What Do We Mean by the Rule of Law?

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NEW ZEALAND BUSINESS ROUNDTABLE

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AUGUST 2005

This lecture, What Do We Mean by the Rule of Law?, was given on 5 August 2004 to an audience hosted by the Legal Research Foundation in Auckland.

First published in 2005 by
New Zealand Business Roundtable,
PO Box 10-147, The Terrace,
Wellington, New Zealand
http://www.nzbr.org.nz

ISBN 1-877394-04-1

Printed and bound by *Astra Print Ltd, Wellington*

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What Do We Mean by the Rule of Law?

Introduction

'The rule of law' is at once one of the most persistent and mysterious phrases in jurisprudence. I am not aware of anyone who is opposed to the rule of law. Yet at the same time, it is difficult to find out what the cash value of the concept is in helping to understand how best to fashion human relationships. Often, the term operates as a catch-all for other conceptions of which the relevance to political and legal theory is hard to define. One recent effort at an account of the concept gives some idea as to the elusive nature of a ubiquitous phrase. Thus, T R S Allan in *Law, Liberty and Justice* (Clarendon Press, Oxford, 1993, p 21) suggests that, "the rule of law is an amalgam of standards, expectations and aspirations: it encompasses traditional ideas about liberty and natural justice, and, more generally, ideas about the requirements of justice and fairness in the relations between government and governed". My objective is to isolate the different senses that can be attached to the term in order to give it some coherence and relevance.

One clue to the meaning of the rule of law is that it requires that there be some sort of rules. These rules are not just generalisations about human nature, but are often specific commands that a sovereign power issues to its subjects, where the breach of a rule could invite the use of the full range of legal sanctions. Accordingly, that concept does not make much sense in a state of anarchy, or in a tribal or customary context. For its origins we have to go back to early systems of sovereignty based on kinship and territorial control, which were top-down systems, with one person at the top. That idea of sovereignty deviates from the current view of political power that is based on a strong belief in a democratic system of elections, a bottom-up view, which is, historically, a relatively modern development.

In a society controlled from the top, the most pressing question is: what limitations, if any, could be imposed upon the power of a dominant individual who exerted unquestioned control by the sword? There are two ways to approach this challenge, and both are captured neatly by Latin maxims. The first is *quod principi placuit legis vigorem habet*, meaning 'that which is pleasing unto the prince hath the force of law'. In other words, the word of the person who commands the coercive power of the state is law. Taken to its limit, there is no difference between a specific directive to a given person on the one hand and a general legal proposition on the other. Because the fount of all authority is personal, we do not have to look at the content, or the generality, of the rule to determine its validity. That validity comes by identifying its origin in some expression of the sovereign will. If the Queen of Hearts says "off with their heads", then off with their heads it is.

Against that strong conception stands the other Latin maxim that views law, and the rule of law, as a bulwark against the arbitrary power of the sovereign: *nulla poena, sine lege*, or 'no punishment shall be imposed without law'. The effort to subject the sovereign to some external norm showed the obvious discomfort with unfettered autocracy. Where there were no popular or electoral checks on legal sovereignty, alternative ways had to be found to prevent the sovereign from being as absolutist as the first maxim implies. The idea behind a 'government of laws' is that dealing with particular problems by applying general rules constitutes an important check upon arbitrary behaviour.

General rules to decide individual cases

Thus, the first requirement of the rule of law is that individual decisions should be derived from general rules. This is not to say that any scheme of legal rules is guaranteed to be perfect and just. Yet a criticism of this approach does not carry the day, because the right question to ask is not whether a requirement of generality constitutes perfection but whether it is an improvement over the previous state of affairs. There is, and should be, a fair degree of consensus that arbitrary power that allows a ruler to select some people for favour and others for disadvantage is a dangerous thing. It undermines any security of expectations when property that someone has

accumulated can be confiscated arbitrarily. It is equally unsettling if one person can be imprisoned for doing something that another is rewarded for. Capricious behaviour leads to a sapping of public confidence in the system and casts a pall over the whole of society. Rulers who insist on arbitrary power may learn to their regret the power of the maxim, uneasy lies the head who wears the crown. Even in the absence of any powerful, formal system that requires them to submit to the rule of law, astute rulers have frequently been willing to do so in order to increase their own legitimacy – and the odds of their own survival.

Next, we must construe this requirement for general rules so as to make it a little more rigorous. The idea of general rules leads us to the concept of formal equality. There are many areas of substantive law in which we cannot necessarily identify the right answer in every case. Yet as we debate what the right answer should be, we agree on the fallback position that like cases should be treated alike. This formal requirement is, again, an important brake upon arbitrary behaviour. That brake holds firm even when we have no clear vision of what substantive rights we ought to have against the sovereign. It lies at the root of the conception that all individuals are entitled to the equal protection of the laws.

But how does this conception play out? One threshold problem is that we have to have some sense as to the domain of individuals or cases that fall within the proposition that satisfies the condition of formal equality. A rule that applied to all women, or all Jews, or all Maori might appear to have a degree of generality. Within the class, like might be treated alike. However, a rule can be general in form and disastrous in effect. The law in Nazi Germany that required all Jewish people to wear yellow stars was in form a general rule. Even a law requiring everyone to display their religious affiliation would be a general law but we would all know that it was a law intended to identify and stigmatise a particular group. So a law can satisfy the formal requirement for generality and still open the way for state victimisation of particular groups.

As the last example shows, one challenge to the idea of formal equality arises whenever there is disparate treatment between groups. A system in which different groups are subject to different legal regimes is easy to identify and

remedy. Suppose, for example, we had one regime of taxation that applied to everyone whose surnames began with letters A–M and a different regime for those whose surnames began with letters N–Z. We might be able to argue about which regime was better, so there might be no clear answer to the question as to whether we should be taxed the A–M way or the N–Z way. But we would be confident that a single system that applied to everyone equally would be better than a regime that distinguished between groups in this way, no matter which rule was chosen. This example shows how powerful the consensus is in favour of a norm of equal treatment.

If one wishes to engage in covert redistribution or favouritism, an option is to adopt a general rule that, by design, has a disparate impact upon different groups. Perhaps one of the most invidious examples of such a rule was the so-called 'grandfather' clauses introduced in some southern states of the United States after the Civil War to water down the effects of the introduction of universal suffrage. Some states required that, in order to be entitled to vote, a person had to have had a grandfather entitled to vote. Of course, grandfathers who had been slaves had not been entitled to vote, so the effect of this apparently neutral rule was to disadvantage blacks as against whites. This outcome is quite different from the way a literacy requirement might play out, or even a poll tax, although the effects of such a tax could be invidious if the ability to pay varied systematically across groups. Now the new requirement might not get its champions the 100-to-zero split that they desired, but it could still skew the outcome heavily in one direction, which might be all that is needed today when majority rules can determine collective social outcomes.

The limitations of the principle of formal equality as a means to prevent arbitrary and capricious behaviour lead many theorists to challenge laws that are neutral at face value because they have an illicit programme to discriminate against some portion of the population. At this point, the analysis becomes much more difficult. If one introduces motivation as a test, it is no longer possible simply to look at the legislation or rule on its face value in order to decide whether it is good or bad. One has to investigate the circumstances that led to the passing of the statute, an exercise that may not throw up reliable conclusions. Another line of inquiry is to ask whether any distinction that the

law does make can be defended on some principled ground. It is hard to find a justification for the grandfather clauses, for example, but a plausible case can be made for a simple literacy requirement for voting, or for a rule that only those who reside in a neighbourhood can vote in local elections (as opposed to those who work or own businesses in the neighbourhood). These and other requirements might be associated with notions of citizenship. They show how difficult it can be to deal not only with questions of motivation but also ones of justification.

Ironically, there are many cases in which this motivational analysis does not go far enough. Thus, what should be done with a rule that has a profound disparate impact on two groups, even though the person or group who adopted it had no intention to bring that unfortunate result about? Does the want of corrupt motivation insulate the bad outcome from public scrutiny or reversal, or does the disparate impact suffice to condemn the law? To return to our simple taxation example (which puts different rules in place for people in different parts of the alphabet), that disparate impact itself would be regarded as enough to conclude that the requirement of equality implicit in the rule of law has not been satisfied. Other cases are more difficult. The discussion becomes, then, not just about the rule of law but about the equality of rights (and right to equality) under law.

Natural justice

The second important aspect of the rule of law is what is called natural justice in New Zealand and England and due process of law in the United States. The procedural guarantees embodied in natural justice are important barriers to arbitrary and capricious behaviour by judges who are charged in most modern systems with the implementation of the rules promulgated by a sovereign, be it a single individual or a modern legislature.

To see why this is so, imagine a Stalinesque trial in which a judge can simply determine that you are guilty of an offence of which you have no knowledge, and the terms of which have not been specified. This dubious procedure is as arbitrary as going around the room and saying that every second person is guilty of a criminal offence. However much we may disagree

about what the substantive law ought to be, most legal thinkers agree that the point of the rules of natural justice is to ensure fair and accurate judgments that reflect the underlying substantive law and thereby prevent decisions that may reflect some ulterior political motive.

The first of the rules of natural justice is *audi alteram partem* or 'hear the other party'. In a criminal case the burden of proof is on the prosecution. The prosecution has to give some sort of notice of the charges the accused faces and present the evidence that shows that the accused has been in violation of the law. Accused persons have the right to defend themselves. The result is that two voices are heard, not just one. The fundamental requirements, therefore, are notice and some sort of hearing. Beyond that, there is a set of issues about exactly what kind of hearing is required for which kind of case. A traffic infringement does not call for a full-blown trial but serious criminal offences require a greater level of procedural protection. More resources should be invested in procedures when more is at stake. The exact extent of that protection is a matter of constant argument, but we can live with errors in fine-tuning so long as we are diligent in our efforts to implement the basic principle.

The second requirement of natural justice is *nemo judex in sua causa* or 'no one should be a judge in his own cause'. In other words, judges must be unbiased. This requirement is so fundamental that John Locke gave it as one of the reasons for leaving the state of nature in his *Second Treatise on Government* (chapter 2, section 13). The reason we are worried about bias is very simple: it corrupts outcomes. Suppose someone gave us a loaded set of dice. We think that the chances of rolling odd numbers are equal to the chances of rolling even numbers. In fact, the dice are weighted so that odd numbers come up only one-sixth of the time. Then, when you roll the dice, you are going to lose on two out of six rolls when you ought to have won. If you have $300 at stake, the owner of the dice has dishonestly appropriated, probablistically, $100. Bias, then, is simply a way of taking property from one person and giving it to another. So long as we condemn that outcome with dice, we should do so with biased adjudication that generates the same form of illicit transfer with respect to rights. We care about the fair shake procedurally because we know that unfair procedures will translate into unfair substantive outcomes.

The need for unbiased judges works itself back into the way we structure a legal system under the rule of law. Thus, the rule of law requires probity in the way judges are appointed, evaluated, staffed and supported. If, for example, judges' clerks are selected by the Ministry of Justice rather than by the judges themselves, this creates the risk that clerks can be selected who might influence judges in ways that reflect the will of the ministry and not the merits of the underlying case. Separation of powers therefore becomes yet another structural way to combat bias. It is no answer to this all-pervasive concern to say that a government ministry can be relied on to make good appointments for the judges; the standard required is that of Caesar's wife. The sensible approach is to give the judges a budgetary appropriation and let them appoint their own clerks. Justice must be seen to be done and there is no need to take the chance of covert influence when we can resort to a simple and effective procedure that will avoid the problem. One of the great achievements of western democracies has been that the standards for combating bias have been so uniformly achieved that there is a tendency to forget the detailed requirements needed to keep a sound programme in place.

Retrospectivity

Another procedural safeguard under the rule of law is the rule against retrospective legislation. The strong commitment to this concern is similar to that which motivates the universal condemnation of bias. Retrospective laws are yet another way to work an illicit transfer of wealth from one party to another. We would not contemplate running a horse race under one set of rules and then evaluating the winner under a different set. The individuals who relied on the rules when they made their decisions should not be subject to adverse consequences by a change after the race is run. Similarly, if the law requires a will to have two witnesses when signed, it is a gross mischief to invalidate it by a subsequent law that requires three witnesses. If legislators can only pass laws with future effect, this problem of changing the rules in the middle of the game is avoided.

Sadly, however, the protection against these retrospective laws has weakened even in the United States with its explicit constitutional norm that guards against

depriving individuals of life, liberty or property, without due process of law. The problem often comes to a head in dealing with various kinds of financial transactions. Thus, in one important programme, the Pension Benefit Guaranty Corporation supplied insurance for the pension plans operated by various corporations. In an effort to induce firms to join the programme, the federal government made it clear that affected parties could withdraw at will if they thought that the programme had become unsound. That threat had an important role to play because it offered a check against the pervasive problems of administrative abuse. Yet when the funding of the programme became suspect, those firms that wished to exercise their right of withdrawal were told by Congress that they had to buy their way out of the programme by paying sums above and beyond those that were specified in the original agreement. The government chose not to keep its word. Yet a unanimous US Supreme Court in *Connolly v Pension Benefit Guaranty Corporation* (475 US 211 (1986)) took the position that everything was all right because such "interference with the property rights of an employer arises from a public program that adjusts the benefits and burdens of economic life to promote the common good and, under our cases, does not constitute a taking requiring Government compensation".

Note that the earlier discussion of bias and retrospective legislation drew the explicit link to bad procedures and the illicit taking of property. The effort of the Supreme Court to deny that linkage shows how easy it is to fritter away constitutional protections for no good purpose. All sorts of horrible programmes are designed to 'adjust the benefits and burdens of economic life'. Indeed, every time property is taken from one person and given to another, just that happens. The purpose of government coercion is not, however, to undermine these settled expectations, but to introduce various kinds of improvements through government action that voluntary arrangements are unable to achieve. But the *Connolly* case, and others like it, did not seek to use the government to stop market breakdowns. They used that power to create the breakdown in question. Fortunately, the *Connolly* case does not represent the last word on this subject, for more recently, in *Eastern Enterprises Inc v Apfel* (524 US 498 (1998)), the Supreme Court indicated that there might be some limits on retrospective legislation, notwithstanding the constitutional bromide

about the adjustment of economic interests. This case involved an effort to impose on the former parent company liabilities for sickness and widows' benefits to coal miners. The catch in this particular case was that the liabilities were imposed over a generation after Eastern Enterprises had divested itself of all connection with the coal companies, so that the case looked as though Congress just put its hand in the corporate pocket to achieve some social objective that could have been done in one of two other ways. Either tax the parties responsible for the wrong, but only under standards that were in effect when the conduct took place. Or use general revenues to support a social welfare programme. The effort to bypass both limitations in this case was struck down by a narrow five-to-four vote, which leaves it unclear how the principle against retrospective exactions applies.

The situation here has real relevance to common law countries without a constitution. Years ago, I was dining with an Englishman (whose name I forget) who lamented to me how parliament had indulged in endless retrospective legislation that could not be put in place in the United States, given its strong constitution. I felt obliged to put on my realist hat, and to note that the Constitution is only as strong as the justices who apply its provisions. In this case, the need for stability in property relations in order to spur growth and relieve political tensions was lost to our justices. The narrowness of their constitutional vision, and their willingness to treat the rule of law as an idle abstraction, helped contribute to the weakness of our own institutions. Constitutions are powerful weapons for the control of state abuse, but they do not offer ironclad guarantees. They are only as good as the philosophy and outlook of the judges entrusted with their interpretation.

Tribunals

Fortunately, the willingness to engage in retrospective legislation is countered by forces that move in the opposite direction, given the popular belief in the rule of law. Indeed, on many matters in countries like the United States and New Zealand, the procedural requirements for the rule of law are so broadly satisfied that we give little thought to what would happen in their absence. But we can get insights from the kind of informal tribunals that are established

within institutions like universities to decide on some very serious questions. They illustrate why over-confidence in the cause of the prosecution should not be allowed to short-circuit procedural justice.

An example at the University of Chicago concerned the design of proper rules to deal with the unpleasant but real threat of academic fraud. I was a member of a committee, comprising primarily non-lawyers, which was charged with putting together rules to deal with this prospect. The initial attitude of the well-intentioned non-lawyers was that we should just have a friendly inquiry, talk over the issues and make a decision. My reaction was to ask whether a person accused of academic fraud would have the right to be represented by counsel, the right to cross-examination and so forth. Some members of the committee suggested we could work these things out as we went along; I insisted that we set up procedures at the outset. After all, the consequences of academic fraud can be drastic: revocation of articles and other writings for all the profession to see, or even dismissal from an academic position. In the end, the seriousness of the situation led to a clear change in committee attitude. I am pleased to say we agreed on rules that have served us well in some difficult cases and legitimated the whole system.

Experience with tribunals handling sexual harassment cases in universities in the United States has been a lot less happy. I have seen cases where people have not been allowed to have a lawyer represent them, and not been able to make an opening statement and call witnesses. They have then had to go before a tribunal where the prosecution also appoints the judges and then reviews the decision. This creates the potential for a kangaroo court and massive injustice.

There can be an enormous amount of slippage between a sound general principle and its application in a particular case. If you are serious about the rule of law, you must never bend it in favour of particular causes. If you think sexual harassment is a major difficulty on campus, you should favour strong procedural safeguards so that people have confidence in convictions when they occur. When you relax your procedural guard you end up making substantive mistakes. There is too much confidence that good intentions will weather the storm. But, all too often, the individuals who are in charge of a particular case

are more committed to the cause, and less concerned with the correctness of the outcome. When people come to issues with strong prejudgments they tend to make serious mistakes. The rules within voluntary institutions will not do their job just because they are sufficient to control tribunals staffed with individuals of goodwill. With the rule of law, we have to be prepared to hunker down in rough seas, and that means the use of procedural protections that are strong enough to withstand the evident biases of true believers (in any cause) that often obtain disproportionate influence on key tribunals. If you guard against abuse, you are less likely to suffer its adverse consequences.

The modern administrative state

When the concept of the rule of law was first discussed, it was in the context of relatively simple systems, with relatively simple legal commands and judicial decisions. For the most part, what was at stake was a total loss of life, liberty or property.

The modern administrative state has enormously expanded the scope of government activity. Inevitably, this enlarged set of tasks leads to a weakening of the potency of procedural protections. Where the decision is whether someone is to live or die or go to jail, the case goes through the standard courts. However, the situation is very different in areas like land use planning. Here, someone may have the idea that imposing a comprehensive zoning scheme on the community is for the common good, to be tested by the same standard of "adjusting benefits and burdens" that leads to so much mischief with retrospective legislation. In the zoning situation, one typically finds that property owners do not have the protection one might expect at common law, but only the right to take part in administrative procedures. Someone might think that they had a strong property right, including, say, to build a house on their property. They are then told that there is some administrative proceeding before a hearing authority at which they must make their case to build, to which others may object. The authority will then decide whether the house can be built. The implicit subtext of this decision is that the owner of private property only has an unquestioned entitlement to exclude others, but no entitlement to exercise the traditional development rights attached to land.

The administrative proceeding is an official acknowledgement of the partial collectivisation of what was once private property.

In line with the revised definition of substantive rights, there is usually some system of judicial review of these administrative proceedings, but the standard of review is typically lax. The decision will not be reversed simply because it was wrong; it has to be shown that it was arbitrary or capricious, otherwise the courts tend to pay deference to the findings of the administrative decision maker, especially findings of fact.

These deferential procedures frequently fail to meet the requirements of the rule of law. To see why this is so, imagine someone with a plot of land in a prime neighbourhood. With the right to build on it, this plot could be worth $100,000. Without that right it may only be worth $10,000. An administrative committee has the power to alter the wealth of the property owner substantially by its decision, up or down. That committee does not ask whether the owner has committed some wrongful act, such as a breach of promise. What it is doing is making a judgment about the contribution, loosely defined, that this development will make toward the well-being of the community at large. The background standards – shared benefits, public interest, convenience, necessity and so on – are so nebulous that even where there is a system of judicial review it is difficult to work out the grounds on which decisions have been made and whether they are right or wrong. The amount of discretion built into the system is simply inconsistent with the rule of law.

The difference in standpoints was neatly illustrated in 1944, a pivotal time for the rule of law. This was when the nations in the western alliance were faced with the choice of retaining a legal system based on traditional notions of property rights or opting for a larger administrative state. In that year, Friedrich Hayek published *The Road to Serfdom* in which he used the highway system as an analogy for the role of institutions in society. The state provides the highway system and lays down the rules of the road – that we must all drive on the same side of the road, keep to speed limits and so on. Usually there are objective criteria that make it clear who is in violation of these norms. However, the government does not decide who goes where, nor on the composition of the traffic. Individuals have freedom to decide the purposes

for which they use the highway system and where they wish to go. So the government has provided order on the one hand and individuals are free to use the infrastructure for their own purposes on the other. It is a wonderful synthesis that breathes life into the term 'ordered liberty'. Even those who wish to reduce fuel consumption and pollution do not argue that people should have to apply for a permit every time they want to use the highway.

Around the time *The Road to Serfdom* appeared, the Federal Communications Commission had to defend the powers it had been given to allocate radio frequencies between competing applicants (*National Broadcasting Co v United States* (319 US 190 (1943)). The simplest way to do this would obviously be just to auction the frequencies, which is more or less what New Zealand did when it liberalised access to the airwaves. The state then merely monitors the traffic to ensure that the 'rules of the road' are complied with, so that there is no interference between frequencies and so on. The composition of the traffic is left to the owner of each station, much as the passengers in each vehicle on the highway are left to its owner. Administrative discretion is reduced to a minimum. However, as the great Justice Felix Frankfurter, a judge of the US Supreme Court and former Harvard law professor, noted:

> [W]e are asked to regard the Commission as a kind of traffic officer, policing the wave lengths to prevent stations from interfering with each other. But the Act does not restrict the Commission merely to supervision of the traffic. It puts upon the Commission the burden of determining the composition of that traffic. The facilities of radio are not large enough to accommodate all who wish to use them. Methods must be devised for choosing from among the many who apply. And since Congress itself could not do this, it committed the task to the Commission.
>
> The Commission was, however, not left at large in performing this duty. The touchstone provided by Congress was the 'public interest, convenience, or necessity', a criterion which 'is as concrete as the complicated factors for judgment in such a field of delegated authority permit' (*Federal Communications Comm v Pottsville Broadcasting Co* (309 US 134, 138, 60 S Ct 437, 439)).

In the 60 years that have followed, no one has managed to figure out what composition of radio (or television) traffic the 'public interest' requires. The

process is generally regarded as being riddled with excessive administrative costs and resource misallocation. When the administrative state attempts to implement these kinds of standards it cannot avoid the very dangers that the rule of law guards against. It has no rule in mind, so it cannot avoid the perils of excessive discretion that a strong system of property rights helps prevent.

The same point was brought home to me when I read the decision of the Waitangi Tribunal on the foreshore and seabed (*Report on the Crown's Foreshore and Seabed Policy*, Wai 1071). My concern here is not with the validity of customary rights claims but with the conformity with the rule of law of the processes used to resolve the issue. The Maori argument was that if there were customary rights these could be lost only through a voluntary transaction or by a state taking that included provision for just compensation. That is the view of the rule of law that Locke would have taken and is precisely the right protected by the final clause of the Fifth Amendment to the US Constitution (the 'takings clause'): "nor shall private property be taken for public use, without just compensation".

The current Labour government, which appears not to be deeply imbued with the notions of property rights, took the opposite position. What it allowed Maori was merely the right to take part in public deliberations as to which rights should be preserved and which modified. There was no strong protection of rights by a requirement that these rights be taken or abridged only with consent or upon payment of compensation. The Waitangi Tribunal report explains in good libertarian fashion what is wrong with the administrative state so far as expropriation of property is concerned. If we are concerned to guard against arbitrary behaviour, we would never adopt a system in which there are no vested rights but only a chance to participate in some collective decision-making processes. And that judgment is not altered no matter how comprehensive the procedures for deciding are. Indeed, quite the opposite: full proceedings are often but a procedural device to avoid reaching a final decision on whether the requested development programme is allowable. It is no accident that virtually all the land use/takings cases that reach the US Supreme Court have been shuttling back and forth within the lower

courts and the administrative agencies for upwards of a generation. Justice delayed means property rights effectively denied.

When we are thinking about the legal system, therefore, our aim must surely be to use our legal procedures to attain the highest level of human welfare by making the best use of resources, natural and human, in situations where people sometimes cooperate and sometimes squabble and fight. This leads me to a strong belief in the classical liberal tradition with its familiar litany of clear property rights (usually private, although there is common property, for example the seabed and waterways), voluntary contract and limited government. The rule of law is part of this honourable tradition, and it does not function well when its substantive commitments are not respected. The rule of law, then, is not so much a distinctive phenomenon as something embedded in our larger constitutional understandings. It seems that while the rule of law cannot stop the administrative state, nor can the administrative state entirely displace the rule of law.

That the rule of law extends to the protection of entitlements, not just to liberty but also to property, turns out to be a difficult message for those enamoured with the modern administrative state. It is, however, a message that can be embraced by anyone who understands that stability of expectations is one of the prime conditions for a successful society and is undermined by arbitrary government behaviour. Hence the need for the standards we have discussed in legislation, administration and adjudication that are fundamental to the operation of our legal institutions.

Questions

Could you elaborate on why you see the removal of customary title to the foreshore and seabed as a breach of the rule of law when it is done by legislation?

I come from a different background than most of you. Under the US Constitution, legislation may be struck down when it is unconstitutional. Where a property right is simply taken away without compensation, the nature of the violation is clear. Although there has been enormous willingness to tolerate administrative regulation that leaves people in possession of their property but restricts the use they make of it, there is almost no tolerance in the United States for legislation that strips people of rights of occupation and does not give full compensation. The question then arises, what counts as occupation. The obvious case is sitting on the land. But other forms of property, such as easements and rights to take profits, are included as well, and those are the types of interests that are involved in the case of Maori claims. However, in saying this, I do not mean to prejudge the nature of the claim. For the compensation to attach, it must be shown that the interests of Maori were exclusive, and not shared with the new European settlers. I have expressed my reservations on that claim in my earlier New Zealand Business Roundtable lecture on the foreshore and seabed.

Placed in a New Zealand context, your question does not only apply to Maori title but to any and all legislation. Put simply, does the doctrine of legislative supremacy mean that the rule of law is a subservient concept? At a formal constitutional level, the answer, alas, appears to be yes. The English tradition of constitutionalism takes a different view from the American. It appears to say that, if at all possible, executive power should observe the constraints of the rule of law and if it does not do so this is a ground for public and political attack. The courts will not interpret legislation as interfering with

vested rights unless the authorisation for the interference is clear. In the final analysis, the legislation prevails over the claims for property rights. In the United States, minor retrospective legislation is tolerated, but not large amounts of it, which seems much the same as here. So, arguably, the Westminster tradition moves toward the same point here as the more formal American tradition. Just that happened with the issue of retrospective legislation discussed earlier.

Likewise, in New Zealand total dispossessions are usually awarded statutory compensation under the Public Works Act 1981 while land use regulation, which leaves you in possession of your land but restricts your use of it, is subject to much laxer standards. That the strong standards do not apply across the board, however, is clear from the foreshore and seabed legislation where the rule of law is the loser.

You included within the rule of law the concept of natural justice. To what extent should natural justice requirements be imposed in a private law context, for example where an employer is deciding whether to dismiss someone, as opposed to a more economically efficient system of employment at will?

To me, that question is very easy. The model of decision making that should apply depends on whether there is a monopoly backed by the coercive power of the state. In that case, there have to be correlative obligations on the state to offset its coercive power. Put aside the employment situation for the moment and assume we are dealing with a natural monopoly industry like railroads. In a situation where there is only one track from one side of the country to the other we need to think about issues like open access and non-discrimination rules. In such circumstances, exclusion has to be justified on grounds such as the threat of damage to the facility or failure to pay the standard fees. Otherwise a refusal to deal could be fatal to someone with a legitimate commercial interest. The use of state power to counteract monopolies in the public interest goes back to Matthew Hale who wrote about it in the late seventeenth century, and to English and US common law cases in the nineteenth century. Here again there is an interesting convergence. The English cases imposed those requirements as matter of common law. Their

incorporation in the United States came through constitutional interpretation that explicitly relied on the earlier English cases.

The employment situation is different. The best protection for an employee is a free and competitive labour market so that if one employer dismisses you there are hundreds of others waiting to offer you a job. Employers who dismiss people arbitrarily will also suffer reputational damage. So where we are dealing with private agreements between two parties, neither of which has state monopoly power, the efficiency arguments dominate. There is no external requirement for procedures for a job held at risk as there is for protected interests in liberty and property.

This does not lead necessarily to contracts at will in all situations. One basic exception is where sequential performance is relevant, such as when an employee makes sales on the basis of commissions that are paid to the firm after the sale is completed. Such an arrangement could not work if the firm was able to dismiss the salesperson before the commissions were paid. The default rule, which to my knowledge has never been reversed, is that the employee has an equitable right to the commission unless that right is explicitly waived.

Other provisions to safeguard against arbitrary behaviour may be written into contracts. Employers may be reluctant to allow recourse to the courts because of the costs and risks of formal proceedings. However, while contracts may in form be contracts at will, or have a bare dismissal on notice clause, inside the firm there will often be administrative procedures and panels and these may include employee representatives. Such procedures may not be legally enforceable but the internal culture that they create tends to be respected, for reputational and other reasons. Also, the contract at will is perfectly consistent with provisions for severance pay, which apply in most cases of mass dismissals in the United States – one month for every year of service is a common provision. Given these kinds of contractual possibilities, it makes no sense to clog the labour market with the kind of due process requirements that are needed in state monopoly situations.

Speaking more generally about property rights, everything depends on background conditions. The rule with waterways is that no one can take them by first possession, otherwise travel would be obstructed. But such a rule is

not needed when it comes to the capture of animals and occupation of land. Seemingly inconsistent regimes do not create problems: stepping out from your private home on to a public road does not give rise to angst in people with the smallest degree of socialisation.

Basically, there are only three kinds of legal regimes to regulate human affairs. One provides for comprehensive state governance over everything. Another allows you and I to have separate governance but on a non-discriminatory basis, so that under the rule of law equal treatment is guaranteed. The third regime, typified by the contract at will, involves no overarching obligation – we just trade with and treat one another as we see fit. The challenge is to apply the right regime to the particular background situation, and there is no dominant solution – sovereignty, non-discrimination or laissez-faire. The real genius consists of knowing enough about institutions to match the regime to the problem at hand.