

SIR ROBIN COOKE*

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I DEDICATION

The students and staff of the editorial committee of the Victoria University of Wellington Law Review respectfully dedicate this issue to the life and memory of Lord Cooke of Thorndon who died on Wednesday 30 August 2006. The death of Lord Cooke has generated a vast array of tributes. All these tributes point to Lord Cooke as New Zealand's leading jurist. Reflections on how history will treat him are best left to when we are affected less directly by the loss of an extraordinary person. The Law Review is presently planning a more comprehensive tribute to Lord Cooke for publication next year.

II A SPECIAL SORROW

The death of Lord Cooke struck many at this Law School not just as the death of a national figure, a monarch, a politician or even a great sportsman might. Undoubtedly he was a national figure, indeed an international figure, of great renown and New Zealand as a whole is the poorer for his passing. But members of this Law School felt the loss more personally.

In three regards the loss of Lord Cooke was, for the members of this Law School, more a personal event than a national one. Firstly, there was the degree to which Lord Cooke had influenced the daily material of our lives, New Zealand cases and legal writing. Secondly, since his retirement from the New Zealand Court of Appeal he had served as a distinguished fellow in our Law School, the recipient and giver of "good morning" and "good afternoon" greetings, whose health we worried about at a polite distance and whom we occasionally invited to address our students. Thirdly he was very much a friend of this Law School. He made a major contribution, for

* The Right Honourable Sir Robin Brunskill Cooke, The Lord Cooke of Thorndon, ONZ, KBE (1986), (Knight Bachelor 1977), PC (1977), Appointed to the Order on 3 June 2002 to Mark the Queen's Golden Jubilee.

He was appointed a Judge of the High Court in 1972 and a Judge of the Court of Appeal in 1976, becoming President of that Court in 1986. On his retirement from the Court of Appeal in 1996 he was granted a British Life Peerage. For five years he sat as a member of the House of Lords Appeal Court and the Judicial Committee of the Privy Council, the Hong Kong Court of Final Appeal and the Samoan Court of Appeal. Lord Cooke was also a Distinguished Visiting Fellow at the Victoria University of Wellington Law School.

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instance, to the Law School campaign for funding in the early 1990s. He expressed his pride in this law school as he did in his other associations. He took obvious delight in the annual lecture instituted in his honour, and in the calibre of those who presented them.

III AN EXTRAORDINARY CONTRIBUTION

In relation to Lord Cooke's contribution to our daily grind – the cases and statutes and legal writings which we study, review and sometimes contribute to – Lord Cooke had an incalculable influence. The sheer period of time during which he occupied the Bench, from 1972 until 1996 in New Zealand and then from 1996 until his retirement from the House of Lords four years ago, is almost unparalleled in New Zealand history. Importantly, he shared longevity as a judge not only with Sir Ivor Richardson, one of our other Distinguished Fellows, but he also served about half his time on the Court of Appeal with another exceptional New Zealand judge, Sir Owen Woodhouse. Together they served during a period of great modernisation in New Zealand law and in New Zealand's economy and life generally. That was a period of remarkable transformation in the sophistication of the New Zealand body politic and in its legal culture. Lord Cooke's career spanned from before the Muldoon years when the executive was perceived by many as in danger of threatening the very nature of the New Zealand constitution, to the years of the Fourth Labour Government's transformations of New Zealand's economy and society. In his time as a judge, Lord Cooke was charged with interpreting perhaps the strictest of financial control regulations, and was later charged with interpreting the statutes which created one of the most deregulated of markets, including somewhat hopeful legislation like the Commerce Act 1986 whose authors claimed it would restrain private power. The period that Lord Cooke was judge was also the very height of a New Zealand sense of identity, the completion of a long process that would see New Zealanders assert a unique cultural identity, distinct from their mother country. The period included the renaissance of Maori and of Maori rights.

It might be thought that any judge who presided over such diverse times would necessarily have made a major contribution to the development of the law. Every course that I have studied at this Law School, or indeed I have taught, necessarily involved a consideration of Lord Cooke's writings. But Lord Cooke was not an ordinary judge. His contribution went beyond merely outlining the law or developing it softly in a new direction. His judgments tended to have a richness and a depth of knowledge that went beyond what might be expected of any judge, especially a judge charged with a task of the sheer magnitude of that in the Court of Appeal. Lord Cooke inhabited the subjects that I studied and that I teach. It was simply impossible to make sense of New Zealand law in diverse areas like tort, contract, constitutional law, equity or trusts without directly confronting Lord Cooke's view of the law as a whole. This was true even when ultimately that vision ran somewhat in conflict with the prevailing political or economic ethos of the later years of his career when a more conservative vision of the role of the state, and a more radical version of the role of the market dominated. Sometimes it conflicted directly with my own. Such was the force of the vision that there was a need to explain yourself before you felt that you could disagree.

His particular vision of New Zealand law was not without its critics, and at times those critics could be savage. Those critics often made the mistake of believing that Lord Cooke's judgments reflected vague notions of "justice and fairness" or a misguided search for simplicity for its own sake. Certainly Lord Cooke would have responded that the point of the law was to seek both justice and fairness but also simplicity. His judgments, however, were never about justice or fairness or the search for a simplicity that did not exist. Rather they reflected a deep concern for the tradition of a common law, a knowledge of its breadth and depth and a remarkable ability to produce synthesis from conflicting material. If any New Zealand judge deserved to be judged not simply on a particular judgment but on the corpus of his work, it was Lord Cooke. Very often when one was perplexed by a decision produced in the final years of his career, one would find a theme that had been reflected throughout his career in an array of judgments, and the most recent one had to be read in that context. Such an extended reading often repaid a far more nuanced and complex approach to difficult issues than was apparent in a particular word or phrase.

IV OUR COLLEAGUE "ROBIN"

Sir Robin was also a daily colleague, at least when he was in New Zealand. Of his time at the Law School I have three particular memories. First, there was his attempt on his welcome morning tea to convince faculty members to call him "Robin". He delighted the audience of assembled, and perhaps nervous, faculty with the tale of his visit to the Garter King of Arms, an almost mystical figure who doled out to the recently ennobled their coats of arms. The point of the story was that Robin's coat of arms included "robins" which was how we should remember to call him. But the real point was Sir Robin's delight in both the tradition of which he was becoming a part, and the more eccentric nature of that tradition. Personally I could never bring myself to call him "Robin" – somehow that did not fit. And I compromised, as I do in this piece, by referring, as I knew him as a student, to "Sir Robin".

My second particular memory of Sir Robin's time at the Law Faculty was his extraordinary work ethic. Shortly put, I have no doubt that Sir Robin during his last 10 years was the hardest worker in our building. One might have expected that a retired master would rest on past glory. That was not the case with Sir Robin. He always seemed to be at work, even when the rest of us were well gone. I will never forget arriving at the Law School on a sunny day after Boxing Day, dressed in berry picking clothes to collect something, to be confronted on the first floor of the building by an elegantly dressed Sir Robin in what looked like a linen suit, obviously set for a day's work. He cared about the law and he cared enough to continue to work hard.

During his time at the Law Faculty, it is fair to say that Sir Robin was never particularly sprightly, except on one occasion that I remember. After the release of the second *Pinochet* decision in the House of Lords, where the House of Lords gave limited recognition to the role of international human rights law in the interpretation of British statutes that might allow the former Chilean dictator to be tried for his crimes, Sir Robin almost ran after me to give me his view of the scorecard in that particular decision.

V *ONE LESS CRICKET FAN*

A more personal context is Sir Robin, the cricket fan and Patron of Cricket Wellington. We often used to joke that you knew when Sir Robin had left the country not when the House of Lords was sitting, but when there was cricket to be played at Lord's.

I have often thought that not enough has been made of the relationship between the common law and cricket, two of the great signs of English civilisation. Cricket is a peculiar game. It is difficult to understand and full of apparent contradictions. It is supposedly a gentlemanly game played within a set of ethical rules. But those who have played it or have watched it for any length of time know that it is pretty dangerous and its stylised gentility masks a game that takes extraordinary concentration and discipline. Most importantly cricket is a game of English tradition which has been embraced by vastly different cultures. The great joy of cricket is not that it is a single tradition but that it is an amalgam of the traditions of the cricket playing countries from England to Australia, the Subcontinent, the "West Indies" and Africa.

Many of us felt that there was a contradiction about Sir Robin. On the one hand he was a great New Zealand judicial nationalist, on the other hand he was very much an Anglophile (who I think never understood why the best and brightest might want to study in the United States) and, of course, ultimately an English judge. But New Zealand will never have a completely New Zealand common law. New Zealand common lawyers will always work within a wider tradition. Narrower views of national identity should always be resisted. We greatly benefit from being part of a wider tradition and it is that wider tradition that makes sense of what we do. In cricket terms, there would be no Australian cricket without English cricket, and one imagines vice versa – they define each other, and most importantly define the tradition of which they are part. This I suspect explains the apparent contradiction in Sir Robin. There is no contradiction between seeking to develop, on the one hand, a New Zealand focused common law that provides solutions in New Zealand and, on the other, believing in a tradition of which at least Commonwealth common law is still a part.

As this tribute began, now is not the time to speculate about what we might see as Sir Robin's long-term contribution. But if I were to hazard a guess as to what his most significant contribution was, it would be his belief that the common law is hard work. His most abiding lesson was that while New Zealand lawyers, New Zealand judges and most importantly New Zealand law students should strive for a uniquely New Zealand identity, the meaning of that identity is not found just in making the law serve a current purpose on these islands, but also to be found in a wider tradition to which they both contribute and from which they both draw.

In the meantime we will miss Sir Robin. We will miss him around the building and at Wellington's cricket ground, the Basin Reserve.