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“The Next Revisit”: Judicial Independence 7 years on

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Sadly, Neil Williamson died shortly after I was appointed as a Judge of the High Court, but while we served together he was encouraging and welcoming to a nervous new Judge. He was regarded by all of us as a model of what a Judge should be. He was modest, committed, straight as a die, a very sound lawyer who was also deeply engaged in the life of the community, and a man of infectious optimism. To speak tonight in the lecture series dedicated to his memory is a privilege.

The inaugural lecture in memory of Neil Williamson was given by Sir Thomas Eichelbaum, then Chief Justice, seven years ago.² In it he surveyed the position of the judiciary in New Zealand. His speech was not simply a snapshot. He identified the challenges for the judiciary in maintaining public confidence. He outlined strategies he was putting in place to meet those challenges and he looked to the future and what it might bring. In concluding his address, Sir Thomas raised some additional matters which might form part of the checklist for what he called “the next revisit”.

Seven years on and five years after I was sworn in to succeed him as Chief Justice, it seemed to me in thinking about what I should say tonight that “the next revisit” was my responsibility. So I thought that I should remind you of where Sir Thomas thought matters stood in 1997 and where they were heading and provide an update and some predictions of my own.

After the turbulence of the past week, I have had some doubts about the wisdom of this course. After all, the title of Sir Thomas’s lecture was “Judicial Independence Revisited”. A significant part of it is devoted to independence in matters of judicial administration. I have no wish to invite further controversy. For a while I cast around for the dullest legal topic I could think of. I thought of the rule in *Joyner v Weeks*³ (concerning damages in relation to maintenance of property)

¹ The Rt Hon Dame Sian Elias, Chief Justice of New Zealand.

² The Rt Hon Sir Thomas Eichelbaum, ‘The Inaugural Neil Williamson Memorial Lecture: Judicial Independence Revisited’ [1997] 6 Canterbury Law Review 421.

³ [1891] 2 QB 31.

until Justice Blanchard reminded me it had been gutted in the Court of Appeal.

In the end, I decided that it has to be business as usual for a Chief Justice. Talking about the role of the judiciary in the legal system and what current issues it faces is the responsibility of the Chief Justice in any jurisdiction - and all of them undertake it. When I became Chief Justice, Sir Geoffrey Palmer, who has done more than anyone I can think of in New Zealand to raise public consciousness of the role of the courts in the constitution, urged me to speak about the role of the judiciary on every possible occasion, because of his concern about the level of understanding about civics in our community. That is what I have tried to do in the last five years in a great number of papers and talks delivered from Winton to Warkworth, to farmers, and justices of the peace, Rotarians, lawyers, and all-comers. It is a topic upon which the judiciary can speak with some knowledge to inform public discussion. It is necessary to acknowledge immediately that public understanding and confidence in the institution is the only protection for judicial function. Sir Thomas understood that well and his 1997 Neil Williamson Inaugural lecture was an important contribution which deserves to be reconsidered today.

Usually, it has to be said, the topic is thought to be rather dull. Indeed, that is one of the reasons Chief Justices always talk about it – it is safer than talking about legal problems that may arise for determination in Court. Of course, at times like these when significant restructuring of our institutions is current, it is difficult to avoid comment on matters within the political orbit. Then the perspective of the judiciary may be controversial. I do not think that means that the perspective should not be expressed on matters which directly affect the administration of justice.

The respect due to the other institutions of government, the executive and the legislature, as well as the need to maintain the impartiality of the judiciary in judging, imposes very real constraints on what is appropriately the subject of judicial comment and the manner of that comment. In New Zealand we have been much more reluctant than the Judges in some other jurisdictions to get embroiled in public controversy - and that is as it should be. We do not respond to criticism of our judgments or even to personal criticism, except sometimes to correct errors of fact for the public record. We are conscious of the mess that Judges who have departed from this approach have ended up in.

One such was Lord Cockburn. He was the Chief Justice of England who in 1879 got into a furious public slanging match about his refusal to admit hearsay evidence in a murder trial. He was evidently deeply

embittered by the experience, from which his reputation never fully recovered. One writer compared him, in a very English metaphor, to:

“.....an old hunter who encounters a pack of hounds on a high road, a very small provocation sufficed to carry him off the beaten judicial track over the fences and ditches of polemics”.⁴

So in speaking publicly – on or off the bench - it is very important indeed that Judges stay on the road and avoid the fences and ditches of polemics. In explaining why judicial independence matters and when it may be at risk, is a judicial responsibility even - or perhaps especially – when it is the subject of current debate. Some stoicism is necessary. This is a subject upon which there may be little public sympathy. Judicial protests easily receive the Mandy Rice-Davies response: “Well, they would say that, wouldn’t they.”

In his inaugural lecture, Sir Thomas Eichelbaum acknowledged that in countries like New Zealand, an independent judiciary is never likely to be a subject to take hold of public attention or sympathy. Nor on the other hand, in a democracy like ours, did he think it a bastion which is likely to fall suddenly. That is, I think, why repeating “judicial independence”, as though it is some sort of charm against an evil empire, does not strike any immediate chord and is profoundly irritating.

Sir Thomas identified the real danger as “an insidious weakening of the castle foundations over a period of time”.⁵ It was his view that it is largely for the legal profession and the judiciary itself to keep explaining the significance of the principle. In addition to such explanations, the judiciary has a responsibility to ensure that it maintains credibility by keeping its procedures up to date and enhancing its performance.

Sir Thomas tackled the question of keeping the procedures of the judiciary up to date and improving its performance with great vigour during his time as Chief Justice. Key in his strategy of improvement were improving the institutional independence of the judiciary, better public communications, reform of the process of appointments for Judges, and better mechanisms for enhancing judicial accountability. The proposals he outlined for improving public communications were strategies the judiciary was largely able to take itself (although they required the provision of some resources from the Executive). The longer term proposals for better institutional independence, reform of

⁴ *A Generation of Judges* (1886) at 6, cited in Roderick Munday, ‘The Judge Who Answered His Critics’ [1987] 46 Cambridge Law Journal 303 at 314.

⁵ *Supra*, n.2, at 422.

the appointments system and systems for accountability, all required executive or legislative action and so were public advocacy of policy changes in government.

The question of institutional independence remains current and appears to be controversial. In 1997, the Department for Courts had been recently set up following a review which had found dissatisfaction with the existing system of administration of the courts and the provision of support to the judiciary through the Justice Department. Sir Thomas expressed the view that this half-way house would prove to be an intermediate step to judicial control of the administration of the courts. He felt that in the end it would be necessary to bite the bullet and to make the judiciary responsible for administration of the courts with a one-line budget, settled by agreement with the legislature, such as applies in some Australian jurisdictions. Comparable independence is secured for the Reserve Bank in New Zealand. In the United Kingdom this model has the support of the Judges and apparently the politicians for the proposed Supreme Court.

Sir Thomas pointed out that that the arrangements in New Zealand by 1997 no longer measured up to international standards. He was referring to the so-called *Beijing Principles*, which followed and built on the 1985 United Nations "Basic Principles on the Independence of the Judiciary".⁶ The Beijing Principles of 19 August 1995 provide:

- "36. The principal responsibility for court administration, including appointment, supervision and disciplinary control of administrative personnel and support staff must vest in the Judiciary, or in a body in which the Judiciary is represented and has an effective role.
- 37. The budget of the courts should be prepared should be prepared by the courts or a competent authority in collaboration with the Judiciary having regard to the needs of judicial independence and administration. The amount allotted should be sufficient to enable each court to function without an excessive workload."⁷

Since 1997, case law in the Supreme Court of Canada⁸ and extra-judicial comment by the Chief Justice of Israel⁹ have affirmed the need for judicial independence of the executive in matters of administration. We are increasingly out of step.

⁶ Preamble to *Beijing Principles*. *Beijing Statement of Principles of the Independence of the Judiciary*, 19th August 1995, reproduced in The Rt Hon Sir Thomas Eichelbaum, 'Sixth Conference of the Chief Justices of Asia and the Pacific' (1995) NZLJ 356 at 359.

⁷ Ibid at 359.

⁸ *Re Remuneration of Judges of the Provincial Court of Prince Edward Island* [1997] 3 SCR 3, para 118; *The Queen v Beauregard* [1986] 2 SCR 56, at 71-74.

⁹ Aharon Barak "A Judge on Judging: the Role of a Supreme Court in a Democracy" (2002) 116 Harv LR 16 at 54.

Sir Thomas was of the view that the Australian model provided by the High Court of Australia since 1979 was the next step. I have been more reluctant about judicial control of the administration of the courts as a whole. I see the provision of courts as a substantial undertaking of executive government, but I have come to the view that our immediate judicial support does need to be under judicial control because it is inextricably bound up with judicial independence. It is not appropriate for our staff and systems to be part of the Executive.

The problem of principle has been exacerbated in recent times by three circumstances. First, the resumption of responsibility for courts and judicial support by the Ministry of Justice, a large policy department with an interest in matters litigated in the courts. Secondly, by Employment Court indication that the "Crown Prerogative employee" status which we had thought was enjoyed by our staff – making them responsible to the Judges – was not effective to prevent them being employees of the Ministry. Finally, by our dependence in internal communication and judgment writing on technology which is part of the Ministry system and in which our security needs have not been adequately addressed.

In terms of institutional independence in New Zealand, the position described by Sir Thomas has deteriorated since 1997. Such deterioration is not the result of deliberate attack. Rather it is part of the process described by Sir Thomas of the insidious weakening that comes about through inadvertence and lack of vigilance.

Sir Thomas expressed in 1997 dismay about public understanding of legal issues. He suggested that there was in this country "a paucity of intelligent written analysis of legal topics in terms understandable to a broader audience" such as was available in newspapers in Australia. He said:

"Here it is more likely that any instant reactions critical of a decision or outcome will be published and will become the definitive judgment on the issue."¹⁰

I do not think there is any reason to believe that rather gloomy verdict should be altered. Sir Thomas was of the view that increasingly in order to achieve balance it was the Judges themselves who would need to take steps to present their point of view. He referred to recent initiatives undertaken by him to provide better information to the public. They included the provision of an annual report which he considered would provide an opportunity for Heads of Court to speak out on controversial matters. He referred to the then recent appointment of a Judicial Communications Advisor to act as a channel for information

¹⁰ Supra, n.2, at 426.

between the media and the judiciary. He referred to the opening up of the courts to television, an attempt to make the courts more accessible to the public in a way in which we still are well ahead of the United Kingdom and Australia.

Despite the efforts made by Sir Thomas, I do not think the strategies then and subsequently put in place to provide better public information have been successful. It is not easy to identify what strategies might work better.

We have tried, for example, in the Court of Appeal and High Court, to make judgments more accessible by providing tables of contents and in cases where there is likely to be substantial public interest, by providing summaries of the decisions. We had hoped that, even if the public as a whole would still find reasons for judgment indigestible, the press would be assisted in its task of reporting them. We have posted sentencing decisions and decisions thought to be of public interest on the Ministry of Justice website so that those interested can have access to them immediately the decisions are available. No doubt these initiatives have assisted to some extent, but there is a limit to what can be done if the media and those who comment on decisions do not play their part - and judgments are not easy to read. They are the reasons for a decision.

Reasons have to serve a number of very important purposes. They have to demonstrate to the parties that they have been heard. They have therefore to deal with the arguments put up to the court. Reasons must be useful to Judges considering similar cases, particularly if the decision will bind Judges in lower courts. In that way judgments promote certainty and consistency by enabling like cases to be decided alike. That means that the facts must be explained sufficiently to demonstrate why a particular legal principle attaches to them. Reasons must show why a decision is reached, so that an appeal court can test the result properly. Reasons must demonstrate to the wider community that the case has been decided legitimately in accordance with valid legal rules or principles and not to fit the personal beliefs of the Judge. Justice between the parties is only part of the picture.

There are real challenges here because the audiences for a judgment are so varied. We do what we can. In some jurisdictions, at least at the highest level of courts, editorial assistance is provided to Judges to make their judgments more readable. Although the quality of the product is probably enhanced by such effort, I am not sure how successful it is in improving accessibility for those who do not read judgments for recreation or for a living. We have, through the Institute of Judicial Studies, run some successful writing courses for Judges. They are helpful – but there are limits. I was rather put out once when a colleague who had just undertaken one of the courses said about a

rather controversial judgment of mine, “Brilliant judgment, Sian. Lovely short sentences!” Well, lovely short sentences in a closely reasoned and lengthy technical judgment does not make it a novel.

I know that there are those who point to the admirably brief *ex tempore* judgments of years ago, but I think it was a simpler time, with more straightforward issues. Look at the topics in the index of the New Zealand Law Reports of 50 years ago if you do not believe me. I have not seen a Sale of Goods Act case in my 10 years on the bench and very few conveyancing disputes.

We would all like to start a judgment with the gusto of Lord Denning. My favourite is:

“Old Peter Beswick was a coal merchant in Eccles, Lancashire. He had no business premises. All he had was a lorry, scales and weights.....”¹¹

You know at once that Old Peter Beswick will not be let down by the Judge - and that is deeply comforting. I thought recently that Justice McGechan was launching into something similarly reassuring and with a touch of Eccles, Lancashire, about it, when I read the first sentence of a judgment: “This is a case about a hedge” – but the next sentence was a real let-down. It read: “Plaintiff and defendant are parties to a contract hedging wholesale electricity prices.”¹² I am afraid the Judge today never sees the Peter Beswicks with their scales and weights.

We do not fare better in communicating views and information about judicial function and its place in the legal system. The judicial communications advisor responds to media inquiries, which is a great help to us, but does not have the means to pursue a more ambitious strategy of public information, although we are currently reviewing what can be done there. The annual report was expensive to produce. It was difficult to co-ordinate all the different Benches to achieve timely publication. In its hard copy format it was not effective as a means of communicating the views of the Heads of the different jurisdictions on matters of controversy, as Sir Thomas had hoped. The statistical information about work-flows in the courts were published in any event in the Department’s annual report.

We decided that we should replace the judicial annual report with a judicial website on which we could place annual reviews as well as the work-flow information, which could be kept up to date rather than being an end-of-year snapshot. In addition to the material published in the annual report, we thought that the judicial website could be the site for

¹¹ *Beswick v Beswick* [1966] 3 All ER 1 (CA) at 4.

¹² *Wel Energy Group Ltd v Electricity Corporation of New Zealand (ECNZ)* [2001] 2 NZLR 1.

publication of decisions of public interest and the papers produced for public speaking engagements by the Judges. These papers are often significant contributions to legal issues and deserve a wider audience than those who are present to hear them, or the subscribers to the law reviews in which some of the more substantial papers are published. In the past, many of these speeches were published in the New Zealand Law Journal as a record. That is no longer the case.

There has been agreement by the Ministry that a judicial website should be established for some years. To date, other priorities have delayed the project.

Views will be mixed on the success of the media in court strategy. Some believe that the advent of television and radio broadcasting of court hearings has accentuated the negative – the sad and violent lives of some in our community – fuelling outrage without assisting in public understanding of the work of the courts, but what I think the greater accessibility of the electronic media has done, is emphasise that the Courts are the courts of our communities. That is a good thing. Justice should not be seen to be remote and the preserve of lawyers and Judges alone.

The public interest in the recent court restructuring has raised questions about the legitimacy of judicial function and the nature of law. It shows no signs of dying down. It is likely to flare up whenever the courts are called upon to decide controversial cases. There is nothing new in that. Nor is New Zealand any different in this respect from other countries. In reflecting on the first hundred years of the High Court of Australia in October last year, the Chief Justice of Australia remarked that there had never been a golden age of the Court when it basked in universal approval:

“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.”¹³

Any one who has been following the public dispute between Mr Blunkett and the Lord Chief Justice in England will know that in New Zealand we are relatively mild and deferential – and long may that continue.

One positive benefit of the inevitable tensions that arise from time to time between the Executive and the judiciary in any country in which executive government must be lawful, is that at times of such tensions

¹³ The Hon Murray Gleeson, Chief Justice of Australia, *The Centenary of the High Court: Lessons from History* (13th AIJA Oration; Melbourne: Australian Institute of Judicial Administration, 2004) at 4.

we may see greater public interest in getting behind the slogans and sound-bites that are the lazy response to difficult questions. I think there are signs that more thoughtful media comment of the kind that Sir Thomas in 1997 mentioned might be found in *the Australian* or *The Age* is developing in New Zealand. No doubt that is in response to greater public interest in our legal system. That is to be welcomed.

Sir Thomas advocated the setting up of a Judicial Appointments Commission to ensure that the public can be assured that appointments are not influenced by politics or by a self-perpetuating judicial oligarchy. In that he was ahead of most of his judicial colleagues and the government of the day. The proposal was opposed by the then current Attorney-General and Minister of Justice.¹⁴ Earlier this year, the Attorney-General published a discussion paper suggesting the sort of Judicial Appointments Commission Sir Thomas proposed.¹⁵ The political climate has changed and I think the judicial climate too. Here is an example of a judicial officer leading an important public debate, contrary to the position of the government of the time, in a way which I believe was wholly constructive.

Similarly, Sir Thomas was ahead of public and judicial opinion in his views about a system for dealing with complaints against Judges. In his lecture he outlined the informal procedures he had instituted for dealing with such complaints.¹⁶ Sir Thomas made it quite clear that as Chief Justice he had no formal disciplinary powers because the Chief Justice, though head of the judiciary, is in no sense superior to the other Judges. In those circumstances the complaints process could not extend to discipline of Judges. Recognising, however, that the public might come to require a more formal system, Sir Thomas did not shrink from the establishment of a statutory mechanism for dealing with complaints although he expressed concerns about the potential threat to judicial independence.

The Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004 today sets up procedures which may be thought to be responsive to both concerns. It formalises the reception of complaints by a Judicial Conduct Commissioner and provides a mechanism for the investigation of conduct which is serious enough to warrant removal from office. For less serious conduct, the complaint is referred to the head of bench under the existing system by which the head of bench has no authority to discipline a Judge. That leaves the constitutional independence of the judiciary established by the Act of Settlement of 1701 intact. Whether it will satisfy those who would like to see lesser complaints handled by a Commission with the power to discipline

¹⁴ Supra, n.2, at 428.

¹⁵ *Appointing Judges: A Judicial Appointments Commission for New Zealand? A Public Consultation Paper* (Wellington: Ministry of Justice, 2004).

¹⁶ Supra, n.2, at 430-435.

Judges, remains to be seen. This matter is likely to be on the list of topics in another 7 years if there is a further review of the judiciary in this lecture series.

In concluding his lecture in 1997, Sir Thomas looked to the future. He foretold that it was likely that there would be increasing pressure in the future on judicial independence. In the absence of other informed comment in New Zealand, he was of the view that the judiciary itself needs to explain to the public “the vital significance of the concept to the well-being of a free and democratic community”.¹⁷ He encouraged “rational informed discussion” on the topics of judicial appointments and judicial accountability.¹⁸ His final contribution was to lay on the table a number of other topics “as possible additions to the next revisit”. They were

“A code of judicial conduct; periodical performance evaluations of Judges by their peers and the bar; and a courts’ charter, informing the public of the delivery they may expect from the judicial system.”¹⁹

Seven years on, we have made some progress on all these additional matters. There is a Courts’ Charter adopted by the Department for Courts with some judicial input. Judges have developed guidelines for judicial conduct to assist them in their work and in their behaviour outside their judicial work. We have developed, through the Institute of Judicial Studies, a programme of mentoring for judges. We have not had the intestinal fortitude to contemplate periodical performance evaluations, whether peer or external, although informal external assessments periodically do the rounds.

I do not myself support greater supervision of Judges. Judicial independence – by which I mean the allegiance of the Judge in judging only to the law and to the effort of coming to the best decision he can – is principally an individual virtue. Two great English judges, Lord Reid and Lord Goff, have emphasised separately that the common law depends upon the independence, not of the courts, but of the individual Judge. It is for that reason that both regard the dissenting judgment, not tolerated in most European traditions, as “liberating”. Because each Judge is independent, “judgments tell the truth – the real reasons for our decisions, expressed, where appropriate, subject to the Judge’s own qualifications, hesitations and even doubts.”²⁰ I do not favour any erosion of the independence of Judges from each other and from the Chief Justice. (Voluntary support is another matter). I think the Act of

¹⁷ Ibid, at 435.

¹⁸ Ibid.

¹⁹ Ibid.

²⁰ Lord Goff of Chievely ‘The Future of the Common Law’ (1997) 46 ICLQ 745 at 755.

Settlement removal for cause by Parliament remains the only formal sanction that can be imposed consistently with that independence.

So what of the next seven years?

Aspects of institutional independence will have to be addressed. Although there seems no current enthusiasm for further reorganisation, international practice may provide some prod over time. In the meantime, we will need to work out better ways to protect the values of independence within the support provided by the Ministry.

Maintenance of public confidence in the judicial system remains the principal challenge. Apart from the strategies to improve communication already discussed, two particular issues need to be confronted. They are anxieties about impartiality in judicial work and what is called judicial "activism."

It is a fundamental requirement of any legal system that it be impartial. Why it is fundamental was described by Lord Denning:

"Justice must be rooted in confidence; and confidence is destroyed when right-minded people go away thinking: "the judge was biased."²¹

The problem lies in identification of when "right-minded people" might think the Judge to be biased. Sir David Williams refers to a murder trial in the early 18th century which was removed from Pembrokeshire to Hereford on the basis that "to try a man in Wales for murder was like trying a man in Scotland for high treason, those being crimes not much regarded in those respective places".²² Now, I am half-Welsh and Sir David is wholly Welsh and neither of us thinks very much about that example of bias. Drawing a similarly long bow it was suggested by Chief Justice Holt that Chief Justice Coke had been biased in the earlier famous case of *Dr Bonham* because Dr Bonham was a graduate of Cambridge "his own mother university."²³ Now I hesitate to say that Chief Justice Holt was not "right-minded people" - but I certainly do not think this was straight-thinking.

Everyone knows the famous declamation by Lord Hewart that "justice should not only be done but should manifestly and undoubtedly be seen to be done."²⁴ It has a certain ring about it of course. The problem with such emphasis is that it encourages loss of perspective and heightens vigilance to unrealistic levels. It is also hard to take from such a source as Lord Hewart. He was described in the *Oxford*

²¹ *Metropolitan Properties Co (FGC) Ltd v Lannon* [1969] 1 QB 577 at 599.

²² Sir David Williams, 'Bias; and the Separation of Powers' [2000] PL 45 at 56.

²³ *Dr Grenville v College of Physicians* 88 ER 1398 at 1400.

²⁴ *R v Sussex Justices, ex parte McCarthy* [1924] KB 256 at 259.

Companion to English Law as “perhaps the worst Chief Justice since the 17th century.” He is allowed not to be dishonest, but is said to have lacked “dignity, fairness and sense of justice” and to be “no jurist.”²⁵ He was also described as “an uninhibited political figure, who thrived on controversy” writing on all subjects ranging from electoral reform and capital punishment to democratic theory and licensing laws.²⁶

The tests the Courts have adopted for bias have swung around a bit since the *Pinochet* decision.²⁷ An objective standard, reflecting the reaction of “the ordinary reasonable member of the public” seems to be where we have come to rest.²⁸ The problem of identifying when that standard is engaged, remains. At times there have been indications that parties may allege bias in order to secure the removal of Judges thought to be potentially unfavourable.²⁹ The English Court of Appeal, alive to the problem, has attempted to categorise factors which may – or may not – give rise to a successful claim of apparent bias.³⁰ Presumptive bias was thought by the Court to be inconceivable in relation to such factors as “religion, ethnic or national origin, gender, age, class, means or sexual orientation”.³¹ Those not “ordinarily” objectionable included:

“.....the judge’s social or educational or service or employment background or history.....previous political associations; membership of social or sporting or charitable bodies;.....previous judicial decisions; or extra-judicial utterances (whether in textbooks, lectures, speeches, articles, interviews, reports or responses to consultation papers); or previous receipt of instructions to act for or against any party, solicitor or advocate engaged in a case before him; or.....membership of the same chambers.....”³²

That would leave close family relationships or friendships or animosities and financial interest as raising connections where apparent bias will be inferred.³³

²⁵ D Walker (ed), *Oxford Companion to English Law* (OUP, 1980) at 565-566.

²⁶ Gregory Henry “*In Search of the Perfect Judge*” [1999] 21 Sydney Law Review 667 at 676.

²⁷ *R v Bow Street Metropolitan Stipendiary Magistrate and others, ex p. Pinochet Ugarte (No 2)* [1999] 1 All ER 577 (HL).

²⁸ *Collier v Attorney-General* [2002] NZAR 257 at para 22; *Porter v Magill* [2002] 2 AC 357; *R v Webb* (1994) 181 CLR 41.

²⁹ See M Taggart, ‘Administrative Law’ [2003] NZ Law Rev 99 at 101.

³⁰ *Locobail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451.

³¹ *Ibid*, at para 25.

³² *Ibid*.

³³ *Ibid*.

It remains to be seen whether this essentially pragmatic approach³⁴ will suffice against the popularity of the Hewart emphasis. Certainly, there seem to be no shortage of litigants raising apparent bias points, particularly when disappointed in result. There has been the odd attempt to administer catechisms to Judges to determine potential conflicts. Such questions in one case included whether any of the Judges was a member of any “secret society” or of something called the “Illuminati” as well as “Skull and Bones” and the Ku Klux Klan.³⁵ As for the last, it is worth recalling in this context that one of the most liberal Judges of the Supreme Court of the United States, Justice Black, was before his appointment an active member of the Ku Klux Klan.

Judicial activism is an easy label - and a damaging one. Our institutions deserve better than to have such terms hurled against them without great care. The term needs to be unpicked. I am not sure that we even have a working definition of an “activist” Judge. Some people seem to use the term to describe the author of any judgment they do not like. That is simply abusive. Others apply it to those they consider crusaders for particular causes. When used in this way, it is effectively a charge of bias and an attack on the observance of the judicial oath. More moderately, the term may be used to describe a Judge who is thought to be too ready to overturn precedent or fill a need in the law that would be better left to Parliament. That is a claim of judicial imperialism, insufficiently deferential to democratic process. In substance, it is a criticism of another form of crusade, equally inconsistent with the judicial oath.

I do not know any Judge who would say that precedent should be thrown over lightly or that all gaps in law should be filled by Judge-made law. What course of action a Judge is driven to in deciding a case properly brought before the court depends on the circumstances. Certainty and stability are always important considerations. Judges are acutely conscious that they lack the tools as well as the legitimacy to legislate.

In New Zealand, Judges have always been deferential to legislative authority. We have had a co-operative approach to statutes, free of the suspicion which has been a feature of other jurisdictions. There never has been a time in New Zealand when the Judges have sought to frustrate legislative policies or shown the hostility to legislative reforms shown by the English Judges or American Judges where those reforms were thought to undermine property interests or to extract property by way of taxes. Those were indeed “activist” Judges. In New Zealand, Judges have had no difficulty in accepting that statutes and common

³⁴ K Malleson ‘Safeguarding Judicial Impartiality’ (2002) 22 LS 53 at 62.

³⁵ *Collier v Attorney-General* [2001] NZAR 257 (CA).

law operate within a single legal system and that the Judge must ensure that they work without friction.

Justice Gault in a recent paper has reviewed the different approaches taken by the Court of Appeal in the last few years where development of the law has been argued for.³⁶ In all of the cases the considerations which prevail and those that did not, are clearly identified and considered. They demonstrate the care with which any development of law is approached. In no case described in the paper in which the Court did modify the existing law, was there subsequent legislative correction. Others may disagree with the particular result, but no one can say that the decision to develop the law in any particular case was taken lightly or without the reasons being explained. Justice Gault discusses the factors which are taken into account in such cases:

“Pressing factual circumstances and compelling argument may point to injustice in the application of established principle. Consideration then must be given to the issue whether to leave the matter, duly highlighted, for legislative attention or whether to change legal principle by judicial decision. Which course depends on many factors. I mention a few. Much depends on the nature of the issue. If it is in a field of law largely developed by the courts there will be less reluctance to make changes. If it is in an area where the implications of any change are unclear so that the issue would benefit from wider research and analysis than the courts are equipped to employ, there will be great reluctance to make any change. The existing principle may be long-standing and underlie entrenched practices and commitments. There may be circumstances of urgency linked with the recognition that it will always be open to the legislature to overrule or modify the change. It may be that on close analysis the existing principle is not soundly based. There may be discernible policy in legislation in related areas indicating a direction for change. The existing principle might rest on superseded social values. There might be current law reform work that is expected to review the existing principle.”³⁷

The scope for development of law by Judges today should not be overstated. To us, it is breathtaking to consider the huge shifts formerly encompassed by Judges. As late as 1867, the Courts of England were of the view, earlier expressed by Lord Hale and Blackstone that Christianity was “part of the law of the land.” In that year the Court of Exchequer Chamber, of which Baron Bramwell was a member, held that a landowner was not obliged to perform a contract

³⁶ The Rt Hon Justice Gault, *Law Reform and the Courts*, a paper delivered on 14 April 2004 at the Australasian Law Reform Agencies Conference:
<http://www.lawcom.govt.nz/>.

³⁷ Ibid, at 6.

to let rooms to the Liverpool Secular Society. The Court unanimously held that its teaching was “a violation of the first principles of the law” and that the contract was unenforceable.³⁸ In 1917 the House of Lords changed entirely and denied that Christian doctrine was part of the law. Lord Sumner explained that society was “stronger than before”:

“In the present day reasonable men do not apprehend the dissolution or the downfall of society because religion is publicly assailed by methods not scandalous.”³⁹

The contrast with a case like *Quilter v Attorney-General*⁴⁰ (where the Court of Appeal declined to update the meaning of marriage) is marked.

Where law is developed by judicial decisions, the method of the courts is to look for all the help they can get from statutes. The same method may be seen where open textured legislation must necessarily be employed because the legislature cannot envisage all circumstances in which the principles it enacts will fall to be applied. It is all very well for people to hanker for a golden age when statutes were tight and judicial opportunity narrow. There never was such a time, but today at least we have the register of general values and principles which are identified in statutes against which to cross-refer Judge-development.

The fact of the matter is that judicial office and the judicial oath are taken very seriously indeed by Judges. Judging is not the exercise of personal power according to personal preference. It has always to be justified with reasons. Felix Frankfurter, musing on the judicial function, was dismissive of the often-heard question “Does a man become any different when he puts on a gown?” He snorted “If he’s any good, he does.”⁴¹ Of course Judges bring their own experiences to bear when they come to judgment. As Chief Justice Brennan of Australia once acknowledged, it is “sometimes difficult to be sure where the wisdom of human experience ends and prejudice begins.”⁴² Judges are acutely aware of that. The obligation to do right according to law obliges Judges to discover and suppress their own views. That is their professional responsibility. That is why reasons for judgment demonstrate that the case has been decided in accordance with valid legal rules or principles and not to fit the personal beliefs of the Judge.

³⁸ *Cowan v Milbourn* [1867] LR 2 Ex 230 at 234. The history of these shifts is told by Lord Radcliffe in ‘Pillars of Society’ published in *The Law and its Compass* (Northwestern University Press, 1960).

³⁹ *Bowman v Secular Society* [1917] AC 406 at 467.

⁴⁰ [1998] 1 NZLR 523 (CA).

⁴¹ Felix Frankfurter ‘Chief Justices I have Known’ (1953) 39 Virginia Law Review 883 at 901.

⁴² Gerard Brennan “Why be a Judge?” (Paper presented at the New Zealand High Court Conference, Dunedin 1996), at 9.

Of course Judges will get decisions wrong at times. That is what the appellate process exists for. Sometimes error will be very much a matter of opinion. No one suggests that Judges should not be criticised by those who think their decisions are wrong. It is beneficial to everyone to have error in the reasoning of a decision pointed out. The epithet "activist" does not add to the opinion that the judge has come to the wrong conclusion. A claim of "activism" or bias is a claim that a Judge is acting falsely to the oath of office. It is a claim that he or she is pursuing an agenda. It is not a charge to be casually made. Its repetition without careful substantiation is damaging to an important institution of our society.

The judiciary is an institution that Neil Williamson served with all his heart. Sir Kenneth Keith is fond of quoting Matthew Arnold's assessment of Sophocles: "Who saw life steadily, and saw it whole." Neil Williamson tried to do so in his life - and so should we all.
