What is the rule of law and why does it matter?

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Introduction

It is a privilege to be asked to give this year's Robin Cooke lecture. Lord Cooke's unique career as both a judge in New Zealand's appellate courts and in the United Kingdom's House of Lords has meant that both countries share the benefit of his remarkable contribution to the common law. In New Zealand, he was instrumental in shaping a distinct jurisprudence that departed from English law, whilst also recognising the importance of our shared common law heritage.[1] Part of this shared heritage is that the rule of law is a fundamental constitutional principle of both our legal systems.

The rule of law's importance is recognised in the respective Acts of Parliament that created the UK Supreme Court and the New Zealand Supreme Court. In the UK, section 1 of the Constitutional Reform Act 2005 states that nothing in the Act affects "the existing constitutional principle of the rule of law". Similarly, section 3 of New Zealand's Supreme Court Act 2003 stated "[n]othing in the Act affects New Zealand's continuing commitment to the rule of law", a formula repeated in section 3 of the Senior Courts Act 2016. But these statutes leave unclear what exactly it is that they do not affect, as neither seeks actually to define the rule of law. This is no doubt due to the controversy surrounding the numerous attempts to provide such a definition. As Jeremy Waldron has observed, the rule of law is an "essentially contested concept", with academics, judges and lawyers engaged in never-ending debate about what it does, and does not, mean.[2] In my view, the debate reflects a creative tension between different values at the heart of the concept. To understand what is at issue in the debate it is desirable to strive for conceptual clarity regarding those sometimes competing, sometimes mutually reinforcing values.

Given the difficulties associated with the concept of the rule of law, the questions posed by the topic of my lecture – 'what is the rule of law and why does it matter?' – constitute a challenging inquiry. But the importance of the rule of law and its centrality in the functioning of modern liberal democracies like those of the UK and New Zealand mean it is an inquiry which is well worth pursuing. I make no claim that I will resolve and put to rest this debate. It has been going on for thousands of years. But in this lecture I hope I can make a thoughtful contribution to it from a particular judicial and jurisdictional perspective.

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[1] Lord Cooke "The Dream of an International Common Law" in Cheryl Saunders (ed) *Courts of Final Jurisdiction: The Mason Court in Australia* (Federation Press, Sydney, 1996).

[2] Jeremy Waldron, 'The Rule of Law as an Essentially Contested Concept' (Social Science Research Network, 19 March 2021) <https://papers.ssrn.com/abstract=3808198> accessed 9 November 2024.

I contend that the concept of the rule of law has particular importance in the legal systems of the UK and New Zealand because they lack written constitutions, which is unusual in the modern world. Without a set of codified rules, reference to general background legitimating principles is necessary in order to create a normative framework for the conduct of public affairs which transcends a purely descriptive account of power relationships.[3] In the late nineteenth century, the British Jurist A.V. Dicey offered the sovereignty of Parliament and the rule of law as two of the fundamental legitimating principles of the UK's unwritten constitution,[4] and these principles continue to play a fundamental role in our legal systems.

A realistic account of the rule of law has to recognise that it is not one thing. The concept of the rule of law is based on a cluster of ideas, the importance of which spans economic, political and moral domains.

I will argue that what is often referred to as a formal conception of the rule of law has substantive and significant value in itself. It provides a minimum content for the rule of law which should command our loyalty, even if one does not regard the concept as justifying or committing us to "thicker" versions of it involving a greater substantive set of principles. As I will explain, I by no means rule out the potential viability or defensibility of more substantive versions of the rule of law. But the more substantive the interpretation given to the concept, the greater the tension with the other foundational pillar of the constitution, namely the democratic principle which underpins the sovereignty of Parliament, in its modern instantiation. How that fundamental tension is resolved in any given polity depends on the political and legal culture of that polity.[5] The basic question is, what substantive content of law and what forms of decision-making secure legitimacy for governance structures in that society? There is no simple a priori *legal* answer to that.

I will begin with an account of the formal conception of the rule of the law and the benefits associated with it. In the economic domain, a formal conception of the rule of law provides solutions to collective action problems, a response to the Tragedy of the Commons and fosters the predictability and certainty necessary to incentivize economic investment. In the political domain, it is essential both for the construction of political authority and then to give effect to democratic choices made by Parliament. In the moral domain, a formal conception of the rule of law respects the dignity of individuals and allows them to exercise agency under conditions of personal responsibility.

I will then turn to examine the ways in which the rule of law concept has a real-world impact in the case law of both the UK and New Zealand. These cases show how tensions arise both between different aspects of the rule of law itself, and between the rule of law and other constitutional principles, particularly parliamentary sovereignty.

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[3] Philip Sales, 'The Rule of Law and the Separation of Powers' [2022] PL 527, 528.
[4] A.V. Dicey, *Introduction to the Law of the Constitution* (1st edn, Macmillan 1885).
[5] J Frerejohn, J Rakove, J Riley (eds), *Constitutional Culture and Democratic Rule* (Cambridge University Press 2001).

What is the rule of law?

The starting point for many discussions about the rule of law is a division of theories of the rule of law into two categories: formal conceptions and substantive conceptions,[6] or 'thin' as opposed to 'thick' conceptions. Paul Craig argues that formal, or thin, conceptions of the rule of the law only require the law to have attributes which do not determine the content of the law, at any rate beyond a fairly minimal level. These are contrasted with substantive, or thick, conceptions of the rule of law, which hold that the rule of law requires certain substantive content of the law, such as conformity with human rights.

Lon Fuller's conception of law is often seen as an exemplar of the formal conception.[7] In his book *The Morality of Law*, Fuller offered eight principles that he argued were constitutive of the law.[8] There must be general rules, rather than ad hoc decisions or commands. The rules must be publicised and available to those who are expected to observe them. They must be of prospective, rather than retrospective, effect. The rules must be clear and intelligible. They must not be contradictory. They must not require the impossible. The rules must be relatively stable across-time. And finally, the implementation of the rules by officials must accord with the rules as they have been published. The unifying aim for all these principles is that the law should be capable of guiding human conduct. Fuller emphasised that the eight principles are neutral between a variety of substantive aims of the law. He called them the 'inner morality of law' in order to contrast them with the 'external' moral aims that the law may pursue.[9] For example, the internal morality of law tells us nothing about whether the law should raise income tax or legalise assisted dying.[10]

Elsewhere in Fuller's writings he added to these eight principles another important element of the formal conception of the rule of law.[11] This is the importance of access to the courts. Jeremy Waldron develops this idea, explaining that it is an aspect of the rule of law has been much neglected in academic commentary.[12] Whilst lawyers have focused on aspects of the law itself (whether formal or substantive in nature), when lay people think of the law they tend to think of the institutions and processes central to law's application: namely what courts do. To paraphrase Waldron, 'the rule of law is not just about rules, it is also about their impartial administration'.[13]

This is not a novel development in theorising the rule of law. Writing in the nineteenth century, Dicey "placed as much emphasis on the normal operation of the ordinary courts as he did on the characteristics of the norms they administered".[14]

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[6] Paul Craig, 'Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework', *The rule of law and the separation of powers* (Routledge 2017).
[7] Brian Z Tamanaha, *On The Rule of Law: History, Politics, Theory* (Cambridge University Press 2004) 93.
[8] Lon Fuller, *The Morality of Law* (Yale University Press 1969) 38–39.
[9] ibid 153.
[10] ibid 96.
[11] Kenneth I Winston (ed), 'Forms and Limits of Adjudication' in Lon L Fuller, *The principles of social order: selected essays of Lon L. Fuller* (Rev edn, Hart 2001) 113.
[12] Jeremy Waldron, *Thoughtfulness and the Rule of Law* (Harvard University Press 2023) 38.
[13] ibid.
[14] ibid.

We must be careful, however, to see what it is that is important about access to the courts. Dicey's view was that it was only traditional-type common law courts which could satisfy this element of the rule of law. As a result, he strongly criticised the rise of administrative tribunals in the twentieth century, which were established to hear appeals in the growing social welfare state. He argued that "[a]dministrative tribunals always tend to exclude the jurisdiction of the ordinary law Courts" and that they are "never a completely independent tribunal" as they were staffed by Government officials and therefore exposed to political bias.[15] Whatever the flaws of their predecessors, in the UK modern administrative tribunals are now staffed by judges with guaranteed security of tenure and play an essential role in securing access to justice, with relaxed rules of evidence and representation that increase their accessibility. For the rule of law, the important point is not access to courts per se, but access to an impartial system of adjudication. As Waldron puts it, what is required are "institutions that apply norms and directives established in the name of the whole society to individual cases, that settle disputes about the application of those norms, and that do so through the medium of hearings".[16] Once Fuller's eight principles are supplemented with access to such institutions, they form a cluster of ideas which have an underlying affinity and constitute together a viable conception of the rule of law.

Against these more formal conceptions of the rule of law, a popular substantive conception of the rule of law is that offered by Lord Bingham. He argues the essence of the rule of law is that "all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly and prospectively promulgated and publicly administered by the courts".[17] Thus stated, the principle seems to resonate with Fuller's conception. Lord Bingham elaborates on this notion through a set of principles, many of which overlap with Fuller's; but he also includes principles that Fuller would categorise as falling within the law's external aims, namely that the law must afford adequate protection for fundamental human rights and that the state must comply with its obligations in international law.

This division between formal and substantive categories is helpful to give a broad sense of the spectrum along which theories of the rule of law are ranged. In the context of the UK, I would argue that the appropriate version of the conception is, like Fuller's, more formal in nature. That is because of the strength of the democratic principle reflected through the doctrine of the sovereignty of Parliament. It is not my place to offer a judgment on where the appropriate resting point should be for a society like that in New Zealand.

However, I should say that I do not entirely accept the rather stark distinction drawn by Craig. This is for three reasons. First, as John Gardner argues, it is wrong to suggest that 'formal' conceptions of the rule of law say nothing about the content of the law.[18] One 'formal' attribute is that the laws are sufficiently clear and intelligible. However, whether a law is clear or not depends on the *content* of that law; if a law is unclear by, for example, stating that 'it is

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[15] AV Dicey, *Lectures on the Relation between Law and Public Opinion in England during the Nineteenth Century* (2nd edn, Macmillan 2019) xiiv.
[16] Waldron (n 12) 46.
[17] Lord Bingham, *The Rule of Law* (Reprint edn, Penguin 2011).
[18] John Gardner, 'The Supposed Formality of the Rule of Law' in John Gardner, *Law as a Leap of Faith: Essays on Law in General* (Oxford University Press 2012).

an offence to drive above a reasonable speed', the way to rectify this is to alter the content by being more specific, such that the law states an exact value, such as '70mph'.[19] Similarly, if a law is retrospective then that is because its *content* is directed at the legality of something that took place in the past. That can be corrected by ensuring that its content is directed at the legality of things happening in the future, so that people have fair notice of their obligations at the time they act.

Secondly, the rule of law is not a static ideal that perfectly obeys such a neat division. It cannot be universally applied, without differentiation, across all societies without regard to specific context. Precisely because it is constituted by a cluster of values, each of which is capable of being given greater or less prominence as part of the whole package, it is a concept that is flexible and attentive to local circumstances. Further, that group of values may be in tension with other values which are also essential in a liberal democracy, namely those which are constitutive of the democratic element and collective self-government. The relative weight given to these competing values may also vary, depending on the challenges faced by a particular society and background ideas of legitimacy which prevail in that society. Comparison of different states within the family of those which can be described as liberal democracies shows that different polities strike these balances in different ways.

Also, it is possible for a polity to have a conception of the rule of law which is 'thick' in some places and 'thin' in others, depending on how ideas of legitimacy vary across the gamut of public decision-making. For example, in the UK there is a strong emphasis placed on the need for the citizen to be able to have access to the courts to obtain justice, which feeds into a very strong presumption (to put it no higher) against interpretations of legislation which would prevent or impede that;[20] but in other areas – for instance in relation to social security benefits – there is a strong impulse to accept the determinations made by Parliament, even if they might be thought harsh.[21]

The third reason I question the starkness of the distinction is that it suggests that formal, or 'thin', theories of the rule of law are undemanding and anaemic conceptions of the law. However, the principles expressed by Fuller place significant demands on lawmakers and the fact is that many states around the world do not to live up to them. Indeed, they are demands that all legal systems will fail to meet in some respects from time to time. Describing them as merely formal risks taking these principles for granted, rather than regarding proper adherence to them as a matter requiring constant vigilance. The distinction might also be taken to suggest that only substantive conceptions result in substantive, as opposed to merely procedural, benefits. I would argue to the contrary, that adherence to the rule of law in its formal version provides significant substantive benefits in the economic, political and moral domains.

Starting with the first of these three domains, Max Weber explains that where the law satisfies the requirement that the law be stable and predictable this has significant economic benefits. If citizens can predict when the law will impact upon them and hence are enabled to

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[19] I use this as a simple illustration, but acknowledge that "reasonable" in many contexts is sufficiently clear to guide human conduct, see the discussion in Waldron (n 12) 112ff.

[20] *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147; *R (UNISON) v Lord Chancellor* [2017] UKSC 51; *R (Privacy International) v Investigatory Powers Tribunal* [2019] UKSC 22 [2020] AC 491.

[21] See eg *R (SC) v Secretary of State for Work and Pensions & Ors* [2021] UKSC 26, [2022] AC 223 (two child limit on benefits for families).

plan their affairs, they can have confidence to invest for economic gain. Where the law defines and enforces property rights it provides an answer to the Tragedy of the Commons.[22] The owner of property can invest in its protection and development in the expectation that the fruits of this work will accrue to them.

Furthermore, citizens can have confidence to trade with each other, knowing the state will enforce their contracts. As the economist Joseph Stiglitz points out,[23] a capitalist economy depends critically on this aspect of the rule of law. Similarly, Weber ties the development of the rational-bureaucratic state in the West, as distinct from state forms based on legitimisation through tradition or charismatic rule, to the development of capitalism. The rational-bureaucratic state allows for the calculability necessary for the accumulation of capital and capitalist economic planning and investment, whereas traditional forms of rule made the law and administration of justice unpredictable. Capitalism needs reliable calculability.[24] The same could in fact also be said of other types of economic system, including our modern mixed economies which are versions of democratic capitalism.[25]

It is these economic benefits that have led the World Bank to monitor the rule of law as one of its six governance indicators, using the index compiled by the World Justice Project.[26] However, despite the obvious economic benefits of the rule of law, attempts at quantifying it and ranking countries by using it as a metric in relation to economic development should be viewed with circumspection.[27]

For a start, the rule of law is a multi-faceted, qualitative ideal that makes for difficult economic quantification. Neil MacCormick points to a tension between the rule of law as governance through predictable rules and the arguable character of law.[28] Through our practice of contestation in court it is always open to parties to present rival arguments about what the law is and how it applies to the facts; and as he says "[a] process of evaluating the relative strength of competing arguments is bound to be a matter of more-or-less, a matter of opinion, calling for judgment".[29] The very practice of law has an effect of destabilising it and making it less predictable. What is required is not absolute predictability but a sufficient level of predictability to give confidence to encourage people to engage in economic activity.

Moreover, there is deep disagreement about what the rule of law entails and this opens the door to the ideological manipulation of the ideal for other purposes. For example, an organisation called the Centre for Financial Stability has an index which includes as indicators

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[22] Joseph E. Stiglitz, *The Road to Freedom: Economics and the Good Society* (Allen Lane 2024), ch 5, 'Contracts, the Social Contract, and Freedom', 62.
[23] Stiglitz, *The Road to Freedom* (n 21), xvi ("without rules and regulations enforced by government there could and would be little trade … A world without any restraints would be a jungle in which only power mattered … It wouldn't be a market at all. Contracts agreeing to receive a good today in return for payment later couldn't exist, because there would be no enforcement mechanism") and ch 5, 'Contracts, the Social Contract, and Freedom'.
[24] M. Weber, *General Economic History* (1923) 341-342.
[25] Martin Wolf, *The Crisis of Democratic Capitalism* (Allen Lane 2023).
[26] 'Worldwide Governance Indicators' (*World Bank*, 2024) <https://www.worldbank.org/en/publication/worldwide-governance-indicators> accessed 18 November 2024; World Justice Project, 'WJP Rule of Law Index' (2024) <https://worldjusticeproject.org/rule-of-law-index> accessed 18 November 2024.
[27] Waldron (n 12) 259–261.
[28] Neil MacCormick, *Rhetoric and the Rule of Law: A Theory of Legal Reasoning* (Oxford University Press 2005), ch 2.
[29] ibid 14.

"the Burden of Government Regulation", "Efficacy of Corporate Boards", and "the Strength of Investor Protections".[30] This suggests the real aim of many of these ranking systems is to persuade governments to adopt substantive content into their law, in particular laws protecting property rights and foreign investment. The extent to which a legal system should protect these matters is a subject of political contestation for good reason, as they require trade-offs with other aspects of the public interest. As Jeremy Waldron has argued, to say that the rule of law requires their maximisation without qualification is a distortion.[31] Instead, the formal conception of the rule of law's emphasis on predictability and stability has sufficient economic benefits without importing these contested substantive ideals.

Turning from the economic to the political domain, the rule of law – as a constraint on government, limiting its discretionary powers and protecting against capriciousness – serves an important legitimating function for the exercise of public power. According to David Beetham, in his book *The Legitimation of Power*, power is regarded as legitimate when its exercise is subject to rules or principles.[32] Acceptance by a ruler of limitations upon their power under a system of law can actually serve to increase that power, by gaining the consent of their subjects to their rule. This argument is tellingly illustrated by the advice given to rulers in the sixteenth century by Jean Bodin, who is usually regarded as a theorist of unlimited sovereignty.[33] In a real sense, when considering the generation of political authority and hence power, less is more. Political authority is a valuable commodity when one is seeking to achieve a well ordered state.

The legitimating aspect of the rule of law might in theory be attractive to a despot as well as to a democrat, but there is also a particular way in which a formal conception of the rule of law is needed for democracy. In a democracy the public as a collective seeks to achieve self-rule. This can only be done if their will is given a concrete expression through laws which can be used to guide the conduct of the political community. It is the cluster of principles that constitute the rule of law which makes this possible. The requirement of generality ensures the laws apply equally to the public as a whole; the requirement of accessibility ensures that they are available to all; and the requirements of stability and certainty mean that the law is capable of guiding the community.

This does not mean that democracy and the rule of law are the same thing. A democratically elected government and a legislature may depart from the rule of law in any number of ways, such as passing retrospective legislation or simply refusing to comply with the law at all. Developing this theme, Raymond Geuss argues that the component elements of liberal democracy involve internal contradictions and are in tension with each other.[34] The rule of law is ultimately difficult to reconcile in full rigour with the discretion inhering in the executive and its ability to react speedily to events, which is an inevitable part of governing.[35]

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[30] The Center for Financial Stability, 'CFS Rule of Law Index' <https://centerforfinancialstability.org/rli.php> accessed 18 November 2024.
[31] Waldron (n 12) 260.
[32] David Beetham, *The Legitimation of Power* (Palgrave Macmillan 2091).
[33] Jean Bodin, *The Six Books of the Republic* (1576); as analysed in Stephen Holmes, *Passions and Constraint: on the theory of liberal democracy* (University of Chicago Press 1995).
[34] Raymond Geuss, *History and Illusion in Politics* (1st edn, Cambridge University Press 2010).
[35] ibid 108.

These are not, therefore, elements which form part of the same concept; they support different claims and different values, and the balance between them is arrived at by compromise.

The final benefit I wish to touch on is the moral value that is inherent in a formal conception of the rule of law. This might appear to be contradiction in terms. However, Fuller emphasized that just because his vision of the law was neutral between *some* different moral aims of the law, this does not mean that it is completely morally neutral. There is a deep connection between the formal conception of law and respect for human agency.[36] As Fuller put it:

> "To embark on the enterprise of subjecting human conduct to the governance of [law] involves of necessity a commitment to the view that man is, or can become, a responsible agent, capable of understanding and following [law], and answerable for his defaults. Every departure from the principles of the law's inner morality is an affront to man's dignity as a responsible agent."[37]

The dignity-enhancing aspect of the rule of law is also a theme picked up by Jeremy Waldron.[38] For Waldron, dignity is "the status of a person predicated on the fact that she is recognized as having the ability to control and regulate her actions in accordance with her own apprehension of norms and reasons that apply to her".[39] Whilst many theorists focus on the law's coercive power, in reality law mostly operates through what Henry Hart and Albert Sacks called 'self-application'[40]: "people applying officially promulgated norms to their own conduct, rather than waiting for coercive intervention from the state".[41] In this way, the formal conception of the rule of law presupposes a commitment to the dignity of human beings as rational agents.

To sum up, here is Neil MacCormick again:

> "The Rule of Law is a possible condition to be achieved under human governments. Among the values that it can secure, none is more important than legal certainty, except perhaps its stablemates, security of legal expectations and safety of the citizen from arbitrary interference by governments and their agents. For a society that achieves legal certainty and legal security enables its citizens to live autonomous lives in circumstances of mutual trust."[42]

If a formal conception of the rule of law already gives us these benefits, why should we adopt a more substantive one? As I have indicated, Lord Bingham defended a conception of the rule of law that included the full range of human rights, including the right to privacy,

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[36] Kristen Rundle, *Forms Liberate: Reclaiming the Jurisprudence of Lon L Fuller* (Hart Publishing 2012) 2, 9–11, 97–101.
[37] Fuller (n 8) 162.
[38] Waldron (n 12) 73ff.
[39] ibid 76.
[40] Henry M Hart Jr and Albert M Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* (William N Eskridge Jr and Philip P Frickey eds, West Academic 1994) 120–21.
[41] Waldron (n 12) 80.
[42] MacCormick (n 28) 16.

family life and freedom of expression. Lord Bingham's argument for this was that "there are some practices so abhorrent as not to be tolerable" and that a state which departs from these human rights should not be given the ennobling – and legitimating - accolade that it adheres to the rule of law. This argument explains why human rights should be protected in every country, but it does nothing to explain why this is itself required by the rule of law. As John Gardner points out,[43] Lord Bingham is making the following invalid argument: conformity with the rule of law is a hallmark of civilization; human rights are also a hallmark of civilisation; therefore human rights are part of conformity with the rule of law.

I should emphasise at this point that to say that the concept of the rule of law does not include human rights or democracy in no way diminishes the importance of these values. We live in a world in which value pluralism obtains, meaning that there are numerous and irreducible moral values.[44] The rule of law, human rights, and democracy are each themselves basic values – or clusters of values - which cannot be reduced into one another and we should not seek to unite them by searching for an overarching common metric.

Since the rule of law attracts near universal affirmation, there is a temptation to seek to inflate the concept so as to include ideas that are more contested. This is the manoeuvre of the Centre for Financial Stability's rule of law index I mentioned earlier, which seeks to incorporate protection for foreign investment under the guise of the rule of law. John Tasioulas rightly argues that there are good reasons why we should take care to resist this temptation to inflate the concept in this way.[45] The danger of this sort of conceptual overreach is that we lose sight of the distinctive idea conveyed by a given concept through its conflation with quite separate ideas, obscuring the fact that all these distinct ideas identify distinct values which we must deliberate over and balance through compromise.

There is a tendency in legal and political theory to attempt to shortcut this process of compromise in order to assert a consensus, which is in fact illusory.[46] Importing ideals which are subject to significant contestation into the concept of the rule of law is an example of this. However, as Bernard Crick writes in his book *In Defence of Politics*, consensus will always be elusive in modern, multi-cultural societies with diverse values and beliefs. Legitimacy in such societies is not maintained by the achievement of consensus, but by procedures that enable all parts of society to engage in political deliberation, such that the losing party believes that the outcome is legitimate, even if they believe it is wrong.[47] Inflating the concept of the rule of law

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[43] John Gardner, 'How to Be a Good Judge' (2010) 32 *London Review of Books* <https://www.lrb.co.uk/the-paper/v32/n13/john-gardner/how-to-be-a-good-judge> accessed 17 November 2024.

[44] Philip Sales and Frederick Wilmot-Smith, 'Justice for Foxes' (2022) 138 LQR 583.

[45] John Tasioulas, 'Conceptual Overreach Threatens the Quality of Public Reason' (*Aeon* 2021) <https://aeon.co/essays/conceptual-overreach-threatens-the-quality-of-public-reason> accessed 18 November 2024.

[46] See, eg, the critiques of this tendency in Lorna Finlayson, *The Political is Political: Conformity and the Illusion of Dissent in Contemporary Political Philosophy* (Rowman & Littlefield 2015); Benjamin Barber, *The Conquest of Politics: Liberal Philosophy in Democratic Times* (Princeton University Press 1988).

[47] Bernard Crick, *In Defence of Politics* (5th edn, Continuum 2000) 177; See also Bernard Williams, *In the Beginning Was the Deed: Realism and Moralism in Political Argument* (Geoffrey Hawthorn ed, Princeton University Press 2008) 126; and David Feldman in David Feldman (ed), *Law in Politics, Politics in Law* (Hart 2013), 261 ("… democracy and constitutions are not about securing agreement. They are concerned with managing disagreement").

conceals the underlying conflicts and hinders thoughtful debate about the trade-offs which are required.[48]

One of these conflicts is between democracy and the rule of law. In some instances, rule of law principles may have to give way to these other values to secure what is good in them. A recent example is the law passed in the UK pardoning gay men who were convicted for consensual sex under previous criminal legislation, now repealed.[49] Whilst this technically breaches the rule of law principle against retrospectivity, a democratically elected Parliament, representing the changed morals of the political community, has weighed these different values and decided that the rights of these men outweighs such considerations.

Similarly, there are tensions and conflicts *within* the cluster of ideas which constitute the notion of the rule of law. For example, there may be a tension between the principles of certainty and accessibility. A statute may use simple, untechnical language that can be understood by any lay reader, thus promoting accessibility. But this may in fact produce results which are excessively crude and unjust, making it uncertain whether a court will actually apply the statute in that way.[50] The legislature may seek to remediate such potential injustice by introducing complex qualifications to the apparently clear statement of the rules, perhaps by employing supplementary definitions in Schedules, cross-references to other legislation and so on. This may make the meaning of the legislation more certain, but at the same time less accessible.

If we attempt to sidestep the conflicts of values which occur within the rule of law idea and those which arise between the rule of law and other values by concealing them through use of an expanded definition of the rule of law, we undermine our ability to engage in deliberation about how we should resolve these conflicts. The denial that there are such conflicts is associated with a form of elite managerial politics which may be felt to be deeply frustrating for those who do not accept the consensus and may serve to make political modes of accommodating the tensions more difficult.[51] Contestation within a democratic framework is healthy rather than something to be avoided at all costs.

My final reason for taking care with what goes into our conception of the rule of law is that, particularly in legal systems with unwritten constitutions such as ours, importing greater substantive content into the rule of law has consequences for the balance of power between the courts and other branches of the state. This is a theme I wish to take up in addressing my second question of why the rule of law matters.

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[48] Tasioulas (n 45).

[49] 'Thousands Officially Pardoned under "Turing's Law"' (*GOV.UK*) <https://www.gov.uk/government/news/thousands-officially-pardoned-under-turings-law> accessed 18 November 2024.

[50] There are interpretive techniques which may allow a court to avoid highly unjust results. The so-called "principle of legality" is one of them: see Philip Sales, "A Comparison of the Principle of Legality and Section 3 of the Human Rights Act 1998" (2009) 125 LQR 598; Jason Varuhas, "The principle of legality" [2020] CLJ 578.

[51] cf Chantal Mouffe, *The Return of the Political* (Verso 2006); Michael Sandel, *Democracy's Discontent* (2nd edn, Belnap Press 2023); Peter Mair, *Ruling the Void* (Verso 2003).

Why does the rule of law matter?

So far I have been discussing the rule of law mostly through the lens of scholarly commentary. But the rule of law is not just an abstract principle debated in university philosophy departments. In the UK and New Zealand, it is a constitutional principle that animates our unwritten constitutions. The courts in both jurisdictions employ the language of the rule of law to legitimise and explain their constitutional role, and also the constitutional roles of other branches of the state.[52] In the first *Miller* case[53] the UK Supreme Court stated that "the role of the judiciary is to uphold and further the rule of law". Similarly, in *Tannadyce Investments Ltd v Commissioner of Inland Revenue*[54], the New Zealand Supreme Court said that "[o]ur constitutional arrangements recognise that the Parliament of New Zealand is the supreme law maker ... The courts of higher jurisdiction, however, have constitutional responsibility for upholding the values which constitute the rule of law." Therefore, the idea of the rule of law is capable of having significant implications for how the judiciary decides real cases before the courts. The more substantive the idea is taken to be, the greater the role claimed for the courts. The more procedural, the more constrained the role of the courts when interacting with other branches of the state.[55] I will consider a few examples from case law.

The *UNISON* case in the UK[56] concerned the level of fees set in relation to bringing a claim in employment tribunals to vindicate rights of employees, including the low paid, and those who have lost their jobs.[57] For a long time, no fees had to be paid to lodge a claim, in order to secure access to justice for such people. But a statute of 2007[58] gave the Lord Chancellor a power to impose fees. In 2013, the Lord Chancellor exercised this power to make an Order requiring fees to be paid in respect of any claim brought in an employment tribunal. As a result, there was a substantial drop in claims.[59] The trade union, UNISON, sought judicial review of the Order on the basis that it was ultra vires the statutory power.

The Supreme Court held that the Order was ultra vires and quashed it. The court held that in determining the ambit of such a power "the court must consider not only the text of that provision, but also the constitutional principles which underlie the text".[60] The relevant principle was the rule of law because "[t]he constitutional right of access to the courts is inherent in the rule of law."[61] There is also a connection between the rule of law and democracy. Lord Reed explained:[62]

> "Courts exist in order to ensure that the laws made by Parliament, and the common law created by the courts themselves, are applied and enforced … In order for the

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[52] Sales (n 3) 528.
[53] *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5 [2018] AC 61, [42].
[54] [2011] NZSC 158, [2012] 2 NNZLR 153, [3].
[55] Sales (n 3) 529.
[56] *Unison* (n 20).
[57] ibid [8].
[58] Section 42 of the Tribunals, Courts and Enforcement Act 2007.
[59] *Unison* (n 20) [39].
[60] ibid [65].
[61] ibid [66].
[62] ibid [66].

> courts to perform that role, people must in principle have unimpeded access to them. Without such access, laws are liable to become a dead letter, the work done by Parliament may be rendered nugatory, and the democratic election of Members of Parliament may become a meaningless charade. That is why the courts do not merely provide a public service like any other."

The statutory power could not be exercised in a manner that was incompatible with the fundamental principle of access to justice. This shows how the connection between the rule of law and democracy is not merely theoretical, but is used as an interpretive tool to place constraints on the manner in which the executive may use a discretionary power delegated to it by Parliament.

The importance of the rule of law can also be seen in New Zealand jurisprudence. In *Attorney General v Chapman*[63] the question was whether so-called *Baigent* damages of the kind identified by Lord Cooke in the seminal case of *Simpson v Attorney General*[64] were available for judicial breach of the Bill of Rights Act 1990. The Supreme Court split 3/2, with the majority holding that such damages were only available against the executive, and not the judiciary. The difference between the majority and minority was due to the fact that the case raises a conflict between two different principles within the rule of law.

On the one hand, the majority emphasised the need to protect the independence of the judiciary, which is a core aspect of the rule of law.[65] On the other hand, the minority gave greater weight to the rule of law principle that violation of rights requires a remedy.[66] Reliance was placed on Lord Cooke's statement in *Darker v Chief Constable of the West Midlands Police*[67] that immunities from suit are "in principle inconsistent with the rule of law". *Chapman* illustrates the underlying conflicts of value within the rule of law. The two values – judicial independence and vindication of rights – are incommensurable. They represent distinct values which cannot be elided into one another.[68] To resolve the conflict, the Supreme Court had to engage in the familiar process of common law reasoning, whereby competing interests are weighed up and balanced to determine the precise content of the rule to be applied.

The line of case law on ouster clauses illustrates the conflict of the rule of law with other constitutional principles, in particular Parliamentary sovereignty and the democratic principle. The *Anisminic* case[69] concerned review of a decision of the Foreign Compensation Commission which had been established to distribute compensation given by the Egyptian government to the UK government for British properties it had nationalised. Anisminic's claim for compensation had been refused on the grounds that their successors in title did not have British nationality, which the Commission considered was required by the compensation scheme. Anisminic sought judicial review, but ran up against a clause providing that "[t]he determination by the commission of any application made to them under [the relevant Act]

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[63] [2011] NZSC 110, [2012] NZLR 462 [192].
[64] [1994] 3 NZLR 667 (CA).
[65] *Chapman* (n 63) [182].
[66] ibid [1], [26], [14].
[67] [2001] 1 AC 435 (HL).
[68] See the discussion of incommensurability in Sales and Wilmot-Smith (n 44).
[69] *Anisminic* (n 20).

shall not be called in question in any court of law." The House of Lords held that this did not prevent judicial review in this case, as the clause would only be effective to oust review of errors made within jurisdiction. Lord Pearce explained that the "more reasonable and logical construction [of the clause was] that by 'determination' Parliament meant a real determination, not a purported determination" and a decision made without jurisdiction would be a purported determination falling outside the ouster clause.[70] The Commission had made an error in construing the Act and this meant the decision was made without jurisdiction.

Anisminic was applied in New Zealand in the *Bulk Gas Users Group* case,[71] another leading judgment of Lord Cooke. He held that the relevant ouster provision "does not apply if the decision results from an error on a question of law which the authority is not empowered to decide conclusively".[72]

Neither *Anisminic* nor *Bulk Gas Users Group* mentioned the rule of law or Parliamentary sovereignty. Instead, they focused on technical concepts of jurisdiction. However, gradually the courts have moved away from a jurisdictional analysis to analyse this sort of case by recourse to underlying constitutional principles.[73] This is seen most clearly in the *Privacy International* case.[74] The claimant sought judicial review of a decision of the Investigatory Powers Tribunal in relation to alleged wrongdoing by the UK's intelligence agencies in relation to computer hacking in respect of certain classes of people. An ouster clause in section 67(8) of the Regulation of Investigatory Powers Act 2000 appeared to prevent such a claim. The clause provided that, except to such extent as the Secretary of State by order provided otherwise, "determinations, awards, orders and other decisions of the Tribunal (including decisions as to whether they have jurisdiction) shall not be subject to appeal or be liable to be questioned in any court". Since the discretionary power in section 67(8) to provide for appeals had not been exercised, decisions by the Tribunal would be legally invulnerable absent judicial review. The question was whether, properly construed, the legislation ousted the courts' judicial review jurisdiction.

In the Court of Appeal, I gave the lead judgment.[75] I acknowledged that the courts adopt a highly restrictive approach to the interpretation of ouster clauses, reflecting the fundamental importance of the rule of law in our legal and political system.[76] However, I concluded that the case turned on a short point of statutory construction and that on its proper construction section 67(8) did clearly mean that all determinations, awards, orders and decisions of the tribunal "shall not … be liable to be questioned in any court".[77] I took into account a number of considerations. Section 67(8) referred not only to 'determinations' as in *Anisminic*, but also to 'decisions as to whether [the Tribunal has] jurisdiction'. The quality of the membership of the Tribunal, which was headed by a High Court judge, was very high in terms of judicial expertise and independence, suggesting that Parliament really did intend that it should be in a

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[70] ibid 199.
[71] *The Bulk Gas Users Group v Attorney General* [1983] NZLR 129.
[72] ibid 133.
[73] Philip A Joseph, *Joseph on Constitutional and Administrative Law* (5th edn, Thomson Reuters 2021) 962.
[74] *Privacy International* (n 20).
[75] [2017] EWCA Civ 1868; [2018] 1 WLR 2572.
[76] ibid [19].
[77] ibid [24].

position to make final determinations on issues of law.[78] Also, Parliament had created the Tribunal to deal with the special problem of determining claims against the intelligence services, which requires the use of closed material procedures to guarantee maintenance of the confidentiality of secret information on national security grounds, a guarantee which would not apply in ordinary judicial review proceedings.[79]

The Supreme Court allowed the appeal, disagreeing with this analysis by a majority of 4 to 3. The two judgments given by the majority (Lord Carnwath and Lord Lloyd-Jones) relied on different reasoning, as did the two judgments given by the minority (Lord Sumption and Lord Wilson). These judgments contain a rich discussion of the tensions between the values of the rule of law, democracy and Parliamentary sovereignty. The conflict identified was that, on the one hand, the rule of law requires maintaining access to the courts to challenge unlawfulness, whilst on the other, democracy and Parliamentary sovereignty require effect to be given to the clear words used by the legislature.

Lord Sumption identified two main ways that this conflict can be resolved which can be used to frame the different judgments.[80] The first "radical", or "normative", view is to hold that the rule of law means that that Parliament is subject to a "higher law" as "ascertained and applied by the court". [81] On the radical view, the conflict should be resolved in favour of access to the courts, since the rule of law is a constitutional principle that is so fundamental that it takes precedence over Parliamentary sovereignty. The possibility of the radical view was countenanced decades earlier in 1986 by Lord Cooke in extrajudicial writing where he said "[w]e are on the brink of open recognition of a fundamental rule of our mainly unwritten constitution: namely that determination of questions of law is always the responsibility of the Courts of general jurisdiction".[82] Such a possibility was also referred to in dicta of some of the judges in the *Jackson* case[83] on the fox hunting legislation. Lord Hope referred to the rule of law as the "ultimate controlling factor" of the constitution;[84] Baroness Hale referred to possible "qualifications" on parliamentary sovereignty;[85] and Lord Steyn considered that there might be fundamental principles of the constitution which no Parliament could abrogate.[86]

The radical view about a rule of law qualification of Parliamentary sovereignty was not expressly endorsed by any of the members of the court in *Privacy International*. Lord Carnwath stated that the court was not addressing "the difficult constitutional issues which might arise if Parliament were to pass legislation purporting to abrogate or derogate from" the rule of law.[87] Lord Sumption explicitly rejected the radical view. He held that the "rule of law… applies as much to the courts as it does to anyone else, and under our constitution, that requires that

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[78] ibid [38].
[79] ibid [43].
[80] Mark Elliott and Alison L Young, 'Privacy International in the Supreme Court: Jurisdiction, the Rule Of Law and Parliamentary Sovereignty' (2019) 78 The Cambridge Law Journal 490, 494.
[81] *Privacy International* (n 20) [208].
[82] Robin Cooke, 'The Struggle for Simplicity in Adminstrative Law' in Michael Taggart (ed), *Judicial Review of Administration Action in the 1980s: Problems and Prospects* (Cambridge University Press 1986) 10 cited in Joseph (n 73) 964.
[83] *R (Jackson) v Attorney General* [2005] UKHL 56.
[84] ibid [107].
[85] ibid [159].
[86] ibid [102].
[87] ibid [119].

effect must be given to Parliamentary legislation". In other words, since Parliament has authority to make law, the principle of the rule of law requires that courts should respect and give effect to any law so made.

Lord Sumption also articulated an alternative, "less radical" and "conceptual", way of resolving the conflict, which is to argue that "judicial review is necessary to sustain Parliamentary sovereignty" because Parliament's ability to legislate depends on the existence of independent courts to interpret and give effect to its legislation.[88] This was a view previously suggested by Laws LJ in the Court of Appeal in the *Cart* case.[89] The less radical view received more support. Lord Sumption stated that he would accept it "up to a point".[90] He reasoned that the only way in which a proposition can have effect in law is for it to be recognised and applied by the courts. However, in his view, there was no conceptual difficulty with Parliament being able to create a body of unlimited jurisdiction that was not subject to judicial review at all, albeit it would be an unusual thing to do. In his view, the conceptual question did not in any event arise, as section 67(8) was not a complete ouster. It only prevented review of a decision of the Tribunal on the merits and did not exclude review to enforce the statutory limits on the Tribunal's powers or subject-matter competence, or the statutory and other rules of law regarding its constitution.[91] Lord Wilson, giving the other minority judgment, expressly accepted the conceptual impossibility of a complete exclusion of review, but considered it did not arise in this case.[92]

In the majority, Lord Lloyd-Jones expressed support for the conceptual approach of Laws LJ, that "it is a necessary corollary of the sovereignty of Parliament that there should exist an authoritative and independent body which can interpret and mediate legislation made by Parliament"; although he accepted that this role could be performed by judicial bodies other than the High Court.[93] Lord Carnwath also defended the conceptual approach, holding that it would be a contradiction for Parliament to entrust a statutory decision-making process to a particular body, but then leave it free to disregard the essential requirements laid down by the rule of law for such a process to be effective.[94]

In my view, it is true that the rule of law ordinarily supports Parliamentary sovereignty by ensuring that there are independent courts to give effect to its legislation. But I think it may be a step too far to say that this is such an essential part of Parliamentary sovereignty at a conceptual level that it is unable to exclude access to the courts in appropriate circumstances. The reasoning seems to overlook the fact that Parliament exists in time and in successive instantiations, rather than as a single unchanging institution. Parliamentary sovereignty, that is the power to choose what laws to make, attaches to each successive Parliament. This seems to entail that in principle a later Parliament can choose to exercise its sovereignty to abrogate access to the courts in relation to rights created by an earlier Parliament. Parliamentary sovereignty is unrestricted. The earlier Parliament does not have constitutional authority to

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[88] ibid.
[89] *R (Cart) v Upper Tribunal* [2011] QB 120, [34]-[38].
[90] *Privacy International* (n 20) [210].
[91] ibid [211].
[92] ibid [236].
[93] ibid [160].
[94] ibid [123].

immunise the rights it creates by its legislation from interference by a later Parliament exercising its own sovereignty. Since the earlier Parliament cannot do that expressly, it is difficult to see how such an effect can be spun out by implication from the notion of Parliamentary sovereignty, which is what confers on the later Parliament the authority to decide for itself what effects to provide for by its legislation. It is the case that there is a very powerful presumption against ouster of the right of access to the courts, but it is not irrebuttable on grounds of supposed conceptual limits to be spelled out of the principle of Parliamentary sovereignty itself.

I would express it in the following way. There is a principle of comity that operates between earlier Parliaments and later Parliaments. This comity means that later Parliaments are presumptively taken to intend that rights set out in legislation of an earlier Parliament should be capable of vindication by bringing proceedings in a court. This falls within the "principle of legality", namely a "principled presumptive commitment by the legislators to certain basic principles which can be viewed as underpinning a liberal democracy committed to the rule of law."[95] In other words, the legislators in later Parliaments are presumed to respect the availability of access to the courts to vindicate rights which have been enacted by earlier parliaments. However, this is a presumption that can be rebutted where it is sufficiently clear that Parliament has clearly considered the issue and has decided that the circumstances warrant creating a body immune from review. What words or other context would make this sufficiently clear is something that, as a sitting judge, I will not venture to consider.

Privacy International represents the high watermark of judicial consideration of ouster clauses in the UK. As for New Zealand, Philip Joseph suggests that the New Zealand courts have charted a middle path with ouster clauses. In *Tannadyce Investments*, the New Zealand Supreme Court recognises that the constitutional principle of the rule of law meant that the courts would be slow to conclude that review had been ousted. However, this was weakened where Parliament had created a sophisticated system of appeals which provided adequate protection against unlawful decisions and rendered judicial review unnecessary. A similar approach has been taken towards partial ouster clauses for decisions of the employment tribunal, which the New Zealand courts have held successfully exclude review for breach of natural justice or error of law.[96] On the other hand, in *Ortmann v United States of America*[97] the Supreme Court held that the more limited rights of appeal under the Extradition Act 1999 did not oust judicial review. But the Court was clear that this did not rest on an absolute prohibition against ouster clauses that stemmed from the approach in *Anisminic*. The Court noted that *Anisminic* had been followed by the UK Supreme Court in *Privacy International*, but stated that the theory of absolute invalidity of an order made ultra vires on which it rested had been eschewed in New Zealand.[98] Instead, the focus of the Court's analysis was on the legislative scheme and it concluded that this scheme showed that review was not intended to

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[95] Philip Sales, 'Legislative Intention, Interpretation, and the Principle of Legality' (2019) 40 Statute Law Review 62; Sales, "A Comparison" (n 49). See, eg, *R v Secretary of State for the Home Department, ex p. Pierson* [1998] AC 539, 573G-575D (Lord Browne-Wilkinson), 587C-590A (Lord Steyn). See also P. St. J. Langan, *Maxwell on the Interpretation of Statutes* (12th edn, Sweet & Maxwell 1969) 251ff ("Statutes Encroaching on Rights or Imposing Burdens").
[96] *Parker v Silver Fern Farms Ltd* [2011] NZCA 564, [2012] 1 NZLR 256 [47] cited in Joseph (n 73) 969.
[97] [2020] NZSC 120.
[98] ibid [535].

be excluded. This strikes me as a sophisticated and principled approach and one which, in the spirit of Lord Cooke, the common law world could learn from.

Turning back to the second question of my lecture, these cases show how the idea of the rule of law can at times play a decisive role in court rulings both in the UK and in New Zealand. They have also illustrated the tensions between different aspects of the rule of law, and between the rule of law and other constitutional principles. These tensions demonstrate the need for careful analysis of what does, and does not form part of the relevant concept of the rule of law.

The rule of law in New Zealand

I wish to conclude by very briefly acknowledging some of the rule of law issues that are currently being considered in New Zealand. As a foreign judge, I can only comment on them at a high level of generality. Justice Glazebrook has made the case, in a speech with the title "*The Rule of Law: Guiding Principle or Catchphrase?*" for a substantive conception of the rule of law in the New Zealand context, including the principles of the Treaty of Waitangi and Māori customary law (tikanga). The role of the Treaty principles, which Lord Cooke played a significant part in developing, is currently the subject of a controversial Bill before your Parliament.[99]

As someone from outside New Zealand society, it is not appropriate for me to attempt to enter into this area of debate. I acknowledge that Justice Glazebrook's more substantive conception of the rule of law is different from the more formal one I have set out to defend this evening. But as I have sought to explain, each individual polity inherits and creates its own legal and political culture. The boundaries of the concept of the rule of law are a function of that culture and are not fixed *a priori*. Moreover, as Jeremy Waldron observes, "by deploying subtly or considerably different conceptions of the rule of law against each other, [we] lay the conditions for each conception to be enriched by elements that are not initially given as part of its content".[100]

Also, as I have emphasised, the concept of the rule of law does not occupy the whole field of what is valuable in political and legal life. To say that some principle of law has value does not mean that it necessarily has to have that value by virtue of the concept of the rule of law. There are other values which, living in a democracy, we may deliberately use the law to pursue. Democratic self-determination for a society requires contestation. At its best one hopes that this can be honest and respectful. It is better to embrace contestation as part of the vibrant life of society and not as something to be suppressed or denied.

As the great New Zealand historian JGA Pocock observed in his book of essays, *The Discovery of Islands*,[101] a political society is one "that constructs a history of itself that is contestable and contested", including "contested accounts of what political authority has been and should be …, and of how history has been and should be written, in the ongoing context of a society's debate with itself as to what it is, has been and ought to be … The political structure which enables a society to contain its self-contestations and continue its history may

[99] The Treaty Principles Bill.
[100] Waldron (n 2) 21.
[101] JGA Pocock, *The Discovery of Islands: Essays in British History* (Cambridge University Press 2005) 305-306.

be described in terms which combine and offer to reconcile the notions of authority and liberty. *Ex imperio libertas*, in the words of an ancient Roman; we are free because we possess authority, exercised over ourselves and over others, which we use to determine what we are and shall be …".[102]

Thank you.

[102] The quotation continues, "at which point arises the problem of arises the problem of those included in our *imperium* but not in our *libertas*".