

## **The Rule of Law, Judicial Independence and Judicial Discretion**

20 January 2016

### **The Honourable Justice Matthew Palmer**

Judge of the High Court of New Zealand

Kwa Geok Choo Distinguished Visitor

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E ngā waka, e ngā mana, e ngā reo, tēnā koutou, tēnā koutou, tēnā koutou katoa. Justice Coomaraswamy, fellow judges, Dean Chesterman and faculty, ladies and gentlemen, friends and colleagues and my family.

I am honoured to address such a distinguished and interesting audience. And I am honoured to do so as the Kwa Geok Choo Distinguished Visitor at NUS. In 1936 at 16 years of age Madam Kwa Geok Choo was the top student across all of Malaya in the senior Cambridge exams where she went on to study law, gaining first class honours in two years. She was a well-known partner in Lee and Lee. She helped draft the PAP constitution and the water rights agreement between Singapore and Malaysia after separation. She was a public champion for women's rights in Singapore as well as a much loved wife and mother. I know something of the influence that wives and mothers can have on public officers; in providing firm, trusted but different perspectives on all sorts of issues. I am quite sure that Madam Kwa contributed significantly to the shape of the nation state that is Singapore.

My topic tonight starts and ends with the rule of law and judicial independence. I offer you a concept and applications to four different topics: international commercial dispute resolution; judicial review; judicial discretion and constitutional dialogue. This is somewhat in the nature of a smorgasbord or a tapas menu. I hope everyone will find something to their taste – some topics might be swallowed whole, some might be a little piquant, others rather chewy and at least one a meal in itself.

## The Rule of Law

First I should say what, for me, is the rule of law; and what it is not.

I emphasise “for me” because the rule of law is simultaneously ubiquitous and uncertain. It is ubiquitous in its appeal; not only to lawyers and judges but to academics and media commentators, and to politicians of all stripes. Professor Tamanaha quotes Robert Mugabe of Zimbabwe as stating “[o]nly a government that subjects itself to the rule of law has any moral right to demand of its citizens obedience to the rule of law.”<sup>1</sup> Professor Jeremy Waldron, an eminent jurisprude who is from New Zealand though based in the US, discussed the appeal to the rhetoric of the rule of law by *both* sides of US legal and political debate over the 2000 election and the case of *Bush v Gore*.<sup>2</sup>

Perhaps the wide appeal of the rule of law is related to the uncertainty about the concept. Waldron suggests the rule of law is “an essentially contested concept” which can be used to mean little more than “hooray for our side”.<sup>3</sup> Certainly there are significant differences in the content of the rule of law as it is envisaged by legal theorist Joseph Raz compared to Ronald Dworkin or, say, that great British judge Lord Bingham. In what has been characterised as a “formal” conception, Raz suggests that the rule of law means that laws must be passed in the correct legal manner and should be capable of guiding one’s conduct in order that one can plan one’s life.<sup>4</sup> From this he derives a familiar list of specific attributes of the rule of law such as prospectivity, stability, clarity, an independent judiciary, access to courts and the requirement that administrative discretion should not undermine the purposes of legal rules.

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<sup>1</sup> Brian Z Tamanaha *On the Rule of Law: History, Politics, Theory* (Cambridge University Press, Cambridge, 2004) at 2.

<sup>2</sup> Jeremy Waldron “Is the rule of law an essentially contested concept (in Florida)” (2002) 21(2) *Law & Philosophy* 137.

<sup>3</sup> At 141.

<sup>4</sup> Joseph Raz “The Rule of Law and its Virtue” (1977) 93 LQR 195; see also Joseph Raz *Ethics in the Public Domain, Essays on the Morality of Law and Politics* (Clarendon Press, Oxford, 1994).

By contrast, the late Lord Bingham's elegant 2006 David Williams lecture, subsequent article and then book identify eight principles lying behind the "core" of the principle of the rule of law that "that all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts".<sup>5</sup> One of these principles, for example, is that "the law must afford adequate protection of fundamental human rights".

In my previous academic writings I have espoused an approach to constitutional theory based on legal realism. This is an approach to the description and understanding of legal phenomena, not to their normative value. But as a realist, at this point, I ought to declare my own conception of the rule of law.

As I noted in a 2007 article, and a 2008 book, my definition centres on certainty and the freedom from arbitrariness in the law.<sup>6</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. As a judge I can now assert authoritatively that such an approach marries both text and purpose. 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.

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*

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<sup>5</sup> Tom Bingham *The Rule of Law* (Penguin Books, London, 2010) at 8.

<sup>6</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 who apply the law; and*
- *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. We must all accept by now that giving meaning to words is inherently an interpretative exercise by an interpretive community composed of human actors.

But I suggest that 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>7</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.

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

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<sup>7</sup> John Rawls *A Theory of Justice* (Belknap Press, Harvard, 1971).

meaning that resides in the law itself. Law would not rule; it would have no independent meaning. The lawmaker and applier would rule.

I do not imagine that the separation of powers doctrine is controversial either in New Zealand or Singapore. I do, though, propose to consider tonight what that separation really requires. 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? I return to this later in my address.

For now, I simply suggest that 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. It requires that laws be public so that all those to whom it is applied have equal opportunity to observe law. It requires that laws be prospective for the same reason. It requires that laws are 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.

But observe also what the rule of law is not, according to my conception. I yield to no one in commitment to human rights. But I most respectfully disagree with Lord Bingham. I do not consider that human rights is a necessary element of the rule of law. It is a separate concept with a separate justification and basis. I accept that, as such, 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>8</sup> or Dworkin’s “rulebook conception” rather than his “rights based” theory which merges the rule of law with his theory of law itself.<sup>9</sup>

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<sup>8</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).

<sup>9</sup> Ronald Dworkin *A Matter of Principle* (Harvard University Press, Cambridge, 1985).

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 in systems where, as Lord Hope said of the United Kingdom, “[t]he rule of law enforced by the courts is the ultimate controlling factor on which our constitution is based.”<sup>10</sup> In November 2015, Singapore’s Chief Justice Menon reiterated this in a judicial review judgment challenging the legality of an order detaining an individual without trial - *Tan Seet Eng v Attorney General*.<sup>11</sup> He said:

The rule of law is the bedrock on which our society was founded and on which it has thrived. The term, the rule of law, is not one that admits of a fixed or precise definition. However, one of its core ideas is the notion that the power of the State is vested in the various arms of government and that such power is subject to legal limits. But it would be meaningless to speak of power being limited were there no recourse to determine whether, how, and in what circumstances those limits had been exceeded. Under our system of government, which is based on the Westminster model, that task falls upon the Judiciary. Judges are entrusted with the task of ensuring that any exercise of state power is done within legal limits. In 2012, at the Rule of Law Symposium that was held in Singapore, Prof Brian Z Tamanaha observed that judges have the specific task of ensuring that the arms of government are held to the law, and in that sense, the ultimate responsibility for maintaining a system which abides by the rule of law lies with the Judiciary.<sup>12</sup>

It even risks legal incoherence in systems, such as New Zealand, where law practitioners are under a statutory duty imposed by s 4(a) of the Lawyers and Conveyancers Act 2006 to “comply” with the “fundamental obligation” to “uphold the rule of law and to facilitate the administration of justice in New Zealand”. I understand there is no equivalent statutory duty in Singapore's Legal Profession Act.<sup>13</sup> But advocates and solicitors in Singapore's legal profession might well be found by the judiciary to have the same duty. As the present Attorney-General and

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<sup>10</sup> *Jackson v Attorney-General* [2005] UKHL 56, [2006] 1 AC 262 at [107].

<sup>11</sup> *Tan Seet Eng v Attorney General* [2015] SGCA 59 at [1].

<sup>12</sup> Citing Tamanaha "The History and Elements of the Rule of Law" [2012] SJLS 232 at 244.

<sup>13</sup> Legal Profession Act (Cap 161, 2009 Rev Ed).

former Justice V K Rajah said in *Public Trustee and another v By Products Traders Pte Ltd*.<sup>14</sup>

In the final analysis, solicitors, as officers of the court, must in their dealings with the court, acknowledge that their obligations to the court reign supreme, over and above their client's and their own interests. When they enter the profession, solicitors accept a responsibility to assist in upholding the rule of law. To fulfil that responsibility, they must be committed to ensuring the sanctity and soundness of the legal system and the administration of justice. Solicitors must aid and assist, and never impair the court's ability to discharge its impartial adjudicatory responsibilities.

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 that:<sup>15</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.

### **International Commercial Dispute Resolution**

So much for theoretical throat-clearing. Let me move now to some applications of my conception of the rule of law.

First, and relatively briefly, international commercial dispute resolution – a topic with which Singapore is well familiar.

Economic activity requires a framework of stable behavioural expectations in order to function most effectively and efficiently. In the language of law and economics, unpredictability of behaviour, especially of the legal frameworks that govern behaviour, caused by the absence or lack of clarity in the default rules of property

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<sup>14</sup> *Public Trustee and another v By Products Traders Pte Ltd* and others [2005] 3 SLR(R) 449; [2005] SGHC 103 at [57].

<sup>15</sup> Joseph Raz "The Rule of Law and its Virtue" (1977) 93 LQR 195 at 196.

and liability, cause transactions costs and information asymmetries that can inhibit efficient economic exchange.

This is why the doctrine of the rule of law is important not only in a constitutional but in an economic sense. The rule of law, manifested in the concept I have advanced today, militates against the law meaning something that depends on who made it, or who applied it, or to whom it is applied, or that depends on the time at which it is applied.

In a very real way the rule of law is a countervailing force against arbitrary use of executive and legislative power. We are familiar with the constitutional reasons for that. But my point here is that arbitrary use of either executive or legislative power can also be directly detrimental to the stability of the behavioural expectations necessary for efficient economic exchange. That is as true of the rule of international law as it is of the rule of domestic law.

The principle of the international rule of law, in the sense I have defined it, is crucial to the regulatory framework for international commercial dispute resolution because of the importance of stability in behavioural expectations:

- Uncertainty over whether sovereign debt lending can be enforced against a reluctant sovereign, wielding the power of domestic Parliamentary sovereignty, will only be reflected in a higher sovereign risk premium. And it will be contrary to the rule of law.
- If a clause of an international investment treaty favours or unfairly targets a particular nation, or multi-national corporation, international investment and development will be inhibited. And it will be contrary to the rule of law.
- If an international tribunal applies a rule in a new way, retrospectively, the international horses of finance will be frightened. And it will be contrary to the rule of law.

- If a rule of a bilateral investment treaty is applied differently because it is applied or not applied to a particular nation, for example the United States, capital as well as horses will be frightened, flee and become more expensive. And it will be inconsistent with the rule of law.

This is why I suggest that it is in the interests of both sovereign nations and the international commercial community to commit themselves to international dispute resolution mechanisms that comply with the rule of law. More particularly:

- The outcome of a dispute must not depend on who has made the law – it must favour all parties equally. There must not be a systemic bias, for instance, against developing states.
- The outcome of a dispute must not depend on who has applied the law – we must be able to have confidence in the independence of those resolving disputes, such as tribunals being independent of the incentives on part-time arbiters who are otherwise international commercial litigators with a particular ongoing financial interest in certain outcomes.
- The outcome of a dispute must not depend on to whom the law is applied – all borrowers and lenders must be equal before the law.
- And the outcome of a dispute must not depend on when the law is applied – law, including the law governing expropriation, must apply prospectively not retrospectively.

Investment treaties are international law that should conform to the same expectations we have of any form of economic law. Breach of any of the aspects of the rule of law in relation to international investments will increase the cost of capital for us all. And just as, if not more importantly, it would not be consistent with a fundamental building block of our constitutions – the rule of law.

Finally on this topic I pause only to compliment the creation of the Singapore International Commercial Court which I had the pleasure of observing in action this month. Its independence appears directly to address rule of law concerns raised about other international commercial dispute resolution mechanisms – and I look forward with interest to its contributions to international commercial jurisprudence.

### **Judicial Review**

The second brief application of my conception of the rule of law is to the judicial review of administrative action – a topic with which New Zealand has had extensive experience. I do not purport to be familiar with judicial review in Singapore.

By judicial review I do not mean the judicial review of legislation by which the judiciary may strike down legislation for inconsistency with some constitutional instrument. The Singapore judiciary has that power under its constitution though the New Zealand judiciary does not.

Rather I mean the judicial review of administrative action – or, perhaps, of public law decisions – the review by the judiciary of decisions by Ministers, officials or sometimes other bodies to exercise public power. The law of judicial review grew significantly in the 1970s to 1990s in New Zealand. Currently, New Zealand law as it is applied has little requirement for standing in order to entitle someone to take a case and it deploys a wide conception of what decisions may be challenged.

Although there has been less development of judicial review principles in recent years<sup>16</sup> there appears to have been an increasing use of existing principles by litigants. As Deputy Solicitor-General and at the bar I defended, took and intervened in judicial review actions against the Crown and other entities in relation to, for example:

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<sup>16</sup> Matthew Palmer “Judicial Review” in Mary-Rose Russell and Matthew Barber (eds) *The Supreme Court of New Zealand 2004-2013* (Thomson Reuters, Wellington, 2015) 158.

- a decision by a private television channel not to allow two political party leaders participate in a party leaders' debate;
- the non-establishment of a University by a Minister;
- an immigration decision of the District Court;
- the Minister of Health's decision to sack a District Health Board;
- a secondary school's expulsion of a student;
- Customs' imposition of cost recovery fees on an international airport;
- The Minister of Commerce's placement of a number of companies into statutory management;
- the Commissioner of Inland Revenue's imposition of tax;
- the Ministry of Primary Industries' relaxation of biosecurity regulation of the importation of pork products;
- Customs' proposed imposition of millions of dollars of excise duty on a petrol importer;
- the Environmental Protection Agency's determination that a particular technique to modify genes was not genetic modification;
- Ministers' decisions regarding the residential red zone created in Christchurch following the earthquakes;
- The Auckland Council's decision to extend a wharf into the harbor; and
- a local body's imposition of rates on ratepayers on the basis of retrospective Parliamentary authority (where I initially sought a formal declaration that the Act was contrary to the rule of law).

Irrespective of which side I acted for I consider that the availability of the law of judicial review to test the legality of exercises of public power is a direct manifestation of the rule of law. If a public body purports to exercise public power in a specific instance those concerned with that exercise must be able to ask an independent body – the courts – whether the exercise of public power accorded with law. If it did, no harm is done by testing the question and, indeed, public confidence in law and government is enhanced. If an exercise of public power were not made according to law then the rule of law requires that be addressed, as it is

when any other decision-maker acts inconsistently with law. To leave the decision to the executive branch, untested, is to leave the effective determination of the law – a judicial function – to the executive.

As former Justice Sir John McGrath said, speaking for himself and Chief Justice Elias in the New Zealand Supreme Court in 2011:<sup>17</sup>

Judicial review is the common law means by which the courts hold such officials to account.<sup>18</sup> It provides the public with assurance that public officials are acting within the law in exercising their powers, and are accountable if they depart from doing so. Statutes limiting recourse to judicial review to challenge statutory decisions accordingly raise issues of constitutional concern. This concern is reflected in the presumption of the courts, when interpreting such legislation, that it was not Parliament's purpose to allow decision makers power conclusively to determine any question of law.<sup>19</sup>

Legislation which does not on its terms prohibit judicial review, but restricts its availability, can nevertheless interfere with full supervision by the courts of the conformity of activities of government with the rule of law. The courts are reluctant to read legislation in a manner that impairs their ability to hold public officials to account in this way.

## Judicial Discretion

In a previous address in New Zealand I outlined my conception of the rule of law and applied it to legislation in New Zealand.<sup>20</sup> I called for the independent and public assessment of draft legislation as it progresses through the New Zealand Parliament for consistency with the rule of law. Such an idea may or may not be of interest in Singapore but I do not pursue it tonight. And of course the rule of law, which is intimately bound up with judicial independence, is often characterised as in tension with that other primary constitutional doctrine in New Zealand – Parliamentary

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<sup>17</sup> *Tannadyce Investments Ltd v Commissioner of Inland Revenue* [2011] NZSC 158, [2012] 2 NZLR 153 at [3].

<sup>18</sup> Recognised in s 4 of the Judicature Amendment Act 1972. (citation in the original)

<sup>19</sup> *Bulk Gas Users Group v Attorney-General* [1983] NZLR 129 (CA) at [133].

<sup>20</sup> Matthew S R Palmer "Assessing the Strength of the Rule of Law in New Zealand" (paper presented to Unearthing New Zealand's Constitutional Traditions Conference, New Zealand Centre for Public Law, Wellington, 30 August 2013). Available at: [http://works.bepress.com/matthew\\_palmer/38/](http://works.bepress.com/matthew_palmer/38/)

sovereignty. The rule of law is often “prayed in aid” as it were, of the judiciary in that institutional tension.

However, the third application of my conception of the rule of law that I want to discuss tonight is to judicial reasoning rather than to Parliamentary enactments. It seems to me that judges need to be just as, if not more alive, to the nature and implications of the rule of law as do Parliamentarians. In particular, I want to examine the implications of the rule of law for judicial discretion in a particular legal context in New Zealand.

My interest in this was sparked by a case I heard last year. I won’t mention it by name as the doctor in the case was appealing a disciplinary penalty and refusal of name suppression and the appeal period has not yet expired.<sup>21</sup>

I was surprised to find that counsel for the doctor and the relevant Professional Conduct Committee did not agree on whether New Zealand law regarding the approach to appeals of professional disciplinary penalties was settled. Counsel for the doctor submitted it was settled – by the 2007 Supreme Court judgment of *Austin, Nichols* that found that an appellate court in a general appeal “has the responsibility of arriving at its own assessment of the merits of the case.”<sup>22</sup> And indeed *Austin, Nichols* had found just that. It stated that:<sup>23</sup>

Those exercising general rights of appeal are entitled to judgment in accordance with the opinion of the appellate court, even where that opinion is an assessment of fact and degree and entails a value judgment. If the appellate court’s opinion is different from the conclusion of the tribunal appealed from, then the decision under appeal is wrong in the only sense that matters, even if it was a conclusion on which minds might reasonably differ. In such circumstances it is an error for the High Court to defer to the lower Court’s assessment of the acceptability and weight to be accorded to the evidence, rather than forming its own opinion.

However, there is a distinct and longstanding line of authority reiterated in a subsequent Supreme Court judgment, *Kacem v Bashir in 2010*, that commentators

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<sup>21</sup> The judgment is now available as *TSM v A Professional Conduct Committee* [2015] NZHC 3063.

<sup>22</sup> *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141 at [5].

<sup>23</sup> At [16].

accuse of sitting somewhat uncomfortably alongside *Austin, Nichols*.<sup>24</sup> In *Kacem v Bashir* the Supreme Court said this:<sup>25</sup>

In this context a general appeal is to be distinguished from an appeal against a decision made in the exercise of a discretion. In that kind of case the criteria for a successful appeal are stricter: (1) error of law or principle; (2) taking account of irrelevant considerations; (3) failing to take account of a relevant consideration; or (4) the decision is plainly wrong. The distinction between a general appeal and an appeal from a discretion is not altogether easy to describe in abstract. But the fact that the case involves factual evolution and a value judgment does not of itself mean the decision is discretionary.

Both counsel in my case were agreed that this approach applies to the appeal of the name suppression decision, on the basis of Court of Appeal precedent (which counsel for the doctor reserved his right to challenge). This approach to appeals against “a decision made in the exercise of a discretion” is also the approach that New Zealand courts say they take to appeals of criminal sentences and bail decisions.<sup>26</sup>

No doubt it can be difficult to determine when an appeal is susceptible to one approach or the other.<sup>27</sup> And it may be that there is little difference between the two approaches in practice – a decision that is “wrong” or “plainly wrong” founds a successful appeal under either (though there is authority that there is a material difference between those tests).

But I confess to finding the latter approach somewhat troubling. The approach to an appeal from a decision made in the exercise of a discretion appears to me to be tantamount to judicial review – a process which emphasises procedure much more than substance. Unlike the *Austin Nichols* approach it does not necessarily entitle the appellant to judgment in accordance with the opinion of the appellate court. If

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<sup>24</sup> See M B Rodriguez Ferrere “The unnecessary confusion in New Zealand’s appellate jurisdictions” (2012) 12 Otago LR 829.

<sup>25</sup> *Kacem v Bashir* [2010] NZSC 112, [2011] 2 NZLR 1 at [32].

<sup>26</sup> *May v May* (1982) 1 NZFLR 165 (CA); *Blackstone v Blackstone* [2008] NZCA 312, (2009) 19 PRNZ 40 at [8]

<sup>27</sup> See also KJ Keith “Appeals from Administrative Tribunals” (1969) 5 VUWLR 123 cited in *Ophthalmological Society of New Zealand Inc v Commerce Commission* [2003] 2 NZLR 145 (CA) at [37].

minds might reasonably differ it is the lower court's opinion which ought to prevail according to this approach; but the appellate court's according the other approach. Yet Parliament would appear to have conferred a right of general appeal in both instances. The difficulty of determining what is discretionary and what is not makes the distinction shaky but one on which the judiciary finds important consequences.

Perhaps the reluctance to require an appellate court's substantive opinion on an appeal of an exercise of discretion is because such cases are simply hard to decide. No doubt they are. That was clearly put by Lord Fraser in his 1985 remarks about the role of the English Court of Appeal in relation to custody of children.<sup>28</sup>

But I wonder whether my worry about the distinction derives from a rule of law concern. Recall Raz's concern that administrative discretion must not undermine the purpose of the relevant legal rule. And Lord Bingham's second principle of the rule of law that "questions of legal right and liability should ordinarily be resolved by application of the law and not the exercise of discretion." And Hart's recently rediscovered article that struggles to justify discretion as consistent with the rule of law.<sup>29</sup>

At first sight, it does not appear consistent with my conception of the rule of law for the result of an appeal to depend on whether one first instance tribunal or another hears it. Yet that seems to be the implication of an approach that accords deference to the substance of a first instance over an appellate decision.<sup>30</sup> I'm not sure whether that is exacerbated or mitigated by the discretion involved in determining whether an appeal is from an exercise of discretion!

The Supreme Court's approach in *Austin, Nichols* to what is required in a case that Parliament has deemed worthy of a general appeal requires a substantive opinion of the appellate court. Using the same approach in relation to a relatively wide

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<sup>28</sup> *G v G* [1985] 2 All ER 225 (HL) at 228.

<sup>29</sup> HLA Hart "Discretion" (2013) 127 Harv L Rev 652 and see Geoffrey C Shaw "H L A Hart's Lost Essay: 'Discretion' and the Legal Process School" (2013) Harv L Rev 693.

<sup>30</sup> Rodriguez Ferrere, above n 22.

discretion exercised by a first instance tribunal could simply require the appellate court to be clear about the nature of the relevant law - the relevant substantive law and relevant legal methodology or steps of legal reasoning. That seems to me to be what usually happens in sentencing, bail or name suppression appeals anyway.

I found the approach in the case before me relatively straightforward to resolve. But I did say this:<sup>31</sup>

In the abstract, “discretion” as a concept, and its relationship with the rule of law, has been the subject of extensive jurisprudential consideration [here I cited Dworkin, Hart and other academics – which I hasten to add is not the norm in my or other NZ High Court judgments]. In practice, of course, there are elements of discretion in many aspects of the judicial enterprise, including the identification of which law is relevant, the identification of which facts are material, and in the interstices of the law’s application to the facts. At a basic level, I consider the rule of law requires that the application of law in imposing a penalty must involve at least a modicum of transparency, certainty and predictability. That, in turn, favours the explicit application of identified legal methodology and principles to shape what may otherwise become the relatively arbitrary exercise of discretion. Such methodology and principles constitute law. They mean a decision-maker’s reasoning can be more easily identified and analysed on appeal where an appeal is provided for by legislation. This appears to me to enhance the rule of law.

As I’m sure you will understand, I offer my questions tonight about a long standing line of New Zealand authority tentatively, as a new judge, and in a spirit of inquiry. The law in New Zealand as it has been determined by the Supreme Court is relatively clear; for now. If the Court decides to revisit the topic, it will be interesting to see whether and how the rule of law figures in the court’s reasoning.

### **Constitutional Dialogue**

Finally, I turn to a larger constitutional canvas to explore a further final question about the rule of law. Here I return to the question of what exactly is required by the rule of law and separation of powers. Is it enough that the power to make law and to apply and interpret law is exercised by different, separate, institutions. Or should these powers also be exercised by institutions with different or separate mindsets or perspectives?

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<sup>31</sup> At [15].

This question derives from the confluence of two areas of interest of mine. The first is the subject of the course I am teaching here at the National University of Singapore this month. I am teaching a group of very good students “Law and Policy”; a course I have taught before, at Hong Kong University, and a topic on which I have written in the past.<sup>32</sup> My core thesis is that the disciplines of law and of 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. 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. only 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, however, 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 not 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. The paradigms of law and policy, as

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<sup>32</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).

disciplines, carry with them different methodologies, different mindsets, different perspectives. I conceive of them as different “languages” – 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 identifying all possible options but can forget to test their analysis in practical applications to specific scenarios. They theorise and get impatient with anecdotes.

I should say also that I regard politics as a third language – one of bargaining, negotiating and logrolling – persuasion, compromise and pragmatism.

I then apply this construct to the second area of interest: constitutional dialogue. Constitutional dialogue theory derives from the 1997 article by Peter Hogg, another New Zealand academic this time based in Canada, and Allison Bushell.<sup>33</sup> The theory is that the old binary (dare I say paradigmatically legal approach) of asking whether the judiciary or legislature should be supreme should give way to a more dynamic, iterative understanding of constitutional interactions. There’s a clue in the title of their first article: “The *Charter* Dialogue between Courts and Legislatures (Or Perhaps the *Charter of Rights* Isn’t such a Bad Thing After All)”. So, if the Canadian Supreme Court strikes down a statute for being unconstitutional, that does not constitute judicial supremacy because that is not the end of the story. In 67 of 89 cases to 2007 they found that the Canadian Parliament responded by re-enacting another statute to address its objective in a different way.

Rather than a one shot game which determines “supremacy”, the development of constitutional law and policy is more dynamic. Each branch of government reacts to each other – as in conversation or dialogue – through their Acts and judgments respectively to explore and clarify the meaning of law and policy iteratively, over time. My friend Dr Yap Po Jen has recently published an excellent book entitled

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<sup>33</sup> Peter W Hogg and Allison A Bushell, “The *Charter* Dialogue between Courts and Legislatures (Or Perhaps the *Charter of Rights* Isn’t such a Bad Thing After All)” (1997) 35 *Osgoode Hall L J* 75.

*Constitutional Dialogue in Common Law Asia*, applying this theory to Singapore, Malaysia and Hong Kong.<sup>34</sup>

The same dynamic occurs in relation to law and policy at a sub-constitutional level. When a court interprets a statute it gives it meaning in a specific instance. If Parliament doesn't like that meaning it can change it by legislative amendment. This is inter-institutional dialogue about the making and application of law and the policy underlying it.

And my suggestion is that each of the branch of governments speak in their own, different, language – via their own methodologies or perspectives.<sup>35</sup> So:

- 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 Parliament speak the language of politics – mediating policy recommendations through the reality of bargaining and negotiating in order to pass legislation. (Though good Ministers eventually become bilingual.)
- And the judiciary interprets legislation and makes common law in the language of the common law – by focusing on the factual context of specific cases.

Perhaps here is a clue as to why a common law judiciary is relatively more assertive in interpretation of some subject matters than others. 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

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<sup>34</sup> Po Jen Yap *Constitutional Dialogue in Common Law Asia* (Oxford University Press, Oxford, 2015).

<sup>35</sup> 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 Peoples: Participation in Governance* (Victoria University Press, Wellington, 2011) 50.

social science data and conceptual frameworks of analysis. But such a 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.

But more generally I say that the dynamics of constitutional life of a nation, as characterised by this framework, is 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.

And it seems to me that the normative constitutional health of New Zealand government is improved by having the different branches of government which exercise public power thinking and speaking in different languages. You 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. As that doyen of American constitutional scholarship, Alexander Bickel, said:<sup>36</sup>

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.

The same sort of checks, bringing different perspectives to bear, are present in other specific aspects of constitutional design – such as the difference in the United States between the very short term local perspective of Congressmen in the House of Representatives and the longer term state wide perspective of Senators. New Zealand institutionalises the presence of Māori voices in the electoral system and Parliament. Singapore, as I understand it, does the same with opposition MPs and minority groups.

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<sup>36</sup> Alexander M Bickel *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (2<sup>nd</sup> ed, Yale University Press, New Haven, 1962) at 261.

And here, finally, is my link to the rule of law, separation of powers and judicial independence. 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. This is clearly not the case of Singapore or New Zealand where the language of common law is well entrenched in the courts and quite different from what is spoken within the political branches. But theoretically – if it were the case – would it be a constitutional problem?

Perhaps not. After all if everyone is speaking in different languages in an ordinary conversation there would be chaos if they don't understand each other. Indeed, in New Zealand, one might sometimes wish for a bit better understanding by the branches of government of the languages the others speak.

But, in the hypothetical extreme, I think I would worry about a uniform mindset across all branches of government. The great advantage of the common law method seems to me to be 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 question: is this part of the separation of powers and the rule of law? 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.

My instinct is that this 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>37</sup> Yes, it helps if they understand each other; but perhaps it would not if they understand each other so much that they lose their own language.

This is the most abstract and academic of my tapas menu of applications of the rule of law tonight – and the one that I thought might be a meal in itself. But perhaps the academics here will be stimulated.

## **Conclusion**

I have covered a range of different topics at some risk of incoherence. I have done so in order to offer and to explore the implications of a conception of the rule of law that might at first sight seem relatively narrow. But I suggest it can offer useful normative implications for:

- essential features of the systems of international commercial dispute resolution;
- the utility of the law of judicial review;
- the risks and limits of judicial discretion; and
- important aspects of constitutional design.

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<sup>37</sup> See Philip Joseph “Parliament, the Courts, and the Collaborative Enterprise” (2004) 15 KCLJ 321.

At the heart of all of these diverse topics is the importance of the rule of law – of the ideal of certainty and freedom from arbitrariness and of independence of the application of law from human interests. I add to this the normative utility and complementarity of firm, trusted but different perspectives in the joint enterprise of formulating and applying law and policy.

Nō reira, tēnā koutou, tēnā koutou, tēnā koutou katoa.