

# LAW, LIKE LOVE: WHY ‘GUARDIANS OF THE LAW’S RATIONALITY’ FAIL TO SATISFY

SIAN ELIAS\*

Paul Rishworth suggested that in speaking today I might look at the responsibilities of teachers of law in relation to the obligations of practitioners to uphold the rule of law. That seemed a helpful suggestion. Last week at a Legal History conference at another University, I was thanked by one of the organisers for having participated in the conference rather than coming along to “tell the academics what to do”, as apparently judges usually do. In that light, Paul’s suggestion seems a little provocative. I felt honour-bound to press on. I had already given Bruce Harris a title for my paper which was intended to invoke Peter Birks’s insistence that guarding the rationality of the law is the responsibility of the law schools,<sup>1</sup> but I do hope it does not sound as though I am trying to tell you what to do. Far from it. I am looking for a little help myself.

The other allusion in my title is of course the poem by Wystan Auden. Despite being entitled “*Law, Like Love*”, the poem is not about law. It is about love. Love is said to share with law the “timid similarity”, that both are irrational and false. I do not hold that opinion. I believe in law and its rationality and that, as Blackstone and before him Aristotle insisted, the study of law is “the principal and most perfect branch of ethics”.<sup>2</sup> I accept that such study is best carried out in law schools which constitute, if not the sole guardians, then at least the principal guardians of the rationality of law. In thinking about what I observe about law today, I question whether guarding its rationality is good enough. Something’s missing. I want to call it love.

## I. RULE OF LAW

It is hard to escape rule of law rhetoric these days. It is one of the “fashion[s] of the times” disparaged by Lord Kenyon CJ<sup>3</sup> and by which he countered Lord Mansfield’s view that “as the usages of society alter, the law must adapt itself to the various situations of mankind”.<sup>4</sup> Lord Mansfield was clearly in the right in this exchange but it is not a bad precept, nevertheless, to be wary of “the fashion of the times.” So it is right to be sceptical about invocations of the rule of law which, I have found, are pressed into use by some to justify unchecked power, the very antithesis of the rule of law. Lawyers in New

\* Chief Justice of New Zealand. *Address to the Australasian Law Teachers Association (ALTA) Conference* The University of Auckland, Auckland, 5<sup>th</sup> July 2010

1 Peter Birks “Adjudication and interpretation in the common law: a century of change” (1994) 14 LS 156 at 156.

2 William Blackstone *Commentaries on the Laws of England* (1<sup>st</sup> ed reprint, Dawsons of Pall Mall, London, 1966) vol 1 at 27.

3 *Ellah v Leigh* (1794) 5 TR 679 at 682, 101 ER 378 at 379 (KB).

4 *Johnson v Spiller* (1784) 3 Doug 371 at 373, 99 ER 702 at 703 (KB).

Zealand have had since 2008 a statutory obligation to “uphold the rule of law and to facilitate the administration of justice”<sup>5</sup> So in considering the education of lawyers, the rule of law is as good a starting point as any.

The rule of law checks the powerful. Such checks are not always welcome and not only for those who are *trying* to be above the law. That is for the very human reason that it is difficult for anyone to resist headlong self-conviction when sure that the end in sight is right. Those who are not acting for personal advantage but for what they believe to be the public benefit or for another good may be especially indignant or impatient when questioned by advisers taking rule of law responsibilities seriously. There is little as distorting as a conviction that you are a good guy, that you are on the right side.

The role of academics and judges is to resist enthusiasms and express doubt. We must be conscious always that decisions taken by public and private actors impact, directly or indirectly, upon the lives of real people in our society, many of whom are vulnerable. All are entitled to be treated with dignity and respect. Where they have claims of right they are entitled to be heard.

During the 40 years I have been in legal practice, there has been a revolution in how power is exercised and checked. The most important changes have not been achieved through the courts, although some significant advances have been made there. The most significant advances have been through popular expectations reflected in statutes providing for official information, Ombudsmen, employment statutes and human rights statutes. I mention here only the Official Information Act 1982 and the New Zealand Bill of Rights Act 1990.

The Official Information Act achieved a shift in culture because it requires justification for the exercise of all public authority. This emphasis on justification is to be seen now throughout society and clearly responds to popular demand. Chief Justice Murray Gleeson said we are living in an age of justification.<sup>6</sup> The implication is that close attention to reasons is now critical. This affects judicial function too. The days when a judge could say “Application denied, next case” or “Five years. Stand down” are long gone. That is a good thing. Power that is not justified is no less ugly for being exercised by a judge.

The New Zealand Bill of Rights Act is now 20 years old. There has been little said about marking this milestone. Perhaps the Act has now become so firmly anchored in national consciousness that we think it was always present. On this view, we have forgotten the significance at least in terms of organising principles provided by a legislatively conferred statement of rights. Or, it may be, as Zhou Enlai said of assessing the French revolution, it is too soon to tell how it is going and for any sort of retrospective.

Lord Cooke of Thorndon took the view that the New Zealand Bill of Rights Act was intended to be woven into the fabric of New Zealand law.<sup>7</sup> I am not sure that status has yet been achieved. My impression in the courts

5 Lawyers and Conveyancers’ Act 2006, s 4(a).

6 Murray Gleeson “Outcome, Process and the Rule of Law” (2006) 65 AJPA 5 at 12.

7 *R v Goodwin* [1993] 2 NZLR 153 (CA) at 156.

is that it is not widely resorted to except in criminal law, refugee law and defamation law. In the United Kingdom, by contrast, human rights have had significant impact on the law of torts, at least in relation to the liability of public bodies. Similar familiarity with the New Zealand legislation by those practising private law cannot, I think, be assumed. I may be wrong about that. Or it may be that in the Supreme Court we have not yet had many counsel appearing who went through law school after 1990.

There is an opinion that human rights are part of the rule of law. I do not enter into that controversy here. It is the case that even a statutory bill of rights which yields to inconsistent legislation has effected something of a revolution in judicial method. Through claims of rights some of the more intractable moral problems of the day are ventilated in court. They cannot be avoided by judges simply because they are hard cases, if the claims are properly constituted. The legal process has become in part a process of mediating conflicting legitimate claims. Pragmatic, unintellectual habits of judicial reasoning or legal argument are no longer good enough. The courts need to engage not only with the international and comparative case law to which we are pulled by common international standards but with the intellectual, scholarly tradition it draws on. This has implications for the teaching of law and for the courts. A number of commentators have expressed the view that human rights are revolutionising our understanding of law.<sup>8</sup> Habermas suggests that rights have become the “architectonic principles of the legal order”.<sup>9</sup>

## II. THE PROFESSION

Rule of law and human rights obligations may not catch the legal profession at a receptive time. There may be possible disconnect in the preoccupations and focus of both the practising profession, or large and influential parts of it, on the one hand, and the law schools and courts on the other.

It is 40 years since I joined the profession, after being one of the first students to pass through Auckland Law School studying full-time. Although the shift to professional teachers of law had been achieved by 1966, a few of our lecturers were legal practitioners who taught part-time. Sir Ian Barker taught us Procedure at an early hour, to allow the part-time students to go to their downtown offices. Another practitioner was Paul Temm (later a High Court Judge), who taught us professional ethics. Paul Temm emphasised that we were part of a learned profession. The acknowledgment of your opponents as your learned friends was not empty ritual. Arguments were put courteously and the competition was left in the court. We were to call even the most senior members by their first names. We should never pass one of them in the street without saying good day. Paul Temm himself never passed me in the street without tipping his hat. Now that was a different age. It was

8 See for example Martin Loughlin *The Idea of Public Law* (Oxford University Press, Oxford, 2003) at 127.

9 Jürgen Habermas *Between Facts and Norms* (Polity Press, Cambridge, 1996) at 247. See also Robert Alexy *A theory of constitutional rights* (Oxford University Press, Oxford, 2002) who argues that constitutional rights impose optimisation requirements on the legal order.

when senior counsel like Paul Temm wore hats. It was before time costing. If there was competition for the work, I did not notice it and it certainly was not cut-throat. It was a time when young practitioners, running errands to the court, would always pop in to hear senior advocates arguing cases or go to the coffee room at the adjournment to be included in the chat. Even as a young woman practitioner, excluded from some aspects of practice in the 1970s, I felt part of an exciting and consuming vocation. Of course, incomes were much lower. Offices had lino on the floors. It was a simpler time.

I know that every generation looks back with the conviction that things were better in their youth. I do not want to fall into nostalgia but some stocktaking is necessary, if only because the changes in the practice of law necessarily impact upon the way law is taught in our law schools and the way it is practised in our courts. The changes may reflect in turn a shift in the perception of law and the place of the courts in our societies. My sense is that the claims on law are high, but that the role of the courts in meeting them has diminished.

I do not suggest that the ways in which legal expectations are met should be exclusively the concern of the courts and indeed, that has never been the case, because the most effective enforcement of law has always been a community habit of law-mindedness, to which lawyers have contributed but courts, only indirectly. Ombudsmen and other agencies have meant that many claims have been diverted from the courts. This shift from court-centredness, I think, does place more responsibility on those who would guard the rationality of the law. That is because the law that is taught needs to describe a wider institutional framework than formerly and it is because there may be less public awareness of what happens in the name of law. Whatever might be said of “Judge & Co”,<sup>10</sup> the methodology of the courts meant that they provided public demonstration of rationality and were readily accessible to the public and to the academics. Much law enforcement is now off the radar. There is good and bad in that, but it adds to the effort required of the guardians.

Other changes in the culture of the profession are harder to pin down. My sense is that there is not much fun anymore. I know that Lord Justice Frog said “[w]e are not here for *fun*”.<sup>11</sup> But why would anyone throw themselves heart and soul into any occupation if it is not engrossing, stimulating, worthwhile, and fun? So for me it is a matter of concern that legal practice does not seem to provide much opportunity for fun, except through corporate sports and bonding jaunts. The excitement in the movement of ideas, the sense of the bigger picture and a willingness to engage in it; these excitements seem far from the consciousness of the practitioner of today. If even partly right in this impression, it has serious implications for law teachers and for the legal system more generally.

10 As described by Jeremy Bentham.

11 Frog LJ in the case of *R v Haddock*, reported in AP Herbert *Misleading Cases in the Common Law* (Methuen, London, 1927) at 42.

The profession is much more specialised than ever it was. That may be efficient and sensible, but only if the specialist retains the sense of law as a whole. Otherwise the practitioner drops out from the current of ideas and professional competence will inevitably be blunted. I see at times a lack of hard thinking. A failure to appreciate that deliberative imagination is essential to law. A loss of appetite for achieving right according to law. A failure to understand that value-neutral lawyering is bad lawyering. A lawyer who views his role as a technical one to achieve the wishes of the client does not serve the client well. He deprives the client of important information the client needs.

It is nearly 20 years since Anthony Kronman wrote of a spiritual crisis in the legal profession in the United States.<sup>12</sup> What had been lost, he thought, was the sense that law required more than technical proficiency and that the work of the lawyer in providing "real deliberative counselling" sets a goal of attainment of practical wisdom which had an intrinsic value of its own.<sup>13</sup> I thought, reading the book soon after its publication, that its theme was too pessimistic and that the ideal it postulated, that of a "lawyer statesman", was embarrassing. Reviewing it today, I am left more doubtful.

None of this is to suggest that the advances made in the organisation and coherence of the law through the efforts of modern legal academics have not been absorbed by the profession, but it is to suggest that a healthy profession needs to stay engaged with academic thinking. If there should be a loss in the respect for the academic teaching of law, it cannot but impact not only academics' function but also judicial function. It is the interconnectedness of the three branches of the profession – teachers, judges and law practitioners – that is my principal theme.

### III. A LITTLE HISTORY OF THE TEACHING OF LAW IN NEW ZEALAND

The teaching of law in universities in Australia and New Zealand in its modern form is relatively recent. To begin with, candidates for admission to the profession were required to prepare themselves. They had to present for examination before the Chief Justice or another Judge. The topics set included "general knowledge" as well as the "theory and practice of the civil and criminal law of England and New Zealand" and the "law of nations". In 1875 "general knowledge" included Euclid (the first four books) and texts in Latin and Greek.

At the beginning of the 20<sup>th</sup> century, matters looked up with the appointment of some outstanding academics to Chairs in Wellington and Dunedin. The first Professor at Victoria University College, John Salmond, formerly a practitioner in Temuka, arrived in 1906 from a Chair in Adelaide, where he had been influenced by the Australian "idealists" and by Dean WE Hearn's attempts in Melbourne to systemise the nature of law. Salmond himself had already published his text on *Jurisprudence*<sup>14</sup> and was shortly

12 Anthony Kronman *The Lost Lawyer: Failing Ideals of the Legal Profession* (Harvard University Press, Cambridge, 1995).

13 *Ibid.*, at 309.

14 John W Salmond *Jurisprudence, or The Theory of the Law* (Stevens & Haynes, London, 1902).

to publish *The Law of Torts*,<sup>15</sup> for which he received the Ames Prize from Harvard. He was also influential later in the setting up of the American Law Institute. His colleague in law (and physics) at Victoria, Richard Maclaurin, later became the first President of MIT. I mention these points partly out of local pride at an Australasian Conference of Law Teachers, but also because it indicates that in New Zealand, as in Australia, academics were not separated from the world of ideas, and indeed played a significant role in the development of legal thinking in their time.

Herbert Hart described John Salmond as among the first to break out from the shadow of John Austin and to stress the moral content of law.<sup>16</sup> The “law-creating power” of judges,<sup>17</sup> which Salmond recognised, were to be found in the “principles of natural justice, practical expediency, and common sense”.<sup>18</sup> He acknowledged that judges very rarely explicitly acknowledged that, when driven to decide cases according to “principle”, they were “in reality searching out the rules and requirements of natural justice and public policy”,<sup>19</sup> largely through analogy. The observance by judges of their obligation to apply the law was one he thought to be “secured and enforced by the pressure of public opinion, and more especially [by the] professional opinion of the bar”.<sup>20</sup> In this Salmond assumed that the profession was closely involved in common law development, and that the public was keenly interested in the enterprise. As I come on to suggest, I do not think either can be taken for granted today.

The standards in the profession seem to have fallen in popular estimation in the years following World War I. In 1925 a Royal Commission on University Education in New Zealand reported that “unless a marked change is effected in the legal education provided in the Dominion, [the term ‘my learned friend’] runs the risk of being regarded as a delicate sarcasm”.<sup>21</sup> In New Zealand we were in a period of slavish adoption of English legislation and case law which continued into the 1960s. In England, law had fallen into the “law is law” formalism criticised earlier in respect of commercial law by Lon Fuller<sup>22</sup> and in respect of administrative law by a shocked Kenneth Culp Davis in 1961.<sup>23</sup>

We had some outstanding professional teachers of law, some of them, like Julius Stone, borrowed from Australia. A few, we even lent to Australia. And we had a number of distinguished exports. For the most part, instruction in the law schools continued to be heavily reliant on practitioners until the end of the 1960s. In 1956 there were only seven full time teachers of law at universities in New Zealand, all in Auckland or Wellington. Sir Kenneth

15 John W Salmond *The Law of Torts* (Stevens & Haynes, London, 1907).

16 HLA Hart “Positivism and the Separation of Law and Morals” (1957) 71 Harv L Rev 593 at 605.

17 John W Salmond “The Theory of Judicial Precedents” (1900) 16 LQR 376 at 379.

18 Ibid, at 389.

19 Ibid.

20 John Salmond *Jurisprudence* (7th ed, Sweet & Maxwell Ltd, London, 1924) at 55.

21 “Report of Royal Commission on University Education in New Zealand” [1925] II AJHR E-7A at 44.

22 Lon Fuller “Positivism and Fidelity to Law – A Reply to Professor Hart” (1957) 71 Harv L Rev 630 at 637.

23 Kenneth Culp Davis “The Future of Judge-Made Public Law in England: A Problem of Practical Jurisprudence” (1961) 61 Colum L Rev 201.

Keith, writing of legal education in New Zealand in the late 1950s, spoke of an emphasis on the learning of rules. He did not remember getting at the time "any real sense ... of legal process, of the law-making enterprise."<sup>24</sup> That was the revolution accomplished at the end of the 1960s by law schools.

It was not until the 1960s that law schools were transformed from centres staffed by practitioners, which had as their objective the training of lawyers, into academic institutions devoted to the advancement of learning about law. The professional teaching of law meant that law schools became places concerned with what Professor Shils calls "the methodical discovery and the teaching of truths about serious and important things."<sup>25</sup>

The lesson of value imparted in these institutions was not the law as a system of rules at the date of study, or even a prediction about the law for the future. It was the sense of the way in which new problems (or apparently new problems) could be confronted in the future, in whatever capacity the student ended up working, in a lifelong commitment to learning. Sir Kenneth cited Karl Llewellyn's aphorism that "[i]deals without technique are a mess, but technique without ideals is a menace"<sup>26</sup> to argue that both principle and process are necessary equipment for a life in law, however spent.<sup>27</sup> "Principle" was not to be confused with detailed knowledge over vast and changing areas of law (and for that reason he thought it important to resist calls for greater coverage and new specialisations in law courses). The process that mattered was "based on reading (including researching), thinking, and writing (and talking)".<sup>28</sup>

The modern law schools tapped into the tradition pioneered at Harvard and the great American law schools, which had sold the profession on the idea of professional law instruction largely by convincing them that university study of law would be "scientific". Later erosion of the Langdellian confidence in the science of law and its reducibility to rules (and the reassertion of craft and experience as indispensable to lifelong learning) did not affect the acceptance that the principles and method of law are best imparted in academic institutions. No one would seriously, I think, maintain today that vocational training is sufficient preparation for a life in law, although it is inevitable that the pendulum will move around a little, as between proponents of practical training and academic instruction. Teaching on the job and by legal practitioners had some advantages. The former Chief Justice of Australia once remarked to me that it had the benefit of imparting a certain "rat cunning". Dicey thought its merits could be summed up in the word "reality".<sup>29</sup>

24 KJ Keith "1883 to 2008: Law and Legal Education Then and Now" [2009] NZ Law Review 69 at 76.

25 Edward Shils *The Academic Ethic*, as cited by William Twining *Blackstone's Tower: The English Law School* (Sweet & Maxwell Ltd, London, 1994) at 49.

26 Karl Llewellyn "On What is Wrong with so-called Legal Education" (1935) 35 Colum L Rev 651 at 662.

27 KJ Keith, above n 24, at 78.

28 *Ibid.*

29 AV Dicey *Can English Law be Taught at the Universities?* (Macmillan, London, 1883) at 8 as cited in Peter Birks, above n 1, at 161.

What was new in the professional law schools was the development of the excitement of law. Dicey described the “passion for the law” of teachers who were “masters of the philosophy and history of law” and who aimed to teach thinking.<sup>30</sup> The result was the “vivid interest” of students and their enthusiasm for living in “an atmosphere of legal thought”.<sup>31</sup> The “ardor” of the students was remarked upon by Mr Brandeis.<sup>32</sup> Even allowing for the politeness of a visitor, it seems likely that the energising effect of instruction in such an atmosphere followed students in their careers in practice and stayed with those who went on the bench or who taught in their turn.

#### IV. THE MODERN LAW SCHOOL

It is hard to overestimate the influence of the thinking coming out of the law schools on the development of common law and statute law in the years since the Second World War. Administrative law, criminal law, evidence, human rights are only some of the more obvious examples of the transformative impact of modern scholarship. Such influences are now frankly acknowledged and looked for by judges. In difficult cases, counsel who do not refer to the legal literature are likely to be criticised. As an English appellate Judge pointed out, it is *arguments* that influence decisions and the judge faced with the “remorseless treadmill of cases that cannot wait” is grateful for academic comment which examines “the history of the problem, the framework into which a decision must fit, and countervailing policy considerations”.<sup>33</sup> Academic lawyers have a greater freedom than others involved in the development of the law. In particular, they have the freedom to identify the questions that must be asked. Judges are bound by the disputes framed by the parties who seek to come to court.

At the frontiers of liability, such analysis may well be pivotal. If the common law is properly to be seen as a method of change,<sup>34</sup> the health of our law schools as producers of legal literature is now critical to the common law as a system. The advantages of academic input are also captured in statute law reform processes, where also the “remorseless treadmill” impacts on the ability of practitioners to contribute as effectively as formerly.

Good teachers, as Mike Taggart makes clear, are those who create frameworks of reference and understanding.<sup>35</sup> Their reward, he says, is that the most able break these moulds and create new ones. This intellectual cycle is oxygen to the scholar. It is critical that it is not disrupted as it could be if

30 AV Dicey “The Teaching of English Law at Harvard” (1899) 13 Harv L Rev 422 at 430–431.

31 Ibid, at 436.

32 Ibid.

33 *White v Jones* [1995] 2 AC 207 (CA) at 235 per Steyn LJ.

34 This is the theme of Benjamin Cardozo in *The Growth of the Law* (Yale University Press, New Haven, 1924). See also Lord Goff “The Future of the Common Law” (1997) 46 ICLQ 745 at 753.

35 Michael Taggart “Prolegomenon to an Intellectual History of Administrative Law in the Twentieth Century: the Case of John Willis and Canadian Administrative Law” (2005) 43 Osgoode Hall LJ 223 at 267.



law schools are not valued by the profession and those who aspire to practise, or if the conditions under which academics work impact adversely on their teaching.

A number of commentators have spoken of the challenges within which law schools today operate. Some, including in Australia and New Zealand, have commented on potential distortions in the “long term enterprise”, of which Mike Taggart spoke, through performance-based research funding.<sup>36</sup> They mention encouragement of short-term thinking, a push towards “safe” research, vulnerability to fashion and pressures to “internationalise” with a push to publication in international scholarly journals having the potential “to disengage legal scholars from the needs and concerns of the local legal community and the broader society”.<sup>37</sup>

If accurate, these predictions should be of concern to all legal practitioners, including judges, as well as to the academic community. The reason lies in the interconnectedness of these three principal communities of lawyers. If the judge, pressed by heavy caseload, finds it difficult to see the wood for the trees, the busy practitioner working in his field of specialisation has even less opportunity to think of the architecture of law. Both are highly dependent on legal literature to supply context. The international and comparative context is extremely important, but so too is engagement with domestic issues. I do not think it fanciful to have the impression that serious academic commentary on matters of New Zealand interest has declined in recent years in New Zealand, despite there having been reforms and cases touching on fundamental principle in a number of areas. When I have asked academic colleagues about this, they have referred to the pressure to publish in overseas journals.

If this impression is correct and the trend continues, the law schools may become increasingly aloof from legal practice and the work of the New Zealand courts. There is little room for complacency here. Opportunities for contact and scholarly dispute between academics, the profession, and the judiciary are not extensive. Such lack of engagement is not only impoverishing in thought. There is a potential vicious circle being set up if the profession loses confidence in the teachers of law. If so the conditions are set for a profession which is not intellectually curious. Law can only be the loser.

It may be expected that the work of the courts, which must continue to draw on scholarly writing (particularly in relation to the difficult cases concerning values), will be seen by many in the profession to be similarly remote from the realities of legal practice. Disenchantment with academic method by the profession can only impact upon the attitude of the students

36 Michael Taggart “Some Impacts of the PBRF on Legal Education” in Claudia Geiringer and Dean Knight (eds) *Seeing the World Whole: Essays in Honour of Sir Kenneth Keith* (Victoria University Press, Wellington, 2008) 250 at 251.

37 *Ibid.*, at 251–253, 259. Taggart cites Lewis Elton “The UK Research Assessment Exercise: Unintended Consequences” (2000) 54 *Higher Education Quarterly* 274 at 281 and Jeanette Taylor “The impact of Performance Indicators on the work of University Academics: Evidence from Australian Universities” (2001) 55 *Higher Education Quarterly* 42 at 53.

risking the oxygen for the teacher which makes teaching so worthwhile. That effect may be accelerated if the emphasis on publication leads to corners being cut on teaching preparation and supervision of students.

Peter Birks thought that the key to avoiding this effect was to keep the law schools attached to the law in action.<sup>38</sup> He considered that if the study of law is not valued by the profession but is viewed simply as something to be endured “as a midshipman must stand before the mast”,<sup>39</sup> then everyone will lose. There is risk of the development of the view that law schools are “no more than trade-schools for high earners”.<sup>40</sup>

As Dicey’s observations in 1899 showed, and as all of us have found excitement about, law begins for most with great teaching. Learned Hand spoke of the importance of teachers of law, extending beyond the instruction provided, to the example they set:<sup>41</sup>

Unafraid before the unknown universe; indifferent to the world’s disparagements, and uncorrupted by its prizes; ardent and secure in that faith by which alone mankind in the end can live; they were themselves the best lesson that I took away.

This praise may seem to us overblown. These standards may not always be met. But perhaps what is most important is that we can imagine this ideal. And surely it should be the aspiration of teachers, judges and practitioners to get near to it.

## V. ACADEMICS, JUDGES, AND LEGAL PRACTITIONERS

Just as law teaching is a long term enterprise of intellectual development, so too is judging or legal practice. The differences between these three types of lawyer should not be exaggerated. And comparative assessment of the contribution of each to the rule of law is unproductive. Each is essential. The functions discharged differ in important respects and each faces particular challenges, although I have tried to suggest that the degree of interdependence means that the challenges of the law schools should not be regarded with equanimity by the profession and the judges. In turn, the law schools themselves have responsibility in relation to some of the challenges faced by the courts and the profession.

Judges respond to particular cases. That is the principal virtue in a common law system. They work with Blake’s “grain of sand”. As confident judges have always acknowledged, the principle they look for is the one that will give the desired result in the particular case. Analogy is the preferred method of dealing with novel cases, but they are open to top-down reasoning especially when provided with organising principles by legislation. The legal academic has the more ambitious task of looking to the whole. That perspective is extremely influential, if not always followed. Just as legal academics face incentives which may compromise their function if care is not taken, so too

38 Peter Birks “The academic and the practitioner” (1998) 18 LS 397 at 406.

39 Ibid, at 403.

40 Ibid, at 414.

41 Billings Learned Hand “On Receiving an Honorary Degree” in Irving Dillard (ed) *The Spirit of Liberty: Papers and Addresses of Learned Hand* (2nd ed, Alfred A. Knopf, Inc, New York, 1953) 134 at 139.

judges face pressures of what has been described as managerial justice. Those who are the guardians of the law's rationality need to be vigilant to criticise any compromise of essential judicial function in this way. Again, it is often not obvious to those trying to respond to heavy caseloads when they cross the line.<sup>42</sup> Providing a reality check is a responsibility of academics and the profession.

Similarly, divergence between the contributions made to law by academics and law practitioners should not be exaggerated. The practitioner, too, is engaged in a long-term enterprise of learning in law, if he or she is to remain effective and to uphold the obligation to the rule of law. There are however a number of forces at work here other than the intrinsic rewards of legal practice. A number of commentators have remarked on the realities of life in legal practice which may deflect practitioners from their obligations to further the administration of justice and uphold the rule of law and divert them from continuing legal education. It is suggested that the move to transactional work, specialisation, in-house counsel and professional management under costs pressures puts emphasis on technical facilitation of what the client has decided to do rather than the provision of advice to assist the client in determining what course to take. What is risked by these pressures is more than bad outcomes for the client or poor arguments in court cases. There is a risk of compromise in the informal guidance traditionally provided by lawyers to clients in living their lives in touch with law and in the engagement of the profession with reforms which touch on important values in the legal system. On the first point, Justice Robert Jackson, in writing about the provincial lawyer of his youth, spoke of the role of the practitioner in adjusting the conflicts of the community by the procedures and law, without recourse to the courts:<sup>43</sup>

He knows how disordered and hopelessly unstable it would be without law. He knows that in this country the administration of justice is based on *law practice*. Paper "rights" are worth, when they are threatened, just what some lawyer makes them worth. Civil liberties are those which some lawyer, respected by his neighbours, will stand up to defend. (emphasis added).

We have moved past such a time. But conditions of disorder and instability are not far from the downtown offices of the profession or the Ivory Tower. I would hope that both continue to recognise a responsibility to support law-mindedness and respond to the expectation of law and that, if one slips up, the other branch of the profession will remind them of their obligation.

I have tried to suggest that the three branches of the profession are interdependent and that each has a responsibility to watch over the performance of the others. If the study of law is indeed to fit students for a life of continuous education in law, as Kenneth Keith insisted,<sup>44</sup> then there is no conflict for the teachers of law in the teaching of the academics of tomorrow, or the practitioners, judges, reformers, or advisers. Rather there is an obligation to provide and accept continuous instruction.

42 See for example *R v Taito* [2003] UKPC 15, [2003] 3 NZLR 577.

43 Robert Jackson "The County-Seat Lawyer" (1950) 36 ABAJ 497

44 KJ Keith, above n 24, at 81.

## VI. SOME CHALLENGES FOR LAW TODAY

There are particular challenges we all need to be alert to. I mention three only. First is the extent to which former common understandings about the informal systems which ensure conformity with the rule of law are neglected.

It has never been adequate to confine description of law to enacted or decided law. Law is also the collected wisdom to which people adhere and to which they conform their conduct. Sir John Baker, in his “Why the History of English Law has not been Finished” referred to the “whole world of law which never sees a courtroom”:<sup>45</sup>

Law can exist, in the sense that people are aware of it and conform to it, even when it is neither written down in legislation nor the subject of accessible declarations by the judiciary.

In addition to such “common learning”,<sup>46</sup> we have overlooked custom although it was an important source of law, particularly in frontier societies such as Australia and New Zealand in the 19th century. In a recent paper Stuart Anderson has described litigation about shore whaling disputes in New Zealand (a matter of early cross-Tasman investment).<sup>47</sup> In some the jury, undeterred by doubts expressed by the judge, acted on their knowledge of custom, demonstrating deft instincts for efficiency and fairness in “law formation at the frontier”. Such sense of “ownership” of law is an attitude we should try to cultivate.

In an age of talk back and populism there are risks to the rule of law if law is seen as remote, inaccessible, and incomprehensible. Criminal law offers a number of cautionary tales about the peril of letting community understanding lag. Similar lag in understanding is demonstrated too often when there is debate about constitutional fundamentals. An example was during the debate about the setting up of the Supreme Court in 2003. A national business paper in an editorial under the heading “Constitutional shenanigans” said that in the “new judicial setup” we could forget about the “common law that has been the bedrock of the civil court system since the start of British settlement in New Zealand”; it was about to be replaced with “judge-made law”.<sup>48</sup> In a society with such misconceptions about the legal system and the discipline it imposes on judicial method, the rule of law is vulnerable.

The second challenge I mention concerns the expectations of law in the circumstances of our pluralistic societies and the need to keep open minds about the response to be made. We live in what Peter Birks called a “flat, secular, plural, sophisticated democracy” in which law is “life blood ... and ... constantly under scrutiny”.<sup>49</sup> Law, in such a society, is a means of achieving

45 JH Baker “Why the History of English Law has not been Finished” [2000] CLJ 62 at 78.

46 Ibid, at 80.

47 Stuart Anderson “Commercial Law on the Beach: Shore-whaling Litigation in early Colonial New Zealand” (speech to Leading Cases Conference, Victoria University of Wellington Law School, Wellington, 25 June 2010).

48 “Constitutional shenanigans” *The National Business Review* (New Zealand, 11 April 2003).

49 Peter Birks, above n 38, at 402.

"equilibrium".<sup>50</sup> Or, more modestly, a temporary "stay against confusion".<sup>51</sup> William Eskridge has expressed the view that, in the "culture wars" waged through litigation, courts perform a valuable role if they lower the stakes, to allow the political processes to adapt, but warns they can also raise the stakes in a way that fractures societies.<sup>52</sup> There are dangers here.

If the courts do not enter into controversies, what is at risk is not only the vindication of rights but also authoritative vindication of conduct substantially compliant with human rights. Providing such legitimacy is a principal contribution of legal process to the rule of law. Full public exposition of questions that have been glossed over or overlooked in the political process is also a benefit of the deliberative process of litigation facilitating wider understanding. That is not to say that questions of relative institutional competence are not important.<sup>53</sup> Where the content of human rights in context turns on what Cass Sunstein has referred to as the "qualitative actual experience and self-understanding" within a society,<sup>54</sup> courts may not always be best placed to make the assessment. These are questions in which it is necessary for society to engage. If it is to do so, the contribution of academics and practitioners will be very important.

In these hard cases too much doctrine may leave a disabling legacy for law. Some writers point to the hostility of law and economics and rational choice theory towards the traditional common law methodology of reasoning by analogy. Kronman argued that academic lawyers have undermined the practical traditions of the common law and the habits of thought and perception and the constraints that immersion in these traditions produces.<sup>55</sup> I do not want to get into this rancorous debate, but I do think that close attention to the modest methods of the common law is the best policy in contentious cases.

Amartya Sen has stressed the importance of public reasoning in evaluative judgments.<sup>56</sup> Explanation of the plurality of the reasons to be accommodated is, he thinks, key to the acceptability of judicial decision-making. Bringing all arguments into assessment protects the public rationality of law.<sup>57</sup> Incompleteness is inescapable because "[w]e do not live in an 'all or nothing' world".<sup>58</sup> So partial ordering after impartial reasoning is the best to be hoped

50 Peter Birks, above at n 1, at 174–175.

51 Robert Frost "The Figure a Poem makes" in *Collected Poems of Robert Frost* (Henry Holt & Company, New York, 1939)

52 William Eskridge "Pluralism and Distrust: How Courts Can Support Democracy by Lowering the Stakes of Politics" (2005) 114 Yale LJ 1279.

53 These issues are explored by Sunstein, Alder, Alexy and others. See for example Cass Sunstein "Incommensurability and Valuation in Law" (1994) 92 Mich L Rev 779; J Alder "The Sublime and the Beautiful: Incommensurability and Human Rights" (2006) PL 697; and Robert Alexy "Balancing, constitutional review, and representation" (2005) 3 ICON 572.

54 J Alder above n 53, at 701, citing Cass Sunstein "Incommensurability and Valuation in Law", above n 53, at 856.

55 Anthony Kronman *The Lost Lawyer: Failing Ideals of the Legal Profession* (Belknap Press, Cambridge, 1993).

56 Amartya Sen *The Idea of Justice* (Penguin Books Ltd, London, 2009).

57 Ibid, at 392–398.

58 Ibid, at 398.

for if the decision maker is unable after critical scrutiny to discard every competing consideration save one. The pursuit of justice sees us bound up with “what [it is] like to be a human being”.<sup>59</sup>

That leads me to my final point, the need for the law to make space for the values acted on by men and women and which they treat as law. Cass Sunstein has written of the “expressive function of law” behind many legal debates.<sup>60</sup> Lord Radcliffe was I think speaking of the same sense of shared values when he said that if law is only the mass of things a citizen has to do in order to keep out of trouble “[s]ome clue has been lost”.<sup>61</sup> In such discussions, it is a mistake to see incommensurability of values as an obstacle to legal reasoning. As Sunstein says, “[i]t is also freedom-promoting”, recognising incommensurability “in the sense that it makes possible certain valuable human connections and relationships”,<sup>62</sup> valued quite apart from any consequentialist considerations. They are values like dignity, or honour, or equality, or love.

## VII. CONCLUSION

Lord Hailsham, writing in 1988, spoke of similar values “intrinsically self-standing”, illustrating his meaning with a quote from an unfinished letter left at his death by his grandfather:<sup>63</sup>

There are some facts established beyond the warrings of all the theologians [or the legal philosophers]. Forever, virtue is better than vice, truth than falsehood, kindness than brutality.

He ended with a sentence from Cicero’s *Treatise on Laws* contained in John Buchan’s biography of Augustus:<sup>64</sup>

We have a natural propensity to love our fellow man, and that is the foundation of all law.

Hailsham thought that the demonstration of man’s inhumanity to man, rather than undermining this “profound truth”, supported the view that what he called the “L” factor was common to all value judgments.<sup>65</sup> So I end, where I began, with law. “Like Love”, I say.

59 Ibid, at 414.

60 Cass Sunstein above n 53, at 820–824 and “Conflicting Values in Law” (1994) 62 Fordham L Rev 1661 at 1668–1669.

61 Lord Radcliffe “Law and the Democratic State” in *Not in Feather Beds* (Hamish Hamilton, London, 1968) at 51.

62 Cass Sunstein “Conflicting Values in Law” above n 60, at 1667.

63 Lord Hailsham “Values” (1989) 4 Denning LJ 85 at 87–88.

64 Ibid, at 89.

65 Ibid, at 90.