

Kluwer Mediation Blog

Declaratory judgments

Ian Macduff (NZ Centre for ICT Law & School of Law, Auckland University) · Thursday, November 26th, 2020

“Half moons ago
people were hollowed-out tablets of stone
spaces were given them
according to spaces they left
...
some spaces were filled with darkness
no light would shine there . . .”

- From “Afkasi” by [Dr Selina Tusitala Marsh](#), former poet laureate of New Zealand

Many of you will be familiar with the legal term “declaratory judgment”, a remedy and clarification provided by a Court, according to its statutory or inherent jurisdiction, having the force and authority of a normal judgment and intended to resolve a specific question of law. The Court, in such instances, responds to an application from parties in a matter, in order to resolve questions of law, rights and obligations. The key elements of such judgments are that they rest on the authority of the Court, the application of legal reasoning and the provision of a settled conclusion. The question at stake is settled or resolved both because the judgment is binding and through the authority and jurisdiction of the relevant Court.

This, however, is not the kind of declaratory judgment I have in mind for this blog. Rather, I refer to another kind of supposedly argument-ending declaration that appears to have become an increasingly familiar tool in everyday conversation and political discourse; but these are declarations - conclusions - that lack authority, evidence, reason or any obvious attempt to engage with whatever tricky matter might be in question.

In at least a couple of earlier blogs, my starting point has been a chance conversation, a question asked, which led me to reflect not only on the substance of the topic in question but also on the conversational issues. And so it is again with this blog. Earlier this month, we had the great good fortune to be asked by dear friends to house-sit for them on [Waiheke Island](#), a 40-minute ferry ride from downtown Auckland, but a world removed from the city. With an unobstructed view of Oneroa Bay, a few minutes’ walk from the local village (cafés, wine shops . . .), and a map of walks across the island, we

were about as well situated as could be. Just beyond the low hedge that separated “our” deck from the expansive view, ran a public path joining this bay and a network of coastal walkways. This led to occasional conversations or at least exchanges of pleasantries with those passing by, some of whom knew our absent hosts (and inquired about their absence and our presence), others of whom merely passed the time of day.

One such walker, who clearly mistook us for the regular occupants, paused to opine that he hadn’t seen us for some time, which of course was true. After resolving the identity issue, and telling us his name, he chatted a bit about his own work on the island, and some matters of local interest, such as the challenge of waste recycling on an island. We appeared to be on common ground on matters of sustainability and ecological accountability.

Then, without warning, the topic changed, and we were regaled with the “truth” about Covid-19, the folly of wearing masks, the conspiracy of Big Pharma and Big Government to keep us all in a state of ignorant submission, and the “fact” that viruses “don’t behave like that”, thus proving that the virus, this “plandemic”, was and only could be caused by “the two-legged virus”: human beings. When he paused long enough to draw breath, we asked where he got this information, and were told that, as a health expert with two PhDs in health science, he knew fact from political fiction. Any contrary view (ours, for example) was deluded and ill-informed.

This, clearly, was not going to be a conversation, and we suggested that, while we seemed to have begun well, we were not going to agree, and we ended the exchange, possibly leaving him with the sense that he’d managed a small victory for “facts”.

Here, then, was a series of conversational declaratory judgments, the authority and conclusiveness of which were claimed to rest on the unilateral preference for and possession of “facts” and the superior possession of relevant qualifications. One small error, however, on that latter point: having given us his name it was an easy matter to check the veracity of his qualifications and to find that, while he had an undergraduate degree in health sciences, he did not have a PhD, let alone two.

In recent years we will all have become only too familiar with the kind of “declaration” that something is fake, false, fraudulent or contrary to the conclusions (viz, preferences) of the speaker. The declaratory mode seems a particularly popular tool of political figures, all the more so when there is a disinclination on the part of media or interviewers to take the time to dig deeper or challenge the speaker. Such declarations, such unsubstantiated conclusions, are typically unsupported by evidence – but that, it seems, is not the point. Rather, the point is that the discussion has been declared to be ended by the statement. It is as though each of us, if we adopt this mode, takes to heart the view of English linguist JL Austin (and his jurisprudential successor, HLA Hart) that there are forms of language that, through the use of words, create the desired reality. That is, there are “performative utterances” – such as “I find you guilty” or “I declare you to be married” – that, when said by a person with the requisite authority, mean that it is indeed so.

But here’s the thing: those judicial declarations or the form of words used – say, by a

marriage celebrant - have behind them the force of jurisdiction and authority (whether statutory, social, or traditional) that render the conclusion transparent and settled. Yet this mode has crept into our social and political discourse, or maybe it has become more obvious in these more contended and contentious times, when we are asked to accept, without more than the apparent personal authority of the speaker, that the matter is settled.

I think, too, of an example here in New Zealand from a few years ago, before the first term of the current Labour Government, when the then-Minister for the Environment was asked about data relating to the parlous state of our freshwater streams. The data, provided by the country's leading freshwater scientist, was dismissed out of hand as "junk science", as though that settled the matter and the Minister was better placed to resolve the matter than were scientists. Regrettably, he was not challenged by the media on this - and might only have reiterated his dismissive conclusion.

This is probably also a familiar theme for any parent or grandparent of the 3-year old (or 13-year old) who is always right. Some latitude might be granted in those cases as the youngster might not be expected to have gone in search of evidence. The risk, increasingly, is that the Internet is going to be the source of "authority", on the basis of whatever social media feed the claimant is prey to. I think here of grandchildren apparently impervious to our wisdom but all too ready to begin a declaration with "did you know?" . . . followed by a truth gleaned from some unsubstantiated online source.

The cost of all of this is a diminished mode of communication that purports to be, but fails to reach, the level of conversation. It is also a mode that stops short of the kind of engagement that seeks or requires input from anyone else, particularly if that input challenges the unilateral possession of "truth". As mediators, citizens and conversational partners, we might not require cogent analyses of evidence from children; but there's a risk that we seem not to require it of people behaving like children. Yet we know - and this is the mediation and conversational point - that the one tool or resource that we have that may both diminish the spurious certainty of others and provide us with a collaborative foundation is inquiry, the question of genuine curiosity, the pursuit of what it is we can know rather than merely believe.

"Somewhere beyond right and wrong, there is a field. I will meet you there."

- Rumi

". . . other spaces were filled with va*
these were warmed with the breath of others"

- Selina Tusitala Marsh

* "va" refers to the Samoan concept of relational ethics, the space between people.

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