Judges and Free Speech in New Zealand

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Introduction

Lord Atkin once memorably remarked that: 'Justice is not a cloistered virtue; she must be allowed to suffer the scrutiny and respectful even though outspoken comments of ordinary men.'[ii] His Lordship had in contemplation, in a contempt case, a bipartite problem: those who administer the law, and with the cloak of the protections afforded that role, may, and must where necessary and appropriate, make strong comment in the course of determining a controversy. And, persons outside the circle of those administering justice are entitled to make 'respectful' but just as outspoken comment or replies about the 'public act done in the seat of justice'.[iii] Those propositions are not in doubt.

The question the equation as thus stated does not answer is, what is the position of a judge who feels impelled to make some observations as to what is happening within the justice system itself, or some particular aspect of it, outside of the formal confines of a given case or judgment? Should the judge confine his or her observations purely to the discharge of particular judicial obligations in that given case? If not, under what circumstances *is* it permissible and appropriate for an individual judge to offer particular commentary of a more general character?

This essay addresses these issues in three parts. First, I set out the 'formal' position in New Zealand. Second, I then outline some contemporary controversies to illustrate the problems arising in this subject-area in New Zealand. Third, I endeavour to address whether there are principled grounds for permitting extra-judicial comment, and how far a judge may properly go outside of a particular case he or she is charged with determining.

An overview of the New Zealand position

Historical constraints on Judges

The historic position in New Zealand was much like the position in Australia and the United Kingdom. Although New Zealand never formally adopted the Kilmuir Rules, in practice, in the mid-1950s and for perhaps twenty years thereafter the New Zealand judiciary acted very much in conformance with those rules, the essence of which was often said to be a doctrine of judicial neutrality.[iv]

Over perhaps the last quarter century however some judges have occasionally chosen to make extrajudicial comment, sometimes ranging quite broadly. More recently there have been some tense exchanges involving senior members of the judiciary on the one hand, and the Executive on the other, as to whether judges have crossed the line, and inappropriately intruded into the political arena.

There are no specific statutory provisions in New Zealand which inhibit a judge from making public comment on a matter that is not before him or her. The principal argument against a judge doing so has to be advanced as one of inference: that is, as a logical consequence from the statutory role of that judge. This might be termed a 'formal constraint' and has long been thought to be the subject of 'convention'.

As to less formal 'internal constraints', the present position is summarised in the Judges' Bench Book, issued under the hand of the Chief Justice of New Zealand, which is distributed to all higher court judges in New Zealand. It provides:

(a) Participation in public debate.

> If a matter of public controversy calls for a response from the judiciary or a particular court, it should come from the Chief Justice or Head of Jurisdiction or with his or her approval. In other cases it may be beneficial to public debate for judges to provide information relating to the administration of justice and the functions of the judiciary. Such

participation is desirable but requires care. In particular, a judge must avoid political controversy unless the controversy is about judicial function. It is important to avoid using judicial office to promote personal views and to avoid the appearance of capture by particular organisations or causes. It is important to avoid expressing opinions on matters which may arise in litigation and which may lead to concern about the impartiality of the judge.

(b) Submissions or evidence to Parliamentary Select Committees.

It is not inappropriate for a judge to make a submission or give evidence before a Parliamentary Select Committee on a matter affecting the legal system. It is important to avoid entering upon matters of a political nature and to bear in mind the need to maintain judicial independence from the Legislative and Executive branches of government. It is important for the Head of Jurisdiction to be consulted before embarking upon a submission.

(c) Comment on judicial decisions.

Judgments must stand without further clarification or explanation. Where a decision is subject to inaccurate comment, any appropriate response should be from the Chief Justice or Head of Jurisdiction. Generally the most effective response is to get the full text of the judgment into the public arena promptly.

Policing judicial free speech

As to the important question of who is to police – if there is to be any policing at all – judicial free speech in New Zealand, traditionally complaints about judges went to the Head of Bench. The Head of Bench would deal with that matter as he or she saw fit but against the background of established conventions, including that of judicial neutrality.

That matter of process has become potentially complicated by the enactment of the Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004. Under s 12 of that statute any person may make a complaint about the 'conduct of a judge'. Conduct is not defined. And s 11(1) is explicit that the Judicial Commissioner must receive and deal with every complaint made under the Act about the conduct of a judge regardless of whether the subject-matter of the complaint arises in the exercise of the judge's judicial duties or otherwise. The breadth of the statutory provisions are such that conceivably, judicial speech whether in court or out could be the subject of the disciplinary procedures and steps which can be taken under that Act.

The Bill of Rights and judicial free speech

The issue of judicial free speech in New Zealand is further complicated by the general law relating to free speech under the New Zealand Bill of Rights Act 1990 (Bill of Rights). Section 14 of the Bill of Rights, the starting point for the legal protection of free speech in New Zealand, protects freedom of expression in these terms:

> Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form.

This right has been described by the New Zealand Court of Appeal as 'being of the highest importance in a modern democracy'[v] and 'as wide as human thought and imagination'.[vi]

Do judges enjoy the benefit of s 14? Commentators agree that the wording particular to each right protected in the Bill of Rights determines who enjoys its benefit. Accordingly the benefit of freedom of expression is enjoyed by 'everyone'.[vii] More generally, s 29 provides that the benefit of the Bill of Rights applies – 'so far as practicable' – to all natural persons. On this basis it can be said that prima facie judicial free speech is protected by the Bill of Rights.

This literal reading of the statutory text is bolstered by a consideration of international instruments relevant to the present context.[viii] In particular art 9 of the

United Nations Basic Principles on the Independence of the Judiciary (Basic Principles) [ix] confirms that judges are entitled to freedom of expression – as provided for in the Universal Declaration of Human Rights – just as citizens are.

There may be something in the point noted by Butler and Butler however that given the purpose of the Bill of Rights is to limit government power, it may appear contradictory that agents of the state enjoy its benefit also.[x] Their suggested reconciliation is to emphasise s 29's 'as far as practicable' limitation: the state and its agents may enjoy the Bill of Rights' protection, but that enjoyment may be subject to special considerations.[xi]

A final note on the scope of the benefit of the Bill of Rights is that it applies only in respect of acts done by the legislative, executive, or judicial branches of government,[xii] or, more broadly, acts done in some public capacity.[xiii] In other words judicial free speech may only be protected by the Bill of Rights against constraints imposed by such acts.

The Bill of Rights itself imposes two 'self-regarding' constraints (self-regarding because they do not require reference to others' rights) on freedom of expression: 'reasonable limits' and 'practicability'. Freedom of expression is limited by 'such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society'.[xiv] For example, judicial free speech is limited in some cases by statutory suppression reminders. Butler and Butler[xv] suggest that s 29 and its 'practicability' requirement is a further limitation on the extent to which public officials enjoy the benefit of the BORA protection. It may be that constitutional convention, for example the principle of comity, might be such a limit on judges' freedom of expression.

The Basic Principles suggest two further self-regarding constraints: neutrality and preserving the impartiality and dignity of judicial office.

As for other-regarding constraints, the Bill of Rights applies to acts of the judicial branch of government.[xvi] This means for present purposes that others may claim Bill of Rights protection in respect of acts of the judicial branch of government.

Judges are constrained by dint of their office from making utterances that infringe on an individuals' rights as protected by the Bill of Rights, unless that infringement is a reasonable limit in s 5 terms. There is a difficult question as to whether s 3 means this constraint applies to all acts done by an individual holding a judicial warrant, or whether acts done in a personal capacity are excluded.

It will be apparent from the foregoing that the Bill of Rights has overlaid what were already quite difficult issues with further layers of complexity.

The judiciary as the third arm of government

New Zealand statute law provides that the judiciary is a 'branch' of the government of New Zealand.[xvii] This may be thought to have some significance for judicial free speech. A 'branch' of government could hardly be expected to be like the submarine service and 'Run Silent, Run Deep' (though perhaps it operates that way sometimes!). A 'branch of government' implies some obligation to speak. The Executive and Parliamentary branches of government have their own rules and conventions, but it is worth observing that they too have some controversies about where the edges of their roles begin and end; and debates about the limits of speech of individual participants are not unknown.

New Zealand controversies

This section covers four incidents which may be regarded as typical of the sort of things which have arisen in New Zealand in recent years. One is an example of the Chief Justice of New Zealand speaking out on criminal justice matters; another is an example of a trial Judge speaking out on a contentious matter not before him in a particular case; one relates to criticism of particular judges, but those judges perhaps not being able to respond; and the fourth relates to an unmitigated ongoing attack on judges to which Judges seem powerless to respond.

The Chief Justice speaks out: sentencing

The Rt Hon Dame Sian Elias, Chief Justice of New Zealand, was invited to deliver the 2009 Shirley Smith Address. This is an annual lecture promoted by the Women in Law Committee of the Wellington Branch of the New Zealand Law Society. By way of context, Shirley Smith is a former Wellington legal practitioner. She was the daughter of a respected High Court judge. She was the first woman law lecturer in a New Zealand university. She entered the profession as a sole practitioner. Much of what she did was pro bono representation for the poorly paid and afflicted. Most of her work was in the area of criminal law. She wrote letters to newspapers editors. She was not averse to breaking into print about the futility of escalating sentences. For instance, in November 1999 she wrote a letter to the Editor of *The Dominion* newspaper in Wellington expressing her abhorrence of a bill increasing sentences.[xviii] She said:

> To provide only a prison at the bottom of the cliff is not a solution. Criminals will just go on falling into it, at great cost to the community.
>
> We have to find out why blameless babes become criminals. Writing as a lawyer who has read many probation reports I have no doubt that their life experience has been the cause. Society creates criminals, society must look at the conditions that create them.

The Chief Justice took those observations as a theme for her invited address. For the first dozen or so pages of a formally reasoned and documented paper the Chief Justice traced the way in which hopeful strategies for penal reform have given way to professional pessimism and community loss of confidence in those working in the criminal justice sector.[xix] She traversed why this was so. She then turned to the inexorable rise in the size of the prison population and the cost of keeping people incarcerated. She considered what might be done by way of community education, intervention to improve the management of prisoners on parole, and the awful statistics relating to the proportion of people with severe personality disorders or serious mental illness within prison.

Nothing which had been said to that point might be thought likely to have crossed any particular line. This was a Head of Bench – indeed, by statute the Head of the Judiciary in New Zealand[xx] – identifying certain problems, and the fact that the penal system in New Zealand has not been able to rectify them any better than in any other jurisdiction. So far so good.

What caused a great deal of debate came right at the end of the paper. It is as well to use the particular words uttered by the Chief Justice. She asked whether the real drivers of the increased prison population depend upon the insistence 'that risk be managed by a policy of containment'.[xxi] She said:[xxii]

> My last suggestion may be controversial. I do not know whether it is practical or politically acceptable, but I think it needs to be considered. We need to look at direct tools to manage the prison population if overcrowding is not to cause significant safety and human rights issues. Other countries use executive amnesties to send prisoners into the community early to prevent overcrowding. Such solutions will not please many. And I am not well placed to assess whether they are feasible. But the alternatives and the costs of overcrowding need to be weighed.
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> ...
>
> I question whether that strategy can responsibly be maintained. Changing it will require public acceptance that risk cannot be eliminated and that the costs we are absorbing to try to do so are disproportionately expensive. If we are not prepared to relax the pressures to contain risk in the discretionary decisions as to bail and parole, then the only other immediate options may be to confront the length of sentences directly. That could be achieved by statutory changes to bring down the parole component of the sentence (effecting an overall reduction in sentence), statutory modification of the policy of containment of risk in the current bail legislation, and early release amnesty. Are we ready for solutions such as these? If not, we will have to

keep building prisons and diverting resources into incapacitation, a strategy that Shirley Smith had no doubt would not work.

The official reaction to the Chief Justice's speech was swift and condemnatory. The Minister of Justice, the Hon Simon Power, commented sharply and publicly: 'It is the judiciary's job to apply the law set by Parliament ... This government was elected on the sentencing policy. Judges are appointed to apply it. The Chief Justice's speech does not represent government policy in any way, shape or form'.[xxiii]

The Prime Minister of New Zealand, the Hon John Key, told a national television audience on the *Breakfast* show on TV1, on Monday 20 July 2009: 'Releasing the speech puts [the Chief Justice] over the line and that was really the point that the Minister of Justice (made) ... There's a line there and hopefully politicians don't stray one side and the judiciary don't stray the other.' Speaking later that day on a public radio channel, the Prime Minister said Dame Sian had strayed 'into the Justice Minister's area'.[xxiv]

In Parliament, the Labour Opposition spoke out in defence of the Chief Justice. Charles Chauvel, Labour's Associate Justice spokesperson said 'it is a convention, and, in fact, a duty, for members of the judiciary, including the head of the judiciary, to speak out on matters of important public policy in the justice sector'.[xxv]

There followed an astonishing outpouring of newspaper editorials and commentary. There were outraged cries from the Sensible Sentencing Trust (a victims' rights organisation) that the Chief Justice should resign. Even quite moderate letter writers took the substance of her points, but thought that the Chief Justice had overstepped the line. For instance, one letter to the Editor of the *New Zealand Herald* said:[xxvi]

> While not in conflict with much of what Chief Justice Sian Elias had to say about crime and punishment, I feel she has dangerously breached the separation of Executive and judiciary. Hers was essentially a political sociological essay ...

Academic commentators were guarded. A commentary by Associate Professor Andrew Geddis in the *New Zealand Herald* for 22 July 2009 pretty much followed the title to that piece: 'Stick to your knitting principle, a knotty one to apply'.

The President of the New Zealand Law Society, Mr John Marshall QC, on behalf of the legal profession in New Zealand, said that the Chief Justice did not criticise any specific government policy.[xxvii] But Sir Douglas Graham, a former Attorney-General and Justice Minister said the present Minister was right to remind the Chief Justice that she had stepped over the line:[xxviii]

> If there is any doubt whether on the one hand you want the Chief Justice to feel free to speak and, on the other, comply with constitutional convention, then she should simply comply. She should comply with constitutional convention, rather than err on the side of liberality. ... The Executive (Cabinet) of government does not trample into the realms of the judiciary. The rules exist so that the judiciary is free to get on with judging and the Executive gets on with governing.

Senior newspaper editorials, on the whole, recognised the force in what the Chief Justice had said but several senior editorials suggested she had gone 'over the line'.

Cartoonists had very good copy:

Figure 1: Tom Scott, *The Dominion Post* (22 July 2009).[xxix]

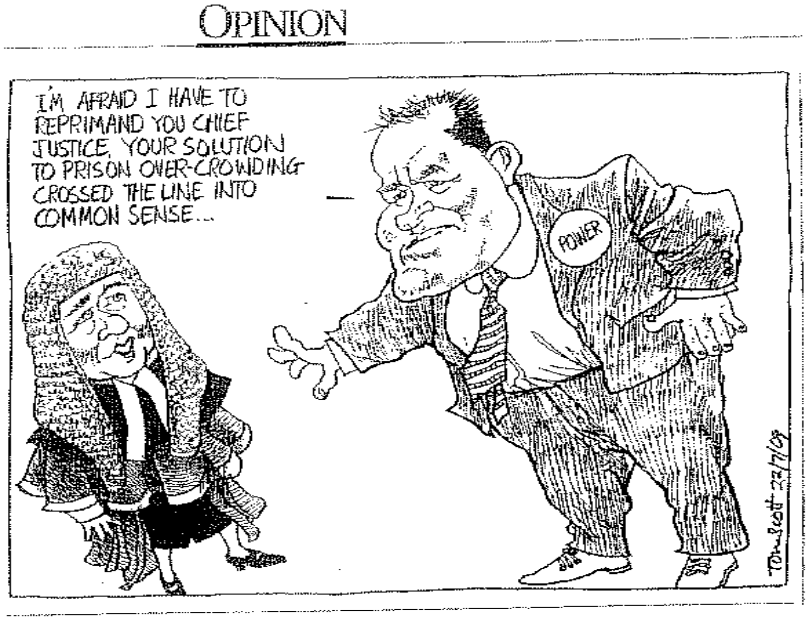

Figure 2: *The New Zealand Herald* (Sunday 19 July 2009).[xxx]

It is now over a year since that incident occurred. It now seems to have dropped off the public radar altogether. It may be thought significant that a recent

address in London by the President of the Court of Appeal, Sir William Young,[xxxi] also expressing concern about the drift of the current sentencing policy, went largely unnoticed in New Zealand.

Public advocacy by a trial judge

It is widely agreed that the Adoption Act 1955 is out of date in New Zealand. Amongst the many criticisms of it is that only married couples and individuals can legally adopt a child. In 2000 the New Zealand Law Commission recommended lifting that adoption ban. It suggested there was not enough evidence to show that being adopted by a same sex couple was against a child's best interests. A proposed member's bill drafted by a Green MP, the Hon Kevin Hague to change the law in this respect was entered into the New Zealand Parliamentary ballot process.[xxxii]

Judge von Dadelszen has many years service as a Judge of the Family Court. Delivering a speech, the Judge came out strongly in favour of the proposed legislation. Fairfax Media became aware that the judge has a daughter in a same sex relationship who could benefit from the changes the Judge advocated. This then attracted sharp media commentary, though on nothing like the scale which had attended the sentencing comments of the Chief Justice.

In the only Parliamentary comment, the Hon Peter Dunne MP, the leader of the United Future Party (very much a family values party) said that legalising gay adoption would be contrary to the mainstream view. But, he said, 'The judge was "as entitled to his views as anyone else"'.[xxxiii]

Given the comparatively mild reaction to Judge von Dadelszen's speech, what explains the difference in response in the 'Blameless Babes' incident? If it was merely a matter of constitutional principle – judges stepping on politicians' toes – that so outraged Elias CJ's critics, then surely there should have been a similar response here?

There are other examples too which seem to demonstrate an even starker disparity in treatment. Two senior Judges, of the Family Court and Youth Court

respectively, are both given to regular and sometimes quite forthright media comment, yet the response is often positive. This may suggest that the issue is not what the limit of judicial free speech is in principle, it is instead what is politically tolerable, and that depends on the content of the speech.

A conclusion that the limits on judicial free speech are essentially politically constrained would help explain the contrasting response to the Chief Justice, as presumably the Chief Justice is perceived to have more influence, or rather, is feared by politicians to have more, over the population at large.

Theoretical support for this kind of conclusion can be found in Matthew Palmer's article 'New Zealand Constitutional Culture'.[xxxiv] Palmer takes a 'constitutional realist' approach to understanding New Zealand's constitutional arrangements, arguing that these arrangements are determined by the 'beliefs and behaviour' of constitutional actors.[xxxv] Identifying features of New Zealand's constitutional culture are, according to Palmer, authoritarianism, egalitarianism, and pragmatism.[xxxvi] Associated norms of representative democracy and parliamentary sovereignty combine with these cultural orientations to generate a generally held 'fundamental suspicion' of judges – particularly of their perceived power to 'frustrate the will of a democratically elected government'.[xxxvii]

Newspaper attacks on judges

The most controversial 'surveys' of judges in New Zealand have been published by *The Independent*, a business newspaper. In September 1994 a survey was taken of lawyers, including apparently senior counsel who remained anonymous, of the High Court and Court of Appeal Judges. The Supreme Court of New Zealand was not then in existence.

The Rt Hon Sir Thomas Eichelbaum, the then Chief Justice of New Zealand, said it was 'unprecedented in New Zealand for lawyers to speak out critically in public of judges in this way'.[xxxviii] Critics responded that the judiciary was demanding blind and uncritical respect for fear of opening the judicial system to the public gaze.

The Editor, Jenni McManus, prefaced the 'results' of *The Independent's* 2009 repeat survey with her observations that:[xxxix]

> Judges are empowered to sit in judgement on all of us. But who judges the judges ... most readers welcome the opportunity to learn more about judges; their habits, intellectual and judicial abilities, and their foibles – information previously confined to Chambers parties and barristers robing rooms.

The 2009 survey results were not altogether kind. To get the flavour of the gutter-type comments made, it is unfortunately necessary to reproduce some of them. It was said of the Chief Justice that she had been:[xl]

> 'promoted beyond her abilities and tried to take on too much, meaning the business of the Court is not being dealt with expeditiously. Has a very good brain but did not have much of a practice before being appointed to the bench.'

The President of the Court of Appeal, Sir William Young, was said to be[xli]

> arrogant, with a high opinion of himself. Makes off-the-cuff comments that are not necessarily justified but can be damaging ... I'm not sure if we're lucky to have him or he's lucky to have the job."

For present purposes, the significant thing about these sorts of bilious outpourings is that judges felt unable or were unwilling to respond, and doubtless that was complicated by the disgraceful attack on the Heads of Bench. In 1994, some judges contemplated suing, but were talked out of it by colleagues. In relation to the 2009 piece, some 15 years later, the then Chief Justice said nothing publicly. And, whatever they thought privately, or said amongst themselves, the judges took no steps. The Attorney-General made no comment.[xlii] The President of the New Zealand Law Society, Mr John Marshall QC, wrote to the Chief Justice on 26 May 2009, in a letter which was distributed to all Judges, indicating that the New Zealand judiciary had the full confidence and support of the profession. Mr Marshall said,[xliii]

> The article does not reflect well on either *The Independent* or on the lawyers who gave their views under the cloak of anonymity. Frankly, I am disappointed to hear that senior barristers have apparently chosen to make comments, some of a hurtful nature, about our judiciary when, as officers of the court, they have a duty to uphold the rule of law.

Concerted attacks by individuals: the Siemer saga

Mr Vincent Siemer has over the last several years been engaged in concerted litigation against superior court judges in New Zealand. At the time of writing there are some 59 judgments relating to Mr Siemer in the High Court, Court of Appeal and Supreme Court with the prospect of more to come. He has also engaged in vituperative media attacks on the New Zealand judiciary.

It all came about this way. Mr Siemer, an American citizen, was the managing director of Paragon Oil. Paragon is a company which purifies and refurbishes oil used in transformers and hydraulic systems. In late 2000, Mr Stiassny was appointed by the Court as Paragon's receiver. Paragon had gone into receivership, by consent, in the context of a claim by Mr Siemer of oppressive conduct by the other shareholders. As it transpired, the present author made orders in Mr Siemer's favour transferring shares held by other shareholders to Mr Siemer.[xliv] After Mr Siemer became the sole shareholder in Paragon the receivership terminated, in August 2001. One of the terms of the compromise agreement was a confidentiality clause. Mr Siemer had, and still maintains, various complaints about Mr Stiassny's conduct of the receivership. Despite the confidentiality agreement, he began to conduct a public campaign against him. For instance, in April 2005 Mr Siemer rented a large billboard in a prominent position in central Auckland which referred to Mr Stiassny in various critical ways and then referred viewers to a website which was distinctly critical of Mr Stiassny's conduct, and of Judges who had found for him.[xlv]

This set in train the extraordinary number of proceedings, some of which are still before the Supreme Court of New Zealand. There were all sorts of interlocutory proceedings, injunction proceedings, and contempt proceedings. As regrettably can happen, when things went against him, Mr Siemer turned his fire to the judiciary. As

the present author had occasion to remark in one Siemer case, a 'deeply disturbing feature' of these proceedings was that: [xlvi]

> Mr Siemer has in the past, and to this day, lashed out at judicial officers who have the burden of endeavouring to adjudicate on the various aspects of the claims which have come before our courts. Lord Reith once famously remarked, "When people feel deeply, impartiality is bias" (*Into the Wind* (1949)). Doubtless all litigants feel deeply about their cases and they can be bitterly disappointed when a ruling or decision does not go in their favour. What is inexcusable is to assert that the judge is corrupt or to make what are nothing more than wild-eyed and unsustainable allegations, simply because they lost.

Ultimately, Mr Siemer was sentenced to a term of imprisonment for contempt. When he had served that term he renewed his attacks on the judiciary, quite unabated. It is not appropriate to refer to the matters that are presently still before the courts, including the Supreme Court of New Zealand, but the Siemer saga introduces another element into the problem of attacks of judges and the ability or inability of judges to respond: much of this attack was electronic and hence hard to police, and it circulated widely outside of New Zealand.

A principled approach towards judicial free speech

Free speech in general

Most of the arguments proffered with respect to judicial free speech seem to operate at the level of an intuitive 'this is not the sort of thing judges ought to be doing'. The concern seems to be with the damage which might be seen to the judicial role, if judges 'cross the line'. This is not particularly attractive, let alone compelling, reasoning. It is simply a visceral approach. The issue needs to be approached from the basis of first principles: Ought there to be a line? Is there a line? And if so, why is it put in the place it apparently is?

Looked at from the point of view of first principle a good place to start is with the general justifications for free speech. We can then turn to whether there are some distinct features of the judicial role which can legitimately be thought to impact upon the general principle.

Freedom of speech and expression is thought by many – perhaps an overwhelming number – of people to have some kind of special status amongst the truly cherished liberties of individuals. It ranks right up behind the right to life itself: the ability to communicate by speech is said to be precisely what differentiates humankind from other life forms.

If freedom of speech has this place in the pantheon of human values it follows that if speech is to be restricted, the reasons for restriction must be distinctly more compelling than we would ordinarily accept as a basis for government or other restraining conduct generally.[xlvii] A slight gain in total welfare will not do: there would have to be in some sense a very real overall welfare gain.

The justifications for an overarching free speech principle fall, broadly, into two categories.

Firstly, there are consequentialist arguments. Free speech is seen to be valuable because it serves some other value or interest – such as the pursuit of truth or democratic self-governance or justice.[xlviii]

The second broad argument is a deontological one. That is, the consequences of the exercise of free speech are disregarded. What is stressed instead is the intrinsic importance of speech to each *individual*.

To take the consequentialist arguments first, the argument from truth is usually most closely associated with John Stuart Mill.[xlix] It is in a sense an avoidance of mistake argument. If some truth about something is to be attained, all individuals must have unrestricted access to the views and opinions of others and enjoy freedom of self-expression. Established opinion may then be tested. The Millian view finds

its firmest legal expression in the famous "marketplace of ideas" propounded by Justice Holmes' dissent in *Abrams v US*[1]:

> When men have realised that time has upset many fighting faiths, they may come to believe even more than they believed the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas – that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.

This sort of approach confers a very wide – perhaps the widest – degree of immunity upon speakers in general, and certainly upon the media. There is no justification for interfering with speech that is possibly true even if highly prejudicial, nor with the intemperate or ill-informed.

A difficulty with this approach is that some downside has to be accepted. For the particular freely expressed view may be a positive instigation to do something very bad. What is to be done about that, and in what contexts, can be a very difficult question. What if *The Independent* publishes an editorial which says: 'Our New Zealand judges are so bad that the people should rise up and displace them all'? Even the Millian thinker has to concede that there are *some* limits to free speech, which explains why even Justice Holmes was prepared to accept war-time restrictions.

There are philosophical difficulties too with this approach. First, there is the assumption that somehow there is an objective truth just waiting to be 'discovered' by free debate. But frequently this will relate to issues of morality or politics, which are contestable. Secondly, even when a truly revealed idea comes forward, that is not to say that it will become somehow accepted simply because of its rational force. We 'accept' something for all sorts of quite diverse reasons.

The argument from democracy puts a very high value on deliberative democracy, and unencumbered political discussion. The value of free speech is that it is seen as perhaps the principal means by which the citizens of a democratic state can

acquire information about the functioning of government. This argument goes all the way back to the views of James Madison, the author of the First Amendment to the United States Constitution. In its simplest terms it is an argument for 'political truth'.[li]

It is only a short step from the political truth argument to a similar thesis with respect to 'justice'. Thus, for instance, in *R v Felixstowe JJ ex parte Leigh*, Watkins LJ described the court reporter as a person of vital significance in opening up the administration of justice to public scrutiny and comment.[lii] The European Court of Human Rights has a similar thesis: [liii]

> Whilst the mass media must not overstep the bounds imposed in the interests of the proper administration of justice, it is incumbent upon them to impart information and ideas concerning matters that come before the courts just as in other areas of public interest.

A difficulty with the political truth argument, and arguments for truth about justice, is that they are vulnerable to majoritarian decisions to restrict speech. Assume for instance, that our elected representatives close all criminal courts to the media and members of the public alike. That could not be resisted by a pure appeal to the argument from democracy or justice. That is why there is such a strong argument for entrenching free speech principles in bills of rights.

Turning now to the intrinsic values of a free speech principle – that is, intrinsic to individuals – these relate principally to self-determination or fulfilment.[liv] The interest is needed if individuals are to develop their capacities and realise their own individual potential. Expression is in this form an integral part of self.

This argument too has found judicial acceptance. Thus, famously, Justice Brandeis said in *Whitney v California*[lv]: 'Those who won our independence believed that the final end of the state was to make men free to develop their faculties'. The European Court of Human Rights early on emphasised the development of each individual in a freedom of expression context in *Handiside v UK*.[lvi]

A more sophisticated argument of a non-consequentialist variety has been advanced by Ronald Dworkin, which turns on the proposition that government should treat all its adult members as responsible moral agents. He says that government cannot:

> ... [insult] its citizens and [deny] their moral responsibility, when it decrees that they cannot be trusted to hear opinions that might persuade them to dangerous or offensive opinion. We retain our dignity, as individuals, only by insisting that no-one – no official and no majority – has the right to withhold an opinion from us on the ground that we are not fit to hear it and consider it.[lvii]

It cannot be confidently asserted at this time that there is any one basis on which we could all agree as to a 'free speech principle' yet clearly there is common ground that it *is* a very valuable principle, and that there ought to be profound distrust as to any regulation of speech.

Judicial free speech

Turning now to the position of the judiciary, in terms of general principle, there has to be a very powerful argument for truth in justice, just as there is for exposure of the truth in politics. Within the context of a case a judge may feel impelled to say that the particular operation of a particular statute in that case has to be observed, and he or she will give effect to that law in his or her judgment. But it is by no means unknown for courts of the highest authority, as well as trial judges, to point out that the statute is having some kind of untoward effect, or creating what most people would regard as an injustice. Whether to make any observations of that kind is a most difficult matter for a judge, but it has never been suggested that there is an absolute prohibition on such observations.

Illustrations in New Zealand include the following. In early 2010 *The Dominion Post*, in Wellington, reported that Judge Saunders had criticised a proposed 'three strikes law' during a sentencing hearing in the Christchurch District Court, noting it might have produced an unduly harsh outcome had it applied to the case

before him (although it appears the Judge may have misunderstood the precise application of the proposed law, which reveals a judicial hazard in commenting!).[lviii]

In *R v Pora*[lix] Thomas J used strong language to describe retrospective legislation increasing the minimum non-parole period for those convicted of murder involving 'home invasion'. In his judgment the offending provision was, amongst other things, 'repugnant to the rule of law'.[lx] In the end the specific provision fell victim to a conflicting general provision consistent with the presumption against retrospectivity.

In *Accident Rehabilitation and Compensation Insurance Corporation v Tarr*[lxi] the respondent had to cease employment because of incapacity. He was entitled to weekly compensation under accident compensation legislation. His entitlement was to be calculated by reference to his 'weekly earnings', which for Mr Tarr were defined by the legislation in this way:

> the earnings of that person other than earnings as an employee in the most recent income year ... last ended before the commencement of the period of incapacity as shown in an income tax return divided by the number of weeks in that income year.

During the previous year he had worked as a self-employed person for 41 weeks and as an employee for the remainder. His weekly entitlement therefore was determined by dividing his earnings over the forty one week period by fifty two, the number of weeks in the income tax year. The effect was to disregard eleven weeks' worth of earnings in the calculation, thereby, somewhat arbitrarily it would appear, reducing his weekly compensation entitlement. The judgment of the Court referred to the 'manifest injustice'[lxii] of this provision, but said the Court was bound to apply the 'clear statutory language'[lxiii] and there was 'no basis for the Court to look for a method of avoiding the injustice that result[ed]'.[lxiv]

If it is accepted that a judge can comment on the operation of the law within a case, on what basis is it to be said that the fundamental value of free speech is to be confined *outside* the courtroom? Recall that, on the argument advanced in this essay, the justification for restraint has to be a very powerful one: something that engages the total welfare of citizens.

The justification which seems to be advanced – if it is articulated at all – is that judges do not pronounce upon contested questions of public policy. But the fact of the matter is that judges do, in cases and outside them! For at least the last fifty years, and increasingly over the last decade or so, judges have been invited to give public lectures, write books, and put their views 'out there' much in the manner contemplated by Justice Holmes.[lxv] They may make fools of themselves; their arguments may be shown to be completely fallacious; and unquestionably there will be occasions on which the Executive is downright irritated by what has occurred. But none of these kinds of things would seem to come anywhere near the level required for something approaching a blanket restraint. And there is an obvious distinction between not doing something at all, under a *per se* restraint, and doing it, but rather badly or ill advisedly or without sufficient care.

The ability to respond

Speech is a form of communication. Today there are fewer utterances, even by authority figures, of a unilateral kind. There are still some very formal occasions on which what could be called a 'unilateral speech' is delivered. But in most contexts, speech is part of a continuing dialogue. This of course fits with the notions of why we have free speech at all: individual development; the advancement of democratic government; and the pursuit of justice. Judges who proffer up some kind of observations on 'the system' or 'the particular workings of the system' could not reasonably expect others not to be able to reply.

However, perhaps the most difficult matter for judges today is a perceived inability to respond to personal attacks. This is a difficult issue. Traditionally, judges have not responded at all to that kind of attack. If there is to be a response, the expectation is that the Head of Bench or in some circumstances the Attorney-General will respond on their behalf.[lxvi] In relation to particular judgments, the principle has always rightly been – and still is – that a judgment speaks for itself, for better or for worse.

But what of the situation in which neither the Head of Bench, nor the Attorney, nor the Bar sees fit to do anything? The profession could do much better than it does, in supporting the judiciary, as well as criticising it, but it is not often

heard from.[lxvii] The expectation then still seems to be that the judge will not respond. That is, that somehow the bile comes with the territory, and the judge must just swallow it. The ability of a judge to live with that fact varies from individual to individual. It has not been unheard of for judges to choose to leave the bench, *sub silentio* as it were, having been in a real sense hounded out of office.

One would have thought that better institutional responses might be found. For instance, when the Judicial Conduct Commissioner scheme was set up in New Zealand this author at one point suggested that judges ought perhaps be able to make a complaint to the Commissioner about what had been said about them, and that the Commissioner might have powers (not unlike some Press Councils) to at least require the publication of a correction. That particular suggestion got no traction. Indeed no explanation was offered for why it did not.

In any event, very much as a convention in New Zealand today the position is still that a judge is expected not to respond to personal criticism. There is in a sense an exception to this for what might be termed 'legal argument'. It is not unknown for a judge in a periodical, or text, to take issue with something that commentators have said as to the validity, or strength of an argument which had been adopted by a judge even in a case. No objection seems to be taken to that, presumably on the footing that this is simply part of an ongoing argument about what the law is on a particular point, and therefore of public benefit.

Conclusion

The older order, based on a 'convention' of a largely visceral nature, is clearly changing in New Zealand. The shape of a newer, and more nuanced order is still emerging. Quite where the lines will be drawn in the future are somewhat indistinct. But it may be thought healthy, and something to be encouraged, that more judges are prepared to speak out on the health of the justice system as such. There is no defensible principle which can be raised against them doing so. Personal attacks will likely always come with the territory, and can only realistically be repelled by institutional responses.

Word count: 7,401. (Word count: End notes – 1137.)

[i] A Judge of the Court of Appeal of New Zealand; sometime Professor of Law and Dean of Law in the University of Auckland, New Zealand.
[ii] *Ambard v A-G for Trinidad and Tobago* [1936] AC 322(PC) at 335.
[iii] Ibid.
[iv] Perhaps the best discussion of the Kilmuir rules and their demise is to be found in G R Rubin, 'Judicial Free Speech versus Judicial Neutrality in Mid Twentieth Century England: The Last Hurrah for the Ancien Regime?' (2009) 27 Law and Hist Rev 373.
[v] *Hosking v Runting* [2005] 1 NZLR 1 (CA) at [178].
[vi] *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 at [15].
[vii] A Butler and P Butler, *The New Zealand Bill of Rights Act. A commentary* (Wellington, LexisNexis, 2005) at 5.10.1; P Rishworth and others *The New Zealand Bill of Rights* (Melbourne, Oxford University Press, 2003) at 71.
[viii] Given the Bill of Rights' genesis in international law, part of its purpose is to 'affirm New Zealand's commitment to the International Covenant on Civil and Political Rights' (ICCPR): Long Title, international instruments are considered useful interpretaive aids in specific contexts: See the well-known example *Simpson v Attorney-General [Baigent's case]* [1994] 3 NZLR 667 (CA) where both the UDHR's and the ICCPR's provisions were an important feature of the finding that Bill of Rights breaches could attract compensation.
[ix] *Basic Principles on the Independence of the Judiciary* GA Res 40/32 and GA Res 40/146 (1995).
[x] Butler and Butler, above n vii at 5.12.2.
[xi] Ibid, 5.12.-3.
[xii] Section 3(a).
[xiii] Section 3(b) is more specific. See also *Ransfield v The Radio Network Ltd* [2005] 1 NZLR 233 (HC).
[xiv] Section 5.
[xv] Butler and Butler, above n vii at 5.12.3.
[xvi] S 3.
[xvii] See the Constitution Act 1986 and the New Zealand Bill of Rights Act 1990, s 3(a).
[xviii] S Smith 'Kneejerk reaction', *The Dominion*, (17 November 1999) ed. 2, p. 12.
[xix] The address has been reproduced as Dame Sian Elias 'Blameless Babes' (2009) 40 VUWLR 581.
[xx] Supreme Court Act 2003, s 18(1).
[xxi] Elias, above n xix at 594.
[xxii] Ibid, 593-594.
[xxiii] Reported in R Tiffin, 'Irate Power tells Chief Justice to butt out of policy' *The New Zealand Herald* (New Zealand, 17 July 2009) A2. It should be added that this was not the first time the Chief Justice had come under political fire. In 2003, the then Deputy Prime Minister in the Labour administration, the Hon Dr Michael Cullen sharply reacted to another address by the Chief Justice which is now published as 'Sovereignty in the 21st century: Another spin on the merry-go-round' (2003) PLR 148. Dr Cullen warned against the Judges developing new limits on the power of Parliament and 'the confusion that can be caused by an activist Judge'. See his comments 'Parliamentary Sovereignty in the Courts' (2004) NZLJ 243 and 'Parliament: Supremacy over Fundamental Norms?" (2005) 3 NZJPIL 1.
[xxiv] Reported in New Zealand Press Association "Chief Justice crossed line on prisons – Key" *New Zealand Herald Online* (New Zealand, 20 July, 2009) <www.nzherald.co.nz>.
[xxv] NewsTalk ZB, July 18 2009.
[xxvi] (29 July 2009) 656 NZPD 5249.
[xxvii] Reported in G Armstrong 'Lawyers rally behind chief justice' *Sunday Star Times* (New Zealand, 19 July 2009) A2.
[xxviii] Ibid.
[xxix] Tom Scott, *The Dominion Post* (22 July 2009) at B5.

[xxx] Petre Bromhead, *The New Zealand Herald* (Sunday 19 July 2009) at 54.
[xxxi] Sir William Young "The Effects of Imprisonment on Offending: A Judge's Perspective" [2010] Crim L R 3.
[xxxii] The procedure relating to this ballot process enables private Members' Bills (from whatever party) to be 'drawn' and entered onto the Parliamentary Order Paper, and to proceed through the House of Representatives, if they can gain support.
[xxxiii] Reported in 'Daughter's status not relevant, says judge' *Taranaki Daily News*(New Zealand, 24 August, 2009) 4.
[xxxiv] M Palmer 'New Zealand Constitutional Culture(2007) 22 NZULR 565.
[xxxv] Ibid.
[xxxvi] Ibid, 576.
[xxxvii] Ibid, 586.
[xxxviii] Reported in J McManus 'Special Report: Judging the judges' *The Independent* (New Zealand, 21 May 2009) 7.
[xxxix] Ibid.
[xl] Ibid, 8.
[xli] Ibid, 8.
[xlii] For a recent discussion of when an Attorney-General should comment, see J Plunkett, 'The role of the Attorney-General in defending the judiciary' (2010) 19 J Judicial Administration 160; and J Priestley, 'Chipping Away at the Judicial Arm' (2009) 17 Waikato L Rev 1.
[xliii] Letter from John Marshall QC, President New Zealand Law Society to The Rt Hon Dame Sian Elias, Chief Justice of New Zealand regarding *The Independent* – "Judging the Judges" article (26 May 2009).
[xliv] *Siemer v Paragon Oil Systems Ltd* (2001) 9 NZCLC 262, 693 (HC).
[xlv] www.stiassny.org.
[xlvi] [2007] NZCA 581 at [31].
[xlvii] F Schauer, *Free Speech: A Philosophical Inquiry* (Cambridge University Press, 1982).
[xlviii] I am indebted to E Barendt, *Freedom of Speech* (Oxford, Clarendon Press, 1985); see also T Campbell, 'Rationales for Freedom of Communication' in T Campbell and W Sadurski (eds.), *Freedom of Communication* (Dartmouth, Ashgate, 1994).
[xlix] See C L Ten *Mill on Liberty* (Oxford, Clarendon Press, 1980).
[l] *Abrams v US* (1919) 25 US 616 at 630.
[li] This sort of notion has been prominent in Canadian jurisprudence: see *Edmonton Journal v Alberta* (1989) 64 DLR 4th 577 at 607-08; and *Dagenais v Canadian Broadcasting Corporation* (1995) 1 20 DLR 12 at 36-37.
[lii] *R v Felixstowe JJ ex p Leigh* [1987] 1 All ER 551.
[liii] *Sunday Times v UK* (1979-80) 2 EHRR 245 at 280.
[liv] See T M Scanlon, 'Freedom of Expression and Categories of Expression' (1979) 40 University of Pittsburgh Law Review 519 at 544-45.
[lv] *Whitney v California* (1927) 274 US 357 at 374.
[lvi] *Handiside v UK* (1979-80) 1 EHRR 737.
[lvii] R Dworkin *Freedoms of Law: The Moral Reading of the American Constitution* (Cambridge, Harvard University Press,1996) at 200.
[lviii] J Hartevelt 'Judge's swipe at '3-strikes' law' *The Dominion Post* (21 January 2010) 5.
[lix] *R v Pora* [2001] 2 NZLR 37 (CA).
[lx] Ibid, at [123].
[lxi] *Accident Rehabilitation and Compensation Insurance Corporation v Tarr* [1996] 3 NZLR 715 (HC).
[lxii] Ibid, at 720.
[lxiii] Ibid, at 720.
[lxiv] Ibid, at 720.
[lxv] At the time of writing this essay, I am involved in an appeal relating to tax avoidance. I note that in 2005 Lord Hoffman published an article criticising certain judgments of his colleagues in the House of Lords (L Hoffman 'Tax Avoidance' (2005) 2 BTR 197). Does it

make a difference that this grew out of a lecture delivered on the occasion of the 25th anniversary of the Centre at the Centre of Commercial Law Studies? Of interest here also is the trend to publishing collections of lectures given by senior judges: see, for example T Bingham, *The Business of Judging. Selected Essays and Speeches* (Oxford University Press, 2005)

[lxvi] The current New Zealand Cabinet Manual provides at para 4.8: 'The Attorney-General is the link between the judiciary and executive government. The Attorney-General recommends the appointment of judges and has an important role in defending the judiciary by answering improper and unfair public criticism, and discouraging ministerial colleagues from criticising judges and their decisions.'

[lxvii] See J Priestley, above at n xlviii.