The Languages of Constitutional Dialogue: Bargaining in the Shadow of the People

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Introduction

E nga mana, e nga waka, e nga reo.
Tena koutou, tena koutou, tena koutou katoa.

“Wot ho!” [in English accent]; “What?! Ho!” [in American accent]. Isn’t it interesting how different languages, and even the same words and expressions, in what is nominally the same language, mean different things in different contexts, whether across geography, time or culture.

My point here is, of course, a constitutional one. It seemed only appropriate, in accepting the great honour of the invitation to deliver the Laskin Lecture at Osgoode Hall, to comment fearlessly, as Chief Justice Bora Laskin would and did, on constitutional matters that matter.¹

Much has been made in Canadian constitutional law circles of the notion of dialogue. And at this point I must immediately acknowledge Peter Hogg, former Dean and current Emeritus Professor of this Law School, and a distinguished New Zealander, and alumnus and holder of an Honorary Doctorate from the Victoria University of Wellington. Peter, and his co-author Allison Bushell as she then was, started a dialogue about dialogue in a lecture delivered in Toronto 11 years ago yesterday – a dialogue to which I wish to contribute, and extend, today.²

My key point is that in characterizing the interactions between the different branches of government as dialogue, and in assessing the nature and quality of that dialogue, we should pay careful attention to the reality of the different languages and perspectives used by each branch. Are they really speaking the same language? Or is a polite greeting by one interpreted by another as abuse? What is the nature of a dialogue conducted, unknowingly, in different languages? And what are the

¹ See Philip Girard, Bora Laskin: Bringing Law to Life (Toronto: University of Toronto Press, 2005).
² Peter Hogg and Alison Bushell “The Charter Dialogue between Courts and Legislatures (Or Perhaps the Charter of Rights Isn’t Such a Bad Thing After All)”(1997) 35 Osgoode Hall L. J. 75.
normative implications? Do we really even WANT different branches of government to understand each other?

I offer my analysis using a perspective that I have developed in recent writings that I call “constitutional realism”, an ironically anti-theoretical theoretical perspective. I am not sure whether this is consistent with the “Osgoode” way, if there is one. It does seem to be consistent with Peter and Allison’s work; as I think much of the impact of their 1997 article lies in the fact that not only did they offer a theory but they backed up that theory with empirical analysis of exactly how Parliament responded to Court decisions striking down legislation. It is also consistent with the forceful questioning scepticism of Harry Arthurs’ writing – that seeks to bring us all down to earth.3 And with Patrick Monahan’s belief, with which I entirely agree, that “the constitutional issues that reach the [Canadian] Supreme Court are fundamentally and inescapably political”.4

My remarks are directly largely towards Canadian constitutional arrangements, though I believe my points largely apply to other Westminster systems, such as the United Kingdom, Australia and New Zealand. My comments draw on my own background as a public law teacher and scholar and, perhaps more saliently, as a former senior public servant in New Zealand who wrote his doctoral dissertation with the benefit of over 100 interviews with those involved in Canadian federal government.

Constitutional Realism

I offer that background about myself because I believe that it is important to understand the context of individuals’ behaviour and beliefs. As lawyers, judges, politicians, public servants, and even academics, our individual and collective behaviour and beliefs are shaped by our experiences; lived and perhaps now virtual. Our analyses of constitutional behaviour and beliefs must recognise that. We must remain grounded in reality, however inherently mediated that reality is through the lens of interpretation.

This is a core precept of the perspective I offer, labelled constitutional realism.5 In this I draw on and build from the American legal realism movement of the 1920s and 1930s.

The essence of my perspective is to suggest that it is the reality of the behaviour and beliefs of those who operate a constitution that tells us what the content of that constitution really is. Go back to the purpose of a national constitution. A constitution “constitutes” a state by providing the rules that govern its behaviour – in particular that govern the exercise of its coercive power. A realist’s perspective of a

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5 This perspective is developed in three recent articles (see below note 7) and in a forthcoming book, The Treaty of Waitangi in New Zealand’s Law and Constitution: Realism and Relationships (Victoria University Press, 2008 forthcoming).
constitution, then, seeks to identify and analyze all those factors which significantly influence the generic exercise of public power.

A “complete” such view of a constitution includes all the structures, processes, principles and even cultural norms that significantly affect, in reality, the exercise of public power. Only through examining the actual behaviour of those involved in the exercise of public power can we identify all those elements of the constitution that count in reality. As Karl Llewellyn maintained in relation to constitutions, “[a]n institution is in the first instance a set of ways of living and doing. It is not, in first instance, a matter of words or rules.”6

So far, in recent writing, I have applied constitutional realism to:7

- defining the elements of New Zealand’s unwritten constitution and revealing the importance of identified public office-holders in its interpretation;
- calling for the United States legal academy to recognise the inherently unwritten nature of their own constitution; and
- in an article available this month in the Dalhousie Law Journal, analysing the ways in which the New Zealand and Canadian constitutions protect indigenous peoples.

I hope that my realist’s view of a constitution still resonates with a Canadian legal academy that remembers Diceyan definitions of constitutional law.8 It seems consistent with your Supreme Court’s identification of the importance of fundamental constitutional principles existing outside text and even convention.9 I do worry, though, that one effect of your Charter jurisprudence over the past 25 years might have been to seduce the Canadian legal academy away from British principle, demure in its lack of definition, towards the blaring American sirens of sexy textual analysis. I understand the allure to lawyers of the apparent security of textual analysis; after all it gives us a distinct disciplinary purpose which we might otherwise worry we lack.

But my advice: just say no.

**Constitutional Dialogue and the Rule of Law**

So what of constitutional dialogue? The interactions between the different branches of government are clearly important. Academics are concerned about them, as are

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6 Karl N. Llewellyn, “The Constitution as an Institution” (1934) 34 Columbia L. Rev. 1 at 17.
8 For example, it is consistent with the first page of Patrick Monahan’s constitutional law text where he says “it can be said that all nation states have constitutions, since all countries have certain organizing principles or rules for the exercise of state authority.” Patrick Monahan, Constitutional Law (2nd ed., Toronto: Irwin Law, 2002) at 3.
judges, and politicians and perhaps most importantly the news media - in today’s world, perception as well as behaviour, is constitutional reality.

And there is good reason for us to think constitutional dialogue is important. Hermeneutics confirms what lawyers have always instinctively known – argument is good!\(^{10}\) Or at least, interactive discussion, where each party genuinely listens, seeks to understand the others’ points, and is prepared to modify their own views, is good. Such interactive conversation can get us closer to truth – perhaps as close as a realist can ever expect to get to truth. The hope of agreement is never lost while the conversation continues.\(^ {11}\)

If that is not convincing enough, I suggest that it is constitutional dialogue that underlies the ubiquitous holy grail of western legal systems – the rule of law. There are many different definitions and elements of the rule of law. Dicey had three elements; Joseph Raz identifies 8 requirements; Geoffrey Walker. But there is a core to the concept that we can grasp. Let’s treat the phrase “the rule of law” with the respect it deserves by analyzing its meaning as legal text. Common to almost every definition, and to the ordinary meaning of the text itself, I suggest, is the notion that there is some distinctly separate or objective meaning to law that is independent of the identity of those to whom it is applied, a meaning that is independent of the identity of those who apply it, and independent of the time when it is applied. It is law itself, given such independent meaning, that rules, and that should rule.

This may appear to sit uncomfortably with a legal realist. And yet, to this constitutional realist, this notion of the rule of law represents a simple normative call. It is a call to separate the institutions that write the law and those that apply or interpret the law. As basic separation of powers theory tells us, combination of those functions in one body gives rise to the potential of tyranny. It does so, because if the same body who wrote the law can apply it, then the words of the law become irrelevant. In reality, they can be “interpreted” or read up, or down or, probably sideways or back to front, using all those technical tricks that we teach law students and more. The maker of a law will always know what they had meant to say (even if they hadn’t), and they will ensure that the law says it (even if it didn’t quite). Law, in that circumstance, has no independent meaning or existence. It becomes the dirty raincoat that clothes the naked power of tyranny.

For law to have independent meaning, it must be interpreted and applied by someone other than those who write it. And inherent to that is dialogue – dialogue between the law-maker and the law-interpreter. In the unending struggle to clarify what rules we want in a society, law-makers make laws, the words of which are interpreted by law-interpreters, the results of which can be scrutinised by law-makers and changed if desired, to then be interpreted anew.

So, even to a constitutional realist, the rule of law is important – and provides an important reason to be interested in constitutional dialogue.


But a constitutional realist should also insist that we need to understand the realities of the dynamics of dialogue. Who exactly is engaged in this dialogue? How do they interact, in reality? This requires some realism about politicians, and about judges.

**Realism about Politicians**

Here we can learn from other disciplines. Political science is replete with treatments of politicians’ reality – ranging from thick descriptions to thin rationalists’ accounts. I advocate taking a systematic approach to understanding politicians’ behaviour in reality, by examining, in more detail than I do here:

- the qualifications for appointment (virtually none);
- the processes by which they are appointed and reappointed (through elections of whatever sort);
- the processes by which their performance is scrutinised – in particular by other groups of politicians and by the media;
- their incentives to establish reputational capital, and for what – and in particular the degree to which the electoral appointors value ideology versus effectiveness, and the role of trustworthiness;
- the processes by which they are dismissed from office – what does it take?!

I won’t go all through that now. We know about politicians. They seek election and re-election, for a combination of ideological and power-seeking motives. They respond to public opinion as manifested at elections. Accordingly, in line with public memory, and their perception of the public’s memory, their horizons are often short-term.

What of the structures and processes governing their decision-making? In particular, we must be conscious of implications of the design of the Westminster system of government, with its fused executive and legislative branches.

Which branches of government, exactly, are we concerned about? The superficial media tends to focus on the politics of the Executive branch of government, with Parliament as a sort of constraint, and often ignores the judicial branch. Legal academics tend to focus on legislators and on judges. After all, they are responsible for the two paradigmatic forms of law – statute and the common law.

It is true that the executive and legislative branches of Westminster government are fused in Canada, in the sense that Cabinet Ministers are drawn from Parliament. But the distinction between Cabinet and Parliament, between the Executive and legislative branches of government remains significant in reality.

The rhythm of reality in executive government is quite different from that of the legislature – largely reflecting the different functions of different branches of government. Cabinet ministers are drawn from Parliament, and an important part of their ongoing function lies there, fulfilling their ministerial responsibility and guiding
legislation and the business of Government through the House and Senate. Their incentives in both places also shade into each other—they seek to win votes for their performance (and lose votes for their opponents’ performance) in either government or opposition.

But Cabinet Ministers and MPs are engaged in very different decision-making processes and environments when they sit in Cabinet and in Parliament:

- Minister politicians in the Executive make policy and operational decisions at either a departmental or whole of government level.

- The paradigmatic process is one of policy analysis, recommendation and decision by an iterative mixture of public servants, Ministers and Cabinet collectively;

- It is undertaken, largely, in secret; and

- If reason are given for decisions, they are given to influence electoral outcomes—and can, accordingly, be hidden, or self-serving, or exaggerated or misleading.

Policy decisions are made in principle, rather than in the sort of precise textual formulation that lawyers are used to. Those policy decisions can be the basis for legislative drafting—and bills introduced into the House by the Executive, and therefore, most Bills passed, are the result of that. But to become a Bill, the policy decisions have to be translated from one language into the other. My point is that the process of making law in the Executive is conducted in the language of policy-making. Apart from seeking some nominal level of assurance that the words of draft legislation appear to reflect their policy decisions in Cabinet, most Ministers don’t usually tend to fuss over most legislative words.

Parliament is supposed to fuss over words. The primary job of MP-politicians, making law, consists of examining successive drafts of legislation. And this is a transparent process—with argument and decision-making and statement of reasons all conducted (largely and apparently) in public. But my experience in New Zealand and Canada is that in the lower house of a Westminster system where Parliament is dominated by Cabinet backed by a majority government, MPs don’t, in reality, fuss over words. Why would you, when you don’t have much power, in reality, to change them on your own?

As a side comment, I suggest that this may be a reason to keep the Canadian Senate (in some form). My understanding is that there is more attention to technical issues of legislative drafting in the Canadian Senate than the House of Commons. New Zealand abolished its upper house in 1950 by simple statute and has no such check. Not that we’ve noticed.

Otherwise, MP-politicians in the legislature, following Minister-politicians in the Executive, continue to be concerned with attacking or defending the policy behind the words. Yes, it is the words that represent the final decisions Parliament reaches in passing law and it is the words for which, in theory MPs are accountable. The words
are law. But even in an environment of minority governments, how often, in reality, is political accountability tied back to legislative wording rather than general policy intent? Rarely, I suggest. The media certainly doesn’t.

Only if wording is really stuffed up and a court says so does it become a political issue. And that is appropriate – it is general policy intent that the electorate cares about. Law is important to them only to the extent that it is effective in effecting that intent.

Realism about Judges

That is not how judges treat law. There is not as much systematic analysis of the incentives on judges in reality by the legal academy as there should be. Again, I will not outline a full-scale such analysis here. But there are some points to pause on.

First, it is important whether judges are appointed by politicians in the Executive branch of government. If they are, this inherently introduces politics into the identity of the judiciary (whether of a party-political or more personal nature). The importance of appointment is reinforced by the ineffectiveness of sanctions on judges – the sanction that counts, removal, is so difficult to effect (and appropriately so) that I don’t believe it has significant effects on judicial behaviour – that in itself is a significant effect.

And note the process by which judges make decisions, in contrast to that of Ministers or MPs:

• They hear argument in public;
• They deliberate in private;
• They depart from previous decisions according to established principles of precedent that can be stretched, or not, as may be; and
• They must give reasons, and the legal quality of their reasoning is what matters to the way in which their decisions are viewed by their judicial and legal peers now and in the future.

More importantly, and unlike politicians, there is an important qualification for appointment of judges which is usually mentioned in passing as a sort of inherent condition. In Canada, like New Zealand and other “civilized” common law jurisdictions, in order to be appointed as a judge you have to be lawyer. This seems to me to be an important defining element of the nature and identity of the judicial branch of government. Elected politicians have dialogue with selected lawyers. More on this anon.

But otherwise the processes of scrutiny of judicial decisions lie in the system of appeals and the public nature of their decisions, including the requirement to give reasons. Judges’ incentives to establish reputational capital along these dimensions is related to their personal motivations for accepting office. This, of course, varies with the judicial office held. The motivations, as well as the backgrounds of judges sitting
on routine criminal cases at first instance are likely to be different from those on the Canadian Supreme Court. There is room for some empirical analysis here. What are the backgrounds of judges appointed to the Supreme Court – in terms of nature and length of experience in practice, or academia, or with policy matters compared with legal cases.

My own view is that all judges I have met, of supreme courts of common law jurisdictions such as Canada, New Zealand, the United Kingdom, the United States and Australia are motivated simply by a strong, if sometimes inchoate, desire to “do justice” according to their own personal moral and philosophical convictions as well as their perception of what is in the interests of the public in the long term. But, in addition, there is something else. Judges also respond politically. At the level of a Supreme Court in particular, judges have a fund of institutional capital of legitimacy that they can conserve or expend on decisions that are more or less aligned to public opinion.12

This is not to diminish the importance of the judicial role. We can and should expect judges’ perspectives of public opinion and the public interest to be different from that of politicians: they take a longer-term view based on their perception of the long term interests of the public of the nation, in some inchoate sense. But they do, I suggest, pay attention to public opinion. If they did not then over the medium to long term judicial institutional legitimacy would diminish, which would show up in the identity of new appointments to the Court by politicians in the Executive and the degree to which the other branches of government submit to judicial decisions. Public opinion matters to judges.

Neither does this view subvert the rule of law. Judges are still a different group than politicians. Here is where I try to apply some realism to the notion of constitutional dialogue.

**Realism about Dialogue**

*Bargaining in the Shadow of the People*

Remember that my conception of the essence of the rule of law is that the law is made and interpreted by different bodies or groups of people. The system we have, in Canada and New Zealand, allocates the task of making statutory law to elected representatives – politicians – the reason for this is clear and constitutes the necessary element that makes our constitutions democratic because they respond to public opinion as expressed through the medium of general elections.

Our system allocates the task of interpreting statutory law, and of making common law, to judges. Consistent with my earlier argument, judges also respond to public opinion, albeit over the longer term, ameliorated by individual judges’ own perceptions of the nature and importance of public opinion compared with their own values, and mediated by their own disciplinary training.

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According to this account, then, “the people” in those different capacities of long term interest and short term opinion, and as mediated through the perception of political representatives and judges, are the common core factor to which both law-maker and law-interpreter turn when in doubt about how to make or interpret law.

This is appropriate in a democratic constitution. And it means that in engaging in dialogue over the meaning of a constitutional element or, indeed, over a law, the political and judicial branches of government can be characterised as “bargaining in the shadow of the people”. Mnookin and Kornhauser coined the term bargaining in the shadow of the law in 1979 to characterise the way in which individuals interact in family disputes – the idea being that the law sits in the background and influences individual interactions as the ultimate force to which either party can turn if in doubt or dispute.\(^\text{13}\)

The same is true of disputes between the political and judicial branches of government over the appropriate meaning of a law or constitution. When in doubt, or dispute, they turn to their own perceptions of the opinions and interests of “the people”. In the long term, we can expect that the view that will prevail is that which is closest to the longer term view of “the people”, if that view survives in the law during the transition from the shorter term view. This is a reason why political branches of government might, over time, defer to the judiciary. But also a reason why, if the judiciary is wrong in their judgement of peoples’ long term preferences, why the political branches might not so defer.

*The Languages of Dialogue*

Characterizing constitutional dynamics in this way entices a realist to beg for various questions to be answered – such as unpacking the different conceptions of “the people” held by each branch and exploring the differences between them in reality.

I want to focus here on how the political and judicial branches of government think – on their mindset and perspective – or “language”:

- In the executive, Cabinet Ministers formulate and consider policy proposals and have them translated into legislative language;
- In the legislature, MPs consider, amend and pass legislative proposals;
- In the judiciary, judges consider legislation in the context of specific cases of dispute.

The primary “dialogue” is between politicians, who formulate policy in the Executive and pass it as legislation in Parliament, and judges who interpret or apply it.

This is a dialogue between politicians and judges. The politicians could come from any walk of life, and are elected by the public to Parliament and to Executive government on the basis of their proposed policy programmes and their presumed

personalities. The judges must be lawyers, and are selected by the executive on the basis of their proficiency in legal argument and reasoning and, hopefully, judgment. What languages do these two parties to constitutional dialogue speak?

I suggest that the best way of thinking about this is in terms of law and policy. Judges are selected lawyers trained in the life and language of the law. The politicians who, in our systems, formulate legislation in the Executive largely do so on the basis of policy analysis and proposals. For completeness, you might also consider that to the extent that the legislature has an independent language it is the art of the possible – compromise.

However, my contention is that it is law and policy – that constitute the two primary mindsets, attitudes, biases – the languages - of the branches of government who are in dialogue with each other. This accords with their purposes. Legal analysis as a technique has developed to enable analysis of what the law is. Policy analysis has developed in order to analyze what should be done – by law and other instruments.

**Legal Analysis and Policy Analysis**

The paradigmatic nature of legal analysis is a distinctive mode of reasoning and analysis. It is the way of thinking in which lawyers are trained at Law School and which they are expected to apply in legal practice – in the preparation of opinions and the conduct of litigation, and in judging. It is the language of the common law and the language of lawyers and, therefore, judges.

Legal analysis does often inherently involve policy considerations. However, my experience is that lawyers in practice and even in government, and judges, often do not realise that public policy advisers use an entirely different mode of analysis. Public policy analysis is the subject of a whole separate academic discipline and literature. Public policy analysis is the language in which the policy of statute law is formulated. It is the language of Ministers and public servants.

The paradigmatic versions of legal and policy analysis I use are, of course, simplified caricatures. My simple point is that there are inherent differences between the paradigmatic versions of legal analysis and of policy analysis and that these constitute the languages used by the executive branch of government in formulating legislation and by the judicial branch in interpreting it.

I suggest that a simple outline of the paradigmatic steps of legal analysis, in which lawyers and therefore judges are trained, is as follows:

1. Identify Issue
2. State Facts
3. State Law
4. Identify arguments for each side as to what the law is
5. Judge comes to a conclusion

At a similar level of simplicity, I suggest that the paradigmatic steps of ideal policy analysis, as used by policy advisers to Ministers in executive government, are as follows:
(a) Identify government’s objectives
(b) Identify problem that requires resolution
(c) Identify all options for resolving problem in order to achieve objective
(d) Analyse all options, including in terms of:
   (i) Achievement of objective
   (ii) Financial implications
   (iii) Legal implications
   (iv) Other implications
(e) Recommendation

Legal analysis is paradigmatically inductive; it reasons from specific disputes to
general rules. It is inherently grounded in the context of specific fact situations. By
contrast, policy analysis is deductive. It reasons from general objectives to (more)
specific policy recommendations. It is more abstracted from fact situations.

I suggest that the inherent nature of the paradigmatic versions of legal analysis and
policy analysis produces certain characteristics, or “biases”, in each mode of thinking
and, therefore, in the activity of each branch of government and the understanding of
each held by the other. Constitutional dialogue between the branches of government
is being conducted by very different groups of people, who come to their conclusions
using different processes, and who speak in different languages.

There is more I can say on this. But in summary, I suggest that legal reasoning
techniques, and therefore Supreme Court judges, are good at, and better than
executive branch policy analysis, at:

- Identifying problems of detail;
- undertaking incisive logical analysis of those problems;
- grounding their analysis in particular contexts of practical, human situations;
- linking their decisions to the context of previous decisions and departing from
  those incrementally; and
- valuing justice in the individual case.

However, the techniques of policy analysis, and therefore the Executive branch’s
formulation of legislative policy, are relatively better than legal/judicial reasoning at:

- identifying the general policy objective;
- comprehensively identifying all relevant options;
- undertaking broad-based analysis that incorporate all relevant considerations;
- being prepared to adopt innovative new solutions; and
• valuing the coherent achievement of a general policy objective.

And, to be fair, I should note that politicians in the legislature tend to be better than either judges or the executive at compromise and consultation, and valuing the possible.

A Normative Assessment of Westminster Dialogue

Well, so what? What are the implications of these characterizations when applied to constitutional dialogue. I think there are a number, and I propose to pursue them, at some point. They include:

• casting new light on the value of that Canadian legal art form of “references” to the Supreme Court of Canada;

• raising issues about the appropriate nature of policy analysis;

• exploring further the distinctive nature of activity in the legislature;

• raising issues for the legal academy about exactly what skills we are teaching putative lawyers and for the legal profession and more particularly the government, about what legal skills should be;

• Considering the effect of different systems of constitutional design on the nature and quality of achievement of the rule of law; and, perhaps,

• casting doubt, in terms of the rule of law, on the legitimacy of judges both making and interpreting the common law.

But for the purposes of this lecture I want to highlight one point: the vital constitutional need to think about who we want to be engaging in constitutional dialogue – who we want to be exercising public power and safeguarding the exercise of public power through maintaining the rule of law.

In the words of Stanley Fish, who I interpret to be a realist:

“Just as rules can be read only in the context of the practice they supposedly order, so are those who have learned to read them are constrained by the assumptions and categories of understanding embodied in that same practice. It is these assumptions and categories that have been internalised in the course of training, a process at the end of which the trainee is not only possessed of but possessed by a knowledge of the ropes, by a tacit knowledge that tells him not so much what to do, but already has him doing it as a condition of perception and even of thought.”

What should that course of training be?

The essence of the rule of law as I have characterised it says that law should not be made and interpreted by the same group of people. Our systems are consistent with

that. But once you have difference, do you need anything else to enhance the quality of the rule of law? In particular, does the rule of law require that the people who interpret and apply the law must all be formally trained, and exposed throughout their careers, to the peculiar techniques of common law legal reasoning?

In the interest of realism, some personal disclosure: I am enough of a lawyer to be relatively comfortable with this situation. I have three law degrees, I have been a public servant. I understand the potential consequences of too much innovation. I can be persuaded to look for incremental changes, consistent with historical trends, on the basis of an ad hoc judgement in relation to problems of detail. And lawyers, as far as I can see, in both Canada and New Zealand, are quite happy with a constitutional system where dialogue occurs between elected representatives and selected lawyers.

I think, and perhaps most of us here think, that a long-term perspective of the public interest, that is conservatively inclined not to part with the past too quickly, that is taken by those trained in the subtlety of exercising Alexander Bickel’s passive judicial virtues – is a valuable anti-dote to populist posturings of politicians.

**But we would, wouldn’t we!**

A further disclosure: my first degree was in economics and political science. And I studied at the Yale Law School, which is renowned for not teaching law. I suggest that we lawyers need to examine some of our core assumptions. And if we don’t, policy advisers considering issues of constitutional design – such as that involving the elevation of the bargaining power of legal reasoning in a Charter-type environment, for example, should.

**Maybe** applying a policy analysis would simply reinforce the validity of the existing regime. If we:

- explicate our views of the objectives that should underlie our constitutions; and

- identify all the various options of groups of people between whom there should be constitutional dialogue (they could be from other disciplines, like economics or, heaven forbid, sociology, or along other dimensions, such as age, or geography, or educational or sporting or cultural attainment – or lack thereof!);

- And if we carefully analyze all the relevant sets of considerations that relate to all of those options;

- then maybe we **would** agree that legal training, in the way in which we currently deliver it, in the common law world, should be constitutionally privileged in terms of the exercise of power.

But maybe we wouldn’t.

Maybe, just maybe, we could envisage a few other people being entrusted with such power. Not a majority, you understand. We wouldn’t want to be hasty or radical.
But, in New Zealand, for example, I personally would be pretty happy with our non-lawyer former-Governors-General being on our Supreme Court. They would add diversity of disciplinary mindset, as well as race and gender. And I would trust their judgment as much as that of experienced lawyers. They might add a valuable accent to the language of the law, especially when it is in dialogue with our elected representatives.

The language and mindset of the law might see such an analysis as too radical. But the mindset and language of policy analysis might suggest it is worth thinking about. What should come out of such dialogue in two languages? Which language do you speak?

No reira. Tena koutou, tena koutou, tena koutou katoa.