I am honoured to have been asked to address this important gathering of the law officers of Te Moananui a Kiwa, the Pacific Ocean that sustains all of us. It is a real pleasure to be here. The work of PILON in facilitating dialogue and co-operation on law and justice issues of regional importance matters to all of us, because we cannot help but be interconnected. We have much to learn from each other as all of us attempt to make our legal systems responsive to local needs while staying in touch with the great currents of law in our own region and further afield.

I thought today I would touch on some of the challenges for lawyers of upholding the rule of law. Some of these challenges are common to lawyers in all jurisdictions, but in the Pacific we also have special issues about reconciling post-colonial legal orders and universal human rights standards with local and customary law. Ours is a region of huge cultural diversity, containing one-third of the world’s languages in far-flung islands covering a vast part of the globe. We face unprecedented upheavals and disruption through global warming, damage to the fragile eco-systems of the Pacific, emigration, and other stressors. At such times, law comes under the same strains as the people. Our job as lawyers is to ensure that it is adaptable but stable, so that people can live their lives under its security.

**Government lawyers**

The first thing I would like to say is that as government lawyers you hold positions of heavy responsibility and considerable power. Judges are in a similar position. So what I say draws on my experience as a Judge and is applicable to my own role and how it is discharged.

First, power. Decisions you make and how you carry out your tasks impact, directly or indirectly, upon the lives of real people in our society. When I was a young lawyer, I acted for people who were often at the bottom of the heap. They were vulnerable. They were entitled to be treated with dignity and respect and they had claims on the attention of our society which deserved to be heard. Sometimes those claims were not initially of legal rights, although pressing them through administrative processes or political processes often gave rise to legal claims for procedural fairness. To such people, lacking power, decisions made by others which affected them deeply were often inexplicable. Those experiences convinced me that arbitrary use

1 The Rt Hon Dame Sian Elias, Chief Justice of New Zealand.
of public power, uneven distribution of benefits, absence of explanation for particular outcomes are not the outcomes of good government and they are contrary to the rule of law.

Public power today not only has to be exercised reasonably, lawfully and for proper purpose, it also has to measure up to the overarching principles provided by statements of rights. In some jurisdictions such statements are constitutionally entrenched. Even where they are not, any government lawyer must be acutely conscious of the fact that behind the domestic statements of rights stand the International Covenants that our nations have signed up to. No government wants to be criticised for violation of rights on the world stage. So your responsibility as government lawyers is to ensure that any potential clash of fundamental rights is identified and addressed in the advice you give. In addition to human rights statements, most of our jurisdictions now operate under a climate of openness in government under domestic statutes concerning official information. Such openness has transformed any culture of power and is something government lawyers need to be acutely conscious of in all they do.

These overarching principles – constitutional, human rights, process of government – make it especially critical for government lawyers to understand the scope and reach of the whole legal system. To know its values. Because, today, no statute is an isolated text.

This interconnectedness has a special challenge for government lawyers. Many have been involved in developing the legislation they operate under. They can easily be so imbued with the policy development which preceded it, that they find it hard to question. It is very important that government lawyers are not hostages to the policies within their departments. Government lawyers have to be prepared to speak for the statute against the expectations that may, wrongly, have grown up around it.

Anyone who exercises power must be dispassionate in its exercise. It is easier to say than to do. Judges are in the same boat. No public power is personal. It always has to be exercised for proper purpose and fairly, reasonably and according to law, as the great administrative cases have established. The Chief Justice of Israel Aharon Barak talks about respecting the chains which bind us as judges. Similar chains bind everyone who exercises public authority.

You have an additional responsibility. As lawyers within the engine room of government policy, you also have to stand apart. That is often very hard because it is not human nature for anyone who is trying to act in the public interest to realise when the power they are exercising should be checked. As lawyers however we know, as Sir Robert Megarry once said, that the law

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reports are full of "open and shut cases which, somehow, were not". Of unanswerable claims that eventually were completely answered. Your role, I think, includes the expression of doubt. To express doubt takes real integrity and strength.

The rule of law

Although it is hard to find any society today which does not profess to live under the rule of law, in many the rule of law is not recognisable to us.

Where law rules, everyone is equally subject to it. Dicey emphasised that the rule of law "excludes the idea of any exemption of officials or others from the duty of obedience to the law which governs other citizens or from the jurisdiction of the ordinary tribunals". The rule of law exists to prevent the exercise of arbitrary power. It checks the powerful.

Such checks are not always welcome and not only by those who are trying to be above the law. It is very difficult for anyone to resist headlong self-conviction when convinced that the end they have in sight is right. Those who are not acting for personal advantage but for what they believe to be the public benefit or for another good end may be especially indignant or impatient at being questioned. The obligation to say what the law is can be heavy responsibility on government lawyers, as indeed it is on the courts. If government lawyers do not give advice that needs to be heard, the judiciary and the executive can collide with potentially destructive consequences for the rule of law.

The role of lawyers, then, is key in maintenance of the rule of law. The independence and integrity of lawyers, as Sir Owen Dixon of the High Court of Australia once said, is more important even than the independence and integrity of the judges. And the role of government lawyers, in expressing caution, in explaining unpopular results, in advising governments when obedience to court decisions is necessary, may be the most important pillar of the rule of law.

Human rights

Whether human rights are part of the rule of law is controversial. Positivist tradition suggests they are not. Dicey himself did not suggest that the rule of law contained substantive rights. Legal philosophers like Professor Raz have said that legal systems which practise discrimination or exclusion and allow inequalities may, in principle, conform to the rule of law better than the legal systems of the more enlightened Western democracies.

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4 John v Rees [1970] Ch 345 (Ch) at 402 per Megarry J.
6 “Swearing in of Sir Owen Dixon as Chief Justice” (1951–1952) 85 CLR xi at xii.
7 Joseph Raz The Authority of Law (2nd ed, Oxford University Press, Oxford, 2009) at 211.
But eminent lawyers like the late Lord Bingham and the former Chief Justice of Australia, Sir Gerard Brennan, have said quite flatly that human rights are part of the rule of law. This debate is not yet played out. I want to suggest that the popularity of human rights in our domestic legal orders means that there has been a shift in understanding of law. Although as lawyers and political philosophers we had rather got out of the habit of thinking of law as a moral force, that divorce of law and morality is of quite recent origin and may never have accorded with the understanding of men and women in our societies that law is justice. The legal historian, Holdsworth, took the view that the effect of positivist philosophy has been to impoverish ethical reasoning in law because of the strict separation of moral and legal rights.

In an age of human rights, this line is hard to maintain. Human rights speak of values.

I have questions whether in popular understanding law and what is right were ever separated and it seems to me that in the Pacific region, with its law sourced not only in the positive enacted law but also in custom, that there is even more reason to accept that legal reasoning cannot avoid substantive values.

Custom

Human rights and fundamental principles are not always viewed as wholly positive in post-colonial contexts. In societies founded on tight-knit communities and focussed on the health of the collective, human rights are sometimes feared to be too individualistic, even egotistical. They can be viewed as contrary to long-held customary values designed to maintain and enhance the inter-connected relationships between members of the community and the environment in which they live. Given the fragility of the communities and eco-systems of the Pacific, anything that strains these ties and the cooperation they permit can be dangerously disruptive.

Suspicion towards human rights can have negative impact on the authority of the rule of law itself. In a democracy, the legitimacy of the rule of law must ultimately rest on popular consent. Since the human rights statements of many Pacific Island nations were contained in the constitutions they were

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given on independence, there may be questions of legitimacy.\textsuperscript{12} In this vein the New Zealand Law Commission noted:\textsuperscript{13}

Ownership [of the law] is difficult to achieve if the legacy of colonial legal systems, whether British, American, French or international legal norms, are seen as alien to custom and customary sources of law.

I entirely accept the importance of custom and consider that it has been neglected in legal systems like New Zealand. Indeed, I think we have much to learn from the nations of the Pacific where custom is acknowledged to be an important source of law. If custom is the law that is known to people and regulates their behaviour "on the ground", the legitimacy of the rule of law depends on its adequate recognition.

English common law does recognise local custom provided it meets certain criteria, including reasonableness. It was said that a custom was reasonable if it was "consistent, or, at any rate, not inconsistent, with those general principles which, quite apart from particular rules or maxims, lie at the root of our legal system."\textsuperscript{14} In New Zealand, Māori custom was upheld by the courts in a variety of situations. As early as 1844 the Secretary of State for the Colonies, Lord Stanley, confirmed the applicability of customary law. With the exception of customs "in conflict with the universal laws of morality", he could see no reason:\textsuperscript{15}

Why the native New Zealanders might not be permitted to live among themselves according to their national laws or usages, as is the case with the aboriginal races in other British colonies.

This year the Court of Appeal was asked to consider the interaction between Tūhoe’s customary law and the common law on the burial of bodies. Judgment was delivered only two weeks ago. While expressing no opinion on that judgment, I note the majority in that case held that customary law applies in New Zealand so long as it has existed since time immemorial, has continued without interruption, is reasonable, is certain in its terms, and has not been extinguished by statute.\textsuperscript{16} This is application of the common law. Of course, the criteria for application of custom as law are different in jurisdictions where its use is more secure than is the case under the common law. My purpose is to point out that the applicability of custom is an issue with which we all grapple and its persistence is indicative of the strength of support for custom as a source of law. In those circumstances, its observance has to be part of the rule of law.

\begin{enumerate}
  \item Ibid, at 55.
  \item Law Commission Converging Currents: Custom and Human Rights in the Pacific (NZLC SP17, 2006) at 11.
  \item Johnson v Clark [1908] 1 Ch 303 (Ch) at 311.
  \item Great Britain Parliamentary Papers NZ 2 1844 (556) XXII Appendix 19, 475, as cited in E Fletcher “A Rational Experiment: The Bringing of English Law to New Zealand” (Master of Arts Thesis, University of Auckland, 1998) at 223.
  \item Takamore v Clarke [2011] NZCA 587 at [109]–[111] per Glazebrook and Wild JJ.
\end{enumerate}
The harder issue is the potential for clash between custom and human rights which are expressed as fundamental and universal. There are those who argue that the imposition of human rights in the face of conflicting custom constitutes cultural imperialism. I am not sure how widely that view is held. It has been my experience in the Pacific as in New Zealand that those who are denied fundamental rights are not willing to be fobbed off by claims of custom. Where there is clash, custom, like the rest of the law, must be able to change and develop. In a Vanuatu case, Coventry J emphasised that:  

Custom and common law have many features in common. One of those features is their flexibility to meet change and development, yet still retain their inherent qualities and value. Neither works on the basis of saying, this is how it was always done in the past and must always be done in the future.

One of the biggest impact of human rights norms on custom has been in relation to the equality of women. This continues to be a challenge in most jurisdictions, despite the fact that the Covenant on the Elimination of All Forms of Discrimination against Women is one of the most popular of the UN Covenants. In this context, perhaps the changes to the British Royal Succession will provide example for further implementation.

As law officers you have a unique ability to foster this change by pointing both case law and custom in the direction of human rights. Sometimes this will require courageous advocacy in the face of public criticism. As government lawyers, this may require you to resist pressure from the powerful who like the status quo and who want you to give different advice.

How then is harmonisation between customary law and human rights achieved? On this issue the New Zealand Law Commission has provided useful guidance in its report Converging Currents: Custom and Human Rights in the Pacific. First, human rights must be considered in their cultural context. The Bangkok Declaration produced by the Asian preparatory meeting at the World Conference on Human Rights in 1993 reflected this sentiment, stating that “while human rights are universal in nature, they must be considered in the context of a dynamic and evolving process of international norm-setting, bearing in mind the significance of national and regional particularities and various historical, cultural and religious backgrounds.” This approach is consistent with the doctrine of the “margin of appreciation” adopted by the European Court of Human Rights. Cultural buy-in necessitates such an approach.

Second, values shared between customary law and human rights should be identified and used as a platform from which to achieve positive change. The differences between custom and human rights should not be over-emphasised. Shared values can be found. The Law Commission identifies the following commonalities: the respect for human dignity aligns with Pacific

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18 Above n 13.
19 Converging Currents, above n 13, at 72.
values of respect, love, care and sharing, humility and generosity; freedom of speech and belief is evidenced in the robust debate and community participation in Pacific Island decision-making; and the goal of human rights law for all to be free from fear and want is a value shared by Pacific communities.\(^{20}\)

Third, the constitutional recognition of human rights and the broad language with which they are framed should be used by litigators and judges to create a more rights-compliant law, both customary and common. The case of *Noel v Toto*\(^{21}\) illustrates such an approach. There the Supreme Court of Vanuatu had to consider the land rights of women. The Court held that customary law governs land ownership in Vanuatu insofar as it does not offend constitutionally protected human rights, in that case the stipulation that all persons should be treated equally.

It must be emphasised that where court intervention is necessary to protect human rights, as in *Noel v Toto*, “the court should strive to align those human rights with any consistent customary values to encourage greater expression of those values”.\(^{22}\) This way, both common law and custom will become increasingly coloured by human rights norms, albeit incrementally. The protection of human rights will not be divorced from indigenous culture and thereby alienate the community.

**Conclusion**

In conclusion, I thank you for the opportunity to speak to you. I wish you well for the meeting and for the conference that is to follow.

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20 *Converging Currents*, above n 13, at 75–76.
22 *Converging Currents*, above n 13, at 81.