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“Judgery and the Rule of Law”

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Introduction

The Law School of the University of Otago is a beacon for law in the south, as I have had occasion to say before. It is always a pleasure to visit. Indeed one of my regrets about the setting up of the Supreme Court is that it has tied me to the capital so that I have fewer such opportunities. I am delighted that the Dean persevered with his invitation and very pleased indeed to be here. We do not take enough time to acknowledge and foster the cycle of interdependence and affection that exists between the teachers of law and the profession, including the judges. It is good to have the chance to say to those who teach at this fine law school how much their work both as teachers and as writers and critics is appreciated and to acknowledge how critical it is to a healthy legal system.

Peter Birks thought that it was the responsibility of law schools to be “guardians of the law’s rationality”.¹ I would like to think that practitioners – and even judges at times – play some part in maintaining rationality too. But is I think right to accept that the teachers of law have particular responsibility to prod and question – and to explain.

Members of a thinking profession need to stand apart a little from transient enthusiasms and be a little sceptical of what Lord Kenyon once disparaged as “the fashion[s] of the times”.² The need for some scepticism about what is fashionable is however not a reason to resist changes needed to keep the law fit for “living people”. That is why Lord Mansfield was in the right and Lord Kenyon was wrong to criticise him for saying that “as the usages of society alter, the law must adapt itself to the various situations of mankind”.³ The role of lawyers – whether academics, judges, or practitioners – is to resist enthusiasms and to express doubt, but not to resist change.

Successful lawyers – judges, members of the profession, and teachers of law – must be adaptable and intellectually curious and must be committed to lifelong learning. That is why law schools cannot impart simply the rules of the day. Nor is it enough to attempt to predict the future. Law Schools must teach the legal *process* – what has been called “the law-making enterprise”.⁴ That is, they must be concerned with the way in which a new problem (or

¹ Peter Birks “Adjudication and interpretation in the common law: a century of change” (1994) 14 LS 156 at 156.

² *Ellah v Leigh* (1794) 101 ER 378 (KB) at 379.

³ *Johnson v Spiller* (1784) 99 ER 702 (KB) at 703.

⁴ KJ Keith “1883 to 2008: Law and Legal Education Then and Now” [2009] NZ L Rev 69 at 76.

apparently new problems) can be confronted in the future. Since, as Karl Llewellyn once said “[i]deals without technique are a mess. But technique without ideals is a menace”,⁵ they must engage with the values by which our society lives.

In positivist tradition, we do not generally speak much about values in law. That tradition, which was not, it should be noted, followed by great New Zealand jurists such as John Salmond⁶ and Robert Stout, is today perhaps giving way under the rights standards and methods which have revolutionised the practice of law in my lifetime. Or alternatively, the positivist sway may explain why the New Zealand Bill of Rights has not yet had the transformative effect on our legal order predicted by Sir Robin Cooke twenty-five years ago.⁷ Especially in a jurisdiction lacking an authoritative text, the constitution cannot readily be described without reference to values that are fundamental and without consideration of our legal and constitutional history.

Mark Henaghan suggested that I should speak this evening about the role of the judges in protecting the rule of law. That gave me some pause. When I last spoke at this Law School, a decade ago, I said that I usually tried to avoid references to the “rule of law”.⁸ While a useful shorthand for some important concepts, I have some sympathy for Paul Craig’s view that the phrase has a moral force which may not aid proper analysis.⁹ It is also, I have always thought, vaguely embarrassing for judges to speak for the rule of law, which is so easily mischaracterised as the rule of judges. It looks like a power grab.

But I have come to think that such reticence is an evasion of responsibility. I do not want to be misunderstood. It is my firm view, expressed on a number of occasions, that the constitution is too important to be the preserve of judges or indeed lawyers. If only judges and lawyers believe in the rule of law as an element of our constitution, then we are in trouble. The problem is that, understanding the constitution requires considerable effort and understanding. Those who have had the opportunity to study our constitutional history and the history of our law and occasion to reflect upon it have an obligation to act as a bridge to wider understanding.

This fits with my belief about the role of the judge more generally. In judging, as in extra-judicial commentary, the principal function of the judge is full exposition of the reasons for judgment, to convince or justify rather than rule. The rule of law is a rule of reason. So I start with the role of the judge in our legal system

⁵ Karl Llewellyn “On What is Wrong with so-called Legal Education” (1935) 35 Colum L Rev 651 at 662.

⁶ Herbert Hart described John Salmond as among the first to break out from the shadow of John Austin and to stress the moral content of law: HLA Hart “Positivism and the Separation of Law and Morals” (1957) 71 Harv L Rev 593 at 605.

⁷ See *R v Goodwin* [1993] 2 NZLR 153 (CA) at 156.

⁸ See Sian Elias “Transition, Stability and the New Zealand Legal System” (FW Guest Memorial Lecture, Dunedin, 23 July 2003).

⁹ Paul Craig “Formal and Substantive Conceptions of the Rule of Law – an Analytical Framework” [1997] PL 467.

before moving to the rule of law and some of the challenges for a constitutional order in which it is an essential element.

My reference in the title to this address to “judgery” was an attempt to disclaim the mantle of the hero judge by emphasising that judging is hard work. Often painstaking, as the judge looks to fit the case within the existing legal framework. Even where the case is not predetermined by existing authority binding on the judge, as most are, the decision cannot be simply the naked policy preference of the individual judge.

When I emailed the title “Judgery and the rule of law” through to my clerk to pass on to the Dean she inquired cautiously whether it might be better to stick to a more usual word like “judging” so that the title read “judging and the rule of law”. I had to explain to her that “judgery” is not a word but a joke, and not even an original joke at that (although I can’t remember who it was who first coined it). I think it does convey something of the life of the judge.

The role of the judge

There are those who think that the role of the judge is strictly confined to interpreting and applying the laws enacted by Parliament and to declaring the common law derived from precedent. Those who take a narrow view of judicial function in relation to both enacted law and common law emphasise the need for “strict logic and high technique”.¹⁰ The most famous antipodean exponent of this view was Sir Owen Dixon who, at his swearing in as Chief Justice, declared that the only “safe guide to judicial decisions in great conflicts” as “a strict and complete legalism”.¹¹

Such protestations may be tactical, designed to reassure those who are suspicious of judicial authority and regard it as anti-democratic. They emphasise that judges fulfil a technical and limited role which is auxiliary and conservative. Beyond soothing the suspicious, however, I am not sure what insistence on “a strict and complete legalism” really means. It is a bit like Lord Goff, speaking of the line between legitimate judicial decision-making and impermissible judicial legislation. He said “although I am well aware of the existence of the boundary, I am never quite sure where to find it”.¹² If such a boundary is hard to find and reasonable minds can reasonably differ after conscientious effort about where it is in a particular case, it is perfectly acceptable to hold the opinion that the Judge has got it wrong in a particular case. That does not justify the charges of activism and illegitimacy which too often result and which are damaging to judicial function.

It cannot seriously be thought that any judge thinks they are free to decide cases other than strictly in accordance with law. No judge believes that he or she is

¹⁰ FW Maitland “Introduction” in *Selden Society Year Book* series I, vol I at XVIII. Although Maitland’s description is often pressed into service by those who take a narrow view of the judicial role, his own writings do not suggest that he saw “strict logic and high technique, though necessary, as sufficient judicial qualities.

¹¹ “Swearing in of Sir Owen Dixon as Chief Justice” (1952) 85 CLR xi at xiv.

¹² *Woolwich Building Society v Inland Revenue Commissioners* [1993] AC 70 (HL) at 173.

free to decide a case on personal whim. Benjamin Cardozo, who has written what is still one of the best accounts of the judicial process, was a Judge who was imaginative and creative. Yet he too accepted that “judges are not commissioned to make and unmake rules at pleasure in accordance with changing views of expediency or wisdom”.¹³

Maitland’s reference to “strict logic and high technique” was made in response to the idea that common law was simply “common sense and the reflection of the layman’s unanalysed instincts”.¹⁴ He was pointing out that law is learning, not untutored instinct. The English common law, he said, is learning which is “rooted in the Inns of Court, rooted in the Year Books, rooted in the centuries”.¹⁵ If it is a reflex to the particular facts of a case, it is an *educated* reflex, as Lord Goff in his turn stressed when speaking of the common law.¹⁶

There is no legitimate judicial common sense solution to a legal problem which is not grounded in a lot of learning – learning of the whole sweep of law and its principles, not a narrow speciality. The role of the judge is to demonstrate by reasons why the solution he or she arrives at fits within the legal order and the principles that provide its skeleton. The common law tradition is *reasoned*. It is not a system of rules. That is why in our tradition judgments have to be read.

Reading and writing judgments

Baron Parke, one of the great judges of the common law, said that the law could only be learned by reading the reports, starting with the Year Books. When as a young practitioner I quizzed the then President of the Court of Appeal, Sir Robin Cooke, about that advice, he first laughed but then acknowledged the truth in the exaggeration. He said that he himself had benefited enormously in developing his own legal thinking by the year or two in which he had read huge numbers of cases for his PhD at Cambridge in administrative law. In my own work I have often found that the only way to understand law is to read a lot of cases and all the judgments delivered in a multi-judge appellate case.

I know that this counsel does not have much appeal to busy practitioners and students in a hurry. It seems easier to make do with the headnote when identifying what the case stands for or to look to the summaries provided by text writers. If you are trying to extract a proposition for application, it may seem unnecessary to look closely at minority opinions, whether they are dissenting or concurring. In many cases, such cursory consideration may be sufficient. But not if you want to understand *why* the case has been decided as it has been and not if you want to understand the currents of legal thinking and where they may lead especially in novel cases or in cases that fall to be considered in changing social conditions. Then there are no shortcuts to *reading* judgments. The emphasis on reasons in a common law system has implications for the role of the judge. A judge has to write judgments to be read and to convince.

¹³ Benjamin Cardozo *The Nature of the Judicial Process* (Yale University Press, New Haven, 1921) at 68.

¹⁴ FW Maitland “Introduction” in *Selden Society Year Book* series I, vol I at XVIII.

¹⁵ At XVIII.

¹⁶ *Smith v Littlewoods Organisation Ltd* (1987) 1 AC 241 (HL) at 271.

Because, in a common law tradition, the interpretation of statutes and the application of law, both enacted and judge-made, is followed only while it continues to convince.

This does not lead to intolerable uncertainty. The need to fit the decision into the existing legal order promotes consistency. It is methodology that is inherently conservative.

In a striking metaphor, Lord Wright once described the judge in a common law system as proceeding “from case to case, like the ancient Mediterranean mariners, hugging the coast from point to point, and avoiding the dangers of the open sea of system or science”.¹⁷ I think that is an accurate description of how judges get to work in difficult cases. The incremental and cautious methodology of the common law does not however mean it is bereft of doctrine or system. Nor is it true that the doctrines and principles of the common law have come down from antiquity or have purely English roots. The common law has adapted and borrowed and invented to meet the needs of the society of the time. Perhaps ironically given modern suspicions of the commercial press, some of the more dramatic innovations of the common law have responded to commercial needs, from the great systemisation undertaken by Lord Mansfield, through the recognition of limited liability, and modern debt securities.

If you want to understand how judges see their role, it is worth reading the writings of a few masters. I have already mentioned Benjamin Cardozo’s two little volumes on the nature of the judicial process.¹⁸ Others that are worth mining for insights are Lord Goff’s writings, particularly his Maccabean Lecture and his lecture on the common law.¹⁹ Like Cardozo, Lord Goff saw the common law as a method of change.

It comes as something of a shock to me to realise that some of this work was written after I was already a member of the legal profession. Not recent to you, but as yesterday to me. Lord Reid’s famous “fairy tale” speech in which he debunked the idea that the common law lies, fully formed, in an Alladin’s cave waiting to be discovered by someone like Sir Owen Dixon, practising strict and complete legalism, was published in 1972, two years after I was admitted.²⁰ It was a breath of fresh air – not only because it put paid to the declaratory theory of the common law. Other points made in that lecture are the importance of the dissenting opinion and the concurring judgment.

Lord Reid thought that the benefits of multiple opinions could be demonstrated by comparing the standing of decisions of the House of Lords (where multiple speeches were the norm) and the Privy Council (where the tradition was that a

¹⁷ Lord Wright “The Study of Law” (1938) 54 LQR 185 at 186.

¹⁸ Benjamin Cardozo *The Nature of the Judicial Process* (Yale University Press, New Haven, 1921); and Benjamin Cardozo *The Growth of the Law* (Yale University Press, New Haven, 1924).

¹⁹ Robert Goff “The Search of Principle” (1983) 69 Proceedings of the British Academy 169; and Lord Goff “The Wilberforce Lecture 1997: The Future of the Common Law” (1997) 46 ICLQ 745.

²⁰ Lord Reid “The Judge as Law Maker” (1972) 12 JSPTL 22.

single judgment with no dissents was offered as advice to the Queen). His view was that where multiple judgments are delivered, each opinion expresses the real reasons with different shades and doubts being laid open, rather than papered over in compromise judgments which read too confidently. The judge is not on the bench simply to decide cases “but to decide them, doing his conscientious best, as he thinks they should be decided”.²¹ Such system allows more wriggle room for the future. As Lord Reid said, “[s]econd thoughts are not always best but they generally are”.²²

These opinions have been echoed by other great judges. Lord Goff thought that the individual responsibility of each judge meant that “judgments tell the truth – the real reasons for our decisions, expressed, where appropriate, subject to the judge’s own qualifications, hesitations and even doubts”.²³ The same view had been taken by Robert Stout in a 1904 article about why we should have abolished appeals to the Privy Council.²⁴ He expressed concern with “corporate opinions”, because of their erosion of individual responsibility. Stout invoked Bentham who was said to have been “so impressed with this view that he advocated single Judges for every Court”.²⁵

Different courts in the legal order

Perhaps contrary to popular belief, a final court of appeal has to be especially cautious of change. That is because its judges will be acutely conscious of the fact that they cannot predict how a proposition of law will affect cases that may follow where the facts may be different. That is why usually final courts try to decide cases narrowly. It is often a disappointment to those who would like to see bold and clear statements. But it is safer practice than putting the law in a straitjacket from which it will take great effort to release it, perhaps after considerable injustice.

I want to spend a few moments talking about the judicial hierarchy more generally. When discussing the work of the judge, it is important not to get rapture of the heights. We spend perhaps too much time examining the work of final courts of appeal. It is important to understand the critical roles played in our legal system by the judge at first instance and the judge of an intermediate court of appeal.

In his 1972 speech, Lord Reid acknowledged the critical role of the first instance judge.²⁶ If he gets the law wrong, appeal will usually cure the error. But if he gets the facts wrong, the error may be difficult to set to rights. Not impossible, but difficult. All cases ultimately turn on facts.

²¹ Stanley H Fuld “The Voices of Dissent” (1962) 62 Columbia Law Review 923 at 928.

²² Lord Reid “The Judge as Law Maker” (1972) 12 JSPTL 22 at 29.

²³ Lord Goff “The Wilberforce Lecture 1997: The Future of the Common Law” (1997) 46 ICLQ 745 at 755.

²⁴ Robert Stout “Appellate Tribunals for the Colonies” (1904) 2 Commonwealth Law Review 3 at 13.

²⁵ At 13.

²⁶ Lord Reid “The Judge as Law Maker” (1972) 12 JSPTL 22 at 22.

The role of an intermediate Court of Appeal often receives less attention than it should. In New Zealand I think we are still adjusting to the setting up of the Supreme Court.

The Court of Appeal formerly was, for all practical purposes our final domestic court of appeal. It handles a substantial volume of work because one appeal as of right is the general approach of our legislation. It is understandable that the Court has felt the need to prioritise its effort. At times that has led it to adopt standards of appeal close to the supervisory standard of judicial review – judges of the Court of Appeal even at one stage said “we don’t do facts”. At other times, the work of the Court has led it to increased reliance on acting judges drawn from the High Court, at some cost to the benefits sought to be achieved by the setting up of the permanent Court of Appeal. From time to time there may have been temptations to shut down or narrow arguments, particularly in novel cases, in the knowledge that the matter may well proceed to the Supreme Court.

I think we need to be careful of this intermediate appellate jurisdiction. In an age which has tended to equate civil justice with dispute resolution and increasingly applies such notions to criminal justice, the value of the general appeal can be overlooked. If the aim of the system of justice is, as the judicial oath has it, right according to law, then the system must provide for correction of error.

Busy first instance judges will inevitably make errors, of fact as well as law. The Court of Appeal needs to be willing to intervene, even if the task of re-weighing the facts is time-consuming. Today, electronic recording of evidence makes deference to the impression made on the trial judge unnecessary in many cases. Indeed, material fact-finding based on the impression made by witnesses has always been rare in practice and where attempted has often been shown to be astray. Nothing rankles like mistake of fact. A second look on facts as well as law is the wise policy of our general legislation on rights of appeal.

What is more, recent reforms to the criminal justice system have opened up for closer appellate review findings of fact formerly subject to the inscrutability of jury verdict. It may well be that this increased appellate scrutiny will come to have implications for the ground of appeal in jury verdict cases that the verdict is against the weight of the evidence. This is not jurisdiction that is welcomed by pressed intermediate courts of appeal. But it is possible that the greater intensity of scrutiny of judge-alone verdicts will lead to greater preparedness to look at the safety of jury verdicts.

Whether or not that proves to be correct, it does seem that the volume of work handled by the Court of Appeal in New Zealand is increasing. It would I think not serve the interests of our legal system if it leads the Court to adopt more managerial solutions to make the burden tolerable. In my time on the bench there has been no more salutary correction than the decision of the Privy Council in the *Taito* case.²⁷ That case exposed the fact that judges of the Court

²⁷ *Taito v R* [2002] UKPC 15, [2003] 3 NZLR 577.

of Appeal – some of the best judges we have ever had – took their eye off the ball in order to process the work.

Perhaps the time has come to consider whether we are using the hierarchy of the courts effectively. We are risking effective error correction if the court is driven to a supervisory model of appellate review. We are risking the benefits obtained from the legal system of a permanent Court of Appeal if the greater part of the work of the Court is decided by a fluctuating population of High Court judges. We may be depriving the legal system of the engine-house in which the work of keeping the law fit for modern conditions should be undertaken.

I have mentioned the view that a final Court of Appeal needs to be cautious. The Supreme Court is not the place for first thoughts on new directions. In England and Wales that role has traditionally been filled by the Court of Appeal. Our Court of Appeal needs to be able to discharge it. It would be damaging indeed to our legal system if overwork stifles the imagination and responsiveness of the court and turns it towards formalism. So I think it would help very much if appeals from the District Court in all criminal matters were to be heard in the High Court, with powers of leapfrog removal and additional appeal by leave (including to the Supreme Court) where necessary. What I do not think we should do in any appellate restructuring is give away the right of general appeal.

Rule of Law

The rule of law is identified in the Supreme Court Act as being, with the sovereignty of Parliament (with which it is in inevitable tension), one of the twin principles of the New Zealand constitution.²⁸ The Judicature Modernisation Bill currently before Parliament will remove that acknowledgement, something I regret.²⁹ In a country without a principal constitutional text, where we have to work harder at understanding our constitution, the textual references we have are precious.

There are a few more than is generally acknowledged. In the Imperial Laws Application Act, the schedule to the Act identifies ancient statutory fragments still in effect in New Zealand as “constitutional”. To them, as is generally acknowledged must be added modern statutes dealing with fundamental principles such as the electoral system, the Official Information Act (with its requirement that reasons must be given for administrative decisions affecting any person), and the New Zealand Bill of Rights Act.

Although the phrase, “rule of law” does not appear in the Bill of Rights Act, the White Paper which preceded it explains the omission from the statement of rights of a right to equality before the law as being unnecessary because equal treatment is part of the rule of law.³⁰ The Bill of Rights Act, which explicitly preserves all other freedoms and liberties, was therefore enacted on the premise of the rule of law.

²⁸ Supreme Court Act 2003, s 3(2).

²⁹ Judicature Modernisation Bill 2013 (178-2).

³⁰ *A Bill of Rights for New Zealand: A White Paper* [1985] AJHR A6 at [10.81].

A further constitutional text, as yet of uncertain status, is the Treaty of Waitangi. Before we reject the plurality it seems to promise or deny legal effect to the Treaty, we should remember that plurality within the legal order was looked to 800 years ago in Magna Carta (in the references to the separate laws of Scotland and the Welsh Marches) and that the status and direction of that Charter took centuries to work through and may not yet be settled, as contemporary agitation for further plurality within the realm of the United Kingdom may show.

It is true that the content of the rule of law remains uncertain and is contestable. Its central plank is the principle of legality – that no one or no body is above the law and that fundamental values and rights can be entrenched only by unmistakable legislative intent. Reasonableness and fairness in the exercise of power seem pretty well established as part of the rule of law. But the extent to which substantive values such as human rights are part of the rule of law is more contested.

The uncertainty of what reference to the rule of law means was a reason given to us when the judges wrote asking for retention of s 3 in the Judicature Modernisation Bill. The rule of law shares that uncertainty with the other elements of our unwritten and largely common law constitution. It does not mean that some democratic recognition of the elements of the constitution are not beneficial. We have to work hard in our system to understand what is constitutional. If the constitution is understood or talked about only by judges and lawyers, we are all exposed.

The rule of law can be imperceptibly eroded unthinkingly if it is not valued by our society. That is not only by changes to the substantive law but also by changes to the administration of justice, including in such matters as listing of cases, court fees and legal aid – matters in our system largely under the control of the executive, not the judges. They can also be eroded by changes to the adjectival law of procedure and evidence which control effective access to justice. They also are increasingly under the control of the political branches of government, not the judges. I think there is no room for complacency here and that the law schools and the profession need to be vigilant to ensure that access to justice is not unreasonably impeded by the understandable imperatives of government.

The courts have to stand apart. That is not an easy message to get across. Indeed, courts are I think increasingly treated as though a department of government, as in form for some purposes they are. Although the former understanding was that the Ministry of Justice simply provided support for independent courts, that is no longer the way in which courts are treated. I think the position has come about unthinkingly, rather than design. In part it may have been because the District Court as the volume court has come to be seen as the basic model for court administration. But the registries of the High Court are increasingly managed by the Ministry. Although subject to direction from the judges in terms of judicial work, what is judicial work is a concept that has been substantially blurred. Scheduling of cases, including setting priorities for hearings, and budgetary decisions not shared with the judges (which also alter

priorities) have the capacity to undermine the independence of the courts and to obscure their institutional constitutional function.

The New Zealand Constitution Act 1986 makes separate provision for the legislative, executive and judicial branches of government. Although our legal system requires the independence of the judiciary from other sources of State power, in reality, that independence is fragile. Judges have security of tenure and salary but the work of the courts is dependent upon the administration provided by the Ministry of Justice. The Ministry wears many hats in the administration of justice. Some of those interests conflict. In the new government joined-up justice sector, there are pressures to share information (including court information increasingly captured electronically) and to manage resources across the sector which are potentially destructive of the institutional independence of the courts and access to justice, without which the rule of law is worth little. It is difficult to get across the message that the independence of the courts is not secured simply if it is understood that judges may not be told how to decide individual cases. If cases cannot get before a judge because of policies followed in the registry, the rule of law is at risk. Scheduling needs to be managed by the judges to ensure that there is no appearance of the Executive, which is implicated in most of the cases that come before the courts, picking the judges to hear particular categories of case. There are risks in specialised panelling if not under judicial control.

International statements of basic principles for judicial independence adopted both by the United Nations General Assembly and by the Commonwealth recognise that judicial independence has an institutional dimension.³¹ The Supreme Court of Canada has held that administrative independence in the organisation of judicial work and the support necessary to achieve it are aspects of judicial independence.³² Chief Justice Barak of Israel has expressed the view that it is inconsistent with judicial independence for the administration of the judiciary to be through a department of government.³³ In the United States, Canada, and Australian jurisdictions considerable operational autonomy is given to judges. In the United Kingdom, the Supreme Court was set up with full institutional autonomy and the court service of England and Wales is under joint management of the Executive and the Judges. We are out of step. The implications for the rule of law are not being sufficiently thought through.

Conclusion

The challenges for judging and for the rule of law in New Zealand in the 21st century are to ensure that access to independent courts and the rule of law continue to be valued as constitutional fundamentals by the community. That

³¹ *United Nations Basic Principles on the Independence of the Judiciary*, endorsed in GA Res 40/32, A/RES/40/32 (1985); and GA Res 40/146, A/Res/40/146 (1985); and *Commonwealth (Latimer House) Principles on the Three Branches of Government*, as agreed by Law Ministers and endorsed by the Commonwealth Heads of Government Meeting (Abuja, Nigeria, 2003) at IV.

³² *Re Remuneration of Judges of the Provincial Court of Prince Edward Island* [1997] 3 SCR 3 at [118].

³³ Aharon Barak "A Judge on Judging: The Role of a Supreme Court in a Democracy" *The Supreme Court 2001 Term – Foreword* (2002) 116 Harvard Law Review 19 at 54–55.

requires understanding of our constitutional and legal history. This is a year of anniversaries of importance to law. It is 175 years since the signing of the Treaty of Waitangi, by which constitutional government was established and the enacted and common law of England, arrived on these shores so far as appropriate to the circumstances of New Zealand (an important qualification). With the Treaty, Magna Carta, 800 years old entered New Zealand law. These are points of reference we need to talk more about. It is not fanciful to see in Magna Carta ideas central to the rule of law and which have influenced our constitutional history ever since. The 800th anniversary of Magna Carta may be a good time to take stock. Magna Carta confronted the arbitrary power of the King. Over the following centuries the ideas it launched brought the King under the law, as Bracton and Coke had insisted he was. The King, they said was made by the law. And, as James I had the wit to see, the implication of being made by the law was that the King was subject to the law.

The folk memories of “the Great Charter of the Liberties of England” (as it was called in the Petition of Right of 1628) and their persistence in popular estimation achieved constitutional government. Those traditions are strong. They are the traditions which set the role of the judges in their work and which maintain the rule of law. They are too important to be the preserve only of lawyers. That places responsibilities on judges to explain the use of judicial authority clearly - and it places responsibility on all of us to make our traditions more accessible.
