

**FROM: AN ADDRESS TO THE NORTH AMERICAN ALUMNI
ASSOCIATION**

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“LAW FROM AFAR”

Let us assume that far out in our galaxy there exists a gentle race of jurists. Every so often, one or other of them visits a far-flung planet to see what progress is being made elsewhere in wrestling with the eternal problems of right and wrong, and the law, and to take a critical, but not unkindly, look at distant systems.

Our little green jurist from far away - I will call her Sarah - has alighted on New Zealand. She has done so quite deliberately: galactic experience has shown that large-scale systems of justice are often unworkable, and certainly less than knowable. Like Frederick William Maitland, who understood that English legal history was better understood and appreciated by trying to study customary law in one English village than the common law as a whole, our galactic visitor wants something that she can see “as a whole”.

Sarah’s first observation about New Zealand jurisprudence is that there is much about it which is concerned to support what might be termed “the human spirit”. It follows that such a legal system should represent the steadfast defence of individual freedom and civil liberties; the constant elevation of reason over prejudice and passion; and determined protections to be afforded to minority and disadvantaged groups.

Sarah observes that the New Zealand legal system endeavours to deliver, and for the most part actually does so, reasoned, articulate, and public legal decision making. The country can hardly be accused of not looking to the rights of minority groups; indeed in some quarters the argument is advanced that it defers too far in that direction. On the whole, Sarah thinks that there is a good deal to be said in favour of Dr Michael King’s final summation of the people of New Zealand, in his widely read, if sometimes overdrawn, *History of New Zealand*:

... most New Zealanders, whatever their cultural backgrounds, are good-hearted, practical, commonsensical and tolerant. Those qualities are part of the national cultural capital that has in the past saved the country from the worst excesses of chauvinism and racism seen in other parts of the world. They are as sound a basis as any for optimism about the country's future.

The position of "disadvantaged" groups may be more problematical. As with so many countries, New Zealand has developed a labyrinth of often subterranean laws into which the sick and the oppressed can disappear, and from which catacombs they may never emerge. As only one instance, any trial judge worth his or her salt has routinely despaired at the high incidence of unsighted or misdiagnosed mental illness amongst prisoners. The usual judicial homily on sentencing falls on somewhat infertile ground in dealing with cases like that.

And Sarah wonders how well the New Zealand system will do when it comes under real pressure in dealing with individual liberties in hard cases. She notes a certain ambivalence on this score: Mr Zaoui on the one hand has been the favourable recipient of that generosity for the human spirit of which Dr King spoke; on the other hand, Mr Morgan's extra year of incarceration (as not representing an "increased punishment") may well provide scope for an inter-galactic "harumph" when Sarah gets back to her planet, and moves to compensate prisoners for clear maltreatment whilst incarcerated were met with a public outcry and swift legislative intervention.

But, on the whole, Sarah is not too concerned under this head: the combination of the cultural norm for fair play of which Dr King spoke, the small scale of the jurisdiction (which enables "bad" cases to surface to public view fairly readily); and a respectable awareness by the judiciary that these things are rather important, gain New Zealand at least a pass mark here.

A second thing Sarah notes New Zealand as having adopted is an aspiration to something called "the rule of law". Sarah thinks that is a very fine thing, and she knows there is much difficulty in the darker sides of the galaxy where the principle is

not observed. But Sarah thinks that gap between the ideal and the reality in New Zealand is deeply troublesome. This is because the New Zealand legal system is, in operation, distinctly inequitable and inefficient. This industrious little country keeps pumping out more law than any comparable jurisdiction in the galaxy. But in practice it is only for those who can afford it. For those who cannot afford all this law, and who likely need it most, there is far too little law. She thinks (legal aid notwithstanding) that most Kiwis find their legal rights hopelessly compromised by the cost of legal services, the extraordinary procedural complications spawned by the law, and the seemingly interminable and frustrating delays involved in advancing proceedings to anything like a conclusion. And Sarah worries that while the powerful and the represented can try and do something about these things, the poor, the marginalised, and increasingly the middle class, are legally voiceless, notwithstanding their supposed legal rights. Sarah cannot understand why Kiwis put up with this state of affairs when they run the best rugby team in the galaxy on simple principles of getting to the ball first, hanging on to it, and taking the shortest route to the try line. These well-understood principles could equally be applied to the law - indeed that flying legal winger, Lord Cooke of Thorndon, was often heard to shout as he touched the ball down over the tryline, "simplify, simplify".

A third thing which seems to Sarah to be near and dear to the heart of the New Zealand legal system, is that not only is all this law-generating activity a good thing in itself, but that it seamlessly produces "good outputs". Sarah really wonders about this spectre of the law mercilessly grinding on in an unremitting effort to build up a large, consistent, internally coherent, body of rules that will actually produce good results. Sarah wonders how far most laws which on the surface seem to offer effective or efficient means of achieving the public good actually do so. She is inclined to the view that what is really important for New Zealand is the growth of the economy, the pursuit of whatever it is that Kiwis see as good or noble in their culture, and the enhancement of the human spirit. Yet a great chunk of the "law", far from enhancing those kinds of things, actually gets in the way of them.

Sarah is not entirely sure that she would give New Zealand a pass mark in this third area. She is not convinced the country has really grappled with issues relating to the basic conception of the role and limits of law. She questions why New Zealand -

which is, after all, a small-scale society - cannot work towards a system of fewer rules, but ones which are more important, more widely understood, and more widely enforced for the benefit of all. But then Sarah is herself generous of spirit, and she wonders whether it is in turn New Zealanders' generosity of spirit which has led them into this impasse: legislators and Judges are inclined to interfere in one way or another in small-scale societies, whenever they feel that one person has unfairly suffered at the hands of another. And where else in the world do Prime Ministers or Ministers have to worry about problems of overflowing local ditches? Small scale is a blessing and a curse.

Another thing Sarah notices since her last visit here is something which appears to not be held with the same force it once did. In the past, New Zealand has enjoyed (and deservedly so) a galactic reputation for being a decidedly "progressive" legal jurisdiction. Distinctly New Zealand solutions arising out of local conditions produced admirable solutions to legal conundrums. For instance, Sarah well recalls an animated discussion in an Ivy League common room over the fiendish problems, both human and legal, thrown up by disputes over the estates of deceased persons. What elsewhere has produced an extraordinary variety of legal doctrines and torturous reasonings to try and solve these problems was brilliantly addressed by legislators in New Zealand in the form of the Testamentary Promises Act, and the Family Protection Act. And can there realistically be any suggestion that the country is not infinitely better off by virtue of the accident compensation scheme, over the old common law fault system?

In so many areas, legislative reforms of this kind were indigenous, and advanced by lawyers who took a distinct interest in public life. Sarah does not entirely understand why this spirit seems so diminished. She observes that in the last quarter of a century or so, the bulk of the reforms that have been advanced in New Zealand have been "derivative" (that is, borrowed from other jurisdictions) and preceded by vast amounts of comparative work, to replicate (often in an over-refined way) every institution and every law to be found elsewhere. But what has happened along the way is that the national character which once so infused our law has thereby all too often been "sucked dry".

Finally, Sarah wonders whether, at the system level in New Zealand, there has developed too much of a touching faith in something called “consensus”. She wonders whether New Zealand’s greatest opportunities will lie rather in tapping New Zealanders’ inclinations towards collaboration and compromise rather than towards competition and rivalry. There is, after all, good reason to reject the idea that consensus is a prime desideratum of rational social policy. The imperative should be rather towards forging systems of interaction that make possible peaceful, and even substantially co-operative co-existence with others in the face of necessarily unresolved, and perhaps even unresolvable, disagreements. A legal system that accepts pluralism and diversity while at the same time broadening the domain of shared interests and fostering arrangements that encourage people to acquiesce in the differences of others has much to be said in its favour.

In his monumental work of scholarship *The Golden Bough* - some argue the greatest work of scholarship of all time - Sir James Frazer set out to endeavour to locate the provenance and meaning of a mysterious fable. The fable - set in the woodland lake of Nemi - is in part that of a dishevelled mad priest endlessly circling an ancient tree, sword in hand. The priest never sleeps. But why is he doing this? Sarah thinks one possible answer is that humanity’s quest for justice, and the vigilance needed to defend it, is the oldest striving of humanity, preceding, interestingly enough, in the history of ideas concerns about immortality or an afterlife. “Justice”, in other words, seems to lie at the very root of humanity, and to be its oldest concern. Sarah is pleased to see that the priest is still circling the tree, sword in hand, in New Zealand.