

## **THE ROLE OF THE COURTS IN DEVELOPMENT OF THE LAW**

At a time when there is some apprehension at least in my country about unelected judges making or changing the law, the invitation to speak to you provides a welcome opportunity to say something about the role of the courts in the development of the law. I prefer development of the law to law reform. Reform suggests a process rather more grandiose than I am going to talk about.

How the legal landscape has changed. The common law, on which the organisation of a substantial part of the world community is based, was developed by the judges. Of course, then it was perceived more as a process of stating the law already existing - articulation of the natural law. In England, well before the emergence of democracy, the judges and sergeants taught the law in the Inns of Court and the judges, with the assistance of the advocates, formulated the law. Even after 1688 the Parliament, unsupported by any organised bureaucracy, did little through the 18<sup>th</sup> century in the way of innovative general law-making. Professor Atiyah<sup>1</sup> has provided an illuminating analysis of the annual volume of legislation for 1770. It contains 99 Acts, and of these 55 were for specified road improvements and similar public works. Nine were for improvement or regulation of specified canals, rivers and harbours, nine concerned imports, exports and excise duties, five related to

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<sup>1</sup> See Atiyah, *The Rise and Fall of Freedom of Contract*, (1979) Chapter 5

other taxes, appropriations and coinage, five concerned the armed forces, three were for promotion of fisheries in specified areas, nine were miscellaneous Acts of local or private nature. Only four were of a public and general law-making character. Those figures bear out Maitland's assertion about 18<sup>th</sup> century legislative activity that:

The British Parliament seems rarely to rise to the dignity of a general proposition.

Even with the emergence of Parliament as the law-maker, the laws of the constitution, the principles of private law and the relationships between government and people continued to evolve in the courts. This process continued through the last century (long after the teachings of Montesquieu and Dicey), as the rules of constitutional and administrative law were attuned to the growth of government.

As parliaments became better supported and assumed more direct responsibility for the whole legal system, the law-making process came to be perceived by some as of the essence of democracy and not the business of unelected judges.

I do not wish to comment on the current, rather superficial arguments directed to so-styled "judicial activism", "accountability" and the like, save to make the

comparison as I have done, between the apprehensions of the present and the realities of the past.

I prefer to concentrate on what Professor Jaffe<sup>2</sup> described as “the total legal performance”. An efficient contemporary legal system reflecting established values must be the product of co-operative interaction between the various contributors, including the courts. I refer to contributors because I want to focus on the formulation and development of the law rather than on restraints and balances such as may be provided by constitutional courts.

The processes for the review and development of the law are different today. Professional law reform agencies such as the Hong Kong Law Reform Commission, together with large and expert bureaucracies, have superseded the judicial development of the common law in most areas. The role of the courts in development of the law has not ceased but it has changed, being now complementary to the primary law reform processes.

New Zealand is a comparatively small country. In terms of its laws and law making the Hong Kong SAR is also. Of course, the responsibilities of governments are not proportionate to the size of a country or its population. But the complexities of parliamentary government can be no less in larger countries.

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<sup>2</sup> Louis L. Jaffe, *English and American Judges as Lawmakers* (1969)

Is it unreasonable to wonder whether, as presently organised, parliamentary capacity is not too small to accommodate all modern law-making proposals? The business of parliaments in modern democracies necessarily encompasses political debate of current issues, ensuring the accountability of the executive government, financial budgeting and authorisations, in addition to law-making. Yet there is resistance to the delegation of the legislative function on the ground that it is not appropriate for matters having significant policy content.

In its law-making role the modern legislature must depend for efficiency upon agencies internal and external of government in the identification of needs, research, consultation and drafting. In each of these areas, it is the nature of government that matters having higher public profile or pressure will have preference. Even well-researched, relatively non-controversial proposals from our Law Commission can wait years before being taken into the legislative programme.

I believe that the lack of room in legislative programmes increasingly is spawning attempts to get satisfaction from the courts in areas many would say are more appropriate for decisions of government.

The expressed anxiety towards judges making or changing the law has been matched by, and may be linked to, the increasing frequency with which broad

and open language is employed in legislation. Perhaps this reflects time pressures on the government and Parliament. Perhaps it reflects compromises in the political processes. In some cases it results from the incorporation of international instruments, necessarily drafted in general terms to attract acceptance. The courts must not only resolve major issues of interpretation but must also determine the impact of the broadly stated rights and obligations on the common law and on administrative decision-making.<sup>3</sup>

Perhaps the most graphic example in my country of open language legislation was s9 of the State-Owned Enterprises Act 1986. As part of the corporatising of government departments the Act established certain state-owned enterprises. Section 9 provided that nothing in the Act should permit the Crown to act in a manner that was inconsistent with the “principles of the Treaty of Waitangi”. That was the treaty signed between the British Crown and representatives of Maori tribes in 1840 by which the native peoples became British subjects, were guaranteed certain customary rights and acknowledged Crown sovereignty. New Zealand thereby became a British colony. The Treaty had not hitherto been treated as part of the domestic law of New Zealand and nowhere were its “principles” defined. The courts were required to determine whether the vesting of certain lands the subject of Maori claims by the Crown in the state-owned

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<sup>3</sup> *Tavita v Minister of Immigration* [1994] 2 NZLR 257

enterprises contravened s9.<sup>4</sup> The opinions of the judges wrestling with the principles of the Treaty are no less controversial today than they were when they were issued. Many statutes enacted subsequently have referred to the principles but still in none have they been defined.

That is a distinctively New Zealand example. I will be referring to others because I am more familiar with them. I believe they are illustrative of the issues involved and in many cases relate to questions that have come before the courts also in other jurisdictions. They are cases decided by the New Zealand Court of Appeal. At the time most were decided, that court was effectively the final court subject only to a few appeals to the Privy Council. Since 2004 New Zealand has established its own final court, the Supreme Court, and has abolished appeals to the Privy Council.

A lack of definition in international instruments can also be problematic for domestic courts. Everyone has the right to be free from unreasonable search and seizure under s21 of the New Zealand Bill of Rights Act. That comes from Art 14 of the International Covenant on Civil and Political Rights. For the last 10 years and more our courts have wrestled with what comes within the concept of search and what is unreasonable.

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<sup>4</sup> *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641.

Another example with potential for litigation is in the 2002 New Zealand Trade Marks Act. Section 94 excludes from infringement the use of a registered trade mark in comparative advertising. The section continues however with this:

... but any such use otherwise than in accordance with honest practices in industrial or commercial matters must be treated as infringing the registered trade mark if the use, without due cause, takes unfair advantage of, or is detrimental to, the distinctive character or the repute of the trade mark.

The phrase “honest practices in industrial or commercial matters” comes from the 1883 Paris Convention on Industrial Property. It was taken into the United Kingdom Trade Marks Act 1994 and adopted in New Zealand from there. Just what it meant in 1883 and what it means today, and what “undue cause” and “unfair advantage” mean, remains to be seen.

Interpretation of such language, when it gives rise to competing views, provides ammunition to dissatisfied litigants whose aim generally is at the judges. But it really should be seen as part of the total legal performance dictated by Parliament.

The importation of the broad language of international instruments raises another issue, that of access to law. This has been highlighted for me over the last decade in the area of human rights. Accession to, and incorporation of, the major international instruments with their broad statements of individual rights and freedoms in constitutional documents or statutes will be familiar to you. In litigation raising issues as to the content and scope of these rights and freedoms, extensive arguments are presented, especially in the higher courts, by reference to the decisions in other jurisdictions and of international tribunals, and also to the *travaux preparatoire* of the various conferences from which the instruments emerged. The scope of fundamental rights should be readily accessible and clear to everyone, and should not have specificity only in the minds of rights-focussed lawyers and complex appellate judgments. The seductive simplicity of generalised provisions does not really help people understand their rights and obligations.

As I see it, ideal legal performance in today's world would encompass a legislature, suitably resourced with sufficient time allocated to law-making, supported by agencies, also suitably resourced, co-ordinating research, consultation and drafting in accordance with clear policy direction from an informed government.

That would still leave a role for the courts. Their contributions must be limited, as reflects their circumstances. They are confined to specific cases presented to them, they have limited resources to investigate wider policy considerations and generally lack empirical data against which to assess competing contentions. Within those limits the courts can, and do, contribute to the overall legal performance.<sup>5</sup>

Courts decide cases. Often the issues are mainly factual. Frequently, however, questions of law require determination. They may involve the reach of the common law, the interpretation of enactments or the relationship between common law and statute law. In making decisions on questions of law the courts may be said to clarify or develop the law. Many cases in this category attract little attention beyond the immediate parties and those researching similar cases. These include interpretations and applications of established principles in new circumstances.

It may be that in the course of consideration of a case it will appear that there is a gap or inconsistency in the law or that the law is proving unsatisfactory in application. Where a decision in the particular case can be reached without injustice the court may be content to highlight the difficulty and invite

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<sup>5</sup> For an instructive account on the role of the courts in development of the law see Justice M H McHugh, *The Judicial Method* (1999) 73 ALJ 37.

consideration by the relevant authorities. Such court stimulation of a review of the law in a particular area can be valuable where there might otherwise have been little pressure for change. The decision of the New Zealand Court of Appeal in *Quilter v Attorney-General*<sup>6</sup> certainly stimulated discussion of the issue of same-sex marriages. The Court decided that the Marriage Act applied only to the relationship of a man and a woman.

Sometimes the courts are invited to effect a significant change or development in the law. Pressing factual circumstances and compelling argument may point to injustice in the application of established principle. Perhaps the most graphic example of such a case was that before the House of Lords in *Fairchild v Glenhaven Funeral Services Ltd*<sup>7</sup> in which plaintiffs suffering from mesothelioma contracted from exposure to asbestos in the course of their employment could not prove which of successive negligent employers caused the harm. The Law Lords expressly created an exception to the general principle requiring the causal link to be proved. When issues like that arise consideration then must be given to the issue whether to leave the matter, duly highlighted, for legislative attention or whether to change legal principle by judicial decision. Which course is adopted depends on many factors. I mention a few. Much depends on the nature of the issue. If it is in a field of law largely

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<sup>6</sup> [1998] 1 NZLR 523

<sup>7</sup> [2002] UKHL 22, [2003] 1 AC 32

developed by the courts there will be less reluctance to make changes. If it is in an area where the implications of any change are unclear so that the issue would benefit from wider research and analysis than the courts are equipped to employ, there will be great reluctance to make any change. The existing principle may be long-standing and underlie entrenched practices and commitments. There may be circumstances of urgency linked with the recognition that it will always be open to the legislature to overrule or modify the change. It may be that on close analysis the existing principle is not soundly based. There may be discernible policy in legislation in related areas indicating a direction for change. The existing principle might rest on superseded social values. There might be current law reform work that is expected to review the existing principle. Lord Bingham, in *Watkins v The Home Secretary*<sup>8</sup> set out a number of reasons for withholding in that case a change in the law of misfeasance in public office that had been formulated by the Court of Appeal.

Weighing these and other relevant factors can result in differing judicial views. This is evident in a number of recent decisions of the New Zealand Court of Appeal.

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<sup>8</sup> [2006] UKHL 17; [2006] AC 395 at para 26

In 1983 the Court considered whether a method of medical treatment should be capable of attracting patent protection.<sup>9</sup> It was said on the one side that the grant of monopoly rights in this area could interfere with the ability of the medical profession to provide patients with the best appropriate treatment. On the other side it was contended that it was anomalous to exclude from protection meritorious inventions in just one field when the definition of invention in the Patents Act drew no distinction so that current practice was unsupportable. All three judges considered that the policy content of the issue and its implications were such that any change should be for the legislature.

In 2000 the Court was asked to rule on the patentability of a known pharmaceutical compound for new, previously unrecognised pharmaceutical use.<sup>10</sup> The Court decided that the identification of a new use could constitute invention and that protection could be granted. Addressing argument that it should be left for the legislature, the Court referred to recently assumed international treaty obligations and the fact that they were modifying rules of interpretation that had been made by judges.

In 1986 the Court was required to determine whether an under-cover police officer, when appearing as a prosecution witness, could be asked questions as to

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<sup>9</sup> *Wellcome Foundation v Commissioner of Patents* [1983] NZLR 385

<sup>10</sup> *Pharmaceutical Management Agency Ltd v Commissioner of Patents* [2000] 2 NZLR 529

his true identity.<sup>11</sup> On one side it was contended that the safety of police officers engaged in dangerous but necessary under-cover work justified their giving evidence under their assumed names. On the other side it was said that the ability to ascertain true identity was part of the right to a fair trial – to test the case against him or her, or to make a defence. In a 3 to 2 majority decision it was held that questions may be asked as to the true identity and that if there should be an inroad in an accused persons civil liberties in this respect, it should be made by the legislature. And it was, later in the same year.<sup>12</sup>

In 1997 the Court, again by a majority of 3 to 2, declined to fashion a rule permitting an eye-witness (unknown to the accused) who had been found to have a genuine fear of retaliation, giving evidence anonymously.<sup>13</sup> The protection of witnesses from intimidation was at the time under consideration by the Law Commission and the majority considered that the matter was not so urgent that the Court should take on itself development of such a rule. The minority said the Court should do so, subject to safeguards, in light of the rights of witnesses and the increasing concern about intimidation.

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<sup>11</sup> *R v Hughes* [1986] 2 NZLR 129

<sup>12</sup> S13A Evidence Act 1908 inserted by s2 Evidence Amendment Act 1986

<sup>13</sup> *R v Hines* [1997] 3 NZLR 529

In decisions in 1998 and 2000<sup>14</sup> the Court modified the defence of qualified privilege in defamation proceedings to extend it to certain political discussion published to a wide, even national, audience. In determining that it was appropriate for the Court to do this rather than leave it for Parliament three reasons were given. First it was considered a refinement rather than an extensive development of the law. Secondly it was said that although generally value judgments are for the legislature, in this area the courts have long been making them without interference. Thirdly, the recent review of the law of defamation and enactment of a new Defamation Act had maintained untouched the central core of the defence of qualified privilege so that the courts were left to determine the scope of its application.

In 1994 the Court formulated a cause of action entitling remedies for acts of the state or its agencies infringing the rights and freedoms affirmed in the New Zealand Bill of Rights Act.<sup>15</sup> It was considered by the majority that Parliament must have intended that there be such remedies even though a remedies provisions in the draft Bill had been dropped. They drew upon the obligation in the International Covenant on Civil and Political Rights that the state should provide “effective remedies”.

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<sup>14</sup> *Lange v Atkinson* [1998] 3 NZLR 424 and [2000] 3 NZLR 385

<sup>15</sup> *Simpson v Attorney-General* (Baigent’s case) [1994] 3 NZLR 667

Finally, in 2004 the Court by majority of 3 to 2 determined that there should be an available action in tort to enable remedies to be sought in respect of the publicising of private facts where that is, or would be, highly offensive to a reasonable person.<sup>16</sup> The majority considered such a step appropriate in light of English authority to similar effect (though differently categorised), international obligations to protect individual privacy and a landscape of not inconsistent legislation. The minority expressed the view that any such limitation on the freedom of expression should not be introduced by the courts.

These examples, are simply some of the cases in which the judgments address expressly whether the court should act or defer to the legislature, and traverse the arguments for and against. Similar cases will have arisen in other jurisdictions.

The judgments in these cases reflect different approaches by the various judges. In those cases in which the court has determined to develop the law the international trend emphasising individual rights has carried considerable weight.<sup>17</sup> Perhaps they show above all the care with which any significant development of the law has been approached. That the approach has been conservative may be indicated by the legislative responses. In those cases in

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<sup>16</sup> *Hosking v Runting* [2005] 1 NZLR 1.

<sup>17</sup> See also Sir Kenneth Keith *Roles of the Courts in New Zealand in Giving Effect to International Human Rights – With Some History* (1999) 29 VUWLR 27.

which our Court declined to make any change in the law, (under-cover police witnesses and intimidated witnesses), legislation followed quickly providing for qualified protections.<sup>18</sup>

In those cases where the Court did modify the law; (allowing patents for a second medical uses of compounds, extending the defence of qualified privilege in defamation, providing a new cause of action under the Bill of Rights Act and introducing a tort protecting aspects of privacy), there has been no intervention by the legislature to overturn the decisions.

As I have attempted to explain, the courts are confronted with cases giving rise to issues of legal development. They approach those with the obligation to do right by all people and according to law. In the pursuit of justice, case by case, the law is articulated. Eventually principles applicable in changing circumstances may become discernible. They are principles founded in the law not in the subjective views of individual judges. They may be reviewed, built upon or rejected on broader analyses undertaken by agencies properly equipped for the purpose.

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<sup>18</sup> For anonymity of witnesses see ss13B – H Evidence Act 1908 inserted by s3 Evidence Amendment Act 1997.

Finally I should emphasise that it is not just in the higher appellate courts that issues I have described can arise. All cases start in the lower or trial courts and may equally present concerns about the reach or scope of established principles. Views expressed at those levels can be of real value when the cases reach appeal courts. That is part of the total process of developing the law.

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