



# **Champions of the Rule of Law, Learning Through Uncertainty**

**Address by Justice Chris Maxwell, President, Victorian Court of Appeal,  
at the Community Opening of the Legal Year**

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The beginning of a new year is a good time to pause and reflect – and a good time for short speeches! It is an opportunity to take stock of the work we do as judges and lawyers, to reflect on what it stands for and how we go about it.

In the spirit of reflection, I want to raise two distinct but related ideas. The first is that what we do is an expression, an embodiment, of the rule of law. The second is that, in striving for the clarity and certainty to which law aspires, we should learn to value uncertainty.

## **The rule of law**

First, the rule of law, which is the foundation stone of the objectives of the International Commission of Jurists, the organiser of today's function. The ICJ is committed to achieving:

*“a world in which, through the rule of law, a just, democratic and peaceful society is achieved, arbitrary exercise of power is prevented, rights and freedoms are expanded and social justice is embraced.”*

Its stated mission is:

*“to advance the understanding that the rule of law requires that states, under the principle of separation of powers, develop effective executive, judicial and legislative institutions and measures, as checks and balances, to respect and protect the human rights of all.”*

Each year, by coming together for this ICJ event, we recommit ourselves to those goals. There is no other occasion like this, and no other organisation like the ICJ which fights for the rule of law. We celebrate the ICJ's leadership, here and abroad.

But what does a commitment to the rule of law mean at a practical level? What part do we as individual participants in the legal system play in upholding those ideals?

To answer that question, we need to examine more closely the key characteristics of a society governed by the rule of law. It is a concept often invoked but rarely explained.<sup>1</sup>

The most obvious characteristic for present purposes is the independence of the judiciary, the guarantee to the community that the judicial officer makes her decision uninfluenced by political or commercial pressure or personal affiliation.

What goes on every day, in every Victorian court, is a demonstration of that independence. The very premise of the engagement between the judge and counsel, of the litigation itself, is that the judge will decide the case on its merits, free from outside influence.

A closely related aspect of the rule of law is access to the courts. In a society governed by law, the courts exist to apply and enforce the law. In order for courts to perform that role, citizens must have access to them.<sup>2</sup> Every lawyer who enables a client to defend rights or enforce obligations in court is thus affirming the rule of law.

Giving voice to a client vindicates her autonomy, restores her control of her life. I want to make particular mention in this context of the collaborative effort of Victorian lawyers, through Disaster Legal Help Victoria, to provide access to justice for those affected by the terrible bushfires of recent months.

Another critical feature of the rule of law is the separation of powers, the independence of the judicial arm from the legislative and executive arms of government and, more particularly, the supervision by the courts of the exercise of executive power. As the Court of Appeal said in 2016:

*“The function of judicial review is to ensure that Government operates according to law, that powers conferred on Ministers and public officials by statute are exercised within the legal limits fixed by Parliament.*

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<sup>1</sup> See, eg, T Bingham, *The Rule of Law* (2010).

<sup>2</sup> *R (on the application of UNISON) v Lord Chancellor* [2017] UKSC 51, [68].

*It is one of the foundations of our democratic society that the courts perform this supervisory role, and do so independently of Government and immune from political pressure. This is one of the guarantees of the rule of law.*<sup>3</sup>

The importance of the rule of law needs to be proclaimed as loudly and as often as possible. Much of what defines the rule of law is subtle, even imperceptible, and we need to draw attention to it, celebrate it, advocate for it. Each of us should aim to be a champion of the rule of law.

Another rule of law value which has featured recurrently in my judicial thinking is the principle of equality before the law. In its simplest expression, this principle requires that like cases be treated alike.<sup>4</sup> I have found myself invoking this notion in a range of contexts, for example:

- in proposing an evidentiary framework to enable comparative evaluation of pain and suffering in serious injury cases;<sup>5</sup>
- in affirming the importance of consistency of outcome in sentencing;<sup>6</sup>
- in developing guidelines to ensure consistency of approach by sentencing judges, on issues such as mental illness and the imposition of non-custodial orders.<sup>7</sup>

And I find myself invoking the rule of law values of certainty and predictability. In statutory interpretation, for example, I have expressed the view in judgments and elsewhere that close adherence to the words actually used in the statutory text promotes certainty and predictability in judicial interpretation.<sup>8</sup> That in turn reduces the scope for disputation and the incentive for a party to keep appealing in the hope of securing a different interpretation.<sup>9</sup>

The link between certainty and the rule of law has been well expressed by the legal philosopher Jeremy Waldron, in these terms:

*“... the whole point of the rule of law is to secure individual freedom by providing a predictable environment in which individuals can act freely, plan their affairs and make their decisions. To eliminate uncertainty in the interests*

<sup>3</sup> *Minister For Families and Children v Certain Children (by their litigation guardian Sister Marie Brigid Arthur)* (2016) 51 VR 597 [11]–[12].

<sup>4</sup> *Green v The Queen* (2011) 244 CLR 462, 472 [28].

<sup>5</sup> *Haden Engineering Pty Ltd v McKinnon* (2010) 31 VR 1, 3 [3].

<sup>6</sup> See, eg, *Hasan v R* (2010) 31 VR 28, 39 [48]–[49].

<sup>7</sup> *R v Verdins* (2007) 16 VR 269; *Boulton v R* (2014) 46 VR 308.

<sup>8</sup> *Treasurer of Victoria v Tabcorp Holdings Ltd* [2014] VSCA 143 [101]–[102]; *Waterfront Place Pty Ltd v Minister for Planning* [2019] VSCA 156, [13].

<sup>9</sup> C Maxwell “The Quest for Certainty and the Limits of the Judicial Role” in J Barnes (ed) *The Coherence of Statutory Interpretation* (2019) p 114; see also *Waterfront Place Pty Ltd v Minister for Planning* [2019] VSCA 156 [13].

*of freedom and to furnish an environment conducive to the exercise of individual autonomy — that is the raison d’etre of the rule of law.”<sup>10</sup>*

So our goal as champions of the rule of law is to eliminate uncertainty in the interests of freedom. Paradoxically, I want to suggest, we need to recognise that uncertainty itself is essential if we ourselves are to make the most effective contribution.

### **Learning through uncertainty**

The first step, as a wise person said to me many years ago, is to learn to live with uncertainty. What exactly does that mean? Well, you may find yourself waiting for a decision in a case, or a response to a job application, or something else which is beyond your control, and you are unsure what the outcome will be. The message is: “Live with the uncertainty; be comfortable with not knowing, with not being in control. Don’t jump to conclusions. Above all, don’t assume the worst.”

Learning to live with uncertainty is vital for psychological well-being. But my theme this morning is slightly different. I want to talk about learning through uncertainty, about acquiring wisdom through self-doubt.

Just over 200 years ago, in December 1818, the poet John Keats wrote to his brothers, George and Tom, in these terms:

*“at once it struck me, what quality went to form a Man of Achievement ... I mean Negative Capability, that is, when a man is capable of being in uncertainties, Mysteries, doubts, without any irritable reaching after fact and reason.”*

What a remarkable idea: the capability “of being in uncertainties”. Of course, our instinct is to reach after fact and reason. Every day, in our work as lawyers, we try to be practitioners of rational analysis. It is the pathway to truth and the foundation of justice. And we live in an age where adherence to fact and reason is more important than ever.

But the getting of wisdom, I believe, depends on learning to “be in” uncertainty, to allow room for doubt. Think how much more productive a discussion is when the participants are open to new ideas and possibilities, rather than dogmatically certain of their positions.

The point was made with great clarity by the philosopher, Pierre Abelard, who lived between

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<sup>10</sup> J Waldron, “Are Sovereigns Entitled to the Benefit of the International Rule of Law” (2011) 22 *The European Journal of European Law* 31543, 31553, cited in C May and A Winchester (eds) *Handbook on the Rule of Law* (2018) p 101.

1079 and 1142. He said:

*“The beginning of wisdom is found in doubting: by doubting, we come to the question, and by seeking we may come upon the truth.”*

The converse, as the Scottish Enlightenment philosopher David Hume said, is that:

*“When men are most sure and arrogant, they are most commonly mistaken ...”*

My experience as a judge has highlighted the importance of embracing uncertainty. The professional responsibility of a lawyer, and of a judge, is of course to provide answers. But I have discovered that the most productive place to start is by asking questions.

The judge needs to be curious, sceptical of conventional wisdom, and open about what he/she does not know. Often enough, a question directed at the rationale underpinning a particular proposition or opinion will reveal assumptions which need to be examined and challenged. I find myself asking counsel, “Why would that be so?” Understood in this way, the experience of being a judge means learning how much you still have to learn.

The scientific method epitomises how we reason from uncertainty to knowledge. Investigating the unknown or the uncertain, the scientist gathers empirical evidence from which a hypothesis is then developed. The hypothesis is then tested and retested until either it is falsified or its accuracy is established. Only then can the conclusion be stated with confidence.

There is, of course, a distinction between healthy doubt and unhealthy anxiety or indecision. Learning from uncertainty does not mean being unable to make a decision or reach a conclusion. On the contrary, a healthy personal and professional life requires that you be able to make decisions – on the basis of fact and reason – and carry them through.

Nor does it mean questioning the expert opinions of others. For a non-scientist to doubt an evidence-based scientific conclusion – whether on the effects of cigarette smoking or on the causes of climate change – is the height of presumption, the very opposite of the intellectual openness I am advocating.

My point is essentially this: be conscious of your limitations, be open to self-doubt. Acknowledging the possibility that you might be wrong promotes reflection, and enquiry, and debate with others. And that process of self-questioning makes it more likely that the conclusion you finally reach will be correct, more likely that you can with confidence give a firm, clear answer to the question you are addressing.

To conclude, we feel certain that the maintenance of the rule of law is essential for the kind of society we believe in. Uncertainty about how best we can contribute provides an opportunity for reflection, and discussion, and leads ultimately to the identification of the way forward.