing on the factual context of specific cases, looking to past precedents, reasoning to more generic principles or rules.
- The public service in the executive branch of government in New Zealand speaks the language of policy – focusing on objectives, identifying options and providing analyses that are reasonably generic and abstract.
- Ministers and Members of Parliament speak the language of politics – mediating policy recommendations through the reality of bargaining and negotiating in order to pass legislation.

Translation is obviously required. In New Zealand the Parliamentary Counsel Office, which drafted all government legislation, translates the language of policy decisions into the language of law. And the Crown Law Office, which conducts all Crown litigation in the courts and explains likely and eventual judicial decisions to departments, helps to translate law back into policy. Many Ministers eventually become bi-lingual – understanding the languages of politics and policy and, for the Attorney-General, law as well.

So I suggest to you, as a positivist descriptive matter, that not only do the institutions of government engage in constitutional dialogue through the routine exercise of their

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<sup>54</sup> Palmer “Constitutional Dialogue”, above n 50.

functions in affecting the generic exercise of public power, speaking more or less loudly, but they do so in different languages. That is the effect of the branches of government in common law jurisdictions being so different and being inhabited by individuals trained in different disciplines. Perhaps the most important difference between the language of law and of policy is that a court interprets a statute in the context of a particular case. If Parliament doesn't like that meaning it can change it generically by legislative amendment. This is inter-institutional dialogue about the making and application of law and the policy underlying it.

Perhaps here is a clue as to why a common law judiciary is relatively more assertive in interpretation of some subject matters than others – a feature Scott Stephenson notes in his paper.<sup>55</sup> An approach that emphasises the factual context of specific cases based on past precedent is not well-suited to analysing issues of social and economic policy which, of necessity, require empirical social science data and conceptual frameworks of analysis. But such an approach – the common law approach – does feel more confident in analysing specific cases of injustice focusing on the “rights” of individuals vis a vis each other and vis a vis the state.

I wonder whether the difficulties Swati Jhaveri identifies in India might derive from the judiciary changing the language they speak, but not changing it consistently enough to have a coherent ongoing dialogue.

But more generally I say that the dynamics of constitutional life of a nation, as characterised by this framework, are determined by what languages each of the branches of government speak, and how loudly each of these voices are empowered to speak to each other.

Again, this is not a normative claim but a positivist, descriptive one. I should not be taken to placing myself in the camp of those using the dialogue metaphor to legitimise judicial review. I agree with invocation of Aileen Kavanagh's point that dialogue is a metaphor not a theory.<sup>56</sup> I see it as just that – as a way of characterising the constitutional dynamics in different jurisdictions. It facilitates

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<sup>55</sup> Stephenson, above n 48.

<sup>56</sup> Kavanagh, above n 11.

comparisons between jurisdictions. And it enables normative debate about whether to dial up or down the volume in which an institution engages in dialogue or whether to change the language in which an institution of government speaks. Because this too, is a constitutional design choice. By constituting different branches of government in the ways we do in a common law jurisdiction we privilege certain perspectives – law, policy, politics. It is so difficult to imagine that being different that it is easy to forget that it is a choice. But it is.

## **Rule of Law**

Finally, and you'll be pleased it's finally, I develop this last point in a more explicitly normative direction. My contention is that the rule of law and the separation of powers *requires* the branches of government to speak in different languages as a normative directive.

First I will briefly explain my conception of the rule of law. I seek the core elements of the doctrine that are common to most others' accounts, that are likely to be widely accepted, and that can be simply and coherently stated so that the rule of law can, relatively easily, be grasped and applied. My conception centres on certainty and the freedom from arbitrariness in the law.<sup>57</sup> It involves taking seriously the words of the phrase "the rule of law" and attempts to hone in on the functional purpose of the rule of law in constitutional design. It marries both text and purpose. I consider that the phrase itself suggests there is some distinctly separate or objective meaning to law that is independent of human interests. It is law itself that rules and that should rule. I suggest this definition:

The rule of law requires that the meaning of a law as it is applied is:

- Independent of the interests of those who made the law; and
- Independent of the interests of those who apply the law; and

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<sup>57</sup> Matthew S R Palmer "New Zealand Constitutional Culture" (2007) 22 NZULR 565 at 586-589; Matthew S R Palmer, *The Treaty of Waitangi in New Zealand's Law and Constitution* (VUP, Wellington, 2008) at 285-289.

- Independent of the interests of those to whom it is applied; and, I think,
- Independent of the time at which it is applied.

This formulation emphasises that the rule of law is an ideal – which may explain the contest over its content. All law is, of course, a human construct – formulated by humans, applied by humans, to humans. But I suggest the ideal for which the rule of law strives is to remove, as far as practical, the influence of the interests of particular human actors. The essence of the concept of the rule of law seeks to advance justice by invoking a Rawlsian veil of ignorance of one’s particular interests in relation to the content of law.<sup>58</sup> Removing human interests from decisions made through human agents must be an ideal – like a limit approached but never reached through differential calculus. But a worthy ideal is worth attempting to approach, as well as to encapsulate clearly.

I suggest my conception of the rule of law zeroes in on essential underpinnings that are common to the most influential commentators. It is the rule of law, not man or woman. And no man or woman can be above the law, to recall Professor Albert Venn Dicey. Laws must be public so that all those to whom it is applied have equal opportunity to observe law. Laws must be prospective for the same reason. Laws must be applied through a fair hearing so as to be independent of the interests of those who apply them. Generality, certainty and freedom from arbitrariness are core to the concept.

I accept that the conception I offer follows Raz as being more in the tradition of the “formal” rather than “substantive” theories of the rule of law, according to the dichotomy analysed by Paul Craig and others,<sup>59</sup> or Dworkin’s “rulebook conception”

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<sup>58</sup> John Rawls *A Theory of Justice* (Belknap Press, Harvard, 1971).

<sup>59</sup> Paul Craig “Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework” [1997] PL 467 (though I suggest that my conception is not “formalist” in the sense of relating only to procedure, because it is concerned with the substance of a law). Similarly, it is more of a “formalist” ideal than a “historicist”, “legal process” or “substantive” ideal in terms of a four-part classification proposed by Richard H Fallon “‘The Rule of Law’ as a Concept in Constitutional Discourse” 97 *Columb L Rev* 1 (1997).

rather than his “rights based” theory which merges the rule of law with his theory of law itself.<sup>60</sup> But I maintain that, for the rule of law to remain a useful concept, it should be confined to its essence. Otherwise I worry that, because of the apparent generic appeal of the term there is a great temptation to freight it with aspects of all those other fundamental legal concepts that are also appealing. This will end in messy incoherence, as perhaps it has already. Further, such doctrinal incoherence risks constitutional incoherence. For me, the risk of incoherence of the notion of the rule of law is great enough that (with a small caveat I need not pause to explain) I join Joseph Raz who says:<sup>61</sup>

... 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.

Democracy, justice and human rights stand on their own feet, with their own meanings. As does the rule of law. These concepts must be distinct in order to be useful, even if they are inter-related.

It can also be seen how this conception of the rule of law is intimately bound up with the separation of powers and judicial independence. The separation of powers is a necessary (but not sufficient) condition for the rule of law. If a lawmaker not only makes but also interprets and applies the law then the meaning of the law that is interpreted and applied will more likely reside in the lawmaker’s intention at the time it is applied. The law maker/interpreter can retrospectively identify in the law “what I meant at the time” even if that was not present or evident in the legal text at the time. It is this aspect of the combination of making and applying law that is contrary to the rule of law – the meaning of the law would become that which the maker and applier later deems, potentially arbitrarily, to be correct – rather than a meaning that resides in the law itself. Law would not rule; it would have no independent meaning. The lawmaker and applier would rule.

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<sup>60</sup> Ronald Dworkin *A Matter of Principle* (Harvard University Press, Cambridge, 1985).

<sup>61</sup> Joseph Raz “The Rule of Law and its Virtue” (1977) 93 LQR 195 at 196.

I do not imagine that the separation of powers doctrine is controversial in principle either in New Zealand or in the other jurisdictions we are discussing. I do, though, ask what that separation really requires in terms of constitutional dialogue. In particular: does the separation of powers require only that the identity of the individuals who make and apply law be separate and different? Or does it require that their perspectives or mindsets are also separate and different?

It seems to me that the normative constitutional health of any system of government is improved by having the different branches of government which exercise public power thinking and speaking in different languages. We want institutions thinking both abstractly about the formulation of general policy and legal principles and contextually about how those principles apply, and should apply, to the messy reality of specific facts of particular cases. Each perspective checks the other.

And here, finally, is my link between constitutional dialogue and the rule of law. Try to conceive of a constitutional system in which the executive, legislature and judiciary all speak the same language – all have the same mindset, the same prejudices and assumptions, the same biases – all think and approach legal and policy issues in exactly the same way. Hypothetically, would that be a constitutional problem?

It could be said it would have the advantage of efficiency in the sense that all the branches of government would understand each other very well. But, in this hypothetical extreme, I would worry about a uniform mindset across all branches of government. The great advantage of the common law focus on individual cases is the cross-check it provides on the generality of legislation – by examining the effect of generally drafted law in specific factual circumstances. By doing justice in the individual case, courts test the formulation of legislation and themselves formulate the common law. If all branches approach issues in the same way then laws and policies, including constitutional law, would not benefit from such cross-checking. There would be little point in constitutional dialogue. Why need the judiciary raise its voice to the executive or the legislature if they have the same view?

And this is my contention: the separation of powers and the rule of law *requires* that constitutional dialogue be conducted in different languages. In my hypothetical scenario, the same individuals would not be interpreting and applying the law as those who make it. But if they share the same biases, assumptions and prejudices – if they have the same mindset and perspective – then they may as well be. I suggest that would be contrary to the rule of law. Not only do we need our legislators and judges to be different people, we need them to be think differently. Otherwise, it would not be the law which rules. It would be the common perspective, language or culture – the “ruling” culture.

The genius of the common law system lies not in the spirit of Montesquieu’s laws that we have different people or different institutions making and applying law. It is that we juxtapose in these institutions people who think in terms of generic principle and others who think in terms of the justice of the individual case. Together, the dialogue between these perspectives jointly contributes to the health of our constitutional common law systems.<sup>62</sup> Yes, it helps efficiency if they understand each other; but it would not help constraining the potential abuse of coercive power if they understand each other so much that they lose their own language.

On this account it is not constitutional dialogue which justifies judicial review – as Kent Roach notes is a common objection to dialogue. But constitutional dialogue between the different perspectives or languages that we choose to privilege in the exercise of power because of our commitment to the rule of law and separation of powers does require judicial review. The degree of strength of that judicial review, I believe, is likely to reflect the circumstances of a particular society and constitution at any particular time.

Nō reira, tēnā tatou katoa.

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<sup>62</sup> See Philip Joseph “Parliament, the Courts, and the Collaborative Enterprise” (2004) 15 KCLJ 321.