Assessing the Strength of the Rule of Law in New Zealand

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I Introduction

The rule of law is a foundational doctrine of New Zealand’s constitution. It is core to the building blocks of the Westminster constitution we inherited. The rule of law is a guiding light of constitutional propriety – appealed to and cited by one side or another, and sometimes all sides, of particular issues of moment.

Section 3 of the Supreme Court Act 2003, in which Parliament affirms “New Zealand’s continuing commitment” to the rule of law, is consistent with legal force being able to be given to the rule of law by the Courts. In so doing, the Courts would be called upon to give content to the rule of law; as they were called upon to do in relation to the Treaty of Waitangi in 1987 in New Zealand Maori Council v Attorney-General.¹

But, as with the Treaty of Waitangi in 1987, there is little case law for the courts to draw upon in giving content to the rule of law in New Zealand in 2013. While the rule of law is, and is recognised as, fundamental to our legal system we have no adequate appreciation – in theory or in reality – of what that means in New Zealand today. The primary call in this paper is for the content of the doctrine of the rule of law to be made clear so that it can be interpreted and applied; not only by the courts but by politicians, public servants, commentators and the public. Its foundational status in our constitution demands no less.

Academics, judges, lawyers and jurisprudents internationally have grappled for centuries with the meaning of the rule of law. I will briefly survey some of their explanations in Part II. The problem is that there are frequently differences between them. Putting all the theories side by side shows that the content of the rule of law is difficult to grasp hold of. More importantly, it is difficult to for us to agree when and to what extent the rule of law has been infringed. Put another way, it is difficult to find a conception of the rule of law that has broad enough support and agreement that we can use it effectively in law.

Part III of the paper proposes a conception of the rule of law that identifies essential elements in the various conceptions of the rule of law. In simplifying and reducing to essentials we lose, of course, richness, subtlety and complexity. But I hope to gain effectiveness - a conception that we can all hold in our heads and use to assess the actions of the branches of government – the executive, the judiciary and the legislature.

Part IV of the paper then attempts to do just that – to assess the actions of the branches of government in New Zealand in recent years against that simplified conception of the rule of law. The methodology used is conventional case analysis beloved of common lawyers – I simply examine a number of instances that have caused public concern to see what we can say about their consistency with the essential conception of the rule of law offered in part III. My conclusion is that some, but not all, of the examples analysed give cause for concern about the state of the rule of Law in contemporary New Zealand.

Part V of the paper expresses dissatisfaction with this method of analysis. Analysing cases against such a broad concept as the rule of law, even simplified to its essence, is subjective, impressionistic and vulnerable to politicisation. The views of more than one individual is called for. I propose that there would be value in the New Zealand Centre for Public Law assembling a panel of 10 experts to rate issues of concern out of 10, as they arise, for the extent of consistency with the rule of law. I go further. Perhaps in today’s crowd-sourcing world there are better ways of assessing consistency with a concept that experts instinctively grasp but can’t agree on?
II Some Conceptions of the Rule of Law

Brian Tamanaha’s book On the Rule of Law provides an impressively condensed overview of the “history, politics and theory” of the rule of law.\(^2\) Disturbingly, he reports “apparent unanimity in support of the rule of law”.\(^3\) Such rhetorical commitment is not the preserve of western nations only. Leaders of, for example, Russia, China, Iran, Mexico have lauded the rule of law. Tamanaha quotes Robert Mugabe of Zimbabwe as stating “Only a government that subjects itself to the rule of law has any moral right to demand of its citizens obedience to the rule of law.”\(^4\)

Furthermore, Tamanaha reports political and legal theorists as often holding “vague or sharply contrasting understandings of the rule of law”.\(^5\) In discussing the rule of law in relation to the 2000 US election Jeremy Waldron suggests the rule of law is “an essentially contested concept” which can be used to mean little more than “hooray for our side”.\(^6\) It was, after all, invoked by both sides of the debate in that issue. Philip Joseph made the same point in 2001 regarding the use of ‘rule of law’ rhetoric for and against actions of the Muldoon administration.\(^7\) So one of the most distinguished British jurists of recent times, Lord Bingham, cites the views of various respected commentators that doubt whether the rule of law was meaningful at all.\(^8\)

Tamanaha explores the classical origins of the rule of law in ancient Greece and Rome. He considers medieval contributions to the rule of law and the central place of the rule of law in seventeenth and eighteenth century western liberalism. He outlines conservative and leftish views of the rule of law. He surveys formal theories and substantive theories of the rule of law. He speculates on the evolution of an international rule of law and considers whether the rule of law can be regarded as a universal value.

\(^3\) At 3.
\(^4\) At 2.
\(^5\) At 3.
\(^7\) Philip A Joseph Constitutional and Administrative Law in New Zealand (2nd ed, Brookers, Wellington, 2001) at 196.
Out of his overview, Tamanaha determines that “it would be facile to suggest that there is an overarching coherence to the subject”.\textsuperscript{9} He notes that adding another proposed definition of the rule of law to the surfeit of definitions already in existence would be “redundant and naïve”.\textsuperscript{10} But he also notes that the danger of the “rampant uncertainty” about its meaning “is that the rule of law might devolve to an empty phrase, so lacking in meaning that it can be proclaimed with impunity by malevolent governments”.\textsuperscript{11} He identifies three “themes” that run through the rule of law tradition – interrelated clusters of meaning which revolve around distinct ideas.\textsuperscript{12}

- **Government limited by law**: officials must operate within a limiting framework of the law; and even when government officials wish to change the law, they are not entirely free to change it in any way they desire.

- **Formal legality**: laws are public and prospective, with qualities of generality, equality of application, and certainty and the availability of a fair hearing within the judicial process.

- **Rule of law, not man**: not subject to the unpredictable vagaries of other individuals, whether monarchs, judges, government officials or fellow citizens.

Despite his protestations of not wishing to add to the surfeit of definitions, Tamanaha’s three themes seem to me to do just that. His tripartite division recalls Professor Dicey’s influential, though different, tripartite definition in his 1885 lectures:\textsuperscript{13}

- 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.

\textsuperscript{9} At 114.  
\textsuperscript{10} At 114.  
\textsuperscript{11} At 114.  
\textsuperscript{12} Chapter 9.  
\textsuperscript{13} AV Dicey *Lectures Introductory to the Study of the Law of the Constitution* (MacMillan & Co, London, 1885), Lecture V.
• Not only that no man is above the law but that every man is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals.

• The general principles of the constitution are the result of judicial decisions determining the rights of private persons in particular cases brought before the courts.

I don’t propose to canvas all other conceptions of the rule of law here. I mention only Lord Bingham’s conception of the rule of law outlined in the Sixth Sir David Williams lecture in 2006, and at greater length (though perhaps less clarity) in a book in 2010. He suggests that “the core” of the existing principle of the rule of law is “that all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts”.14 He acknowledges that that is not comprehensive and not universally applicable and goes on to identify 8 principles that go behind that one:15

1. The law must be accessible and, so far as possible, intelligible, clear and predictable.

2. Questions of legal right and liability should ordinarily be resolved by application of the law and not the exercise of discretion.

3. The laws of the land should apply equally to all, save to the extent that objective differences justify differentiation.

4. Ministers and public officers at all levels must exercise the powers conferred on them in good faith, fairly, for the purpose for which the powers were conferred, without exceeding the limits of such powers and not unreasonably.

14 Bingham at 8.
15 At 37.
5. The law must afford adequate protection of fundamental human rights.

6. Means must be provided for resolving, without prohibitive cost or inordinate delay, bona fide civil disputes which the parties themselves are unable to resolve.

7. Adjudicative procedures provided by the state should be fair.

8. The rule of law requires compliance by the state with its obligations in international law as in national law.

The multiplicity of definitions of the rule of law is a problem. One solution, such as that of Richard Fallon, is to integrate the competing strands into an interwoven conception. But I do not agree that that the solution is amalgamate all proposed elements of the rule of law into an all-encompassing global definition.

III The Conceptual Essence of the Rule of Law

I offer my own conception of the rule of law for the purpose of attempting to hone in on its conceptual essence. I want to discern the core elements of the doctrine that are common to most others’ accounts and that can be simply and coherently stated so that the rule of law can relatively easily grasped and applied.

As I noted in a 2007 article, and a 2008 book, my definition centres on certainty and the freedom from arbitrariness in the law. It involves taking seriously the words of the phrase “the rule of law”. The phrase itself suggests there is some distinctly separate or objective meaning to law that is independent of human agency. It is law itself, in its independent meaning, that rules and that should rule. I suggest:

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16 Richard H Fallon “’The Rule of Law’ as a Concept in Constitutional Discourse” (1997) 97 Columbia Law Review 1 at part IV.
The rule of law requires that the meaning of law is:

- Independent from those who make the law.
- Independent from those who apply the law.
- Independent from those to whom it is applied.
- Independent from the time at which it is applied.

This formulation emphasises that the rule of law is an ideal. All law, of course, a human construct – formulated by humans, applied by humans, to humans. We must all accept by now that giving meaning to words is inherently an interpretative exercise by an interpretive community composed of human actors. In this I follow and acknowledge Stanley Fish’s work in particular:18

there is no such thing as literal meaning, if by literal meaning one means a meaning that is perspicuous no matter what the context and no matter what is in the speaker’s or hearer’s mind, a meaning that because it is prior to interpretation can serve as a constraint on interpretation

The ideal that the rule of law strives for is to remove, as far as practical, the influence of the particular human actors. The rule of law seeks to advance justice by invoking a Rawlsian veil of ignorance of one’s particular interests in relation to its content.19 I suspect that removing human interests from decisions made through human agents must be an ideal – like a limit approached but never reached through differential calculus. But a worthy ideal is worth attempting to approach. This conception also emphasises that there must be a continuum of degrees to which a proposal is consistent with the rule of law, rather than a black and white binary choice.

I suggest that this conception of the rule of law zeroes in on essential underpinnings that are common to the most influential commentators. Of Tamanaha’s three themes, it resonates strongly with his third: rule of law not man. But the second, formal legality, can also be seen to derive from this essential conception. Laws must be public so that everyone knows of them, in order to be independent from those to

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whom law is applied – as is the equality of application of law. Laws must be prospective in order to be independent from the time at which they are applied. Generality and certainty are core to the conceptual essence. So is a fair hearing, requiring independence from those who apply the law. And Tamanaha’s first theme, government limited by law – restates independence from those who make and apply the law. Some elements of Tamanaha’s themes are not so clearly caught by my conceptual essence of the rule of law: the requirement for constraints on the ability to change the law and the necessity of judicial processes. Aspects of these elements seem to me to be logical extensions in particular constitutional contexts, rather than necessarily part of the core conceptual essence of the rule of law.

One allied doctrine that is intimately bound up with the rule of law is the separation of powers. The separation of powers is a necessary but not sufficient condition for the rule of law. If a lawmaker also applies and/or interprets the law then the law that is applied will more likely reside in the lawmaker’s intention at the time — retrospectively justifying “what I meant” even if that was not evident in the legal text at the time. It is this aspect of the combination of making and applying law that is contrary to the rule of law – the meaning of the law becomes that which the maker/applier deems correct. This is also why making retrospective legislation is pernicious. Legislation that is made retrospective, and contrary to the understandings of those subject to it at the time, substitutes the preferences of today’s legislators for yesterday’s legislators, without affording those affected by the law yesterday an opportunity to adjust their behaviour so as to comply with the law. This offends against the requirement that the meaning of law be independent of the time at which it is applied.

Similarly, while a variety of Lord Bingham’s eight principles are intimately bound up with the conceptual essence I identify in the rule of law, some are not. So his emphasis in his statement of the “core” of principle on “all persons and authorities within the state, whether public or private” is exactly in line with my conception. So is:

- the accessibility, intelligibility, clarity, and predictability of law in principle 1 (since they are prerequisites for the law being independent from those to whom it applies);
• the distinction between law and discretion in principle 2 (which goes directly to certainty);
• the application of law equally to all, save for objective differences justifying differentiation, in principle 3 (independence from those to whom law is applied);
• public officers exercising powers conferred on them in good faith for the purposes for which they were conferred in principle 4 (since that is simply what law states);
• fairness in adjudication in principle 7 (a logical extension of independence from those who apply the law).
• Compliance with international law in principle 8 (independence from those to whom law is applies, in this case states).

But other aspects of Lord Bingham’s principles of the rule of law, while worthy for other reasons, seem to me to be more difficult to justify on the basis of the rule of law. In particular, I don’t see that his principle 5, “the law must afford adequate protection of fundamental human rights” is part of the conceptual essence of the rule of law. I agree wholeheartedly with the imperative; but I see it as deriving from the fundamental importance of human rights, not from the rule of law. As Joseph Raz states: 20

.. the rule of law is just one of the virtues by which a legal system may be judged and by which it is to be judged. It is not to be confused with democracy, justice, equality (before the law or otherwise), human rights of any kind or respect for persons or for the dignity of man.

I accept that my perspective is more in the tradition of the “formalist” rather than “substantive” theories of the rule of law, according to the dichotomy analysed by Paul Craig. 21 Or, in terms of a four-part classification proposed by Richard Fallon, my perspective is That is the consequence of looking for uncontested (or, perhaps, less contested) essence of the doctrine. And I acknowledge the need for transparency about this dimension, as Paul Craig points out when he says that intellectual honesty

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21 Paul Craig “Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework” [1997] PL 467 (though I suggest that my conception is not “formalist” in the sense of relating only to procedure, because it is concerned with the substance of a law).
requires that it be made clear whether criticism of government action as contrary to the rule of law is posited upon a substantive or formalist conception.22

So, in my view, just as the rule of law is a worthy ideal, it is not the only worthy ideal. Other fundamental concepts underlie our legal system, such as democracy. And other fundamental norms animate our constitution, such as the parliamentary sovereignty mentioned in section 3 of the Supreme Court Act.

We should strive to uphold the rule of law. Lawyers, particularly, should do that according to the Lawyers and Conveyancers Act. But there are other important norms, doctrines and principles to be weighed as well in formulating or applying law. The key requirement in order to do so is to have an adequate working definition of each concept and be able to apply it to a particular issue in practice.

IV How to Assess the Strength of the Rule of Law?

A Legislation

One conventional legal method of assessing the strength of a doctrine is to determine what legal force there is behind it. In New Zealand that means examining legislation.

There are many statutory references to the phrase “rule of law”; but these are almost always to particular rules of law. So, for example, the long title of the Perpetuities Act 1964 is “to effect reforms in the rule of law commonly known as the rule against perpetuities and to abolish the rule of law commonly known as the rule against accumulations”. A search of Acts for the phrase “rule of law” on www législation.govt.nz yields 445 results – almost all of them of this nature. In particular, the phrase is used in provisions that override other laws, “notwithstanding any rule of law”.

The rule of law is a much more rarely recognised in New Zealand legislation – I can only find four such references. Where it is recognised, it is clearly accorded

22 At 487.
significance. So, every lawyer is under a legal duty under the Lawyers and Conveyancers Act 2006 to “comply” with “the fundamental obligation” to “uphold the rule of law and to facilitate the administration of justice in New Zealand”.23

The rule of law is used in a different way in the first of the principles upon which the Policing Act 2008 is based. That reference invokes the authority of the rule of law to support the authority of, but also impliedly limit the authority of, policing services. It states that “principled, effective, and efficient policing services are a cornerstone of a free and democratic society under the rule of law”.

The preamble to the Marine and Coastal Area (Takutai Moana) Act 2011 provides a more tangential reference to the rule of law. At (2) it records that the Waitangi Tribunal raised questions as to whether the previous Foreshore and Seabed Act 2004 “complied with the rule of law”.

At a more “constitutional” level, the rule of law has been explicitly recognised in the purpose clause, section 3, of the Supreme Court Act 2003. Subsection (2) of that provision is a peculiarly passive aggressive “savings” clause, consistent with our constitutional culture. It affirms New Zealand’s “continuing commitment to the rule of law” is mentioned in the same breath as its continuing commitment to Parliamentary Sovereignty – the only two constitutional doctrines thought worthy of mention:

“Nothing in this Act affects New Zealand’s continuing commitment to the rule of law and the sovereignty of Parliament.”

This clause was not present in the Supreme Court Bill as introduced. The sponsoring Minister, the Hon Margaret Wilson, has subsequently stated:24

The final reference to the rule of law and the sovereignty of Parliament was a response to the concern that the new Supreme Court might usurp the authority of Parliament to make the law. There was no such reference in the original Bill, but it was inserted by the Select Committee. In many ways for me it was the most

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23 Section 4(a) of the Lawyers and Conveyancers Act 2006.
24 Margaret Wilson “The Disconcerting Reality of Constitutional Theory Informed by Practice” in Claire Charters and Dean R Knight (eds) We, The People(s): Participation in Governance (VUW & NZCPL, Wellington, 2011) at 203.
significant constitutional statement, but it seemed to pass without much comment. All these changes resulted from the submissions and the considerable discussion that took place within the Select Committee. The government agreed to incorporate the Select Committee changes in the purpose clause when the matter was referred back to Cabinet.

Savings clauses have an honourable history of unexpected legal bite in New Zealand, as a similarly worded section 9 of the State-Owned Enterprises Act 1986 bears witness in relation to the Treaty of Waitangi.25 Here, though, the two concepts of the rule of law and Parliamentary sovereignty stand to be examined together. That would involve getting to grips with the essence of each notion as well as the extent to which each qualifies the other.

As yet, section 3 has not successfully founded any legal action. But it is not beyond the bounds of imagination that it might. There seems no reason why an action by any branch of government that is clearly inconsistent with the rule of law could not be subject to a declaration by a Court to that effect. If New Zealand indeed has a continuing commitment to the rule of law, one might expect its Courts to be willing to “call” clear instances where that commitment is not honoured.

As yet, however, it cannot be confidently said that the rule of law is enforced explicitly, as such, by the New Zealand Courts. This does not deny that decisions of the courts, in many ways, can and do uphold the rule of law. But they do not do so on that basis alone.

B  Constitutional Culture

Another way in which the strength of the rule of law in New Zealand can be assessed is by examining the extent to which it is entrenched in our constitutional culture. In a 2007 article I voiced a concern about the extent to which the rule of law is entrenched in popular understanding and support in New Zealand.26 I suggested that it was not clear to me that the norm of the rule of law and judicial independence is reinforced by New Zealand constitutional culture. I cited regular examples of behaviour by

25 Section 9 states “Nothing in this Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi.”
governments that could be characterised as breaches of the rule of law. I sounded a word of warning to the legal establishment that I was not confidence “that New Zealanders currently understand the rule of law or, in a crunch, would necessarily stand by it as a fundamental constitutional norms”. 27 I stated: 28

Without academic and judicial clarification of the meaning and importance of the concept of the rule of law and judicial independence, and some concrete event or debate that generates public appreciation and regard for it, I believe the rule of law is a vulnerable constitutional norm in New Zealand.

My concern about the rule of law and judicial independence was endorsed and expanded upon by Justice Priestley in the Harkness Henry Lecture published in 2009. 29

A couple of years later, in a paper for another NZCPL conference, I struck a slightly more optimistic note about how the rule of law and judicial independence might be strengthened as a constitutional norm: the people have to value it. 30 The long–term institutional power of the judiciary, and the strength of the rule of law and separation of powers, depends on the judiciary’s retention of support of the New Zealand public. Judicial decisions that are consistent with the kiwi sense of giving people a fair go may attain public legitimacy despite a hostile political reaction from elected representatives. But this is a long term and general normative prescription. My concerns about the vulnerability of the rule of law in New Zealand are unabated.

C Assessment of Particular Issues

The third way of assessing the strength of the rule of law in contemporary New Zealand is to analyse particular controversies that have arisen for the extent of consistency with the rule of law. Such methodology resonates with lawyers and judges since it is, after all, the essence of case analysis.

27 At 589.
28 At 589.
30 Matthew S R Palmer, “Open the Doors and Where are the People?: Constitutional Dialogue in the Shadow of the People” in Claire Charters and Dean R Knight (eds) We, The People(s): Participation in Governance (VUW & NZCPL, Wellington, 2011) at 73.
Such analysis could easily be the subject of a full length book. For the purposes of this paper, I simply identify a few particular controversies that have occurred since 2000 that are said to have implicated the rule of law. I briefly identify the issue and provide my view of the extent to which the final decision was inconsistent with the rule of law. In revising this paper for publication I propose to identify such controversies more systematically, so further nominations are welcome.31

The conception of the rule of law I assess these decisions is the one I outline in part III of the paper. For ease of reference:

*The rule of law requires that the meaning of law is:*

• Independent from those who make the law.
• Independent from those who apply the law.
• Independent from those to whom it is applied.
• Independent from the time at which it is applied.

Since I have argued above that consistency or inconsistency with the rule of law is a matter of degrees on a continuum, I tentatively “mark” each controversy out of ten for inconsistency with the rule of law – one being a little inconsistent and ten being fully inconsistent.

*The Electoral Amendment Act 2004:* retrospectively validated Harry Duynhoven’s membership of Parliament.

The argument at the time was that this merely, albeit retrospectively, conferred a benefit. But, as Jeremy Waldron has observed (in relation to arguments by one of my relatives), “the principle of non-retroactivity is key to the rule of law ideal, and here it is being fairly casually brushed aside in order to undermine the integrity of just a little bit of our electoral law”.32

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31 Feel free to email me at Matthew.Palmer@aya.yale.edu
32 Jeremy Waldron “Retroactive Law: How Dodgy was Duynhoven?” (2004) 10 Otago Law Review 631 at 650. Note that Waldron distinguishes between “retrospective” legislation (that alters the legal consequences of a past action) and “retroactive” legislation (that alters the legal status of a past action ex post facto).
I agree, especially with Waldron’s point that this matters even more in relation to constitutional legislation. The meaning of the law was not independent of those to whom it was applied. 6/10.

_The Foreshore and Seabed Act 2004_: removed an avenue for Maori to argue in court for enforceable property rights in their customary rights or title to the foreshore and/or seabed.

The Act extinguished the right to go to court to uphold customary rights and title at common law but replaced it and codified it with a statutory regime for investigating and negotiating the existence of customary rights and title. The Waitangi Tribunal’s 2004 report, later referenced by the Marine and Coastal Area (Takutai Moana) Act 2011 as noted above, found that:

The rule of law is a fundamental tenet of the citizenship guaranteed by article 3 [of the Treaty of Waitangi]. Removing its protection from Maori only, cutting off [Maori] access to the courts and effectively expropriating their property rights, puts them in a class different from and inferior to all other citizens.

I agree. The meaning of the law was not independent from those to whom it was applied. The mitigating factor was that a separate regime was enacted in place of the common law; but its effectiveness depended upon the Crown. The exacerbating factor was that it applied to such a significant number of New Zealanders. 7/10

_The Appropriation (Parliamentary Expenditure Validation) Act 2006_ retrospectively validated parliamentary expenditure by a number of political parties, vitiating a live legal challenge to the expenditure.

This legislation was passed by a Labour-led government to override legal proceedings that challenged the actions of the Labour Party and other parties. Again it relates to a matter of constitutional importance.

The meaning of the law was not independent from those to whom it was applied. 8/10
New Zealand Public Health and Disability Amendment Act 2013 overturned the Court of Appeal’s decision in Ministry of Health v Atkinson that found that refusing to pay family members for providing support services to adult disabled children is a breach of the right of freedom from discrimination under the New Zealand Bill of Rights Act 1990.\(^{33}\) Furthermore, it prevents further legal proceedings alleging such a breach. It does preserve the fruits of particular legal proceedings for the litigants.

This Amendment Act breaches fundamental rights without sufficient justification, as acknowledged by the Attorney-General’s negative vet under the Bill of Rights.\(^{34}\)

The meaning of the law is not independent from those to whom the law is applied. 8/10

Government Communications Security Bureau and Related Legislation Amendment Act 2013 changed the scope of the operation of the GCSB to enable it to conduct surveillance on New Zealand citizens and residents.

This doesn’t seem to me to constitute a breach of the rule of law at all. There were arguments about the process of consultation/submissions and there were arguments about whether the scope of the Bill should be so extended. But those are arguments about legislative process, which is more relevant to the constitutional norm of representative democracy, and about policy than about the rule of law. 0/10.

New Zealand International Convention Centre Bill would provide regulatory concessions only to the holder of the Sky City Casino operating licence, in return for Sky City’s agreement to build a convention centre.


The Bill is still under consideration. However, as introduced, it appears that it would result in (gambling) law not being independent of those to whom it is applied. 7/10.

*Kaipara District Council (Validation of Rates and Other Matters) Bill* would retrospectively validate rates, including rates that could not have been lawfully set under previous law, vitiating a live legal challenge to those rates.35

This is a proposed Bill which is still being considered by the Local Government and Environment select committee and I have been engaged to oppose it. However, I consider that if the Bill were passed as introduced it would result in the meaning of (rating) law not being independent of those to whom it is applied. 7/10

V A Proposal to Strengthen the Rule of Law in New Zealand

The above analysis does not seem very satisfactory. There is little enforceable legal bite to the rule of law in New Zealand. The strength of the rule of law as a constitutional norm seems vulnerable. And there are a number of instances which a rough and ready analysis suggest are significantly inconsistent with even the conceptual core of the rule of law identified in this paper.

However, the analysis is not very satisfactory for two other reasons as well. First, it is difficult to identify trends. Some commentators in the blogosphere suggest that the current National-led government is exhibiting an increasing tendency to breach the rule of law. But there were plenty of examples available from the previous Labour-led administration as well. And the potential biases in the sample selection would give a social scientist conniptions. A more systematic means of analysing the extent to which proposals are inconsistent with the rule of law is required. It would be useful to be able to assess different administrations in terms of their consistency with the rule of law. But it would also be useful to identify what sorts of patterns exist in

35 I should disclose that I represent the ratepayers in their legal challenge to the Council’s rates – *Mangawhai Ratepayers and Residents Association v Kaipara District Council* (CIV-2013-488-152).
relation to breaches of the rule of law. For example, the above few examples unscientifically suggest that the question of to whom the law applies is a key focus of concern. And the use of validating legislation may be an area of concern.

Second, analysing particular controversies, inherently the most politically heated ones, against such a broad concept as the rule of law, even simplified to its essence, is subjective, impressionistic and vulnerable to politicisation. The views of more than one individual is required if there is to be broader credibility to claims that any particular measure breaches the rule of law.

The problem is similar to that of identifying trends and credible assessments of inconsistencies with the Bill of Rights Act. A similar solution to section 7 vets would be possible. At one point in the life of the Bill formerly known as the Regulatory Standards Bill, such a possibility was mooted. But that seems unlikely now.

But that is not to say that such an exercise could not be undertaken. I propose that there would be value in the New Zealand Centre for Public Law assembling a panel of, say, 10-15 constitutionally expert academics and lawyers to rate proposals of concern out of 10, as they arise, for the extent of consistency with the rule of law. Such ratings could be aggregated and posted on the Centre’s website. They would provide a basis for trying to measure trends and, through aggregation, for mitigating personal subjectivity. And it would be consistent with the value of constitutional transparency.

Such a proposal is, of course, open to claims that a self-appointed elite wishes to set itself as arbiter of government legislative proposals – because, although in theory the judiciary and executive can also be guilty of breaches of the rule of law, it seems to be legislative proposals that attract most such allegations. I think the expert rating proposal is worth pursuing nonetheless. But, in addition, perhaps in today’s crowd-sourcing world there is indeed also room for enabling more popular expression of a concept that the experts apparently instinctively grasp but can’t articulate coherently? Online voting is subject to abuse, but is there no technological way of inviting the public of New Zealand to express their assessment of the strength of the rule of law in New Zealand?