

October 27, 2015

# Palmer J Swearing In Speech 27 October 2015.pdf

The Hon Justice Matthew Palmer

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**Swearing in Ceremony**

**High Court of New Zealand,**

**Wellington, 27 October 2015**

E te Tumuaki Kaiwhakawā - Chief Justice Elias. E te Roia Matua - te hōnore Chris Finlayson. E ngā mana, e ngā reo, e ngā karangatanga maha - ā me taku whānau hoki. Rau rangatira mā, koutou katoa, tēnei taku mihi atu ki a koutou - tēna koutou, tēna koutou, tēna koutou katoa.

Kei te whai whakaaro mo ngā hoa kāre i tae mai i te rā nei, tae atu hoki ki te hunga kua mene atu ki te pō. E ngā mate, haere atu ra, haere atu ra - e moe i te moengaroa.

Ka hoki mai ki a tatou kua hui mai nei i roto i tēnei whare. Tēna tātou katoa.

Chief Justice, judges, Mr Attorney, Mr Solicitor, practitioners, my family, friends and all you special people. Greetings. I pay tribute to those who are unable to be here today including those who have passed on. Tēna tātou katoa.

**Surprise and Humility**

I sit here today with a sense of surprise and humility.

The surprise is because, so far, this event has not been quite as difficult as I was told it might be. My expectations had been conditioned by receiving the following formal written advice, as I gather other new judges have before me:

The worst experience for a new Judge is the swearing-in. Little comfort can be offered; it is an emotional time and simply must be gone through. Once that is safely over (and no-one has yet failed to survive the experience) nothing that follows will seem quite as bad.

A fellow judge “kindly” told me this morning that that’s not correct; other things will be much worse.

The humility is reinforced by the further formal written advice that:

If the new judge does **not** approach the task confronting him or her with apprehension, but with a feeling of confidence, then it may well be that the Attorney-General has made an unfortunate mistake.

**Perspectives and Values**

As noted already, my path to this office has been a winding one – through various different thickets of the legal undergrowth from which I have viewed the mountain of law from different perspectives.

I feel lucky to have learnt more about my values, with each new perspective.

- I have viewed law as a policy adviser and manager in the Treasury and the Ministry of Justice, providing free and frank advice in the public service (as we then did) to all administrations since that of Sir Robert Muldoon. This experience emphasised to me the instrumental value of law in affecting behaviour in reality - in ways the executive government proposes, and Parliament decides, it should be affected – and in some ways that they do not.
- I have viewed law from academia, which taught me to value deep principle, to look for underlying patterns and conceptual consistencies and inconsistencies and to seek to evaluate the normative ought as well as the descriptive is.
- I have viewed law, from the wonderful collegiality and quality of Crown Law Office, as a government lawyer. This showed me the sharp end of the complementarity, conflict and occasional collision between law and politics. It demonstrated in practice that of which (the Chief Justice has already noted) I have written – the importance of behind the scenes legal advice to the ongoing maintenance of the rule of law.
- And I have viewed law from the luxury of the junior and senior bar which has emphasised to me the human face of legal conflicts which involve real people and real issues seeking to defend or obtain something that matters so much to them that they are willing to brave lawyers and courts to have it.

### **Future Expectations**

For the future, some have questioned my choice to sit in Auckland. As a former staff member at Justice said to me when he moved to Auckland: public law is done where the public is. And Auckland, I think, is different. I'm not sure that it is now possible to understand New Zealand, and therefore New Zealand law, without understanding Auckland. I embrace that challenge.

I have also had expressed to me disappointment that I will not, in future, be available to take cases that challenge the potentially unlawful use of power. But many others at the bar take and win these cases. And I know that members of Thorndon Chambers, for example, set fees based only on the ability of clients to pay, though they may not thank me for saying so.

I believe the true reward of being at the bar is the sense of helping real people, and of achieving justice for them when other means fail. Contrary to popular myth, lawyers are not, and must not be, all about money.

I have had others suggest that I will be what is called an activist judge, on the basis of the sorts of cases I did at the bar which gained most public profile. It is true that my litigation career was bookended by two high profile public law challenges:

- My first case involved conceiving of the challenge by Peter Dunne and Jim Anderton to TV3's decision to exclude them from the 2005 election debate, and junioring to David Goddard to pursue it to success.
- My last case, almost exactly 10 years later, involved representing Jane Kelsey and other applicants in challenging a Ministerial decision about application of the Official Information Act in relation to the Trans Pacific Partnership Agreement.

But an expectation of activism on the bench from me may end in disappointment. My criterion for arguing cases at the bar was simply to accept all cases which came to me unless I felt so incompetent or over-committed that I could not do them justice.

I did enjoy acting for clients such as Sustain Our Sounds, Save the Basin, Urban Auckland, the Quake Outcasts, the Mangawhai Ratepayers' and Residents Association and Jane Kelsey.

But I would have worked as hard for any client, as I indeed I did in representing the Honourable Gerry Brownlee, the Honourable Bill English and Nick Smith, Inland Revenue, Progressive Enterprises, and Talleys.

### **Perspective?**

And this is a clue to the perspective of law I expect to adopt as a judge. Our constitutional system, and our constitutional culture, expects the government to govern through representative democracy and according to law. I consider that it is the role of judges to facilitate that, rather than frustrate it, and to supervise the boundaries of lawfulness carefully, honouring constitutional principle and the doctrine of precedent.

And my first disciplinary training, that of an economist, still speaks to me of the value of certainty and predictability of law as an important underlying aspect of the rule of law.

In my academic writings I developed an approach that I labelled "constitutional realism" in the tradition of Karl Llewellyn and the American legal realists. The single unifying ambition of this approach has been described as "the commitment to candour, to telling it – whatever 'it' happened to be – as it is".<sup>1</sup> It seems likely to me that there is room for that in judging.

In terms of more fundamental values, I remain inspired by the words of Professor Guido Calabresi who was Dean of Yale Law School when I studied there, and went on to become (and still is) a judge of the US Federal Court of Appeals for the Second Circuit. He was

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<sup>1</sup> Neil Duxbury *Patterns of American Jurisprudence* (Oxford, Clarendon Press, 1995) at 71.

explicit in espousing the values “excellence and humanity” which resonated with me then and have always done so since. To me, there is no point in doing something unless you strive for excellence. And there is no point in striving for excellence unless you do so with, and for, humanity.

### **A note of thanks**

While Guido gave explicit expression to these values, others in my life have demonstrated them. In a final note of thanks, I want to single out my parents in particular.

My father Sir Geoffrey Palmer has been a constant inspiration to me. His boundless energy, his outspoken and consistent demands of officials, Ministers and the public of New Zealand for principled law, his concern to make New Zealand and the world a better place through law reform have demonstrated to me what is possible in one’s chosen career. We don’t always agree on issues, and we have very different personalities; which is probably well reflected in his choice of a political and legal career of law reform and mine of a career as a politically neutral public servant and now judge.

But I want on this occasion to express my deep respect, love and gratitude to my father; as well to my mother Margaret who makes the world a better place with her unwavering love and concern for all those whose lives she touches, and her stubborn insistence that things should be put right.

Finally, I want to thank my wife Ruth and my children; Russell and his fiancée Kathryn; Andrew; Jeremy; Helena; and Kate. You are my love and support and you hold me to account. You remind me why I want the world and New Zealand to be a better place for current and future generations.

No reira, tena koutou, tena koutou, tena koutou katoa.