A Reflection on Dame Sian Elias's Address

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Dame Sian Elias's address, "Reclaiming a New Zealand Legal Tradition", showcases the very values that Elias celebrates as the best of law and legal education. It reflects deep reading, thinking, writing and talking. It reveals a sense of excitement about law: a reminder that law can be thrilling, exhilarating, even fun. It highlights the importance of a breadth of perspective that crosses categories in law, and in scholarship more generally. It is a reminder of Elias's belief in, and commitment to, the matter of New Zealand. And there is a humanity in her approach that points to the way Elias has always sought to contribute to an understanding of life as a whole through law.

There are four principal themes in Elias's address: legal history, legal education, the New Zealand constitution, and the relationship between law and life. I offer brief comment in what follows on each of these themes, albeit not in the order in which they appear in the address.

On the pressures on legal education

I agree with everything that is said in the address about the value of learning law, and about the pressures that risk disfiguring legal education: including increased specialisation in legal education, the loss of tutorials in some law schools, and the reduced emphasis on case-books (and perhaps, by extension, a certain kind of reading). I would only add that there seem to me to be additional pressures, even setting aside the challenges of teaching via Zoom in Covid-times. Whether because of cuts to public funding of tertiary education or law schools' keennness to engage with the commercial legal fraternity or large firms' own marketing, large corporate law firms have a heightened presence in the life of law schools: in particular in the sponsorship of events and groups, and the naming of competitions. That does not seem to me to be an entirely benign development. It can entrench the view that law schools play a primarily vocational role. And it can (consistent with the purpose of such marketing) lift the status attached to work at corporate law firms, compared with other lines of work in the law.

Pressures on legal education can acquire their force from the norms, culture, and politics experienced within law schools. Put another way: the pressures on legal education manifest not just in what is taught (for example, increasingly specialised courses) but also in the perspectives and perceptions encouraged when studying. During my time at law school, while contract law was one of four compulsory Part II courses, there seemed to be a quite widespread perception – at least among a group of vocal and influential students – that your intellectual mettle was properly tested by contract law: it mattered more than public law or criminal law or tort law. I think that perception is less to do with these subjects' intellectual content (in my view, some of the most exciting contemporary legal questions arise in public, criminal, and tort law: such as the intersection of the Bill of Rights and criminal law or the refashioning of tort law to address environmental breakdown) and more to do with the current, but perhaps not permanent, dominance of contracting in society and government. There was also a quite widespread perception that company law and tax law were de facto compulsory subjects, not for reasons of understanding the law whole, but to prepare students for commercial life. These were perceptions and views that circulated in conversation and in informal settings. But they appeared to be influential. (I refused to take company law and tax law as an act of rebellion, which I now regret, given the importance of these subjects for understanding questions about the state, regulation, and redistribution that seem to me fundamental for our time.)

These anecdotes illustrate, perhaps, that it may be as important to name social pressures (which can be more difficult to measure), not least to understand their connection to where resources and power are held within society. Current or recent students may be in the best position to bring these pressures to the surface, and the Auckland University Law Review is well placed to capture these student perspectives.

That background culture and politics can affect the conditions of legal education was confirmed to me in studies at Oxford, where I felt a greater distance between academics and students than at Auckland. I attributed this distance to the United Kingdom's more pronounced class system and social structure. If social structure can affect education in this way, and I believe it can and does, then this is another reason we should be concerned about deepening inequality in Aotearoa.

To say background culture and social pressures are important is not to downplay the more material pressures on experience of legal education, which I also witnessed in my time at law school. These

pressures include some students, more likely those without financial support to go through university, having to work multiple jobs because of the need to pay off loans or support others in their life; the shadow of student loans pushing students towards certain kinds of legal work. These are pressures that may get in the way of intellectual curiosity: the work of reading, talking, thinking and writing about law.

On the importance of legal history

I had some of the very best teachers I could have hoped for when studying law at the University of Auckland. But even with that good fortune, one challenge was that cases were not always placed in full historical context. Headnotes and case summaries do not help, as Elias notes in her address (headnotes, indeed, can be a "menace"). But cases themselves present only a brief record of the historical context in which they are situated. Judges can hardly be expected to analyse how their decision-making sits within a broader political, economic, and social context when they are required to reach a decision in the case before them. One thing law teachers can do is provide this context. It seems to me that more can be done, for example, to learn about the full political context surrounding *Fitzgerald v Muldoon* when learning about that case.[1] It was only through sustained engagement with historical and legal materials that I was able, in postgraduate study, to understand how early cases on the prerogative were connected to the development of capitalism and the needs of the British state, in particular in the seventeenth century.[2] Connecting history, political economy, and law – ensuring, as Elias says, that law and history are not separated – can help to bring cases alive and understand why cases were decided the way they were.[3]

This leads me to wonder whether I have a slightly more critical view than Elias of cases as a source of insight into life, including national life. If cases themselves can only be expected to present a glimpse of a broader historical, political, and economic matrix, how much should we prize them as a reservoir of insight into life itself?

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1 *Fitzgerald v Muldoon* [1976] 2 NZLR 615 (HC).

2 See, for example, *The Case of the King's Prerogative in Saltpetre* (1606) 77 ER 1294 and *R v Hampden* (1637) 3 State Tr 826.

3 There has been a resurgence of work on the relationship between political economy and law, both from Marxist and more reformist perspectives: for an example of the latter, see Jedediah Britton-Purdy, David Singh Grewal, Amy Kapczynski, and K Sabeel Rahman "Building a Law-and-Political-Economy Framework: Beyond the Twentieth Century Synthesis" (2020) 129 Yale Law Journal 1784.

And if cases themselves are full of "slippages" and silences that may obscure a "deeper logic" in society,[4] what does this mean for Peter Birks' claim, cited by Elias, that law schools should "guard the rationality of law"?[5] I say this not in disagreement with Elias's address, which speaks beautifully of the need to remember the contestation over law that has occurred historically. But could it be that if law teachers seek to guard the rationality of law, seeking always to render law as internally consistent as possible, they may be pulled away from presenting an honest picture of law's messiness and missteps?

Elias is absolutely right, in my view, that ignorance of history (including legal history) may have damaged social debate, for example around the passage of the Foreshore and Seabed Act 2004. Amnesia has deep roots in this country, especially in Pākehā and early settler culture. This country was established in its current form with great hope. But many settlers also wished to remake their lives here: to start afresh, to wipe the slate clean.[6] We were, and are, *New* Zealand. (Many of us do not have any sense of identification with "Zealand", but we know the "New" part.) Place names like "*New* Plymouth" were installed. I worry that these urges, on the part of Pākehā in particular, to make things anew, to start afresh, meant that this country in its current form was built on a foundational desire to escape or at least to ignore histories, personal and public.

On the New Zealand constitution in all of its dimensions

I appreciate the comments made in Elias's address about how a constitution can evolve by agreement and modification. Justice Sir Joe Williams has often spoken about how the New Zealand national anthem began, organically, to be sung in te reo Māori as well as in English:[7] this is perhaps an example of that process in action, if such an example can be considered constitutional. I agree that constitutional law reflects the reality of life around us, which supplies yet further reason to be alert to pressures and perceptions, as well as

4 Ntina Tzouvala *Capitalism as Civilisation: A History of International Law* (Cambridge University Press, Cambridge, 2020) at 9.

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

6 Much writing has highlighted, however, that even early Pākehā culture did not eliminate, but often transplanted, class structures from the United Kingdom: see Jared Davidson *The History of a Riot* (Bridget Williams Books, 2021).

7 See Joseph Williams "Can you see the Island?" (2015) 2015(10) Māori L Rev 21.

rules and resourcing. This recalls John Griffith's claim that "the constitution is no more and no less than what happens. Everything that happens is constitutional."[8] I also think that Elias's address makes a very important point, especially for teachers and students of constitutional law, when it says that New Zealand's 1852 and 1986 constitutional legislation present an incomplete picture of actual constitutional arrangements.

When assessing constitutional law today in light of the realities of life around us, it seems to me that – building on the work of Jane Kelsey[9] – it is imperative to engage with the contemporary economic constitution. The contemporary economic constitution is in large part a product of the laws, norms, and processes introduced over the last thirty or forty years that have encased a particular neoliberal vision of the state and economy:[10] with reduced public services, lower taxes, more light-touch regulation, weakened trade unions, a public sector designed in the image of the corporation, and an economy that serves the interests of a particular power bloc (well represented in what Kelsey has described as the 'FIRE economy': the finance, insurance, and real estate sectors).[11] Lawyers have been key actors – and legislation and case law key tools – in locking-in this vision of the state and economy. The Public Finance Act 1989 is pre-eminently constitutional in the way that it imposes a framework on annual budgetary processes (requiring total government debt to be kept at "prudent levels" as part of "responsible fiscal management")[12] and in the status that it is accorded in economic and political life. We can better grasp the economic constitution, what Marco Goldoni and Michael Wilkinson have called "the material constitution",[13] if we have a proper understanding of history and of society around us: an understanding that Elias urges us to adopt.

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8 JAG Griffith "The Political Constitution" (1979) 42 Modern Law Review 1 at 19.

9 See, for example, Jane Kelsey *The New Zealand Experiment: A World Model for Structural Adjustment* (Bridget Williams Books/Auckland University Press, Auckland, 1997)

10 On the role of law in encasing a particular economic order, see, Quinn Slobodian *Globalists: The End of Empire and the Birth of Neoliberalism* (Harvard University Press, Cambridge, 2018).

11 Jane Kelsey *The Fire Economy* (Bridget Williams Books, Wellington, 2015).

12 Public Finance Act 1989, s 26G.

13 Marco Goldoni and Michael A Wilkinson "The Material Constitution" (2018) 81 Modern Law Review 567.

On law and life

Law must, as Elias says, answer the needs of society. As Elias and other judges have said,[14] we should all be deeply concerned about how restricted access to law renders law incapable of responding to the needs of all of society. Access is not only restricted by legal aid cuts and changes (including the normalisation of legal aid as loans, which disfigures the vision of legal aid as first introduced) but the increased perception that the law in its current form does not cater for all, including the needs of Māori. To be attuned to these perceptions, again we have to supplement analysis of what has been written down and pronounced with an understanding of how people view law and where people understand power to lie. I worry that the pandemic has circumscribed this understanding we can build of each other, since it has (necessarily) limited face-to-face contact and our capacity for solidarity.

I share Dame Sian Elias's aspirations for the law, including the study of the law: that through law and the study of it we might catch a glimpse of the matter of our country, and a better glimpse of who we are as human beings; that through law and the study of it we might be able to better care for others and better care for how our society treats us all. Reading her address makes me a little more hopeful that we might realise these aspirations. I hope it has the same effect on other readers.

14 See for example, Justice Helen Winkelmann "Access to Justice – Who Needs Lawyers?" (2014) 13 Otago L Rev 229.