

**ADDRESS GIVEN TO THE AUSTRALASIAN LAW TEACHERS'  
ASSOCIATION CONFERENCE**

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**“EQUALITY UNDER LAW”**

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It is 50 years since the United States Supreme Court decided that “separate but equal” state schools violated the “equal protection of the laws” guaranteed by the Fourteenth Amendment of the Constitution.<sup>1</sup> At the same time, the Court held that segregation of public schools in the District of Columbia (to which the Fourteenth Amendment did not apply) was unconstitutional as a breach of the due process clause of the Fifth Amendment.<sup>2</sup> *Brown v Board of Education* has been described as “the centerpiece of justice in America”.<sup>3</sup> It was an inspiration for those working for human rights around the world. In the United States it paved the way for the Civil Rights Acts of 1964 and 1968 and the Voting Rights Act 1965 which eventually undermined the long-standing segregation of the black minority. Anthony Lester has described the background.<sup>4</sup> The United States faced escalating embarrassment in its post-war foreign relations because of the discrimination against black Americans. The Truman administration had ended racial segregation in the armed forces and other institutions over which it had direct control. The Attorney-General filed an *amicus* brief in support of the claimants in *Brown*, attaching a letter from Dean Acheson, then Secretary of State, explaining the damage to the foreign relations of the United States in the continuation of such discrimination. The Court had the comfort of knowing the Executive branch of government was convinced of the need for change.

Richard Posner has argued that the Supreme Court’s reversal of *Plessy v Ferguson* did not arise from re-examination of the text of the Fourteenth Amendment, but from the changed social conditions in which *Brown* came to be determined:<sup>5</sup>

It was not the “pull of the text” that compelled re-examination of *Plessy* but the vagueness of the text that *permitted* re-examination of the decision in light of half a century of social and political

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<sup>1</sup> *Brown v Board of Education* 347 US 483 (1954).

<sup>2</sup> *Bolling v Sharpe* 347 US 497 (1954).

<sup>3</sup> Paul Finkelman “Civil Rights in Historical Context: In defence of *Brown*” (2005) 118 Harvard Law Review 973.

<sup>4</sup> Anthony Lester, ‘*Brown v Board of Education Overseas*’, American Philosophical Society, Philadelphia, 23 April 2004.

<sup>5</sup> Richard A Posner, *The Problems of Jurisprudence* (Harvard, 1990), 307.

change. It was not brooding over the words “equal protection of the laws” but a change in the nation’s ethical and political climate that resulted in the decision in *Brown*.

As Posner suggests, the Supreme Court rejected *Plessey* for grounds based on “political history, common sense and common knowledge, and ethical insight”.<sup>6</sup> Formal equality of opportunity was no longer good enough in a world recoiling from the terrible events of World War II. The Universal Declaration of Human Rights and the Covenants it gave rise to affirmed human dignity and diversity of human aspiration under equal protection of law. These standards and aspirations, necessarily expressed in general propositions that have to be assessed in social context, have had a profound impact upon the ethical content of law and on the way in which law is taught.

In New Zealand, there is no reference to “equality before and under the law” in the New Zealand Bill of Rights Act 1990, such as is contained in section 15 of the Canadian Charter of Rights.<sup>7</sup> The White Paper which preceded the Bill of Rights Act considered that the term was “elusive and its significance difficult to discern”.<sup>8</sup> It took the view that “the general notion” of equality before the law was implicit in reference in the proposed bill (which would have bound the legislature) to “New Zealand being founded on the rule of law”. Although the proposed preamble was not enacted in the modified Act, the Supreme Court Act 2003 contains a similar reference to “New Zealand’s continuing commitment to the rule of law”. The extent to which the concept of the rule of law contains the notion of “equality before the law”, as suggested by the White Paper, remains conjectural. So too does the content of equality under the law and its relationship with the express statutory rights to be free of the forms of discrimination prohibited by the New Zealand Bill of Rights Act and the Human Rights Act.

The liberal concept of freedom as the right to be free of legal disability cannot deliver equality under law. This is what Stephen Sedley has described as the “snake in the legal grass”<sup>9</sup> – the unequal effects of equal laws. It was to redress that effect that the Supreme Court of the United States expanded the concept of discrimination to include what Chief Justice Burger, writing for the Court, referred to as “practices that are fair in form, but discriminatory in operation”.<sup>10</sup> As he explained, alluding to the Aesop’s fable:

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<sup>6</sup> At 309.

<sup>7</sup> Which provides:

Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex age or mental or physical disability.

<sup>8</sup> *A Bill of Rights for New Zealand* (Govt Printer, New Zealand, 1985), para 10.81, 86.

<sup>9</sup> Stephen Sedley “The Lion and the Ox” in *Freedom, Law and Justice* (1999) at 41.

<sup>10</sup> *Griggs v Duke Power Co* 401 US 424 (1971).

Congress has now provided that tests or criteria for employment or promotion may not provide equality of opportunity merely in the sense of the fabled offer of milk to the stork and the fox. It has ... provided that the vessel in which the milk is proffered be one all seekers can use.

It is to address the unequal effect of apparently equal laws that indirect discrimination is proscribed in a number of jurisdictions. In New Zealand s 65 of the Human Rights Act 1993 forbids “any conduct, practice, requirement or condition not apparently in contravention of the Human Rights Act but which has the effect of treating a person or group of persons differently” on one of the prohibited grounds. Indirectly discriminatory policies or practices may apply equally to all persons but operate to disadvantage a minority group. So, in *Australian Iron and Steel Pty Ltd v Banovic*<sup>11</sup> the High Court held that a “last on, first off” retrenchment of employment indirectly discrimination against women employees whose entry into employment had been delayed because of historic discrimination. In the United States, weight and height requirements for employment have been held to discriminate indirectly against women.<sup>12</sup> Such grounds of discrimination recognise real effect, despite the result being unintended.

But freedom from discriminatory policies is not sufficient to remove disabilities, particularly when they arise from systemic historic discrimination. In many jurisdictions special legislative savings exempt affirmative action programmes. Where redress is sought from the courts without legislative backing, our tradition is cautious, generally treating equality before and under the law as a formal concept inherent in the nature of law, as the White Paper suggested.

Is this good enough? Stephen Sedley points to centuries of positive discrimination in favour of incompetent or mediocre white men which has resulted in typecasting of minority groups. Remedial steps, he suggests, are required to liberate the individuals comprising such groups.<sup>13</sup> Anthony Lester has written of the inequalities in their environments which are the significant impediments to allowing people to fulfill their real potential.<sup>14</sup>

Anti-discrimination legislation cannot provide a remedy to those who are denied work because their lack of qualifications or seniority make them the first candidates for unemployment and technological redundancy or because of the absence of adequate training programmes... Anti-discrimination legislation cannot by itself ensure that schools in poor neighbourhoods have good teachers and

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<sup>11</sup> (1989) 168 CLR 165.

<sup>12</sup> *Dothard v Rawlinson* 433 US 321 (1977).

<sup>13</sup> *Supra* n 9 at 43.

<sup>14</sup> Anthony Lester, “Equality and United Kingdom Law: Past, Present and Future” [2001] PL 77, 83.

modern amenities... Only if such general sources of inequality are removed can legislation be really effective in dealing with a specific inequality of racial discrimination. Similar considerations apply to some other forms of inequality, notably against women, where positive measures are needed to alleviate the double burden of child rearing and bread winning, especially for single parents.

The solutions to social inequalities are not principally to be found in law or legal process. They raise political and ethical questions, generally requiring political answers, usually delivered through enacted laws. Lord Bingham has identified three ways in which such laws regulate the position of all in a society.<sup>15</sup> First, is the proscription of adverse discrimination in the manner I have been discussing. But the law can be used in two other ways. It can be used to entrench the power and influence of the dominant groupings. We have a number of examples in our history of such use of law. Finally, law can be used to recognise the existence of a minority and provide it with some autonomy and validity. Lord Bingham cites legislative measures taken in Finland and Belgium to empower minority languages. He refers to separate electoral rolls and seats in a number of countries, including New Zealand, to ensure that minorities have a distinct political presence. He points to the relative autonomy enjoyed by Scotland since the Act of Union and contrasts it with the position of Northern Ireland.

The empowerment of minority groupings through law takes many forms. At their least ambitious they may entail exemptions from legal prescription to meet particular cultural, linguistic or religious interests. At the other extreme, they may entail devolution of political authority, as in the assemblies of Scotland and Wales, which reflect a principle of subsidiarity, which shares common roots with federalism. Between are such structural accommodations as separate parliamentary seats, as in India, Fiji, and New Zealand and special measures for language protection, preservation of culture, and custom, including separate systems of property ownership, all of which we have in New Zealand. All of these measures require community commitment. They entail the allocation of resources. It would be wrong to see such responses when adopted as divisive or in breach of principles of equality. Their aim is to integrate minority groups into the wider society without requiring loss of identity. Thus, Roy Jenkins looked to the integration of minority immigrant groups on the basis of “equal opportunity, accompanied by cultural diversity, in an atmosphere of mutual tolerance”.<sup>16</sup> Such aspirations may be disappointed. My point is that there is nothing wrong in principle with such solutions.

The truth is, as Sedley says, “all laws discriminate”:<sup>17</sup>

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<sup>15</sup> Tom Bingham, “Law in a Pluralist Society” in *The Business of Judging*, 101-115.

<sup>16</sup> Speech to the National Committee for Commonwealth Immigrants, 23 May 1968, cited in Lester, *supra* n 14, 81.

<sup>17</sup> Stephen Sedley, *supra* n 9, 40.

They discriminate between the virtuous and the wicked, between the permitted and the prohibited, between the taxable and the duty-free. They discriminate, too, on grounds which from era to era are taken to be so obvious that they do not even require justification. It was obvious that the right of all Athenian citizens to vote did not include women or slaves. Among the American founding fathers who proclaimed the self-evident truth that all men are born equal were several slave owners. In this country until well into the 20<sup>th</sup> century the unsuitability of women to vote, sit on juries or join the professions was regarded – at least by men – as too obvious for argument.

We live in an increasingly diverse society. A comparison of the last three census results demonstrates how much the ethnic mix of our population is increasing and how rapidly it has happened. Alienation of minority groups threatens social stability and squanders human talent. Proper conduct can be promoted on a consistent and regular basis only by the mainstream processes of socialisation. Those mainstream processes of socialisations turn on a shared ethical sense and the practical and cultural networks in a community which reinforce expectation and interdependence. Cultural groupings which are not recognised, which have no sense of mutual expectation with others in the community and which feel isolated or denigrated, are not positive forces within our community. The validity our society gives to its cultural minorities is therefore very much in the wider community interest.

After the last election, the briefing papers of the Ministry of Women Affairs to the incoming Minister, published in March 2002, demonstrate both gender and cultural deficits. The statistics there recorded show both the continuing gap in earnings between women and men and the disparity in economic independence between the genders. The position of women who were members of some racial minorities lagged still further behind.

There are some serious challenges as to the law's ability to protect, recognise and affirm the right to difference of the ethnic and cultural minorities for whom New Zealand is home.

No recognition of cultural values is absolute. Tolerance of cultural diversity is bounded by notions of reasonableness and public policy, as the courts have recognised in a number of cases. New Zealand has legislated against cultural practices which run contrary to deeply held social and legal traditions. For example, female genital mutilation and bigamy are made criminal offences under the Crimes Act 1961. On the other hand, in the United Kingdom the Road Traffic Act 1988 exempts Sikhs from having to wear safety helmets on motor bikes because of the interference with their religious freedom. This statutory modification, it should be noted, followed a court decision in which the Court of Appeal was divided on the question whether the offence under the old legislation

permitted religious belief to be accepted within the defence of necessity provided for.

In the United Kingdom multi-culturalism has been recognised as a fundamental objective of the government. It was defined in the UK government's submission to the UN Committee on the Elimination of all Forms of Racial Discrimination in 1995 in the following terms:

It is the fundamental objective of the UK government to enable members of the ethnic minorities to participate freely and fully in the economic, social and public life of the nation, with all the benefits and responsibilities which then entails, while still being able to maintain their own culture, traditions, language and values. Put more simply, this view of a multi-cultural society is one which protects the cultures represented in it by promoting their retention.

It is misconceived to suggest that the recognition of distinct cultural values detracts from the general principle that laws must apply equally to all. In New Zealand, we forget some of our own legal history when we claim that it is a fundamental tenet of English and New Zealand law that there is no room for distinctions in law to recognise minority interests. In the early years of the colony, for example, quite different penal provisions attached to Maori and non-Maori. In part that was in recognition of profound Maori abhorrence of imprisonment as a form of punishment and different notions of property which made dishonesty offences difficult to apply to Maori. The Maori Welfare Act 1962 contained provision, only recently repealed, for marae courts in minor matters, although it was never used. Until the new Constitution Act was enacted in 1986 the New Zealand Constitution Act 1852 continued provision for the gazetting of Maori districts in which Maori could administer their own laws provided they were not repugnant to the laws of humanity. Repugnancy to the laws of England or the general laws of New Zealand did not matter. This is an early response to the aspiration for a degree of autonomy which remains with us today and which is consistent with the contemporary aspirations of a number of European communities.

Pluralism in law through preservation of custom was common in colonial law.<sup>18</sup> The common law, which we inherited from England, was in origin the custom of England. Wherever it was imposed in the British Empire, it picked up local customs, some of application only to distinct cultural or ethnic groupings within society. In an early case, the Privy Council recognised that English notions of property law were inadequate to deal with the religious practices of India. The court recognised and gave effect in law to the personality of an idol which was a family god. This approach was confirmed in its application to New Zealand by

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<sup>18</sup> See P McHugh *The Maori Magna Carta: New Zealand Law and the Treaty of Waitangi* (Oxford, 1991), 85-86.

the Secretary of State for the Colonies, Lord Stanley in 1844. With the exception of customs “in conflict with the universal laws of morality”, Stanley could see no reason:<sup>19</sup>

why the native New Zealanders might not be permitted to live among themselves according to their national laws or usages, as is the case with the aboriginal races in other British colonies.

In 1841, when the *Tyne* slipped into Auckland harbour bringing William Martin and William Shortland to set up the new legal order, the realities of life in New Zealand presented substantial challenges for the establishment of the “settled form of government” and the protection of custom and law promised by the Treaty of Waitangi. In 1840 there were approximately 100,000 Maori in New Zealand, and 2,000 settlers. By 1842 the settler population had grown to 11,000, most of whom were in New Zealand Company settlements at Wellington, Nelson, Wanganui, and New Plymouth, well to the south of the capital in Auckland.<sup>20</sup> Both Maori and non-Maori had expectations of law in the Crown Colony it was going to be very difficult to fulfil.

In vast tracts of the country, Maori were undisturbed in their traditional social organisation. Plunder to avenge injury was the usual vindication of right. Warfare, at least in parts of the country where Christian teaching was not accepted, continued. Collective responsibility for the depredations of individuals was accepted. Land was held collectively. Interests in land could be elaborate and could cross hapu territories. They could include usufructory rights, often seasonal, to particular resources; possessory rights to occupy habitations, cultivations and fisheries; and tribal rights under the mana rangatira.<sup>21</sup> The complexities of Maori systems of social organisation and in particular their relationships with land were only dimly perceived. Land purchases undertaken before 1840 remained to be investigated. The Crown’s exclusive right under Article 2 of the Treaty of Waitangi to acquire Maori land (and sell it to settlers) required the establishment of a system. More settlers were on the way, with more pressures upon Maori land. Protection of those Maori customs not inconsistent with principles of humanity, suppression of those that were (cannibalism and warfare, but not initially slavery because of its role in Maori social organisation), and protection of the law raised questions of boundaries requiring negotiation and persuasion. The crucial piece in the plan to obtain Maori acceptance of law gradually was the Native Exemption Ordinance 1844. It aimed to attain “gradual” and “willing” acceptance by Maori of “the laws and

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<sup>19</sup> Great Britain Parliamentary Papers NZ 2 1844 (556) XXIII Appendix 19, 475 cited in E Fletcher, *A Rational Experiment: the bringing of English Law to New Zealand* (unpublished Master of Arts thesis, Auckland University, 1998), 223.

<sup>20</sup> McLintock, *Crown Colony Government in New Zealand* (Government Print, Wellington, 1958), 134.

<sup>21</sup> See Waitangi Tribunal, *Mohaka River Report* (Brooker and Friend, 1992, Wai 119), 16.

customs of England". In the meantime, special laws more in accordance with Maori custom were proposed.

Thus the Ordinance provided for the participation in charging and arrest of Maori of two of the principal chiefs of the tribe to which the offender belonged. Because of Maori horror of imprisonment, bail was provided for as of right on provision of security in all cases except murder or rape. In the case of theft, no sentence was to be passed upon conviction if payment of four times the value of the goods stolen was made into Court before sentence. The value of the goods was to be paid to the victim, with the balance going to the Treasurer. No Maori was to be imprisonment for judgment debts in any civil proceedings. A further Fines for Assaults Ordinance enabled up to one-half of any fines imposed to be paid to victims, in explicit recognition of native preference for *utu*.

In introducing this measure to the Chiefs at a great gathering in Remuera, Governor Fitzroy explained that he did not wish to interfere with native custom. Rather he hoped to persuade by reason the abandonment of those customs in time. Key in this strategy, as Fletcher has argued,<sup>22</sup> was an emphasis on the benefits of individual responsibility, the dispassionate administration of justice (to achieve equality before the law) and the collective security to be obtained eventually from a common legal system. In the meantime, the legal system was to be separate in its provisions for Maori and non-Maori.

The Native Exemption Ordinance, which Governor Fitzroy acknowledged had been "framed on no precedent", came to be considered in London in a new climate. War had broken out in the North of New Zealand. Fitzroy was recalled and Governor Grey, an ambitious trouble-shooter, was sent out to New Zealand in 1845. Stephen was sympathetic to the Ordinance, but thought it would provoke settler hostility too far. Lord Stanley considered that the "zeal" of the reformers had "rather outrun discretion". Although the Ordinance was not formally disallowed, the new Governor was instructed to revise it.

The themes of cultural plurality and the response of law still exercise us. They include recognition of Maori custom within our law and questions as to the inevitability of a unitary legal system. How we have dealt – or not dealt – with such themes is part of the story of the New Zealand legal system.

Our laws for many years recognised informal Maori marriage and adoptions. For all our history we have maintained a separate system for the ownership and alienation of Maori land. Maori land is explicitly exempted from the provisions of the Matrimonial Property Act 1976. Statutes such as the Resource Management Act 1991 and its predecessors the town and country planning legislation, have given explicit recognition to Maori cultural values. The Maori Community Development Act 1962 provides for Maori Wardens to exercise control over other

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<sup>22</sup> Fletcher, above at n 19, 234.

Maori and perform minor policing roles. Under the Evidence Act, exceptions to the rule against hearsay are made for evidence of Maori custom.

Leaving aside the place of Maori in New Zealand society, other legislation permits the recognition of minority cultural values. That is particularly the case in family law where the courts have invoked Article 30 of the UN Convention of the Rights of the Child in being guided by the principles that a child should be able to know and enjoy his or her own culture and language. The Children Young Persons and Their Families Act 1989 specifically recognises cultural issues. It is based on the assumption that children are best raised within their own cultural context and with their own people. It permits tribal elders to take leadership roles in family group discussions. Under the Mental Health (Compulsory Assessment and Treatment) Act 1992, courts and tribunals exercising powers under the Act are required to do so “with proper respect for the patient’s cultural and ethnic identity, language and religious or ethical beliefs” and the significance to the patient of his or her ties with family, hapu, iwi and others. Cultural evidence is able to be called on sentencing. Apart from sentencing, in criminal law, we have not maintained recognition through law of diversity. In family law, property law, and public law, we have continued to accept that the law can respond to the distinct values of distinct racial and cultural communities. On the topic of cultural maintenance, we may have been more ambivalent. Language is a case in point.

Matthew Arnold once described the Welsh language as “the curse of Wales”.<sup>23</sup> Today in the United Kingdom and in Europe minority native languages are not regarded so miserably. It has come to be recognised that such diversity is a source of richness and strength in a society. It has come to be seen that validation of cultural minorities through recognition of their languages is critical to human dignity. Joseph Raz has argued more widely that freedom of expression validates an individual’s identification with his or her way of life and sense of self-worth.<sup>24</sup> If individuals believe their way of life or culture to be valid that “facilitates rather than hinders their integration into society”.<sup>25</sup> Such validation also makes the way of life “a real option” for others. A perception that a language is dead, dying or irrelevant may be shattered. Public validation is essential to a sense of “cultural transmission, preservation and renewal”. We have lost much time with many minority languages. Modern communications which have done so much to kill them off now present a unique opportunity to deliver the scarce resource of the native speaker to a wide audience.

The Welsh Language Act which is the prototype for our Maori Language Act, was passed by the Westminster Parliament in 1967. There are Welsh language radio and television stations and statute requires the curriculum of schools to contain Welsh language instruction. There is wider support for such initiatives in Europe.

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<sup>23</sup> Jan Morris, *Wales* (1982), 66.

<sup>24</sup> J Raz, “Free Expression and Personal Identification” (1991) 11 *Oxford Journal of Legal Studies* 303, 311.

<sup>25</sup> At 312.

And they are not confined to native languages. A European Community directive requires member states:<sup>26</sup>

to take appropriate measures to promote, in co-ordination with normal education, teaching of the mother tongue and culture of the country of origin for the children of other community nationals.

“Pluralistic equality” aims to give members of minorities the same advantages as members of the majority. “Affirmative equality” goes further and may involve a corresponding interference with the freedom of the majority, for example by making the education system bilingual or requiring all civil servants to be bilingual. These are steps that have been taken in Wales, Belgium and Canada. We have not been prepared to go as far to date.

So far, I have talked about substantive equality under law. Equality before the law is also an aspect of the rule of law, as the New Zealand White Paper recognised. It strikes a universal chord because of a shared moral sensibility that the delivery of justice by impartial tribunals matters. Such equality was part of Aristotle’s notion of corrective justice. Essential to it is the requirement of impartiality in the application of law by which no weight is given to the character or social status of the parties. Posner, in arguing against the view<sup>27</sup> that Aristotle’s notion of corrective justice is more than a formal concept, comments that “Aristotle seems to be saying little more than that there should be an impartial government machinery for redressing redressable wrongs”.<sup>28</sup>

Well, it may seem little in saying, but the delivery of a level playing field is more easily said than done. The difficulties lie both in the provision of impartial judges and in their application of equal laws to people who are manifestly unequal. The disparities do not simply arise in ease of access to the courts because of lack of means, although that is a significant barrier to equality before the law. Eligibility for legal aid and commercial value explain why criminal cases and freedom of speech cases are the most common to invoke human rights and why the privacy interests of wealthy individuals are often before the courts. The principled development of law is the loser if the discourse enabled by litigation about equality is blocked or skewed. Court fees, lawyers’ fees and the exposure to costs greatly inhibit public interest litigation today.

It has to be acknowledged that the techniques and legitimacy of judicial function are fragile. That can be illustrated by the difficulties experienced by Courts in expressing ethical and legal standards which will allow principled determination of issues of life and death and the allocation of medical resources.<sup>29</sup> More

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<sup>26</sup> EEC Directive on the Education of Children of Migrant Workers 1977.

<sup>27</sup> Expressed for example by Bingham, *supra* n 15, 310-311 and Sedley, *supra* n 9, 50-51.

<sup>28</sup> Posner, *supra* n 5, 316.

<sup>29</sup> *Roe v Wade* 410 US 113 (1973); *Airedale NHS Trust v Bland* [1993] 1 All ER 821; *Patient A v Health Board X & Anor*, HC BLE CIV-2003-406-000014, 15 March 2005, Baragwanath J.

widely, the scope for judicial correction of inequalities is circumscribed by legislation and also by the reality that the courts lack legitimacy in making substantial changes to long-standing assumptions, often reflected in older legislation. That is illustrated in New Zealand by *AG v Quilter*<sup>30</sup> in which gay couples who applied for marriage licences were unsuccessful in a claim that they were being discriminated against. Instead, this form of disadvantage has since been directly addressed by the legislature, which is clearly better placed to reflect contemporary values and provide appropriate solutions. What I think should not be underestimated is the didactic role that the litigation may have played. As it has in other major litigation about equality which has been formally unsuccessful.<sup>31</sup>

Other disparities in equality before the law arise in the application of the criminal law to those of unequal responsibility. For those who are sane and not provoked to kill, the law is in general implacable. Sedley says of sentencing that most of the individuals before the court are irreparably damaged by their formative experiences. This is the “majestic even-handedness of the law”, described by Anatole France, “which forbids rich and poor alike to sleep under bridges, to beg in the streets and to steal bread”.<sup>32</sup> The courts in sentencing such people are instruments of society in maintaining civil order and public confidence in the system. The scope for contextualised judging to ensure equal justice is small.

That is not necessarily a bad thing. In cases involving equality, cultural values and gender and class assumptions may distort impartiality unconsciously. This is the risk of the “unexpressed major premise” described by Oliver Wendell Holmes. Such premise is often based on values and attitudes which have been absorbed by the judge through his or her own experiences in life. Felix Frankfurter identified a critical quality of a judge as the “power to discover and to suppress his prejudices.”<sup>33</sup> It is easier said than done, particularly if judges come from narrow sections of society. Lord Devlin pointed to the English judges who, in looking for the philosophy behind an Act, found “a Victorian Bill of Rights”:<sup>34</sup>

favouring (subject to the observance of the accepted standards of morality) the liberty of the individual, the freedom of contract, and the sacredness of property, and which was highly suspicious of taxation. If the Act interfered with these notions, the judges tended either to assume that it could not mean what it said or to minimize the interference by giving the intrusive words the narrowest possible construction, even to the point of pedantry.

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<sup>30</sup> [1998] 1 NZLR 523.

<sup>31</sup> *New Zealand Māori Council v Attorney-General* [1992] 2 NZLR 576 (CA); [1994] 1 NZLR 513 (PC); [1996] 3 NZLR 140 (CA).

<sup>32</sup> *Le Lys Rouge* (1894), ch 7.

<sup>33</sup> Felix Frankfurter “The Appointment of a Justice” in P Kurland, *Felix Frankfurter on the Supreme Court* (1970), at 211, 216-217.

<sup>34</sup> Patrick Devlin, “The Judge as Lawmaker” in *The Judge* (OUP, 2<sup>nd</sup> ed, 1981) at 15.

Within my time in legal practice in New Zealand, I can point to similar hostility by the then exclusively male judiciary to the policies of early matrimonial property legislation. These were judges who prided in their mastery of legalism. They would have been horrified to think that they were pushing any sort of ideological barrow. I suspect the same is true of the English judges who were hostile to tax and other legislation impacting on property rights. They simply did not see that their construction of the legislation was heavily influenced by their own personal values and they did not appreciate the extent to which those values were out of touch with the values of the times.

There are limits to the insights to be expected of a judge who thinks that all the world thinks as he does and therefore that a factor goes without saying. That is why diversity in appointments matters. Had there been women on the bench, it is most unlikely that the unconscious hostility to the matrimonial property legislation would have continued unchallenged for so long. Or that I could have received a judgment in defended separation case where the judge said “You only have to look at the photographs of the home to see that the respondent is a good husband and provider.” Again, however, there are limits to what can realistically be achieved with greater diversity on the bench, especially when we move beyond gender. Whatever their origins, most judges are appointed from well-educated, middle-class, economically comfortable backgrounds. Perhaps honesty in identification and expression of the major premises in judicial reasoning is the best policy.

It can however be controversial, as is illustrated by a 1997 decision of the Canadian Supreme Court, *R v RDS*.<sup>35</sup> A black youth was acquitted by a black judge, who declined to accept the evidence of a police officer. What she said was:<sup>36</sup>

The Crown says, well, why would the officer say that events occurred the way in which he has relayed them to the court this morning. I am not saying *that the constable has misled the court, although police officers have been known to do that in the past*. I am not saying that the officer overreacted, *but certainly police officers do overreact, particularly when they are dealing with non-white groups. That to me indicates a state of mind right there that is questionable*. I believe that probably the situation in this particular case is the case of a young police officer who overreacted. I do accept the evidence of [RDS] that he was told to shut up or he would be under arrest. *It seems to be in keeping with the prevalent attitude of the day*.

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<sup>35</sup> [1997] 3 SCR 484.

<sup>36</sup> Ibid at 494 (emphasis added in judgment).

At any rate, based on my comments and based on all the evidence before the court I have no choice but to acquit.

The Supreme Court of Canada was deeply divided on the acceptability of what L'Heureux-Dubé and McLauchlin JJ described as "contextualised judging."<sup>37</sup> Four judges expressed the view that "judicial neutrality" is to be contrasted with "judicial impartiality". The first is impossible to achieve. On this view judges should draw on knowledge of their communities. Relevantly, they would understand the racial dynamics of the community "including the existence . . . of a history of widespread and systematic discrimination against black and aboriginal people, and high profile clashes between police and the visible minority over policing issues."<sup>38</sup> L'Heureux-Dubé and McLauchlin JJ found the judges' remarks:<sup>39</sup>

reflected an entirely appropriate recognition of the facts in evidence in this case and of context within which this case arose – a context known to the judge and to any well-informed member of the community.

Cory and Iacobucci JJ, while concurring in the result to uphold the verdict, emphasised the dangers of reasoning from generalisations. They stressed that the life experience of a trial judge is no substitute for evidence. They thought the reasons given were sufficient, however, without the offending words. The dissenting judges (Lamer CJ, Sopinka and Major JJ) took the view that the reasoning was based on stereotyping and was impermissible propensity reasoning not based on evidence relating to the particular officer.

Cases such as this illustrate why it is easier to treat equality before the law as a claim for formal equality through provision of an impartial adjudicator who is a check against the exercise of arbitrary power. As such, it is a central plank of the common law notion of the rule of law. That leaves questions of substantive equality to be addressed largely in the political arena. But not always.

I started with *Brown v Board of Education* as an example of an exceptional case which came before the Court at a time when there was significant political will for change, perhaps majoritarian will. That is not to diminish its impact. It was a case where the Court did not evade the snake in the legal grass. It determined that the unequal impact of apparently equal laws was contrary to the requirement of equality under law, an attribute of the rule of law. It stands to remind us that equality under law is not a formal concept only. It never has been.

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<sup>37</sup> Ibid, paragraph 59.

<sup>38</sup> Ibid, paragraph 47.

<sup>39</sup> Ibid, paragraph 30.

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