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*Sian Elias

I am delighted to have this opportunity to address you today. In a week I step down as Chief Justice, just a month short of 20 years since being appointed to the office. Apart from the few remarks I intend to make at my final sitting in Wellington on Friday, these remarks are the last I shall make as Chief Justice. I am the presiding judicial officer in the newest New Zealand Court, the Supreme Court. It is entirely fitting that my last obligation should be to acknowledge you who serve in the oldest office to exercise judicial authority in New Zealand.

I thought on this occasion I might reflect on the nature of the New Zealand legal order and what is special in it and in particular explain the connections between the court I sit in and the work you do as Justices of the Peace. So I start with the background to the New Zealand legal order and what was hoped to be achieved by the setting up of the Supreme Court.

I doubt that ever any country was as consciously founded on expectations of law as ours was. The speeches at Waitangi were particularly concerned with questions of law and justice. The lawless Europeans who had come to form new lives in the new world soon discovered, as all those on the frontier do, that they needed law. Once settled, they hankered for the legal stability that enabled them to prosper and have their contracts enforced.

The New Zealand legal order was adventurous in much of its early ideas. As it had to be. The constraints of tiny societies with few lawyers meant that the legal system of England could not be transplanted entirely. Indeed administrators were instructed to look in the framing of laws beyond England to the laws of comparable jurisdictions. In New Zealand we were told to avoid "slavish imitation" of English laws.

Some early legislation consciously set out to reflect values acceptable to Maori, such as through the substitution of fines paid to the victim (a closer

rendering of Maori notions of utu) for imprisonment (which Maori thought to be barbaric).[1]

Because society was small and not wealthy, the laws framed met the social conditions. The Family Protection Act 1908, for example, was a response to local needs and had no parallel in England. (It was soon copied in Canada and Australia because it met the needs of their small societies too). The courts, too, were able to act according to equity and good conscience rather than the strict letter of the law. As a result, in New Zealand and in Australia, we had a developed local case-law which examined whether bargains were unconscionable.

Some of these innovations, possible when New Zealand was isolated and tiny, retreated after the First World War brought a sense that we were part of the British Empire and as the Privy Council asserted more authority over New Zealand law. As was understandable in England, a great and prosperous trading nation, the interests of certainty in commerce meant that some of the practical attempts in New Zealand to do justice were not acceptable. Our law became more English.

In 1904, Sir Robert Stout advocated abolition of appeals to the Privy Council. It was a long time coming after that.

Stout was not out on a limb here. Impatience with what was seen as the yoke of the Privy Council and its remoteness and lack of understanding of local conditions was expressed in Canada and Australia, as well as in New Zealand.[2] Sir Robert Stout was particularly irritated by a number of reversals of the New Zealand courts in the late 19th century.

In 1903, there was mutiny from the local judiciary in response to a decision of the Privy Council relating to Maori land. Stout CJ summoned a sitting of the Court to record a protest. He acknowledged in his remarks, published in the Privy Council Cases, that "a great Imperial judicial tribunal sitting in the capital of the Empire, dispensing justice even to the meanest of British subjects in the uttermost parts of the earth, is a great and noble ideal".[3] But he pointed out that if the tribunal did not understand the local laws it could work real injustice. Of the Privy Council he said that "it has shown that it knows not our statutes, or our conveyancing terms, or our history".[4]

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* The Rt Hon Dame Sian Elias, Chief Justice of New Zealand.

1 Native Exemption Ordinance 1844 7 Vict 18, cl 9.

2 For New Zealand, see *Wallis v Solicitor-General, Protest of the Bench and Bar* (1903) NZPCC 730 at 732–744.

3 At 746.

4 At 746.

In advocating abolition of appeals to the Privy Council, Sir Robert Stout suggested that there should be an Australasian final court of appeal but that hope was one he recognised was not possible after Federation and New Zealand's unwillingness to join up. These stirrings of independence were boosted by the development of law as a subject of university study. The first professor at Victoria University College, John Salmond, had originally practised law in Temuka but in 1906 he arrived at Victoria University College from Adelaide where he had held a chair in law. He was influenced by American law teaching, which was more advanced than legal education in England. In the early years of the 20th century a great deal of innovation occurred in New Zealand law.

The First World War seems to have brought with it for New Zealand a sense of participation in empire. There was loss of earlier innovation. Calls to do away with appeals to the Privy Council subsided into ineffective grumbling. The notion of a single English common law meant that the ability to develop the common law in accordance with local conditions, including local statutes, was necessarily constrained and with it, the distinctiveness of our law.

Political emancipation in the 1940s led to calls for separation from England in law too. Canada broke away in 1949.[5] Australia in constitutional matters in the 1960s,[6] but not in general law in all states until the mid-1980s.[7] New Zealand remained an outlier for a lot longer despite the cost and trouble of mounting appeals to England and the inevitable lack of familiarity with New Zealand conditions. Indeed, there were deep suspicions, substantiated by senior English judges, that the Privy Council did not go into appeals thoroughly.

In New Zealand in 1956, a young lawyer, Robin Cooke, later to become President of the New Zealand Court of Appeal, expressed publicly his impatience with "unquestioning compliance" with English case law.[8] It was not however until the late 1980s, the decade in which Robin Cooke joined and later led the Court of Appeal, that change started to pick up pace. By then, the Privy Council had bowed to the inevitable and had accepted that the idea of a single common law was an impossible dream and that the common law itself benefited from difference, at least in cases

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5 An Act to amend the Supreme Court Act SC 1949 c 37.

6 Privy Council (Limitation of Appeals) Act 1968 (Cth); and Privy Council (Appeals from the High Court) Act 1975 (Cth).

7 Australia (Request and Consent) Act 1985 (Cth); Australia Act 1986 (UK); Australia Act 1986 (Cth); Australia Acts (Request) Act 1985 (NSW); Australia Acts (Request) Act 1985 (SA); Australia Acts (Request) Act 1985 (WA); Australia Acts (Request) Act 1985 (Qld); Australia Acts (Request) Act 1985 (Vic); and Australia Acts (Request) Act 1985 (Tas).

8 Robin Cooke "The Supreme Tribunal of the British Commonwealth?" [1956] NZLJ 233 at 235.

which did not impact on British standards in matters of commerce.[9] In the end, the Achilles heel of the Privy Council was its perceived "parochialism".

With the social changes that occurred in New Zealand and the movement of law in the administrative state and under reforming social legislation such as the ACC legislation and the New Zealand Bill of Rights Act,[10] it was clear that the appeals were an anachronism that could not continue. Too much of our law was neglected because the cases able to be taken to London generally were commercial cases.

AP Herbert once said that while the provision of one appeal is "reasonable precaution", two appeals "suggests panic".[11] When in New Zealand 14 years ago we decided to remove appeals to the Privy Council, there were powerful voices for not panicking. In the end they did not prevail and the New Zealand Supreme Court was set up in 2004. It was set up with the express purpose of establishing a court responsive to New Zealand conditions and history. New Zealand has been a latecomer in establishing a final court and it is early days for us yet. But it seems to me from the experiences in Canada and Australia that such establishment inevitably puts a different stamp on the legal order, even if the change does not come about overnight. That has been the experience in both Canada and Australia.

A final court is freed to concentrate on the shape of the legal order. That means it is a constitutional court, even if it does not operate under a "Capital C constitution" and our constitutional tradition is distinct from other countries. Explaining it is a principal responsibility of a final court of appeal.

The Court is still very recent. It also differs from Australia and Canada in operating within a constitution that is only partly written and is highly contestable and in which judicial function is vulnerable. There is no established constitutional impediment to the devolution by Parliament of legislative and judicial powers to the Executive.[12] Much rides on habits and traditions including the rule of law and the separation of powers recognised in the common law. An established court operating with a mature jurisprudence and under a secure constitutional position may be more confident of its mission to develop law to suit the circumstances of its society.

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9 See for example *Takaro Properties Ltd v Rowling* [1987] 2 NZLR 700 (PC); and *Re Goldcorp Exchange Ltd (in rec)* [1995] 1 AC 74 (PC).

10 Accident Compensation Act 1972 (repealed); and New Zealand Bill of Rights Act 1990.

11 AP Herbert *Look Back and Laugh* (House of Stratus, Cornwall, 2001) at 128.

12 SA de Smith "Delegated Legislation in England" (1940) 2 West Pol Q 514 at 514.

Because it was new, the Court had no established standing with the public. The statute setting up the Court expressed the hope that the Court would allow New Zealand law to be developed with an understanding of New Zealand conditions, traditions and history,[13] but there was also scepticism, particularly among influential sections of the commercial bar. There was suspicion of judicial overreaching – which led to a reminder in the statute that New Zealand is committed to the sovereignty of Parliament as well as the rule of law.[14]

How are we doing? I think we have made solid progress in the last decade and a half. But it is clear that establishing an institution like this is a work of many years.

What does this round up have to do with your work as Justices of the Peace?

I think quite a lot. You are a critical part of the institutional response by which law is administered in New Zealand - and that is whether you undertake court work or the critical ministerial work so essential to the system.

I know that the ministerial work has assumed even more importance in recent years with the anti-money laundering background that looks set to continue to require more formality and record than we have been used to.[15] The increased responsibilities you shoulder and the demands increasingly placed on you by the public have properly led to emphasis on training and better accessibility. The Federation and the Associations are in the middle of substantial restructuring to ensure that the services provided by Justices of the Peace are accessible and in the modern language of government, sufficiently agile to meet the needs of the men and women in our society who need to bring their affairs under law and to obtain the shelter law provides.

These adaptations are properly seen as part of the continuous service provided by Justices of the Peace in New Zealand since the Governor of New South Wales probably unlawfully authorised Thomas Kendall to act as a Justice of the Peace well before acquisition of British sovereignty. After 1840, the position was swiftly regularised. As you know, Justices of the Peace have been a constant in the New Zealand legal order ever since.

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13 Supreme Court Act 2003 (repealed), s 3. Its successor statute, the Senior Courts Act 2016, does not repeat this language.

14 Supreme Court Act 2003 (repealed), s 3(2).

15 Brought about by the introduction of the Anti-Money Laundering and Countering Financing of Terrorism Act 2009.

Although the evolution of the professional magistracy inevitably changed the role significantly in practice, if not in strict point of jurisdiction, it would be rash to assume there will not be a swing back. The reason for that is the demonstrated vitality of lay participation in the administration of justice.

The rule of law, a foundation of the New Zealand constitution, is not a rule of rules. Nor does it rest on the work of the appellate courts. It has to be demonstrated every day in the first instance courts in ensuring that the great coercive judicial power of the state is exercised by judicial officers who are conspicuously independent and who act fairly, reasonably and with patience and courtesy in all they do. Those Justices of the Peace who sit in court demonstrate that judicial obligation in what they do. I want to come on to say something about the special contribution lay justices make in that setting. But what is done in court, though very important, is only the tip of the iceberg in terms of what is necessary to secure the rule of law.

The English legal historian, John Baker, once pointed out that there is a whole world of law that never sees the inside of the courtroom.[16] If not for a culture of "law-mindedness", law would be nothing more than what is observed to keep out of trouble, but what we see all around us is that is not true. People believe in justice, they believe in equality of treatment before the law. If they ever lose that belief, then nothing that is done in the courts will save the rule of law.

People will not retain that sense of law-mindedness if law is seen as remote or the preserve of lawyers and judges alone. Lay participation in the administration of justice is demonstration that law belongs to, and matters to, all of us. That participation is something all of you bring, whether you undertake judicial or ministerial work. The ministerial work enables society to function civilly and deliberately by providing the process any organised society needs. Taking declarations, witnessing documents and issuing summonses, being accessible in the community for all who need help, is as important for our legal system and the administration of justice as the conduct of criminal trials and the exercise of appellate functions. But it is more.

It is demonstration that law is not remote. It shows community ownership. Contact with Justices of the Peace is often the only direct interaction many people will have with our system of justice and its values. That is why in your work you are critical in providing confidence in the legal order and you affirm its practical importance in the lives of everyone in the

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[16] John Baker "Why the History of English Law has not been Finished" [2000] CLJ 62 at 78.

community. You are the demonstration of community law-mindedness in action.

In the end, what marks any community or any nation is the sharing of common values. We do not talk much about values today. The office of Justice of the Peace is a demonstration of community values. You who are appointed to this office have the respect of the communities you serve. Because of that, the community itself not only participates in the application of law but can have confidence that it will remain grounded. In your lives you are example and bridge to understanding. You stop the system being seen as aloof from real life preoccupations. You provide essential glue for the rule of law.

I am delighted that my last speaking engagement as Chief Justice has been at this conference. It allows me to say how much I have valued your work in mine – not only as Chief Justice but as a lawyer and judge before then. It has allowed me to reflect on the legal order as a whole and to remember that the pleasure I have had in the privilege of serving for so long as head of the judiciary in New Zealand has been because it is the work of many hands and the Chief Justice is a small part of the great tradition of service which is your tradition also.

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