BINGHAM CENTRE FOR THE RULE OF LAW

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A JUDGE'S VIEW ON THE RULE OF LAW: an international perspective in response to the Bingham lecture delivered by Lord Judge 3 May 2017

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It is, for me, happy timing that I should be in London on the occasion of the delivery of the annual Bingham lecture. It is the first I have been able to attend. The world may have shrunk, but the South Pacific is still a long way away.

I am delighted to have made it at last to the annual lecture. First because of my great admiration and affection for Lord Bingham himself. And secondly because of my admiration for the way in which the Centre carries on Lord Bingham's work in promoting practical observance of the rule of law. It is also a delight that the lecture this year has been delivered by another great lawyer and friend in Lord Judge.

The paper we have heard this evening is important and timely. And it is sobering. Lord Judge picks up with characteristic verve where Lord Bingham himself left off in the final chapter of *The Rule of Law*: that is to say with parliamentary sovereignty. On this occasion, his attention is not directed at the substantive values protected by the rule of law. That is the topic that generally excites lawyers when considering the rule of law. Lord Judge, however, is concerned with risk to constitutional values in formal observance of parliamentary supremacy in law-making but practical abdication of responsibility to the Executive.

Ensuring the supremacy of the law enacted by Parliament over the Executive is the defining characteristic of the constitution of the United Kingdom, as indeed Lord Bingham described it. Parliamentary scrutiny of enacted laws, both primary and secondary legislation, is the assumption of the constitution. If that scrutiny is not fulfilled in practice, the constitutional balance is disturbed. Formal or theoretical parliamentary oversight (what Lord Judge describes as "constitutional sovereignty") is insufficient compliance with the rule of law looked to in the Petition of Grievances. It opens the door to Executive government, to Executive sovereignty, which would reverse the 17th century constitution.

While the rule of law is shared with all systems where the power of a state is organised and not arbitrary, parliamentary sovereignty is almost unique. These are the two principles around which the New Zealand constitution, too, revolves. Like you, we lack any primary constitutional text, although most of the written bits of our constitution are inherited from and shared with you. When I was asked to give an international perspective tonight, I did think that since we are both outliers on the world stage my perspective might be a mirror, although a slightly distorted one (if only

because no constitution stays still). But the focus on parliamentary sovereignty means that a New Zealand perspective is perhaps the only international perspective to be had.

There are of course differences. New Zealand has a unicameral legislature, an electoral system of mixed-member proportional representation, and an unresolved question about the constitutional status of the Treaty of Waitangi (which for us raises a similar query to that concerning the Treaty of Union in the United Kingdom, referred to in his book by Lord Bingham). You acceded to Europe and now have the challenge of leaving Europe; and you seem to be moving towards federalism. That would have Dicey spinning in his grave. And if taken further it may yet enthrone the Constitution rather than Parliament as sovereign.

In his final chapter of *The Rule of Law*, Lord Bingham raised the question whether the constitution was becoming "unbalanced" by erosion of the institutional checks in law-making to ensure it conformed to rule of law values. While he was clear in the view that the major constitutional change entailed in substituting the sovereignty of a codified and entrenched constitution for the sovereignty of Parliament was one for the British people, not for judges developing a common law constitution, he was concerned at the erosion of institutional checks in the parliamentary process. He thought the spectre of legislation being enacted by a majority of the House of Commons without restraint to protect rule of law values was a serious problem. He saw a risk of provoking collision between judges and Parliament and undesirable constitutional uncertainty.

Lord Judge's focus is more immediate problems with the present system – the process of legislative enactment, both of primary legislation and subordinate legislation, and Parliament's abdication of law-making authority to the Executive. As he says, the tsunami of Brexit legislation to be expected carries the risk that undesirable habits will harden into a constitutional shift which is inconsistent with the rule of law.

Jeremy Waldron has written of the dignity of legislation and has referred to what he calls "legislative due process" including the checks and balances in producing legislation (including bicameral check and the formality and solemnity of debate and enactment).[1] They are important aspects of the rule of law, as indeed Lord Judge treats them, and a constitutional responsibility of the sovereign legislature. The rule of law does not simply set up the conditions for judicial check and collision between the judicial and political branches. It requires close attention to the process of law-making and avoidance of the provision of blank cheques in law-making to be completed by the Executive as to policy as well as detail.

Waldron describes the phenomenon of rush to legislation as "an instrument of political power" as in opposition to the rule of law.[2] These are the concerns Lord

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1 Jeremy Waldron "Legislation and the Rule of Law" (2007) 1 Legisprudence 91 at 107.
2 At 108.

Judge has expressed about the impossibility of parliamentary review of the volume of legislation and the advent of "hooray" legislation. To them he adds the concerns about skeleton Acts and Henry VIII clauses.

I should say that although the rush to legislation has attracted much criticism in New Zealand in the past, considerable effort now goes into better process through Parliamentary scrutiny and observance of published standards for legislation, which include protections for rule of law interests. And, although Henry VIII clauses are not unknown in New Zealand, they are generally frowned upon and have been largely confined in recent years to emergency legislation such as that following the Christchurch earthquakes.[3] (A Henry VIII clause did however appeared in a recent dog control Bill.[4]) The Legislation Design and Advisory Committee (an extra-parliamentary committee) has recommended that such provisions be subject to sunset clauses,[5] usually of 3 years.[6]

Where there are deficiencies in parliamentary process, however, only Parliament can fix the problem, as Lord Judge is right to say. With the authority of a gamekeeper turned poacher, Lord Judge calls for immediate effort in addressing these issues.

The insight that parliamentary sovereignty is being wrongly elided with the rule of law is very important. But I wonder whether the apparent indifference to ceding so much ground to the Executive is a result of more deep-seated malaise in our constitutional arrangements than the press of work and the volume of law-making. I think Trevor Allan may be right to say that it is a central problem that the Executive is widely seen in our societies as an independent source of policy formulation and governance which is elected to govern directly while it holds the confidence of Parliament.[7]

If so, then I think our constitutions may have bigger problems than reforming parliamentary processes. The effort to understand our system, particularly in a world that is used to written constitutional texts, may be too much. It may not be good enough to fall back on the principles of the sovereignty of Parliament and the rule of law as constitutional foundations. Although Dicey himself treated the two as reconcilable, there is undeniable tension between them.

I personally think there is much to be said for our constitutional arrangements. They have served well and do not imprison our polities with text. But if they are not

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3 See Canterbury Earthquake Response and Recovery Act 2010, s 6; and Canterbury Earthquake Recovery Act 2011, s 71. Compare Hurunui/Kaikoura Earthquakes Recovery Act 2016, s 7.

4 Dog Control Amendment Bill (No 2) 2008 (176–2), cl 7, proposing insertion of new s 78A into the Dog Control Act 1996 and removal of the protections in current s 78B.

5 Legislation Design and Advisory Committee *Guidelines on Process and Content of Legislation* (October 2014) at [13.5].

6 As suggested by the Regulations Review Committee in respect of "transitional" override powers: see Regulations Review Committee "Inquiry into the Resource Management (Transitional) Regulations 1994 and the Principles that Should Apply to the Use of Empowering Provisions Allowing Regulations to Override Primary Legislation During a Transitional Period" [1993–1996] XLII AJHR I 16C at 19.

7 TRS Allan "Doctrine and Theory in Administrative Law: An Elusive Quest for the Limits of Jurisdiction" [2003] PL 429 at 433.

understood and valued, and if the history that produced them is not understood and valued, I wonder whether they come at too great a cost in a modern democracy. The rule of law and the sovereignty of Parliament are what Benjamin Cardozo once described as “magic words and incantations”. And he thought that “magic words and incantations are as fatal to [the science of law] as they are to any other”.[8] Lord Judge challenges us to a more muscular than magic view of the constitution. I hope he is heard.

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[8] Benjamin N Cardozo *The Growth of the Law* (Yale University Press, New Haven, 1924) at 66.