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"DISCOUNTING JUSTICE"

In the depression of 1921-1922 the New Zealand judges of the Supreme Court offered to take a voluntary reduction in their salaries, in support of a national programme of belt-tightening. Sir Frances Bell, then Attorney-General, replied that the government would reject any such offer. His reason was one of principle: the independence of the judiciary.

Since the Act of Settlement 1701, 300 years ago this year, the salaries of the higher judiciary have been protected from reduction of salary during office. That principle has been maintained in the New Zealand Constitution Act 1852 and is now to be found in s24 of the repatriated Constitution Act 1986.

The question of the judges' salaries arose again in the Great Depression. Sir Francis Bell was no longer in government. In 1931 the salaries of public servants were reduced by 10% by the Finance Act No.1. The judges were not included. The Prime Minister told the House that they were protected by the provisions of the Constitution Act 1852. As the economic position deteriorated and there were riots in the main centres, the then Attorney-General asked the Chief Justice whether the judges would agree to a voluntary reduction in their salaries. Chief Justice Myers declined the invitation, saying that the principle that the salary of a judge may not be reduced made it as improper for a judge to offer to accept a reduction as it would be for the administration to ask for it.

By February 1932 the salary of the English judges had been reduced by 10% and there was a further call by Parliament for judicial salaries in New Zealand to be reduced. The Prime Minister again asked the judges for a voluntary reduction. Opinion among the judges was divided.

At that point, with talk of amendment to the 1852 constitution being sought, Sir Frances Bell wrote a letter to the editor of the *Dominion*. He opposed any change to the Constitution Act 1852 because of its erosion of judicial independence. A voluntary refund was also opposed on the grounds: first, that the judges were not servants of the Crown and should not feel the need to share in a reduction imposed upon such public servants; and secondly, that any voluntary surrender of salary would make it difficult, if not impossible, for their successors in office to resist the precedent so created. Bell's letter concluded:

> I trust that those who now hold the pass which separates judicial office from all other avocations, those who have accepted the place which makes them the keepers of the pass, may not be induced in this crisis to surrender it.

The government made no further approach to the judges and adverse comment about their position in Parliament and in the wider community stopped.[1]

My purpose in referring to this episode in our history is not to defend the result achieved. I am by no means persuaded that a voluntary contribution to a national effort would erode the principle of judicial independence. What is striking however is the potency of the argument and the extent to which it struck a chord with the wider community of the time. That suggests an understanding of the balances achieved by our unwritten constitution which I think cannot be taken for granted today.

In the last two years, as Chief Justice, it has been worrying to encounter widespread ignorance about civics in our community. I doubt that many New Zealanders would consider that there is a "pass which separates judicial office from all other avocations". Judges are not infrequently referred to as though public servants, and reform initiatives for the courts often identify judges as one of a range of "stakeholders". There is little understanding that judicial independence is a safeguard not of judges but of our constitutional arrangements. And that the independence of the judiciary underpins the principle of legality, the most important attribute of the rule of law.

Although judges obtained security of tenure with the Act of Settlement in 1701, their constitutional position had been settled by the revolution of 1689. The result of the revolution was to overcome the view of James I that the judges were servants of the King and must obey his orders. Instead, the King was confirmed as subject to the law, as Bracton had said.[2] The independence of judges from executive direction exists to ensure that every exercise of governmental power is justified in law. The "pass" described by Sir Frances Bell is not a division of labour aimed at efficiency through specialised function. It is an essential divide which follows from the duty and responsibility of the courts to say what the law is.

There is no tension between the functions performed by Parliament and the Courts. The Courts apply the laws expressed in statute through Parliament. But executive action and subordinate legislation must be faithful to the laws which empower them. And ensuring their legality is the function of the Courts.

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[1] Sir David Smith, "Bench and Bar 1928-1950" in Cooke (ed) *Portrait of a Profession* (1969) at 99-102.

[2] See generally, W S Holdsworth, "The Constitutional Position of the Judges" (1932) 48 LQR 25, 28.

All this is elementary to this audience. But constitutional principles are too important to be the preserve of a few initiates. The constitution is not owned by judges. In 1926 and 1932 the public of New Zealand demonstrated its understanding that protection of the independence of the judiciary was not a benefit for the judges, but, as Sir Anthony Mason has put it "a privilege of, and a protection for, the people".[3] I question whether there is such understanding today.

We are of course not alone in ignorance about civic fundamentals. A national survey in Australia in 1994 found that while most people are familiar with the mechanics of voting and understand the role of government, there is very little knowledge or understanding of the principles guiding the system of government, of the division and balance of powers, the importance of free exchange of information and views, and of the function and independence of the Courts.[4] Even in the United States, with its rather more fixed devotion to the constitution, a task force has identified the need to educate the public in the actual role of Courts and about the independence of judges.[5]

In New Zealand, I have been startled by calls from some commentators that judges should be "sacked" or "stood aside" by me as Chief Justice. Such calls indicate a worrying ignorance about the independence of the judiciary and the role of the Chief Justice.

Lord Atkin likened the impartial administration of justice to oxygen. People "know and care nothing about it until it is withdrawn".

The chief worry about lack of widespread understanding about judicial independence and its role in upholding the rule of law and our constitutional arrangements is that it dilutes the vigilance necessary if our unwritten constitution is to work. The real danger to judicial independence comes not from direct executive encroachment or conscious legislative erosion, but from laziness of thought. In Fox's celebrated defence of free speech in 1795, he reminded the House of Commons of Tacitus' description of how the tyrannies Augustus imposed upon Rome began imperceptibly:

> At home all was quiet. The titles of the Magistrates were unchanged.

The existence of judges, undisturbed in their titles or even in their salaries, is insufficient protection of freedom under law.

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[3] Sir Anthony Mason, "The Independence of the Bench", an address to the 1992 Conference of English, Scottish and Australian Bar Associations, 4 July 1992, quoted in the Discussion Paper *Judicial Appointments – Procedure and Criteria*, Attorney General of Australia, September 1993.

[4] Summary of the report of the Civics Expert Group *Whereas the People* (1994) 6-7.

[5] *A Shadow Over Justice* Trial, April 2001, 20

Constitutional principle is not abstract or remote. It is engaged in decisions which are being taken every day. It should be a matter of concern to all of us that, lacking sufficient context, implications for these fundamentals may not be sufficiently appreciated. In such a climate, erosion of basic protections may happen imperceptibly, without any tyrannous intent. It is worth taking a moment to think about recent initiatives with implications for access to the courts and judicial independence in which the constitutional context may not have been sufficiently appreciated. That is not to say that the outcomes necessarily entrench upon basic principle, just to point out that that may have been more by luck than informed consideration.

Court fees, new processes for handling complaints against members of the judiciary, removal of part of the High Court original jurisdiction to entertain bail applications, reform of the procedures for dealing with criminal appeals in the Court of Appeal, and new management techniques in the courts are just some of the changes which have touched upon the place of the courts in our constitutional arrangements in the last year. Around the corner we have significant proposals for restructuring of the courts and for judicial accountability through a Judicial commission and through overhaul of the parliamentary processes for removal of judges. It is time to get our thinking in order.

In Australia, both Chief Justice Gleeson, Chief Justice of Australia, and Chief Justice Spigelman, Chief Justice of New South Wales, have spoken of the challenges posed for the courts by proponents of the new system of public management, with its emphasis on transparency, accountability and objective measurement. Neither suggests that better standards of court management, to achieve value for the money the community puts into courts, is to be resisted. Indeed, Gleeson CJ has questioned the pursuit of the "Holy Grail" of individualised justice[6] and both Chief Justices have acknowledged an acceptance of modern case management techniques by which the judiciary, in its sphere, co-operates with the systems introduced by the Executive in the running of the court registries.

Judicial case management is not an end in itself but an auxiliary measure adopted to increase access to justice. It can be acknowledged that in our small community we cannot go on increasing the number of judges and courtrooms without depriving other important social institutions of resources. Case management which tries to identify the cases which need to be resolved by litigation is sensible. But what is appropriate by way of case management is subject to the constraint that judicial intervention must not undermine the judicial responsibility impartially to do right according to law.

There are insidious pressures here. They are exacerbated by a fascination with measurement. The key performance indicators adopted by the Department for Courts as part of its contract with government include outputs

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[6] Gleeson CJ, "Individualised justice - the Holy Grail" (1995) 69 Australian Law Journal 421.

of numbers of cases to be disposed of in the different courts and timeliness standards.[7] Similar timeliness standards are also adopted in case management practice notes adopted by the judiciary. Such standards need to be careful to recognise the realities of modern litigation. One of those realities is the increased reliance on written material. Chief Justice Gleeson has referred to the "maddening tendency" which "adds insult to injury" to assume that judges are only at work when sitting in court:[8]

> If judges had the luxury of being able to devote whatever time was necessary to decide one case before moving on to the next, there would be few complaints about delays in reserved judgments. But there would be very long backlogs of cases. The pressure under which most judges now operate greatly exceeds that under which judges worked when I entered the legal profession. I have no doubt that this is a factor in early retirements. (Since, by constitutional amendment, Justices of the High Court became compelled to retire at 70, no Justice of the Court, other than a Chief Justice, has remained in office until the age of 70).

Statistics on disposal of cases are useful, but they are only part of the picture. As Chief Justice Spigelman puts it, "cases are a measurement of *output*. They are not a measure of *outcome*".[9]

The outcome of a judicial decision-making process can be variously stated. The administration of justice in accordance with law is one. Another is the attainment of a fair result arrived at by fair procedures. Such "outcomes" are not measurable. They can only be judged. Courts are the means by which rights according to law are vindicated. That is a core function of government. It is therefore an inadequate view of courts that they are publicly funded dispute resolution centres.[10] The functions performed by the courts are not adequately described as dispute resolution. While private disputes may be resolved through the courts, it is through a public process to establish right. The courts are a compulsory forum. A citizen can be compelled to participate or suffer loss by a default. Court orders are backed by the coercive power of the State.

So, too, it is an inadequate view of our justice system to describe litigants as "consumers" of court services. Citizens must have access to the courts in a

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7 See Department for Courts *Annual Report for the year ending 30 June 2001.*

8 Gleeson CJ, "A Changing Judiciary" (2001) 75 Australian Law Journal 547, 553.

9 Spigelman CJ, "The 'New Public Management' and the Courts" address to the Family Courts of Australia 25th Anniversary Conference, Sydney, 27 July 2001.

10 This is a theme that Spigelman CJ has developed with spirit. See, for example, Spigelman CJ, "Seen to be done: the principle of open justice" (2000) 74 Australian Law Journal 290, 378; Spigelman CJ, "Citizens, consumers and courts" International Conference on Regulation Reform, Management and Scrutiny of Legislation, Sydney, 9 July 2001.

society operating under the rule of law. They can expect right to be done to them there according to law by judges who are impartial and independent of government. It is destructive of the place of the courts in our constitutional arrangements if litigants are seen to be purchasing a service. The service is due to the community as a whole. Litigants cannot call the tune either as to the result or as to process.

The authoritative ascertainment of what the law is and the encouragement of consistent and proper conduct by public process is a substantial public good. The public benefit in authoritative adjudication is substantial. Where one dispute has been publicly determined, others similarly placed will not need to litigate. Court decisions are therefore a benefit available to all, not simply to those who participate through litigation.

Performance standards such as the KPIs set by the New Zealand Department for Courts are not in themselves an adequate measure of the performance of the judiciary. They say nothing about the quality of decision-making and they may obscure the function of the courts. There is inevitable overlap in provision of courts between the executive and judicial functions. Allocation of cases to judges and scheduling of judicial work, as an aspect of judicial independence, is under judicial control. Scheduling of courtrooms and the staff to run them, is the responsibility of the executive. The Department's measurement standards therefore intersect with judicial responsibility, but do not fulfil the obligation of the judge to do right according to law to all manner of people in delivery of justice which is individual.

There are potential risks to judicial independence and impartiality in the intersection of executive and judicial function in the administration of the courts. Improvements in the efficiency of the judicial process are desirable. But they must be contained within bounds which do not trade off fair processes and just outcomes for efficiency and expedition. Chief Justice Gleeson has expressed the opinion that, in Australia, there is a very real danger of creeping bureaucratisation of judicial processes from these developments. This requires a heightened sense of vigilance on the part of the judiciary.[11] Indeed, Chief Justice Spigelman detects a determination on the part of some advocates of managerialism "to put judges in their place":[12]

> It is understandable that the significance of judicial independence is not fully accepted by those of whom the judiciary is independent. The comparative freedom of the judiciary from external constraints, and the fact that the judiciary has in large measure escaped the gales of destruction that has swept through the traditional public service is, understandably, reflected in an underlying, albeit unexpressed, sense of resentment.

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11 Gleeson CJ, "A Changing Judiciary" (2001) 75 Australian Law Journal 547, 555.

12 Spigelman CJ, "The 'New Public Management' and the Courts" address to the Family Courts of Australia 25th Anniversary Conference, Sydney, 27 July 2001.

The same comment has been echoed by Chief Justice Gleeson.[13] It would not be accurate to leave the impression that there is no such undercurrent in New Zealand.

The challenge is to strike the appropriate balance between efficiency in despatch of court business and ensuring that overall justice is not prejudiced in that pursuit.[14] If judges become too executive-minded, too concerned with achieving case flow standards, the judicial function may be compromised. I have heard it said, even by judges, that disposal of cases is the only concern in judicial administration. I profoundly disagree.

It has to be said that, in most cases, judges must work within a process which is inherently "inefficient" as Spigelman CJ has pointed out:[15]

> We should recognise that inefficiencies in the administration of justice in common law countries are not unintentional. There is no doubt that a much greater volume of cases could be handled by a specific number of judges, if they could sit in camera, not be constrained by obligations of procedural fairness or the need to provide a manifestly fair trial, and not to have to publish reasons for their decisions. Even greater "efficiency" would he quickly apparent if judges had made up their minds before the case began. There are places where such a mode of decision making has been, and indeed is being, followed. We do not regard them as role models.
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> Open justice does not provide the most efficient mode of dispute resolution. Nor, indeed, does democracy provide the most efficient mode of government. In both respects we have deliberately chosen inefficient modes of decision making…
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> Not everything that counts can be counted. Some results or outcomes are incapable of measurement. They can only be judged in a qualitative manner. Justice, in the sense of fair outcomes arrived at by fair procedures, is, in its essential nature, incapable of measurement."

Litigation through the courts is not time efficient or cost efficient. It is however fair, open, subject to the discipline of reasons and subject to correction for error through appeal or review. These are considerable virtues. They must not be undermined. In the rush to justice, judges must not lose the opportunity for adequate preparation and reflection. Litigants must not be denied a proper hearing.

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13 Gleeson CJ, "A Changing Judiciary" (2001) 75 Australian Law Journal 547, 553.

14 See *Craddock v Registered Securities Limited* (CA111/99, 19 May 1999).

15 Spigelman CJ, "Judicial Accountability and Performance Indicators" paper given to the 1701 Conference: The 300th Anniversary of the Act of Settlement, Vancouver, 10 May 2001.

If a matter eventually comes for decision to a judge, I am not one who subscribes to the view that litigants are interested only in a result and not in the reasons for that result. The losing litigant in any case is entitled to and expects to know why he or she lost. No one goes to a judge for a verdict. That means we must continue to attract to the Court, judges who are of the highest possible calibre.

Public confidence is the only sure protection for judicial independence and the rule of law. The modern judiciary is much more concerned about public opinion than the judiciary of my youth. And that is a good thing. But the view which sees the justice system as a government funded dispute resolution service has exposed the judiciary to the demands of consumerism.

We have set up a complaints mechanism in part to meet these demands. I am not sure that our thinking has been entirely straight on this point. It is a theme touched upon both by Chief Justice Gleeson[16] and by Justice Drummond.[17] Judges cannot hope to satisfy those who lose or those who appear under compulsion.

How is public confidence in the judiciary to be maintained? Judges cannot expect to be popular. It would be wrong if they cared for popularity. Ultimately judicial independence depends upon community belief that the system is valid. It is only valid if judges are seen to scrupulously discharge the trust reposed in them to uphold the law. Naked preference is not judicial method.

That is why the space to provide reasons for judgment which convince is so important. And why the provision of an appeal to correct error is essential. In the frenzy over a Supreme Court to replace the Privy Council, it is important that we do not get rapture of the heights. If scarce resources are to be put to best use, re-hearing on the merits must be available to correct the inevitable errors which will arise from time to time in courts obliged to operate in summary fashion or under time constraints. We should not overlook the essential function performed by appellate courts which exist to correct error of fact and law and which attempt to identify and confront difficult points of law by provisional answers which the ultimate appeal court can then consider. In a well-functioning appellate system, the intermediate appeal tier is key. It is critical to the health of the legal system that it does not avoid a proper second look at the facts because it is overworked. Its role is not to defer to the trial judge but to correct error. But even more important to the health of the overall system is the role of the first instance judge. As Lord Reid said:[18]

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16 Gleeson CJ, "A Changing Judiciary" (2001) 75 Australian Law Journal 547, 554.

17 Drummond J, "Do courts need a complaints department?" (2001) 21 Australian Bar Review 11.

18 Lord Reid "The Judge as law maker" (1972) 12 JSPTL NS 22.

> Nine-tenths of the time of a judge at first instance is taken up with getting at the facts – keeping control of the proceedings, watching the witnesses and evaluating the evidence. More often than not once the facts are determined the law is clear. If it is not and the judge goes wrong the Court of Appeal can set him right. But if he gets the facts wrong his mistake is generally irretrievable.

It is very important that in the process of restructuring we do not overlook the key importance of the trial judge in some quest for structural simplicity.

Better understanding of what it is that the courts do is necessary to stop public confidence being eroded. Those who criticise the modern judiciary with labels such as "conservative" or "activist" or praise them as "brave" or "imaginative", are astray. These are superficial judgments, unfortunately too readily alighted on by commentators in the wider community and, regrettably, sometimes by writers of law review articles. Such epithets are, as Lord Radcliffe remarked, "romantic writing… useful only to fellow romantic spirits". The fact is that the intellectual differences to which these inappropriate labels are applied are severely circumscribed by legal context and method.

No judgment is isolated from the existing order. A judge is always faced with the need to fit the decision into the existing fabric, both in achieving a just solution for the parties and to maintain the balance for future application of principle. The judge must weigh matters not according to his or her own personal values but according to the principles which flood across our law. The process is an open one.

As Neil MacCormick has argued, the rule of law is not a static "rule of rules", but "an arguable discipline" in which all norms are "defeasible".[19] Judgments are the opposite of what is arbitrary. They are defeasible, by appeal or by further consideration. If it is to convince, a decision must be principled and coherent and in accordance with what Chief Justice Brennan called "the skeleton of principle which gives consistency to the common law".[20]

The legitimacy of the judge is founded upon the fact that he or she operates in public and must give reasons for decision in public. The obligation to act publicly is the best check against arbitrariness or illegitimacy. Arbitrary power is the antithesis of the rule of law. It is through open process, more important even than the appellate process, that the judge is accountable. Jeremy Bentham, no friend to judges, conceded that open justice was the great virtue of judicial decision making. The decisions of the judges are, as he put it "in the face of mankind".

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[19] Neil MacCormick "Rhetoric and the Rule of Law" in Dyzenhaus (ed) *Recrafting the Rule of Law* (1999) 163, 176.

[20] *Dietrich v R* (1992) 109 ALR 385, 403.

It is apparently no longer acceptable to many that judges are accountable through their reasons given in public and through the appeal process. A judge held accountable by an appellate court must be further pursued. Judges who make mistakes are now, in addition to the discipline of public reversal by an appeal court, the subject of complaint, calls for resignation, or calls for removal. Judges, like all men and women, are fallible. All judges from time to time will be wrong in the eyes of the public or of an appeal court or the opinion of academic commentators or the verdict of history. Some errors will be indefensible. Others will be a matter of judgment or opinion. That does not mean that our system of justice is deficient or that the judge who makes an error or who is reversed on further consideration is not a good judge. That is so even in those cases where unfairness may have resulted. The fact of the matter is that all of the most distinguished judges of the common law have erred in this way on occasions. Nor does the fact that judges are fallible mean that the ideal of justice which we all share is not worth pursuing.

One third of all cases will be reversed on appeal, however many levels of appeal are provided. That simply demonstrates the reality that cases will appear differently to different judges, particularly if an appellate court has more leisure or argument to assist it than a busy trial judge. It may be good spectator sport to hound judges who make errors – but it is dangerous sport. It may cause appellate judges to pull their punches for fear of goading public frenzy. That is not in the interests of justice. It may deter able men and women from accepting judicial appointment, because, why bother? That is not in the interests of justice. It leads to destruction of confidence in the law – and that leaves all of us exposed.

So far I do not think we have seen judges deflected from doing their duty by vociferous and unfair criticism, but we risk a great deal by demanding that judges adhere to passing and sectional enthusiasms where to do so is not right according to law. We should be troubled by the number of judges who take early retirement and the difficulties in recruiting new judges. Those trends are bad news indeed for those who value freedom under law.

I do not suggest that the courts should not be criticised. I accept that criticism is beneficial but, as Felix Frankfurter put it,[21] the need is just as great that they be allowed to do their duty. At the end of the day, we are judges. Our judgments, as Lord Denning once put it, have to be their own vindication. That is a message we have to get across.

I started with Sir Francis Bell's rather romantic notion that the judges guard the pass in protection of judicial function. I hope I have made it clear that I recognise that only public commitment protects judicial independence and the rule of law. And that we need to do rather better in spreading the word and maintaining vigilance. That is why it is a pleasure to speak tonight to the Legal Research Foundation. I was in at the beginning of its foundation in a

[21] *Bridges v California* 314 US 252, 284 (1941).

small way. And for all my time in practice it has worked to promote understanding of law and its place in the community.

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