

What Right Do We Have? Securing Judicial Legitimacy in Changing Times.

The Dame Silvia Cartwright Address

17 October 2019.

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Kei te mana o te pō, tēnā koe, kei ngā tini mana wahine o te ture, tēnā koutou, tēnā koutou, tēnā tatou katoa.

It is a privilege to present this year's Dame Silvia Cartwright Address. As I have told Dame Silvia, I am something of a fan girl of hers. Dame Silvia bore the mantle of being first into many roles; first female Chief District Court Judge in 1989, and the first female High Court Judge in 1993. But there is more to admire than her gender in the offices that she has held. Dame Silvia has been a model of courage and steadfastness as she has sought, throughout her career, to do what is right, rather than what is convenient. She has shown constancy in working to ensure that all are afforded equal treatment before the law and afforded full human dignity by the institutions of power. Dame Silvia has spoken up for those who are without voice and spoken the truth when few wished to hear it. She has also been involved, one way or another, in some of the more important steps taken within this last generation to secure the judiciary's legitimacy.

The topic I have chosen, "What Right Do We Have?" is about securing the judiciary's legitimacy in these changing times. If I were to set out the full question, it would be "What Right Do We Have to Sit in Judgment on Our Fellow Citizens". The judiciary's claim to legitimacy rests in large part upon its ability to provide equal treatment before the law and its commitment to affording all those who come before the courts the dignity of a fair hearing. It is therefore, I believe, a fitting subject for an address given in Dame Silvia's honour.

There are several ways in which we can speak about the legitimacy of the exercise of public power by bodies or institutions. It is possible to speak about legitimacy in jurisdictional terms. A public institution or figure can be said to be exercising power legitimately when it does so within the jurisdiction conferred upon it by law and for a proper purpose.

In the political realm, governments exercise political power pursuant to their electoral mandate as prescribed by statute. In the judicial sphere, judges in New Zealand do not have an electoral mandate (unlike in some other jurisdictions) but judicial office and power is principally derived from statute. That is subject to the caveat that the judges of the High Court have an inherent jurisdiction which, although preserved by statute, derives from the common law; one of the reasons why the High Court is important in our constitutional order.

¹ Chief Justice of New Zealand. My thanks to my clerk, Ruby King, for her assistance with this speech.

Jurisdictional legitimacy is not my focus tonight. Rather I want to spend this time exploring another kind of legitimacy — the kind of legitimacy that exists when the decisions of a court are accepted “without fear of punishment or hope of reward”.² As former Chief Justice of Australia Murray Gleeson commented:³

Like Parliamentarians, judges make decisions which, in the interests of civil order, have to be accepted even if they are not popular. Since court cases usually have at least one losing party, almost all judicial decisions adversely affect somebody ... What ultimately secures their acceptance is not their wisdom, as to which there may be strong disagreement, but their legitimacy.

This type of legitimacy depends upon public confidence in the judiciary. Acting within the legal rules and jurisdiction is a necessary condition for legitimacy to exist in this broader sense, but on its own, it is not enough.

In a democracy, judicial legitimacy rests upon public confidence that judges, and the judiciary as a whole, are:

- a) independent,
- b) impartial,
- c) skilled and;
- d) representative of the community in the work they do.

If a judge is seen to be lacking in one or other of these criteria, then the public will lose confidence in that judge. But if the institution of the judiciary is seen to be deficient in one or more of these respects, then the public will lose confidence in the judiciary and, it follows, it is the judiciary which will lose its legitimacy.

I plan to speak tonight to each of the criteria for judicial legitimacy; independence, impartiality, skill and community representation, focusing on what each requires of the judiciary in Aotearoa New Zealand in 2019.

To begin at the beginning. Judicial independence is essential if the judiciary is to fulfil its constitutional roles of checking the exercise of public power and upholding the rule of law. A judiciary which serves only the interests of the government, or of a subsection of society, will soon lose its legitimacy as it will not be fulfilling its fundamental task of ensuring that all are equal before the law.

² Nick Huls “Introduction: From Legitimacy to Leadership” in Nick Huls, Maurice Adams and Jacco Bomhoff (eds) *The Legitimacy of Highest Courts’ Rulings: Judicial Deliberations and Beyond* (TMC Asser Press, The Hague, 2009) at 16.

³ Murray Gleeson “Judicial Legitimacy” (2000) 12(6) *Judicial Officers’ Bulletin* 41 at 42.

It can also be said that a critical underpinning of judicial legitimacy is the understanding that judges are impartial between the parties who come before them. Impartiality is different to independence.

The essence of justice, and indeed of the rule of law, is the care that judges take to applying the law consistently to circumstances as they arise. It lies at the very heart of the judicial method. If a judge is seen to favour one party over another for reasons unconnected to the merits of the case, then the public will lose confidence in that judge. But if the judiciary as a whole is seen to act in a manner that favours one sector of society over another, then the judiciary will lose its legitimacy.

A lack of impartiality can arise for many reasons unrelated to external pressure of any kind. It can arise from prejudice, it can arise from personal animus or affection or it can arise from ignorance.

With respect to skill, a society will not for long tolerate a judiciary made up of incompetent or lazy judges. Key competencies include knowledge of the law and society, diligence, and fairness. Today we also regard as part of the judicial skill set, a judicial temperament. Once upon a time it was accepted that judges could be abrupt, and even rude to counsel, and the occasional litigant. But a growing intolerance for bullying in society has now extended to intolerance of bullying by those who exercise power. That is as it should be. My predecessor Dame Sian Elias was right to say that bullying by judges is not acceptable and that all judges are expected to deal with litigants, witnesses and counsel with respect and courtesy.

Fairness could be considered a standalone requirement for judicial legitimacy. However, I see it running instead as a common thread through all the criteria. It is one of the core tasks of a judge to provide a fair hearing.

A fair hearing entails the provision of a forum in which all parties can put forward their arguments with the understanding and prospect that those arguments may have an impact on the outcome. This is in accordance with the centuries old common law principle that those who are affected by a decision should have an opportunity to be heard. As Jeremy Waldron has written:⁴

Applying a norm to a human individual is not like deciding what to do about a rabid animal or a dilapidated house. It involves paying attention to a point of view and respecting the personality of the entity one is dealing with. As such it embodies a crucial dignitarian idea — respecting the dignity of those to whom the norms are applied as beings capable of explaining themselves.

⁴ Jeremy Waldron “How Law Protects Dignity” (2012) 71(1) CLJ 200 at 210.

The provision of a fair hearing promotes the rule of law as it allows counsel or the parties to bring forward arguments as to the consistent application of the law. Most fundamentally, providing a fair hearing avoids, or at least minimises, the sense of injustice in the person whose rights are being decided through the proceeding.

That takes me to the final of the four criteria listed: the importance to its legitimacy that the judiciary is, and is seen to be, representative of the community. I focus on this particular aspect, because I believe it the most difficult to secure in a rapidly changing country.

Someone writing a list of what grounds judicial legitimacy a century ago might have come up with the same four criteria as I have. But I am not sure that prior to the gender diversity debates in the last quarter of the last century, much thought was given to the importance of the representative nature of the judiciary.

At one level the representative role of the judiciary is the expression of a democratic principle. If judges are seen to be drawn from one part of society only, they may be thought to serve only that group's interests. And if appointments regularly come from one part of society, or exclude another, those appointments may be thought to seek preference or detriment for only part of society. This aspect of the representative nature of the judiciary connects directly to the perception that a judiciary is independent and that it is impartial.

Initial arguments made in favour of a diverse judiciary focused upon this democratic justification. This is present in the explanation given by Lady Hale in a 2000 paper:⁵

[Diversity] matters because democracy matters ... We are the instrument by which the will of Parliament and government is enforced upon the people ... it does matter that judges should be no less representative than the politicians and civil servants who govern us.

The democratic ideal of a diverse judiciary is an important one. Fairness and justice should be there for everybody to see.

The issue of a diverse judiciary was first tackled within the context of the issue of gender diversity, and rightly so. It was simply unsustainable that 50% of the population should be excluded from the judiciary.

It is remarkable that it was not until 1975, and the appointment of Dame Augusta Wallace to the District Court, that the first woman judge was appointed. And that it was not until 1993 that the first woman was appointed to the High Court. At the time of that appointment, the New Zealand Herald headline was "Equality Comes to the High Court". Dame Silvia has been

⁵ Brenda Hale "Equality and the Judiciary: Why Should We Want More Women Judges?" [2001] Autumn PL 489 at 503.

heard to quip; that sounded about right, one woman of course being the equal of the thirty or so men that then made up the High Court bench.

While things have improved in the last 25 years, “equality” has still not come to the judiciary. As at 14 March 2019, 82 of the 237 judges across all courts were women; approximately 35 percent. Barring the Employment Court and the Supreme Court, men outnumber women on all courts.

Even so, today we must seek more than gender diversity. It is, for example, a pressing issue that Māori are underrepresented in our judiciary. This is cause for concern given the critical issues that remain to be worked out in the area of Treaty obligations and the place of tikanga in our law. It is cause for concern when Māori are over represented in every negative step of our criminal justice system. The most concerning is the gross overrepresentation of Māori in the prison population.

We know that Māori feel the weight of the criminal law far more than other parts of society. It is therefore a troubling reality that an overwhelmingly pakeha judiciary deals with a predominantly Māori cohort of defendants.

I have just outlined the democratic justification for diversity in judicial appointment. But that diversity secures more than a democratic ideal. A fully diverse judiciary is important to the quality of the substantive law. This is because the path that judges have walked through life shapes how they will and can develop the law.

The law is full of concepts which require judges to draw upon their knowledge of society: the notion of the reasonable person on the Clapham Omnibus, Molesworth Street or Te Rakau Drive Bus; the reasonable expectation of privacy; a reasonable belief in consent; the sentence required to hold someone to account for their offending, or to provide for the interests of the victim; the sensibility and expectation of public behaviour brought to mind by the judge when determining what is disorderly and offensive conduct.

The list goes on. The law is suffused with tests informed by what the community expects, what the community regards as reasonable, or how reasonable people will react in a given situation.

I am not suggesting that judges act as mere instrumentalities of the community in applying this knowledge. I do not mean that judges should be guided in their decisions by the latest opinion poll or by media coverage of popular opinion. But what I do say is that there should be a diversity of experience which is reflected in the judicial response to the cases that come before the courts.

As Sir Anthony Mason said at the conference held earlier this year in honour of the retiring Chief Justice, Dame Sian Elias, “it is important for judges to think of values, but they need to be more or less convinced that their values are shared by the community”. A diverse judiciary

has the advantage that it brings to the law knowledge of the lives of people, their challenges, and their values, which may not otherwise be available. It contributes to strength and flexibility in reasoning because it means that problems are looked at from more than one point of view. At that same conference Jeremy Waldron put it this way:

Tunnel vision can afflict you if you stay for too long in the sole presence of your own register of justice, your own sense of justice, without it being challenged from outside in various ways, without it being educated through such challenges.

It is standard common law method to weave community derived expectations and values into a framework established by precedent. It is also standard common law method to balance those community expectations and values against other long-standing common law values such as freedom of speech, freedom of association, freedom of movement, freedom from arbitrary arrest or detention, and the right to a fair hearing.

You will notice that these freedoms I have listed are derived from the New Zealand Bill of Rights Act. But that Bill of Rights did not create them. They have far older, common law antecedents. And there are other long-standing values of the common law which sit beyond the Bill of Rights such as the interest in privacy, and the concept of a duty of care.

It is to be remembered, of course, that this is not one-way traffic in the sense that values only move from the community into the law. The law can be seen as the repository of long standing community derived values or to put it another way, as the articulation of the community's conscience. The explanation and application of law in judgments informs and shapes the standards and expectations that apply in society. By continually weighing those values in their judgments, judges remind society of them and of their importance. That is how the rule of law operates.

My point is, that in creating and developing the common law, judges have always looked to their society and to their communities for the values they apply. And the community in turn, looks back to the courts. This secures certainty and stability in the law, protects the law from passing waves of populism, while keeping it grounded in the values of the community. This common law method lies at the heart of the legitimacy of the judiciary because it ensures that the values judges apply are those the community shares and understands.

What does this mean for how the judiciary should act or be administered? I believe that several things flow from it.

First, it means that we are right to place importance upon diversity in judicial appointment. The diversity we seek is not aimed at a statistical mirror image of society. But we should ensure that our judiciary is not exclusively drawn from the same narrow part of society. The diversity we aim for should be sufficient to ensure that there is a richness of thought and experience in our judiciary available to contribute to the development of the law. Through

judicial appointment we should also look to achieve greater ethnic diversity and to recruit judges from diverse socio-economic backgrounds. The work in this area is far from done.

We know from information collected about the cohort of defendants that most who come before the courts carry burdens which hamper their ability to engage fully with economic and social structures within our society and importantly for our purposes, hamper their ability to engage fully with our courts. They carry the burdens of disability, mental health, addiction or linguistic difficulties and almost certainly, a common denominator is poverty.

As I mentioned earlier, part of the duty of judges is to secure fair hearings. Knowledge of how life is for those who exist at the margins can be critical in any given case. It may provide important, and mitigating context for a defendant's offending. It may suggest questions for the judge to ask of counsel or the defendant as to how a required court appearance, refusal of bail, fine or sentence will impact on the defendant and their family. It may assist counsel and the judge in ensuring that the defendant understands what is going on in court, so that the defendant is afforded the dignity of a fair hearing.

At present there is a modest amount of socio-economic diversity in our judiciary. The fact there is any diversity perhaps reflects that most of the current judiciary were at law school in the 70s, and 80s, a time when the barriers for those from lower socio-economic backgrounds were less formidable. When most of us got our law degrees, University fees were low, students received bursaries and part time jobs were abundant.

But as I look ahead I am concerned that even this modicum of socio economic diversity will be difficult to maintain. The judiciary is recruited from the profession. And we know that the legal profession we recruit from is likely to be made up of people who come from the most affluent homes.

Although we may suspect that of the profession of today, we can say it with some confidence for the profession of the future. Studies of the intake of students into Universities and into Law Schools tell us that only one in 100 entrants to New Zealand's elite university courses come from the most deprived homes. Data sourced from six universities shows that 60 per cent of the almost 16,000 students accepted into law, medicine and engineering in the past five years came from the richest third of homes, and just 6 per cent came from the poorest.⁶

This data is cause for concern. No doubt there are many factors contributing to this inequitable outcome, but amongst them is surely the financial obstacle that exists for those from poorer homes who want to pursue tertiary studies. Yet an investigation into five universities found that high decile schools received four times the number of entry level scholarships as those in low decile schools.⁷ What this means is that in so far as Universities

⁶ NZ Herald "Want to be a doctor, lawyer or engineer? Don't grow up poor" (15 September 2018) <https://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=12123299>.

⁷ NZ Herald "Half of university scholarships go to wealthiest students while the poorest struggle" (6 October 2018) <https://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=12137326>.

are providing financial assistance, it is going overwhelmingly to students from high decile schools.

These figures should be of concern to the Universities, the Law Schools and the profession. As head of the judiciary I am concerned about their implications for judicial appointments. If our law schools are overwhelmingly made up of those from the most affluent schools, then so too will the profession be, and it is the profession from which judges are appointed. This may seem long-term thinking, but long-term thinking is needed. There are others of the same mind. The judiciary of England and Wales has a Judicial Diversity Committee that works and reports to a strategic plan designed to target women, those from diverse ethnic backgrounds and those who demonstrate “social mobility” (defined as being in the first of generation of their family to attend University). Most of the work focuses on engaging with lawyers, but the Committee’s work plan for 2018, included using community outreach judges into schools and universities to encourage consideration of a career in the law.

An active approach to this issue is essential for us. We cannot accept that our future judiciary will be comprised only from those from the most affluent backgrounds. Again, employing the wisdom of Lady Hale, “[i]n a democratic society, in which we are all equal citizens, it is wrong in principle for ... authority to be wielded by such a very unrepresentative section of the population”.⁸

Beyond diversity of gender, ethnicity and background, I believe we should be looking for judges who have diversity of experience in their work. Those who spend twenty years doing work for corporate interests will have experience only of the justice needs and concerns of those clients. I do not diminish the importance to the law of that experience as it is critical that our Senior Courts continue to recruit lawyers who have experience of commercial and corporate law. The Senior Courts in particular are charged with the development of a law which has sufficient certainty and content to support the economic activity which forms the basis of our nation’s prosperity.

But while experience of working for the business sector is important, in an ideal world, lawyers who are appointed to the bench would have at least some experience beyond that. For that reason, I am pleased that providing access to justice has been added as a measure of excellence for the rank of Queen’s Counsel. Implicit in the inclusion of this criteria is the recognition of the importance of access to justice to the wellbeing of our justice system and New Zealand. But from the perspective of judicial appointment it has other significance, because to the extent that a practitioner undertakes a broader range of work, their engagement with society is correspondingly broadened, and so too is their knowledge.

Having just made the case for diversity in judicial appointment I have to observe that pursuing diversity through appointment is not enough. This is so for two reasons. First, we cannot

⁸ Hale, above n 5, at 502.

achieve the diversity required in the judiciary overnight. Secondly, even if we could, diversity of appointment can only provide part of the answer. The ideal is that each judge has the required knowledge to judge in a diverse society.

Judicial education is critical in this and is a focus for me. Through the Institute of Judicial Studies judges receive education about the social structures, values and lives of people from all parts of society. Judges are taught about courtroom management skills to ensure that they can provide the fair hearing which is the centrepiece of our justice system. They are taught about the cognitive and linguistic disabilities which make it difficult for many defendants to engage with a hearing, and which have implications for culpability and sentence.

Knowledge of the broader society is a more difficult educational objective. There are no colleges or universities to which we can go for this knowledge. In developing its own diversity educational programmes, the Institute of Judicial Studies has had to seek help from the community.

It is also important for the legitimacy of the New Zealand judiciary that judges receive education in tikanga Māori and are offered support in acquiring basic skills in Te Reo Māori. Knowledge of tikanga Māori, or Māori custom, is essential knowledge for judging in New Zealand. Tikanga Māori forms part of the values of the common law available to be weighed by judges when deciding cases before them. In *Ngāti Whātua Trust v Attorney-General* the then Chief Justice Dame Sian Elias said that “rights and interests according to tikanga may be legal rights recognised by the common law and may establish questions of status which have consequence under contemporary legislation”.⁹ For the last five years the Institute of Judicial Studies has offered courses educating judges in tikanga.

It occurred to me while preparing this speech that the issues I was concerned with extend beyond the judiciary to include the profession. As the data from our Universities highlights, the profession faces its own legitimacy issues, as it becomes increasingly unrepresentative of the society it serves. The common law is lawyer driven; relying upon the arguments being made, and the evidence produced. Lawyers need to know about the lives of those they represent, so that they can offer the argument and present the evidence to properly put their client’s case before the courts. While the law will not develop if the judiciary does not know about the community it serves, the same is true of the profession.

This point arises powerfully in relation to tikanga. Judicial education alone will not be enough if tikanga is to find its rightful place in the law. Lawyers need a sufficient understanding of tikanga concepts to identify and make the arguments. The next challenge then is for the law schools, the New Zealand Law Society, and other professional bodies to ensure adequate education is offered in relation to tikanga.

⁹ *Ngāti Whātua Orakei Trust v Attorney General* [2018] NZSC 84 at [77].

The final point I address is the relationship between the courts and the community. I believe that maintaining a sense that the judiciary is representative as I have described, requires rethinking and building the relationship between the courts and the community. Greater connection is best achieved by involving that community in the processes of the delivery of justice.

This is not a radical notion. The jury, an institution dating back to the middle ages, engages the community in the delivery of justice. The Rangatahi courts are also working models in this regard. These are courts which sit on marae in the Youth Court jurisdiction. The processes of the Court are in accordance with tikanga and involve kuia and kaumatua in the young person's rehabilitation. The community is thereby directly involved in lending its knowledge and strength and communal space to the Court. This is therapeutic justice, aimed at restoring balance to the lives of all affected by the young person's conduct, and creating new support structures for the youth and their whānau.

A similar concept lies behind the Special Circumstances and New Beginnings Courts which deal particularly with homeless defendants. These Courts aim to connect people going through the courts with appropriate community services. There are several other therapeutic court initiatives; time does not permit me to describe them. But at present, apart from the Rangatahi Court, these are all run as pilot courts. While this approach has been necessary to date because of resource constraints, it carries with it the risk of different outcomes for defendants depending upon the area in which they come before the courts. This is not sustainable in the longer term. Differential treatment on such a basis will itself ultimately be undermining of judicial legitimacy.

For this reason, we need to seek greater connection to the community through the mainstream courts. This is an issue the new Chief District Court Judge wishes to pursue, and I am fully supportive of him in that regard. This involves taking the best of what has been learned through these pilots and applying throughout the District Courts. I believe the time is right for that approach.

To conclude, I have explained how the legitimacy of the judiciary is dependent upon public confidence. I have explained factors which can enhance or undermine that confidence. In particular I have outlined how important it is that the judiciary be connected to and representative of the community, both in its makeup and through the values it applies in its judgments. I have described how diversity in judicial appointment, judicial education, and greater community involvement in the work of the courts will help secure judicial legitimacy. I have proposed there are similar issues the profession must address if we are to develop a law fit for our Aotearoa, New Zealand which is truly representative of the breadth of our society and the depth of our shared values.

To achieve this aim will take the courage to do what is right, rather than just what is convenient. But if we do that we will be building upon the foundations laid by the likes of the woman we honour this evening.

Thank you for listening to me this evening.

Tēnā koutou, tēnā koutou, tēnā tatou katoa