

ADDRESS BY THE RT. HON. DAME SIAN ELIAS,
CHIEF JUSTICE OF NEW ZEALAND
TO THE AUSTRALIAN LAW TEACHERS' ASSOCIATION
ANNUAL CONFERENCE
Held at Vanuatu,
3 July 2001

The theme of this conference is "Tradition and Change in Law: Old Paths, New Directions". Yesterday, Justice Arbour inspired us with a brave new direction in law. The International Criminal Court was conceived in conscious response to the inadequacies of domestic legal systems and as a break with old paths. I want to return to old paths. Not to take us back. But because often such paths may be a sure way forward.

In speaking to a conference of law teachers, it is perhaps as well to start by acknowledging the blend of new and old in your own occupation. Sir Kenneth Keith of the New Zealand Court of Appeal, who has addressed the Annual Conference of the Australasian Law Teachers' Association on more than one occasion, recently reminded me how new the systematic teaching of law in Universities in New Zealand and Australia is. In 1963, when he first addressed the conference on the first occasion on which it was held in New Zealand, only 40 law teachers participated. That was accounted a very good turnout. On the other hand, modern teaching of law taps into traditions which are very old. As we plunge off into new directions what is striking is the constancy and validity of old paths.

My topic is "Law and its application to changing societies" but my theme is the legal principles which organise our law and permit it to meet the needs of changing societies.

Legal principle is, as Lord Reid put it in his "fairytale" speech to the Society of Public Teachers of Law in 1972, is "not very easy to define".¹

We have to avoid on the one hand the rock Scylla where sits the austere figure of Austin and on the other the whirlpool Charybdis where some modern theorists for ever go round in circles. But we must get rid of the idea which still seems to animate some of our pedestrian confreres, that law is a congerie of unrelated rules. That results in the dreary argument that the case is similar to *A v B* and *C v D* but is distinguishable from *X v Y* and *In re Z*. That way lies confusion and uncertainty. We must try to see what was the principle or reason why *A v B* should go one way and *X v Y* the other.

Lord Reid described the judicial method in cases where there is freedom to move without undermining settled principle or encroaching upon the sphere of Parliament. He identified, in order, "commonsense, legal principle and public policy".² Commonsense is not static. It is necessary for law to reflect

¹ Lord Reid, "The Judge as Law Maker" (1972) 12 JSPTL NS 22, 26.

² Ibid 25.

commonsense if the law is not to be an ass. It is significant that, apart from shifts in attitudes over time, the chief reason identified by Lord Reid for law getting out of step with commonsense is technically-minded Judges pressing precedents to their logical conclusions.³

I do not imagine many here need convincing that legal method consists in commonsense organised by principle, although the unruly horse of public policy may be less welcome. The question is, how do we discover the principle which convinces and how do we provide certainty balanced with justice which moves with the times?

Lord Reid recognised that people's expectations of law are inconsistent. They want the law to be certain but they want it to be just law which moves with the times. Both objectives have to be kept in view.⁴

Rigid adherence to precedent will not do. And paying lip service to precedent while admitting fine distinctions gives us the worst of both worlds. On the other hand too much flexibility leads to intolerable uncertainty.

It is hard to escape the feeling that as we stand on what is still only the edge of the information age we are in a legal and business frontier comparable to that which confronted the Medici in the 15th century or Morgan, Rockefeller, and Carnegie in the 19th century. Huge changes in the traditional order can be expected. They necessarily entail risk because all change does.

Anthony Giddens⁵ has suggested that because of the dramatic onrush of change in the new electronic global economy (which we understand only imperfectly), we operate at the "outer edge of the ordered world, on the barbaric final frontier of modern technology".⁶ This he takes to be the "defining characteristic" of a "risk society".⁷

Legal systems are increasingly confronted with the reality that new technology has undermined the efficacy of court orders. National courts may be powerless to enforce local norms and values where information is global. Justice Kirby has pointed to the failure of the British government to prevent publication through the Internet of details of information which it had sought to suppress to ensure the fair trial of Rosemary West, accused of serial killings.⁸ The New Zealand Court of Appeal recently had a similar case where

³ Ibid 26.

⁴ Ibid 26.

⁵ Anthony Giddens, "Risk and Responsibility" (1999) 62 MLR 1.

⁶ The phrase is adopted by Giddens from the description given by Sebag Montefiore to Nick Leeson and financial traders dealing in the futures market. He argues that it is not just the new financial entrepreneurs who live at the barbaric outer edge of modern technology: "All of us now do" (at 2).

⁷ Giddens, *supra* note 5, at 3.

⁸ Hon Justice Michael Kirby, "Privacy in Cyberspace" (1998) 21 University of New South Wales Law Journal 323, 329-330.

suppression of name in a District Court failed to prevent its publication through the Internet.⁹

It is not only new technology which provides risk. The huge growth in public law litigation over the last half of the 20th century shows no signs of abating. It has been fuelled by international and domestic statements of human rights. These statements are necessarily open-ended and conflicting. They are often incomplete. The challenges that litigation about rights bring to the courts are substantial. Such cases often entail judgments about community values and allocation of resources which many see as unsuitable for judicial determination. Where there are a range of valid outcomes, judicial methods may be inadequate. But where a case is properly brought before the courts, judges cannot avoid making decisions simply because the matter is difficult or politically contentious. In such cases, judges can be left exposed and the rule of law can come under great strain unless the role of the courts is well understood. That is not the position in New Zealand or, I venture to think, Australia or the jurisdictions of the Pacific.

It is important to consider why it is that the courts are the forum in which human rights adjustments are often made in our legal tradition. It must be because the community holds the view that justice ultimately must be vindicated in actual cases. That view arises it seems to me from a shared ethical belief that justice matters. As Sir Stephen Sedley has pointed out, it is impossible to prove *why* it is that justice in this sense matters. What is important is the existence of the shared "moral sensibility which says that it does".¹⁰ So, although there are risks, it is of critical importance that the courts continue to respond to this expectation that justice will be delivered through law by the courts.

Risk is not only negative. It can be an "energising principle". Risk permits the exploration of new horizons. Giddens maintains that the idea of "risk" was first used by Western explorers "when they ventured into new waters in their travels across the world".¹¹

It is in that spirit perhaps that we should address the challenges to law in the 21st century. We may not sufficiently understand what the frontier will open up - but we must not set our faces against the energy it can release. We must learn to live with an uncertainty in which previous experience may not provide ready answers. Principle and analogy will be the only guides. I know there are those who criticise legal reasoning by analogy. And I accept that the virtue of analogy is limited. But I agree with Cass Sunstein that no system of law is likely to be feasible if it dispenses with analogy as a legal method.¹² Analogy however requires the golden thread of organising principle.

What I think needs to be said immediately is that there is nothing new for law in change, uncertainty and risk. I have mentioned the Medici and the

⁹ *Lewis v Wilson & Horton* [2000] 3 NZLR 546.

¹⁰ Rt Hon Sir Stephen Sedley, *Freedom, Law and Justice* (1999) at 47.

¹¹ Giddens, *supra* note 5, at 3.

¹² C Sunstein, "On analogical reasoning" (1993) 106 Harvard Law Review 741.

American business magnates. They accomplished huge change and the law responded to facilitate and to curb as necessary. Although the pace of change is not constant, law has never stood still.

In the absence of legislative reform, the courts are left to deal with new situations as they arise as best they can. The common law has demonstrated considerable invention. Although judge-made law is sometimes thought to be unresponsive to or out of step with commercial needs, it is worth remembering how much modern commercial law is a product of the decisions of the courts. Modern security devices such as pledges, mortgages, fixed and floating charges and contractual liens are, as Professor Goode has pointed out in the 1998 Hamlyn Lectures, all the product of Judge-made law:¹³

We have priority and subordination agreements, contractual set-off, retention of title under sale agreements. We can divide up or transfer rights in tangibles and intangibles, horizontally or vertically, by legal or equitable co-ownership, by trust and sub-trust, by assignment and sub-assignment, by syndications and participation. We have the concept of negotiability for bills of exchange, bearer securities, and certificates of deposit. We can also provide in advance for the automatic substitution of contracting parties by novation – an invaluable tool for increasing liquidity and reducing risk – and for the conferment of irrevocable powers of attorney, a common contractual device to allow assignees and secured creditors to perfect their title. The derivatives market has given rise to a wondrous array of contractual and securitisation devices which enable market participants to package financial assets, loans and investments in whatever way best suit their needs to secure such benefits as hedging, arbitrage, reduction of balance sheet assets and the minimisation of tax liabilities. And, astonishingly, not a single one of these commercial devices was the creature of statute. All of them evolved through commercial practice and were blessed by decisions of our judges; and what the common law lacked, equity in its beneficence was able to provide. Moreover, the law largely leaves it to the parties to agree on remedies, including re-possession, sale and the appointment of an administrative receiver, which do not necessitate any recourse to the courts at all.

In public law too, we are in the middle of substantial change. The suggestion that modern judicial review is a recent development by activist judges insufficiently deferential to democratic process has been exposed by Sir Stephen Sedley as historically inaccurate.¹⁴ In the United Kingdom, judicial concern not to intrude into areas of high policy resulted in no-go areas for the courts.¹⁵ We have our own examples in New Zealand. It has also led to the fixation with what has come to be known as “*Wednesbury*

¹³ Roy Goode, *Commercial Law in the Next Millennium* (1998) at 11.

¹⁴ Rt Hon Sir Stephen Sedley, “The Sound of Silence: Constitutional Law Without a Constitution” (1994) 110 LQR 270, 277.

¹⁵ See, for example, *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374.

unreasonableness”¹⁶ as the standard for review on the merits. That standard, as Lord Greene noted in the *Wednesbury* case itself, was pitched at a level which shades into bad faith.¹⁷

In the United Kingdom, the pendulum is now swinging back, assisted by the standards provided by the European Convention for the Protection of Human Rights and Fundamental Freedoms. In recent years, British courts have recognised that the more substantial the interference with human rights, the more the court will require by way of justification if it is to find the action reasonable.¹⁸ But the standard of review on the merits has continued to be the high one of unreasonableness or irrationality.¹⁹

The European Court of Human Rights has now held²⁰ that the *Wednesbury* standard applied by the English Court of Appeal is inadequate to protect the right to respect for the private life of the individual²¹ and itself constitutes a breach of the right to have an effective remedy before a national authority.²² The Court found that the standard of irrationality considered by the domestic courts was “so high that it effectively excluded any consideration by the domestic courts of the question of whether the interference with the applicants’ rights answered a pressing social need or was proportionate to the national security and public order aims pursued”,²³ the tests by which that Court analyses complaints of breach.

With the coming into effect of the English Human Rights Act 1998 in October, it is to be expected that the standards and method applied by the European Court of Human Rights will have profound effect upon the exercise of judicial review in the United Kingdom. It is difficult to believe that the courts in this part of the world will be unaffected.

I do not want to sound complacent about reform being left to judge-made law. The time lag in establishing precedents through the courts may not sensibly be countenanced where change is rapid and society is under stress. My point rather is that law adapts to change. And that the invention demonstrated by the common law in responding to commercial need and the claims for protection of human rights could not have occurred if the common law was not flexible and able to respond to changing conditions.

I think we forget too much of our own legal history when we hanker after a golden age where law was certain. There never was such a time. Even commercial law as we know it is not of great antiquity. Professor Corbin has

¹⁶ *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.

¹⁷ *Ibid* at 229.

¹⁸ *R v Home Secretary, ex parte Brind* [1991] 1 AC 696, 751 per Lord Templeman; *R v Ministry of Defence, ex parte Smith* [1996] QB 517, 556 per Sir Thomas Bingham MR.

¹⁹ *R v Ministry of Defence, ex parte Smith*, *supra* note 18, at 558.

²⁰ *Smith & Grady v The United Kingdom* 27 September 1999 (Applications nos. 33985/96 and 33986/96) (Involving British servicemen discharged on the grounds of homosexuality. Considered by the Court of Appeal in *R v Ministry of Defence, ex parte Smith*, *supra* note 18).

²¹ Article 8 of the Convention.

²² Article 13 of the Convention.

²³ *Smith & Grady*, *supra* note 20, at para 138.

reminded us that any comparative historical survey of contract law frees us from what he describes as the “illusion of certainty; and from the delusion that law is absolute and eternal...”²⁴

Of course certainty is a value prized in all areas of law. But so is change. The fundamental building block provided by the law of contract dates only from the 18th century. It is generally thought to have been systemised by Lord Mansfield in adoption of mercantile custom.

That is worth remembering in legal systems such as those of Australia and New Zealand which have forgotten custom as a source of law. Cases such as *Mabo*²⁵ are not revolutionary. They fit squarely within the principle that the common law adopts local custom; a principle consistently applied by the Privy Council and not so consistently by local courts in New Zealand.²⁶ Sir John Salmond put custom as the second most important source of law, after statutes. Its importance is reflected in the judicial oath to do right “after the laws and usages” of New Zealand, or Australia, or other jurisdictions within our tradition. We have not always made use of this tool. But there are sufficient examples²⁷ to show that they are there for the use.

A legal system is not static. It develops with the history of the country and its people. Maitland posed the question “how are we to define constitutional law?” not at the beginning but at the end of his series of lectures on constitutional history because of his view that the constitution of a country can be discerned only from its general law, and only at a particular time.²⁸ I suggest the same is true of all areas of law. Adapting Maitland’s language, it is my view that only those who know a great deal of law are really entitled to have any opinion as to the limits of the classifications of law which it is convenient for us to adopt. Our legal system is not divided into hermetically sealed compartments. The principles which flood across it are not confined.

On the other hand, those who seek principles from the muddle of decided cases have to be careful that, in their scrutiny of the texts of the judgments, they are not misled into discerning a pointillist painting when in reality there are only dots. Lord Browne-Wilkinson has suggested that is exactly what the academics who fathered the fashionable study of a law of restitution have done. It is necessary to take care that we do not decide cases to meet theories which do not fit.

On the subject of Restitution I’m inclined to agree with Lord Browne-Wilkinson. But I think the risk of forcing the law into theories which do not fit is

²⁴ Klau, “What price Certainty? Corbin, Williston and the Restatement of Contracts” (1990) 70 Boston University Law Review 511, 526, n 71.

²⁵ *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

²⁶ *The Queen v Symonds* (1847) NZPCC 387, 390; *Re Landon and Whitaker Claims Act 1871* (1872) 2 NZCA 41; *Nireaha Tamaki v Baker* (1901) NZPCC 371; *Tijani v Secretary Southern Nigeria* [1921] 2 AC 399; *Te Runanganui o Te Ika Whenua v A.G.* [1994] 2 NZLR 20, 24 (CA).

²⁷ In New Zealand see, for example *Baldick v Jackson* (1910) 30 NZLR 343; *Public Trustee v Loasby* (1908) 27 NZLR 801,807.

²⁸ FW Maitland, *The Constitutional History of England* (1963) at 101.

not a reason for abandoning the search for system. Some lawyers persist in thinking that the pragmatic common law is forever to be contrasted with a Roman law preference for preordained principle. Again, we have forgotten how much the common law builds on Roman law. Professor Ibbetson's fascinating *Historical Introduction to the Law of Obligations* convincingly explodes that conceit.

That is not to say that we should reconstitute large areas of law according to restatements of overarching principles. The pragmatism of the common law is based on a good deal of common sense and is very resilient. To take an example, thirty years ago, there were doubts that contract would see out the century without being subsumed into a general law of obligation. Such pessimism failed to anticipate the libertarian revival. It affirms, as did the cases which established contract law as we know it, the economic and social efficiency of freeing competent parties to strike their own bargains. There is social benefit in the enforcement of such bargains.

A ferocious debate continues in New Zealand²⁹ about whether bargains should be enforced by courts according to their formal content or according to standards of substantive fairness or good faith. It is paralleled by the arguments in public law about substantive review and fairness. I confess to a certain weariness.

The tension between the two views is nothing new and is one to be found in all areas of law. Professor Tony Honore compared the contest between natural lawyers and legal positivists to an international soccer match "Decade after decade Positivists and Natural Lawyers face one another in the final of the World Cup (the Sociologists have never learned the rules). Victory goes now to one side, now to the other, but the enthusiasm of players and spectators alike ensures that the losing side will take its revenge".³⁰

There is special enthusiasm for this topic among commercial lawyers. The libertarians claim to be the upholders of a classical law of contract. Indeed in the earliest emergence of modern contract from the action on the case, Lord Mansfield drew on natural law and equity as the justification for the law's enforcement of promises. Natural law fell out of favour especially with the rise in laissez-faire philosophy, but it would be rash to think that its influence is spent.

The height of laissez-faire did not last long. Dicey fixed at 1865 the start of the legislation of what he described as the "collectivist period". It is characterised by faith in state interference to promote the welfare of the

²⁹ Rt Hon Justice Thomas "Fairness and Certainty in Adjudication: Formalism v Substantialism" (1999) 9 Otago Law Review 459; James Allan "The Invisible Hand in Justice Thomas's Philosophy of Law" [1999] New Zealand Law Review 213; Rt Hon Justice Thomas "The 'Invisible Hand' Prompts a Response" [1999] New Zealand Law Review 227; D F Dugdale "Framing Statutes in an Age of Judicial Supremacism" (2000) 9 Otago Law Review 603.

³⁰ Collins, "Democracy and Adjudication" in MacCormick and Birks, *The Legal Mind: Essays for Tony Honore* (5th ed, 1986) at 69.

community and the individual.³¹ Contract law was not immune. And not all the changes were legislative.

Since the 18th century, perhaps earlier, the common law interfered with freedom of contract in employment and in the availability of necessary public services. As Sir Stephen Sedley reminds us in his 1999 Hamlyn lectures covenants voluntarily entered into which restrict an employee's freedom to move on and take his skills and knowledge with him have for the better part of three centuries been subjected by the courts to the stringent test of what is reasonable. That is not in the deferential *Wednesbury* sense, but in the direct sense that it is in the court's own judgment tolerable on public policy grounds. Similarly those operating monopolies were for centuries prevented from levying more than the court regarded as a reasonable charge.³² In employment contracts the common law had gone a considerable way to recognising that natural justice needed to be observed in such contracts, before statute law intervened. In the United States duties of good faith are imposed in contract law. The sky has not fallen in.

As the historical school of jurisprudence has shown, law is the product of historical development, and is continually developing. Whether the product of statute or judge-made, the manner of its application tends to reflect current views of right and justice and current social requirements.

On the new frontier, as in the frontier societies of the Wild West or early mercantile custom, it may be that natural law will once again swing into ascendancy.

The divide between formalist and substantive views turns partly upon the vision of law. A Benthamite insistence that real law is statute law and a suspicion about the validity of judge-made law upon the grounds that it is discretionary and uncertain, seems to me to miss the nature of law, even in a formal sense.

Professor Neil MacCormick has argued that any adequate overall view of law must recognise that it is "a form of institutionalised discourse or practice or mode of argumentation".³³ The rule of law is not therefore a static "rule of rules", but "an arguable discipline" in which all norms are "defeasible".³⁴ Answers to legal problems are sought through propositions which seem arguable and which are tested against contrasting arguments. Decision-makers, including judges, do not approach decision in a vacuum, but in the context of constitutions, statutes, regulations, precedents, scholarly writing, history and shared moral values. The relativity of law is itself a protection against arbitrariness. MacCormick suggests that this quality should be admired in an open society:³⁵

³¹ Windeyer, *Lectures on Legal History* (2nd ed, 1957) at 294.

³² Rt Hon Sir Stephen Sedley, *supra* note 10, at 35.

³³ Neil MacCormick, "Beyond the Sovereign State" (1993) 56 MLR 1, 10.

³⁴ Neil MacCormick, "Rhetoric and the Rule of Law" in Dyzenhaus (ed) *Recrafting the Rule of Law* (1999) 163, 176.

³⁵ *Ibid* 165-166.

We should look at every side of every important question, not come down at once on the side of prejudice or apparent certainty. We must listen to every argument, and celebrate, not deplore, the arguable quality that seems built in to law.

Contests over proper interpretation, inferences, relevance and classification:³⁶

are not some kind of pathological excrescence on a system that would otherwise run smoothly. They are an integral element in a legal order that is working according to the ideal of the rule of law, so far as that insists on the production by governments of an appropriate warrant in law for all that they do, coupled with the right of the individual to challenge the warrant produced by government.

...

Whatever care is lavished on the source materials of law by legislators, drafters, or judges writing opinions that attempt to state a holding or *ratio* with exemplary clarity, the rule statements these yield as warrants for governmental action aimed at vindicating public or private right are always defeasible, and sometimes defeated under challenge by the defence. Law's certainty is then defeasible certainty.

Law then is what convinces. It is the opposite of what is arbitrary. It convinces until defeated by better argument. Certainty and consistency are themselves powerful arguments and will generally prevail for reasons of fairness. Where there is no settled law, or where the conditions have altered so that a former legal rule is not persuasive, the judge must call on wider considerations. The argument, the decision, must be principled and coherent if it is to convince.

I find this vision of law compelling. It recognises that law is more than the product of legislatures or judges. How things have changed! Today practitioners and judges pay close attention to academic writing. When I started in practice an author had to be dead before he or she was quoted. Now we rightly look for help wherever we can. What do we look for in academic writing? The thread of principle. Not for the sake of an abstract symmetry but so that we can work with knowledge and understanding and experience in responding to the issues thrown up by real life. So that the law can be made, as Paul Freund put it, to "work itself pure".³⁷

As law teachers you hold positions of considerable responsibility in a law in which certainty is always defeasible. To return to the quote from Lord Reid with which I started, better the risks of the pillars of Hercules and the eternal soccer matches than the vision of law as a "congerie of unrelated rules".³⁸ Only principle will save us from Tennyson's gloomy verdict on the common law:

The lawless science of our law
That codeless myriad of precedent;
That wilderness of single instances:

³⁶ Ibid 175-176.

³⁷ P Freund, "Mr Justice Brandeis: A Centennial Memoir" (1957) 70 Harvard Law Review 769, 792.

³⁸ Lord Reid, *supra* note 1, at 26.
