SIR JOHN GRAHAM LECTURE

2018

Towards Justice

THE RT HON DAME SIAN ELIAS GNZM
CHIEF JUSTICE OF NEW ZEALAND

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The rule of law as "an unqualified human good"

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First published in September 2018 by Maxim Institute
PO Box 49 074, Roskill South, Auckland 1445, New Zealand
Ph (0064) 9 627 3261 | Fax (0064) 9 627 3264 | www.maxim.org.nz

ISSN 1179-4305 (softcover)
ISSN 1179-4313 (PDF)
ISBN 978-0-9951069-4-9 (softcover)
ISBN 978-0-9951069-5-6 (PDF)

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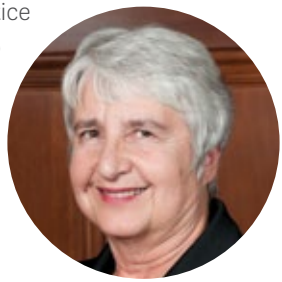
THE ANNUAL SIR JOHN GRAHAM LECTURE

Sir John Graham was an exemplary New Zealander who throughout his life displayed the consistency of character and care for others we hope for in the best of our leaders. Along with his well-known leadership roles as Captain of the All Blacks, Headmaster of Auckland Grammar, and Chancellor of the University of Auckland, Sir John inspired and led many organisations, including Maxim Institute.

Appropriately, he was recognised with a CBE in 1994 for his services to education and the community, and was further honoured when he was knighted in 2011. As a Founding Trustee of Maxim, Sir John Graham's deep love for New Zealand, his passion for education, and concern for those on the margins of life remain at the heart of our work, and we are honoured to be able to hold this annual lecture in his name.

In honour of Sir John's life of service and contribution to public life, the Annual Sir John Graham Lecture provides an opportunity to invite leading experts to contribute to public debate in New Zealand.

RIGHT HONOURABLE DAME SIAN ELIAS



The Right Honourable Dame Elias is the 12th Chief Justice of New Zealand and the first woman to be appointed to that office. She graduated from Auckland University with an LLB Honours Degree in 1970 and was admitted to the New Zealand Bar the same year. She studied at Stanford University, from which she graduated in 1972 with a Master's Degree in Law. Following her return to New Zealand, Dame Sian worked first as a solicitor and then as a barrister in Auckland. In 1984-1989 she was a member of the Law Commission working particularly on the reform of company law.

In 1988, Dame Sian was appointed a Queen's Counsel. She appeared in a number of significant cases, including cases concerning the Treaty of Waitangi. She was awarded a Commemorative Medal in 1990 in recognition of services to the legal profession.

In 1995, Dame Sian was appointed Judge of the High Court in Auckland. On 17 May 1999, she was appointed Chief Justice of New Zealand and was made a Dame Grand Companion of the New Zealand Order of Merit. The Chief Justice was appointed a Privy Councillor in 1999 and first sat on the Privy Council in 2001.

When in 2003 the Supreme Court Act established a final Court of Appeal in New Zealand, the Chief Justice became the head of the new Supreme Court, which began sitting in July 2004.

Annual Sir John Graham Lecture
Friday 10 August 2018

The Rt Hon Dame Sian Elias
Chief Justice of New Zealand

Introduction

I am delighted to have been invited to deliver this lecture. Sir John Graham is someone I have always admired, even if at times we may not have seen eye to eye. I was reminded of one of our differences when a friend, who had represented the New Zealand Rugby Union in 1985 when I was junior counsel seeking the injunction to stop the Tour of South Africa, asked if I remembered the affidavit John Graham had given in that case. I think he thought it might set off a useful train of thought for this address. Re-reading the copy he then sent over was something of a shock. It seemed from a different world, so much has changed in our society. What had not changed is the unmistakeable voice in which Sir John expressed his forthright views, particularly his indignation about hypocrisy and flabby thinking. I admired Sir John because he was always straight and true and because he cared. He was a great New Zealander who influenced very many lives for the better through his life's work in education and in society more broadly. I appreciate very much the honour of being asked to speak in a lecture named for him.

I appreciate too the forbearance shown to me by Alex Penk and Ella Anselmi in putting up with my indecision about the subject of the address and then suggesting a title that has given me maximum flexibility. They were keen that I should revisit a lecture I gave nearly 10 years ago on the subject of criminal justice. Now penal

policy, being highly contentious, is perhaps one of those topics that a sensible Chief Justice should avoid speaking about in public. That may not have deterred me. But the depressing fact is that what I said in 2009 is pretty much everything I want to say on the topic today. Although the lecture caused something of a storm at the time, in rereading it, as I felt bound to do in preparing for tonight, I was surprised to see how tame it was. It made me think that perhaps I should have spoken more plainly.

I will touch on criminal justice very briefly. But my main concern is to look more widely at justice and its place in our society. I want to make the points that there is no justice without law, and there is no law unless everyone has access to courts which are open, impartial and fair and which give full justification in their published reasons for what they do. Courts demonstrate the rule of law in action. I want to suggest that there is no room for complacency about our system. We have a great tradition of law. T. S. Elliot once remarked that tradition is "the means by which the vitality of the past enriches the life of the present."[1] But he stressed that any tradition worth having cannot be passively inherited, it can be obtained only by "great labour."[2] I think an educator like John Graham would have agreed.

Is the labour of understanding and holding on to our tradition in law counted as worthwhile today? It would be good to think so, but I have some doubt. So I value the opportunity to throw out some thoughts on law and why it matters to everyone.

The philosopher, Amartya Sen, says that in the pursuit of justice we are bound up with "what [it is] like to be a human being."[3] I will say something further about the human thirst for justice. But if I am right that there is no justice without the rule of law, then it seems to me that the rule of law is itself "an unqualified human good." That was indeed the surprising verdict of the Marxist historian of the 18th century Black Acts, E. P. Thompson.[4] Despite the ferocious injustices perpetrated under these laws, he came to the conclusion that the rule of law was ultimately the winner. It could not be empty rhetoric when even the powerful landowners who tried to use the law for their own ends found it necessary to legitimise their powers and to feel themselves just:[5]

> *Most men have a strong sense of justice, at least with regard to their own interests. If the law is evidently partial and unjust, then it will mask nothing, legitimise nothing, contribute nothing to any class's hegemony. The essential precondition for the effectiveness of law, in its function as ideology, is that it shall display an independence from gross manipulation and shall seem to be just. It cannot seem to be so without upholding its own logic and criteria of equity; indeed, on occasion, by actually being just.*

Law

It is necessary to unpick what we mean by "law." I once had an exchange with a senior Government Minister about a paper I was preparing for a legal conference. When she heard that the paper was on the contribution of New Zealand judges to law, she said briskly "That's easy. Judges apply the law." Well of course that's true. The difficult question is, however, how judges identify what is the law they must apply. That requires engagement with a wider view of law than the common misconception that law is confined to enacted rules.

An English Judge, Lord Radcliffe, made the point that if law is only the mass of things a citizen has to do in order to keep out of trouble "[s]ome clue has been lost."[6] Legal philosophers such as Hayek and Dworkin agree that a working conception of law cannot be reduced to a system of commands or rules but includes substantive values such as equality before the law. Others have stressed the "expressive function of law" which "makes possible certain valuable human connections and relationships" valued quite apart from any consequentialist considerations.[7]

The moral content of law is worked and reworked in decisions of the courts in a common law system. The decisions of the courts are themselves law. So too is custom and the body of doctrine drawn on by all of us in criticising existing law. The significance of these additional sources of law has caused some commentators to suggest that we need to find another name for statutes than "law" because enacted rules are understandable only in the wider framework of values provided by these other sources of law. Lord Radcliffe suggested, not entirely tongue in cheek, we might call enacted rules "para-law" or "sub-law."[8]

Now I do not intend any such provocation here. I am content to accept that the courts are junior players in the development of law. In New Zealand, from earliest days, we have long relied heavily on statutes as the principal source of law. We have not had the sort of suspicions of statute law displayed by English judges of the 19th century. We see the need to make statutes and common law work together.

But the serious point is that the function of explaining the rationality and morality of law and the principles which underlie it is a particular responsibility of the common law. The common law is a method of change. It is a method which, as one Australian Attorney-General puts it, allows "the past to join the future, without undue collision and strife in the present."[9] Common law principles (some in fact taken from or recognised in ancient charters and statutes) ensure that law is not a series of

disconnected rules or norms but has structure and coherence. In such a system, a judge cannot act at whim but within a discipline of principle. A statute which seems to depart from fundamental legal principles of the common law is interpreted narrowly by the courts because the presumption applied by the courts is that Parliament acts on the principles of the common law except where it clearly seeks to depart from them.

Law is therefore a lot of learning and it is law, in this sense, that is invoked in the constitutional principle of the rule of law, to which I now turn.

The rule of law

In the Supreme Court Act, the rule of law was identified as one of the two principles of the constitution, the other being the sovereignty of Parliament. The rule of law is particularly concerned with equality of treatment before the law. Such equality applies between citizens and between the state and citizens. In the earliest statute still in force in New Zealand, the Statute of Westminster I of 1275, it was provided "for the maintenance of peace and justice," "The King willeth and commandeth…that common right be done to all, as well poor as rich, without respect of persons."[10] That is an expression of the rule of law.

The Statute of Westminster is placed in a category of "constitutional" statutes by the Imperial Laws Application Act 1988. The same classification applies to a fragment of Magna Carta as well as the Petition of Right, the Bill of Rights 1688 and the Act of Settlement 1700.[11] Magna Carta itself proceeds on the critical basis that law is observed by the king and his ministers, not as a matter of grace, but as a matter of obligation. Its articles curb arbitrary power by requiring conformity to law. The Charter made it clear that the future of the law was with the royal courts of justice and under them to a law common to the whole of the realm.[12] These fragments remained as the chief legal weapon against the growing absolutism of the Tudor and Stuart Kings. When the American colonies rebelled against government by royal edict, they invoked these charters and the common law constitution they reflected. They said George III was acting unconstitutionally.

Much of what is constitutional law in New Zealand comes from case-law. The equality of private citizens with the servants of the Crown was established in the great constitutional case of *Entick v Carrington*.[13] Officials are answerable in the ordinary courts to the ordinary law of the land. Gradually, by court decisions the

discretionary powers conferred on officials were made subject to court supervision for fairness, reasonableness and lawfulness as well as to check that they are within the powers conferred. Claims of immunity or privilege have largely been whittled away as inconsistent with the rule of law. Where prosecutions are brought for breach of regulations, administrative rules, or decisions, it was established that the validity of the legislation, rule, or decision could be challenged in the prosecution.

Access to the courts was secured and freed from impediments unless they are unmistakeably imposed by primary legislation. Principles of interpretation developed to presume conformity with common law principles protective of liberties or property. Finally, in the second half of the twentieth century, the prerogative powers of the Crown were brought under law and judicial control for legality, reasonableness and fairness (in what has been described as the "last prize" of the Civil War).[14]

This is our constitution. A collection of fragments of old statutes and modern ones (such as the Official Information Act and the New Zealand Bill of Rights Act) and case law which deals with fundamental matters and is rightly regarded as constitutional. It is fragile. It is not well-known. It is like a cats'-cradle. It is easy to move a strand here and not realise the damage that is done there. It requires constant vigilance by everyone. If it is the preserve only of lawyers and judges, it is vulnerable. Unless we are prepared to work harder at maintaining our dynamic constitution, one of the big questions that will have to be faced in the years ahead is whether the risks of imperceptible erosion will drive us to adopt what my Australian friends like to speak of as a "Capital C" constitutional text.

In the meantime, these balances are precious. They have developed over centuries. They will inevitably evolve further in response to changes in our society and in our perceptions of what is just.

Change

It is worth thinking about the inevitability of change in law. It has to adjust to meet the needs of society.

So, changes to the way government is organised have led in the last 50 years to adaption of public law. Lord Diplock considered it the responsibility of the courts to adapt their processes "to preserve the integrity of the rule of law despite changes in

the social structure, methods of government and the extent to which the activities of private citizens are controlled by government authorities."[15]

Other changes in law have come about in response to shifts in the makeup of New Zealand society. One such wave we will need to confront more systematically is the aging of our population. It is likely to send us back to ransack equitable principles of the common law.

The impact of modern technology on personal freedom is also a substantial challenge to law. The Supreme Court has only just touched on the difficulties.[16] It has to be said that it is difficult to see how this genie is going to be put back in the bottle. Yet the problems of preserving space for what is private is inextricably tied up with dignity values and what it is to be human.

Further challenges arise out of modern science about the functioning of the human brain. It may yet cause us to reassess notions of culpability and equal treatment of those who are clearly not treated equally in our criminal justice system. We have, in prospect, reconciliation of law and indigenous rights, such as is being undertaken in Canada and Australia, drawing often on principles of trust law and equity as much as public law and there remains the uncertain status in our legal order of the Treaty of Waitangi.

Any examination of the mid-19th century views of the Treaty shows that the ideas we still grapple with were known and debated in the mid-19th century. We have forgotten too much of our own history. The eclipse of original understandings of the Treaty, both Māori and non-Māori, were strongly contested all the way until the New Zealand Company views became orthodoxy in 1877 with *Wi Parata*.[17] *Nireaha Tāmaki v Baker* too declined to give effect to Māori property in land according to custom. Although the Privy Council said that it was "rather late in the day"[18] for it to be said, there was no customary law of the Māori of which the courts of law could take cognisance, the local legislature backed the local courts. Māori property in land was transformed through the Native Land Court into title held of the Crown. Māori were prevented by legislation from asserting customary property against the Crown.[19] Native proprietors were denied access to the courts to eject trespassers (leaving it to the Crown to take steps to protect the proprietors under a provision which "deemed" the land to be Crown land).[20]

From the middle of the 20th century, my impression is that the Treaty of Waitangi hardly intruded on the consciousness of Pākehā New Zealanders. That did not

change till the land march and the protests of the 1970s. They led to the enactment of the Treaty of Waitangi Act in 1975 and the publication of the Motonui Report in 1983,[21] followed by the Kaituna and Manukau reports.[22]

It is really hard to recapture now the impact those decisions had. When I asked for a show of hands at the annual general meeting of the Legal Research Foundation in 1985, not one of the 100-odd lawyers present had ever read the text of the Treaty. I had not myself read it until I appeared in the Manukau claim and read the text in the schedule to the Treaty of Waitangi Act. It was never referred to in my time at Auckland Law School. I think for most New Zealanders it was a revelation when on Waitangi Day 1988, following the decision of the Court of Appeal in the Lands case, the New Zealand Māori Council took out a full-page advertisement in the major dailies and printed the text of the Treaty in Māori and in English. My then young son was very excited. It says here, he said, that Māori have "full, exclusive and undisturbed possession" of their fisheries. Then he told me "Well you've got to win that fisheries case – anybody can see that."

The matter of the Treaty and its place in our constitution remains a work in progress. The insight that Treaty and land claims could be repositioned within the tradition of the common law resulted from the bridge to understanding built by the Waitangi Tribunal. It described claims of right, to which our legal order could respond.

Change in law is often hotly contested. When contentious issues arise in properly constituted cases which the courts must decide, they can cause real strains between courts and governments and courts and the public. If judicial function and its role in the constitution is not understood and if the courts do not have the confidence of the community, they are exposed and vulnerable. At times the constitutional balances too are vulnerable.

As a young lawyer I once watched a dramatic exchange in the New Zealand Court of Appeal in 1981 between the Court and the SolicitorGeneral. The Court insisted on being provided with material relied upon by the Minister in making his decision in the Aramoana smelter case.[23] It was a close-run thing. The Solicitor General who had resisted disclosure was sent back for further instructions. The relief of the Judges when the Court was eventually advised that the Minister acquiesced was palpable. They were not sure that he would. It was a constitutional moment. Constitutional moments are dangerous for the rule of law.

Fairness

They are also dangerous for the rule of law because it depends on access to impartial courts. It is a great mistake to think of courts as simply centres for dispute resolution, as is all too common. That sort of thinking leads to views that court functions can be outsourced or modified in procedure to achieve ends other than the impartial determination of right according to law. Such attitudes may overlook the ways in which Court processes and their accessibility are valuable in themselves to good government and to civil society.[24]

Much of this value lies in the method of courts in dealing fairly and openly with conflict. Fairness results in better decision-making by ensuring that all information which bears on a contested matter is received and properly tested. More importantly, what is achieved by conspicuously fair processes is the avoidance of a sense of injustice that might otherwise be felt. It may be this matters most for those directly affected, but demonstration of fair treatment is necessary for everyone. Intuitively, we expect that procedures which apply the coercive powers of the state will afford those affected the respect of hearing them. They can say what they want to say that is relevant to their claims of legal right. Law in this way "protects dignity," as Jeremy Waldron in his writings emphasises.[25] As he says, "applying a norm to a human individual is not like deciding what to do about a rabid animal or a dilapidated house." Rather, "it involves paying attention to a point of view" and affording the person holding it the dignity of presenting it.[26]

Preventing a sense of injustice is a good in itself. It is an important function of courts to preserve civility in disagreement by hearing those affected. Feelings of injustice rankle. It is sometimes said that affording natural justice is too expensive. There are pressures, even on courts, to cut corners for these reasons, some of which have led to spectacular errors, because they have led to judges taking their eye off the ball. We need to count the cost if people affected do not feel they have had a fair hearing.

The law does not have too many purple patches, Lord Denning excepted. But every lawyer knows Lord Justice Megarry's defence of fairness:[27]

> *"When something is obvious," they may say, "why force everybody to go through the tiresome waste of time involved in framing charges and giving an opportunity to be heard? The result is obvious from the start." Those who take this view do not, I think, do themselves justice. As everybody who has anything to do with the law well knows, the path of the law is*

strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change. Nor are those with any knowledge of human nature who pause to think for a moment likely to underestimate the feelings of resentment of those who find that a decision against them has been made without their being afforded any opportunity to influence the course of events.

Courts can be important in mediating social tensions. We have seen examples in our history. It was said of the Māori Lands case, for example, that it defused a situation that was almost revolutionary.[28] That was my perception at the time. What I think should not be underestimated is the didactic role that litigation may play in cases of high anxiety. Full public exposure of matters that may have been glossed over or overlooked in administrative decision-making is itself a benefit of the deliberative process of litigation, facilitating wider understanding of good government. If courts do not enter into controversies, what is at risk is not only correction of error, it is also the absence of authoritative vindication of official conduct. Providing such assurance of legitimacy is a principal contribution of legal process to the rule of law.

Amartya Sen has stressed the importance of public reasoning in evaluative judgments.[29] Demonstration of all arguments and the values acted on by men and women in our society is, he suggests, demonstration of the public rationality of law.[30] In high stakes cases, those of real public anxiety, the dispassionate processes of the supervisory jurisdiction are particularly important.

So it is important that courts retain and demonstrate detachment and that they have the confidence of the community, including members of the community who are not always heard and may be disaffected. The great virtue of court process is deliberation and fairness and the provision of reasons that convince or which at least acknowledge the people who feel injustice. It is the obligation of the courts to insist on human dignity in circumstances of public anger and distaste.

Maintaining community confidence in an age of social media while observing standards of fairness and justice is not always easy. Deliberation and fairness are not always practised by those venting anger or half-baked opinions on-line. Attentionspan for engagement too often seems twitter-sized and civility seems to be shrivelling at times in public discourse.

It would however be presumptuous to think the values of law do not remain important to the human spirit. They are values like equality of treatment, protection of what is private, protection from arbitrary power, and justice. These are the values of the rule of law which must be explained in action.

Access to courts

I said at the start of my remarks that access to the courts is essential to the rule of law. Last year, the UK Supreme Court had occasion to consider what it called "the constitutional right of access to the courts." It was of the view that such access was "inherent in the rule of law"[31] and it explained why: [32]

> *At the heart of the concept of the rule of law is the idea that society is governed by law. ... Courts exist in order to ensure that the laws made by Parliament, and the common law created by the courts themselves, are applied and enforced. That role includes ensuring that the executive branch of government carries out its functions in accordance with the law. In order for the courts to perform that role, people must in principle have unimpeded access to them. Without such access, laws are liable to become a dead letter. ... That is why the courts do not merely provide a public service like any other.*

The Court pointed out that access to the courts is not of value only to the particular individuals involved. Litigants settle what the law is for everybody. That is why the resolution of disputes is not an adequate description of what courts do. They are concerned with establishing what is right, according to law, for all. As a former English Lord Chancellor put it, "Justice in this country is something in which all the Queen's subjects have an interest, whether it be criminal or civil...whether the individual resorts to them or not...[and] whether [the actual dispute is] between the State and the individual or between individuals."[33]

It is damaging that law is represented to be a system of dispute resolution of service only to the "users" in the particular disputes. That view has gained considerable currency in recent times. It has been accompanied by worryingly anti-court and anti-lawyer rhetoric at times, described in England by Dame Hazel Genn in her work on civil justice reforms.[34] Much procedural change to the way the courts operate has been driven by what can be measured, in civil and criminal justice. That is something of a problem for courts, which are concerned with outcomes that are not easily measured (like justice) and speak of values and value deliberation. We do need

to continue to refine our processes to minimise expense and delay. But the courts cannot be co-opted into corner-cutting for administratively set targets.

There are other risks. They include the risks to open justice of use of technology in courts and barriers to access to the court provided by fees which seek to recover from litigants the costs of the provision of courts. Barriers to access may be provided by procedural requirements and by inability to secure legal representation. Application of law in a way which is uniform, equal and predictable and which protects citizens and their interests requires formal processes that are not quick or cheap. They have other virtues however. Judicial determination is not properly regarded as system failure.

There are of course those who provide private dispute resolution services where the costs are borne by the parties and where no general principles are established for other cases because the cases are kept private. These services are very valuable in a society. But treating courts as comparable services is wrong because these alternative methods of resolving disputes cannot provide the rule of law benefits provided by public courts.

Criminal justice

The reforms which have swept through civil justice have also affected criminal justice. I want to speak briefly about some aspects of criminal justice. In the 2009 paper the Institute originally suggested I revisit tonight, I dealt with matters of punishment. In more recent addresses I have spoken about changes to criminal procedure in the courts. I touch on both very shortly.

When I spoke in 2009, the prison population was about 8,500. Today, it is 10,500. We are imprisoned at the rate of 200 per 100,000 of population. This has come about because of high public anxiety about crime to which decision-makers have understandably responded. I cited then the pessimistic view of a noted British criminologist. Looking back over 20 years of practice she said she was increasingly haunted by the nagging feeling that the whole penal system was "a gigantic irrelevance – wholly misconceived as a method of controlling [crime]" because the origins of crime are "inextricably rooted in the structure of our society."[35] There are no easy or quick fixes because, as other criminologists have made clear, it is only the mainstream processes of socialisation and inclusion that work.[36]

I said then it is necessary to get some heat out of the discussion. I talked about practical measures adopted in Finland and recommended in a neglected Department of Corrections publication put out in 2001, *About Time*.[37] Finland's drive to reduce its prison population was expert-led, supported by a political accord that there would be no use of "fear of crime" as a populist theme. There was a substantial programme of public information about the futility of imprisonment in bringing down crime and an open agenda of reducing the length of prison sentences and the range of crimes for which prison was imposed. Most importantly of all, there was acceptance of the fact that the justice sector could not be the sole focus.

In 2009, I thought strategies that had to be considered included: community education, intervention strategies for those at risk, better support for probation, increased attention to mental health and substance abuse, and a frank policy of being prepared to reduce the prison population.

More recently, I have delivered some lectures on the impact on the criminal justice system of changes in procedure and imposition of modern case management methods taken from civil justice. I do not repeat here what I said in those lectures. The changes have arisen for a number of reasons: the repositioning of criminal justice around the victim, the approach that the courts operate in the middle of a criminal justice pipeline which should be managed as a whole, the expectations and incentivisation of guilty pleas as a means of shifting cost out of the system and the consequences in terms of perceptions of fair process. These changes have been exacerbated by the pressures on legal aid.

"Cool, impartial justice" now seems less valued.[38] There seems to be impatience with the accusatory method of proof conducted on behalf of the state and tested by the defence before a judge, who comes to the case as a judge only and not as a case-manager. I raised the question whether the criminal justice system can take the weight of expectations loaded on to it in the past 20 years and I pointed to studies here and in other jurisdictions which have gone down similar paths that it is increasingly seen as the engine of a system that is delivering injustice and discrimination. If that view endures, our legal order risks forfeiting public trust and if the system ends up being seen as one that is imprisoning distinct populations, as some think, we may have the conditions for serious civil unrest.

The New Zealand legal tradition

I am conscious that I have said little about the New Zealand legal tradition developed since 1840. I have talked principally about laws and principles which are ancient and imported. They are, of course, our laws and principles too. As John Beaglehole pointed out in 1954, we are as old as our learning and inherited traditions.[39]

But the law received into New Zealand was a starting point which allowed the new legal order to evolve from the snapshot of English law at 1840 and which limited the direct applicability of English law after that date. It was to be adapted to New Zealand circumstances. The common law we received is living law. Louis Brandeis once described living law as "a reality, quick, human, buxom and jolly."[40] Buxom and jolly may be overdoing it. But we can all accept that a living legal order serves real people and changes as society changes.

The lawless Europeans who came to form new lives in New Zealand discovered, as was discovered on the frontiers in North America and Australia, that they needed law. Once settled, they hankered for the legal stability that enabled them to prosper and have their contracts enforced. The New Zealand legal order was adventurous in its sources in the early years. Some of our local legislation was framed on no precedent and attempted to reflect values and processes acceptable to Māori. Other laws reflected the social priorities of a small society and had parallels in other comparable jurisdictions.

Despite these beginnings, following the First World War and perhaps in response to a heightened sense of participation in the Empire, New Zealand and other jurisdictions in the Empire became less adventurous. The Privy Council asserted more authority over local development. There may not have been strict cause and effect but it is striking that innovation in local law in New Zealand dwindled and that we subsided into a "law is law" formalism for some decades. There was of course push back. In New Zealand as there was in other Commonwealth jurisdictions. In Canada and in Australia there were determined moves to sever the links with the Privy Council and end what a Canadian commentator referred to as years of "arrested adolescence."[41]

Recently I had occasion to look at the remarks I made when sworn in as Chief Justice, 19 years ago. I do not think I have read them since. It was a bit of a trip down memory lane, and not a little disconcerting to find that some of the preoccupations then remain depressingly familiar today. They are perennial challenges such as the maintenance of community confidence in our system of justice and the risks to the rule of law if they are not met. Some of the remarks I made then were about

the unique tradition in law we have here in New Zealand. I expressed optimism we would hold on to what is good in the inherited legal tradition we value, while looking, I said "to develop a voice that is truly our own." This remark provoked at least one newspaper to ask whether I was pushing abolition of appeals to the Privy Council.

I was not conscious of the opportunity that was likely to arrive in the new millennium to set up, in law, the "home in thought" Robin Hyde had looked for in letters more than 50 years earlier.[42] It had been achieved for the political order with the cutting of the ties to Westminster in 1947. It seemed to many that similar emancipation in law was overdue.

In the mid-1980s, I was told by Sir Anthony Mason, then Chief Justice of Australia, that the development of a distinct New Zealand jurisprudence could not develop while appeals still lay to London. I have no idea why he chose to tell me this since I was quite a young lawyer. My meeting with him was quite random. Still, it took, as you know, until 2003 for the painter to be cut, and even then it was a near-run thing. A. P. Herbert once said that while the provision of one appeal is "reasonable precaution," two appeals "suggests panic."[43] There were powerful voices in 2003 for not panicking. But in the end the Supreme Court was set up with the object of allowing New Zealand law to be developed with a sense of our own history and traditions in matters of public interest, such as those touching on the Treaty of Waitangi.

The Court is now nearly 15 years old. I cannot, as someone deeply implicated, offer any objective assessment of how it is meeting the expectations with which it was set up. But I think I can say that it is clear that such an institution is a work of many years. We have made a beginning.

Conclusion

I want to end by saying something about judging. Judging is different from other jobs. But it is a job nevertheless and like any job worth doing, it is hard. I once gave a paper at Otago University talking about "judgery." My clerk was mystified and suggested I change the title to "judging." I had to explain to her that judgery is not a word, but a joke - and not even an original joke at that. But it captures something of the flavour of what we do.

Ronald Dworkin was a great legal philosopher but I think he did us a disservice by naming his judge Hercules.[44] Judges know better than to get carried away with the

heroism of their role. We know that good judging stays close to the ground. Lawyers, who have been used to measuring the importance of what they do by the amount of money at stake or the degree of public interest in the case, have to adjust when appointed. That's judgery. Doing what comes your way as well as you can is the obligation of office. It is an aspect of the impartiality which is counted as the supreme virtue in a judge.

We do not in our judgery usually give any thought to the verdict of history or to our contribution to a distinct New Zealand jurisprudence or voice. You would really have to be a bit addled to think like that. We are too busy trying to do what is right according to law to the litigant before us. That task absorbs all our learning and experience. What is accomplished in this unheroic, hard, but deeply satisfying work is the demonstration of the rule of law in action. Increasingly, it is shaped by our own history and values.

When Allen Curnow said of Tasman's exploration of these lands "[s]imply by sailing in a new direction, you could enlarge the world,"[45] the enlargement he referred to was not to the physical world but to the fresh insights and expansion of the human spirit that occurs with such leaps. We are all heirs to such a leap, in law as in all thought. My purpose tonight has been to suggest that the rule of law is precious tradition we need to gain and hold on to in our time with great labour.

Q+A SESSION TRANSCRIPT

Q: The seabed and foreshore case was something quite significant that you were involved in. Did the court case ease tensions and was it a fair outcome?

A: Which outcome; ours or over the road? Did it ease tensions? I'm not sure that I could…no it didn't, did it? I suppose it was inevitable that it would take time for that case to be absorbed. Personally I think perhaps a little bit more time could have been taken before reflex but then I'm not a politician. I'm sure that the strains to look as if that was under control were pretty intense. That was a break, that case. That's an example of the sort of case I say that you really rather don't have those cases. If there was anywhere to hide; you would. But no, it did raise tensions.

But that's perhaps a process we have to be going through in this country. I'm sure we've got through that and we hope we won't encounter…well I won't encounter many more like that anyway. But I mean I was perfectly happy with the case which I thought legally speaking was in fact quite a conservative decision; even if people hadn't been prepared for it. It's what I say, we've forgotten a lot of our own legal history that it was such a surprise really.

Q: Today a report said that 50 percent of Māori and Pasifika men born in 1988 have a criminal record. From your side of the bench; does this seem accurate? Why do we have such a depressing statistic in our country?

A: From my side of the bench that does seem accurate. As to why; that's the big question for our country. We need to address that because it's not something we can continue to live with. As I suggested in my remarks earlier, I think we are at risk of criminalising a distinct population. If that perception is accurate, then we do have, I think, recipe for civic disorder. So I think we need to address it.

Q: You've said that institutions are central to protecting the rule of law. But what if the institutions themselves are under threat as we've seen in the US with the attacks on the judiciary and the media? How can the judiciary respond to direct attacks on institutions of justice by politicians?

A: Well, that really was the burden of my remarks, that I think our institutions are fragile. They depend on popular support. Our job is to do our job and to explain why we come to the decisions we do and hope that the public values that. We can't fight back in any other way. We can't sort of hire publicists. We really have to…as I think Lord Denning once said: our judgements have to be their own vindication. If they aren't, well then we have to work harder at them.

Q: Is a supreme codified constitution desirable to bring greater legal certainty and better protect rights in New Zealand?

A: I don't think so, really, if we understand our constitution and if we're prepared to work at it. An unwritten constitution does require that sort of commitment. My main question about that is whether there is enough social glue; whether we share enough heritage. Particularly as our population changes; for us to feel that it is sufficient to have a largely unwritten—we do have fragments of writing which are constitution—but a largely unwritten constitution. If we don't know what the constitution is then it can be imperceptibly eroded very easily. There are constantly changes that are being brought about which do impinge on constitutional fundamentals. I'm sure they're not done by design. I think it's just that people don't understand that they do trench on rights.

Q: I disagree with your characterisation of New Zealand's constitution as fragile. Unwritten constitutions have proven more robust at adapting to the rigours of the advancements in society than many, if not all, written constitutions. Do you think that Parliamentary sovereignty is adequate as a constitutional safeguard?

A: Well, they only survive in two places; that is New Zealand and the United Kingdom. The United Kingdom is in the throes of probably becoming a federation which will mean it will have a written constitution to some extent. Once you have federalism; you have a more rigid separation of the different functions in the state. From those, there are a lot of implicit values that...well you can see that in Australia. Australia's got a pretty rudimentary constitution. What they have is a strict separation of powers and from that, a lot flows. So when it is said that our system has been robust. I mean I do believe in an evolutionary constitution; I think it's been able to respond to changes in society extremely well.

But that is not the perception of most countries. We are almost on our own in that and perhaps we have to start asking whether we should be so confident. Particularly if, as I suspect is the case, most people couldn't really describe the New Zealand constitution. So my query is whether we can afford our present constitutional arrangements. It doesn't fill me with any joy to think we might adopt a written constitution because once you get hard edged like that, it's a complex thing. I don't know any ideal constitution. Of course there's no constitutional document that is complete in itself. It always has a common law feature or an unwritten aspect.

Q: How far do you think we've come in sexism within law compared to where you think we should be?

A: It's not a very good time to be thinking about that, is it? I mean I had thought we'd come a lot further. I'd never thought that all the barriers were down and I'm dismayed at what's come out about attitudes in the profession. I think that it is not surprising with some of those attitudes that women are not getting ahead. There is a cultural impediment I think that we need to face up to within the profession.

Q: A judge's ruling can often become a case study for future rulings. Does this ever impact your final decisions? If so, in what way?

A: No. I mean occasionally…particularly when you write a dissent hoping that some of the ideas may stay around and be picked up. But I don't think you ever write to be a case study. You're writing to try and convince readers, perhaps, but no I've never thought about ending up in a casebook. It would be nice actually, now I come to think of it.

Q: Are there any ideological winds blowing through non-statute law (para law) that worry you?

A: Well I mean it's like anything really. One of the good things about judicial decisions is that every judge exercises independent judgement. There is no party line. I'm always a little bit nervous if there is a party line and I'm always nervous about fashion. You do see fashion in judgements; you couldn't pretend that you don't. So whether those are ideological…sometimes they have been. The Victorian judges, it was said, used to see a Bill of Rights protective of property in the constitution. They used that to strictly construe statutes which interfered with property. It may be that there are similar…I mean people do have values. One just hopes that they are thought through and tough values which are held because they have been argued through rather than being what is the received wisdom.

Q: How is the law preparing to deal with artificial intelligence and what do you think the impact will be?

A: Well look, I'm retiring in March and I'm very pleased! I don't know. I'm sure there are those in the audience who know much more about it than I. I do find it hard to believe that evaluation and values are things that we are not going to require humans to provide in a just society. I'm not terribly worried about lawyers. I think transactional work may be a bit different. There will have to be adjustments there. But I think at the thinking end; I shouldn't say that should I? I know there's lots of thinking that goes into transactions and I couldn't do one. It's a different

way of thinking. Well if there is, then I'm sure that transactional work will flourish too.

Q: It seems that the court of public opinion is more active and powerful than ever through social media and the desire for large corporations to seem to be in line with perceived public opinion. Do you see this development as a threat to the rule of law? What is the court's role in this new context?

A: I don't think public opinion is a threat. That's really to disparage people a bit. I think we do see fashions; we do see people being led.

What is the court's role in public opinion? Well again, I think our only role is to do what our job is. It's only to come to decision and to hope to convince; which is why I think the expression of the reasons for decision is so important. I suppose you have to worry that people may not read them, but then that's probably our fault is they're so opaque too. But we do need to be more effective communicators; I do agree with that.

Q: The free speech coalition recently raised $50,000 to take Phil Goff to court in defence of free speech. How equitable is access to justice for those who can't raise that money for equally important cases do you think?

A: Well it's a huge issue access to justice and it's something that we need to address. It's not just questions of legal aid. There are all sorts of other impediments. I think the scale of fees may be one of the problems. We just need to look at other ways of delivering legal advice to people. But I suppose I'm a bit of a purist really; one of those who says that the courts are open to everyone like the Ritz. I think it's important that they're open. It is true and we've got to acknowledge that not everybody can go through those doors. Well they can go through those doors; they can't go through them effectively.

But an awful lot of important litigation has been won to establish critical points in our history by people with very little in the way of resources. I think the fact that the courts are open is the critical thing. Yes we've got to work on making sure that people who need legal representation are able to obtain it and we need to think of more creative ways to do that. But it's really important that we keep those doors open; even if it does look like the Ritz.

Q: When you stress the importance of "preserving civility and disagreement," what do you make of the debate over free speech in recent weeks and how the debate or otherwise has played out?

A: I haven't really been following it very closely. It seemed to be very excited, really. I do think freedom of speech is a very important principle. I apply it across the board. It's why I think, actually, the advisory system is a really good system and we should be very careful before we throw it over because you can raise any point you want to raise. I think that yes, there have to be some limits to freedom of speech, but they have to be ones that are imposed for principled reasons, like disruption of public order and matters like that. Yes, it didn't really look terribly edifying what I saw about some of the recent events. I think people should be able to be heard.

Q: Do you think we as a nation will ever reach a point that the Treaty is entrenched in law?

A: The Treaty *is* entrenched in law, really. I mean you cannot escape the fact that that is the foundation of the New Zealand legal order. It's clearly not a legal nullity. It has effect in international law. Indeed there was an international arbitration which said it was a valid Treaty of session and it appears in the Treaty series. What we make of it is something for our society to work on.

Q: Your evident concern for fairness and ensuring people coming before a judge feel they are being heard and treated fairly. What processes do judges as a group have in place to evaluate their performance in achieving such fairness?

A: As I said, one of the things about impartiality and the independence which supports impartiality is that judges are free of direction from other judges including the Chief Justice. That's a really important principle. So we don't have party lines on these sort of things and I wouldn't like to see them. We do try to keep abreast with the ideas and the knowledge that might help us, but we don't impose those standards on other judges. But we have a lot of judicial education among ourselves.

Q: You said in your speech a few times, "the court must have the trust of the community." What does this mean? What does it look like?

A: I think we need the community's trust. I think that's the way I put it. But I suppose the question is right, that we also should trust the community; and we do in law. We have lots of standards for juries to apply or where you're applying the standard of the reasonable man, or something like that. We are meant to be grounded in the values of our society and we do, I think, need to stay close to them.

Q: Will the judiciary be globalised in response to massive issues of justice like climate change? How might this work in practice?

A: Well I don't see the judiciary globalising. I mean there are international legal institutions, of course, but they are pretty under-formed. Perhaps that's what the question's directed at. And yes, one can see that things that require a wider community than a national community to address them effectively, and climate change could well be one. These are ones where we can expect international institutions to develop further.

Q: Dame Sian, you're the Patron for the Centre of Ethics at Diocesan and were involved with its establishment. How do you see that influencing law and good community decision-making?

A: Well I think any civic education is to be applauded. I think any educational initiatives that attempt to encourage young people to think about the values of our society are important in inculcating shared values; and shared values are what support law.

Q: There are currently 60 percent female law graduates but fewer than 30 percent in senior roles in the profession. Do you have any comments on what it will take to right the balance at the top?

A: This bothers me a great deal because when I entered the profession, I really did think that when I had grandchildren who are the age of my granddaughters; we would be laughing at some of the impediments there were for women and that is not the case. It's still not a laughing matter. So I do think the profession needs to look at itself, but maybe it's a bigger social issue too. I mean presumably the clients are also not particularly welcoming to women. I personally think it's time for women to get really angry. I think women in the legal profession—and I have said this to women's groups—I think women in the legal profession should really look at the place where they're working. If they feel that they are not sufficiently valued, if they feel they're not getting a fair crack; I think they should leave.

There is great work to be done out there. There may be lower incomes, but actually I think people are trapped by the unrealistic incomes in legal practice today. I think a lot of young people are on treadmills where the work they're doing is quite unworthwhile. When I started off in legal practice we did some cases which were amazing. There are people out there who need help. There are really good careers out there to be made and I think if women are not enjoying the lives that they've got in the profession they should regroup and do it themselves. I have said this to women's groups—this is a mixed group—but I think we haven't

learnt the lesson of the suffragettes. They knew that getting the vote wasn't the end. There was no point in getting the vote so that affluent women could get a bigger share of the spoils. Our aim in getting into law was not so that affluent women could get a bigger share of the spoils. The suffragettes wanted to change the world. Well I think it's time for women to be ambitious enough to want to change the world they're in.

Q: You said that rule of law requires "great labour." What does that mean in practice for the general public?

A: Well it requires labour of its practitioners. I think it requires effort of those who would understand it. It may be a council of perfection or over-optimistic to think that people would want to read judgements; but I would hope that they would want to understand the elements of our legal order; and that does take a little effort.

Q: What have been some of the highlights of your time as Chief Justice and your career generally?

A: Actually when I went to a school of one of my granddaughters who is very proud of the fact that I'm Chief Justice. She really doesn't want me to retire, I think it's part of her social standing. Anyway, she persuaded me to go along and talk to a bunch of eight-year-olds. They asked me such good questions. One of them said to me, "What's the case you're proudest of?" which really floored me. I said, "It's actually the last case you decide because you're so thrilled that you managed to come to a conclusion." But they didn't think that was a very satisfactory answer. I am pleased about the setting up of the Supreme Court. I think it was over time and it's going to take a while. In fact I had this in my written paper which I'll make available of course and I didn't read it out.

But I think it is going to take time to settle that institution in. It's a work of generations probably; a number of generations anyway. But I'm very pleased that it was done. It gives us an opportunity to develop our own voice and to concentrate on areas of our law that never had a look in when we had second appeals to the Privy Council because there was not enough money involved. So I think it has actually improved access to justice. Criminal cases never went; just one or two. Family law cases; apart from relationship property cases involving a lot of money. There were lots of ACC cases; things like that. So I think it has helped access to justice. I'm proud of that institution.

The other one may sound absolutely trivial but when I was sworn in as Chief Justice; I was absolutely determined we were going to do away with the spaniel's

ears wigs and the red robes in which judges are always caricatured. So all the cartoons show us in that, and we've done it. We've developed what I think is a fabulous gown. It's a traditional gown. It's the Tudor gown. It was done by the gown makers so it's authentic. It has a beautiful jacquard, black-on-black design on the gown fabric, which is a repeating kauri cone. It's gorgeous. Then we had poutama panels, the stepping design in red and gold, and on the black. We have on our arms the three baskets of knowledge.

So it speaks of our country I think and our twin heritage. I'm pleased we've done that. It's a symbol and symbols sometimes matter.

ENDNOTES

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3 Amartya Sen *The Idea of Justice* (Penguin Books, London, 2009) at 414 (emphasis removed).

4 See EP Thompson *Whigs and Hunters: The Origin of the Black Act* (Breviary Stuff Publications, London, 2013, first published 1975).

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6 Lord Radcliffe "Law and the Democratic State" in *Not in Feather Beds* (Hamish Hamilton, London, 1968) at 51.

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8 Lord Radcliffe "Law and the Democratic State" in *Not in Feather Beds* (Hamish Hamilton, London, 1968) at 47.

9 Commonwealth, *Parliamentary Debates*, House of Representatives, 18 March 1902, 10967–8 (Alfred Deakin, Attorney-General).

10 Statute of Westminster, The First 1275 (Imp) 3 Edw I, c 1. This expression of equality is not found in the New Zealand Bill of Rights Act 1990, although it is implicit in the rule of law (as the White Paper that preceded the Bill of Rights explained). See Geoffrey Palmer "A Bill of Rights for New Zealand: A White Paper" [1984-1985] I AJHR A6 at [10.81].

11 Schedule 1.

12 Sir William Holdsworth *A History of English Law: Volume I* (7th ed, Sweet and Maxwell, London, 1956) at 63.

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17 *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur (NS) 72 (SC).

18 *Nireaha Tamaki v Baker* [1901] AC 561, (1900-01) NZPCC 371 at 382.

19 Native Land Act 1909 (Imp) Edw VII, s 84.

20 Native Land Act 1909 (Imp) Edw VII, s 88.

21 Waitangi Tribunal *Report of the Waitangi Tribunal on the Motunui-Waitara Claim* (Wai 6,1983).

22 Waitangi Tribunal *Report of the Waitangi Tribunal on the Kaituna River Claim* (Wai 4, 1984); and Waitangi Tribunal *Report of the Waitangi Tribunal on the Manukau Claim* (Wai 8, 1985).

23 See *Environmental Defence Society Inc v South Pacific Aluminium Ltd* [1981] 1 NZLR 146 (CA); and subsequently *Environmental Defence Society Inc v South Pacific Aluminium Ltd (No 2)* [1981] 1 NZLR 153 (CA).

24 See on this point the discussion in *R (Osborn and others) v Parole Board* [2013] UKSC 61, [2014] AC 1115.

25 See for example Jeremy Waldron "How Law Protects Dignity" (2012) 71(1) CLJ 200; Jeremy Waldron "Dignity and Defamation: The Visibility of Hate, 2009 Holmes Lectures" (2010) 123 Harv Law Rev 1596; Jeremy Waldron "The Concept and the Rule of Law" (2008) 43 GA L Rev 1.

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