# ADDRESS GIVEN TO THE ANGLO-AUSTRALASIAN SOCIETY

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## *Superior Courts in Transition*

Sian Elias[1]

Two of the three jurisdictions with which this gathering will be most familiar, the United Kingdom and New Zealand, are going through significant restructuring of their final courts, though prompted by quite different considerations. In both countries too wider reform proposals are afoot which touch on the place of the judiciary in our constitutional balances. In the United Kingdom and in New Zealand changes to the way in which we appoint judges and to the way in which they intersect with the Executive are under action. In New Zealand there is a Bill establishing procedures for Parliamentary removal of judges and for investigating complaints of misconduct. In both countries we are seeing changes to the way the judiciary is led.

In Australia on the other hand we celebrated in October last year 100 years of the High Court.

I want to suggest that in all three countries, including Australia, the position of our final courts is changing - and that the changes arise from developing community expectations of law and impartiality in its delivery. Because we share so much common heritage and because we look to each other for help in considering the difficult questions final appeal throw up, change in one jurisdiction cannot help but create ripples in the others.

I should start with the substantial changes in my own jurisdiction. The Supreme Court Act 2003 has the declared purpose of "establishing within New Zealand a new court of final appeal comprising New Zealand judges". That overall purpose is said in the enactment to be:

(i) to recognise that New Zealand is an independent nation with its own history and traditions; and

(ii) to enable important legal matters, including legal matters relating to the Treaty of Waitangi, to be resolved with an understanding of New Zealand conditions, history, and traditions; and

(iii) to improve access to justice.

With those consciously nationalistic objects, the Act ends appeals to the Judicial Committee of the Privy Council from decisions of New Zealand courts. It is clear that the Act is not intended to result in any shift in the constitutional balances

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between the courts and the legislature. The purpose provision goes on to provide

> Nothing in this Act affects New Zealand's continuing commitment to the rule of law and the sovereignty of Parliament.

This last provision, invoking the duality described by Dicey in his *Introduction to the Law of the Constitution*, is a departure from our traditional reticence to spell out the features of our unwritten constitution. By contrast, the New Zealand Constitution Act 1986 rather flatly makes provision for the legislative, executive and judicial functions without attempting any description of their relationship or scope. It provides simply that the New Zealand Parliament continues to have "full powers to make law for New Zealand".

It is possible that in the reference to the rule of law and Parliamentary Sovereignty, we are in New Zealand seeing the beginning of an attempt to address and capture in writing some of the fundamental elements of our constitution. Whether there is much in the way of shared understanding what these much disputed concepts mean may be doubted.

The references to the rule of law and parliamentary sovereignty evolved out of a suggestion to the Select Committee considering the Bill which is worth remembering. It was made by a respected legal practitioner and was supported by two parties represented on the Committee. The proposal would have affirmed the importance of certainty in laws and law was firmly identified as legislation enacted by Parliament.

The role of the Supreme Court under this proposal was to apply "the established and accessible laws of New Zealand" to disputes in what was expressed to be "reaffirmation" of an explicit separation of powers. In particular, it was proposed that the purpose of the legislation should "reaffirm the principle that substantial issues of public policy in New Zealand and the establishment of new principles to govern the duties of private persons should be decided by the outcomes of Parliamentary process and not by judicial legislation".

It is clear that the genesis of this proposal was an uneasiness about the role of the judiciary and the future directions it may take. In the United Kingdom similar concerns about judicial aggrandisement and activism are being aired in the debate about the future of the Appellate Committee of the House of Lords.

In New Zealand, the risks are thought by some to be amplified by what are seen to be perhaps ambitious references to New Zealand culture and traditions in a manner suggestive of conscious break with the past.

This is a much more doubtful start than the High Court had in Australia. Contemporary references in 1903 acknowledge the Court as the "keystone" in the arch of the constitution.

In New Zealand one of the matters to have emerged from the rather bruising debate we have been through in the establishment of the Supreme Court is that there is in New Zealand in 2004, a general suspicion of the role of the courts and uncertainty about the outlines of our constitution. Such matters need to be addressed. At root, these are questions about legitimacy and the nature of law. They suggest that we cannot assume shared understandings and values in the constitution and about the nature of law.

Straws in the wind suggest that there is no reason to think that this is a New Zealand quirk. Actual or proposed ouster clauses in immigration cases, purporting to exclude the supervision of the general courts, have raised concerns for fundamental constitutional principle in the United Kingdom and in Australia.

Separation of powers arguments are central to the debate about removal of the Law Lords from the House of Lords. It must be acknowledged that in Westminster systems we have never had a strict division. I am not sure however that the move towards greater separation is convincingly countered in the manner suggested by Lord Irvine[2] by reference to the "pragmatic" nature of the English constitution which has traditionally recognised no such purity. The problems increasingly being identified are not confined to the mix of legislative and judicial roles which risks disqualification of judges who participate in parliamentary debates. Perhaps more important is the risk in the close association between judges and members of the executive, which follows from the Westminster system. In New Zealand some of those opposed to the establishment of the Supreme Court cited the smallness of Wellington. Some might think that Westminster is even more of a village.

The fact of the matter is that community expectations and perceptions of what is appropriate may well have shifted. Perhaps that has been through greater familiarity with the arrangements adopted in other jurisdictions which share the same roots but which have moved to more explicit constitutional arrangements. Perhaps in a modern democracy our citizens prefer to understand the institutions which exercise the authority of the state in their name and are no longer content with systems which cannot be explained on a principled basis because they have arisen "pragmatically". Maybe it is no longer enough that those of us who are initiates in the system have confidence in it.

I think the debate about these important aspects of our constitutions is very much to be welcomed. It demonstrates that the values and institutions which are fundamental to our system matter to everyone. At least in my country we do not come to this national discussion very well prepared. There is a risk that if

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[2] Irvine Nov 2001 Hansard

reforms are rushed we will overlook some important safeguards upon which there is little current understanding.

At the time of the Great Depression the judges in New Zealand offered to take a pay reduction. Parliament turned down the offer on the basis that it would undermine judicial independence to go down that path. Now, I do not suggest that was a very sensible view – after all, similar reductions in pay had been taken by Judges in the United Kingdom and I think in Australia. What is striking is that judicial independence as a plank of the constitution was understood to be engaged and indeed that it carried the day. It is hard to be confident that the principle of judicial independence would even surface as a consideration today. A little over ten years ago in New Zealand when the government restructured judicial pensions to bring judges into line with the system adopted for public servants, I do not think the question of how the proposal impacted upon judicial independence was raised outside judicial circles. Similar proposals are now current in Australia. It will be interesting to see whether they receive any wider public consideration. It will be interesting to see whether they are thought to raise points of constitutional principle under the constitution.

Australia's constitution may have arisen from the imperatives of federalism but, across the Tasman, it is not so much the way the High Court holds the balance between state and federal power that is of interest, but how it holds the scales between the state and the individual. In reflecting on the first hundred years of the High Court, Chief Justice Gleeson has expressed the belief that the Australian people understand that in a context between citizen and government, the High Court holds the scales of justice evenly. It is not clear to what extent the importance of this role is widely appreciated in countries like the United Kingdom and New Zealand where separation of powers is not an explicit plank of the constitution.

New Zealand shares with the United Kingdom its unwritten constitution, the product of our combined history and in particular the 17th century struggles between Parliament and the King. The accommodations reached then have continued to evolve, as any living constitution must evolve, whether written or unwritten. Maitland was of the view that the constitution of a country can be discerned only for a particular time and only through its general law.[3] So too, Bagehot, writing of the English constitution, speaks of the:

> . . . great difficulty in the way of a writer who attempts to sketch a living Constitution – a Constitution that is in actual work and power. The difficulty is that the object is in constant change.

If such writers have difficulty, it is hardly surprising that the rest of us flounder and dispute. I do not think the answer is necessarily a written constitution in a state untroubled by federal considerations. Even in such states it is impossible to

[3] Maitland *The Constitutional History of England* (1963 ed) 538.

describe the constitution by the text alone, as Australia has found. Neither is it good enough if the constitution is left as the preserve of an elite. In New Zealand I think there is a risk we may pay too high a price for the opaqueness of our institutional balances. If it is difficult to identify what matters and why, it is difficult to see when those values are under threat.

In New Zealand we have been remarkably uncurious about our constitution. What that means is that when we do come to consider reforms touching upon it, we are not well prepared. We have little shared vocabulary and we often do not recognise the principles we are playing with. Nor are these easy concepts to get across.

A newspaper editorial in New Zealand described the Bill to set up the Supreme Court under the heading "Constitutional Shenanigans". It said that under the "new judicial set-up" we could forget about the "sanctity of contract". Instead the common law, described as the "bedrock of the civil court system since the start of British settlement in New Zealand" would be steadily replaced by "Judge-made law". Another newspaper at about the same time attacked the Court of Appeal for applying in a decision what was described as a "common law intrusion" alien to the New Zealand tradition. It is really hard to know where to start when confronted with such gulfs in understanding.

It is not clear whether those who supported the amendment to the Supreme Court Bill to prevent "substantial issues of public policy" and "new principles to govern the duties of private persons" being adopted by courts would do with the common law. As Professor Goode has pointed out in his 1998 Hamlyn Lectures, all modern commercial security devices have been the product of Judge-made law, adopted in response to commercial need. Professor Corbin has reminded us that any comparative historical survey of contract law will free us from what he describes as the "illusion of certainty; and from the delusion that law is absolute and eternal". Of course all Judges are conscious of the need for stability and the desirability of certainty, but as Benjamin Cardozo noted once:

> The picture of the bewildered litigant lured into a course of action by the false light of a decision, only to meet ruin when the light is extinguished and the decision overruled, is for the most part a figment of excited brains.[4]

Simplistic assumptions about what it is that courts do are not easily countered. What courts do is complex - and difficult – but we who are involved in law have not perhaps done well enough to make the work more accessible to the public and to take pains to explain what is done in their name. At times of constitutional reform we pay the price.

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[4] Benjamin Cardozo *The Growth of the Law* (1924) p 122.

The New Zealand discussion about ending appeals to London revealed a good deal of suspicion about the New Zealand judiciary and its capacity for "activism". As indicated by the criticisms I have quoted, some of that criticism seems to me to be based on a misconception about the role of the judge in a common law system. There is nothing particularly new in such misconception. Cardozo in 1924 described suspicion and hostility towards judges in the minds of laypeople, based on the assumption that the role of the judge is simply to apply statutes to the facts, but in New Zealand our reliance on statute law (a feature common to many former colonies because of early lack of legal infrastructure) has made us particularly vulnerable to questions about legitimacy.

I think the legal system in New Zealand has gained a great deal from our familiarity and acceptance of statutes. We have had a less suspicious view of legislation than perhaps has been the case in both the United Kingdom at some periods and Australia and we have a lively appreciation of the difference between adjudication and legislation. The application and construction of the statutes which in our jurisdiction express much of the original common law is a high order judicial task which draws heavily on the methodology of the common law as well as its concepts. To suggest that judges mechanically apply statutory rules to facts is a caricature which is mischievous.

The existence of rights of appeal to the Judicial Committee of the Privy Council clearly provided comfort to some who regard the New Zealand judiciary as too adventurous. The basis they have for that view is not particularly clear. The New Zealand Court of Appeal has been overturned in about the proportions to be expected of further appeal. I like to think that in some cases where that has been the result on an important point of legal principle, the same outcome would have been achieved by further appeal within New Zealand. The perspective available to a final court may be clearer than that available to a busy intermediate appeal court – that is after all one of the main reasons for having two tiers of appeal. In some cases there is no clearly correct answer. Differences between the New Zealand Court of Appeal and the Privy Council may reflect different perceptions of the needs and expectations of the communities they serve. Examples from New Zealand arguably include *O'Connor v Hart*, *Bottrill*, and (more controversially) *Lesa.* Sir Anthony Mason has described some divergence between the High Court and the House of Lords as being attributable to different intellectual preferences.

The extent to which the establishment of a Supreme Court will accelerate divergence between our legal systems is one of the big questions which hangs over our reform. What is clear from the anxieties that have attended the creation of the Supreme Court is that for the new Supreme Court in New Zealand divergence – both from English law and from existing authority - will have to be carefully explained. That is as it should be. It may not lead to brevity in judgments.

Which leads me to make a comment about the High Court of Australia. I know there are those who think that the length and number of the opinions in that court is a barrier to digestion. I disagree. I recently had occasion to write a paper on the work of the High Court in criminal adjectival law. No one warned me in advance that the case law on this topic represents a huge proportion of the output of the Court in the last 20 years. I emerged with renewed respect for the way a great court conscientiously discharges its heavy responsibilities in criminal justice; directly confronting hard points. The fact is that composite opinions, skeleton judgments, suppression of dissenting judgments or diverging opinions - the responses of what Chief Justice Gleeson has dubbed "managerial justice" - are not a fit response for an ultimate appeal court.

In considering the extent to which the common law now diverges in different jurisdictions, it is worth remembering that the common law has never been entirely the same in all jurisdictions to which it attached with colonization. In New Zealand, the laws of England, both statutory and common law, applied under the English Laws Application Act only "so far as applicable to the circumstances of New Zealand". Australia had similar colonial legislation. It was modified by the pre-existing custom of local populations and it has continued to evolve distinctly. Why it must evolve was explained by an American judge in a case decided in Illinois at about the time the legal system was first established in New Zealand:

> If we are to be restricted to the common law, as it was enacted at 4th James, rejecting all modifications and improvements which have since been made, by practice and statutes, except our own statutes, we will find that system entirely inapplicable to our present condition, for the simple reason that it is more than 200 years behind the age.

The common law received into New Zealand or Australia or the United States was not those cases decided at the date of reception in England or at the date on which local law was removed from UK appellate oversight. It is the common law as a system. As Walter Schaefer, Benjamin Cardozo, Owen Dixon and many others have identified, the outstanding characteristic of the common law is its capacity for growth and its ability to slough off outmoded precedents. The common law is a principle of change.

That does not mean our laws are likely to diverge dramatically through judicial decision. The experience in Australia and Canada does suggest that some conformity may be lost over time, but the common law heritage pulls together. More often than not when decisions in novel cases have to be measured against the principles identified in comparable jurisdictions, it is likely that we will agree. Where there are differences between us it will usually be because there are reasons to go different ways, usually legislatively led. Sometimes the departure will be prompted by special local conditions. Such expectation of responsiveness

is, after all, one of the purposes expressed in the Supreme Court Act with its reference to New Zealand's own "conditions, history and traditions".

Sometimes, as was the case in Australia when the High Court in *Parker v Queen*[5] declined to follow *DPP v Smith* [1961] AC 290, the divergence will result from a preference for other reasoning. Very often a preference for different reasoning may be expressed as arising out of contemporary national values. Thus in *Azzopardi v the* Queen[6] the majority (comprising Gaudron, Gummow, Kirby and Hayne JJ) were of the view that "the accusatorial character of the criminal trial has become deeply embedded in the common law of Australia, whatever that law might have earlier provided". As a result, they held (overturning what McHugh J described as 200 years of settled practice) that it was not open to a judge to tell a jury that the refusal of an accused to provide an answer within his knowledge was of evidential significance.

The expression of such differences is itself critical to the continued vitality of the common law. The former Chief Justice of New Zealand, Sir Thomas Eichelbaum, once suggested that the continuation of appeals to the Privy Council from New Zealand may have resulted in some self-inhibition by the New Zealand courts because of unwillingness to court reversal on appeal. It is impossible to know whether that was indeed so but I doubt it. I do think however that the ending of appeals to London may mean we take more notice of the reasons for decision in Australian and Canadian cases even where there is English authority in point.

If so, we will benefit from the dialogue between the top common law courts said by Lord Bingham to enrich the common law. That may be politeness, but I do not think it is just that. The freedom to differ between jurisdictions is a source of strength in the common law in much the same way as Lord Reid and Benjamin Cardozo believed the dissenting judgment in our system to be a source of strength. Differences make us more rigorous in method and encourage us to speak truth plainly.

Observance of the discipline of common law method and close attention to the reasons which have persuaded in other jurisdictions is also good practice for courts which must demonstrate the legitimacy of their decisions. Cases which are considered by leave at the highest appellate level are genuinely hard. Because in New Zealand appeals have gone by right to the Privy Council if the amount in issue has been $5,000, many of the cases considered at final appeal level have been disputes which have been relatively straightforward. In Australia, Justices Kirby and Heydon have both noted that since leave has been required for all appeals to the High Court, the proportion of criminal and immigration cases has increased dramatically. That pattern may well be followed in New Zealand.

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5 (1963) 111 CLR 610

6 (2001) 205 CLR 50 at 65.

Very few criminal cases in our history have been granted special leave to appeal to the Privy Council. Very few family cases have been eligible to go to London as of right. There are areas of law of great importance to New Zealanders which have not had the benefit of second tier appeal. I have elsewhere suggested that has been the real cost to us of retention of appeals to the Privy Council. It is damaging to the integrity of the legal system because it is the role of a court of final appeal to maintain overall coherence. As Aharaon Barak, Chief Justice of Israel, has identified, a legal system must be headed by a court which has a sense of the scope and reach of the whole law:

> The development of a specific common law doctrine radiates into the entire legal system. The interpretation of a single statute affects the interpretation of all statues. A legal system is not a confederation of laws. Legal rules and principles together constitute a system of law whose different parts are tightly linked.[7]

The further advantage we can hope to obtain from the establishment of a final court of appeal in New Zealand is better public understanding through its visibility and accessibility. I started off this evening with the bewildering obscurity of our constitutional arrangements, a position we share with the United Kingdom. That obscurity can be contrasted with the position of the High Court of Australia. It is visible and accessible, as our final court has never been. It is open to the public and visited by hordes of school children and visitors every day.

I doubt whether many New Zealanders, if asked before the government policy on ending appeals to the Privy Council was announced, would have been able to name our final appeal court. My experience has been that most lay-people have been incredulous to be told that New Zealand's highest court was located in Downing Street in London and composed of Lords of Appeal in Ordinary with the odd retired Law Lord or Lord Justice and an occasional visiting Commonwealth Judge. I wonder whether the Appellate Committee of the House of Lords is much better understood or accessible in the United Kingdom.

Why does this inaccessibility and invisibility matter? Because courts called upon to make decisions which may be unpopular with the Executive or with powerful vested groups or even with the community more generally are vulnerable. If the courts are vulnerable, so is the rule of law. Chief Justice Gleeson believes that, however unpopular particular decisions of the High Court may be from time to time, the public understands the role of the Court and knows that it provides a guarantee of impartiality in the application of law to individuals. Similar pride in the institutions, if not in particular outcomes, can be seen in Canada and the United States. I am not so confident that can be said about New Zealand. The

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[7] Aharon Barak, "A Judge on Judging: the Role of a Supreme Court in a Democracy" (2002) Harvard Law Review 16 at 25-26.

existence of the Privy Council has not helped the understanding of our judicial system throughout the community.

Some sense of the extent to which we are out of step with jurisdictions such as Australia, with whom we identify closely, may be seen from the extent to which the judiciary in New Zealand is dependent upon the Executive for support. Judges have security of tenure and salary, but in most other matters lack institutional independence. It is arguable that New Zealand does not conform with international statements of basic principles for judicial independence and the domestic law of countries such as Canada.

In Australia considerable operational autonomy is given to judges. Concern for judicial independence is behind the Law Lord's submission that any new Supreme Court in the United Kingdom must enjoy corporate independence. An important part of the reform being undertaken here is the explicit reference to judicial independence in the Bill and the obligations imposed upon Ministers to uphold it. This is another example of an attempt to capture an important constitutional principle.

We have no such comparable explicit legislative recognition of judicial independence in New Zealand. We have considerably less institutional independence than has been provided to other agencies of government, such as the Governor of the Reserve Bank. In New Zealand the administrative support for Courts through a designated department of government was last year reorganised through the Ministry of Justice. The move was driven by considerations of better organisation in government which may well have been compelling. I do not seek to criticise them, but the Ministry has responsibility for criminal justice policy, Treaty of Waitangi settlements, the collection of fines, the appointment of District Court judges, and law reform generally. In the restructuring the implications for judicial independence were not apparently identified and assessed. They were certainly not the subject of comment outside government.

Direct judicial support staff (secretaries and research clerks) are employed by the Ministry. Judicial libraries and communication systems are maintained as part of the budget of the Ministry of Justice and are subject to shifts in its priorities. Long-standing concerns expressed by the Judges about security of their communications and their work spaces have not been addressed.

It would be unrealistic to expect that the restructuring of appeals will effect any immediate improvement in awareness of these issues - but the obscurity of our court structure has not helped to date. Over time, we may hope that the establishment of the Supreme Court may assist in raising awareness of what is at stake.

That is not of course to suggest that a final Court can expect to be popular. It is some consolation to remember that the High Court, too, was established in circumstances of some controversy. It was thought it would not have enough to do. Chief Justice Gleeson made it clear in his reflections on its first hundred years that there never was a golden age when members of the High Court have basked in universal admiration:

> From the very beginning, decisions of the Court that have frustrated political objectives have resulted in noisy criticism, resentment of the court's power and independence, and threats to limit that independence.

Philosophically, he expresses the view that such reaction is only what is to be expected in a "robust democracy". We know that we, too, will have to develop comparable fortitude.

So, I think it not too unrealistic to hope that with the setting up of a final appeal court in New Zealand we may achieve, over time, better understanding of the role of the courts in the constitution, better coherence in our overall law through greater accessibility, as well as the contextual local insights hoped for by the legislation.

Despite these consolations, it would be wrong not to acknowledge at this time that the Privy Council exerts a real tug upon us in New Zealand. We have not had the same tussle for authority that soured the relationship at times between the High Court and the Privy Council. The tug we feel is in part because the Privy Council represented a dream of unity through principle. At times the remoteness from local preoccupations was a substantial advantage. It is instructive to consider the nineteenth century cases where principle was scrupulously applied to native custom without condescension and with great care. Those of us who criticize colonial institutions such as these have forgotten much of our own history.

There was one very rocky patch however. Following *Wallis v Solicitor-General* there was a rather unseemly revolt by the New Zealand judiciary. You can read the statements of the Judges in the special sitting they held to protest the case in the New Zealand Privy Council Cases. They refuted the reasons adopted by the Judicial Committee. The Chief Justice, Sir Robert Stout, concluded:

> The matter is really a serious one. A great Imperial 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. But if that tribunal is not acquainted with the laws it is called upon to interpret or administer, it may unconsciously become the worker of injustice. And if such unfortunately happen, that Imperial spirit that is the true bond of union amongst His Majesty's

> subjects must be weakened. At present we in New Zealand are, so far as the Privy Council is concerned, in an unfortunate position. It has shown that it knows not our statutes, or our conveyancing terms, or our history. What the remedy may be, or can be, for such a state of things, it is not at present within my province to suggest.

The verdict of history on the difference between the Courts in that dispute is not entirely settled. In *Ngati Apa* last year a Court of Appeal of which I was a member favoured the Privy Council approach. To say that the decision has proved controversial would be a considerable understatement.

Sir Robert Stout does however receive vindication of another sort this year. In 1904 he proposed the ending of appeals to the Privy Council and the setting up of a New Zealand Court to hear final appeals. It has taken 100 years, two or three Royal Commissions, a number of false starts and much anguish all round. It has been a hard decision for New Zealand to take. Sitting as I am at the moment in the room still called the Commonwealth Judge's room at the top of the building at Downing Street it is impossible not to feel a pang of regret that the "great and noble ideal" of a single judicial tribunal for the Commonwealth is an idea that has passed. The room still has bookshelves full of the statutes and law reports of South Australia, West Australia, Tasmania, Victoria and Queensland. (I do not know where New South Wales is.) The series all end in about 1986.

The hearing chamber was purpose built, before New Zealand was a colony. It has served as our final court of appeal for all our history. Matters important to us were heard here. I cannot help wishing that the chamber will be retained. Instead of the language of "supremacy" which most of us seem to have been locked into, how much more fitting for the Lords, if they are to move, to translate into the Judicial Committee of the Privy Council.

These are sentimental notions. The fact is that the labels and the places and buildings are not important. The real legacy of the Privy Council for all of us is the example it has set for us with its respect for local issues and diverse populations and the palpable determination shown by it to do right according to law. That is what sets the tone and lays down the challenge for our jurisdictions. That is the tradition we must keep to.