

An interview with HE Sir David Baragwanath

1 Please describe your general background and 1-2 highlights of your career

I am a New Zealander. Soon after admission to the Bar I had the privilege of being tutored at Balliol College, Oxford University, by a compatriot with an immense vision of law, the late Donald Harris. My prior and first appearance before the High Court of New Zealand had been to appear for the Government on an appeal by indigenous Maori against conviction for taking shellfish without a permit. I was initially puzzled: the statute creating the offence stated “nothing in this Act shall affect any Maori fishing rights”; how could the conviction be justified? But I discovered a reported case from 1927 in which a bench of two High Court judges had held the exemption had no modern application. I cited the case and the appeal was dismissed. Wrongly.

Twenty-five years later I was instructed by the tribes of the Far North of New Zealand, from where my first case had come, to resist the Government’s removal of their few remaining fishing rights. I had in the meantime prepared for my first Harris tutorial an essay on an English political philosopher. I went to the Bodleian library and assembled a collection of what had been written about him. As Don read my “essay” his eyebrows rose, he put it down and asked me, “yes, but what do YOU think?” He had taught me I had failed in my first case. It was not enough to locate a decision—even one that seemed authoritative. It is the task of counsel—especially counsel for the Government—to identify and apply the *principles* raised by the case. Later performing the research I should have done a quarter of a century earlier, I discovered that the 1927 decision had applied a disgraceful decision of a Chief Justice who had disregarded the rights of colonised people. These had been recognised not only by the Privy Council in London; a Chief Justice of the United States; the great Spanish jurist Victoria; and, in respect of New Zealand, by Montgomery’s intelligence officer Sir Edgar Williams; but also by the Treaty of Waitangi on which the Government relied for its claim to sovereignty over New Zealand. In appeals to the Court of Appeal we secured reversal of the earlier decisions rejecting Maori rights. But my failure had withheld them for a generation.

At Balliol I was asked to tutor a young woman in what was the topical subject of economic torts. The UK House of Lords had just decided *Stratford Ltd v Lindley* [1965] AC 269 in which one of two leading cases cited arose from the conduct of the defendant captain of a slaving ship. Having secured his cargo of slaves, to avoid a competitor’s depressing the slave price on the London market he fired a cannon which frightened other local people from the coast; so the plaintiff slaver, who was unable to secure other slaves, was then awarded damages. My pupil turned out to be, not only an outstanding student of law, but from the part of the West Coast of Africa where these hideous events had occurred.

This added to my lesson about counsel’s duty—a brutal example of both why the law must recognise that every person is as precious as any other; and why the descendants of former slaves must be given true equality of opportunity. That requires that, since their families have been grievously wronged, special care be taken to ensure they and their descendants suffer no

disadvantage – educational, social, economic, or any other kind. A similar principle applied to the Maori cases in New Zealand.

2 What in your life has led you to an interest in development and how do you think law can shape positive development trends? What do you think are the most important development trends currently?

“Development” concerns erasing the difference between the “is” and the “ought.” It embraces needs to abolish poverty and malnutrition and to replace disorder in all its forms, including war, global warming and disease by peaceful, safe and healthy conditions for humans and other forms of life, present and future.

As spelled out in Chapter 10 “Strengthening the International Rule of Law” of *Global Governance and the Emergence of Global Institutions for the 21st Century*” of a recent text by Augusto Lopez-Claros, Arthur L. Dahl and Maja Groff¹, we are in this together. I suspect my own appreciation of problems and the need for answers has evolved since meeting my father, when he returned from war service as a chaplain in the Pacific and resumed parish duties, and my uncles, when they returned from North Africa and Italy. Since then, globalization of information and the pandemic, awareness of the nature and potential of modern weaponry, of the abject and deteriorating living conditions of multitudes, and of destruction of the environment, remove any intellectual justification for ignorance. Ideas of the great legal and philosophical thinkers cited by Lopez-Claros, Dahl and Groff—among them Bentham, Kant and Kelsen; modern writers such as Hathaway and Shapiro who recount the significance of the Kellogg-Briand Pact of 1928 as precursor of the Charter of the United Nations in shredding the entitlement of States to use war to implement policy; the work of the United Nations and its various agencies; and the thinking of philosophers such as Tony Ord in *The Precipice—Existential Risk and the Future of Humanity*,² are among important pointers to a better future.

3 When were you first introduced to Lex:lead, and what are your thoughts on the initiative?

I had the pleasure of meeting Anne Bodley in London about six years ago. I was impressed by her practical vision of letting the ablest potential lawyers from disadvantaged States demonstrate their ability by anonymously assessed examination. It is a treasured convention of the bar that each of us is a colleague of all others. On successive visits to the Maison du Barreau in Beirut, my 30 years at the New Zealand Bar assisted a fellowship of experience that helped compensate for my lack of Arabic and inadequate French. Likewise, the pleasure of lecturing to, being challenged in debate by, and learning from able law students in different societies, including Beijing and Shanghai, on topics of common interest. In our ever-more globalized world Lex:lead contributes notably to two overlapping values: identifying, debating and searching for answers on such topics; and developing and enriching the international professional community that overarches and facilitates them.

¹ (Cambridge 2020)

² (Bloomsbury 2020)