JUDGING: A BUTTERFLY VIEW

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The toad beneath the harrow knows

Exactly where each toothpoint goes;

The butterfly above the road

Preaches contentment to that toad.

Rudyard Kipling Pagett MP

Having stopped sitting as a New Zealand judge, I propose to anticipate the privilege available on retirement, of fluttering above the road. What picture does judging present?[1]

In my fifteenth year in that role I am aware of two dominant themes. One is the sense of privilege, being invited to exercise this historic office, not in one's own right but on behalf of other New Zealanders. The other is the sense of responsibility that entails.

At his swearing-in this month Justice Brewer, formerly the Brigadier commanding the New Zealand Territorial Force, described the stark contrast between life in New Zealand under the rule of law and the conditions in Afghanistan where he had been serving.[2] It echoed the experience of the judges of the previous generation, with their experience in North Africa, Italy, the Pacific and in the war at sea. We must make every effort to maintain the rule of law; as my brother Temm urged me when I took office, not to let standards slip below those obtaining when I started. Indeed we should strive to lift them, not because of some idiosyncratic notion of our own but because that is one of the things to which our paymaster, the citizenry, is entitled. We are not government employees but independent officers of the Crown, given great powers by the community to exercise on its behalf and in its interest.

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1 I acknowledge subjectivity, drawing disproportionately on my own experience and judgments.

2 In May 2011 at a UN counter-terrorism conference in Thimpu, Bhutan, I had the privilege of meeting a senior Afghan judge. His courage in returning to resume office after being driven into exile, his decency and his wisdom underline the point. His interpreter was a no less impressive Pakistan judge whose life is at risk every day. The picture of him and his distinguished Indian colleague joking and embracing one another, notwithstanding Kashmir, shed light on the role judges can play across state borders in developing the rule of law.

Common law judges have the enormous privilege of standing on the shoulders of their predecessors – the metaphor used by Newton to describe the influence of *his* precursors upon his career. They included giants like Mansfield who created much of our civil law,[3] private international law[4] and human rights jurisprudence[5]. He found inspiration in the work of Tribonian, who in the great law school in what is now Lebanon systematised the work of *his* predecessors in Justinian's Code. In a recent address Lord Neuberger MR has described other sources of the common law, which included the feudal law developed on the Continent from the time of Charlemagne and imported into England by the Norman conquerors.[6]

The heritage of our predecessors embraces not only substantive and adjectival law, whether statutory or judge-made, but the rules of etiquette and conduct of Bar and Bench.[7] It includes as well appreciation of the contribution of the Bar from where most of us came and of the Academy who serve not only as critic and conscience of judges' performance but as a source of ideas and inspiration.[8] Like the English language, the common law of New Zealand[9] is open to contributions from any reputable source. Among the tasks of the judge is to review whatever part of the common law, with its complex of traditions, principles and rules, is in issue and, where necessary, to update it. That function, ostensibly denied to civil law judges,[10]

3 Both public (see Stuart Anderson "Public law" in *Oxford History of the Laws of England* Volume XI 1820-1814 English Legal System (Oxford University Press, Oxford, 2010) and his FW Guest Memorial Lecture "'Grave injustice', 'despotic privilege': the insecure foundations of crown liability for torts in New Zealand" (2009) 12 Otago L Rev 1) and private (see Ian Fletcher *Insolvency in Private International Law* (Clarendon Press, Oxford, 1999) recounting his "judicial activism [expressed in] decisions [that] contains the seeds of what can justly be acclaimed as an internationalist tradition spanning more than two centuries of English judicial development [there of international insolvency'". But there are distinct limits: as witness the anachronistic decision *Shaw v DPP* [1962] AC 220 where a majority of the House of Lords sought to add his opinion that the judges should add categories of crime, which while true in the 18th century had been outmoded by the Parliament Acts. Lord Reid, in dissent, appreciated their significance to the law-making role of judges.

4 Fletcher, ibid.

5 *Somersett's case* (1772) 20 State Tr 1.

6 Lord Neuberger MR "The incoming tide: the civil law, the common law, referees and advocates" (The European Circuit of the Bar's First Annual Lecture Gray's Inn, 24 June 2010).

7 I owe to TA Gresson J my copy of Boulton's *Etiquette and Conduct at the Bar* and to Mahon J Pound's *Spirit of the Common Law.*

8 From this Law School alone Professors Orchard, Burrows and Joseph have been among my regular mentors.

9 The recognition of which as a distinct entity still requires emphasis but which the establishment of our own Supreme Court will accentuate, as emphasised in an earlier lecture in this series.

10 See John Henry Merryman and Rogelio Pérez-Perdomo *The Civil Law Tradition* (3rd ed, Stanford University Press, Palo Alto, 2007).

has been the source of much ill-informed criticism. The reality is that, while Parliament has essentially plenary authority to override the common law: [11]

1. Interpretation and application of legislation is a judicial responsibility;
2. Where there are gaps in statutes or areas where they do not run the court must determine what law to apply;
3. The judges too, and not only Parliamentarians and the public service, are custodians of our national traditions responsible for their protection. I return to that interesting topic in relation to certain minorities.

The judge is also referee, fact-finder, adjudicator and interstitial lawmaker. A major responsibility is to secure and maintain public confidence in the rule of law.

How do judges go about it? How should they?

I. Process

The former Premier Président of the final French Court the Cour de Cassation, Guy Canivet, used the vivid image:[12]

Il faut rendre justice les mains tremblantes...[13]

There is no room in judging for smugness, arrogance or insensitivity. Any dispute is troubling to the participants; even more troubling is to have one's private affairs ventilated in public, in an unfamiliar environment, before an unfamiliar judge or jury who will decide one's fate after the searing process of hostile cross-examination. Judging requires courtesy, sensitivity to the situation of others, and effort. As Michael Taggart showed, virtually every vexatious litigant has merit of some kind which has been overlooked or overridden in the litigation process. His account of the tragic *Wiseman* case teaches that careers can be ended and lives destroyed, sometimes literally, when the case goes off the rails.[14] A French judge, Antoine Garapon, in *Bien Juger: Essai sur le ritual judiciaire*[15] speaks of how in his country "the accused is crushed by the ceremonial and the event turns into a symbolic destruction

11 I leave alone the question of what the judges should do in the case of legislation to put blue-eyed babies to death. In *Cooper v Attorney-General* [1996] 3 NZLR 480 I dismissed the concern as theoretical. The Foreshore and Seabed Act was very troubling, enacted after advice to the Crown's advisors that its compensation provisions emulated those struck down by the Constitutional Court of South Africa eight months earlier and infringing the basic principle of equal treatment. It caused me in two of the three essays cited below n 50 to depart from the practice, to which I have otherwise adhered, that judges discuss legislative policy only in judgments. It is a relief that it is to go and comforting that by the repeal Parliament has saved the courts from wrestling with a measure that both infringed the Treaty of Waitangi and, as I propose to argue elsewhere, breached a fundamental right of racial equality before the law.

12 Guy Canivet, Premier président de la Cour de cassation (Audience solennelle de début d'année judiciaire, 6 January 2006).

13 "It is necessary to make justice with trembling hands"

14 Michael Taggart "Alexander Chaffers and the Genesis of the Vexatious Actions Act 1896" (2004) 63 CLJ 656; "Vexing the Establishment: Jack Wiseman of Murrays Bay" [2007] NZLRev 271

15 Antoine Garapon *Bien Juger: Essai sur le ritual judiciaire* (Editions Odile Jacob, Paris, 2001).

of life because public opinion is too strong and the response of the judges too weak". Since then we have seen in France the tragedy of Outreau, where a young investigating judge ordered the arrest of 14 innocent people who suffered great distress, including a suicide, before their vindication. The result shook confidence in the criminal system and led to the abandonment of the *juge d'instruction* procedure.

As Bentham said, a judge when judging is himself on trial. [16]

The court is a crucible which must contain the pressures, often immense, of working through human difference that is a crucial element of the rule of law. The blood feuds between the Montagues and the Capulets in *Romeo and Juliet* like the one recounted by Mark Twain in *Huckleberry Finn* are what happens when the law does not command confidence.

Very often there are elements of merit on more than one side and the process must ensure that each party, especially the loser, goes away with a sense that his or her case has been understood and dealt with fairly. That is a big ask. There has been a progressive widening of the kinds of issues that come before the courts, which could not possibly be accompanied by an equivalent education of judges and jurors in the complexities of modern life. Judges tend to be from a relatively privileged background in terms of education and living standards. But that carries with it limitations: how can a judge (or juror) acquire the knowledge required to do justice in a case turning on the unfamiliar?

The answer is that the first obligation of each judge – professional or juror – is to qualify oneself for the task. It is a real problem, of which my first serious experience was as counsel before the Waitangi Tribunal in the Muriwhenua fishing case. When the enormity of the case dawned upon me – deprivation of the five tribes' access to fishing rights, from being the wealthiest tribes in New Zealand to the poorest – I lost a stone in a week. It was my task to get inside their minds and look out through their eyes in order to equip myself to represent them. I was looking across a cultural and racial divide at what my people had done to theirs.

I have had a similar challenge presiding in the Court of Appeal of Samoa – parachuting into others' society, with responsibility for interpreting their Constitution and administering justice according to their culture and their values. It is burdensome and impossible to achieve completely. But one's task is to try.

A further vital element of the obligation to be qualified to sit is the obligation of every judge both to be and to appear to the reasonable informed observer to be unbiased. How can that be achieved? Cardozo appreciated that all of us are prejudiced.[17]

16 See the citation by the Supreme Court of Canada in *A-G (Nova Scotia) v MacIntyre* [1982] 1 SCR 175 at 183 per Dickson J (later CJ) :

> …Only in proportion as publicity can any of the checks applicable to judicial injustice operate. Where there is no publicity there is no justice. Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against impropriety. It keeps the judge himself when judging under trial.

17 Benjamin N Cardozo *The Nature of the Judicial Process* (Yale University Press, Hartford, 1975) at 167, 175-176.

> Deep below consciousness are other forces, the likes and dislikes, the predilections and the prejudices, the complex of instincts and emotions and habits and convictions, which make the man, whether he be litigant or judge ...

He cited James Harvey Robinson:

> We are abjectly credulous by nature, and instinctively accept the verdicts of the group ... we are ever and always listening to the still small voice of the herd and are ever ready to defend and justify its instructions and warnings, and accept them as our own reasoning.

What are we to do about it? The answer, as I have sometimes directed a jury where there such high risk of prejudice that I have read those passages at the start of the case, is to recognise our bias and quite deliberately lift it from our mind and set it aside until after verdict. But that is not easy.

We are conscious of what matters to us in life; that can be expressed rather loftily as our human dignity. But others' human dignity tends to be seen as difference, which slides very fast into doubt, insecurity and, all too often, the dislike of the unfamiliar called xenophobia. In many cases the mere allegation could be enough to make an ordinary person squirm. In others, of which the injustice to Captain Dreyfus is an outstanding example, there is overwhelming public distaste in the society for a member of a particular creed, race, or social group. In criminal trials there are 12 lay judges as well as the single professional judge; all must maintain the high standards of fairness.

So much for process. What of substance?

II. Substantive Law

QCs are "Her Majesty's counsel learned in the law".
To achieve such qualification is also the task of the judge.
Sir John Laws has cited Sir Walter Scott:

> A lawyer without history or literature is a mechanic, a mere working mason, if he possesses some knowledge of these, he may venture to call himself an architect.

Sir John added: [18]

> The common law has always needed more than mechanics. Its ingenious subtlety requires sophisticated managers. The mere study of the law is not enough to do the law justice.

While the advantages of requiring retirement at[19] the Biblical three score and ten clearly outweigh those of the former life tenure,[20] the need to learn has accelerated with age. Asked not long ago to deliver an address on Magna Carta I found it necessary to re-read the US experience recounted in Dick Howard's *Road from Runneymede*[21], study Peter Linebaugh's *The Magna Carta Manifesto*[22] and analyse the division of opinion in the Supreme Court in *Boumediene v Bush*.[23] Yet chapter 29 of the Magna Carta 1297 is a core

18 Sir John Laws Foreword to *Inner Temple Yearbook* (2010-2011) 5.
19 In New Zealand as in a number of other jurisdictions.
20 Still possessed by US Federal judges.
21 A E Dick Howard *The Road from Runneymede: Magna Carta and Constitutionalism in America* (University Press of Virginia, Charlottesville, 1968).
22 Peter Linebaugh *The Magna Carta Manifesto* (University of California Press, 2008).
23 *Bou mediene v Bush* 553 US 723 (2008).

element of New Zealand domestic law, to be found in volume 30 of our brown reprinted statutes. It states specifically the judicial obligation both to give a decision and to so promptly. In *Mihos v Attorney-General*[24] I was required to consider as well as Magna Carta three 14th century statutes and the Bill of Rights of 1688, as well as the New Zealand Bill of Rights Act 1990, a number of statutes and the concept of proportionality, on which a handwritten book of Swiss statutes dating back to the 14th century was relevant: it was about proportionality in the judicial administration of torture. And in *Attorney-General v Mair*[25] I looked to a recent decision of the Constitutional Court of Italy[26] for guidance upon the tenet of equality which is a basic part of the New Zealand value system.[27]

Our substantive law includes not only the historic statutes and the more recent enactments of Parliament and subordinate legislators. The ever-changing mosaic of the common law of New Zealand draws on fundamental New Zealand values and their application in context both in the local context and elsewhere.[28]

III. Judging in Action

I have said that a judge is referee, fact-finder, adjudicator and lawmaker.

A. Referee

How the judge approaches the task of judging must alter according to the needs of the case. In jury cases the judge's role is predominantly that of referee, whose task is to stay out of the dispute between the parties – prosecution and defence – and ensure fair play. That begins with ensuring the jury has the assistance needed to perform its function. Before Professor Warren Young's *Juries* report for the Law Commission[29] some of us tended to view jurors rather as bit players – one tried to be courteous but had not really reflected on what it meant to be a juror. But, as it happened, when I joined the Commission we had been given a reference by the Minister, Sir Geoffrey Palmer, on the criminal law which included juries. We decided that no worthwhile report could be made without original research, including interviewing jurors. Since we had no statute prohibiting that course we sought and received the consent of the Chief Justice and the affected trial judges to

24 *Mihos v Attorney-General* [2008] NZAR 177 (HC).

25 *Attorney-General v Mair* [2009] NZCA 625. See now *Haronga v Waitangi Tribunal* [2011] NZSC 53.

26 Judgment no 262 of 2009, 19 October 2009, cited in *Mair* at [164].

27 In his essay "Government "third source" action and common law constitutionalism" (2010) 126 LQR 126 Professor BV Harris cites Sir John Dyson's reference in *R (Association of British Civilian Internees: Far East Region* [2003] QB 1397 at [83], to the notion of a "common law principle of equality". In New Zealand the Court of Appeal had given judgment in that sense: *Reckitt and Colman (New Zealand) Limited v Taxation Board of Review* [1966] NZLR 1032 (CA) at 1042 per Turner J.

28 The argument is developed in "The Community of the Common Law" *The Common Law Lecture Series* 2010 83 published by the University of Hong Kong.

29 NZLC R69 *Juries in Criminal Trials* (February 2001)

that course – not in relation to jurors' decision-making in the particular case but into what they thought of the system and what the researchers made of it all.

The answer was very clear. Jurors were unimpressed by the mismatch between their responsibility – as judges of fact – and the lack of resources provided. Unlike professional judges, they received very little by way of access to such primary elements as the relevant statutes, the transcript of evidence, and a number of basics about their role. Reading the Young report was embarrassing but salutary. We immediately realised that, if as law students we could not have answered examination questions without ever receiving and being able to study the primary legislation; as judges sitting alone we found it necessary from time to time to remind ourselves from the notes of evidence of what precisely had been said, there was no reason to think that juries would perform better without them.

Nowadays juries are recognised as judges, whose fact-finding role is the more difficult task. The professional judge's role is subordinate – providing at the outset a handout containing the indictment, the relevant statutes, a locality map, where possible particulars of any agreed issues and a list of witnesses; offering help; assisting clarification; and generally acting as mother's little helper to the actual decision-makers. The summing-up will be accompanied by a decision trail for the jury work through "if you find this factual result you move on to …". The community is now educated as to these entitlements: a recent jury requested a decision trail where none had been prepared. And of course juries now receive the transcript of evidence. The result is better justice.

Like Professor Young, who performed for the Law Commission the trail-blazing research into jury trials, I have been impressed by jurors' ability to heed and give effect to judicial directions – including those against prejudice.

But sometimes the task of qualification is so exacting as to be simply impossible. In *R v Hutton*[30] I considered there should have been a new trial because without much greater assistance from the judge the case was beyond the capacity of the jury. Parliament has now permitted judges to require such cases to be tried before a judge sitting alone. But it is imperative to recall the virtues of trial by jury, "the little Parliament" which we mentioned in referring the Law Commission's Juries report to the Minister.

B. Fact-finder and adjudicator

I take these together. In civil cases before a judge alone the position is rather different. Since the judge is responsible for the decision he or she will seek before the case begins to identify the issues and, as it proceeds, take care to get to the right answer. Where experienced counsel will give judges a Rolls-Royce ride, freeing them simply to focus on what direction to take, in other cases, especially those involving litigants in person, much greater judicial intervention may be required. There is a difficult balance between assisting the inexperienced to handle an unfamiliar task, and "getting into the ring" thus risking a perception of unfairness.

30 *R v Hutton* [2008] NZCA 126.

Within civil cases there is a continuum. In matters of public law the judge is often required to take a broader view that that adopted by the parties. It may, for example, be necessary to order joinder of other parties of the Court's own motion. In *Air New Zealand v Director-General of Civil Aviation*[31] there was need to serve the Attorney-General in no fewer than three capacities: for the Ministry of Foreign Affairs and Trade, for the Ministry of Transport and for the Attorney-General, who as senior Law Officer has responsibility to act in the public interest, free of political influence, in the administration of justice, including relations between the executive government and the Crown.[32] And in public law cases the Court may elect to give judgment notwithstanding settlement between the parties before the decision has been given.

In other cases, especially where there is a contract, the court may adopt a very hands-off approach. The parties may have agreed to abide the decision of an expert, or an arbitrator; in those circumstances the Court will try to do no more than keep the ball in play by facilitating the agreed method of resolution (as by restraining conduct inconsistent with the agreement). A prize-winning French thesis contains an elaborate discussion of the relationship between judge and parties in contract cases.[33] The Supreme Court[34] has recently substituted a more elaborate search for the parties' imputed intention than that formerly adopted by the House of Lords;[35] it remains to be seen how the jurisprudence will develop.

In cases with penal or other dire consequences the Court will apply the principle of legality which includes the maxim *in favorem libertatis*.[36] It is a facet of the common law rules about onus and standard of proof. It is currently unfashionable to employ Latin; Lord Woolf discouraged its use in England and Wales. But care is required not to throw out the *infans* with the *aqua*: like other judges,[37] I have often found the principle needed to resolve a difficult problem can be found in *Broom's Legal Maxims*[38] (or *Adages du Droit Français*[39] which is its French equivalent).

There are many techniques available. They have included not only hot-tubbing witnesses but, on one occasion when the parties could not agree on the choice of interpreter, the use of twin interpreters to ensure that each side was satisfied that the translation was accurate. They have extended, in complex cases, to the issue of judgments in draft to ensure that errors are identified before the judgment is finalised; and the grant of leave to apply,

31 *Air New Zealand v Director-General of Civil Aviation* [2002] 3 NZLR 796 (HC).
32 See Law Commission *Criminal Prosecution* (NZLC R66, 2000) at [32]–[33]).
33 Christine Boillot *La Transaction et le Juge* (Les Presses Universitaires de la Faculté de Droit de Clermont-Ferrand, Clermont-Ferrand, 2003).
34 In *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] NZSC 5, [2010] 2 NZLR 444.
35 From *Prenn v Simmonds* [1971] 1 WLR 1381 (HL). The UK Supreme Court has also shifted position: *Oceanbulk Shipping & Trading SA v TMT Asia Limited* [2010] UKSC 44.
36 See *Chief Executive of Department of Labour v Yadegary* [2008] NZCA 295, [2009] 2 NZLR 495.
37 See for instance *Goldsbro v Walker* [1993] 1 NZLR 394 where Richardson J employed the maxim *omne majus in se continet minus* to make the Fair Trading Act 1986 work sensibly.
38 H Broom, *Legal Maxims* (9th ed, Sweet and Maxwell, London, 1900)
39 H Roland and L Boyer ((4th ed, LexisNexis, Paris, 1999)

as in the *New Zealand Maori Council* case,[40] which ensured that subsequent breach of the principle applied in the judgment could be cut short promptly and efficiently. [41]

It is the task of a judge to educate him or herself as to such techniques. The learning of the past is part of our heritage, which is not that of the judges but of the members of the community whom they are appointed to serve.

IV. Lawmaker

The Judge's responsibility for judicious updating and development of the judge-made common law is no longer disputed by those familiar with the process. In *Antons Trawling Co Ltd v Smith*,[42] for example, an 1809 English decision, that variation of contract is ineffective unless there is fresh consideration, would have resulted in injustice. Mr Smith was the Master of a fishing vessel and he contracted with Antons to search for orange roughy. He was told that if he discovered a new bed he would be entitled to 10 per cent of the resulting quota. Having done so, he was denied the quota and sued. We held that the common law rule was a misapplication of an earlier principle aimed at avoiding extortion by a person in Mr Smith's position. There being no question of that, and the consideration required by the ordinary law of contract being provided by the exchange of mutual obligations we held the oral agreement to be enforceable.

Likewise in the Feltex case *Saunders v Houghton*[43] we held that the former rule of policy against champerty (contracting to receive a share of proceeds of a claim which one has facilitated) could no longer represent New Zealand public policy designed as it was to protect the King from abuse by over-powerful barons. In public policy terms the prime considerations are on the one hand access to justice which too often is unavailable without recourse to a litigation funder and on the other hand avoidance of abuse of a defendant. That is achieved satisfactorily in England, Australia, Canada, Hong Kong, the United States and elsewhere by careful control by the presiding judge with recourse where needed to appellate courts.

We followed a decision of the Chief Justice of Canada in almost identical circumstances and allowed the class action to proceed.[44]

I mention as well the proceeding brought by this University and the University of Auckland to challenge as infringing natural justice a report proposing to assimilate the institutional structures of universities to those appropriate for kindergartens. My brother Fogarty and I, with the esteemed Solicitor-General Paul Neazor QC on the other side, had an agreeable morning before Sir Robin Cooke and his colleagues at the conclusion of

40 *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641
41 *New Zealand Maori Council v Attorney-General* [1989] 2 NZLR 142 (CA).
42 *Antons Trawling Co Ltd v Smith* [2003] 2 NZLR 23 (CA).
43 *Saunders v Houghton* [2009] NZCA 610; [2010] 3 NZLR 331
44 *Western Canadian Shopping Centres v Dutton* [2001] 2 SCR 534.

which the case was resolved by various agreed elements. They included the sections of the Education Act providing for academic freedom[45] and as critic and conscience of society.[46]

V. Counsel

No judge can be expert in all dimensions of the cases that come before the court. The role of counsel is critical to the administration of justice. Another responsibility of judges is educative: both of themselves and of counsel. Senior counsel are likely not only to have a mastery of their brief but to have specialist expertise which will help the judge to ascend what may be a very steep learning curve indeed.

VI. Minorities

A. Women

Minorities present a special challenge and take one back to the topic of bias. The history of the law's treatment of minorities is not a pretty one. The problem has extended to women, who have been a minority not numerically but in terms of power. It illustrates what has been discreetly called the *de haut en* bas phenomenon; in plain English, patronising abuse of their power by those in authority. In a preface to the Law Commission's paper *Women's Access to Legal Services*, after the considerable help of colleagues, I found it necessary to write:[47]

> What may be thought striking, and deeply troubling, is how fundamental the issues are and how long the law has taken to react to injustice.
>
> Very recent decisions revealed:
>
> ... failures of the common law – to recognise the effect of physical and emotional abuse; to protect women from rape by an estranged husband; to credit them as competent to give credible evidence; to protect guarantors from the effects of undue influence; to deal justly with the consequences of dissolution of marriage; to understand the reasons for delay in commencing suit on the grounds of sexual abuse.[48]

B. Children

Child custody was until recently seen as a matter between parents each seeking to exert rights against the other. In *L v A*[49] we turned that approach inside out. It is now accepted that the overriding rights are those of the

45 Education Act 1989, s161

46 Education Act 1989, s162

47 Law Commission *Women's Access to Legal Services* (NZLC SP1, 1999).

48 *R v Lavallee* [1990] 1 SCR 852 (Supreme Court of Canada) (followed in *R v Oakes* [1995] 2 NZLR 673 (CA)), *Ruka v Department of Social Welfare* [1997] 1 NZLR 154 (CA), *R v R* [1992] 1 AC 599 (HL), *Barclays Bank Plc v O'Brien* [1994] 1 AC 180 (HL) (followed in *Wilkinson v ASB Bank Ltd* [1998] 1 NZLR 674 (CA)); *Z v Z (No 2)* [1997] 2 NZLR 258 (CA) and *W v Attorney-General* [1999] 2 NZLR 709. In other spheres it has been necessary for Parliament to intervene: Domestic Violence Act 1995; Evidence Act 1908 s 23AB and 23AC; Property (Relationships) Act 1976.

49 *L v A* [2004] NZFLR 298 (HC).

child to the exercise by parents of their responsibilities. The emergence of this perception is a logical consequence of the obligation of the Court as *parens patriae*.[50]

At base, as with the following examples I will mention, is the increasing appreciation that human dignity is the overarching value and in matters of sexual behaviour as in the matters of religion individual dignity requires freedom of choice.

C. Māori

It is of note that in the Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010 enacted by consent of the parties the competing claims to the river were looked at through another lens; from the standpoint of the river, viewed by Tainui as an ancestor: what was required of others able to influence its future?

The topic of Māori is a vast one that can only be mentioned in passing. In the present paper I have expressed my own views as to aspects of it in three recent publications[51] and in *Mair.* Further work in this area is in train

D. Refugees and other immigrants

It is now recognised that refugee status is conferred in law by the Refugee Convention and in fact by whatever are the particular circumstances of the applicant. The Court's task is to find the facts and apply the law. In this sphere the imperative of human dignity underlies the judgments in *Ding*,[52] *X v Refugee Status Appeals Authority*[53] (reversed by the Supreme Court) and *Tamil X v Refugee Status Appeals Authority***.**[54]

E. Intellectually and mentally disadvantaged

In *R v Tuia* CA 312/02 27 November 2002 we stated that:[55]

> … reduced culpability is a factor which ought to receive specific acknowledgment; that the law must give full weight to the principle that criminal punishment has an essentially moral base and lesser moral fault requires recognition ….

50 See *Ding v Minister of Immigration* (2006) 25 FRNZ 568 (HC).

51 "The Evolution of Treaty Jurisprudence" (2007) 15 Waikato L Rev 1; "New Zealand Law and Māori" in *Reflections on the New Zealand Law Commission* (LexisNexis, Wellington, 2007); "Arguing the case for the appellants" in Jacinta Ruru (ed) *In Good Faith* (New Zealand Law Foundation, Wellington, 2008).

52 Above n 50.

53 *X v Refugee Status Appeals Authority* [2006] NZAR 533 (HC).

54 *Tamil X v Refugee Status Appeals Authority* [2009] NZCA 488, [2010] 2 NZLR 73; appeal dismissed [2010] NZSC 107.

55 *R v Tuia* CA312/02, 27 November 2002, approved in *R v Bridger* [2003] 1 NZLR 636 (CA).

In *RIDCA Central v M*[56] we were asked by the Crown for leave to appeal the bold judgment of Simon France J in which he had declined to follow decisions of the final courts in England, Canada and the United States, which had held that nuisance conduct by an intellectually disadvantaged person could receive effectively the same treatment as the conduct of a recidivist paedophile sentenced to preventive detention. I was of opinion that the issue is of such importance that leave to appeal to the Court of Appeal, from which no appeal lies to the Supreme Court, should be contingent upon the Crown's agreeing to issue a concurrent proceeding for judicial review which could be moved into the Court of Appeal for contemporaneous determination and from the decision in which an appeal could lie to the Supreme Court.

F. Gay and lesbian

Until the Wolvenden Report the law of England and that of other common law States including New Zealand, criminalised homosexual conduct between consenting adults. The opinion of the Wolvenden Committee, that what consenting adults do in private is no business of the law's, has been accepted across much of the common law world including New Zealand, England and, in *Lawrence v Texas*,[57] by the United States Supreme Court.

Further, successive judgments, among them *King v Church*,[58] have recognised that same sex partnerships must be accorded no less dignity than other relationships.

VII. The international dimension

I touched upon this in my lecture at Victoria University of Wellington.[59] The essential point is that globalisation, having affected most domestic activities, must equally affect the law that regulates conduct and disputes in respect of those activities. There is an interesting and important contrast with the civil law.[60] Of major significance is the (decreasing) difference of approach in relation to judicial law making, prohibited by Napoleon's Code but fundamental to the judicial function in New Zealand as in other common law states.

In two recent works, Campbell McLachlan's *Lis Pendens*[61] and Benedict Kingsbury's and Stephan Schill's essay "Investor-State Arbitration as Governance",[62] masters of international law have shown how legal practice

56 *RIDCA Central v M* [2010] NZCA 213.

57 *Lawrence v Texas* 539 US 558 (2003).

58 *King v Church* [2002] NZFLR 555 (CA). See most recently the UK Supreme Court's decision *HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department* [2010] UKSC 31.

59 "Creating a New Zealand Jurisprudence in Public and International Law" (2010) 41 VUWLR 703.

60 See John Henry Merryman and Rogelio Pérez-Perdomo *The Civil Law Tradition: An Introduction to the Legal Systems of Europe and Latin America* n 10 above..

61 Campbell McLachlan *Lis Pendens in International Litigation* (Martinus Nijhoff, Leiden, 2009).

62 Benedict Kingsbury and Stephan Schill "Investor-State Arbitration as Governance" in AJ Van den Berg (ed) the International Council for Permanent Arbitration's *50 Years of the New York Convention* (Kluwer Law International, New York, 2009), which reference I owe to the former High Court judge and leading arbitrator David Williams QC.

has globalised and moved into the sphere of international governance. New Zealanders are already playing leading roles as judges in this evolving jurisdiction as arbitrators. We have our own member of the International Court of Justice. And there are roles in international criminal tribunals which form part of this developing process.

VIII. The Future

I have had the privilege as counsel, judge, law commissioner and occasional lecturer of seeing a fair range of New Zealand legal talent. While there will always be pressures upon our systems, I am confident that the next generation of judges will heed Paul Temm's precept and ensure that the judicial institution is enhanced.