Beneath the blindfold: responsive to society or caving to pressure?

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Tēnā kotou, tēnā koutou, tēnā tatou katoa

As is customary in my country I have greeted you in te reo Māori, the language of the indigenous people of Aotearoa/New Zealand.

I pay my respects to our hosts and in particular the Chief Justice and all the other judges of the Constitutional Court. I pay tribute to the esteemed leaders of the IAJ and to you all. I also take this opportunity to acknowledge and thank the members of the Chinese Taipei Chapter of the International Association of Women Judges who have welcomed me so warmly.

It is a great honour and pleasure to have been invited to join this distinguished panel of speakers covering such important topics.[2]

Article 3.1 of the IAJ Universal Charter of the Judge, as updated in 2017, provides that judges are "subject only to the law and must consider only the law".[3] Article 2.2 provides that judges must be able to exercise judicial powers free from social, economic and political pressure. Article 2.5 provides that the state must ensure judges are protected from threats. It also provides that any criticism of judgments should be avoided where that criticism may compromise the independence of the judiciary or jeopardise the public's confidence in the judiciary.[4] Article 3.3 states that judges "are accountable for their actions and must spread among citizens any useful information about the functioning of justice".

The Charter was first promulgated in 1999.[5] One of the recorded reasons for the update in 2017 was the fact that the world is now more and more open and connected. My focus today is on

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2 This speech was given in Taipei on 18 September 2023 as part of the Constitutional Law Forum at the 65th annual conference of the International Association of Judges (IAJ) and its 70th anniversary.

3 The original Charter can be found online at <www.icj.org>. The updated Charter can be found at <www.unodc.org>. See also *Basic Principles on the Independence of the Judiciary* GA Res 40/32 (1985) and GA Res 40/146 (1985).

4 It also provides that the physical security of judges and their families must be protected.

5 The Charter was adopted at the IAJ conference held that year in Taipei.

social media and social pressure. I will cover two topics.

The first is the line between acceptable public debate on the one hand and, on the other, criticism that threatens the independence of and public confidence in the judiciary. The second topic is the possible tension between independence from social pressure and the need for judges to understand and be part of the community.

Social media has meant global connectivity, improved access to information and the ability for everyone with internet access to communicate with each other.[6] It has also brought cyber bullying and fake news. Judges have not been immune. They have been subject to online attacks from disgruntled litigants and from others who have taken exception to particular judgments or are just more generally disaffected. These attacks often impugn the integrity of the judge and are frequently based on misinformation.

So, to my first topic. Where should the line be drawn between legitimate debate and unacceptable behaviour and what can and should be done with cases that cross the line?

The cases at each end of the spectrum are easy to identify. Threats and harassment should obviously be met with the appropriate response under the criminal law. At the other end of the spectrum, measured discussion of judgments by expert academics should be welcomed as it is designed to foster constructive debate and improve outcomes and the law.

It seems to me that the starting point of any analysis of where to draw the line must be freedom of expression. This has been said to be the foundation of every sort of freedom.[7] That the public is free to engage in public debate about the judiciary and its work serves to increase public confidence in the justice system rather than undermining it. It is the corollary of open justice, one of the ways that the judiciary is held to account.[8] As the old maxim goes "justice should

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6 There is also the issue of how judges themselves interact with social media. To that end some courts have their own social media guidelines. Internationally, the Global Judicial Integrity Network worked alongside the United Nations Office on Drugs and Crime to develop non-binding guidelines to assist in strengthening judicial integrity and preventing corruption: United Nations Office on Drugs and Crime *Non-Binding Guidelines on the Use of Social Media by Judges* (2018). The Guidelines include references to the Bangalore Principles of Judicial Conduct: *Strengthening basic principles of judicial conduct* ESC Res 2006/23 (2006), annex [*Bangalore Principles*].

7 Justice Benjamin Cardozo of the United States Supreme Court wrote of freedom of thought and speech as being "the matrix, the indispensable condition, of nearly every other form of freedom": *Palko v Connecticut* 302 US 319 (1937) at [5].

8 Beyond the scope of this talk are the different considerations in terms of the separation of powers that arise in relation to criticism of judgments by members of other branches of government and, in particular, Ministers. For the New Zealand position see Cabinet Office *Cabinet Manual 2023* at [4.12]–[4.16].

not only be done, but … seen to be done".[9]

It must be remembered too that the issues dealt with by courts are by their nature contentious. One or more of the parties will be unsuccessful, at least in part.[10] Heightened emotion and intemperate language may therefore be understandable.

As the value of freedom of expression is so important, the judiciary should be open minded, robust and resilient in the face of public criticism, even when it is unreasonable.[11] At least public debate shows engagement rather than apathy. The judiciary should also be very cautious and considered in determining whether criticism has crossed the line to the extent that it threatens judicial independence and public confidence.

I do recognise that social media has created particular risks for justice and for the courts when communications do "cross the line". The internet is a permanent repository of information and there is the potential for posts to go "viral". It is therefore no longer possible to "dismiss attacks on judges on the ground that today's newspaper is tomorrow's fire lighter".[12] Some response is necessary.[13]

In my view, even where criticism has crossed the line, however, the judiciary should try to seek constructive ways to deal with it,[14] including publicly correcting misinformation.[15] Turning immediately to punitive measures might not be the best approach in the long run as it may create the impression the judiciary is out of touch and defensive and could even give greater

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9 *R v Sussex Justices, ex parte McCarthy* [1924] 1 KB 256 at 259 per Lord Hewart CJ.

10 New Zealand Law Commission | Te Aka Matua o Te Ture *Reforming the Law of Contempt of Court: A Modern Statute* (NZLC R140, 2017) at [6.4].

11 This may not be easy for individual judges where one of their judgments is subjected to sustained criticism. Judges in this position will need support to maintain their wellbeing. See Chief Justice of New Zealand | Te Tumu Whakawā o Aotearoa *Annual Report: For the period 1 January 2020 to 31 December 2021* (Te Tari Toko i te Tumu Whakawā | The Office of the Chief Justice, March 2022) at 17 which sets out strategies the New Zealand judiciary has implemented to ensure judicial wellbeing, such as access to counselling, workflow management and establishing pastoral response protocols for judges.

12 Law Commission, above n 10, at [6.47].

13 There may be some difficulties in requiring material to be taken down, however, where a site is hosted offshore and subject to local regulations.

14 In many jurisdictions it is not considered proper for individual judges to defend or further explain their judgments but judicial authorities may be able to do so. The Bar also has a role to play and in New Zealand the Attorney-General who, although a member of the executive, also acts as an independent officer of the law: see "Role of the Attorney-General" in the *Cabinet Manual*, above n 8, at [4.2]–[4.11]. For more discussion on the role of others to defend the judiciary and some actions that can be taken see Law Commission, above n 10, at [6.6]–[6.15].

15 Unfortunately, however, correcting misinformation does not necessarily solve all the problems as misinformation can still persist even in the face of evidence to the contrary: see Ullrich K H Ecker and others "The psychological drivers of misinformation belief and its resistance to correction" (2022) Nature Reviews Psychology 13.

publicity to the perpetrator.

On the other hand, where the allegations are false, abusive and persistent, punitive action, including through contempt proceedings, may be the proper and only reaction.

Persistent spreading of misinformation can be particularly pernicious.[16] One way of diminishing the risk of misinformation is for judges to do their best to ensure that their actions are fully explained and understood and that all parties feel that they have had a truly fair hearing.

This includes ensuring that everyone is treated with respect, both in the lead up to any hearing and in the hearing itself, and that the proceedings are explained in terms persons unfamiliar with the law and court processes can understand.[17] The judgment, whether oral or written, should show the parties and all others involved in the hearing that they have been listened to and that what they have said has been properly considered and assessed. It should explain clearly why the result has been arrived at and why arguments made have been accepted or rejected. And this applies in particular to the arguments of the losing party.[18]

These measures will also improve public understanding. New communication methods and the internet can assist in extending the reach of information. In my court, for example, there is now pre-hearing public communication as well as post-hearing when the judgment is published. Prior to the hearing, the parties' submissions are published, along with a case synopsis. Most hearings are live streamed and the recording, along with the transcript of the hearing, are placed on the courts' website.[19] Our judgments on substantive appeals will usually include headings,

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16 The dangers of misinformation and its threat to democracy is all too real: European Commission "Disinformation: A threat to democracy – Brochure" (9 April 2021) <digital-strategy.ec.europa.eu>.

17 Making justice inclusive is a priority for the New Zealand judicial leadership and in particular the Chief Justice, Winkelmann CJ. I chair a judicial committee called Tomo Mai | Inclusion Committee. The Committee's remit is to reduce barriers to participation in courts for litigants, practitioners, judges, staff and other interested parties. See *Annual Report*, above n 11, at 9.

18 See for example, the comment that a judgment should be framed as a "letter to the loser" in Rosalind Dixon *Responsive Judicial Review: Democracy and Dysfunction in the Modern Age* (Oxford University Press, Oxford, 2023) at 247.

19 See <courtsofnz.govt.nz>. Appeals where there are suppression orders are not livestreamed but the transcript of the hearing is put on the website after being checked to ensure there are no breaches of the suppression orders. The website now also has an archive of hearings that were previously livestreamed. Our processes owe a lot to the practices of other final courts overseas.

a table of contents and a summary of the decision for easy access to the issues decided.[20] A press release summarising the judgment is sent to media outlets and placed on the courts' website, along with the full text of the judgment.

Outreach programmes and good websites designed to explain the functioning of the courts and the justice system are also important to ensure public understanding of and confidence in the judiciary. This is also reflective of the principle of open justice and the importance of retaining legitimacy in the eyes of the public.[21]

Outreach and maintaining ties with the community can be wider than direct communication. It can also be achieved through appearance and symbols.[22]

The Supreme Court courtroom in New Zealand was designed to feel unmistakeably distinctive to Aotearoa/New Zealand, as indeed were our ceremonial judicial robes.[23] Both weave together both Māori and common law symbolism.[24] Our Court is a place that is open for guided visits by members of the public and school tours and of course the public can attend hearings. The courtroom also has a window that directly opens out onto the foyer so that what goes on inside is visible to those who walk past in the street.

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20 It is now general practice in the New Zealand Supreme Court also to include in the judgment a separate summary of the various positions where there are multiple judgments and to highlight where the judges may differ on the issues raised in the appeal. This aids the reader to understand the ratio of the case (the binding parts of judgment in line with common law doctrine of precedent). This is a practice borrowed with gratitude from the Constitutional Court of South Africa. Examples of recent cases in New Zealand where this was done are *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127, [2021] 1 NZLR 801; and *Bathurst Resources Ltd v L&M Coal Holdings* [2021] NZSC 85, [2021] 1 NZLR 696.

21 See article 3.3 of the Charter set out above. For New Zealand see the *Annual Report*, above n 11, at 49. The importance of having outreach is recognised by other final courts. For example, see the Chief Justice of Canada, Richard Wagner "Message from the Chief Justice, Richard Wagner" <www.scc-csc.ca>: "We're leveraging technology and new media to better communicate with you, wherever you live, in both of Canada's official languages". While New Zealand's judgments are not fully bilingual, for the first time last year the Māori Land Court | Te Kooti Whenua Māori published the first bilingual judgment in te reo Māori and English: *Pokere v Bodger - Ōuri 1A3* (2022) 459 Aotea MB 210 (459 AOT 210).

22 See Dame Sian Elias, former Chief Justice of New Zealand, in "Demystifying the Judicial Process" in *Core Values of an Effective Judiciary* (Academy Publishing, Singapore, 2015) 126 at 136.

23 These judicial robes are worn on ceremonial occasions by senior court judges, such as the swearing in of new judges and admission to Bar ceremonies. Judges of the Supreme Court and Court of Appeal do not wear gowns for their hearings. Black robes are still worn by counsel and by High Court and District Court judges for court hearings but wigs are no longer worn, either ceremonially or in court proceedings. With the introduction of Te Ao Mārama (discussed below), District Court judges can now choose to wear a modified black gown in Court which represents the kaupapa (philosophy) of Te Ao Mārama. See District Court of New Zealand | Te Kōti-ā-Rohe o Aotearoa "Te Ao Marāma Judicial Gown" <www.districtcourts.govt.nz>.

24 See Ngā Kōti o Aotearoa | Courts of New Zealand "Judicial Ceremonial Robes" <www.courtsofnz.govt.nz>. Note that on this site is a picture showing both the old judicial robes and wigs previously worn on ceremonial occasions.

I now turn to my second topic and, in this regard, I refer to the Bangalore Principles on Judicial Conduct.[25] As part of the requirements for fulfilling the value of independence, clause 1.1 of those Principles provides in summary that a judge must decide cases independently on the basis of the judge's assessment of the facts and the law, free of any extraneous influences, pressures, threats or interference, either direct or indirect. Clause 1.2 provides that a judge shall be independent in relation to society in general. These provisions largely equate to the provisions in the IAJ Charter I have already discussed.

In accordance with the value of equality, however, clause 5.1 of the Bangalore Principles provides that a judge shall be aware of, and understand, diversity in society and differences arising from various sources, including but not limited to race, colour, sex, religion, national origin, caste, disability, age, sexual orientation, social and economic status and other like causes.[26] The commentary on this clause by the United Nations Office on Drugs and Crime reinforces the idea that judges must understand the community.[27]

The second topic of my talk today involves in part considering the intersection between these two values in the Bangalore Principles: independence and equality.

There will be times when independence and equality are completely aligned and where upholding the value of equality, the rule of law and the judicial oath will require judges to withstand majoritarian social pressure. This can take great courage, especially in conservative societies less tolerant of differences.

But, at the same time, it is not possible to judge fairly and uphold the value of equality if judges do not understand the society in which they judge. In the past it was thought that, to be independent and impartial, judges had to separate themselves from society and be

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25 There are six core values set out in the Principles: independence, impartiality, integrity, propriety, equality, and competence and diligence: *Bangalore Principles*, above n 6.

26 The IAJ Charter does not explicitly discuss the value of equality but it is implicit in the commentary at the beginning of the Charter which references the role of the judiciary in protecting human rights and fundamental freedoms and also the reference in article 1 to the rule of law and to the right of the individual to a fair trial in the determination of civil rights and criminal charges, as well as the duty of impartiality in article 6.2.

27 United Nations Office on Drugs and Crime *Commentary on the Bangalore Principles of Judicial Conduct* (September 2007) for example states at 186: "A judge should attempt, by appropriate means, to remain informed about changing attitudes and values in society … However, it is necessary to take care that these efforts enhance, not detract from, the judge's perceived impartiality."

"insulated from the controversies of the day".[28] In fact, this probably meant that, as part of the "establishment", they judged accordingly.[29] Judges traditionally were so far removed from society that they could not identify with many of the people they sat in judgment on.[30]

Now the importance to judicial legitimacy of diversity of appointments is widely recognised.[31] This is both to ensure that the judiciary is reflective of the community but also so that judges better understand all those who may come before the courts.[32] The ability of judges to speak to their communities has been said to be a "great virtue of the legal process".[33]

There has also been a recognition that actively engaging the community can bring better results, particularly in the criminal field and for both defendants and victims. For example, New Zealand's main first instance trial court, the District Court | Te Kōti-ā-Rohe, is embarking on an ambitious change program, Te Ao Marama (The World of Light). This is designed to bring the lessons learned in specialist problem solving courts into the mainstream court

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28 This remark was made by Lord Kilmuir of the United Kingdom in 1955 and became known as the "Kilmuir Rules". These "unofficial" rules were officially abandoned in the United Kingdom in 1987, although it is generally agreed that the Kilmuir Rules merely recommended restraint and that public discourse to some extent continued. See Katherine Sanders "Away from the Familiar – Judges in Public Debate and as Commissioners" in John Burrows and Jeremy Finn (eds) *Challenge and Change: Judging in Aotearoa New Zealand* (LexisNexis, Wellington, 2022) at 226–228.

29 An interesting project that has occurred in many jurisdictions is the feminist judgments project. This is where famous cases are "reconsidered" from a feminist perspective but within the constraints of the law as it was at the time of the decision. Sometimes it is not possible to reach a different result but it is still possible to reframe the reasons for the decision to be more conscious of the people (and particularly the women) involved. In New Zealand, see Elisabeth McDonald and others *Feminist Judgments of Aotearoa Te Rino: A Two-Stranded Rope* (Hart Publishing, Portland, 2017). The New Zealand project also contained perspectives with a te ao Māori (Māori world)/wāhine (woman) worldview. As noted in the foreword, at vii–viii, "[a] lack of diversity in decision makers can lead to biased and unjust laws" and also perpetuate stereotypes or monocultural values and norms. Increasing diversity in the judiciary will increase diversity in ways of thinking and in links to the community.

30 A Canadian author, Wes Pue, observed that the legal profession's culture was formed in "bars and cafes, gentlemen's clubs … golf games and railway cars": W Wesley Pue *Lawyers' Empire: Legal Professions and Cultural Authority, 1780–1950* (University of British Columbia Press, Vancouver, 2016) as cited in Hilary Sommerlad "Judicial diversity: Complexity, continuity and change" in Graham Gee and Erika Rackley (eds) *Debating Judicial Appointments in an Age of Diversity* (Routledge, Abingdon, 2018) at 216. Sommerlad explains that "these sites and practices privilege specific formations of cultural and social capital and tend to exclude women and minorities": at 216–217.

31 For example, there is now an International Day of Women Judges (10 March) instituted by UN resolution *International Day of Women Judges* GA Res 75/274 (2021) which recognises that the "systemic mainstreaming of a gender perspective in the implementation of [the Sustainable Development Agenda] is crucial". In New Zealand, the protocol for judicial appointments for the senior courts states that there is a "commitment to actively promoting diversity in the judiciary without compromising the principle of merit selection": Attorney-General *Judicial Protocol* (Crown Law, April 2014) at 1. This protocol can be found on the Courts of New Zealand and Crown Law websites: <www.courtsofnz.govt.nz> and <www.crownlaw.govt.nz>.

32 Community engagement obviously must be done in a way that follows the relevant ethical rules and any obligations of judicial office, such as caution in commenting on issues that may in future come before the courts: see the *Bangalore Principles*, above n 6, at [2.4]. On the requirements relating to impartiality generally see at [2.1]–[2.5]. See also art 6.2 of the IAJ Charter.

33 Dame Sian Elias, above n 22, at 128.

processes.[34] It will be inclusive of all cultures and emphasise restoration, rehabilitation and healing, as well as ensuring community engagement.[35]

In common law systems judges are also responsible for developing the law in an incremental fashion in accordance with the common law method.[36] This requires courts to understand the social and economic conditions in their jurisdiction and to adapt the law where necessary to meet new conditions.[37] In performing this role, courts need to be cognisant of the needs of all members of their societies and to take care not to get too far ahead of (or indeed too far behind) their communities.[38]

Looking to the future, our world is facing major challenges, including artificial intelligence, climate change and threats to the rule of law. The ability of the courts to be responsive and innovative as well as courageous will be more important than ever.

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34 See District Court of New Zealand | Te Kōti-ā-Rohe o Aotearoa "Introducing Te Ao Mārama" <www.districtcourts.govt.nz>.

35 Chief District Court Judge Heemi Taumaunu "'Te Ao Mārama – Enhancing Justice For All': Two Years On: An Update on Progress in the District Court of New Zealand" (2022) 28 Auckland U L Rev 1; and John Walker, Principal Youth Court Judge "Norris Ward McKinnon Annual Lecture 2022" (Waikato University, 20 September 2022).

36 See Janet McLean "*Attorney-General v Taylor*: An Example of the Cautious, Incremental and 'Common Law' Approach to Constitutional Change in New Zealand" IACL-AIDC Blog (5 December 2019) <blog-iacl-aidc.org>.

37 I am not qualified to comment on the position in civil law jurisdictions, although I do note that the book Tania Sourdin and Archie Zariski (eds) *The Responsive Judge: International Perspectives* (Springer, Singapore, 2018) covers both common and civil law systems.

38 See Dixon, above n 18, at 269 who talks of the perils of "responsive judging" which may lead to "los[ing] sight of the substantive democratic values or goals they are designed to serve".