

OPENING ADDRESS TO THE CONFERENCE OF MAORI LAND COURT JUDGES and ENVIRONMENT COURT JUDGES

Amora Hotel, Wellington
Wednesday 13 May 2015

*Sian Elias

I appreciate very much the invitation to address you at the start of your conference. I am even more appreciative of the opportunity to spend time with you. One of the regrets I have about life in the Supreme Court (there are not many) is that I don't get around much any more and the chances to see you around the courthouses of New Zealand have greatly diminished. It is also very special to see you en masse. It certainly brings home how lucky we are in New Zealand to have judges of such high calibre and dedication in these two very important courts.

Conferences such as this are rare opportunity to take stock, catch up with colleagues, get out of the usual swim and think outside the box. Especially about our roles as judges and how we can better fulfil them.

This year the annual conference of the Judges of the High Court, Court of Appeal and Supreme Court was held at Waitangi because of the 175th anniversary of the founding of our nation. The programme was built around Treaty themes. We were addressed by a number of academics working in Treaty matters. It was a lot more successful than the occasion nearly 20 years ago when I arranged for Judith Binney to speak to the judges of that time. There has been a huge shift in attitudes among judges in the intervening years. As I come on to say, I think that shift in attitude is largely due to the work of the Waitangi Tribunal.

The material circulated in advance for our conference by David Williams included reference to the *Huakina*¹ case. I was counsel in that case and David's reference to it prompted me to some personal recollections and further rumination about the role of the courts. Since the case dealt with matters of interest to the two

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

¹ *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 (HC).

jurisdictions represented at this conference, I thought I might begin with it.

Huakina, as you will know was decided by Sir Muir Chilwell, who died last year much mourned by all of us who knew that decent and brave judge. The case concerned an appeal against an award of costs of \$200 against Nganeko Minhinnick by the Town and Country Planning Tribunal. The costs order was made because Nganeko, despite a number of admonitions, had taken another objection to the discharge of effluent from a cowshed into a tributary of the Waikato River. The Tribunal had held, as it had in other cases, that there was nothing in the Water and Soil Conservation Act that permitted it to take into account Maori customary values in considering whether to grant a right to discharge effluent into natural water. My friends in law were aghast that I should be taking a case to the High Court about \$200 and the discharge from a cow shed. But Nganeko had said she would go to gaol rather than pay the costs award and so I felt there was no option but to plough on.

As a young lawyer, I was very nervous about how my argument based on the Treaty of Waitangi would be received. When Nganeko rang me the day before the hearing to find out when she would be able to get into the court to set out the mattresses for the kuia who were attending, I told her firmly that I had enough on my hands with the Treaty and that the mattresses could wait for another case. I am very relieved that in subsequent cases she seems to have forgotten about the mattresses.

I had never heard of the Treaty being cited in a New Zealand court. I went through the early volumes of the NZLRs and the GLRs to find any such references. I was amazed. There were a number. Because in those days we did not photocopy authorities but had them on the desk in front of us, I had all stacked up in the court.

I have always thought of those cases as all those old tears. But perhaps indeed they tapped into a surer Maori understanding of the Treaty, lost to sight in more recent times. Indeed, when reading for the *Paki*² case, it was interesting indeed to find that our predecessors as judges knew much more than my

² *Paki v Attorney-General* [2012] NZSC 50, [2012] 3 NZLR 277 (SC); and *Paki v Attorney-General (No 2)* [2014] NZSC 118, [2015] 1 NZLR 67.

contemporaries about the Treaty and Maori society. I put large extracts from the old cases into my judgment in both *Paki* decisions because I thought they deserved pulling out of the mothballs and being made more accessible.

The thought I had in reflecting on the *Huakina* case was of more general relevance to our role as judges. It concerns not so much what we know (or think we know), but our attitude to the job we undertake. I have often wondered whether another judge would have heard the argument out in *Huakina*. It was bold at the time. It required a great deal of effort in understanding and reading. The subject-matter was not calculated to make the judge think his work and effort were particularly worthwhile.

It is possible that other judges of the day would have seen it as their duty to hear an appeal which was properly constituted, even if they thought it unimportant (although they are unlikely to have been as patient as Sir Muir). I am more doubtful whether the case would have been entertained without a great deal of trouble and grief under modern case-management and I think even if heard there is a high risk it would have received peremptory disposal. Prosecuting the appeal may well have elicited threats of further costs, applications for security for costs and even the risk of costs against counsel. These are techniques we regularly employ today.

I know that we are very busy in our work. We are properly conscious of the demands of other cases and the costs to the other party. It is understandable that we sometimes cut corners. But it is troubling when, from time to time, we hear of counsel (usually young counsel) who are deeply discouraged by their reception when they seek to argue a point they think has given rise to injustice but which is novel. As young counsel who might have been discouraged, I think often with deep gratitude of Muir Chilwell.

If I do not always live up to the ideal he represented, at a conference such as this I am glad to have the time to reflect and remind myself that our tradition is one of belief that through law justice will be obtained. Not always of course, but that is the expectation.

What we have in common

I am conscious that you know a great deal more than I do about your specialist jurisdictions. So it would be rash for me to enter into areas of your expertise. I thought I might reflect a little on what we have in common and where there may be differences or challenges ahead.

First, what is held in common. Those who serve as judges in our society have common goals, which I express neutrally in terms that would be recognisable in most jurisdictions that aspire to live under the rule of law. We want:

- a) to ensure that all in our communities live under the security of law and not at the whim of arbitrary power;
- b) claims of right to be resolved in processes which are accessible, fair, and effective;
- c) the rights of New Zealanders to be decided by impartial and competent adjudicators who know our history and traditions;
- d) the law to be equally applied to all and all to have equal access to justice; and
- e) the system we operate to deliver just outcomes as well as good process.

Those who work in the legal order of any society must understand how legal process impacts on the lives of real men and women. It has the capacity to harm people in the things they hold most dear if carelessly applied or if their expectations are dashed.

In the press of cases there is huge pressure to dispose of work. In all jurisdictions, even in criminal law, efforts are made to achieve settlement of cases without requiring court determination. Very often, perhaps even most often, settlement by agreement is the best outcome when people are in dispute. But courts do not simply provide forums for dispute resolution. As judges, we have to be careful to keep an eye on the judicial ball.

The most salutary illustration of taking eyes off the ball is the Privy Council correction of the Court of Appeal management of criminal

appeals in the *Taito*³ case. For the best of all reasons (husbanding the resources of the Court to give priority to matters that seemed to have more merit), the Court of Appeal fell into the errors identified by the Privy Council: it denied the right of appeal; it breached natural justice; it failed to afford equal access to justice to the poor as well as those able to pay for representation.

We should not be exasperated (as we too often are) if in the end controversies can only be stilled by a judicial determination. We cannot deny claims of right hearing according to law. We have to be careful that the challenges provided by litigants in person or by seemingly hopeless claims do not cause us to fall into the same errors. Lord Reid was quite right in his “fairytale” address to say that, while second looks are not always better, they generally are.⁴ In the same spirit, Judge Learned Hand hit the mark when he said that the spirit of the law is one that is not too certain.⁵

The particular responsibilities of specialist jurisdictions

These judicial traditions are common to us all. But there are differences. One is that as Judges in specialist courts, you occupy positions of particular responsibility, in providing bridges in understanding and links to the wider legal order.

The best example in recent history is the huge success of the Waitangi Tribunal in transforming our idea of New Zealand law. I still remember the sense of excitement with which I read the *Motonui*⁶ decision of the Waitangi Tribunal. It provided insight that we have the tools to shape a legal system that is ours.

The Environment Court, like the Maori Land Court, has a different diet than is staple for courts of general jurisdiction. It is positioned within the wider world of physical science, political and ethical philosophy and economics. It is not surprising that in the years since environmental law emerged an object of distinct legal study

³ *R v Taito* [2003] 3 NZLR 577 (PC).

⁴ Lord Reid “The Judge as Lawmaker” (1972) 12 JSPTL 22.

⁵ Dilliard *The Spirit of Liberty: Papers and Addresses of Learned Hand* (Alfred A Knopf, New York, 1952).

⁶ Waitangi Tribunal *Report of the Waitangi Tribunal on the Motonui-Waitara Claim* (Wai 6, 1983).

it has been a subject in constant motion as social priorities and experiences change. The explanations provided by the Court for outcomes which are complex and controversial are critical in shaping public understanding – and understanding in the general jurisdictions.

Both environmental law and the work of the Maori Land Court are part of the wider system of law. Staying connected enriches the legal order and also provides legitimacy and strength to the specialist court. Isolation from the main makes an institution vulnerable.

The wider system of law starts with international obligations. They are developing fast and particularly in the connection with environmental regulation, human rights and the special rights of indigenous peoples.

Environmental law is increasingly being positioned within the law of human rights, itself derived from international instruments. Environmental issues may touch on the rights to life, to self-determination of peoples and to family life and culture. The United Nations Human Rights Committee has recognised the link between the right to culture in art 27 of the International Covenant on Civil and Political Rights (ICCPR) and the use of land and sea resources. It has referred to the “particular way of life associated with the use of land resources, especially in the case of indigenous peoples”.⁷ It has recognised that the enjoyment of rights such as fishing or hunting may require positive legal measures of protection and effective participation.

In New Zealand, for its part, the human rights dimension of environmental law is seen especially in the treatment in environmental law concerning Maori connections and values in relation to land and waters. This domestic revolution since the 1980s now has international support in the United Nations Declaration of the Rights of Indigenous Peoples.

The Declaration on the Rights of Indigenous Peoples has been referred to in a number of Waitangi Tribunal reports and decisions. It has been invoked in the Court of Appeal and the

⁷ United Nations Human Rights Committee *General Comment No. 23: The Rights of Minorities* UN Doc CCPR/C/21/Rev.1/Add.5 (8 April 1994) at [7].

Supreme Court in *Takamore v Clarke*⁸ and by the Supreme Court in *New Zealand Maori Council v Attorney General (Mighty River Power)*.⁹ Although not a source of enforceable rights, it is proving influential in domestic law.

International law, often received first through the work of the specialist domestic bodies, is important in the wider domestic legal system in interpreting legislation which gives effect to international obligations and as a source of values and standards for domestic application, especially in supervision for legality of discretionary decisions.

In the domestic legal order, environmental law and the work of the Maori Land Court and Waitangi Tribunal operate in the wider context of modern administrative law. They also intersect with the general law of property and especially in the case of the Environment Court, the private law remedies of nuisance and negligence (which may themselves yet be galvanised by the challenges of environmental protection). Maori Land Law intersects with trust law and equity. Again, there is perhaps reason to expect that the non-enacted New Zealand law of property and equity may yet be transformed by the work of the Maori Land Court and the insights it provides into the property and values of Maori.

Exposition in actual cases is critical to development of the New Zealand legal system. That is the method of the common law. It allows us to draw on principles and values obtained from all sources in developing a New Zealand common law which may yet come to reflect our dual heritage. Specialisation in environmental law and Maori property and tikanga may be necessary and beneficial, but not if it comes with isolation from the mainstream. So engagement with the law as a whole is important responsibility for a specialist court.

Participation

Both the Maori Land Court and the Environment Court operate in areas that have sought to provide highly participatory processes. In the case of the Maori Land Court, such processes have been

⁸ *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733

⁹ *New Zealand Maori Council v Attorney-General* [2013] NZSC 6, [2013] 3 NZLR 31.

dictated by the nature of land ownership and can also I think be justified by the terms of the Treaty of Waitangi.

In the case of the Environment Court, it has been said by eminent judges such as Sir Owen Woodhouse and Lord Cooke that the legislation responded to demands for “a substantial degree of democratic participation in processes of decision-making that affect many people or even virtually the whole community”.¹⁰

There are straws in the wind that the cost of such participation is increasingly being questioned, including at times by the Courts. That can be seen by increased readiness to impose security for costs and award costs against those who have been unsuccessful. If there is such a shift away from open access, then it may call in question whether the participatory system in place in both Courts may need to be replaced by other mechanisms.

In the excellent annual report of the Environment Court, the Court makes special mention of the increasing use it is making of the mediation powers conferred by s 268 of the Resource Management Act. It is acknowledged that although the section has a “voluntary” flavour about it, the Court takes the view that the public interest issues have driven the court towards compulsory mediation.

Similar proposals for increased use of mediation are being made in respect of the review of Te Ture Whenua Maori Act and are foreshadowed in relation to representation issues in the current legislation. I note that in Judge Ambler’s critique of the proposals for rewriting Te Ture Whenua Maori he queries the proposal for mediation to be compulsory (on the basis that compulsion may be counterproductive and complicated to administer), although not the general concept that it should be encouraged as a first step before proceedings are heard by the Court.

Now there are of course a number of jurisdictions where the workload of courts has encouraged the adoption of filters such as compulsory mediation. We are increasingly seeing – even in criminal law - attempts to avoid costly, delayed and often destructive contested hearings by promoting compromises and

¹⁰ Robin Cooke “Forward” in Kenneth Palmer *Planning and Development Law in New Zealand* (Sweet & Maxwell, Wellington, 1984) at v.

settlements. Such efforts may well be appropriate. We need however to be careful not to compromise judicial function and access to justice by setting up roadblocks which may in themselves be expensive. Such filters should not be allowed to avoid determinations of right according to law.

I have some doubts about the view expressed in the annual report that, where the public interest is engaged, there is more need to promote settlement and avoid adjudication. At least in the case of claims of illegality, that seems counter to the approach in mainstream administrative law, which has been to relax standing restrictions on the basis that observance of law is of interest to all. Nor may it be easy to reconcile with the developing repositioning of environmental protection under human rights. It is arguably contrary to the long-standing approach under successive environmental statutes that the public interest is worked out in a contestable process in which costs of regulation and enforcement are borne by individuals and organisations, both those personally interested in the outcomes and those personally disinterested.

If the assumption of the process is to shift, perhaps we need to have a second look at the breadth of the discretions left to be worked out in these processes. Regulatory control or a strategy to siphon off some of the work into administrative decision-making, may be more acceptable than filtering access to the courts to obtain compliance with the law. I also have a certain squeamishness about judges being drawn in to administrative work or being co-opted into conducting mediations in part to manage case-loads.

This, you may think, is the sort of purist approach that only a Supreme Court judge could adopt. But if the system of adjudicative determinations is grinding the system down, perhaps it would be better to address the causes directly. They are likely to be connected with the wide discretions available in resource management determinations and the lack of bright lines and they may also be bound up with methods of hearing.

Facing up to the real problems is, as I understand it, part of the reason concerns have been expressed in relation to the proposed reforms to Te Ture Whenua Maori. The answer to the challenges in releasing the economic value of Maori land for the owners may not lie in sweeping changes to the legislation at all.

If so, the important challenges faced in protection of the environment and the rights of Maori might continue to be addressed in judicial processes which are open and reasoned and which draw on the framework of law provided by international law, domestic law, and scholarly writing. Such processes have great virtue in cases of controversy, such as the jurisdictions of your courts throw up.

Future directions

I want to conclude by looking at the tea-leaves a little and throwing out some thoughts which may be a little off-beam. There are three topics on which I comment.

First, I should say something about change. Change is always with us. Re-assessment of the jurisdiction of and standards applied by courts dealing with important topics is not to be discouraged. We should not start at shadows. The institutions you serve in are robust and valued and they are important to the wider legal order, as I have tried to show. We should pay attention to the connections and we should keep to judicial strengths if we want to keep decision making judicial.

Although human rights may seem to require policy choices, human rights generally come with qualifications, both specific and in the nature of the general restrictions contained in s 5 of the New Zealand Bill of Rights Act. They are also supported by well-developed ethical theory and international and comparative jurisprudence which is directly helpful because the standards of rights are expressed to be universal. Human rights are rights possessed by individuals. They are thus, inevitably, law and subject to judicial determination and vindication.

By contrast, environmental issues may be more difficult to resolve by judicial process if the ends in view are not ordered in any way that provides a handle for decision-makers. At-large judicial balancing may be at best unconvincing and at the worst may mask political judgments which cannot be adequately justified by reference to legal standards and which, in our tradition, are usually taken by those who are politically accountable.

Although international standards may be expected to evolve, they are at present embryonic and comparative law determinations about environmental values and priorities may be difficult to transplant. There is room for some concern that judicial function may be compromised without sufficient standards. It may be that legislative changes which provide more bright lines for judicial decision-making will be adopted, as has been proposed. Whether that is necessary following Supreme Court revisionism and better more recent development of secondary legislative planning documents is not something on which I am qualified to express an opinion. I simply urge staying close to judicial function as good judicial policy.

In the end, the work of the judge has to meet the community's need for vindication of right according to law through impartial and convincing judgments delivered within time frames the community is willing to accept. In jurisdictions such as yours, dealing with human rights, environmental rights and the rights of indigenous peoples, the cases are often highly contentious. It is important that the public controversies they inevitably give rise to are stilled by just outcomes justified publicly by independent judges in reasons that convince. That is the whole virtue of judges.

The second point I make has to do with institutional connection. I have tried to suggest that connection and engagement with the wider legal order is institutional strength and has benefits throughout the legal system. I have wondered whether more cannot be done to use the powers of reference between the specialist courts and the generalist courts. Both under *Te Ture Whenua* and under the Resource Management Act the powers to state cases for determination of points of law by the High Court seem underutilised. Very often of course recourse under case stated procedure is better reserved until the facts are determined and the point of law can be seen in context. But reading some of the cases, especially those of the Environment Court, there is more than a whiff of reluctance, supported perhaps by suggestions by the High Court that there would have to be some "proper reason".

The Maori Appellate Court similarly has expressed the view that it is compelled by the *Austin Nicholls*¹¹ case to give its own answer

¹¹ *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141.

before seeking guidance on law, a reason that is difficult to spell out from the authority cited and which probably also indicates reluctance to have recourse to the procedure for High Court direction on law. I fully understand why such referrals are not always sensible. But in cases where they may provide a short answer, I would have thought a less suspicious approach might be appropriate.

Although I had thought that recourse by the High Court to the case stated procedure for the opinion of the Maori Appellate Court on questions of tikanga or questions of fact relating to the interests or rights of Maori in any land would have been more taken up, there seem remarkably few cases of referral. It may reflect the few cases in which questions of tikanga or ownership of Maori land are in issue in the High Court. I think however that the uptake on questions of tikanga is likely to increase and I think that will be to the benefit of the legal system.

The third matter for the future is that it is certain that the impact of human rights and the developing international law of the environment on the work of the Environment Court and the Maori Land Court will increase greatly. Consideration of human rights will be influenced by international bodies and by comparative law. The New Zealand Bill of Rights Act is an Act to affirm and implement in domestic law the obligations of New Zealand under the ICCPR.

Consideration of the rights by the United Nations Human Rights Committee and by the domestic courts of jurisdictions subject to the same obligations is inevitable and inevitably helpful. Under the Convention and the Declaration of Human Rights it invokes, is the concept of human dignity. Human dignity underpins alike the rights of indigenous peoples and human rights more generally, including rights which bear on the environment.

The increasing emphasis on human rights has implications for participation in decision-making. Those who live in our society are entitled to equality before the law and to the assurance that laws are equally applied. Their participation in legal process to vindicate rights was achieved in the great administrative law cases of the 1960s and 1970s. The demonstration of the rule of law requires that claims of right or the questioning of authority to

affect human rights and other interests recognised by law should be justified in public reasons.

Cultural identity is an aspect of human dignity. It is not surprising that decisions about representation in the Maori Land Court and the Waitangi Tribunal are attracting a good deal of attention. They bear on human rights.

Many constitutions now contain environmental rights, such as the provision in Chile which refers not only to a right to life but also “a right to live in an environment free of contamination”. These rights are not merely aspirational, but are able to be enforced by special procedures and relaxation of restrictions on standing which are not confined to those who have suffered individual injury. The Constitutional Courts of Jurisdictions such as South Africa and Hungary have adopted precautionary principles in response to the irreversible processes set in motion by environmental degradation. There are echoes of similar precautionary and restitutionary thinking in the Universal Declaration of the Rights of Indigenous Peoples. Some constitutions, like those of Canada and Colombia provide explicit protections for indigenous peoples. These are relatively recent developments and they point to an increasing world view that the environment and indigenous populations matter. It would be rash to think that our jurisdiction will be impervious to similar thinking.
