

**Address by the Rt. Hon Dame Sian Elias, GNZM,
Chief Justice of New Zealand
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*The Usages of Society and the Fashions of the Times
(W[h]ither the Common Law?)*

Introduction

In his *Introduction to English Legal History*,¹ Professor Baker cites the Serjeant who in 1470 asserted that the common law had been in existence since the creation of the world. Well, as legal historians such as Baker have demonstrated, not quite. Another conceit, that the common law is an unchanging expression of sturdy English common sense (“flesh of our flesh, bone of our bone” as Lord Bingham put it),² has also been convincingly exploded.³ The common law indeed has ancient roots, but many are not English at all. It has borrowed, adapted, travelled, and grown. It is more in debt to the doctrine of the civilians than we often care to acknowledge.⁴ There is no longer, if indeed there ever was, one substantive common law.⁵ And we no longer pretend that the judges draw the law from an eternal spring; we know that the common law has never stood still.

As many commentators have observed, the common law is not a body of law or even a body of principles so much as a method of legal argumentation. It is a method that acknowledges continuity as well as adaptability. The nostalgia we have for the common law as an expression of the wisdom of ages (part of the comforting “leaf-drift of history” described by Helen Waddell) is as much a source of its strength as its adaptability and vigour in changing conditions. Indeed, it is perhaps a necessary condition of change through case law (the solutions arrived at in actual cases) that the decision-makers be acutely conscious of historical context. The common law method seeks to meet the twin objectives of law that is stable but does not stand still.

Tension between these objectives of stability and change is nothing new. Baker quotes an eighteenth century judicial disagreement.⁶ In 1784 Lord Mansfield CJ

¹ J.H. Baker *An Introduction to English Legal History* (3rd ed., 1990) 1.

² Lord Bingham of Cornhill “The Common Law: Past, Present and Future” (1999) *Commonwealth Law Bulletin* 18 at 22.

³ Lord Reid “The Judge as Law Maker” (1972) 12 *Journal of the Society of Public Teachers of Law* NS 22.

⁴ D.B. Ibbetson *Historical Introduction to the Law of Obligations* (1999).

⁵ *Invercargill City Council v Hamlin* [1994] 3 NZLR 513 (CA); [1996] 1 NZLR 513 (PC).

⁶ Barker, above at n 1, 229.

accepted that, “as the usages of society alter, the law must adapt itself to the various situations of mankind”.⁷ Lord Kenyon CJ was of another mind: “I confess I do not think that the Courts ought to change the law so as to adapt it to the fashions of the times”.⁸ I have taken my title from this exchange. Whether the common law will wither, or whither it will go depends upon its fitness to respond to the usages of society while avoiding the fashions of the times.

The method of the common law

We tend to think of the common law as case-law, the decisions of the courts. It is true that it has always been in large part the product of the results in actual cases. And that has had a profound effect on our legal method (a matter I turn to shortly). But it is important at the outset to acknowledge that an explanation of the common law as simply the decisions of the courts is inadequate in itself. It ignores how the common law has developed.

Until the development of professional law reporting in the nineteenth century, the common law could not properly be discerned from the case-law. As Baker has pointed out:⁹

Only blind faith could persuade anyone who has tried to read the year books that the mediaeval common law was somehow derived from their contents. Trying to glean law from the year books is like trying to learn the rules of chess or cricket merely by watching video-recorded highlights of matches. The reader soon senses that contemporaries must have known something he does not, some common understandings to enable them to appreciate the moves. There must have been a body of presuppositions and ground rules which do not appear in the books themselves, except in oblique glimpses.

(The problem was not easily overcome. As late as 1704 Holt CJ was complaining about the unreliability of these “scrambling reports”, which “will make us to appear to posterity for a parcel of blockheads”).¹⁰

The common learning applied in the mediaeval courts of justice was developed in the Inns of Court. Those formidable centres of learning were said, in a description ascribed to Erasmus, to be “the university and church militant of the

⁷ *Johnson v Spiller* (1784) 3 Doug 371 at 373.

⁸ *Ellah v Leigh* (1794) 5 Term Rep 679 at 682.

⁹ J.H. Baker “Why the history of the English Common Law has not been finished” [Inaugural Lecture as Downing Professor of the Laws of England, 14 October 1998] (2000) 59 *Cambridge Law Journal* 62 at 79-80.

¹⁰ *Slater v May* 2 LD Raym 1072, cited in C.K. Allen *Law in the Making* (7th ed., 1964) 219.

common law”.¹¹ Although after the Civil War the influence of the Inns waned and the development and exposition of the common law shifted to the courts, it is important to remember that the common learning inherited by the courts was derived in large part from doctrine developed by the readers and benchers of the Inns. They drew on English custom, Roman law, Ecclesiastical law, and contemporary European as well as English legal theory. Nor did this approach change with the switch of authority to the courts. The extent to which the common law of obligations (often thought of as the judge-made “centre” of English common law) draws on Roman law, is demonstrated by Professor Ibbetson’s fascinating *Historical Introduction to the Law of Obligations*.¹² And this process of borrowing from wider traditions and thinking has been an on-going one:

Both the classical forms of the tort of negligence and of contractual liability developed in the nineteenth century under the influence of the models of the Natural lawyers of the seventeenth and eighteenth centuries and their successors. Specific doctrines of the law of contract in particular were derived explicitly from the works of Pothier and Savigny: offer and acceptance, mistake, the requirement of an intention to create legal relations. All of the principal elements of the tort of negligence can be found in the writings of Pufendorf and his followers, and it may well be that nineteenth century common lawyers consciously replicated shifts in continental theory in common law contexts. There is good reason to believe that a similar process is at work in the modern day development of the law of unjust enrichment. The legacies of the past survive into modern law.

It is important therefore to acknowledge that the common law is not bereft of doctrine. Although we prefer to reason from actual case to actual case, it is against a frame of principle, which draws explicitly upon legal theory only part of which is home-grown or case-made.

What Sir Gerard Brennan has described as the “skeleton of principle”¹³ of the common law is also the necessary background to a proper understanding of the place of precedent in the common law. While the common law movement from case to case can be seen, as Lord Goff suggests,¹⁴ as a process of reasoning upwards from the facts (rather than as a process of reasoning downwards from abstract principles embodied in a code), the difference is not black and white.

¹¹ R. O’Sullivan “The Philosophy of the Common Law” in *The Spirit of the Common Law* (1965) 44.

¹² Ibbetson, above at n 4, 296. See also, Allen, above at n 10, 272.

¹³ *Dietrich v R* (1992) 109 ALR 385 at 403 quoting himself in *Mabo v Queensland* (1992) 107 ALR 1 at 18.

¹⁴ Lord Goff of Chievely “The Future of the Common Law” (1997) 46 *International Comparative and Law Quarterly* 745 at 753.

Pushed too far, it suggests Tennyson's view of the common law as a "wilderness of single instances".¹⁵ As Cardozo put it, such a view condemns the concept of law, to¹⁶

a series of isolated dooms, the general merged in the particular, the principle dethroned and the instance exalted as supreme.

When a case by case approach was coupled from the mid-nineteenth century with the discipline of accurate law-reporting and hierarchical organisation of the courts, it is not surprising that it led at times to an emphasis on precedent in which the duty of the common law judge seemed largely to be only reproductive. As Lord Reid pointed out in his celebrated speech to the Society of Public Teachers of Law in 1972, such emphasis "results in the dreary argument that the case is similar to *A v B* and *C v D* but is distinguishable from *X v Y* and *In re Z*".¹⁷ It is the way of confusion and uncertainty. It may achieve a spurious consistency but, unless the broad sweep of common law principles is kept firmly in mind, it results in intolerable rigidity and artificial and unreal distinctions.

Lord Mansfield, in many ways the father of the modern common law, emphasised certainty and consistency of decision-making. But he was impatient of mechanical application of precedent, insisting that its only proper use was to ascertain the principles for application to the particular case.¹⁸ In *Jones v Randall*¹⁹ he expressed his views:

The law of England would be a strange science if indeed it were decided upon precedents only. Precedents served to illustrate principles and to give them a fixed certainty. But the law of England which is exclusive of positive law, enacted by statute, depends upon principles, and these principles run through all the cases according as the particular circumstances of each have been found to fall within the one or the other of them.

These principles are derived not only from decided case-law but also from what Pound described as the "general body of doctrine and tradition" which is invoked in judgments and "from which we criticise them".²⁰ This body of doctrine and tradition must also be ranked as law because they are observed by the judge in the judicial process. They provide yardsticks against which decisions are taken. And, most importantly, they provide the analogies by which the common law

¹⁵ *Aylmer's Field*.

¹⁶ Benjamin N Cardozo *The Growth of the Law* (1924) 54.

¹⁷ Lord Reid, above at n 3, 26.

¹⁸ Allen, above at n 10, 210.

¹⁹ [1774] Cowp. 37.

²⁰ Benjamin Cardozo *The Growth of the Law* (1924) 37 quoting Roscoe Pound.

judge reasons. Lord Goff has described the common law judicial process as “an educated reflex to facts”:²¹

It is my experience that, when a Judge approaches a particular case before him, he tends to have an instinctive feel for the result in that case. This is not mere hunch; it is the fruit of an amalgam – an amalgam of his knowledge of legal principle, his experience as a lawyer, his understanding of the subtle restraints with which all Judges should work, his developed sense of justice and his innate sense of humanity, and his common-sense. It is a simple fact of life that a combination of these factors provides experienced Judges with a strong instinct for the appropriate legal result in any particular case. It is this intuitive feeling which persuades appellate Judges, as much as any reasoning from precedents, whether they should simply apply a precedent; or qualify it; or re-mould it; or depart from it.

The power of precedent is the “power of the beaten track”.²² No judgment is isolated from the existing order. But judges are not sheep. They must move from the beaten track for good reason. In the common law method the importance of judgments is to predict future outcomes. Law, as Cardozo pointed out, a matter of prediction. It is²³

[t]hat body of principle and dogma which with a reasonable measure of probability may be predicted as the basis for judgment in pending or in future controversies. When the prediction reaches a high degree of certainty or assurance, we speak of the law as settled, though, no matter how great the apparent settlement, the possibility of error in the prediction is always present. When the prediction does not reach so high a standard, we speak of the law as doubtful or uncertain. Farther down is the vanishing point where the law does not exist, and must be brought into being, if at all, by an act of free creation.

. . .

We may frame our conclusions for convenience as universal propositions. We are to remember that in truth they are working hypotheses . . .

The theme of the method of the common law as the method of the “working hypothesis” is one taken up by Lord Goff²⁴ and Lord Bingham.²⁵ It describes a method that is modest and careful, avoiding wide generalisations. It develops from case to case, in response to the problems brought before the courts by

²¹ Lord Goff, above at n 14, 754.

²² Cardozo, above at n 20, 62.

²³ Ibid. at 43 and at 73.

²⁴ Lord Goff, above at n 14, 753.

²⁵ Lord Bingham, above at n 2, 19.

litigants. It means that any rule announced by a court is tentative. All the facts to which it may be applied cannot be foreseen. Professor Neil MacCormick has argued that any adequate overall view of law must recognise that it is “a form of institutionalised discourse or practice or mode of argumentation”.²⁶ It is an “arguable discipline” in which all norms are “defeasible”.²⁷ That does not mean that decisions are at large or at whim. Judges do not decide cases in a vacuum. They have the context of statutes, precedents, scholarly writing and shared moral values. They proceed by analogy from case to case. Certainty and consistency (the “beaten track”) are themselves powerful arguments and will usually prevail. As Cardozo recognised, nine-tenths or more of the cases that come before a court are predetermined. The scope for change is relatively small and should not be exaggerated.

But it should be recognised that the method of the working hypothesis is a method of change. And it is in that principle of change that the vitality of the common law is to be found. If it is to be successful, the method of the working hypothesis requires close attention to reasons and to the articulation of the principles which, applied directly or by analogy, underlie the determinations of the courts. The future of the common law depends upon the ability of our legal systems successfully to operate by this method. I want to consider the challenges for common law methodology against a number of topics: statutes, human rights, internationalism, pluralism and diversity, and the strains the method of the common law imposes upon the judiciary of today.

Statutes and common law

In my country, the common law attached from 1840.²⁸ But the circumstances of settlement meant that we have always depended heavily upon statute law. I expect that we share that characteristic with most other former colonies. As a result, such jurisdictions may have been comfortable about statutory incursions into and restatements of common law, even in areas such as contract law.²⁹ Our legislatures have often had prodigious output, in New Zealand sometimes of pioneering law-reform without parallel in other jurisdictions.³⁰ That experience may have made us more willing to wait for legislative correction of common law

²⁶ N. MacCormick “Beyond the Sovereign State” (1993) 56 *Modern Law Review* 1 at 10.
²⁷ N. MacCormick “Rhetoric and the Rule of Law” in D. Dyzenhaus (ed.) *Recrafting the Rule of Law* (1999) 163 at 176.
²⁸ British sovereignty over New Zealand was proclaimed on 21 May 1840 principally on the basis of the signing of the Treaty of Waitangi on 6 February 1840.
²⁹ In New Zealand the common law principles are substantially restated and partly reformed in a number of statutes enacted in the 1970s: the Contractual Remedies Act 1979, the Contractual Mistakes Act 1977, and later, the Contracts (Privity) Act 1982.
³⁰ Note, for examples, the development of a comprehensive “no fault” accident compensation scheme that began in 1972 (see the Accident Compensation Act 1972 and succeeding Acts); and the Law Reform (Testamentary Promises) Act 1949.

at times.³¹ More importantly, it led us to pay early and close attention to the meaning and policy of statutes, construed in the light of their purpose.

Such attention to the contextual meaning of statutes may be said to be a characteristic of the New Zealand common law method. We have long employed purposive construction of statutes, at statutory direction. The Interpretation Ordinance 1841 thus provided that “the language of every Ordinance shall be construed according to its plain import, and where it is doubtful, according to the purpose thereof”.³² This history has meant that in New Zealand we have had no difficulty in accepting that both statutes and common law operate within a single legal system and that the judges must make sure that both work without friction. It has been a short step from this acceptance to a willingness to work from statutory analogies in the development of the common law,³³ discarding worn-out precedents which do not fit with legislative restatements³⁴ or identification of where the public interest lies.³⁵

It is nearly 100 years since Roscoe Pound wrote of common law and legislation.³⁶ He has been followed by Landis, Traynor,³⁷ Cross,³⁸ Atiyah,³⁹ and Calabresi.⁴⁰ Early judicial leads were given by Lord Diplock⁴¹ and Lord Scarman⁴² in the United Kingdom, and Kirby J in Australia.⁴³ It is no longer realistic, if ever it was, to see statutes and common law as oil and vinegar. Statutes have refreshed stagnating pools of common law.⁴⁴ They have provided

³¹ *R v Hines* [1997] 3 NZLR 529 at 539-540 per Richardson P and Keith J; *Invercargill City Council v Hamlin* [1994] 3 NZLR 513 at 528 per Cooke P.

³² Maintained in s5 of the Interpretation Act 1999.

³³ See *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants and Investigations Ltd* [1992] 2 NZLR 282 at 298 per Cooke P; *Lord Advocate v The Scotsman Publishing Ltd* [1990] AC 812; *R v Uljee* [1982] 1 NZLR 561; *Day v Mead* [1987] 2 NZLR 443; *Lange v Atkinson* [1997] 2 NZLR 22.

³⁴ *Fletcher Timber Ltd v Attorney-General* [1984] 1 NZLR 290; *Commissioner of Police v Ombudsman* [1988] 1 NZLR 385; *Choudry v Attorney-General* [1999] 3 NZLR 399.

³⁵ *Erven Warnink Besloten Vennootschap v Townsend & Sons (Hull) Ltd* [1979] AC 731.

³⁶ Roscoe Pound “Common Law and Legislation” (1907) 21 *Harvard Law Review* 383.

³⁷ R.J. Traynor, “Statutes Revolving in Common Law Orbits” (1968) 17 *Catholic University Law Review* 401 (reprinted in *The Traynor Reader* (1987)).

³⁸ Sir Rupert Cross *Precedent in English Law* (2nd ed., 1968).

³⁹ P. Atiyah “Common Law and Statute Law” (1985) 48 *Modern Law Review* 1 at 6.

⁴⁰ G. Calabresi *A Common Law for the Age of Statutes* (1982).

⁴¹ *Erven Warnink Besloten Vennootschap v J Townsend & Sons (Hull) Ltd* [1979] AC 731 at 743.

⁴² *Ahmad v Inner London Educational Authority* [1978] QB 36; *Gillick v West Norfolk and Wisbeck Area Health Authority* [1985] 3 WLR 830.

⁴³ *Osmond v Public Service Board of New South Wales* [1984] 3 NSWLR 447 (overturned by the High Court in *Public Service Board of New South Wales v Osmond* (1986) 159 CLR 656).

⁴⁴ Professor Burrows (*Statute Law in New Zealand* (2nd ed., 1999) 324-325) refers to the atmosphere of change created by statutes and the transferral of ideas. Landis “Statutes and the Sources of Law” in *Harvard Legal Essays* (1934) at 213 (reprinted in (1965) 2 *Harvard Journal of Legislation* 7) refers to the “cross-fertilisation” of statute and common law (although laments its virtual absence at that time).

analogies for the development of judge-made law, particularly where the legislation provides authoritative guide to “the usages of society”, providing the context for the development of common law. If there is a principle to be discerned from a statute or group of statutes (and sometimes it is not so easy to find one), it will not automatically provide an answer outside the scope of the statute. It provides rather an argument to be tested against competing principles drawn from other statutes or from the common law itself. By such process the common law method permits co-operation between Parliament and courts to promote coherence in our legal systems.

Beatson quotes Chief Justice Stone’s view that it is the role of judges to express “the idea of a unified system of judge made and statute law woven into a seamless web by the processes of adjudication”.⁴⁵ In this task, judges need all the help they can get if they are to see the whole. As Beatson points out, “[t]he enterprise will require great care if we are not to lose sight of the wood for all the trees. But unless we do so, studying the common law will eventually be like shining an ever brighter light on an ever shrinking object”.⁴⁶ A challenge for the common law method in what Calabresi has called the age of statutes is to develop an understanding of the reach and sense of the law as a whole and to avoid the shoals of illegitimacy by judicial overreaching.

Common law and legitimacy

The prevalence of legislation as a source of law since the nineteenth century may have obscured the role of judge-made common law in a number of common law jurisdictions. Certainly Cardozo in 1924 described, even in the United States, a suspicion and hostility towards “the creative activity of the courts” in the minds of laymen, based on an assumption that the role of the Judge is simply to apply statutes to facts.⁴⁷ In New Zealand our reliance on statutes has made us more vulnerable to misconceptions about the nature of law. It is common for the suggestion that judges make law to be indignantly denied, even by those who might be expected to know better. That attitude poses particular challenges about legitimacy for the common law in New Zealand and perhaps also in other Commonwealth jurisdictions which share a similar heritage.

The imitation of significant developments of the common law in the United Kingdom (for example the substantial responses to commercial needs described by Professor Goode in his Hamlyn lectures)⁴⁸ has not been controversial. It is not clear however that such sweeping home-grown judicial development would have been as acceptable. It may be that our traditions will operate to circumscribe the responsiveness of the common law of New Zealand to changing

⁴⁵ (1936) 50 *Harvard Law Review* 4 at 12.

⁴⁶ J. Beatson “Has the Common Law a Future?” [1997] *Cambridge Law Journal* 291 at 313.

⁴⁷ Cardozo, above at n 20, 135.

⁴⁸ R. Goode *Commercial Law in the Next Millennium* [The Hamlyn Lecture, 1998] 11.

conditions, unless we can do rather better in explaining the role of the courts in its development and in gaining public acceptance of that role. Reasons for judgment are, as I will suggest further below, essential for judicial legitimacy in development of the common law in the age of statutes.

In many of our jurisdictions, statutes now occupy much of the traditional heartland of the common law. Much development of the common law now takes the form of statutory construction. This shift should not be exaggerated. As Lord Goff has pointed out, in codified systems as in common law systems, “the substantive law has to develop in some degree from case to case”. The working hypothesis is equally applied in construing statutes from case to case. That is particularly so where statutes are declaratory of the common law, employ open-textured drafting, or state general principles for the courts to apply. The construction of such a statute is not a mechanistic exercise. It is a high-order judicial task, which draws heavily on the methodology of the common law.

Internationalism

The world is shrinking. If borrowing from outside has always been a feature of the common law, that trend is only likely to accelerate. International legal regimes now provide the context in which much domestic law operates. Increasingly domestic legislation fulfils international obligations. International electronic commerce creates challenges domestic law cannot hope to meet, except through international co-ordination. As Kenichi Ohmae so memorably put it, “Nothing is ‘overseas’ any longer”.⁴⁹ And judicial reaction to common problems, despite differences in culture and legal background, is likely to coincide. We reason from the analogies of foreign case-law and domestic statutes. International conventions and the determinations of international tribunals under them similarly provide assistance that we should be glad to receive.

Today it is difficult to believe that anyone seriously doubts the value for the common law method of international legal materials. They impact particularly in domestic criminal, labour, commercial, and human rights law. They are likely to become increasingly important in dealing with environmental law and with the vexed problems thrown up by terrorism and armed conflict within national boundaries as well as across them. It is no longer true to see international rules as simply binding on states in their relations with each other. They are the basis of rights and duties of individuals which, adopted into domestic law, are often capable of enforcement in courts. Sir Kenneth Keith⁵⁰ has described the sweep

⁴⁹ Kenichi Ohmae *The Borderless World* (1991).

⁵⁰ Sir Kenneth Keith “The Impact of International Law on New Zealand Law (1998) *Waikato Law Review* 1.

of such obligations (which in New Zealand either give rise to or affect more than 200 statutes),⁵¹

Their wide-ranging subject matter includes war and peace, disarmament and arms control, international trade, international finance, international commercial transactions, international communications, international spaces, the environment, human rights, labour conditions and relations, and other areas of international economic, social and cultural co-operation.

In the jurisdictions of the common law, reference to international materials is now relatively common place. International obligations have made startling inroads into common law doctrines of sovereignty in the United Kingdom.⁵² In many common law jurisdictions there are examples of the courts applying presumptions that legislation is to be construed in conformity with international obligations.⁵³ Unincorporated treaties and judicial consideration of them by international bodies and the domestic courts of other nations are part of the materials routinely drawn on by courts working within the common law method. They are persuasive arguments in the search for reasons that convince.⁵⁴

The challenges of rights for common law method

The most dramatic illustration of the influence of international material on the common law is to be seen in domestic human rights law. Seven years ago Lord Cooke of Thorndon, expressed the view that although “[t]he world is moving towards an international law of human rights”, the progress would be “lengthy”.⁵⁵ He was right about the movement, but its pace has been rapid indeed. At the Commonwealth Judicial Colloquium in Bangalore in 1998, the participants were of the view that judges must interpret legislation in conformity with international human rights codes and must develop the common law “in the light of the values and principles enshrined in international human rights law”.

⁵¹ Ibid. at 13. Note, the New Zealand Law Commission estimated in 1996 that one quarter of the Acts in New Zealand raised issues connected to international law (*A New Zealand Guide to International Law and its Sources* (NZLC R34)).

⁵² *Factortame v Secretary of State for Transport (No 2)* [1991] AC 603; *Thoburn v Sunderland City Council* [2002] EWHC 195.

⁵³ See for example in New Zealand *Tavita v Minister of Immigration* [1994] 2 NZLR 257, in New Zealand, *Lange v Atkinson* [1998] 3 NZLR 424; *Newcrest Mining (WA) Ltd v the Commonwealth* (1997) 147 ALR 42, 147 per Kirby J; *Jumburna Coal Mine NL v Victorian Miners' Association* (1908) 6 CLR 309 at 363 per O'Connor J; *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 128 ALR 353 at 362 per Mason CJ and Deane J.

⁵⁴ See R Higgins “The Relationship between International and Regional Human Rights Norms and Domestic Law” (1992) 18 *Commonwealth Law Bulletin* 1268.

⁵⁵ *R v Barlow* [1995] 14 CRNZ 9.

Even before enactment of domestic legislation giving effect to international human rights obligations in the United Kingdom and New Zealand, the pull of the international legal community in human rights was proving irresistible to the common law.⁵⁶ Domestic legislation in both countries now requires the courts to act in conformity with human rights. It seems inescapable that the development of the common law will now march in step with human rights.⁵⁷ And for those jurisdictions which have acceded to the Optional Protocol to the Covenant on Civil and Political Rights, the decisions of our courts are taken upon an international stage. The effect, as the experience of the United Kingdom with the European Courts suggests,⁵⁸ is likely to be salutary. Human rights have “internationalised” our law.⁵⁹ The habit is likely to spread.

In countries where the function of the common law judge is not well-understood, human rights litigation raises concerns about the legitimacy of judicial function. In addition, Carol Harlow has raised the dangers of “campaigning litigation”, which human rights litigation opens up and which may result in “colonisation of the legal by the political process”.⁶⁰ She expresses concern about extension of standing to allow campaigning groups to argue for particular outcomes and the readier invocation of techniques such as the Brandeis brief to ascertain legislative facts. This may “push courts into areas of policymaking to which their processes are inherently ill-adapted”. It is suggested such litigation may escalate the scrutiny of judicial officers for association with the causes advocated, as *Pinochet* and *Locabai*⁶¹ illustrate. Harlow echoes T.R. Allan in expressing concern that the admission of pressure groups or factions or special interests may mark a corruption of the legal process: “To put this important point differently, too close a relationship between courts and campaigning groups may result in a dilution of the neutrality and objectivity of law”.⁶² In similar vein, Lord Hoffman has argued for judicial restraint in consideration of the limits which human rights impose upon democratic institutions. Judges must recognise that they are “not appointed to set the world to rights”.⁶³

It seems to me that criticisms such as these can be overstated. Judges who work within the common law method, case by case in actual controversies brought to the court by litigants, cannot believe they are appointed to set the

⁵⁶ *R v Home Secretary ex parte Brind* [1991] 1 AC 696. *Smith and Grady v. the United Kingdom* (European Court of Human Rights, REF00001276, 27/09/1999).

⁵⁷ *Lange v Atkinson* (HC); See *R v Secretary of State for the Home Department ex parte McQuillan* [1995] 4 All ER 400 at 422 per Sedley J.

⁵⁸ *Smith and Grady v UK*.

⁵⁹ See, for example *R v Butcher* [1992] 2 NZLR 257 at 267 where Cooke P explained judicial remedy for breach of human rights as lying not in “judicial discretion but [in] the increasing international recognition of basic human rights”.

⁶⁰ C. Harlow “Public Law and Popular Justice” (2002) 65 *Modern Law Review* 1 at 2.

⁶¹ *R v Bow Street Magistrate, ex p Pinochet Ugarte (No 1)* [1998] 3 WLR 1456; *Lochabail v Bayfield Properties* [2000] 2 WLR 870.

⁶² Harlow, above at n 60, 13.

⁶³ Lord Hoffman *Separation of Powers* (The Comber Lecture, 2000).

world to rights. Brandeis briefs and relaxation of standing are techniques, sparingly used, which enable courts to be properly informed about all sides of a dispute.⁶⁴ They are not techniques confined to human rights or public law litigation. Nor are they an invitation to judicial legislation. In appropriate cases they overcome deficiencies in adversarial process without subverting it. The labels too may mislead. “Campaigning” commercial enterprises are not unknown in modern litigation.⁶⁵ And close scrutiny of the associations judges may have with litigants is a fact of life in litigation unconnected with political causes.⁶⁶

The application of human rights standards may bring some special challenges. In Lord Goff’s words, they invite downward reasoning from principles, rather than upward reasoning from the facts. But, as I have already suggested, it may be questioned whether this is a distinction more apparent than real since in the application of law to facts the common law has always sought organising principles. The real change brought about by human rights standards is the power of the organising principles they supply. This is not a revolution in method. At different periods in history the common law has been similarly galvanised by the great Charters and reforming statutes. The legislative statements enable judicial reasoning to be more explicit than it has perhaps been in the past in administrative law. The Courts have in the past been largely adrift in considering challenges to official conduct based on substantive values. They have had to seek such values in the statute, in the international context where applicable,⁶⁷ and in judicially-identified enduring community expectations. Inevitably, the result has been deference to the decision-maker and a lack of clarity and persuasiveness in judicial reasoning where, as Michael Taggart has put it, judgments are too often “characterised by assertions of unreasonableness or unfairness, and little else”.⁶⁸

Where legislative enactment of rights is available, conduct which infringes human rights must be “demonstrably justified” or “necessary” in a free and democratic society. This is the language of proportionality. The three-part approach adopted by Lord Clyde in *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries and Housing*⁶⁹ and adopted by Lord Steyn in *ex parte Daly*⁷⁰ points in a direction most of us are likely to travel. First, the objective of

⁶⁴ See, for example, the calls for counsel to present Brandeis briefs where appropriate: Sir Ivor Richardson “Public Interest Litigation” (1995) 3 *Waikato Law Review*; Ivor Richardson “The Role of an Appellate Judge” (1981) 5 *Otago Law Review* 1.

⁶⁵ As litigation about copyright, competition, and regulatory controls illustrates.

⁶⁶ *Man O’War Station Ltd v Auckland City Council (Judgment No 1)* [2002] 3 NZLR 577 (PC); *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451, [2000] 2 WLR 870; *Clenae Pty Ltd v Australia and New Zealand Banking Group Ltd* [1999] VSCA 35; *Webb v R* (1994) 181 CLR 41; *Moch v Nedtravel (Pty) Ltd* 1996 (3) SA 1.

⁶⁷ See *Tavita v Minister of Immigration*.

⁶⁸ M. Taggart “Tugging on Superman’s Cape: Lessons from Experiences with the New Zealand Bill of Rights Act 1990 [1998] *Public Law* 266.

⁶⁹ [1999] 1 AC 69 at 80.

⁷⁰ [2001] 3 All ER 433.

the measure taken must be sufficiently important to justify limiting a fundamental right. Secondly, the measure must be reasonably connected to the objective. Thirdly, the limitation upon the right must be no more than is necessary to accomplish the objective.

Values which the courts have identified with difficulty (and little legitimacy) or have glossed over have now gained democratically conferred organising principles. The courts have a register against which to structure judicial reasoning. Statements of human rights in domestic law now provide a measure against which executive action can be readily tested. It would be naive to think that they will not ultimately come to exercise a huge influence on the interpretation of all statutes and the development of the common law. As Cooke P remarked of the New Zealand Bill of Rights Act in *R v Goodwin*:⁷¹

The Bill of Rights Act is intended to be woven into the fabric of New Zealand law. To think of it as something standing apart from the general body of law would be to fail to appreciate its significance.

Human rights adjustments may be complex. Where there are a range of valid outcomes, the case will not always be easy for judicial determination. But where a case is properly brought before the courts, they cannot avoid grappling directly with the issues. As Janet MacLean has persuasively argued,⁷² there is no illegitimacy in this. The courts act in dialogue with the legislature, not pulling against it.

What is developing is an elaborate system of deference depending on the right at risk.....not all rights will be treated the same, and some rights, such as that to be free from unreasonable search and seizure, contain their own modifiers.....over time, one would hope that a more explicit methodology will develop – adapting some version of proportionality doctrine, *Wednesbury* doctrine or a domestic version of the margin of appreciation doctrine. Such an approach has the potential to combine a sensitivity to democratic judgments, as well as providing a means by which to make quite forceful normative statements in a proper case. The existence of doctrines by which courts pay deference to legislative judgments does not depend on whether or not there is a striking down power. Equally, however, the normative force of a court's judgments will diminish the more contestable the "reasonableness" component, and according to the susceptibility of an issue to a legal analysis.

⁷¹ [1993] 2 NZLR 153 at 156.

⁷² J. McLean "Legislative Invalidity, Human Rights Protection and s 4 of the New Zealand Bill of Rights Act" [2001] *New Zealand Law Review* 421 at 447.

In the end, as Leventhal suggests, courts in common law jurisdictions will proceed in political thickets as they have always done, “carefully, pragmatically”.⁷³ They will have the comfort of standards developed by the courts of comparable jurisdictions and by international bodies. But the principal answer to suggestions of judicial overreaching lies in scrupulous adherence to common law judicial method, through the provision of reasons which convince.

Reasons for judgment and judicial independence

It will be obvious by now that I am of the view that the provision of reasons for judgement which convince is essential to change by common law method. And without change, without the “principle of growth” Cardozo believed to be part of the common law, it will wither indeed. Because our system relies so heavily on case-law, change always needs to be explained.⁷⁴ The challenge for the future of the common law will be to attract and retain independent judges who observe the discipline of common law method, have the imagination to see when change is necessary, and the capacity to explain why in judgments that convince.

There are insidious pressures on common law method here. In Australia, the Chief Justices of Australia and New South Wales have spoken of the challenges for the courts posed by modern public service management, with its emphasis on transparency, accountability and objective measurement. None of us are immune from these pressures. And for the most part they are appropriate responses to the reality that we cannot go on increasing the number of judges and courtrooms without depriving other important social institutions of resources. But modern case-management, the measurement of outputs, and a tendency to view litigants as consumers of services, carry potential risks to judicial independence and impartiality. Just as they must not trade off fair processes and just outcomes for efficiency and expedition, they must not erode the space judges need to reflect and convince especially in those cases where it is necessary to leave the beaten path, while fitting the new point of departure within the existing fabric.

Both Lord Reid and Lord Goff have emphasised that the common law depends upon the independence not of the courts, but of the individual judge. It is for that reason that both regard the dissenting judgment, not tolerated in most European traditions, as “liberating”. Because each judge is independent, “judgments tell the truth – the real reasons for our decisions, expressed, where appropriate, subject to the Judge’s own qualifications, hesitations and even doubts”.⁷⁵ Again, if the common law is to maintain its dynamism, the pressures for efficiency must not be at the expense of the liberty of the judge to tell the truth as he or she sees it.

⁷³ H. Leventhal “The Courts and Political Thickets” (1977) 77 *Columbia Law Review* 345.

⁷⁴ As Ibbetson, above at n 4, points out at 299.

⁷⁵ Lord Goff, above at n 14, 755.

The common law method is not efficient. It needs time. That is why it proceeds from case to case, sometimes retreating, always cautiously. If we are too impatient of the process, we lose much of its value. If we streamline it too much, perhaps by composite opinions, we lose the authentic voice with its doubts and markings for the future traveller. Lord Reid suggested that the process cannot be rushed.⁷⁶

The truth is that it is often not possible to reach a final solution of a difficult problem all at once. It is better to put up with some uncertainty – confusion if you like – for a time than to reach a final solution prematurely. The problem often looks rather different the second time you deal with it. Second thoughts are not always best but they generally are.

We should not be complacent about our ability to attract suitable appointments to the bench. In a number of jurisdictions there is worrying resistance to recruitment from able men and women. And early retirements are now common. Lagging standards of remuneration and pensions are only part of the problem. It is no longer acceptable to many that judges are accountable through their reasons and through the appeal process. Judges who make mistakes on and off the bench are subjected to complaint and calls for removal. Many of our jurisdictions maintain formal disciplinary processes. I do not suggest that judges should not be criticised. But, as Felix Frankfurter put it in *Bridges v California*,⁷⁷ the need is just as great that they be allowed to do their duty. Maintaining the right balance, achieving the public commitment which is the only sure protection for judicial independence, is one of the challenges for our systems.

Pluralism and diversity

The common law of England was applied to New Zealand first as a matter of common law.⁷⁸ In 1854 the legislature gave statutory recognition to English law as at 1840, both statutory and common law “so far as applicable to the circumstances of New Zealand”. It was not until 1988 that the Imperial Laws Application Act attempted a list of statutes still in force in New Zealand, beginning with the Statute of Marlborough 1267. The common law of England was, rather oddly, said to continue to apply “so far as it was part of the laws of New Zealand immediately before the commencement of this Act”.⁷⁹ Since the common law of England was modified by local custom attaching to native societies in the countries to which it was exported,⁸⁰ what that provision means is unclear. The fact of the matter is that the common law has never been a seamless whole

⁷⁶ Lord Reid, above at n 3, 29.

⁷⁷ 314 US 252, 284 (1941).

⁷⁸ *R v Symonds* (1847) NZPCC 387.

⁷⁹ English Laws Act 1854; section 1 of the English Laws Act 1858.

⁸⁰ *Tijani v Secretary Southern Nigeria* [1921] 2 AC 399.

throughout the common law world. It was modified by the pre-existing custom of the local populations and it has continued to evolve distinctly in the separate countries to which it attached.

One of the challenges for the common law in the years ahead may be how it copes with modern pressures for local or social autonomy on the one hand and relocation of authority to supranational authorities on the other. These are the forces that in the United Kingdom have led both to devolution and accession to Europe. As Justice Sandra Day O'Connor identifies, the principle of subsidiarity applied in Europe shares common tactical roots with federalism and devolution.⁸¹ In the United Kingdom the courts have been at the forefront of both shifts.⁸²

In jurisdictions with indigenous minority populations, such as mine, the aspiration of plurality has been largely unmet. In New Zealand, preservation of Maori custom was an explicit promise to Maori when the Treaty of Waitangi was signed. Although the common law was acknowledged to adopt local custom, and although the Privy Council sternly told the local courts in 1901 that it was "rather late in the day" to hold that there was "no customary law of the Maoris of which the courts of law can take cognisance",⁸³ the common law of New Zealand largely failed to respond.⁸⁴ Our constitutional arrangements until 1986 contained provision for Maori Districts in which Maori could live under those customs "not repugnant to the laws of humanity".⁸⁵ The provision was never used and remained a curiosity. Most of us had forgotten the promise of plurality it contained⁸⁶

Claims for pluralism remain in a number of countries of the common law world. In others it is accepted and acted upon. We have forgotten in some of the old Commonwealth countries that custom has always been an important source of law. Sir John Salmond put it as the second most important source of law, after statutes. Its importance is reflected in the judicial oath common to our tradition. Our populations now have the example of the use of custom as law in the Pacific nations and the example of the communities empowered in the United Kingdom by devolution. It is impossible to say that in other countries our common law legal systems will remain immune from such movements. We may have to reconsider.

⁸¹ Justice Sandra Day O'Connor "Altered States: Federalism and Devolution at the 'real turn' of the millenium [2001] *Cambridge Law Journal* 493.

⁸² *R v Secretary of State for Transport; ex parte Factortame Ltd (No2)* [1991] AC 603; *R v Secretary of State for Transport; ex parte Factortame* [1990] 2 AC 85; *Thoburn v Sunderland City Council*.

⁸³ *Nireaha Tamaki v Baker* (1901) NZPCC 371.

⁸⁴ *Baldick v Jackson* (1910) 30 NZLR 343; *Public Trustee v Loadsby* (1908) 27 NZLR 801.

⁸⁵ Constitution Act 1852.

⁸⁶ The Maori Purposes Act 1962 is a more recent attempt at a measure of diversity but has also largely been overlooked and today reads rather oddly.

Diversity in the common law tradition is more readily accepted. While at times some of us may have been more deferential to “the latest gospel from London”⁸⁷ than others,⁸⁸ by 1987 Lord Cooke felt able to express the view that even in New Zealand our law had evolved into “a truly distinctive body of principles and practices, reflecting a truly distinctive outlook”.⁸⁹ The Privy Council itself gracefully said as much in *Invercargill City Council v Hamlin*.⁹⁰

But in the present case the judges in the New Zealand Court of Appeal were consciously departing from English case law on the ground that conditions in New Zealand are different. Were they entitled to do so? The answer must surely be Yes. The ability of the common law to adapt itself to the differing circumstances of the countries in which it has taken root, is not a weakness, but one of its great strengths. Were it not so, the common law would not have flourished as it has, with all the common law countries learning from each other.

The former Chief Justice of New Zealand, Sir Thomas Eichelbaum, has suggested that the continuation of appeals to the Privy Council from New Zealand may have resulted in some self-inhibition by the New Zealand Courts, because of the risk that any departure from English precedent would be overruled. It is impossible to know whether that is so. The common heritage pulls together, as the experience of those common law jurisdictions which have relinquished the Privy Council demonstrates. More often than not, when decisions in novel cases have to be measured against principle, it is likely that we will agree. The increasing internationalisation of law also pulls us together. Where we go different ways, it will be because there are reasons to differ. Those expressions of difference are themselves critical to the continued vitality of the common law.

Beatson has expressed an opinion that the European forces affecting the development of the common law in the United Kingdom “appear to be matched by centrifugal forces in Commonwealth common law systems, most noticeably and self-consciously seen in Australia and Canada but also evident in New Zealand”.⁹¹ He concludes that the United Kingdom’s and this country’s links with the common law world seem “looser and increasingly fragile”. I wonder whether that will prove to be so. Lord Bingham has described the common law as flowing now in a number of channels. He identifies the “diminished role” of the Privy Council as having given freedom to the courts of Australia, Canada, India and

⁸⁷ J. Cameron “Legal Changes over Fifty Years” (1987) 3 *Canterbury Law Review* 198 at 210.

⁸⁸ See Erwin Griswold *Law and Lawyers in the United States* (1965).

⁸⁹ Sir Robin Cooke “The New Zealand Legal Identity” (1987) 3 *Canterbury Law Review* 171 at 182.

⁹⁰ [1996] 1 NZLR 513 at 519-520.

⁹¹ Beatson, above at n 46, 292-293.

elsewhere to develop principles of their own. His view is that, as a result, the common law is strengthened by the dialogue, the process of “learning from each other” described in *Invercargill City Council v Hamlin*. And it may be that, through the dialogue, the rest of us will also gain important European insights. If so, the common law will only be enriched.

The novel questions we address in the future will still be addressed and resolved by the techniques of the common law. That point, the stability of the common law method, was made in his Hamlyn lectures by Dean Griswold in 1965 in discussing the common law of the United States. He said that the judges of the common law in all jurisdictions wrestle with problems:

To the end that controversies between men and men, and between men and their governments, may be rightly resolved. What they do they do in the spirit of the common law, though the questions they have to decide may be ones which would have startled the judges who formulated the common law . . . With the tools and the terms of the common law we proceed, usually on a case by case basis, in the common law tradition.

Conclusion

I am conscious that I have said nothing at all about the fashions of the times. I agree that the discipline of the common law requires rather more steadfast fidelity to principles of certainty and consistency than following the fashions of the times would allow. But I have tried to suggest that the most important principle of the common law is in fact a principle of change, as Cardozo rightly saw. The common law tradition, as Paul Freund identified,⁹² teaches that the life of the law is response to human needs. It operates on the basis that, through knowledge and understanding and immersion in the realities of life, law can work itself pure. That is hard work. Human nature and inertia as well as respect for the cases which precede us keep us generally on the beaten track. But the common law must adapt with the usages of society or wither.

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P. Freund “Mr Justice Brandeis: A Centennial Memoir” (1957) 70 *Harvard Law Review* 769 at 792.