

Singapore Academy of Law
20th Annual Lecture

The Rule of Law as a Many Coloured Dream Coat

Chief Justice Robert French AC

18 September 2013, Singapore

Introduction

Chief Justice Menon, former Chief Justice Chan, Attorney-General Chong, the Australian High Commissioner, Philip Green, your Honours, ladies and gentlemen: Thank you for inviting me to deliver the twentieth Annual Singapore Academy of Law Lecture. One of the functions of the Academy is to promote the standing of the profession in the region and elsewhere. That outward-looking orientation is reflected in the engagements the Academy has undertaken with the judiciaries and legal professions of other countries and, on this occasion, in the invitation which it has so graciously extended to me. The purposes of the Academy are similar to those of the Australian Academy of Law, which was established in 2007 and which seeks to bring together academics, practitioners and members of the judiciary and to establish links with similar organisations outside Australia. As Patron of the Australian Academy, it is my hope that the common purposes of our two institutions may provide the occasion for some future collaboration. It is also the hope of the President of the Australian Academy, the Honourable Kevin Lindgren, to whom I spoke last week on that topic.

The title of this lecture is the Rule of Law as a Many Coloured Dream Coat. It draws upon a rather free association with the Webber and Rice musical, *The Amazing Technicolour Dreamcoat*, an adaptation of the story of Joseph and his brothers from the book of Genesis. A key song in the musical is 'Any Dream Will Do'. It is a useful metaphor to highlight the many-hued discourses that exist about the rule of law, a concept which means different things

to different people and which has been called 'a celebrated historic ideal, the precise meaning of which may be less clear today than ever before.'¹

I propose to speak of the rule of law primarily from an Australian perspective. In so doing, I acknowledge that, although the idea has elements common to all societies in which it is asserted, each society has its own history, culture, legal traditions and demographic mixture. There will inevitably be different understandings of the rule of law and, even when understandings coincide in theory, different applications of those understandings in practice. It is useful to begin with a reminder of Dicey's concept of the rule of law and how that concept has evolved in the United Kingdom. I refer to the United Kingdom because we are the common inheritors of its legal tradition and it presents the case of a society in which the rule of law is based upon common law constitutionalism.

The rule of law — common law constitutionalism

Parliamentary sovereignty and the rule of law were described by Professor AV Dicey as two characteristic features of the political institutions of England since the Norman Conquest. Parliament inherited the royal supremacy.

The Diceyan vision of the rule of law involved 'at least three distinct though kindred conceptions'. They were in summary:

1. ... no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land.²
2. Every man whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals.³

¹ RH Fallon, 'The Rule of Law as a Concept in Constitutional Discourse' (1997) 97 *Columbia Law Review* 1, 1.

² AV Dicey, *Introduction to the Study and the Law of the Constitution* (Palgrave MacMillan, 10th ed, 1959) 184, 188.

³ *Ibid* 193.

3. ... the general principles of the constitution (as for example the right to personal liberty, or the right of public meeting), are with us the result of judicial decisions determining the rights of private persons in particular cases brought before the courts.⁴

Dicey's formulation has been much criticised but judicial elaboration of the rule of law has been described rightly as '[p]erhaps the most enduring contribution of our common law'.⁵ Professor Jeffrey Jowell, who so described it, sees the rule of law as supplying the foundation of a new model of democracy in Britain that limited governmental powers in certain areas even where the majority preferred otherwise:

It is a principle which requires feasible limits on official powers so as to constrain abuses which occur even in the most well-intentioned and compassionate of governments. It contains both procedural and substantive content, the scope of which exceeds by far Dicey's principal attributes of certainty and formal rationality.⁶

In the United Kingdom, the primacy of parliament and the rule of law underpin a constitutional paradigm described as a 'bipolar sovereignty of the Crown in the Parliament and the Crown in its courts to each of which the Crown's ministers are answerable — politically to parliament, legally to the courts.'⁷ That concept is not novel. In 1991 in *X Limited v Morgan-Grampian Ltd*,⁸ Lord Bridge, with whom four other Law Lords agreed, said:

In our society the rule of law rests upon twin foundations: the sovereignty of the Queen in Parliament in making the law and the sovereignty of the Queen's courts in interpreting and applying the law.⁹

Notwithstanding the strength of the concept of parliamentary sovereignty in the United Kingdom, the possibility that the rule of law imposes fundamental common law

⁴ Ibid 195.

⁵ J Jowell, 'The Rule of Law Today' in J Jowell and D Oliver (eds) *The Changing Constitution*, (Oxford University Press, 6th ed, 2007) 24.

⁶ Ibid 25.

⁷ Sir Stephen Sedley, 'Human Rights: A Twenty First Century Agenda' [1995] *Public Law* 386, 389; see also Anthony Bradley, 'The Sovereignty of Parliament — Form or Substance?' in Jowell and Oliver (eds), *The Changing Constitution* (Oxford University Press, 7th ed, 2011) 34, 37.

⁸ [1991] 1 AC 1.

⁹ Ibid 48.

constraints on legislative power has been raised. Lord Woolf, in an essay¹⁰ published in the journal *Public Law* in 1995, hypothesised legislation which might seek to undermine in a fundamental way the rule of law on which the unwritten constitution depends, for example, by removing or substantially impairing the judicial review jurisdiction of the courts. He said of that jurisdiction that it was:

in its origin ... as ancient as the common law, predates our present form of parliamentary democracy and the Bill of Rights.¹¹

Absent the protection of a written constitution against such intrusions on the judicial function, Lord Woolf was prepared to define a limit on the supremacy of parliament which it would be the responsibility of the courts to identify and uphold.¹²

In the Singapore Academy of Law Annual Lecture in 2005, Lord Woolf returned to that theme. His subject was 'Constitutional Protection without a Written Constitution'.¹³ Pointing to the principles informing the rule of law in the United Kingdom prior to its adherence to the European Convention on Human Rights and the enactment of the *Human Rights Act 1998* (UK), Lord Woolf referred in particular to what Lord Justice Laws said in the same edition of *Public Law*:

The democratic credentials of an elected government cannot justify its enjoyment of a right to abolish fundamental freedoms. If the power of a State is in the last resort absolute, such fundamental rights as free expression are only privileges; no less so if the absolute power rests in an elected body.¹⁴

The views of Lord Woolf and those of Lord Justice Laws, which appear to question the absolute character of parliamentary supremacy, were contested by the late Lord Bingham in his book on the *Rule of Law*. Drawing upon the writing of a respected Australian academic, Professor Jeffrey Goldsworthy in his book *The Sovereignty of Parliament*, Lord Bingham said:

¹⁰ Lord Woolf, 'Droit Public — English Style' [1995] *Public Law* 57.

¹¹ Ibid 68.

¹² Ibid 67-69.

¹³ (2005) 17 SAcJ 518.

¹⁴ (2005) 17 SAcJ 518, 524 citing the Hon Sir John Laws, 'Law and Democracy' [1995] *Public Law* 72, 84.

As Goldsworthy demonstrates, to my mind wholly convincingly, the principle of parliamentary sovereignty has been endorsed without reservation by the greatest authorities on our constitutional, legal and cultural history.

The question whether any such constraint could exist in Australia has not been much agitated. It may be that there is a reason for that. In 1988 the High Court of Australia, in *Union Steamship Co of Australia Pty Ltd v King*,¹⁵ referred to the position of the New South Wales State Parliament, which was authorised by its Constitution to make laws for the peace, order and good government of the State, and said:

Just as the courts of the United Kingdom cannot invalidate laws made by the Parliament of the United Kingdom on the ground that they do not secure the welfare and the public interest, so the exercise of its legislative power by the Parliament of New South Wales is not susceptible to judicial review on that score. Whether the exercise of that legislative power is subject to some restraints by reference to rights deeply rooted in our democratic system of government and the common law ... a view which Lord Reid firmly rejected in *Pickin v British Railways Board* ([1974] AC 765 at 782), is another question which we need not explore.¹⁶

The cases which seemed to favour some such restraints were all New Zealand decisions.¹⁷ The question has not been further explored in Australia although it was mentioned in passing in *South Australia v Totani*.¹⁸ In the context of Australia and Singapore it is probably an academic debate given the limits on parliamentary sovereignty imposed by our written Constitutions. Against that background it is appropriate to consider the legal framework in which the rule of law functions in Singapore and Australia.

Singapore and Australia — similarities and differences

Singapore and Australia differ markedly in land area, in population, in demographic mix, in culture and in history. Singapore has a population of 5.3 million people in a land area of 710 square kilometres. Australia has a population of 23 million people in a land area of 7.7 million square kilometres. Singapore is a unitary State. Australia is a Federation. We nevertheless share a common legal heritage as a legacy of our colonial histories. We are both societies whose legal systems rest upon written constitutions. In May 2012, former Chief

¹⁵ (1988) 166 CLR 1.

¹⁶ (1988) 166 CLR 1, 10.

¹⁷ *Drivers v Road Carriers* (1982) 1 NZLR 374, 390; *Fraser v State Services Commission* (1984) 1 NZLR 116, 121; *Taylor v New Zealand Poultry Board* (1984) 1 NZLR 394, 398.

¹⁸ (2010) 242 CLR 1, 29 [31].

Justice Chan Sek Keong, whom I had the pleasure of meeting when we both attended the Commonwealth Law Conference in Hong Kong in 2009, delivered a judgment¹⁹ in which he compared Singapore's constitutional system with that of the United Kingdom. He made the point that as with the Westminster model, the sovereign power of Singapore is shared between the legislature, the executive and the judiciary.

Separation of powers is built into the Singapore Constitution. Article 28 vests the executive authority of Singapore in the President. Article 38 vests legislative power in the legislature consisting of the President and the Parliament. Article 93 vests the judicial power in a Supreme Court and such subordinate courts as may be provided by any written law. Those provisions disclose a structure similar to that set out in Chapters I, II and III of the Australian Constitution and, in particular, ss 1, 61 and 71 of that document. The structural division tells the same story for both countries. As four Justices of the High Court, including Chief Justice Sir Owen Dixon, said in the *Boilermaker's Case* in 1956:

If you knew nothing of the history of the separation of powers, if you made no comparison of the American instrument of government with ours, if you were unaware of the interpretation it had received before our Constitution was framed according to the same plan, you would still feel the strength of the logical inference from Chaps I, II and III and the form and contents of ss 1, 61 and 71.²⁰

A point of difference arising out of the federal structure of Australia's Constitution is that the Australian States have their own written Constitutions, which originally derived their legal force from statutes of the United Kingdom Parliament. Those constitutions do not expressly provide for the separation of the State judicial power from legislative and executive power. Nevertheless, that principle is generally recognised as a matter of convention in the States and the High Court has developed a doctrine, to which I will refer later, that State Parliaments cannot confer upon State courts functions which are incompatible with their institutional integrity.

Chief Justice Chan Sek Keong pointed to an important difference between the Westminster model of the United Kingdom and that of Singapore. Whereas Parliament is

¹⁹ *Mohammad Faizal bin Sabtu v Public Prosecutor* [2012] SGHC 163, [11]–[12].

²⁰ *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 275 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).

supreme in the United Kingdom, it is the Constitution which is supreme in Singapore. The same proposition is generally true in Australia. The courts in both our countries have the responsibility when disputes about validity are before the court for determination, to determine whether a law is valid or invalid under the Constitution.

A second point of difference between Singapore and the United Kingdom, which was pointed out by the former Chief Justice, is that the sources of judicial power in Singapore are to be found in the Constitution²¹ and in statutes providing for subordinate courts pursuant to Art 93. In Australia, the Constitution vests the judicial power of the Commonwealth in the High Court and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction.²² A point of difference between the Singapore Constitution and the Australian Constitution, arising out of our federal system, is that the judicial power of the Commonwealth can be vested in State courts created by or under State Constitutions. The Constitutions of the States are the sources of the judicial power of the States exercised by State courts.

Given the similarities in the nature and allocation of judicial power in Singapore and Australia, it is not surprising that last year the former Chief Justice, in considering whether laws imposing mandatory minimum sentences constituted legislative interference with the judicial power, should have had regard to decisions of the High Court of Australia about the separation of powers and the imposition upon courts of functions incompatible with their institutional integrity.²³ In that context I should note that in the last sitting of the High Court in Canberra three weeks ago the Court heard a challenge to the validity of laws imposing minimum mandatory sentences on people smugglers. There are differences between us, but we share a common constitutionalism, the same inherited legal traditions and, I venture to say, similar conceptions of the essential features of the rule of law. In both our countries it is a topic of abiding interest.

²¹ Constitution of the Republic of Singapore, Art 93.

²² Commonwealth Constitution, s 71.

²³ *Mohammad Faizal bin Sabtu v Public Prosecutor* [2012] SGCH 163.

The rule of law — ideals and reality

Last year Singapore held a major symposium on the rule of law in which the tensions between its universal aspects and its application in a particular society were discussed. One of the sessions consisted of a panel discussion of the Rule of Law Index, which is published by a United States based non-government organisation called the 'World Justice Project'. The Index measures, by reference to a variety of factors, what is said to be the state of the rule of law in 97 different countries. Its most practical benefit, I suspect, is to provide to those who advocate improvements in the legal systems of their countries a credible comparative empirical basis for their advocacy.

The Index rests upon a definition of the rule of law which extends well into the territory of substantive as well as process rights — what is sometimes called a 'thick' concept of the rule of law. It is a definition with which lawyers and legal historians and philosophers might cavil, but it sets out, in uncomplicated language, what are said to be culturally universal principles. They are really proposed as defining features of the rule of law and, reframed in that way, comprise:

- accountability under the law generally applicable to governments, public officials, individuals, and public and private entities;
- clear, publicised, stable and just laws evenly applied which protect fundamental rights including the security of persons and property;
- accessible, fair and efficient processes for the enactment, administration and enforcement of laws
- timely delivery of justice by a sufficient number of competent, ethical, independent, adequately resourced representatives and neutrals who reflect the makeup of the communities they serve.

The breadth of the World Justice Project definition and its language underpins the proposition that the rule of law is not a refined concept to be owned by lawyers, legal

historians and legal philosophers alone. It is a part of societal infrastructure, the content and strength of which is a matter of legitimate interest to all members of society. It is also an essential condition of social stability, social justice and of business, consumer and investor confidence.

Whatever concept of the rule of law applies in any given country, it must work on the ground. The Minister for Foreign Affairs and for Law delivered a keynote address at the Rule of Law Symposium last year in which he placed emphasis upon the importance of demonstrable benefits 'provided for society and individuals by the rule of law.' In so doing, he made a point with which I agree that:

There is no use having beautiful laws, embodying the noblest ideals, only to do something else in practice.²⁴

I have seen the truth of the proposition that the rule of law in any society cannot depend solely upon lofty and aspirational words on paper. For some six years, from 2003 to 2008, I had the privilege of serving as a Sessional Member of the Supreme Court of Fiji, the final court of appeal in that country, which used Australian and New Zealand judges on its intermediate and final appeal courts along with local people. The Constitution had been drafted in a spirit of national reconciliation following the 1987 military coup. It was a document with a Bill of Rights, and checks and balances for the exercise of official power. It ended when the interim military government, which had displaced an elected government late in 2006, abrogated it following a subsequent decision of the Supreme Court to the effect that the coup was unlawful. There is a degree of poignancy about a particular paragraph of the Preamble of the Constitution of Fiji, which reads:

WE, THE PEOPLE OF THE FIJI ISLANDS,

...

REAFFIRMING our recognition of the human rights and fundamental freedoms of all individuals and groups, safeguarded by adherence to the rule of law, and our respect for human dignity and for the importance of the family,

WITH GOD AS OUR WITNESS, GIVE OURSELVES THIS CONSTITUTION.

²⁴ K Shanmugan, 'The Rule of Law in Singapore', [2012] *Singapore Journal of Legal Studies* 357, 358.

What the people had given themselves they lost. The rule of law did not safeguard them. The new Constitution, recently signed into law by the President of Fiji, declares in cl 1, that the Republic of Fiji is a 'sovereign democratic State founded on the values of respect for human rights, freedom and the rule of law.' It is to be hoped that constitutional government and with it a constitutionally based rule of law will be re-established in Fiji in the near future.

Against that general background it is appropriate now to turn to the function of judicial review of executive action and administrative law generally in defining the content of and applying the rule of law.

Judicial review and the rule of law in Australia

In the 9th edition of Wade and Forsyth's *Administrative Law*, it is said that:

The British Constitution is founded on the rule of law and administrative law is the area where this rule is to be seen in its most active operation.²⁵

That aspect of administrative law, which involves judicial review of executive action, is the clearest demonstration of that proposition.

The great common law remedies against unlawful official action came to Australia from the courts of England. The prerogative writs — certiorari to quash jurisdictional error, mandamus to require the performance of official duty and prohibition to restrain excess of official power together with habeas corpus against unlawful restraints on liberty — form an historical foundation for administrative justice in Australia. The principles underpinning their application have a constitutional character which does not depend upon the existence of a written constitution.

The rule of law, insofar as it requires respect by Commonwealth officials for the limits of power and official compliance with their legal duties, is supported by s 75(v) of the Constitution which directly confers upon the High Court original jurisdiction in all matters:

²⁵ HWR Wade and CF Forsyth, *Administrative Law* (Oxford University Press, 9th ed, 2004) 20.

in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth.²⁶

The subject is thus provided with a mechanism to challenge the lawfulness of the exercise of official power. Its construed extension to Ministers of the Crown also provides the States with 'a significant means of requiring observance by the Commonwealth of the federal system'.²⁷

The rule of law is also supported, in relation to the exercise of powers and discretions by State officials, by implications drawn from Ch III of the Constitution relating to the continuance, jurisdiction, powers and functions of State Supreme Courts and State courts generally. As explained in a number of decisions of the High Court beginning with *Kable v Director of Public Prosecutions (NSW)*,²⁸ State legislatures cannot abolish State Supreme Courts, nor impose upon them functions incompatible with their essential characteristics as courts, nor subject them, in their judicial decision-making, to direction by the Executive.²⁹ Nor can a State legislature immunise statutory decision-makers from judicial review by the Supreme Court of the State for jurisdictional error.³⁰ In a joint judgment, six Justices of the High Court said in *Kirk v Industrial Court (NSW)*:

There is but one common law of Australia. The supervisory jurisdiction exercised by the State Supreme Courts by the grant of prerogative relief or orders in the nature of that relief is governed in fundamental respects by principles established as part of the common law of Australia. That is, the supervisory jurisdiction exercised by the State Supreme Courts is exercised according to principles that in the end are set by this Court. To deprive a State Supreme Court of its supervisory jurisdiction enforcing the limits on the exercise of State executive and judicial power by persons and bodies other than that Court would be to create islands of power immune from supervision and restraint.³¹

That is to say there are no exceptions to the rule of law.

It has sometimes been contended that the exercise of common law prerogative powers

²⁶ See the reference by Gleeson CJ to s 75(v) as providing in the Constitution 'a basic guarantee of the rule of law' in M Gleeson, *The Rule of Law and the Constitution*, (Boyer Lectures 2000 ABC Books) 67.

²⁷ WMC Gummow, 'The Constitution: Ultimate Foundation of Australian Law?' (2005) 79 *Australian Law Journal* 167, 179.

²⁸ (1996) 189 CLR 51.

²⁹ See *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319.

³⁰ *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531.

³¹ *Ibid* 581 [99].

or executive powers directly conferred by the Commonwealth and State Constitution are not justiciable. But as Gummow J pointed out in 1988 in a decision given when he was a member of the Federal Court:

even in Britain, the threshold question of whether an act in question was done under the prerogative power will be for the court to decide, the point being that if it was, the court may then decide it will not inquire further into the propriety of that act. ... To decide whether a question is “non-justiciable” is not to decide the alleged non-justiciable question itself.³²

Under the Commonwealth Constitution, the executive power of the Commonwealth is conferred by s 61. Its scope and content was considered by the High Court in *Pape v Federal Commissioner of Taxation*³³ and in *Williams v Commonwealth*.³⁴ It has been said to extend to:³⁵

- powers necessary to or incidental to the execution and maintenance of a law of the Commonwealth;³⁶
- powers defined by reference to such of the prerogatives of the Crown as are properly attributable to the Commonwealth;³⁷
- powers defined by the capacities of the Commonwealth common to legal persons;³⁸
- inherent authority derived from the character and status of the Commonwealth as the national government.³⁹

³² *Re Ditfort; Ex parte Deputy Commissioner of Taxation* (1988) 19 FCR 347, 368–69.

³³ (2009) 238 CLR 1.

³⁴ (2012) 86 ALJR 713.

³⁵ *Ibid* 723 [22].

³⁶ *R v Kidman* (1915) 20 CLR 425, 440–41 (Isaacs J); *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410, 464 (Gummow J).

³⁷ *Farey v Burvett* (1916) 21 CLR 433, 452 (Isaacs J); *Barton v Commonwealth* (1974) 131 CLR 477, 498 (Mason J), 505 (Jacobs J); *Davis v Commonwealth* (1998) 166 CLR 79, 93–94 (Mason CJ, Deane and Gaudron JJ), 108 (Brennan J).

³⁸ *Victoria v Commonwealth* (1975) 134 CLR 338, 397 (Mason J); *R v Duncan; Ex parte Australian Iron & Steel Pty Ltd* (1983) 158 CLR 535, 560 (Mason J); *New South Wales v Bardolph* (1934) 52 CLR 455, 509 (Dixon J); *Davis v Commonwealth* (1998) 166 CLR 79, 108 (Brennan J); *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1, 60 [126] (French CJ).

³⁹ *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1, 63 [133] (French CJ), 87–8 [228], 91–2 [242] (Gummow, Crennan and Bell JJ), 116 [328]–[329] (Hayne and Kiefel JJ).

It is sufficient for present purposes to say that the limits of executive power under the Commonwealth Constitution are justiciable. That is an aspect of the larger proposition of the rule of law that there is no such thing as unlimited official power.

The rule of law — all power is limited

Last year the Court of Appeal of the Supreme Court of Singapore in *Ramalingam Ravinthran v Attorney-General*⁴⁰ made an important affirmation of a basic principle of the rule of law in both Singapore and Australia. That principle was enunciated by former Chief Justice Chan in delivering the judgment of the Court of Appeal, when he said:

All legal powers, even a constitutional power have legal limits. The notion of a subjective or unfettered discretion is contrary to the rule of law.⁴¹

So too in Australia, with written Commonwealth and State Constitutions, there is no such thing as unlimited official power, be it legislative, executive or judicial. The legislative power of the Commonwealth is confined to the subjects upon which the Commonwealth Parliament is authorised to make laws and is subject to guarantees and prohibitions set out in the Constitution or implied from it. The legislative powers of the States are conferred, not by reference to enumerated heads of power, but by their own Constitutions and they are subject to the paramountcy of Commonwealth legislation and the guarantees and prohibitions, express or implied, to be found in the Commonwealth Constitution and which are applicable to State Parliaments.

The executive and judicial powers of the Commonwealth and of the States are also subject to the constraints, express or implied, imposed by the Commonwealth Constitution and in the area of State executive power by the State Constitutions themselves. It follows that no law can confer upon a public official unlimited power. Such a power could travel beyond constitutional constraints.

⁴⁰ [2012] SGCA 2.

⁴¹ [2012] SGCA 2 [17], quoting *Law Society of Singapore v Tan Guat Neo Phyliss* [2008] 2 SCR(R) 239, [149] (Chan CJ), in turn citing *Ching Suan Tze v Minister for Home Affairs* [1988] 2 SCR(R) 525, [86].

The existence of limitations on legislative power is an aspect of constitutionalism, particularly in federations where legislative power is divided between their components. In unitary states, legislative power may be constrained by separation of powers requirements and by constitutional guarantees and protections, including those which relate to human rights and fundamental freedoms. There is also a general class of limitations which flow from the internal logic of grants of power according to legal rules. I turn to that topic now.

The rule of law — logical limitations on official power

The application of any legal rule is confined by its own internal logic. Every statutory power and discretion is limited by the subject matter, scope and purpose of the statute under which it is conferred.⁴² To say that is to state a particular application of a more general proposition. It is in the nature of a legal rule that it must be applied rationally within a framework defined by its text and context and in accordance with its scope, subject matter and purpose. Even if a discretion or power is conferred upon a judicial or an administrative official without any express definition of the conditions or grounds upon which it is to be exercised, that does not mean it is to be regarded as unfettered. The power must be exercised reasonably.

The proposition that every power is to be exercised according to 'the rules of reason' has a long history. In 1965, Justice Kitto, paraphrasing *Sharp v Wakefield*, said:

a discretion allowed by statute to the holder of an office is intended to be exercised according to the rules of reason and justice, not according to private opinion; according to law, and not humour, and within those limits within which an honest man, competent to discharge the duties of his office, ought to confine himself.⁴³

⁴² *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492, 505 (Dixon J); *R v Australian Broadcasting Tribunal; Ex parte 2HD Pty Ltd* (1979) 144 CLR 45, 49; *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342, 368 (Mason J); *O'Sullivan v Farrer* (1989) 168 CLR 210, 216 (Mason CJ, Brennan, Dawson and Gaudron JJ); *Oshlack v Richmond River Council* (1998) 193 CLR 72, 84 [31] (Gaudron and Gummow JJ).

⁴³ *R v Anderson; Ex parte Ipec-Air Pty Ltd* (1965) 113 CLR 177, 189.

Sir Anthony Mason, a former Chief Justice of the High Court, quoted that passage in a later case and linked it to the general proposition that the extent of discretionary power is to be ascertained by reference to the scope and purpose of the statutory enactment.⁴⁴

The requirement that a power conferred by a statute is to be exercised reasonably is a requirement not met merely by avoiding absurdity in the *Wednesbury Corporation*⁴⁵ sense. The application of reasonableness as a constraint upon official power was considered by the High Court earlier this year in *Minister for Immigration and Citizenship v Li*.⁴⁶ In that case, the Migration Review Tribunal had refused an adjournment to an applicant for an occupationally-based visa. The applicant was awaiting a revised skills assessment from a body called Trade Recognition Australia. The Tribunal proceeded to a decision adverse to the applicant without waiting for that revised assessment which was critical to her success. In holding that the decision of the Tribunal was vitiated by unreasonableness, Hayne, Kiefel and Bell JJ referred to the decision of the Court of Appeal in *Wednesbury Corporation*⁴⁷ and said:

The legal standard of reasonableness should not be considered as limited to what is in effect an irrational, if not bizarre, decision — which is to say one that is so unreasonable that no reasonable person could have arrived at it.⁴⁸

Indeed, the Master of the Rolls, Lord Greene in *Wednesbury Corporation*, made the point that bad faith, dishonesty, unreasonableness, attention given to extraneous circumstances, and disregard of public policy, were all relevant to whether a statutory discretion was exercised reasonably.⁴⁹ As the joint judgment, in this Court said in *Li*:

Whether a decision-maker be regarded, by reference to the scope and purpose of the statute, as having committed a particular error in reasoning, given disproportionate weight to some factor or reasoned illogically or irrationally, the final conclusion will in each case be that the decision-maker has been unreasonable in a legal sense.⁵⁰

Reasonableness in the exercise of official power may be regarded as an aspect of the rule of law. So too may consistency which is perhaps a species of the genus of reasonableness.

⁴⁴ *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342, 368.

⁴⁵ *Associated Provincial Picture House Ltd v Wednesbury Corporation* [1948] 1 KB 223.

⁴⁶ [2013] HCA 18.

⁴⁷ [1948] 1 KB 223.

⁴⁸ [2013] HCA 18 [68].

⁴⁹ [1948] 1 KB 223, 229.

⁵⁰ [2013] HCA 18 [72].

Consistency as an aspect of rationality

Whatever form a rule takes, whether it confers power or has some other function, central to the idea of a legal rule is the requirement of consistent application to all to whom it applies. Unless a dispensing power is built into the rule or some higher rule, the rule cannot be disapplied as a matter of discretion. The concept of a rule carries with it a notion of equality before the law. That notion is consistent with different outcomes from the application of the rule to different cases. The point was made succinctly in relation to sentencing in the joint judgment of the High Court of Australia in *Wong v The Queen*⁵¹ in 2001 by Justices Gaudron, Gummow and Hayne, when their Honours said:

Equal justice requires identity of outcome in cases that are *relevantly* identical. It requires *different* outcomes in cases that are different in some relevant respect.⁵² (emphasis in original)

In a more recent judgment of the High Court, also concerning sentencing discretion, the idea of equal justice was described as embodying the norm expressed in the term 'equality before the law', which in turn is an aspect of the rule of law. In that case the majority said:

Consistency in the punishment of offences against the criminal law is 'a reflection of the notion of equal justice' and 'is a fundamental element in any rational and fair system of criminal justice'.⁵³ (footnotes omitted)

The requirement that rules of law be applied and discretions under them be exercised consistently is an aspect of the larger requirement of rationality which must inform any legal system and is an essential element of the rule of law. Fairness is closely linked to the same concept.

Fairness as an aspect of the rule of law

If you were to ask a non-lawyer, 'Should the law be applied fairly?', the answer would be 'Yes'. Fairness is a central concept informing the exercise of official power and

⁵¹ (2001) 207 CLR 584.

⁵² (2001) 207 CLR 584, 608 [65].

⁵³ *Green v The Queen* (2011) 244 CLR 462, 473 (French CJ, Crennan and Kiefel JJ).

thus the rule of law. Of course, different people have different ideas of what is fair in the law, but the notion of procedural fairness has a certain general appeal.

When a statute empowers a public official to adversely affect a person's rights or interests, the rules of procedural fairness regulate the exercise of the power unless excluded by plain words.⁵⁴ It is a matter which goes to power. As the High Court said in 2000:

if an officer of the Commonwealth exercising power conferred by statute does not accord procedural fairness and if that statute has not, on its proper construction, relevantly (and validly) limited or extinguished any obligation to afford procedural fairness, the officer exceeds jurisdiction in a sense necessary to attract prohibition under s 75(v) of the Constitution.⁵⁵

Procedural fairness supports rational decision-making. Bias in a decision-maker is likely to give rise to other grounds for judicial review. A failure to give a person affected by a decision the right to be heard and to comment on adverse material creates a risk that not all relevant evidence will be before the decision-maker who may thereby be led into factual or other error. Apparent or apprehended bias is likely to detract from the legitimacy of a decision and so undermine confidence in the administration of the relevant power.

Fairness is not simply an ethical ornamentation upon official decision-making. It is an instrument of that rationality which the logic of the law and the rule of law demands.

Administrative justice and the rule of law

Each of the preceding factors feeds into a concept of administrative justice. Administrative justice involves at least the following elements:

1. Lawfulness — that official decisions are authorised by statute, prerogative or constitution.

⁵⁴ *Annetts v McCann* (1990) 170 CLR 596, 598.

⁵⁵ *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82, 101 [41].

2. Rationality — that official decisions comply with the logical framework created by the grant of power under which they are made.
3. Consistency — that official decisions apply legal rules consistently to all to whom the rules apply allowing for different outcomes where there are relevant differences between cases.
4. Fairness — that official decisions are reached fairly, that is, impartially in fact and appearance and with a proper opportunity to persons affected to be heard.
5. Good faith — official decisions must be made honestly and with conscientious attention to the task required of the decision-maker — this also may be seen as an aspect of rationality in decision-making.

The identification of these elements of administrative justice is a little like the identification of 'fundamental' particles in physics. When pressed, they can transform one into another or cascade into one or more of the traditional grounds of review developed at common law.⁵⁶ A decision-maker may be affected by actual bias which constitutes a breach of the requirements of procedural fairness. Such bias, if directed against an attribute of the person affected by the decision, such as race or gender or sexual orientation, may mean that the decision is made by reference to irrelevant considerations or for improper purposes and therefore is beyond power. A serious enough bias may lead to dishonest decision-making. Lack of rationality may manifest as a failure to take into account mandatory relevant considerations. In such a case there may be an error of law for failure to apply statutory criteria or an improper exercise of power. Or it may yield a decision so unreasonable that no reasonable person could have made it. Unfairness following from a failure to hear from a party to be affected may also constitute a failure to comply with express statutory procedures conditioning the exercise of the power.⁵⁷ These examples indicate that there is a degree of overlap between the elements of administrative justice. They nevertheless form a convenient

⁵⁶ To a large extent reflected in the statutory grounds for judicial review set out in s 5 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) and its State counterparts: *Kioa v West* (1985) 159 CLR 550, 567, 576, 594, 625, 630; *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321, 356–8.

⁵⁷ See eg Div 4 of Part 7 of the *Migration Act 1958* (Cth).

taxonomy, not least because they are capable of being broadly understood by a wider audience than lawyers or judges, in terms of widely accepted community values. All are considered as an aspect of the concept of limitations on official power which are central to the rule of law. It is a function of the court to define those limits. That involves, in large part, the constitutional task of interpreting the laws.

Statutory interpretation — the rule of law at work

Statutory interpretation is the application of the rule of law in court. It is the field in which Parliament, the Executive and the courts interact in the discharge of their respective functions. Parliament makes the laws, the Executive exercises powers and discharges obligations conferred on it by those laws and the courts hear and determine cases including cases about the correct interpretation of the laws. Central to the process of statutory interpretation are the concepts of legislative intention and statutory purpose.

The concept of legislative intention, however, is a construct. It has been called a fiction on the basis that neither individual members of Parliament necessarily mean the same thing by voting on a Bill 'or, in some cases anything at all'.⁵⁸

The significance of the term 'legislative intention' has been considered recently in decisions of the High Court. One of those was *Lacey v Attorney-General (Qld)*,⁵⁹ which was delivered on 7 April 2011. Six Justices in a joint judgment said of legislative intention:

The legislative intention ... is not an objective collective mental state. Such a state is a fiction which serves no useful purpose. Ascertainment of legislative intention is asserted as a statement of compliance with the rules of construction, common law and statutory which have been applied to reach the preferred results and which are known to parliamentary drafters and the courts.⁶⁰

Despite what was said in *Lacey* about legislative intention, interpretation does involve the identification of a statutory purpose. It is possible to determine the purpose of a constructed thing, be it a tool or a law, without exploring the intention of its maker. I may

⁵⁸ *Mills v Meeking* (1990) 169 CLR 214, 234 (Dawson J); *Corporate Affairs Commission (NSW) v Yuill* (1991) 172 CLR 319, 339 (Gaudron J).

⁵⁹ (2011) 242 CLR 573.

⁶⁰ (2011) 242 CLR 573, 592 [43] (footnotes omitted).

look at the human eye and say its purpose is to enable its possessor to see. That does not answer the question whether it evidences a creator's intention. The purpose of a statute may appear from an express statement in the statute itself or by inference from the terms of the statute and by appropriate reference to extrinsic materials. Reference to such material is expressly authorised in respect of Commonwealth statutes by the *Acts Interpretation Act 1901* (Cth) and, in respect of State and Territory statutes, by similar provisions in State and Territory laws. So too, is purposive construction. Ultimately, however, it is the text of the statute which governs. If a Minister in introducing a proposed statute to Parliament made statements about its intended meaning which the text cannot bear, then the text must determine the available interpretations even if they do not reflect the ministerial intention.⁶¹

Common law interpretive rules

An interpretative rule of considerable importance, derived from the common law and said to be an aspect of the rule of law, is the principle of legality. It is well established in Australia. That principle requires courts to favour a construction of a statute which will avoid or mitigate infringement by the statute upon fundamental rights and freedoms. It has been explained in the House of Lords as requiring that Parliament squarely confront what it is doing and accept the political costs.⁶² Fundamental rights are not to be overridden by general or ambiguous words. There is a risk that, absent clear words, the full implications of a proposed statute may pass unnoticed by those who are voting for it. Those observations about the principle were made in the House of Lords in *R v Secretary of State for the Home Department; Ex parte Simms* leading to the conclusion that:

In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual.⁶³

Commonwealth and State statutes in Australia are made under Constitutions which do not in terms guarantee common law rights and freedoms against legislative incursion. The

⁶¹ *Re Bolton; Ex parte Beane* (1987) 162 CLR 514, 518; *Mills v Meeking* (1991) 69 CLR 214, 223, 226 (Mason CJ and Toohey J); *Hepples v Federal Commissioner of Taxation* (1992) 173 CLR 492; *Federal Commissioner of Taxation v Tyan* (2000) 201 CLR 109, 126 [29].

⁶² *R v Secretary of State for the Home Department; Ex parte Simms* [2000] 2 AC 115, 131 (Lord Hoffmann)

⁶³ *Ibid.*

principle of legality can nevertheless be regarded as 'constitutional' in character even if the rights and freedoms which it protects are not.⁶⁴

While the supremacy of Parliament enables it, subject to the Constitution, to override common law rights and freedoms, the strength of the principle should not be underestimated. Common law rights and freedoms have weight.⁶⁵ The common law accords high value to freedom of expression, particularly the freedom to criticise public bodies.⁶⁶ That freedom is distinct from the freedom of political communication which the Court has implied in the Commonwealth Constitution and which cannot be transgressed by any Australian parliament.

The common law principle of legality has a significant role to play in the protection of rights and freedoms in contemporary society while operating consistently with the principle of parliamentary supremacy. It does not, however, authorise the courts to rewrite statutes in order to accord with fundamental human rights and freedoms.

The rule of law — cross-fertilisation

Although there is diversity in the understandings and applications of the rule of law in different countries, ideas about important common principles can travel across national boundaries so that what happens in one country can inform the development of the law in another. This phenomenon is exemplified by a case on which I sat in the Supreme Court of Fiji in 2003. We sat a bench of three comprising Justice Sir Kenneth Keith from New Zealand, who is now a Judge of the International Court of Justice, Justice John von Doussa of the Federal Court of Australia, who later became President of the Human Rights and Equal Opportunity Commission, and myself. The case was *Matalulu v Director of Public Prosecutions*.⁶⁷ It had a rather complex background in Fijian customary law. It concerned a disputed election for appointment to the office of a Paramount Chief. Two protagonists on one side of the dispute filed complaints against an opposing party alleging that in the course

⁶⁴ *Evans v State of New South Wales* (2008) 250 FCR 33, [70] (Branson, French and Stone JJ).

⁶⁵ TRS Allan, 'The Common Law as Constitution: Fundamental Rights and First Principles' in Cheryl Saunders (ed), *Courts of Final Jurisdiction: The Mason Court in Australia* (Federation Press, 1996) 146, 148.

⁶⁶ RS French, 'Dialogue Across Difference: Freedom of Speech and the Media in India and Australia' (2008) *Lawasia Journal* 1–33, 18–23.

⁶⁷ [2003] 4 LRC 712; [2003] FJSC 2.

of judicial review proceedings arising out of the election, he had committed perjury by swearing a false affidavit for use in those proceedings.

The Director of Public Prosecutions of Fiji ('DPP') exercised a constitutional power to take over the private criminal proceedings and then filed a nolle prosequi terminating each of them. The complainant sought judicial review of the DPP's decision. The Court of Appeal of Fiji held that judicial review of such decisions was available only on rare occasions and dismissed the application. The Supreme Court dismissed an appeal from that decision. In the course of our joint judgment, Justices Keith, von Doussa and myself considered the general principles for reviewability of a prosecutor's decision to enter a nolle prosequi. We explained the reluctance of courts to interfere with prosecutorial discretion by reference to what we called:

the polycentric character of official decision-making in such matters including policy and public interest considerations which are not susceptible of judicial review because it was within neither the constitutional function nor the practical competence of the courts to assess their merit.⁶⁸

Nevertheless, we set out a number of circumstances in which a purported exercise of power would be reviewable. They included excess of the DPP's constitutional or statutory grant of power, acting under the direction or control of another person or authority, and acting in bad faith or dishonestly. We also referred to circumstances in which the exercise of power would constitute an abuse of the process of the court in which it was instituted or where the DPP had fettered his or her discretion by a rigid policy.

The judgment in that case having been delivered, I did not expect to hear or see anything more of it. It was something of a surprise therefore to discover that subsequently the decision was referred to and approved by Lord Bingham in the Privy Council on three occasions: one on appeal from Mauritius,⁶⁹ another on appeal from Trinidad and Tobago⁷⁰ and a third on appeal from Jamaica.⁷¹ It was also cited and applied in 2008 in the High Court of Justice in Northern Ireland⁷² and in 2009 in the decision of the House of Lords in *R v*

⁶⁸ [2003] 4 LRC 712, 735.

⁶⁹ *Mohit v Director of Public Prosecutions of Mauritius* (2006) 1 WLR 3343.

⁷⁰ *Sharma v Brown-Antoine* (2007) 1 WLR 780.

⁷¹ *Leonie Marshall v Director of Public Prosecutions* (2007) WLR 2866; [2007] UKPC 4.

⁷² *Re Hammel's Application* (2008) NIQB 73.

Director of Serious Fraud Office.⁷³ It was cited most recently, on 16 March 2012, in *Lord Carlisle v Secretary of State for the Home Department*.⁷⁴

In referring to those cases, I should also mention that the joint majority judgment of the High Court of Australia last year in *Likiardopoulos v The Queen*⁷⁵ reaffirmed earlier authority concerning limitations on judicial review of prosecutorial discretions. The Court thus reaffirmed the proposition that the independence and impartiality of the judicial process would be compromised if courts were perceived to be in any way concerned with who is to be prosecuted and for what. The Court considered that certain decisions involved in the prosecution process are unsusceptible of judicial review. Moreover, the sanctions available to enforce well established standards of prosecutorial fairness were to be found mainly in the powers of a trial judge and not directly enforceable at the suit of the accused or anyone else by prerogative writ, judicial order, or an action for damages.

Singapore itself has recently had to grapple with the question of prosecutorial discretion and its interaction with the guarantee of equality before the law and equal protection of the law under Art 12 of the Singapore Constitution. That consideration has arisen in the Court of Appeal in connection with decisions to charge co-offenders with different criminal offences when one offence carries a mandatory death penalty and the other does not. It is, of course, not for me to comment upon the merits of what is no doubt a vigorous and continuing debate. What those cases illustrate however, is the extent to which our different jurisdictions have to confront similar legal issues.

Conclusion

The rule of law is a many coloured dream coat. It has different attributes and aspects. I have endeavoured in this lecture to highlight some of its important features in our societies whose governance is based upon constitutionalism. Those important features include the following propositions:

⁷³ *R (Corner House Research) v Director of Serious Fraud Office* [2009] 1 AC 756.

⁷⁴ [2012] EWHC 617.

⁷⁵ (2012) 86 ALJR 1168, referring to *Maxwell v The Queen* (1996) 104 CLR 501, 534.

- all official power derives from rules of law found in the Constitution or in laws made under the Constitution;
- there is no such thing as unlimited official power be it legislative, executive or judicial;
- the powers conferred by law must be exercised lawfully, rationally, consistently, fairly and in good faith;
- the courts have the ultimate responsibility of resolving disputes about the limits of official power and in so doing they, like those whose decisions they review, must act lawfully, rationally, consistently, fairly and in good faith and within the proper limits of their constitutional function;
- laws are to be interpreted in accordance with their text, context and purpose and in accordance with common law and statutory rules of interpretation;
- laws are to be construed, where choices are open, so as to avoid or minimise their impact on fundamental common law rights and freedoms.

There are different ideas of what the rule of law embodies. There are 'thin' concepts and 'thick' concepts. However, the features of lawfulness, rationality, consistency, fairness and good faith in the exercise of official powers, and the function of judicial review in determining the meaning and constitutionality of laws and the lawfulness of action under those laws, are essential elements of any constitutionally based concept of the rule of law. They are, in my perception of the many coloured dream coat, its primary colours.