

CHIEF JUSTICE, THE RIGHT HONOURABLE DAME SIAN ELIAS

Speech at the Special Sitting of the New Zealand Supreme Court, 1 July 2004

My response to the expressions of good will from the Government and from the profession is made on behalf of the Court, not the Judges who serve on it. The institution is, as has been said of an older Supreme Court in another country, “greater than the sum of its parts”. And no one is more conscious of that than we who are its present parts. Although we value the confidence expressed in us and the good wishes extended to us, we know that we serve an idea much bigger than all of us. And that is sobering.

What we should celebrate is the aspiration for the delivery of justice which has prompted the creation of the Court. Those aspirations have been with us from the very beginning. In February 1840 at Waitangi much of the debate was about law and its administration. I doubt whether any country was founded with such expectations of law as ours.

The creation of a final Court of Appeal in New Zealand furthers those aspirations for justice. To date, we have secured the benefit of second tier appeal only for a very small number of cases. In part, that has been because of geographical inaccessibility and associated costs, but it has also been because statutory rights of appeal to the Privy Council have been limited. There have been many areas of law of great importance to the lives of New Zealanders where second tier appeal has not been available except by the uncertain route of petition for special leave. That has been damaging to the integrity and coherence of the legal system as a whole.

A final court must have a sense of the reach and scope of law overall. The reasons were put well by the Chief Justice of Israel

The development of a specific common law doctrine radiates into the entire legal system. The interpretation of a single statute affects the interpretation of all statutes. A legal system is not a confederation of laws. Legal rules and principles together constitute a system of law whose different parts are tightly linked.

Benefits we may hope to obtain from the establishment of the Supreme Court include better understanding of the interconnection of all our laws as well as greater accessibility.

The Act setting up the Court also identifies a statutory purpose of better understanding of New Zealand conditions, history and traditions. In addition we may hope to obtain greater understanding of the role of courts and some of the constitutional balances referred to in the Act. The obscurity of our appellate arrangements to date has not helped such understanding. Following the establishment of the Court, there are signs of greater interest in engagement on the constitution and the role of the courts in it. And that is very much to be welcomed.

There are then opportunities to be taken and expectations to be met by the Court. And there are shoals to be avoided. It would be wrong not to acknowledge at this time the anxieties that have been expressed about this step. And the sincerity of those views. In the end, they can only be answered by the performance of the Court.

But it is worth remembering that they are anxieties that have been present in every jurisdiction which has set up such appeal courts. When the High Court of Australia was set up in 1903 there were fears that the judges would not have enough to do. The Supreme Court of the United States in fact had nothing to do – for the best part of three years. It languished for its first ten years, existing on the fringe of American awareness. When Canada and Australia removed appeals to the Privy Council concerns were raised there, as they have been in New Zealand, that overseas business and investment would be lost because of lack of confidence in the local courts, and that the law would be disrupted and unsettled. Those fears were not realised in Canada or in Australia. And I do not expect them to be realised here.

Those who worry about upheaval in our law may not understand how conservative judicial method must be even in a common law system. No judgment is isolated from the existing order. A judge must always ensure that a decision fits within it, both to achieve a just solution for the parties and to maintain the order for future cases, which can only be dimly foreseen. Judicial decisions must be legitimate. That means they must always be justified through reasons. Only through reasons is fidelity to the judicial obligation to do right according to law demonstrated. Courts cannot have agendas. They respond to actual controversies brought before them by real litigants. And their judgments must be their own vindication. But judgments will not convince if they stray from established doctrine and precedent except for sound reason, laid out for all to assess.

The reference to New Zealand's history and traditions in the statute does not prompt any wholesale reassessment of our law. The history and traditions of the common law are our history and traditions too. So too are the Great Charters of England, such as Magna Carta. In its origin, this history and tradition predates European knowledge of New Zealand by centuries. To that extent it is an inherited tradition. But to a substantial extent English law is not inherited history but part of our own direct history. Sir Kenneth Keith has pointed out that the last volume of Blackstones commentaries was published in the year Captain James Cook made landfall in New Zealand in 1769. That early systematic statement of law together with the rise in professional law reports which occurred only from the late 18th century marked the beginning of the modern common law with its reliance on precedent and development of the doctrines of equity to meet the needs of modern economies. Most of the common law we know and still apply developed during the period of our shared history since 1840. It is directly part of our own traditions.

But in these Islands we have other traditions. Some were shaped by our history as a country already occupied by Māori. Lord John Russell writing to Hobson at the end of 1840 described them as a people in whom "the arts of government have made some progress . . . with usages having the character and authority of law". And English law adapted to meet those local conditions and customs.

Other traditions arose from the experiences of our young country. The circumstances of settlement meant that we have always depended heavily upon statute law. As a result we have traditionally paid close attention to the context of statutes and have had no difficulty in accepting that both statutes and common law operate within a single legal system and that the task of the courts is to ensure that they work together. A less suspicious, more cooperative approach to legislation than applies in some other common law jurisdictions is our way.

All of these strands of history and memory contribute to a distinctive New Zealand legal tradition. The Supreme Court is set up to operate consciously within it, not to tear it down.

Some of the anxieties expressed have to do with the quality of judicial decision-making in New Zealand and a concern that we should not be cut off from a larger legal community. Again, these sort of anxieties have surfaced before in our history whenever we have reshaped important institutions. They are expressed for example in the debates in Parliament before

New Zealand eventually adopted the Statute of Westminster and emancipated our legislature. Again, they can only eventually be addressed by demonstration of competence in action. We need however to acknowledge these concerns and to take some of the implicit criticisms about our approach to date on board. What they demonstrate is that our community cares about the quality of judicial decisions. They are right to do so. They are entitled to expect that a final court of appeal will not cut corners and will take great care with the explanation and development of legal principle. These sort of expectations of the Court demonstrate a commitment to justice which continues to be a unifying force in our society.

Three things are of comfort at this time. First, our start is at least in one respect much more optimistic than the opening of the High Court of Australia in 1903. Then, the Argus of October 7 1903, reporting the event noted that “the most experienced man in the Court” was the crier. The bench of the New Zealand Supreme Court is made up of our senior appellate judges. All have served as judges on the Judicial Committee of the Privy Council.

The second matter of comfort is the excellent relations that have always characterised the dealings between the legal profession and the bench. We are well-served by the counsel who appear before us. And we are honoured that so many senior members of the profession have taken the trouble to be at this first sitting of the Supreme Court – and that so many of the junior members of the profession have been willing to attend the sitting and are outside.

The third matter I would mention is the support we have had from the Attorney-General and her officials. The Attorney-General is the last of a line of Attorneys-General who have tried to bring New Zealand’s final court of appeal home. Many of us remember Sir Geoffrey Palmer announcing to the New Zealand Law Society conference in 1987 that abolition of appeals to the Privy Council was about to happen. And Sir Douglas Graham came very close to achieving it in his turn. But this Attorney has succeeded. And we are grateful for the care she and the officials led by the Secretary for Justice have taken with the arrangements and equipment for our temporary accomodation.

I hope that what I have said indicates that on this side of the bench the feeling is not one of exultation. Rather, we have a keen appreciation of the task ahead; a consciousness of the solemn trust we undertake; and a willingness to respond to the expectations with which this reform has been undertaken.

Sian Elias
Chief Justice