

**Speech by The Hon. Justice B J Preston
Chief Judge, Land and Environment Court of New South Wales**

‘The enduring importance of the rule of law in times of change’

**Environment and Planning Law Association (NSW) Annual Conference:
‘The times they are a-changin’**

13 October 2011, Sydney

INTRODUCTION

There have been examples, including in recent times, of the executive and legislative branches of government circumventing compliance with the law by executive fiat or action or legislative amendment so that the law does not stand in the way of desired objectives. Examples come readily to mind in the field of environmental and planning law.

With executive governments, and their agencies, there will always be pressure to push the exercise of powers conferred by the legislature to or beyond their limits.¹ The law reports are replete with judicial decisions enforcing compliance with the limits of executive powers conferred by environmental and planning legislation.

Equally, legislatures succumb to pressures to bypass or overcome inconvenient or undesired legislative requirements or judicial decisions. Legislation, both primary and delegated, has fast-tracked or created alternative regimes for assessment and approval of major development projects by exempting such projects from compliance with part or the whole of environmental and planning legislation; overturned decisions of courts and tribunals or otherwise terminated legal proceedings with respect to such projects; concluded indenture or franchise agreements for such projects; or granted parliamentary authorisation to such projects.²

Such circumvention of the law undermines public confidence in the legislative and executive branches of government and their legitimacy. A fundamental reason is that such actions are seen to be inconsistent with the rule of law. The essence of the rule of law is that all governmental authority is subject to and constrained by law. When any branch of government seeks to remove itself from the constraints of law, the rule of law is impoverished.

Australia, and New South Wales, are both undertaking reviews of laws and governmental action with respect to the environment. At Commonwealth level, there is a review of the *Environment Protection and Biodiversity Conservation Act 1999*

¹ A M Gleeson, ‘A Core Value’ (2007) 8 *The Judicial Review* 329, 339.

² Examples are given in Gerry Bates, *Environmental Law in Australia* (LexisNexis Butterworths, 7th ed, 2010) 287-296.

(Cth)³ and a legislative package concerning climate change.⁴ At the New South Wales level, there is a review of planning laws.⁵ There are, no doubt, desired objectives the executive and legislative branches of the respective governments may wish to achieve. However, critical to the legitimacy of their actions will be the extent to which the government adheres to or departs from the rule of law. It is, therefore, an opportune time to examine the rule of law and to remind ourselves of its enduring importance, especially in these times of change.

Support for the rule of law has grown over time, but has accelerated in recent decades to a point where there is apparent unanimity.⁶ The rule of law stands as the pre-eminent legitimating political ideal in the world today.⁷ Peculiarly, however, there is no agreement as to what the rule of law precisely means. There is a core of meaning on which most would agree but an extended penumbra of meaning where agreement is absent.

Formulations of the rule of law can be grouped into two basic categories, formal versions and substantive versions. Each category can, in turn, be subdivided into three distinct forms.

Formal versions of the rule of law focus on the proper sources and form of legality. The three forms are rule by law, formal legality and legality with democracy. Substantive versions incorporate the formal requirements of formal versions of the rule of law but add requirements about the content of the law. These content requirements include individual human rights, rights of dignity and/or justice and social welfare rights.

In each category, the formulations can be seen to progress from simpler to more complex accounts or, what Tamanaha describes as, thinner to thicker accounts. Each subsequent formulation incorporates the main aspects of the preceding formulations, making them progressively cumulative.⁸ Furthermore, substantive formulations are cumulative upon formal formulations, incorporating and adding to their aspects. Tamanaha tabulates this categorisation of the alternative rule of law formulations as follows:⁹

³ Commonwealth of Australia, *Australian Environment Act: Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999* (October 2009); Department of Sustainability, Environment, Water, Population & Communities, *Australian Government Response to the Report of the Independent Review of the EPBC Act* (August 2011).

⁴ Australian Government, Department of Climate Change & Energy Efficiency, *Clean Energy Legislative Package* (20 September 2011) <<http://www.climatechange.gov.au/en/government/legislation.aspx>>.

⁵ New South Wales Government, *NSW Planning Review* <<http://planningreview.nsw.gov.au/>>

⁶ Brian Z Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge University Press, 2004) 1–3.

⁷ *Ibid* 4.

⁸ *Ibid* 91.

⁹ *Ibid*.

Thinner ----- >--- to -----> Thicker

FORMAL VERSIONS:	1. Rule by Law	2. Formal Legality	3. Democracy + Legality
	- law as instrument of government action	- general, prospective, clear, certain	- consent determines content of law
SUBSTANTIVE VERSIONS:	4. Individual Rights	5. Right of Dignity and/or Justice	6. Social Welfare
	- property, contract, privacy, autonomy		- substantive equality, welfare, preservation of community

Support for the various formulations of the rule of law is stronger for the formal versions over the substantive versions and strongest for the first two forms of the formal version (rule by law and formal legality) but weakens with each cumulative formulation. A central reason is that formal versions of the rule of law have no content requirements, while substantive versions have increasing content requirements as one moves from thinner to thicker accounts. This lack of content requirement makes formal versions politically neutral. As Fuller notes, formal legality is “indifferent towards the substantive aims of law and is ready to serve a variety of such aims with equal efficacy”.¹⁰ This indifference or neutrality of formal versions of the rule of law enables the rule of law to be universally supported, a point well made by Summers:

A relatively formal theory is itself more or less politically neutral, and because it is so confined, it is more likely to command support on its own terms from right, left and center in politics than is a substantive theory which not only incorporates the rule of law formally conceived but also incorporates much more controversial substantive content.¹¹

The increasing substantive content of the rule of law in more complex or thicker formulations also obscures rather than illuminates the meaning and lessens the usefulness of the rule of law as a concept. Spigelman notes that the label of rule of law “becomes progressively less useful as its scope extends”.¹²

I propose to examine these alternative formulations of the rule of law in the order of progression from the thinnest to the thickest accounts of, first, the formal versions, then the substantive versions. In the course of my examination, I will add illustrations from the field of environmental and planning law. I will spend more time on the formal versions than the substantive versions as these formal versions attract greater support and are more useful.

¹⁰ Lon L Fuller, *The Morality of Law* (Yale University Press, revised ed, 1969) 153.

¹¹ Robert S Summers, ‘A Formal Theory of the Rule of Law’ (1993) 6 *Ratio Juris* 127, 136.

¹² James J Spigelman, “The Rule of Law in the Asian Region” in T D Castle (ed), *Speeches of a Chief Justice: James Spigelman 1998-2008* (CS2N Publishing, 2008) 54.

RULE BY LAW

At its most basic, the rule of law postulates that law is the means by which government conducts its affairs. The rule of law requires that “the government shall be ruled by the law and subject to it”.¹³ This means “all government action must have formulation in law, must be authorised by law”.¹⁴ Put another way, “all authority is subject to, and constrained by, law”.¹⁵

This first and most basic of the formal versions of the rule of law has been described as “rule by law”. It is the broadest and oldest of the ideas of the rule of law. The root of the idea is the restraint of government tyranny. Restraining the tyranny of the sovereign has been a perennial struggle. The Magna Carta, originally signed in 1215, was the renowned action by nobles to use law to restrain King John and thereby subordinate the sovereign to law.¹⁶ This understanding of the rule of law, as a restraint of government tyranny predated the emergence of the idea of individual liberty, when the emphasis of the rule of law shifted to formal legality.¹⁷

The idea of rule of law, of a government limited by law, involves two components. First, the government must abide by the currently valid law. The government may change the law, by Parliament enacting statutes or the executive exercising delegation to make subordinate legal rules, but until the law is changed, the law must be complied with.¹⁸ Secondly, even when the government wishes to change the law, it is not entirely free to change it in any way it desires because there are certain restraints on the law making power.¹⁹ These restraints are to be found in constitutional, statutory and common law.

The rule by law is a necessary aspect of the rule of law but it is insufficient in itself.²⁰ Tamanaha observes, “rule by law carries scant connotation of legal *limitations* on government, which is the *sine qua non* of the rule of law tradition.”²¹

It is necessary, therefore, to progress in our examination to the second formal version of the rule of law, termed formal legality.

FORMAL LEGALITY

Formal legality involves a number of principles which fall into three groups: first, there are principles requiring that the law should conform to standards designed to enable the law to guide effectively the conduct of the government and the governed; secondly, there are principles designed to ensure that the legal machinery of enforcing the law does not deprive the law of its ability to guide conduct; and thirdly,

¹³ Joseph Raz, *The Authority of Law* (Clarendon Press, 1979) 212.

¹⁴ *Ibid.*

¹⁵ A M Gleeson, ‘Courts and The Rule of Law’, a paper delivered to the Rule of Law Series, Melbourne University, 7 November 2001, 1.

¹⁶ Tamanaha, above n 6, 25–26.

¹⁷ *Ibid* 115.

¹⁸ *Ibid.*

¹⁹ *Ibid* 117–118.

²⁰ Spigelman, above n 12, 54.

²¹ Tamanaha, above n 6, 22.

there are principles designed to ensure that the laws and legal machinery actually achieve or realise the rule of law.

Standards of laws

In order for both the government and the governed to be ruled by law, the law must conform to certain standards so that government and governed are aware and understand what they can and cannot do, how they can do it and what are the sanctions if they do not comply. These standards or, to use Fuller's term, the desiderata are as follows.

Generality

The law must be general, both in statement and intent, and not be used as a way of harming particular individuals.²² The law should apply, without exception, to everyone whose conduct falls within the prescribed conditions of application. Rousseau described this requirement of generality as being that "the law considers all subjects collectively and all actions in the abstract; it does not consider any individual man or any specific action".²³ Hayek asserts that this attribute of generality mandates another requirement of the rule of law, of the separation of powers between the legislature and the judiciary, for only in this manner can the law be set out in abstract terms in advance of its application to any particular individual.²⁴

Equality

The law must apply to everyone equally without making arbitrary distinctions among people.²⁵ Put simply, everyone is equal before the law, including government officials.²⁶ An exception to the principle of equality before the law is where objective differences justify differentiation.²⁷

Public accessibility

Laws need to be publicly promulgated, adequately publicised and readily available. If law is to guide people, they must be able to find out what it is.²⁸

Prospectivity

Laws ordinarily need to be prospective, not retrospective. A person cannot be guided by a retrospective law: it does not exist at the time of action.²⁹ Whilst there be some

²² John Rawls, *A Theory of Justice* (Harvard University Press, revised ed, 1999) 209; Fuller, above n 10, 46.

²³ Jean-Jacques Rousseau, *The Social Contract* (Penguin Books, 1968) 82, quoted in Tamanaha, above n 6, 66.

²⁴ Friedrich A Hayek, *The Constitution of Liberty* (University of Chicago Press, 1960) 210–212.

²⁵ Hayek, above n 24, 209–210.

²⁶ Albert V Dicey, *An Introduction to the Study of the Law of the Constitution* (Macmillan, 9th ed, 1945) 188; see also H W Arndt, 'The Origins of Dicey's Concept of the "Rule of Law"' (1957) 31 *Australian Law Journal* 117.

²⁷ Tom Bingham, *The Rule of Law* (Penguin Books, 2011) 55, 57–58.

²⁸ Raz, above n 13, 214; Fuller, above n 10, 51; Rawls, above n 22, 209; Bingham, above n 27, 37–40; Gleeson, above n 15, 2.

occasional retrospective enactments, these cannot be pervasive or characteristic features of the system otherwise they cannot serve to organise social behaviour by providing a basis for legitimate expectations.³⁰ Penal laws, in particular, should not be retrospective to the disadvantage of persons to whom they apply.³¹ Dicey's first aspect of the rule of law is centred upon the notion that there can be no punishment without a pre-existing law.³²

Clarity

The meaning of the law must be clear as to what it enjoins or forbids.³³ "An ambiguous, vague, obscure or imprecise law is likely to mislead or confuse at least some of those who decide to be guided by it".³⁴

Certainty and predictability

Laws should be certain and predictable:

Certainty requires that those who are subject to the law should be able to predict reliably what legal rules will be found to govern their conduct and how those rules will be interpreted and applied. Predictability is a necessary aspect of the foreknowledge that enables freedom of action.³⁵

Not contradictory or requiring of the impossible

Laws should not be contradictory, such as, at the same time, both commanding and forbidding an action to be done. Contradictions can arise within a single statute, a self-contradictory law, or between statutes passed at different times.³⁶ Equally, law should not command the impossible. As Rawls notes:

the actions which the rules of law require and forbid should be of a kind which men can reasonably be expected to do and to avoid. A system of rules addressed to rational persons to organise their conduct concerns itself with what they can and cannot do. It must not impose a duty to do what cannot be done.³⁷

Stability

Laws should be relatively stable. Raz states that:

[Laws] should not be changed too often. If they are frequently changed people will find it difficult to find out what the law is at any given moment and will constantly be in fear that the law has been changed since they last learnt what it was. But more important still is the fact that people need to know the law not only for short-term

²⁹ Raz, above n 13, 214; Fuller, above n 10, 54.

³⁰ Rawls, above n 22, 209.

³¹ Ibid.

³² Dicey, above n 26, 208; Tamanaha, above n 6, 63.

³³ Rawls, above n 22, 209; Fuller, above n 10, 63; Bingham, above n 27, 37–38.

³⁴ Raz, above n 13, 214.

³⁵ Tamanaha, above n 6, 66; see also Hayek, above n 24, 208; Bingham, above n 27, 37-39; Spigelman, above n 12, 54.

³⁶ Fuller, above n 10, 65–70.

³⁷ Rawls, above n 22, 208; see also Fuller, above n 10, 70–79.

decisions (where to park one's car, how much alcohol is allowed duty free, etc) but also for long-term planning. Knowledge of at least the general outlines and sometimes even of details of tax law and company law are often important for business plans which will bear fruit only years later. Stability is essential if people are to be guided by law in their long-term decisions.³⁸

These comments apply with equal cogency to environmental and planning laws. Relative stability or constancy in the law is necessary for developers, investors, residents and the community to be guided in their short-term and long-term decision-making.

Desiderata for subordinate legal rules and orders

Raz adds another principle concerning the making of subordinate legal rules and particular legal orders: "The making of particular laws (particular legal orders) should be guided by open, stable, clear, and general rules".³⁹ Raz introduces this principle because, increasingly, the executive government uses delegated law making powers to make particular legal regulations or to make particular legal orders in order to introduce flexibility into the law. However, such regulations and orders can be ephemeral and have the potential to run counter to the basic idea of the rule of law. This difficulty can be overcome if the process of making subordinate legal rules and orders is guided by open, stable, clear, and general rules so as not to undermine the standards of the primary statutes under which those subordinate legal rules and orders are made.⁴⁰

Collectively, these standards of laws are the desiderata of a system for subjecting human conduct to the governance of the law. I now turn to the legal machinery of enforcing the law.

Machinery to enforce the law

In addition to the standards of the laws, there is a need for organisational and institutional structures and machinery to enforce the laws. These include: an independent and impartial judiciary; adjudicative procedures that are fair; constraints on arbitrary exercise of power; judicial review of administrative action; judicial decision-making being bounded by legal rules; courts being easily accessible; the law being enforced; and the discretion of crime preventing agencies not being allowed to pervert the law.

Independent and impartial judiciary

An essential component of a system governed by law is the existence of an independent and impartial judiciary charged with the duty of applying the law to cases brought before it and whose judgment in those cases is final and conclusive.⁴¹

³⁸ Raz, above n 13, 214–215; see also Fuller, above n 10, 79–91.

³⁹ Raz, above n 13, 215.

⁴⁰ Ibid 216.

⁴¹ Ibid 216–217; Rawls, above n 22, 210; Bingham, above n 27, 91–92; Marilyn Warren, 'Does Judicial Independence Matter?' (2011) 85 *Australian Law Journal* 481, 481.

Independence requires separation of the judiciary from other branches of government, being the executive and the legislature. There must be separation between executive and judicial functions.⁴² The legislature cannot confer upon the judiciary, executive or administrative functions incompatible with the essential and defining characteristics of courts and the courts' place in a national integrated judicial system.⁴³ The legislature cannot confer judicial functions upon the executive.⁴⁴ The legislature is constrained in removing or confining the judiciary's supervisory jurisdiction over executive conduct.⁴⁵ There must also be a separation of legislative and judicial functions. The judiciary cannot engage in legislative rule making.⁴⁶

Independence not only requires independence from government but also independence from all influences external to the court which might lead it to decide cases otherwise than on the legal and factual merits. Lord Bingham states that the principle of independence:

calls for decision-makers to be independent of local government, vested interests of any kind, public and parliamentary opinion, the media, political parties and pressure groups, and their own colleagues, particularly those senior to them. In short, they must be independent of anybody and anything which might lead them to decide issues coming before them on anything other than the legal and factual merits of the case as, in the exercise of their own judgment, they consider them to be.⁴⁷

This statement of the principle of independence is particularly apposite to a specialist court, such as the Land and Environment Court, which deals with environmental and planning disputes where there is high potential for significant external pressures.

Closely related to the principle of independence is the requirement that a judicial decision-maker be impartial. This requires that there be no conflict of interest and no actual or apprehended bias.⁴⁸ A decision-maker can, of course, not be a judge in his or her own cause.⁴⁹ It also requires judicial decision-makers to alert themselves to, and to neutralise as far as practicable, personal predilections or prejudices or any extraneous considerations that might pervert their judgment.⁵⁰

In order to demonstrate that the judicial decision has been reached independently, impartially and with fidelity to the law, the judicial decision-maker needs to provide reasons for the decision. The reasoning for judicial decision-making is "inextricably interwoven with judicial independence."⁵¹

⁴² Gleeson, above n 15, 2.

⁴³ *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51; *South Australia v Totani* (2010) 242 CLR 1; *Wainohu v New South Wales* (2011) 278 ALR 1.

⁴⁴ Elizabeth Southwood, 'Extending the Kable Doctrine: *South Australia v Totani*' (2011) 22 *Public Law Review* 83, 95.

⁴⁵ *Kirk v Industrial Court (NSW)* (2009) 239 CLR 531.

⁴⁶ Peter Cane, 'Merits Review and Judicial Review – the AAT as Trojan Horse' (2000) 28 *Federal Law Review* 213, 237.

⁴⁷ Bingham, above n 27, 92.

⁴⁸ Bingham, above n 27, 93; Warren, above n 41, 482; Steven Rares, 'What is a Quality Judiciary?' (2011) 20 *Journal of Judicial Administration* 133, 137–138.

⁴⁹ Rawls, above n 22, 210.

⁵⁰ Bingham, above n 27, 93.

⁵¹ Warren, above note 41, 482.

The independence and impartiality of the judiciary can be enabled by institutional arrangements and rules concerning: selection of judges for appointment based upon appropriate legal qualifications; long-term tenure and security of tenure; procedural and substantive protection against removal of judges; the means of fixing and reviewing reasonable remuneration and other conditions of service; and sufficient resources to maintain a functioning court system. Such institutional arrangements and rules are intended to guarantee that judges will be free from extraneous pressures and be independent from all authority except that of the law.⁵²

In addition to an independent and impartial judiciary, there is the need for an independent legal profession, “fearless in its representation of those who cannot represent themselves, however unpopular or distasteful their case may be”.⁵³ The judiciary and legal profession are “interrelated in a symbiotic manner”.⁵⁴ A strong and independent legal profession contributes to a strong and independent judiciary.

Fair adjudicative procedures

The adjudicative procedures used to determine cases should be fair. This requires procedural fairness or the principles of natural justice be observed.⁵⁵ The principles of natural justice are manifold but include the absence of bias (impartiality) and an open and fair hearing. These principles are guarantees of impartiality and objectivity.⁵⁶ They are intended to preserve the integrity of the judicial process.⁵⁷ “Procedural fairness effected by impartiality and the natural justice hearing rule lies at the heart of the judicial process”.⁵⁸

The hearing should also be open to the public. The open-court principle provides a visible assurance of independence and impartiality. It is also an essential aspect of the characteristics of all courts.⁵⁹

Fairness requires giving both sides, not just one side, a fair opportunity to present their case. This applies equally to criminal matters as it does to civil matters. The prosecutor or claimant should be given a fair opportunity to present their case as should the defendant to rebut it.⁶⁰

⁵² Raz, above n 13, 217; Tamanaha, above n 6, 124; Tom Ginsberg, ‘The Politics of Courts in Democratization’ in James J Heckman, Robert L Nelson, Lee Cabatingan (eds), *Global Perspectives on the Rule of Law* (Routledge, 2010) 176; Rares, above n 48, 135–136; Robert French, ‘The State of the Australian Judicature’ (2010) 84 *Australian Law Journal* 310, 317–318.

⁵³ Bingham, above n 27, 92–93.

⁵⁴ Spigelman, above n 12, 55.

⁵⁵ Raz, above n 13, 217.

⁵⁶ H L A Hart, *The Concept of Law* (Oxford University Press, 2nd ed, 1994) 160, 206.

⁵⁷ Rawls, above n 22, 209–210.

⁵⁸ *South Australia v Totani* (2010) 242 CLR 1, 43 [62]; see also *International Finance Trust Co Ltd v The New South Wales Crime Commission* (2009) 240 CLR 319, 379–381 [141]–[145].

⁵⁹ *South Australia v Totani* (2010) 242 CLR 1, 43 [62]; *Russell v Russell* (1976) 134 CLR 495, 505, 520, 532; James Spigelman, ‘Seen to be Done: The Principle of Open Justice’ (Part 1) (2000) 74 *Australian Law Journal* 290, 294–295; James Spigelman, ‘Seen to be Done: The Principle of Open Justice’ (Part 2) (2000) 74 *Australian Law Journal* 378, 378.

⁶⁰ Bingham, above n 27, 90.

Fairness requires equality of arms: “a trial is not fair if the procedural dice are loaded in favour of one side or the other, if ... there is no equality of arms”.⁶¹

Ordinarily, there should be provisions for conducting orderly trials and hearings,⁶² rules of evidence that guarantee rational procedures of enquiry,⁶³ and a system of adversarial trial,⁶⁴ including cross-examination of adverse witnesses.⁶⁵

Constraints on arbitrary exercise of power

A core attribute of the rule of law is that the law must operate to constrain the arbitrary exercise of power, both public and private.⁶⁶ Arbitrariness, in the sense of unbounded discretion is the antithesis of the rule of law.⁶⁷ A former Lord Chief Justice of England, Lord Hewart, criticised various legislative provisions, including in town planning and rating legislation, which conferred excessive and unchallengeable discretions on ministers and government officials as undermining the rule of law.⁶⁸

The exercise of discretionary powers should be pursuant to legal rules that possess the qualities of generality, equality, certainty and the other desiderata to which I have earlier referred, as well as be subject to judicial oversight (which I will discuss next).⁶⁹

Judicial review of legislative and administrative action

To ensure conformity to the rule of law, courts should have supervisory jurisdiction to review both parliamentary and subordinate legislation and rules and executive action.⁷⁰ As Justice Brennan has pointed out:

[j]udicial review is neither more nor less than the enforcement of the rule of law over executive action; it is the means by which executive action is prevented from exceeding the powers and functions assigned to the executive by law and the interests of the individual are protected accordingly.⁷¹

Rules have been developed to identify the kinds of unlawfulness in respect of which the courts will intervene in judicial review. They include that government authorities and officials exercise powers conferred on them by the legislature, fairly, in good faith, for the purpose for which the powers were conferred, without exceeding the

⁶¹ Ibid.

⁶² Rawls, above n 22, 210.

⁶³ Ibid.

⁶⁴ *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45, 76 [64].

⁶⁵ Fuller, above n 10, 81.

⁶⁶ Spigelman, above n 12, 53.

⁶⁷ Tamanaha, above n 6, 64, 67; Bingham, above n 27, 48.

⁶⁸ Lord Hewart of Bury, *The New Despotism* (Ernest Benn, 1929), 13; see Bingham, above n 27, 48-49.

⁶⁹ Hayek, above n 24, 212–217; Bingham, above n 27, 50.

⁷⁰ Raz, above n 13, 217; Gleeson, above n 15, 5.

⁷¹ *The Church of Scientology Inc v Woodward* (1982) 154 CLR 25, 70 citing Louis L Jaffe and Edith G Henderson, ‘Judicial Review and the Rule of Law: Historical Origins’ (1956) 72 *Law Quarterly Review* 345; Bernard Schwartz and H William R Wade, *Legal Control of Government: Administrative Law in Britain and the United States* (Clarendon Press, 1972), Ch 9.

limits of such powers, considering relevant matters and ignoring irrelevant matters, and not manifestly unreasonably.⁷²

Central to all grounds of judicial review is the sole focus on the lawfulness and not the merits of administrative action. In the often quoted words of Justice Brennan:

The duty and jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository's power... The merits of administrative action, to the extent that they can be distinguished from legality, are for the repository of the relevant power and, subject to political control, for the repository alone.⁷³

This demarcation between the legality and the merits of administrative action is fundamental to a system of governance based on the rule of law.⁷⁴ It preserves the separation of powers and the balance between the branches of government.

The demarcation between legality and merits "does not involve a bright line test. The boundary is porous and ill defined."⁷⁵ Yet the legitimacy of judicial review depends on courts policing that boundary, ensuring that judicial interference with administrative decisions and conduct only occurs in respect of the legality and not the merits of such decisions and conduct.⁷⁶

Tatel observes that:

judicial review performs a quasi-constitutional role: it prevents the rule of administrative policy judgment from supplanting the rule of law. On the flip side, these rules also restrict the courts. The basic administrative law framework narrows and focuses judicial review, obliging us judges to assess not the merits of agency policy but rather the agency's compliance with a discrete set of fairly well-defined and policy-neutral requirements.⁷⁷

The rule of law, and judicial review of legislative and administrative action, are assumed and adopted by the Australian Constitution.⁷⁸ As a consequence, the legislature's capacity to remove or confine the supervisory jurisdiction of federal or State supreme courts to review legislative and administrative action is constrained by the limits imposed by the Constitution.⁷⁹

⁷² Spigelman, above n 12, 55; Bingham, above n 27, 60–65.

⁷³ *Attorney General (NSW) v Quin* (1990) 170 CLR 1, 35–36.

⁷⁴ James J Spigelman, "The Integrity Branch of Government" (2004) 78 *Australian Law Journal* 724, 730.

⁷⁵ *Ibid* 732; see also Cane, above n 46, 220.

⁷⁶ Brian J Preston, "Judicial Review of Illegality and Irrationality of Administrative Decisions in Australia" (2006) 28 *Australian Bar Review* 17, 18.

⁷⁷ David S Tatel, "The Administrative Process and the Rule of Environmental Law" (2010) 34 *Harvard Environmental Law Review* 1, 3.

⁷⁸ As to judicial review of legislative action, see *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 193, 205, 271; as to judicial review of administrative action, see *Kirk v Industrial Commission (NSW)* (2009) 239 CLR 531, 566 [55], 580–581 [96]–[100].

⁷⁹ *Kirk v Industrial Commission (NSW)* (2010) 239 CLR 531; James J Spigelman, "The Centrality of Jurisdictional Error" (2010) 21 *Public Law Review* 77; John Basten, "The Supervisory Jurisdiction of the Supreme Courts" (2011) 85 *Australian Law Journal* 273.

Judicial decision-making bounded by legal rules

The rule of law is not only enforced by courts; it also controls the operation of courts themselves.⁸⁰ Just as unbridled administrative discretion runs counter to the rule of law, so too does unbridled judicial discretion. The rule of law requires that “no discretion should be unconstrained so as to be potentially arbitrary. No discretion may be legally unfettered”.⁸¹

The constraining of judicial discretion accords with the precept that there should be “rule by law, not men”, including judges. To live under the rule of law is to be not subject to the unpredictable vagaries of other individuals, whether they be legislatures, government officials or judges. Rule by law is preferable to unrestrained rule by another person, even by a wise person, out of concern for the potential abuse that exists in the power to rule.⁸²

Various rules have emerged to direct the exercise of judicial discretions. These include: judges should find, interpret correctly and apply the appropriate legal rule;⁸³ judicial decisions should be made according to legal standards, rather than undirected considerations such as fairness or policy;⁸⁴ and judges should observe fidelity to the law, that is the inherited, enacted and judge-made law, and not create what they perceive to be better law according to some subjective or personal preference.⁸⁵

Similar cases should be treated similarly save where objective differences justify differentiation.⁸⁶ The principle that like decisions be given in like cases limits the discretion of judges.⁸⁷

One mechanism for ensuring fidelity to the law by judges is the appellate system. As Gleeson notes:

[t]he appellate system is a powerful instrument for ensuring adherence to the principle of legality by the judiciary. The possibility of appellate review means that, even in that small minority of cases where judges might be called upon to break new legal ground, or in areas where they are invested with substantial discretion, judges must conform to a legal discipline by which their powers are circumscribed. Only a relatively small number of cases go on appeal, and all but a few appeals are finally disposed of by an intermediate appeal court. But the very existence of the appeal system, and of an ultimate court of appeal, is a powerful influence for judicial conformity to law.⁸⁸

⁸⁰ Gleeson, above n 15, 7.

⁸¹ Bingham, above n 27, 54.

⁸² Tamanaha, above n 6, 122.

⁸³ Rawls, above n 22, 206–207; Roscoe Pound, *An Introduction to the Philosophy of Law* (1954) 48; Brian J Preston, ‘The Art of Judging Environmental Disputes’ (2008) 12 *Southern Cross University Law Review* 103, 103–105, 107–108.

⁸⁴ Gleeson, above n 15, 2.

⁸⁵ Owen Dixon, ‘Concerning Judicial Method’ in *Jesting Pilate* (William S Hein, 2nd ed, 1997) 157–158; Murray Gleeson, ‘Judicial Legitimacy’ (2000) 20 *Australian Bar Review* 4, 11.

⁸⁶ Rawls, above n 22, 208–209.

⁸⁷ *Ibid* 209.

⁸⁸ Gleeson, above n 15, 7.

Courts should be easily accessible

As courts have a central position in ensuring the rule of law, it follows that accessibility of the courts is of central importance.⁸⁹ Ensuring accessibility requires that citizens have rights to access the courts to enforce claims of right and accusations of guilt and to prevent the law from being ignored or violated.⁹⁰ It requires that the courts provide means for resolving disputes without long delays or excessive costs.⁹¹

Enforcement of the law

The existence of laws which meet the required standards, and of institutional arrangements and machinery to enforce the law, are necessary components of the rule of law. But they will be insufficient unless there is actual enforcement of the law.⁹² Enforcement can be by the executive as well as by citizens. There is, of course, a discretion as to whether to enforce the law. However, a miscarriage of that discretion can subvert the rule of law. Raz makes the point, in relation to criminal enforcement, that the actions of the police and prosecuting authorities can subvert the law:

The prosecution should not be allowed, for example, to decide not to prosecute for commission of certain crimes or for crimes committed by certain classes of offenders. The police should not be allowed to allocate its resources so as to avoid all effort to prevent or detect certain crimes or prosecute certain classes of criminals.⁹³

Raz's comments resonate in the field of environmental law. Ministers and governmental agencies in New South Wales, from time to time, have not allocated resources to and have elected not to prosecute at all or to prosecute only certain persons for the commission of certain offences under national parks and wildlife legislation and native vegetation legislation. Sometimes, citizens have been forced to take civil enforcement actions in the absence of action by the relevant government agencies. An example is *Corkill v Forestry Commission of NSW*⁹⁴ where an environmental activist took action to enforce the provisions of the *National Parks and Wildlife Act 1974*, prohibiting the taking or killing of protected endangered fauna, against the Forestry Commission which was breaching those provisions in the conduct of logging operations.

Realisation of the rule of law

The realisation of the rule of law depends on congruence between action and the law⁹⁵ or between what may be termed "law in action" and "law on the books".⁹⁶ Unless there is congruence, "the rules contained in law will not provide a clear signal

⁸⁹ Raz, above n 13, 17.

⁹⁰ Gleeson, above n 15, 2.

⁹¹ Raz, above n 13, 217; Bingham, above n 27, 85–89.

⁹² Spigelman, above n 12, 54.

⁹³ Raz, above n 13, 218.

⁹⁴ (1991) 73 LGRA 126.

⁹⁵ Fuller, above n 10, 81.

⁹⁶ Spigelman, above n 12, 54.

about what is permitted and what is proscribed. Persons will never acquire the requisite degree of security and predictability in their dealings with others”.⁹⁷

Congruence is also required for legitimacy. Legitimacy involves reasoned deference to authority. Levi and Epperly suggest that:

When legitimacy exists, rule of law can create a virtuous circle of increasing levels of voluntary compliance ... The expectation that others, including government officials and elites, should obey the law, followed by the observation that they are indeed obeying the law, increases the willingness of the populous to comply. Wide-scale compliance with the law then enhances the ability of government to provide law and other public goods that rule of law facilitates. Rule of law institutions are only effective to the extent that the general public believes in the value of being law-abiding and the powerful of the society believe they, too, are subject to the law. If officeholders and the privileged act as if they are above the law, the rule of law becomes fragile or non-existent. And the virtuous circle is ruptured.⁹⁸

Hayek makes a similar point: “[The rule of law] will be effective only in so far as the legislature feels bound by it. In a democracy this means that it will not prevail unless it forms part of the moral tradition of the community, a common ideal shared and unquestionably accepted by the majority”.⁹⁹

Sen advances a similar argument by reference to two classical Sanskrit words, *niti* and *nyaya*. The term *niti* is organisational propriety while the term *nyaya* stands for a more comprehensive concept of realised justice.¹⁰⁰ Sen argues that in order for the rule of law to be realised, there is a need to move from *niti* to *nyaya*: “The challenge is not confined only to making sure that the laws, as they exist, apply to all and are followed by all, though these demands too can be very important ... But going beyond that, we must also take on board the need to scrutinise the kind of comprehensive justice (in the sense of *nyaya*) that emerges from practises of the rule of law”.¹⁰¹

FORMAL LEGALITY AND DEMOCRACY

The third and last formal version of the rule of law adds democracy to formal legality. Like formal legality, democracy does not say anything about what must be the content of law. Rather, it is a decision procedure that specifies how to determine the content of law.¹⁰²

One of the fundamental ideals of Western political thought is the notion of political liberty, that freedom is to live under laws of one’s own making.¹⁰³ Political liberty,

⁹⁷ Ibid.

⁹⁸ Margaret Levi and Brad Epperly, “Principled Principals in the Founding Moments of the Rule of Law” in James J Heckman, Robert L Nelson and Lee Cabatingan (eds), *Global Perspectives on the Rule of Law* (Routledge, 2010) 192.

⁹⁹ Hayek, above n 24, 206.

¹⁰⁰ Amartya Sen, ‘Global Justice’ in James J Heckman, Robert L Nelson and Lee Cabatingan (eds), *Global Perspectives on the Rule of Law* (Routledge, 2010) 55.

¹⁰¹ Ibid 56.

¹⁰² Tamanaha, above n 6, 99.

¹⁰³ Ibid.

therefore, provides the justification for adding democracy to formal legality. Tamanaha explains this justification:

According to philosopher Jurgen Habermas, who has provided the most sophisticated account of the link between formal legality and democracy, 'the modern legal order can draw its legitimacy only from the idea of self-determination: citizens should always be able to understand themselves also as authors of the law to which they are subject as addressees.' Law obtains its authority from the consent of the governed. Judges, government officials, and citizens must follow and apply the law as enacted by the people (through their representatives). Under this reasoning, formal legality, especially its requirements of certainty and equality of application, takes its authority from and serves democracy. Without formal legality democracy can be circumvented (because government officials can undercut the law); without democracy formal legality loses its legitimacy (because the content of the law has not been determined by legitimate means).¹⁰⁴

SUBSTANTIVE FORMULATIONS OF THE RULE OF LAW

Over the last two decades, support for enlarging the scope of the concept of the rule of law has grown. This broader conception of the rule of law holds that the rule of law should have substantive content and not just be concerned with formal and procedural norms.¹⁰⁵

The substantive content proposed by various commentators varies from fundamental human rights to rights of dignity and justice, to social welfare rights. The common substantive version of the rule of law is that which includes fundamental human rights. Dworkin is one of the proponents. Dworkin argues for a rights conception of the rule of law:

It assumes that citizens have moral rights and duties with respect to one another, and political rights against the state as a whole. It insists that these moral and political rights be recognised in positive law, so that they may be enforced *upon the demand of individual citizens* through courts or other judicial institutions of the familiar type, so far as this is practicable. The rule of law on this conception is the ideal of rule by an accurate public conception of individual rights. It does not distinguish, as the rule book conception does, between the rule of law and substantive justice; on the contrary it requires, as part of the ideal of law, that the rules in the rule book capture and enforce moral rights.¹⁰⁶

Lord Bingham, the former Lord Chief Justice of England, also argues in favour of a "thick" definition of the rule of law, embracing the protection of human rights within its scope.¹⁰⁷ He notes that there is no universal consensus on the rights and freedoms which are fundamental, even amongst civilised nations. Nevertheless, he suggests that the rights and freedoms embodied in the *European Convention on Human*

¹⁰⁴ Ibid.

¹⁰⁵ Thomas Carrothers, 'Rule of Law Temptations' in James J. Heckman, Robert L. Nelson and Lee Cabatingan (eds), *Global Perspectives on the Rule of Law* (Routledge, 2010) 21.

¹⁰⁶ Ronald Dworkin, 'Political Judges and the Rule of Law' (1978) 64 *Proceedings of the British Academy* 259, 262.

¹⁰⁷ Bingham, above n 27, 67.

Rights, given direct effect in the United Kingdom by the *Human Rights Act 1998*, are fundamental.¹⁰⁸

Kirby endorses Bingham's inclusion of fundamental human rights in the rule of law:

The rule of law, in the sense of the *letter* of the law, is not, therefore, enough. Lawyers must be concerned with the *content* of the law and the *content* of the procedures and institutions that deliver law to society. Above all, lawyers must be ever vigilant to see new truths (often revealed by scientific research) which earlier generations did not perceive. This is why the rule of law means more than obedience to a law than exists in the books. We can never ignore our duty as lawyers, and as citizens and human beings, to ask whether the law so appearing is contrary to universal human rights. If it is, it is in breach of the fourth of Lord Bingham's subordinate attributes of the 'rule of law' as that principle is understood today.¹⁰⁹

These rights conceptions of the rule of law, however, have a number of core difficulties. The first is that noted by Lord Bingham: there is no universal consensus on the rights and freedoms which are fundamental. Contemporary Australian society is deeply divided over what are individual rights and freedoms, whether there should be constitutional or statutory recognition of any individual rights and freedoms, and what should be the remedies for a contravention of such rights and freedoms. As Tamanaha observes:

These are not peripheral issues but disputes that cut to the core of the political principles and morals circulating in the USA and in other liberal societies. When a community is divided in its moral sense there is little reason for confidence that the collection of legal rules, political principles, or the community morality will be coherent or internally consistent. Perhaps no single or majority community moral view exists; different moral views might win out in contests over the law at different times or in different subjects. It should not, furthermore, be assumed that those empowered to make the law are always or primarily motivated to create law that faithfully mirrors the community morality. The influence of special interests in securing favourable legislation is notorious.

These objections strike not only at Dworkin but at all substantive versions of the rule of law that incorporate individual rights. There is no uncontroversial way to determine what these rights entail. All general ideals – like equality, liberty, privacy, the right to freedom, the freedom of contract, freedom from cruel punishment – are contestable in meaning and reach. In particular contexts of application conflicts between rights can arise. And no right is absolute, so consideration of social interests must always be involved, which cannot be answered through consultation of the right alone.

The most troublesome implication of Dworkin's approach is that it promises to remove disputed issues from the political arena and gives them over to judges.¹¹⁰

¹⁰⁸ Bingham, above n 27, 68.

¹⁰⁹ Michael Kirby, 'The Rule of Law Beyond the Law of Rules' (2010) 33 *Australian Bar Review* 195, 210.

¹¹⁰ Tamanaha, above n 6, 103–104.

The second core difficulty is that individual human rights can clash. There is no agreement in society as to how, or the objective criteria to be employed, to reconcile and resolve conflicts between individual human rights.

A third core difficulty is that individual rights have anti-democratic implications. One implication is that incorporation of individual rights and the rule of law imposes limits on democracy: individual rights will trump democracy when they come into conflict.¹¹¹

Another anti-democratic implication is that incorporating individual rights in the rule of law enlarges the power accorded to judges. As Tamanaha explains, because rights are not self applying, someone, and that is usually judges, would be accorded the responsibility to say what individual rights mean in particular contexts of application and what limits they impose on the law making power. When judges are not elected, which is the position in Australia, this confers on a group of individuals not accountable to democracy, the power to veto democratic legislation.¹¹²

An even thicker, substantive version of the rule of law would add social welfare rights. Social welfare rights might include human dignity and certain desired social, economic, educational, cultural or environmental conditions.¹¹³

Incorporating such social welfare aspirations in the rule of law poses severe difficulties. First, it would multiply the potential conflicts between individual rights, between individual rights and democracy, and between individual rights and social welfare rights, such as between personal liberty and social equality. Secondly, as Raz observes, “[i]f the rule of law is the rule of the good law then to explain its nature is to propound a complete social philosophy. But if so the term lacks any useful function. We have no need to be converted to the rule of law just in order to discover that to believe in it is to believe that good should triumph.”¹¹⁴ Tamanaha adds:

Debates over social values are thereby reformulated into fights over the meaning of the rule of law. The rule of law then serves as a proxy battleground for a dispute about broader social issues, detracting from a fuller consideration of those issues on their own terms, and in the process emptying the rule of law of any distinctive meaning.

The rule of law cannot be about everything good that people desire from government. The persistent temptation to read it this way is a testament to the symbolic power of the rule of law, but it should not be indulged.¹¹⁵

CONCLUSION

The rule of law is universally accepted as a legitimating political ideal. The precise meaning has, however, proved elusive. The greatest support is for formal versions of the rule of law. These include three clusters of meaning: that the government is

¹¹¹ Ibid 104.

¹¹² Tamanaha, above n 6, 105.

¹¹³ Ibid 112.

¹¹⁴ Raz, above n 13, 211.

¹¹⁵ Tamanaha, above n 6, 113.

limited by the law, that the law should satisfy the qualities of formal legality, and that there should be the rule of law, not persons. These conceptions of the rule of law are silent with respect to content. However, such silence may be their strength, enabling the rule of law to attract universal support. Adding substantive content to the rule of law dissipates support. There is a real risk that those who reject the inclusion in the rule of law of certain substantive content, such as certain individual rights or rights of dignity or social welfare rights, will reject of the rule of law itself. Loss of support risks undermining the legitimacy of the rule of law.

I have endeavoured to articulate the meaning of the rule of law, and of its essential aspects. Such articulation renews our appreciation of the enduring importance of the rule of law as an ideal to be shared and accepted by the government and community alike. In times of change, this should not be underestimated. The rule of law serves as an anchor in the swirling currents of change. It provides a referential touchstone, both for the formulation of proposed governmental action and against which past governmental action can be adjudged. As Hayek observes:

If the idea of the rule of law is a firm element of public opinion, legislation and jurisdiction will tend to approach it more and more closely. But if it is represented as an impracticable and even undesirable ideal and people cease to strive for its realisation, it will rapidly disappear. Such a society will quickly relapse into a state of arbitrary tyranny.¹¹⁶

Respect for the rule of law encourages its realisation. Disrespect for the rule of law engenders its disintegration.

¹¹⁶ Hayek, above n 24, 206.