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EDITOR'S NOTE

# Teaching Law and Social Justice

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Last year, the Rt Hon Sir Edmund (Ted) Thomas DCNZM QC, retired judge of the Court of Appeal of New Zealand and a former acting judge of the Supreme Court of New Zealand, supported Auckland Law School to offer a course on "Law and Social Justice". Sir Ted, who was an Honorary Fellow at the Law School following his retirement, had a long-standing interest in the subject and the cause.

Professor Paul Rishworth (as course director) and the teaching team designed the course starting in late-2020. 108 students would take the course in semester 2, 2021—this was the room capacity and enrolment limit.

The course outline explains that, whilst "[a]n idea of social justice is necessarily implicit in [most] law subjects", "it may not be articulated and discussed as such". "Yet all law embodies a vision of the way the world should be, and how its vision of social justice is to be achieved." The course is an opportunity to explore social justice as a subject of inquiry, using different areas of the law as lenses and case studies.

The course commences with a three-session introduction to law and social justice. First, I took a session on what the law school experience does to students' values, and why it is important for students to rekindle a flame for social justice. I gave each student a piece of paper and asked them to divide it into three segments. I then gave students three instructions: first, to doodle pictures and write keywords capturing who they were before they came to law school, focusing in particular on family, relationships, friendships, hobbies, sports, instruments, high school experience and values; secondly, on the right side, to doodle and write keywords capturing what they thought about life and felt as a law student that day, focusing on the same factors; and thirdly, in the middle, to articulate what changed and how law school contributed to the change. I asked students to indicate at the top right of their paper if they were comfortable with it being shown to the class. I collected the papers. I then spent the rest of the session showing and commenting on a series of students' papers. In doing so, I unpacked the images and keywords using the language, concepts and tools explored in the pre-reading.[1] I also invited student discussion

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1 See, for example, Lawrence S Krieger "Roasting the Seeds of Law School Stress" (2004) 5(8) Journal of College and Character 1.

on my comments. Secondly, I used "The State of Public Interest Law in Aotearoa New Zealand", an article authored by the Equal Justice Project (EJP) and published in the previous volume of this journal,[2] to lecture on the institutions of law and social justice in New Zealand, with a focus on law firms and practitioners;[3] government and community organisations; and universities.[4] Finally, Dr Arie Rosen lectured on theories of social justice, with a focus on the positions of libertarians, Marxists, neo-liberals and egalitarian liberals, and how these theories can help students think about questions of social justice.

The rest of the course explored case studies in law and social justice, taught by experts in each area. Professor David Grinlinton lectured on the idea of a right to adequate housing in international law and its implications for New Zealand. Dr Kate Doolin lectured on prison culture and the search for alternatives. Dr Fleur Te Aho lectured on tamariki (Māori children) in state care. Professor Michael Littlewood lectured on taxation and tax policy as an instrument of social justice. Dylan Asafo and Litia Tuiburelevu lectured on tangata o le Moana and social justice. Dr Anna Hood and Professor Pene Mathew lectured on migration, refuge and global social justice. Finally, Professor Julia Tolmie and Associate Professor Scott Optican lectured on law enforcement, criminal policy and social justice. The lectures were supplemented by guest lectures, including John Hancock, the Chief Legal Adviser at the New Zealand Human Rights Commission, on the Child Poverty Reduction Act 2018. John was involved over a period of years in the development of the policy that led to the Act and talked about how it exemplifies the interaction of international and domestic law in the implementation of social and economic rights.

The course was assessed in three ways. First, students were asked to write a 450 word contribution to a Canvas discussion thread and peer review two other students' contributions. In the contribution, students were asked to define "social justice" in their own words, explain the key implications of the hidden curriculum in New Zealand law schools for social justice in New Zealand,[5] discuss whether it is currently possible to genuinely advance social justice as an employed lawyer in New Zealand, and suggest one new reform or initiative that would better enable employed lawyers to genuinely advance social justice in New Zealand (and briefly explain why it would do so). For the peer review, students were asked for each contribution they had been assigned to identify something on which they took a different view, and respectfully explain what their view was and why they took a different view. Secondly, students wrote a research essay. The students signed up with one of the lecturers and selected an essay question relating to that lecturer's case study. Finally, at the end of the course, students were given a take home exam with a broad essay question examining cross-cutting themes across the course.

The course was a success. The SEC for 2020 places the course well above the Faculty and University averages. The course is in the academic calendar to be offered in 2022. The current teaching team will be joined by Eesvan Krishnan, an alumnus of Auckland Law School based at Blackstone Chambers in London who co-founded EJP in 2005.

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2 Equity Justice Project (Pro Bono Team) "The State of Public Interest Law in Aotearoa New Zealand" (2020) 7 PILJNZ 5.

3 See, for example, *Access to Justice Āhei ki te Ture: Report of the New Zealand Bar Association Working Group into Access to Justice* (New Zealand Bar Association, Auckland, 2018).

4 See, for example, "The Making of Lawyers: Expectations and Experiences of New Zealand Law Students and Recent New Zealand Law Graduates" (20 December 2019) Ako Aotearoa <www.ako.ac.nz>.

5 Students were first asked to read a recent article on the hidden curriculum: Khylee Quince "Universities should beware the 'hidden curriculum' that disadvantages many students" (24 July 2021) Stuff <www.stuff.co.nz>.

The articles in this issue explore a range of public interest issues related to the case studies in the course, as well as other areas.

The Prostitution Reform Act 2003 was an overwhelmingly positive reform for sex workers in New Zealand but prohibits migrants from undertaking sex work here. Reilly Polaschek argues that the current law is discriminatory and inconsistent, leaving migrant sex workers vulnerable to exploitation and unsafe working conditions. Arguments for and against the decriminalisation of sex work are explored. Polaschek proposes that s 19 of the Act be repealed to afford migrant sex workers the same protections as domestic sex workers.

Ella Shepherd analyses the citizenship deprivation decision of Shamima Begum through a feminist lens. Shepherd addresses the inherent problems with the largely unfettered discretion to deprive a person of citizenship — namely, the lack of judicial and public oversight, the absence of the investigative rigour that is seen in criminal proceedings, and that it is used as a form of punishment rather than to fulfil its stated goal of public protection. It is most severely applied to women and minorities, illustrating a discriminatory application. Shepherd proposes that citizenship deprivation should be used as a last resort, with suspected terrorist returnees instead being allowed to return and prosecuted domestically. This approach is more compatible with human rights (including international obligations), allows individual considerations to be taken into account, and leaves open the possibility of deradicalisation.

Charlie Cox discusses novel neuroscience evidence that brain activity occurs before an individual has made a conscious choice to perform an action, and the impact this evidence may have on the model of culpability and punishment in the criminal justice system. Cox argues that this raises a fundamental question about free will, undermining the current fault line model of blameworthiness in the criminal justice system. Cox proposes that the fault line model should be abandoned in favour of a consequentialist model that better accords with the neuroscience research to conceptualise criminal responsibility.

Recently, the Ombudsman found that seclusion in mental health treatment centres amounted to degrading treatment. Hye-Song Goo critically reviews the inadequacy of protection for the rights of mental health patients subjected to seclusion in New Zealand, and concludes that, in the long-term, New Zealand should completely prohibit the use of seclusion. Goo proposes a short-term solution of stricter regulation of the practice, including a Code of Seclusion Practice recognised in the Mental Health (Compulsory Assessment and Treatment) Act 1992, restricting the use of seclusion to situations requiring protection from imminent harm, and requiring clinicians to consider the effect of seclusion on the patient.

In the age of *big data* can the rights of individuals to keep genetic information private outweigh the right to access and use that information to improve public health and ensure profitability? Gauri Prabhakar explores this question through the lens of privacy law in the context of direct-to-consumer genetic testing (DTC testing). Prabhakar argues that the traditional conception of *privacy-as-freedom* is no longer adequate in this context, noting the ubiquity of the internet in society, the lack of informed consent, and the imbalance of power between consumers and companies. Prabhakar proposes that privacy should be reimagined as a positive right, no longer about separation but focusing on the right to choose — a model of *privacy-as-trust*. This would see companies as "information fiduciaries" who owe duties to consumers. Prabhakar applies this framework in the genetic testing and insurance context, suggesting that insurers should have tiered access to genetic information, proposing a total bar on accessing genetic information from third-party platforms, and advocating for the creation of an independent advisory board.

Sophie Shrimpton addresses the shadow of neocolonialism in the Pacific. Shrimpton argues that neocolonialism continues to reproduce colonial dynamics in the present day through indirect political, cultural and economic controls. Shrimpton appraises the Pacific Agreement on Closer Economic Relations Plus (PACER Plus) using several criteria for identifying a neocolonial relationship and concludes that PACER Plus is a neocolonial legal instrument.

Social media is now a widespread tool in politics, but concerns are growing in relation to misleading political advertising on social media and the effect this has on democracy. Maisy Bentley assesses how the Advertising Standards Authority (ASA) regulates political advertising in New Zealand. Bentley uses a case study of a National Party of New Zealand petrol advertisement to demonstrate that the ASA is failing to take into account several relevant factors in its decision making. Bentley recommends the inclusion of five additional considerations to better account for the modern reality of social media and political advertising in order to protect democracy.

New Zealand is experiencing a housing crisis characterised by a severe lack of accessible homes, prompting concerns about breaches of fundamental human rights for disabled people. Ben Stewart explores this issue, arguing that New Zealand's current housing law and policy is insufficient to uphold the right of disabled people to adequate housing. Stewart recommends creating a tiered model of accessibility standards, prioritising accessible housing for public housing projects such as Kiwibuild, remedying discriminatory funding policies for retrofitting modifications, and creating a register of accessible properties in New Zealand. Stewart concludes that the combination of recommendations will address the existing issues without imposing an undue burden on the housing sector or the government.

Eva McRae explores whether damages ought to be available for breaches of natural justice under the New Zealand Bill of Rights Act 1990 (NZBORA). McRae assesses the current position in New Zealand and rebuts the general rule that damages are not an available administrative law remedy. An analysis of the Supreme Court judgment in *Taunoa v Attorney General* concludes that the case law has left open the possibility of damages as a remedy.[6] McRae concludes that *Baigent* damages should be available for serious breaches where there is no other effective remedy, with quantum being determined proportionately to individual rights and public interests.

Te reo Māori is a taonga of the Māori people. Etienne Wain explores the rights of mokopuna Māori to this taonga. Wain argues that the Oranga Mokopuna framework, originally developed in the context of Māori rights to health and well-being, is applicable in other rights contexts. Wain applies the Oranga Mokopuna framework to mokopuna rights to te reo, beginning with mokopuna rights borne from whakapapa and tikanga, strengthened by He Whakaputanga and te Tiriti o Waitangi, and protected by the accountability mechanisms in international obligations. Wain argues that this framework, with its starting point in te ao Māori, provides a more appropriate perspective for conceptualising mokopuna rights than traditional universalist approaches, which are inherently Western and often marginalise Indigenous peoples.

It remains for me to thank the team responsible for this issue. The Editors-in-Chief, Anita Chung and Phoebe Wilson, have led masterly from the front. I am grateful, as always, to our Editorial Board and Academic Review Board. Finally, my thanks to Michelle Chen and Tara McGoldrick, who have supported me in the finalisation of the issue.

6 *Taunoa v Attorney General* [2007] NZSC 70, [2008] 1 NZLR 429.