Beneath the blindfold: responsive to society or caving to pressure?

Justice Susan Glazebrook[1]

Tēnā kotou, tēnā koutou, tēnā tatou katoa

As is customary in my country I have greeted you in te reo Māori, the language of the indigenous people of Aotearoa/New Zealand.

I pay my respects to our hosts, to the esteemed leadership of the IAJ and to you all. It is a great honour and pleasure to have been invited to join this distinguished panel of speakers covering such important topics.

Art 3.1 of the IAJ Universal Charter of the Judge, as updated in 2017, provides that, in the performance of judicial duties, a judge "is subject only to the law and must consider only the law". Art 2.2 provides, among other things, that judges must be able to exercise judicial powers free from social, economic and political pressure.[2] Article 2.5 provides that the state must ensure judges are protected from threats and that any criticism of judgments that may compromise the independence of the judiciary or jeopardise the public's confidence in the judiciary should be avoided.[3] Art 3.3 states, among other things, that judges "are accountable for their actions and must spread among citizens any useful information about the functioning of justice".

The Charter was first promulgated in 1999 and one of the recorded reasons for the update in 2017 was the fact that the world is now more and more open and connected. My focus today is on social media and social pressure. I will cover two topics. The first is the line between acceptable public debate and criticism that threatens the independence of and public confidence

---

1 Judge of the Supreme Court of New Zealand/Te Kōti Mana Nui o Aotearoa and immediate Past President of the International Association of Women Judges (IAWJ). For more on the New Zealand Supreme Court see <www.courts.govt.nz> and on the IAWJ see <www.iawj.org>. My thanks to my associate, Rachel McConnell, for her assistance with this paper. All views expressed here are my own and not to be taken as those of the Supreme Court or the New Zealand judiciary.

2 The original Charter can be found online at <www.icj.org.>. The updated Charter can be found at <www.unodc.org>. See also *Basic Principles on the Independence of the Judiciary* GA Res 40/32 (1985) and GA Res 40/146 (1985).

3 It also provides that the physical security of judges and their families must be protected.

in the judiciary. The second is the possible tension between independence from social pressure and the need for judges to understand and be part of the community.

Social media has meant global connectivity, improved access to information and the ability for everyone with internet access to communicate with each other.[4] It has also brought cyber bullying and fake news. Judges have not been immune. They have been subject to online attacks from disgruntled litigants and from others who have taken exception to particular judgments. These attacks often impugn the integrity of the judge and are frequently based on misinformation.

So, to my first topic. Where should the line be drawn between legitimate debate and unacceptable behaviour and what can and should be done with cases that cross the line?

The cases at each end of the spectrum are easy to identify. Threats and harassment should obviously be met with the appropriate response under the criminal law. At the other end of the spectrum, measured discussion of judgments by expert academics should be welcomed as designed to foster constructive debate and improve outcomes and the law.

It seems to me that the starting point of any analysis must be freedom of expression. This has been said to be the foundation of every sort of freedom.[5] The fact the public is free to engage in public debate about the judiciary and its work can serve to increase public confidence in the justice system rather than undermining it and is the corollary of open justice, one of the ways that the judiciary is held to account.[6] Justice must not only be done but seen to be done.[7] It must be remembered too that the issues dealt with by courts are by their nature contentious.

---

4 There is also the issue of how judges themselves interact with social media. To that end some courts have their own social media guidelines. Internationally, the Global Judicial Integrity Network worked alongside the United Nations Office on Drugs and Crime to develop non-binding guidelines to assist in strengthening judicial integrity and preventing corruption. United Nations Office on Drugs and Crime *Non-Binding Guidelines on the Use of Social Media by Judges* United Nations Office on Drugs and Crime (2018). The Guidelines include references to the Bangalore Principles (see n 24below).

5 Justice Benjamin Cardozo of the United States Supreme Court wrote of freedom of thought and speech as being "the matrix, the indispensable condition, of nearly every other form of freedom" *Palko v Connecticut* 302 US 319 (1937) at [11].

6 Beyond the scope of this talk are the different considerations in terms of the separation of powers that arise in relation to criticism of judgments by members of other branches of government and, in particular, Ministers. For the New Zealand position see Cabinet Office *Cabinet Manual 2023* at [4.12]–[4.16].

7 *R v Sussex Justices (ex parte McCarthy)* [1924] 1 KB 256 at 259 per Lord Hewart CJ.

One or more of the parties will be unsuccessful, at least in part.[8] Heightened emotion and intemperate language may therefore be understandable.

As the value of freedom of expression is so important, the judiciary should be open minded, robust and resilient in the face of public criticism, even when it is unreasonable.[9] At least public debate shows engagement rather than apathy. The judiciary should also be very cautious and considered in determining whether criticism has crossed the line to the extent that it threatens judicial independence and public confidence.

I do recognise that social media has created particular risks for justice and for the courts when communications do "cross the line". The internet is a permanent repository of information and there is the potential for posts to go "viral". It is therefore "no longer possible to dismiss attacks on judges on the ground that today's newspaper is tomorrow's fire lighter."[10] Some response is necessary.[11]

In my view, even where criticism has crossed the line, however, the judiciary[12] should try to seek constructive ways to deal with it, including publicly correcting misinformation.[13] Turning immediately to punitive measures might not be the best approach in the long run as it may create the impression the judiciary is out of touch and defensive and could even give greater publicity to the perpetrator. On the other hand, where the allegations are false, abusive and persistent, punitive action, including through contempt proceedings, may be the proper and only reaction.

---

8 New Zealand Law Commission *Reforming the Law of Contempt of Court: A Modern Statute* (NZLC R140, 2017) at [6.4].

9 This may not be easy for individual judges where one of their judgments is subjected to sustained criticism. Judges in this position will need support to maintain their wellbeing. See Chief Justice of New Zealand *Annual Report 2021* (2021) at 17 which sets out strategies the New Zealand judiciary has implemented to ensure judicial wellbeing, such as access to counselling, workflow management and establishing pastoral response protocols for judges.

10 Law Commission, above n 8, at [6.47].

11 There may be some difficulties in requiring material to be taken down, however, where a site is hosted offshore and subject to local regulations.

12 In many jurisdictions it is not considered proper for individual judges to defend or further explain their judgments but judicial authorities may be able to do so. The Bar also has a role to play and in New Zealand the Attorney-General who, although a member of the executive, also acts as an independent officer of the law: see "Role of the Attorney-General" in the Cabinet Manual, above n 6, at [4.2]–[4.11]. For more discussion on the role of others to defend the judiciary and some actions that can be taken see Law Commission, above n 8, at [6.6] to [6.15].

13 Unfortunately, however, correcting misinformation does not necessarily solve all the problems as misinformation can still persist even in the face of evidence to the contrary: see Ullrich K H Ecker et al "The psychological drivers of misinformation belief and its resistance to correction" (2022) Nature Reviews Psychology 13.

Persistent spreading of misinformation can be particularly pernicious.[14] One way of diminishing the risk of misinformation is for judges to do their best to ensure that their actions are fully explained and understood. This includes ensuring that everyone is treated with respect, both in the lead up to any hearing and in the hearing itself, and that the proceedings are explained in terms persons unfamiliar with the law and court processes can understand.[15] The judgment, whether oral or written, should show the parties and all others involved in the hearing that they have been listened to and that what they have said has been properly considered and assessed. It should explain clearly why the result has been arrived at and why arguments made have been accepted or rejected.[16]

These measures will also improve public understanding. New communication methods and the internet can assist in extending the reach of information. In my court, for example, there is now pre-hearing public communication as well as post-hearing on the publication of the judgment. Prior to the hearing, the parties' submissions are published, along with a case synopsis. Most hearings are live streamed and the recording, along with the transcript of the hearing, are placed on the courts' website.[17] Our judgments on substantive appeals will usually include headings, a table of contents and a summary of the decision for easy access to the issues decided.[18] A press release summarising the judgment is sent to media outlets and placed on the website with the full text of the judgment.

---

14 The dangers of misinformation and its threat to democracy is all too real: European Commission "Disinformation: A threat to democracy – Brochure" (31 March 2021) European Commission <www.commission.europa.eu>.

15 Making justice inclusive is a priority for the New Zealand judicial leadership and in particular the Chief Justice, Winkelmann CJ. I chair a judicial committee called Tomo Mai/Inclusion Committee. The Committee's remit is to reduce barriers to participation in courts for litigants, practitioners, judges, staff and other interested parties. See *Annual Report*, above n 9, at 9.

16 See for example, the comment that a judgment should be framed as a "letter to the loser" in Rosalind Dixon *Responsive Judicial Review* (Oxford University Press, Oxford, 2023) at 247.

17 See <courtsofnz.govt.nz>. Appeals where there are suppression orders are not livestreamed but the transcript of hearing is put on the website after being checked to ensure there are no breaches of the suppression orders. The website now also has an archive of hearings that were previously livestreamed. Our processes owe a lot to the practices of other final courts overseas.

18 It is now general practice in the New Zealand Supreme Court also to include in the judgment a separate summary of the various positions where there are multiple judgments and to highlight where the judges may differ on the issues raised in the appeal. This aids the reader to understand the ratio of the case (the binding parts of judgment in line with common law doctrine of precedent). This is a practice borrowed with gratitude from the Constitutional Court of South Africa. Examples of recent cases in New Zealand where this was done are *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127, [2021] 1 NZLR 801, and *Bathurst Resources Ltd v L&M Coal Holdings* [2021] NZSC 85, [2021] 1 NZLR 696.

Outreach programmes and good websites designed to explain the functioning of the courts and the justice system are also important to ensure public understanding of and confidence in the judiciary. This is also reflective of the principle of open justice and the importance of retaining legitimacy in the eyes of the public.[19]

Outreach and maintaining ties with the community can be wider than direct communication. It can also be achieved through appearance and symbols.[20] The Supreme Court was designed to feel unmistakeably distinctive to Aotearoa/New Zealand, as indeed were our ceremonial judicial robes.[21] These weave together both Māori and common law symbolism.[22] Our Court is a place that is open for guided visits by members of the public and school tours and of course the public can attend hearings. The courtroom also has a window that directly opens out onto the foyer so that what goes on inside is visible to those who walk past in the street.

I now turn to my second topic and, in this regard, I refer to the Bangalore Principles on Judicial Conduct.[23] As part of the requirements for fulfilling the value of independence, clause 1.1 of those Principles provides in summary that a judge must decide cases independently on the basis of the judge's assessment of the facts and the law, free of any extraneous influences, pressures, threats or interference, either direct or indirect. Clause 1.2 provides that a judge shall be independent in relation to society in general. These provisions largely equate to the provisions in the IAJ Charter I have already discussed.

---

19 See Article 3.3 of the Charter set out above. For New Zealand see *Annual Report*, above n 9, at 49. The importance of having outreach is recognised by other final courts. For example, see the message from the Chief Justice of Canada, Richard Wagner: "We're leveraging technology and new media to better communicate with you, wherever you live, in both of Canada's official languages": <www.ssc-csc.ca>. While New Zealand's judgments are not fully bilingual, for the first time last year the Māori Land Court published the first bilingual judgment in te reo Māori and English: *Pokere v Bodger* – Ōuri 1A3 (2022) 459 Aotea MB 210 (459 AOT 210).

20 See Dame Sian Elias, former Chief Justice of New Zealand, in "Demystifying the Judicial Process" in *Core Values of an Effective Judiciary* (Academy Publishing, Singapore, 2015) at 136.

21 These judicial robes are worn on ceremonial occasions by senior court judges, such as the swearing in of new judges and admission to Bar ceremonies. Judges of the Supreme Court and Court of Appeal do not wear gowns for their hearings. Black robes are still worn by counsel and by High Court and District Court judges for court hearings but wigs are no longer worn, either ceremonially or in court proceedings. With the introduction of Te Ao Mārama (discussed below), District Court judges can now choose to wear a modified black gown in Court which represents the kaupapa (philosophy) of Te Ao Mārama. See District Courts "Te Ao Marāma Judicial Gown" District Courts <www.districtcourts.govt.nz>.

22 See Courts of New Zealand "Judicial Ceremonial Robes" Courts of New Zealand <www.courtsofnz.govt.nz>. Note that on that site is a picture showing both the old judicial robes and wigs previously worn on ceremonial occasions.

23 There are six core values set out in the Principles: independence, impartiality, integrity, propriety, equality and competence and diligence: *The Bangalore Principles of Judicial Conduct* ECOSOC 2006/23 (2006).

In accordance with the value of equality, however, clause 5.1 of the Bangalore Principles provides that a judge shall be aware of, and understand, diversity in society and differences arising from various sources, including but not limited to race, colour, sex, religion, national origin, cast, disability, age, sexual orientation, social and economic status and other like causes.[24] The commentary on this clause by the United Nations Office on Drugs and Crime reinforces the idea that a judge must understand the community.[25]

The second topic of my talk today is the intersection between these two values in the Bangalore Principles: independence and equality.

There will be times when independence and equality are completely aligned and where upholding the value of equality, the rule of law and the judicial oath will require judges to withstand majoritarian social pressure. This can take great courage, especially in conservative societies less tolerant of differences.

But, at the same time, it is not possible to judge fairly and uphold the value of equality if judges do not understand the society in which they judge. In the past it was thought that, to be independent and impartial, judges had to separate themselves from society and be "insulated from the controversies of the day".[26] In fact, this probably meant that, as part of the

---

[24] The IAJ Charter does not explicitly discuss the value of equality but it is implicit in the commentary at the beginning of the Charter which references the role of the judiciary in protecting human rights and fundamental freedoms and also the reference in article 1 to the rule of law and to the right of the individual to a fair trial in the determination of civil rights and criminal charges, as well as the duty of impartiality in article 6.2.

[25] United Nations Office on Drugs and Crime *Commentary on the Bangalore Principles of Judicial Conduct* (September 2007) for example states at 186: "A judge should attempt, by appropriate means, to remain informed about changing attitudes and values in society…. However, it is necessary to take care that these efforts enhance, not detract from, the judge's perceived impartiality."

[26] This remark was made by Lord Kilmuir of the United Kingdom in 1955 and became known as the "Kilmuir Rules". These "unofficial" rules were officially abandoned in the United Kingdom in 1997, although it is generally agreed that the Kilmuir Rules merely recommended restraint and that public discourse to some extent continued. See John Burrows and Jeremy Finn (eds) *Challenge and Change: Judging in Aotearoa New Zealand* (Lexis Nexis, Wellington, 2022) at 226–227.

"establishment", they judged accordingly.[27] Judges traditionally were so far removed from society that they could not identify with many of the people they sat in judgment on.[28]

Now the importance to judicial legitimacy of diversity of appointments is widely recognised.[29] This is both to ensure that the judiciary is reflective of the community but also so that judges better understand all those who may come before the courts.[30] The ability of judges to speak to their communities is a "great virtue of the legal process".[31]

There has also been a recognition that actively engaging the community can bring better results, particularly in the criminal field and for both defendants and victims. For example, New Zealand's main first instance trial court, the District Court/Te Kōti-ā-Rohe o Aotearoa, is embarking on an ambitious change program, Te Ao Marama (The World of Light) to bring the lessons learned in specialist problem solving courts into the mainstream.[32] It will be inclusive of all cultures and emphasise restoration, rehabilitation and healing, as well as ensuring community engagement.[33]

---

27 An interesting project that has occurred in many jurisdictions is the feminist judgments project. This is where famous cases are "reconsidered" from a feminist perspective but within the constraints of the law as it was at the time of the decision. Sometimes it is not possible to reach a different result but it is still possible to reframe the reasons for the decision to be more conscious of the people (and particularly the women) involved. In New Zealand see Elizabeth McDonald et al *Feminist Judgments of Aotearoa Te Rino: A Two-Stranded Rope* (Hart Publishing, Portland, 2017). The New Zealand project also contained perspectives with a te ao Māori (Māori world)/wāhine (woman) worldview. As noted in the foreword, at viii, "a lack of diversity in decision makers can lead to biased and unjust laws" and also perpetuate stereotypes or monocultural values and norms. Increasing diversity in the judiciary will increase diversity in ways of thinking and in links to the community.

28 A Canadian author, Wes Pue, observed that the legal profession's culture was formed in "bars, cafes, gentlemen's clubs…golf games and railway cars. … [T]hese sites and practices privilege specific formations of cultural and social capital and tend to exclude women and minorities", quoted by Hilary Sommerlad "Judicial Diversity" in Graham Gee and Ericka Rackley *Debating Judicial Appointments in an Age of Diversity* (Rutledge, Abingdon, 2018) at 216–217.

29 For example, there is now an International Day of Women Judges (10 March) instituted by UN resolution *International Day of Women Judges* GA Res 75/274 (2021) which recognises that the "systemic mainstreaming of a gender perspective in the implementation of [the Sustainable Development Agenda] is crucial". In New Zealand, the Attorney-General *Judicial Appointments Protocol* (2019) for the senior courts states that there is "a commitment to actively promoting diversity in the judiciary without compromising the principle of merit selection", at 1. This protocol can be found on the Ministry of Justice website: <www.justice.govt.nz>.

30 Community engagement obviously must be done in a way that follows the relevant ethical rules and any obligations of judicial office, such as caution in commenting on issues that may in future come before the courts: see 2.4 of the Bangalore Principles. On the requirements relating to impartiality generally see 2.1–2.5 of the Principles. See also art 6.2 of the Charter.

31 "Demystifying the Judicial Process", above n 20, at 128.

32 See District Court of New Zealand "introducing Te Ao Mārama" District Courts <www.districtoucrts.govt.nz>.

33 Heemi Taumaunu "Te Ao Mārama – Enhancing Justice For All: Two Years On: An Update on Progress in the District Court of New Zealand" (4 October 2022) and John Walker "Norris Ward McKinnon Annual Lecture 2022" (Tauranga, 20 Sept 2022).

In common law systems judges are responsible for developing the law in an incremental fashion in accordance with the common law method.[34] This requires courts to understand the social and economic conditions in their jurisdiction and to adapt the law where necessary to meet new conditions.[35] In performing this role, courts need to be cognisant of the needs of all members of their societies and to take care not to get too far ahead of (or indeed too far behind) their communities.[36]

Looking to the future, our world is facing major challenges, including artificial intelligence, climate change and threats to the rule of law. The ability of the courts to be responsive and innovative as well as courageous will be more important than ever.

---

34 See Janet McLean "*Attorney-General v Taylor*: An Example of the Cautious, Incremental and 'Common Law' Approach to Constitutional Change in New Zealand" IACL-AIDC Blog (5 December 2019), <www.blog-iacl-aidc.org>.

35 I am not qualified to comment on the position in civil law jurisdictions, although I do note that the book Tania Sourdin and Archie Zariski (eds) *The Responsive Judge: International Perspectives* (Springer, Singapore, 2018) covers both common and civil law systems.

36 See Dixon, above n 16, at 267 who talks of the perils of "over responsive" judging which "may lead to losing sight of the democratic values and goals judges are designed to serve".