

F.W. GUEST MEMORIAL LECTURE, 2003

Given by the Rt.Hon. Dame Sian Elias, Chief Justice of New Zealand
Held at Otago Law School, Dunedin
Wednesday 23 July 2003

Transition, Stability and the New Zealand Legal System

Introduction

I thought this evening I might touch upon themes of transition and stability within our legal system. As you know, we are in the middle of a process of reassessment of our legal institutions. Sometimes the process has been bruising. I like to think that all of us can learn even from the more wounding slings and arrows. They show that New Zealanders care deeply about our legal system and its future – and that is essential for a society constituted under law. Our constitutional arrangements are too important to be the preserve of lawyers and legal philosophers.

Many reforms being considered at present touch upon our constitutional arrangements. They include reassessment of the role of the courts through the Law Commission review as well as the Supreme Court Bill; proposals for changes to the methods by which we appoint and remove Judges from office; and the restructuring of the justice sector of executive government. Some of these proposals have received a great deal of attention. Others are being considered with very little apparent public interest or input at all.

The level of such debate as there has been, has been worryingly low. We should probably not be surprised by that. In New Zealand we have been notoriously indifferent throughout our history about our constitutional arrangements. That casualness is illustrated by the fifteen years it took us to adopt the Statute of Westminster and assume full self-government. Beaglehole, in his incandescent 1954 essay “The New Zealand Scholar” said of that experience:¹

We thrust the horrid thing away: only to find, in the course of the next fifteen years, that an adult who insists on going through the forms of being a child is a nuisance to everybody.

Even more perplexing was our adherence to the Imperial Constitution Act 1852. It served as our principal constitutional document – unbelievably – until 1986. Many of the provisions of the 1852 Constitution Act, though nominally in effect, had been forgotten or were simply ignored. Until 1947, when New Zealand eventually adopted the Statute of Westminster, 15 entrenched sections of the Act could only be amended by the UK Parliament. Such amendment was proposed in 1939 to obtain a reduction in salary of the

¹ JC Beaglehole “The New Zealand Scholar” (1954) republished in P Munz (ed.) *The Feel of Truth*; Essays in New Zealand and Pacific History (1969) 245 (AH & AW Reed, 1969).

Judges. Rather oddly, to modern eyes, the proposal was defeated because of concern for the constitutional principle, derived from the Act of Settlement 1701, that the salaries of Judges cannot be reduced during their terms of office. I am not sure that the same devotion to judicial independence would carry the day now, or indeed that the point would be widely recognised as having any constitutional significance.

We have been remarkably uncurious about the limits of our constitution. What this neglect means is that when we do come to consider reforms touching upon it, we are not well prepared. We have little shared vocabulary and we often do not recognise the principles we are playing with. Nor are these easy concepts to get across. We are not well equipped to carry on a productive debate on this topic.

Two recent examples from newspaper reports illustrate the point. An editorial on the subject of the proposed Supreme Court, under the heading “Constitutional Shennanigans”² told us that we could:

Forget about the sanctity of contract in the new judicial set-up; Judge-made law will steadily replace common law that has been the bedrock of the civil court system since the start of British settlement in New Zealand.

Another columnist referring to the *Ngati Apa* case³ the other week accused the Court of Appeal of moving “unacceptably into making law, something only Parliament is supposed to do”.⁴ The theme of this writer was that the Judges had illegitimately adopted what he called a “common law intrusion” which is contrary to the New Zealand tradition. Well both writers cannot be right: the common law cannot be both the bedrock of our legal system and an alien intrusion. The suggestion of the first writer that the common law is to be steadily replaced by Judge-made law is so fatuous that it might be funny if the context were not so serious.

Of course, the vocabulary of constitutional lawyers contains slogans too. I shall try to avoid references to the “rule of law”. It is a useful shorthand for some important concepts. As Paul Craig has pointed out,⁵ the phrase has a moral force which may not aid proper analysis. The same may be said about use of the adjective “constitutional”, with which I have already peppered my introductory remarks.

It is always faintly embarrassing to hear Judges talking about the constitutional role of the judiciary. Too often it sounds defensive, power-grabbing, or insufferably smug. I know that a perspective of a Judge on such

² National Business Review – Editorial, 11 April 2003.

³ *Ngati Apa and Others v Attorney-General, New Zealand Marine Farming Association Incorporated, Port Marlborough Limited and Marlborough District Council* (CA173/01 & CA75/02), 19 June 2003.

⁴ *Sunday Star Times*, 6 July 2003.

⁵ Paul Craig “Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework” [1997] Public Law 467.

matters is not sufficient. The debate is a much wider one. We all have an obligation to inform the discussion so that all in our community can participate in it. So I offer these comments as a contribution and I hope that it stimulates others. Some of the reforms we have underway at the moment are too important to be left to the sloganeers. Those who have some particular reason to have acquired some knowledge of constitutional law have done a poor job of explaining it to others. In particular, we have done a very poor job of explaining judicial function and why judicial independence is a protection not for Judges but for government under law.

What is striking about the current public discussion and illustrated by the two newspaper opinions is the extent to which there is deep suspicion of Judge-made law, that is to say, the common law. The common law is having a rather bad press at the moment. I want to suggest that is a result of muddled thinking and ignorance about our legal history and traditions. I need to start at the beginning.

The constitution

The dynamic elements of our constitution are today identified by the scheme of the Constitution Act 1986. It was an Act to reform the constitutional law of New Zealand and “to bring together into one enactment certain provisions of constitutional significance” as well as “to provide that the New Zealand Constitution Act 1852 of the Parliament of the United Kingdom shall cease to have effect as part of the law of New Zealand”. The Act has four principal parts which separately identify the Sovereign, the Executive, Parliament (the Queen in Parliament) and the Judiciary (the Judges of the High Court).

These formal elements of the constitution are an incomplete description of it. In particular, the Act is largely silent upon the relationship of the four institutions separately identified. What the constitution of New Zealand is remains a matter upon which there is room for disagreement. It is no part of my wish tonight to be dismissive of difference. The common law tradition is a system based on contest in ideas. It assumes that law “works itself pure”⁶ through open debate. The New Zealand constitution, as fundamental law, benefits from the same process of open debate. Its elements are open to different views, because it is impossible to obtain a snapshot of a living constitution. If that is true for countries with elaborate written constitutional documents (as the current differences in the United States Supreme Court illustrate), there is wider area for debate in a country like New Zealand with a constitution substantially uncaptured by written text.

The great legal historian, Maitland, was of the view that the constitution of a country can be discerned only for a particular time and only through its

⁶ Paul Freund described the common law tradition as one “teaching that the life of the law is response to human needs, that through knowledge and understanding and immersion in the realities of life law can be made . . . to work itself pure” (Paul Freund, “*Mr Justice Brandeis: A Centennial Memoir*”) – (1957) 70 Harvard Law Review 769, 791-792.

general law.⁷ Similarly, Bagehot,⁸ writing of the English constitution speaks of the:

.....great difficulty in the way of a writer who attempts to sketch a living Constitution – a Constitution that is in actual work and power. The difficulty is that the object is in constant change.

If it is difficult for such accomplished students of their constitutions to describe them, it is understandable that the rest of us flounder and dispute.

We are, in this year, 150 years from the establishment of representative government in New Zealand. It was achieved under the 1852 New Zealand Constitution Act, an Act of the Imperial Parliament that limited the powers of the new local legislature. While those limitations operated, the New Zealand courts had power to declare Acts of the New Zealand legislature to be invalid. Section 4 of the Declaratory Judgments Act 1908 confers jurisdiction on the High Court to make declarations of invalidity in respect of “any statute”. The jurisdiction remains, but whether there are any conditions of valid law-making following the attainment of “full power to make laws” (as s15 of the Constitution Act 1986 puts it) is a question we have not fully explored.

I have elsewhere⁹ raised the question whether a fixation with Dicey and the relative democratic merits of Parliament, the Executive and the Court to the exclusion of a wider perspective, has impoverished our constitutional thinking. It has led us to trade slogans about supremacy and activism and protestations of democratic legitimacy. With such labels we fend off more thoughtful discussion. It has led us to an arid vision of the constitution as the power that trumps. That strikes me as a distortion of the constitution through the lens of command. It is an inadequate view of a living constitution. We need to work harder to identify ours.

New Zealand law and the New Zealand judiciary

The establishment of our local institutions of government followed the constitutional history of New Zealand. First, executive government was established, then the judiciary and finally the House of Representatives.

The first Chief Justice of New Zealand arrived on the *Tyne* in September 1841. Before his arrival the temporary expedient of applying “the laws of New South Wales so far as they can be made applicable” had been adopted. The local settlers greatly resented this as bringing a “penal taint” to the new colony.¹⁰ Martin was accompanied by William Swainson, the new Attorney-

⁷ Maitland *The Constitutional Law of England* (1963) 538.

⁸ W. Bagehot, *The English Constitution* (1867) Oxford, the preface to the 2nd ed.

⁹ Elias CJ, “Another Spin on the Merry-go-round” a paper delivered to the Institute for Comparative and International Law, University of Melbourne, 19 March 2003.

¹⁰ AH McIntock *Crown Colony Government in New Zealand* (Government Printer, 1958) 132.

General and Thomas Outhwaite, the Registrar of the Supreme Court. They spent the voyage out studying Maori and drafting Ordinances. They were, as Lady Martin recorded in her diary “young and full of life”. They needed to be.

One of the Ordinances drafted was the Supreme Court Ordinance which was enacted on 22 December 1841. It gave the Supreme Court the common law and equity jurisdiction of the English courts of Queen’s Bench, Common Pleas, Exchequer and Chancery at Westminster. In *R v Symonds* (1847) NZPCC 387, the Full Court of Martin CJ and HS Chapman J applied the English common law. That approach was confirmed by the English Laws Application Act of 1858 which applied the common law and statutes in force in England at 1840 to New Zealand “so far as applicable to the circumstances thereof”. The same provision was carried over into the English Laws Act 1908.

Today, some order into the application of English statutes has been provided by the Imperial Laws Application Act 1988. It lists the statutes still applicable in New Zealand, beginning (rather oddly) with the Statute of Marlborough 1267. As for the common law, the 1988 Act provides:

After the commencement of this Act, the common law of England (including the principles and rules of equity), so far as it was part of the laws of New Zealand immediately before the commencement of this Act, shall continue to be part of the laws of New Zealand.¹¹

I hope I am never called upon to decide what that means. The reference to the common law was contrary to the recommendation of the Law Commission which saw “no reason for, and some harm in, this direction to the courts.”¹² The Law Commission report suggests a more expansive, less English, view of the sources of the common law:

The courts of course apply, without any statutory direction, common law principles and rules, drawing on judicial decisions in many different jurisdictions over time and up to the present day.

What is clear is that the common law of England, received into New Zealand at 1840 was not just the case-law of the period. In the same way, the common law of England received into American colonies was not “just that heterogeneous group of cases which happened to have been decided in England before 1607.”¹³ Rather it was:

¹¹ Section 5.

¹² “Imperial Legislation in Force in New Zealand” (1987) NZLC Report No.1, para.15 at p3.

¹³ Walter Schaefer “Precedent and Policy” (1966) 34 University of Chicago Law Review 3, 6.

The common law as a system, the outstanding characteristics of which are its capacity for growth and its ability to slough off outmoded precedents.¹⁴

At about the time William Martin was setting up the Supreme Court in New Zealand, the United States had moved well beyond the “bedrock” about which the New Zealand editor was rhapsodising. In a case decided in that year in Illinois, Justice Douglas explained:

If we are to be restricted to the common law, as it was enacted at 4th James, rejecting all modifications and improvements which have since been made, by practice and statutes, except our own statutes, we will find that system entirely inapplicable to our present condition, for the simple reason that it is more than 200 years behind the age.¹⁵

Judicial independence in New Zealand

The security of tenure of Judges was an issue that arose early on in New Zealand. Such security of tenure had been recognised in England since the Act of Settlement of 1701, but the Colonial Office was not in favour of such protection for colonial Judges. James Stephen, the brilliant Under-Secretary for the Colonies at the time of the annexation of New Zealand explained that permanent appointment posed risks in colonies because of “the peculiar constitution of small colonial society”:

If the Judge were independent and irremovable, I fear he would too often become an ally of some or other of the local parties.....holding in his hands all the power connected with the administration of justice, he would be violently tempted to abuse it to party purposes.¹⁶

Because it had provided for the tenure of Judges during good behaviour, the Ordinance drafted by Martin and Swainson was disallowed by the Colonial Office. Instead, our first Supreme Court Judges held office, not during good behaviour, but at the pleasure of the Queen.

The Colonial Office took however a very different view of the need to ensure judicial independence once limited self-government was provided. Stephen considered that Judges in colonies where there was a measure of self-government by colonial representative assemblies. should not serve at the pleasure of those assemblies because of the risk to judicial independence. In accordance with that view, by Act of 3 July 1858, the Judges of the Supreme Court came to have the security of tenure obtained under the Act of Settlement: they continue in office during good behaviour and are subject to

¹⁴ Walter Schaefer “*Precedent and Policy*” (1966) 34 University of Chicago Law Review 3 at 6.

¹⁵ *Penny v Little* 4 Ill (3 Scam) 301, 304 (1841).

¹⁶ Stephen, quoted in Knaplund *James Stephen and the British Colonial System*, p60.

removal only by the Governor-General on the address of the Legislature. That is the provision, now contained in the Constitution Act, which still applies.

The 1858 Act also contained that other bulwark of judicial independence: the requirement that the salaries of the Judges may not be reduced during their terms of office. It also provided for judicial pensions. They were not, it has to be said, easily won. The most lavish entitlement was to 8/12ths of the Judge's retiring salary – but that only applied after service of 35 years.

Arguably, by its separate identification of the elements of government, the New Zealand Constitution Act provides explicit recognition of a constitutional separation of powers in government between the legislative, executive and judicial branches. Our legal system is built upon the independence of the judiciary from the other sources of state power.

Independence of the judiciary ensures that, as Aharon Barak put it recently, "in judging, the Judge is subject to nothing other than the law."¹⁷ Judicial independence has both an individual and an institutional dimension, as was recognised in the United Nation General Assembly Statement of the Basic Principles on the Independence of the Judiciary in 1995. The Supreme Court of Canada has emphasised that they require not only security of tenure and salary, but also administrative independence in the organisation of judicial work and the support necessary for it.¹⁸ Chief Justice Barak has expressed the view that it is inconsistent with judicial independence for the administration of the judiciary to be connected to a department of government.¹⁹ In the United States, Canada and Australia, considerable operational autonomy is given to Judges. In New Zealand since 1995 we have taken a middle path, with a separate Department for Courts. The restructuring now underway will see the Department absorbed back into the Ministry of Justice. The implications for judicial independence have not been the subject of public discussion.

We are starting to get out of step with countries we identify closely with. Canada and Australia have gone much further than us in insulating judicial administration from Executive control. If the public statements of concern about judicial independence in the context of the Supreme Court proposal are not crocodile tears, it is surprising that questions about the institutional dependence of the judiciary in matters of court administration in New Zealand are not being raised.

Final appeal

¹⁷ "A Judge on Judging: The Role of a Supreme Court in a Democracy", the foreword to the 2001 Supreme Court year, (2002) Vol.116 Harvard Law Review 16.

¹⁸ *Re Remuneration of Judges of the Provincial Court of Prince Edward Island* [1997] 3 SCR 3, paragraph 118.

¹⁹ *Supra*, Note 16 at 54.

The Privy Council has served as our final court since Crown colony government was established. I do not propose to enter into the question whether the appeal should be retained, but I want to raise some questions about what we need from an appellate structure.

The first appeal to the Privy Council from New Zealand resulted in the Full Court of the Supreme Court being overturned. Over the years the local courts have been upheld and overturned in about the proportions to be expected of further appeal. The fact of the matter is that approximately one-third of all appeals will be successful. That seems to hold good however many appeals are provided. Cases which are cut and dried are appealed only by the perverse. So some arguable point is almost always available before an appeal is lodged. At the higher levels, points are genuinely difficult. That can be seen in the divisions of opinion within the senior courts of all common law jurisdictions. Refinements of argument on further appeal provide a difference in perspective which has nothing to do with geographical location. So although score-keeping in such matters excites some, it is really not the point. The real benefit obtained by our legal system from appeals to the Privy Council has been the benefit of a second appeal. To date, that is not a benefit we have been able to achieve from local resources.

The benefit of a second-tier appeal has been secured only for a very small number of cases. That, it seems to me, is the real cost of not having a final court in New Zealand. It has meant that most of our law has not been subject to scrutiny by our highest court. The result is that areas of law of critical importance to the lives of New Zealanders (family law, criminal law and human rights law) effectively do not achieve the quality of adjudication available to a final court through refinement of argument and the deliberation permitted to Judges who are freed of the intermediate appellate volume of work. That is destructive of the integrity of the structure of the legal system and the development of our law. No change is not an option. Either we improve accessibility to the Privy Council for all cases which merit second appeal or we must restructure appeals locally, whether or not we retain appeal to the Privy Council for those cases entitled to go there at present.

Those who have been critical of the performance of the Court of Appeal are unfair to compare it with an apex court, able to control its own list by granting or refusing leave to appeal. Our Court of Appeal performs magnificently. It is however dangerously overworked as a very busy intermediate appeal court as well as an effective final appeal court for many cases. I like to think that, in a number of cases where it has been rightly reversed, the same result would have been achieved on further appeal within New Zealand.

There are decisions of the Privy Council on appeals from New Zealand which are legal landmarks. Some affirmed decisions of the Court of Appeal and some reversed them. I think it is striking how few of the landmark decisions of the common law which we apply are decisions of the Privy Council on appeal from New Zealand. There are a number of possible reasons. Firstly, because of the fact that appeals lie as of right where the amount in issue is more than \$5,000, a number of New Zealand cases may be more pedestrian

than those which reach the House of Lords only with leave. Secondly, it may be a factor that, until comparatively recently, the Privy Council delivered one opinion only. Lord Reid believed that circumstance led to compromises and lack of clarity which diminished the standing of decisions of the Privy Council. Perhaps the main reason why the decisions of the Privy Council have provided relatively few truly important decisions is that given by the Law Commission in discussing the common law: the common law principles and rules we apply draw on judicial decisions in many different jurisdictions. That is because the common law is not so much a system of rules but rather a method of legal reasoning. Through it, we draw on the great judgments of other common law jurisdictions. That has implications for the future of our law whether or not we retain appeals to London. It does not suggest a new direction for New Zealand law if appeals to the Privy Council are abolished.

The common law

Many commentators have observed that the common law is not a body of law or even a body of principles so much as a method of legal argumentation. The method is one that acknowledges continuity as well as adaptability. Benjamin Cardozo described the common law method as one of prediction.

We may frame our conclusions for convenience as universal propositions. We are to remember that in truth they are working hypotheses.²⁰

The idea of common law as the method of the “working hypothesis” has been widely taken up, including by the current senior law lord, Lord Bingham.²¹ Precedent in the common law tradition is a powerful force. It is the power of the “beaten track”²². The method of the common law in change is, because of the attraction of precedent, therefore modest and careful. It has to avoid wide generalisations because it develops in response to the cases brought before the courts by litigants. Any rule described by the court must be tentative because it is impossible to foresee all the circumstances to which it will apply, but decisions are not at whim. They are made in the context of statutes, precedents, and scholarly writing. The method of the common law requires reasoning by analogy. The scope for change is small. Most cases are pre-determined by what has gone before. It is in the ability to adapt to the needs of a changing society that the vitality of the common law lies.

The great writers on the topic of the common law have recognised that people’s expectations are inconsistent: they want law to be certain, but they want it to be just law which moves with the times. As Lord Reid said:

²⁰ Benjamin Cardozo *The Growth of the Law* (1924) p73.

²¹ Lord Bingham of Cornhill “The Common Law: Past, Present and Future” (1999, Spring) *Commonwealth Law Bulletin* Vol.25, 18 at 19.

²² Benjamin Cardozo *The Growth of the Law* (1924) p62.

Rigid adherence to precedent will not do. And paying lip service to precedent while admitting fine distinctions gives us the worst of both worlds. On the other hand too much flexibility leads to intolerable uncertainty.²³

The best argument against departing from precedent is that a sudden shift in law disappoints existing expectations. All Judges are very conscious of the need for stability. The point can, however, be exaggerated. As Cardozo pointed out, "in many fields of human action there is no reliance on past decisions and in many others no knowledge of the existing law."

The picture of the bewildered litigant lured into a course of action by the false light of a decision, only to meet ruin when the light is extinguished and the decision overruled, is for the most part a figment of excited brains.²⁴

Those who think that Judges have no business developing the law and that it expresses eternal truths do not understand the nature of law in our common law system. Forget contract law indeed! The editorial writer who said that would be the result of abolishing appeals to the Privy Council and allowing "Judge-made law" clearly does not understand how contract law developed. He would deny us the substantial developments of the common law and equity in meeting the needs of commerce. Modern security devices such as pledges, mortgages, fixed and floating charges and contractual liens are all, as Professor Goode has pointed out in his 1998 Hamlyn Lectures, the product of Judge-made law. If contract law is to be taken as the paradigm, Professor Corbin has reminded us that any comparative historical survey of contract law will free us from what he describes as the "illusion of certainty; and from the delusion that law is absolute and eternal."²⁵

Common law and statute

The circumstances of settlement in New Zealand inevitably meant that we have always depended heavily upon statute law. Cardozo in 1924 described 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.²⁶ In New Zealand, our reliance on statutes has meant that it is not only lay people who indignantly deny the suggestion that Judges make law. That attitude poses particular challenges for the maintenance of confidence in the judiciary. There are a number of responses.

I believe that our reliance upon statute law in New Zealand has been greatly to the benefit of our common law method. It may have led us to be more

²³ Lord Reid, "The Judge as Law Maker" (1972) 12 JSPTL NS 22, 26.

²⁴ Benjamin Cardozo *The Growth of the Law* (1924) p122.

²⁵ Klau "What price certainty? Corbin, Williston and the Restatement of Contracts" (1990) 70 Boston University Law Review 511, 526, n71.

²⁶ Benjamin Cardozo *The Growth of the Law* (1924) p135.

willing to wait for legislative correction at times and to invite legislative response so that problems can be dealt with in a systematic and informed way through legislative process. As importantly I think the emphasis on statutes in our legal system has led us to pay close attention to the meaning and policy of statutes. Attention to the contextual meaning of statutes is I think a characteristic of the New Zealand common law method. We have had no doubts that both statute and common law operate within a single legal system and that the responsibility of Judges is to make sure that both work without friction. We have been willing to work from statutory analogies in the development of the common law and to look for authoritative identification of where the public interest lies in the text of statutes.

We have looked to the whole statute book for help, not seeing common law and statute as oil and vinegar. Professor Burrows²⁷ has remarked on the atmosphere of change created by statutes and the transferral of ideas through analogy. By such process the common law method enables the courts to co-operate with Parliament to provide coherence in the legal system.

The work of New Zealand Judges has I think been characterised by scrupulousness in attention to statutes and a consciousness of the limits to judicial legitimacy, particularly where legislative facts are required. In New Zealand we have not had experience of the sort of hostility to statutes demonstrated by the English Judges referred to by Lord Devlin who obstructed reforms because of personal hostility to the aims of the legislature:

They looked for the philosophy behind the Act and what they found was a Victorian Bill of Rights, favouring (subject to the observance of the accepted standards of morality) the liberty of the individual, the freedom of contract, and the sacredness of property, and which was highly suspicious of taxation. If the Act interfered with these notions, the judges tended either to assume that it could not mean what it said to minimize the interference by giving the intrusive words the narrowest possible construction, even to the point of pedantry.²⁸

That has not been the New Zealand way. I think we have had a less suspicious, more appreciative understanding of the role of both legislature and executive in securing good government. It is therefore surprising that so much recent – and vociferous – criticism of the New Zealand judiciary is based upon democratic objections to its function.

Parliament and Courts

²⁷ JF Burrows *Statute Law in New Zealand* (3rd ed, 1999) 324-325.

²⁸ Patrick Arthur Devlin, *The Judge* (Oxford University Press, 1979) at 15.

The constitutional role of the courts in supervision for legality does not make the Court a rival for legislative power. Criticisms of Judges as anti-democratic miss the point about judicial function within the constitutional order.

The function of the Judge is to supervise for legality. Wherever power is organised and not arbitrary, its legitimate exercise depends at the very least upon observance of the formal requirements and conditions upon which it is conferred. That is the why constitutional government is government according to law.

It is the function of the courts to ensure that the exercise of power is authorised by law. The courts are themselves subject to law. They cannot usurp the functions of other bodies. Nor can they self-start. They can adjudicate only in disputes properly brought before them. The courts do not encroach upon legislative authority. Indeed, as Sir Owen Dixon rightly identified, the sovereign law-making power of the legislative branch of government is itself a rule of the Judge-made common law.²⁹

Our substantive law is an amalgam of statute and common law. Parliament and the courts are not in conflict in its development. Rather, both are participants in the view of law described by Sir Neil MacCormick as “a form of institutionalised discourse or practice or mode of argumentation.”³⁰ They do not legislate and they must give effect to the legislation of Parliament. Because the formal processes of adjudication require all sides to a dispute to be heard and because the Judge must explain the result in reasons for decision, the process of adjudication is an important contribution to the discourse of law. The decision of the courts are, as Jeremy Bentham put it, “in the face of mankind.”

The constraints upon judges

Of course controversial decisions arise. Judges cannot avoid deciding them in cases properly brought before the courts. In some cases, including those where Parliament has specifically conferred jurisdiction requiring general policies to be applied with little guidance in the particular case, it may be impossible to avoid difficult questions of policy. Those who criticise Judges for decisions they do not like as “conservative” or “activist” are indulging in what Lord Radcliffe described as “romantic writing . . . useful only to fellow romantic spirits”.³¹ No judgment is isolated from the existing order. The process of judgment is the opposite of what is arbitrary or personal. If a decision is to convince, it must fit within the existing fabric and be principled and coherent.

²⁹ Sir Owen Dixon “The Law and the Constitution” reprinted in *Jesting Pilate* 1977 (2nd ed) 38.

³⁰ Neil MacCormick “Beyond the Sovereign State” (1993) 56 MLR 1, 10.

³¹ Lord Radcliffe: “Review: Final Appeal – A Study of the House of Lords in its Judicial Capacity. By Louis Blom-Cooper and Gavin Drewry” (1973) 36 Modern Law Review 559 at 564.

Our Judges know they are not appointed to “set the world to rights.”³² They operate within the discipline of the common law tradition. They work case by case in actual controversies brought to the court by litigants. In areas of controversy such as human rights they now have a legislative register to assist. They work under the considerable restraint of the obligation to give reasons.

Change always needs to be explained in a case-law system. It is essential to the health of our legal system that we continue to attract and retain independent judges who observe the discipline of the common law method, have the imagination to see when change is necessary, and the capacity to explain why in judgments that convince. Judgment-writing was described by one Californian judge as “thinking at its hardest”³³

There are a number of pressures to be resisted here. Managerial justice which is fixed upon measurement, the press for greater efficiencies, the view that the courts provide dispute resolution services, these are attitudes which are dangerous to common law method if pushed to extremes. Skeleton judgments and composite judgments are seen by some as the answer to time constraints. Many question the utility of the dissenting or concurring judgment. We need to be careful.

Common law method depends upon the independence of the individual judge. Because each judge is independently responsible, as Lord Goff put it, “judgments tell the truth – the real reasons for our decisions, expressed, where appropriate, subject to the Judge’s own qualifications, hesitations and even doubts”.³⁴ In New Zealand, Sir Robert Stout, in a 1904 article about why we should abolish appeals to the Privy Council, expressed his doubts about single opinion judgments. His concern was with “corporate opinions” because of their erosion of individual responsibility. He invoked Bentham who was said to have been “so impressed with this view that he advocated single Judges for every court”.³⁵

The importance of the dissenting judgment was a substantial theme of Lord Reid’s celebrated “fairytale” speech to the Society of Teachers of Public Law. It is echoed by thoughtful Judges throughout common law jurisdictions. As one United States appellate Judge said:

Dissents do, of course, destroy the illusion of absolute certainty and of judicial infallibility, but, obviously, the reputation and prestige of a court – the influence and weight that it commands – depend on something stronger and more substantial than an

³² Lord Hoffman “Separation of Powers”, the Combar Lecture 2001 [2002] JR 137.

³³ Roger Traynor, (1957) 24 University of Chicago Law Review 211, 218.

³⁴ Lord Goff of Chieveley *The Future of the Common Law* (1997) 46 International and Comparative Law Quarterly 745 at 755.

³⁵ Sir Robert Stout “*Appellate Tribunals for the Colonies*” (1904-5) 2 Commonwealth Law Review 3 at 13.

illusion. Certainty in the law and flawless adjudication may be highly desirable ideals. We are not, however, discussing whether we shall ever attain them, but only whether we should seek to maintain the appearance of an impeccability which does not in fact exist. We should not deplore the destruction of this illusion. Honest and reasonable disagreement exists in every field of human competence. . . . A Judge is on the bench not simply to decide cases, but to decide them, doing his conscientious best, as he thinks they should be decided.³⁶

To see judicial work as an exercise in power, could not be more wrong. Roger Traynor expressed the reinforcement of obligation in the hard task of providing reasons:

Something is lost to the judicial process if judges fail to exert full responsibility for their decisions. Such responsibility imposes its own discipline. As they analyze issues that have been disputed every inch of the way, they learn to guard against premature judgment. Entrusted with decisions, bound to hurt one litigant or the other, they come to understand the court's responsibility in terms not of power but of obligation. The danger is not that they will exceed their power, but that they will fall short of their obligation.³⁷

Benjamin Cardozo explained coming to judgment in this way:

I have gone through periods of uncertainty so great, that I have sometimes said to myself, "I shall never be able to vote in this case either one way or the other". Then, suddenly, the fog has lifted. I have reached a state of mental peace. I know in a vague way that there is doubt whether my conclusion is right. I must needs admit the doubt in view of the travail that I suffered before landing at the haven. I cannot quarrel with any one who refuses to go along with me; and yet, for me, however it may be for others, the judgment reached with so much pain has become the only possible conclusion, the antecedent doubts merged, and finally extinguished, in the calmness of conviction.³⁸

Those who say that Judges are not accountable because not elected, do Judges such as these wrong. They are accountable through effort which is laid open for all to assess.

³⁶ Stanley H Fuld *"The Voices of Dissent"* (1962) 62 Columbia Law Review 923, 928.

³⁷ Roger J. Traynor (1957) 24 University of Chicago Law Review 211, 224.

³⁸ B. Cardozo *Paradoxes of Legal Science* (1928) 80-81 (Greenwood Press 1970, c1928).

The place of the High Court

In the excitement over restructuring our appellate courts, it is important that we do not get rapture of the heights. In the fascination of the sort of root and branch reassessment of the courts being undertaken by the Law Commission, it is important that we do not throw over our institutions lightly, in search of an arid symmetry or illusory simplicity. We need to count the cost of reform in terms of the disruption of balances which are easily overlooked.

Throughout our history, the court with the plenary responsibility for insisting on the observance of legality in our system has been the High Court. I regret the re-naming of the old Supreme Court. Not only because the freeing up of the name Supreme Court for an ultimate appeal court traps us into the language of power rather than scope and feeds fears of judicial overreaching. But more importantly because the old name, which we shared with the Australian jurisdictions based on the same judicature act model, underscored the centrality of the superior court of general jurisdiction. The Court of Appeal was a division of the Supreme Court, as it remains in Australian jurisdictions and as is still indicated in the requirement of our Judicature Act that the Court of Appeal of New Zealand comprises the Chief Justice, by virtue of office, and seven High Court judges appointed to the Court.³⁹

The High Court remains the central court of general jurisdiction. It exercises inherent as well as statutory jurisdiction. The statutory jurisdiction is sometimes shared with other courts. The inherent jurisdiction is not. It includes the jurisdiction to review for legality the exercise of all authority whether by the executive or by the inferior courts. Judicial review by the High Court has been systemised by statute, but it follows from the full authority exercised by that court to say what the law is. That function is essential to government under law.

The centrality of the High Court and its function is not well understood. It requires understanding that a division between superior and inferior courts is a technical concept which reflects function. It is not a slight upon the status or capacity of judges of the inferior courts. It is a division based on responsibility to supervise for legality.

It has to be said that the preliminary papers circulated by the Law Commission in its review of the courts do not focus on these balances in the existing legal system. They raise questions about the status of different courts. They suggest that the Maori Land Court stands outside the general courts but with a direct appeal right to the Privy Council. They suggest that first appeal and judicial review can be separated and that appeals could

³⁹ Judicature Act 1908, s57

leapfrog the High Court, while leaving judicial review (described in the papers as supervision for procedural error only) to be exercised in the High Court. They float the ideas that High Court Judges could be assigned to a National Trial Court and that the general jurisdiction of the High Court might be subdivided into specialist divisions. These suggestions are not ones yet adopted by the Law Commission. For the most part they are ideas proposed by others which are put forward uncritically by the Law Commission for public consideration.

Some of the suggestions made may well be worth considering. But we need to count the cost. The cost could be the loss of the superior court of general jurisdiction. In volume courts, specialisation may well be sensible and efficient but the legal system at present comes together at the High Court. There are benefits we should be careful to preserve.

Firstly, the principles applied by our law are not confined into the compartments it is sometimes convenient for us to use. A sense of the reach and proportions of the whole body of law is necessary to maintain balance. Secondly, if our higher appellate courts are not to be representative of all the different specialisations (with the dangers for deference and erosion of individual responsibility that entails) then they need to be drawn principally from a court exercising general jurisdiction. Thirdly, supervision through judicial review and first appeal cannot sensibly be split, as the exclusion of judicial review in the case of the Employment Court as a consequence of direct appeal to the Court of Appeal illustrates. If the Court of Appeal is not to be hugely enlarged (with the destruction of the benefits of collegiality secured by the permanent court) and if we are to use hierarchy efficiently (as our reliance on precedent permits), then we need to maintain the appellate as well as the judicial review supervision of the High Court over lower courts. Finally, we should not be complacent about recruitment to the High Court bench if the centrality of that Court within the legal system is compromised or its jurisdiction whittled down. Why that should concern us was explained by Lord Reid. The trial Judge in a properly functioning legal system is key. If a Judge is wrong on law, the Court of Appeal can set the matter to rights readily, but if he or she gets the facts wrong, the mistake may be irretrievable. We need to attract and retain Judges to the High Court of the highest calibre.

A New Zealand legal system

I end, where I started, with the New Zealand legal system. The performance of the courts, like that of the legislature, has varied. At times, the yoke of the Privy Council has weighed rather heavily. The unprecedented attack by the New Zealand bench and bar, led by Stout CJ, on the judgment of the Privy Council in *Wallis v Solicitor General* (and a number of other judgments in which the Privy Council was thought to have demonstrated its ignorance of New Zealand law and conditions) still crackles off the page. After a point by point demolition, Stout CJ concluded:

The matter is really a serious one. A great Imperial judicial tribunal sitting in the capital of the Empire, dispensing justice even to the meanest of British subjects in the uttermost parts of the earth, is a great and noble ideal. But if that tribunal is not acquainted with the laws it is called upon to interpret or administer, it may unconsciously become the worker of injustice. And if such should unfortunately happen, that Imperial spirit that is the true bond of union amongst His Majesty's subjects must be weakened. At present we in New Zealand are, so far as the Privy Council is concerned, in an unfortunate position. It has shown that it knows not our statutes, or our conveyancing terms, or our history. What the remedy may be, or can be, for such a state of things, it is not at present within my province to suggest.⁴⁰

At times, such fierceness faded. It took some time, but it was eventually established that the courts of New Zealand are bound only by decisions of the Privy Council in New Zealand cases. Decisions from other jurisdictions, like the decisions of the House of Lords, are given very careful consideration, but in a few cases we have been prepared to go our own way. Most commentators would I think be prepared to accept Sir Robin Cooke's verdict in 1987 that:

.....New Zealand law, both that made by our parliament and that made by our judges, has now evolved into a truly distinctive body of principles and practices, reflecting a truly distinctive outlook.⁴¹

The Privy Council has itself acknowledged that the common law is not a seamless whole. In *Invercargill City Council v Hamlin* it acknowledged that the Court of Appeal was entitled to depart from English law on the grounds that conditions in New Zealand are different.

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.⁴²

This theme has been developed extra-judicially by Lord Bingham. He describes the common law as now flowing in a number of streams. He identifies the "diminished role" of the Privy Council as having given the freedom to the courts of Australia, Canada, and India to develop principles of their own. As a result he says the common law has been strengthened by

⁴⁰ *Wallis and Others v Solicitor-General*, 25 April 1903 NZPCC 730 at 746.

⁴¹ Sir Robin Cooke, *The New Zealand National Legal Identity* (1987) 3 Canterbury Law Review 171, 182.

⁴² [1996] 1 NZLR 513, 519-520.

the dialogue, the process of “learning from each other”.⁴³ I do not think this is simply politeness. Nor do I think that the process has been confined to those countries which have abolished appeals to the Privy Council. As *Invercargill City Council v Hamlin* shows, English law as received in New Zealand has now become New Zealand law, just as Australian law is Australian.

Whether or not we retain the links to the Privy Council, New Zealand law will continue to steer by the common law and its method. Our common heritage pulls together. Where there is reason to differ, we will go our own way. Allen Curnow, in *Landfall in Unknown Seas* wrote, in tribute to Abel Tasman:

Simply by sailing in a new direction
You could enlarge the world⁴⁴

When the laws of England arrived in New Zealand on the *Tyne*, with William Martin and William Swainson and Thomas Outhwaite, they did not enter a new world. Their world was enlarged. Today the legal system of New Zealand is distinctive, not in any petty triumphalist way, but because it is responsive to New Zealand conditions.

Rt. Hon Dame Sian Elias
Chief Justice of New Zealand

⁴³ Lord Bingham of Cornhill *The Common Law: Past, Present and Future* (1999, Spring) Commonwealth Law Bulletin Vol.25, 18 at 28.

⁴⁴ Allen Curnow, “Landfall in Unknown Seas” 1943: J Bornholdt, G O’Brien and M Williams (eds.) *An Anthology of New Zealand Poetry* (Oxford University Press, 1999) 401.