The role of judges as policy makers

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In this paper the Rt. Hon. Mr Justice Richardson considers the work and role of the New Zealand Court of Appeal and also discusses the role of judges as law makers in the New Zealand context. The paper is an edited version of an address given to the Wellington Branch of the New Zealand Society for Legal Philosophy on 6 June 1984.

I. INTRODUCTION

The primary function of the courts in our type of society is to determine disputes between the parties according to law. As we all know the judicial determination of most litigation involves the application of settled legal principles or fairly straightforward legislative provisions to the facts of the case. In the vast majority of cases at the trial and first appellate level it is the facts that are critical. Once they are determined and assessed the legal answer is clearcut. However, in a relatively small number of cases the legal answer is not automatic. Legislation may be ambiguously expressed. The direction of development of the Common Law depends on what analogies are used and on an assessment of the values involved. In such cases what course is followed reflects a value judgment on the judge's part. The judicial answer will thus depend on a conscious or unconscious assessment of the underlying values involved — whether they be social, economic, philosophical or moral values. In that class of case the judge is engaged in a balancing exercise. Some commentators see that balancing exercise as a trade off between the need for certainty and predictability on the one hand and the obtaining of a socially just result on the other. And on that argument the determination of what are the interests of justice in the particular case is seen as dependent on the perspectives of the judge concerned and on the constraints under which he operates.

Against this background, if we want to assess the effectiveness of the work of the courts in the application and development of the laws in a particular society we need to consider two matters: (1) the case list of the courts — what cases and how many cases come before the courts; and (2) how the courts decide those cases. What I propose to do this evening is to discuss those questions

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in relation to the Court of Appeal. This is not because of any particular parochial feeling — it is simply that I can speak of what I have been doing for the last seven years. And what I have to say is, of course, related entirely to New Zealand. Each society develops its own institutions to meet the needs of that society and I am not in any position to comment on what judicial approaches may be appropriate in other jurisdictions.

II. THE WORK OF THE COURT OF APPEAL

There are two features of the workload which deserve some emphasis. The first is the increase in the volume of business. In 1983 our court dealt with 263 criminal and 109 civil appeals compared with 51 criminal and 35 civil appeals twenty-five years ago. Over the last ten years the proportion of appeals allowed has been 22 per cent on the criminal side and 35 per cent in civil cases. Those proportions are to be expected if we assume that ordinarily appeals are not brought in civil cases unless the legal advisers consider there are reasonable prospects of success and that in criminal cases there is a greater incentive to appeal, particularly where there are long prison sentences involved.

The second feature of our court lists is the change in the nature of the questions arising in civil appeals. There is today far more emphasis on administrative law, on the interpretation of statutes, and on public law responsibilities than there was even a few years ago. And there is far less emphasis on contracts and wills and private disputes of those kinds which featured so largely in the law reports over a long period. No doubt there are various reasons for this. The rise of the modern welfare state, the powerful influence in so many areas of our lives of decisions made within central and local government and by administrative tribunals, the restlessness of modern society and the greater willingness to challenge previously accepted norms and conventional institutional structures have all contributed. Finally, the costs of litigation today may have had some effect too. The high cost of legal services is a powerful disincentive to unaided would-be litigants. Overall it seems to bear particularly heavily on the individual litigants in private law disputes: moreso than in the public law field where by definition one of the parties is a government agency or, if not, is almost always state supported, where there are more interest groups prepared to litigate or to support an otherwise unaided individual litigant, and where too what the unaided individual has at stake cannot as readily be viewed in simple cost benefit terms.

In turn, and in response to the flow of cases, our courts have developed public law principles and have expanded the scope of negligence and other areas of the Common Law. In terms of the division of governmental power that emphasis on the development of checks and balances against the growth of the state and the concentration of power in the legislature and the executive reflects a particular philosophy of government. It is a philosophy of government expressed in the conclusion that "Only a balanced system of reciprocal checks can combine, without dangers to freedom, a strong legislature with a strong executive and a strong judiciary as well".[1]

1 Cappelletti "The Law-Making Power of the Judge and its Limits: a Comparative Analysis" (1981) 8 Monash L.R. 15, 34.

Turning now to the hearing and determination of appeals, our procedure for hearing cases falls midway between two extremes. In some appeal courts extensive oral argument is addressed to judges who have not read any of the material beforehand and who ordinarily give oral judgments at the conclusion of the argument. Other courts require detailed written briefs which are supplemented by closely limited oral argument with the judgments ordinarily being delivered in writing after further research and consideration by the individual judges.

We adopt a middle course. Counsel for the appellant is required to file a memorandum of points on appeal which identifies the issues to be argued. Before or at the hearing he hands in a synopsis of the argument which is often the verbatim argument for the appellant and may run to 30 or 40 or 100 pages or more. Increasingly, too, the respondent's counsel puts his submissions in writing anticipating in that respect the argument for the appellant.

The hearing itself is relatively informal. Often the only persons present are the judges, the counsel involved and the registrar of the court. In a case of any difficulty the judges tend to question counsel, often extensively, and freely discuss the facts and the law, testing the argument and not worrying about revealing the trend of thinking. After all, it is our one opportunity of checking our own immediate initial reactions to the case against the arguments and counter-arguments of counsel who have often been thinking about the issues in the case for years. And if we have reached a firm view at the end of the argument, then, whenever we feel able to do so, we dispose of the case orally on the spot with a single judgment in criminal cases and some civil cases, and individual judgments in other civil cases. We determine a substantial majority of the criminal appeals and about one half of the civil appeals in this way.

Where judgment is reserved we usually have a discussion amongst ourselves at the end of the hearing to see what tentative views we have on the different issues and we agree that one or more of us will prepare a draft or draft judgments for circulation and discussion. In most cases very little further discussion is required. In others, particularly where we think there are wider policy issues involved, we may live with the case for weeks. So there are great advantages in the collegiate system where the judges are working together as a group. It is not just that we benefit from discussion with one another. The point is that, if it is a single judgment, then all members of the court are committed by it and, if there are individual judgments, we are still vitally interested in what the other members of the court say.

The practice of engaging in extensive discussion during the course of the argument and of giving immediate oral judgments has obvious advantages, one of which is that the decision-making process is carried out publicly. The judges are working in full public view. It is obvious that they are all participating in the decision-making process. The case is determined on the arguments advanced and not on points which have not been subject to comment by the parties at the hearing. That consideration does not always apply where the decision is reserved. Judgments are not addressed simply to the parties concerned. They may have a wider impact and the judge cannot be limited to consideration of arguments

that counsel happen to advance. He is entitled to conduct his own research and reflect that in his own judgment. That is subject to the obvious rider that, if after the hearing he comes across a line of thinking likely to bear significantly on his final decision, ordinarily he should bring that material to the attention of counsel for their comment.

III. JUDGES AS LAW MAKERS

This brings me to the central question for discussion, the role of the judges as law makers. How much freedom does a judge have in those cases where different answers are open? How much freedom should he have in those cases?

Regrettably, perhaps, a judge is not a pre-programmed computer. He does not find that the true answer is miraculously revealed to him. But he does not have and should not have a completely free hand. There are powerful limiting circumstances.

One constraint is inherent in the judicial function. The courts decide specific disputes; they are not engaged in solving general problems. And they do not initiate cases. A litigant must decide to institute proceedings which that court has jurisdiction to determine. And under the adversary system the parties largely determine what issues are argued and what factual material is tendered to the court.

There are, of course, other limitations on the role of the courts as agencies of change. As Edward White has observed,[2] in 20th century jurisprudential theories "some limitations are intellectual (an obligation to give adequate reasons for results), some institutional (an obligation to defer to the power of another branch of government), some political (a need to avoid involvement in hotly partisan issues), some psychological (a need to recognise the role of individual bias in judicial decision making)".

There are perhaps four particularly important constraining factors which New Zealand appellate judges are likely to have in mind. The first is the need for particular care in reaching conclusions as to social policy and the public interest on the information and arguments furnished by the parties to the litigation where there are social and economic value judgments involved.

Litigation under the adversary process is not an ideal vehicle for conducting an extensive social inquiry. And there are obvious dangers in assuming from our own reading and research, however wide, that we fully appreciate the economic and social implications of alternative approaches. However, if lawyers are trained to think through every ramification of a problem (an assumption which outside observers of the judicial process are not always prepared to make), they ought to be able to inform themselves of the social policy implications of the alternatives. The problem then lies not so much in an inherent inability on the part of the courts to assess social data as in the difficulty of ensuring that the relevant material is before the court. That is a difficulty. There may be serious gaps in the material furnished to the court; and the techniques of requiring supplemental

2 White *The American Legal Tradition* (Oxford, 1976) 371-372.

briefs from the parties and amicus curiae briefs from government and affected industry and citizen groups have not been developed in New Zealand. It is true that we may properly take judicial notice of a range of factual material and that section 42 of the Evidence Act 1908 allows generous reference to such published works as we consider to be of authority on the subjects to which they relate so that a wide range of statistical and economic and social data may be considered under that rubric. At the same time we must be cautious in the weight we give to material of that kind which has not been subject to scrutiny on the argument of the appeal or in the High Court. We must be cautious too in moving in new directions without a solid foundation in the argument of counsel. And — unfortunately in my view — many counsel still seem somewhat reluctant to explore wider social and economic concerns; to delve into social and legal history; to canvass law reform committee materials; to undertake a review of the general legislative approach in New Zealand to particular questions; to consider the possible impact of various international conventions which New Zealand has ratified; and so on. For reasons of the kind I have just been outlining there is a need for particular care in reaching conclusions as to social policy and the public interest.

The second constraining factor is that any legal change through the adjudication process is at the expense of some certainty and stability. People need to know where they stand. What the law expects of them. So the body of legal decisions of the past should be a reasonably reliable guide for them in that respect. Obviously that is important to the commercial community. Obviously too it is a matter of general concern if a major judicial change defeats legitimate expectations in any area of our lives — and particularly is this so because of the retrospective impact of judicial change. What may be said in partial answer is that any social change reflects an assessment that the obtaining of a socially just result outweighs the need for certainty and predictability in the particular case. And that judge-made changes are rarely totally unexpected.

A third constraint sometimes put forward is that judges are not directly accountable to the public will as are politicians. They never have to put their acceptability to the test of re-election. They never have to justify their decisions in public debate. And it is often also argued from this premise that the control of the abuse of power is essentially a political question which the judges, respecting the supremacy of Parliament and the separation of powers, should not attempt to decide. Judges who do not accept that limitation of their role must still have these accountability considerations in mind in drawing the line between interpreting statutes and developing the Common Law on the one hand and legislating on the other.

The fourth is that they are not necessarily reflective of society in their attitudes. There are no women on the Court of Appeal or High Court (and never have been), no Maoris, no one under 50. We are not representative in that sense. Not that we could ever have a court of limited numbers which in its membership balanced all the interest groups in our society. What is more important is that our judges fully appreciate the nature and complexity and directions of the New Zealand society of the 1980s.

In this regard it is often said by our critics that our training with its emphasis on the precedents of the past makes judges conservative and old-fashioned in their thinking and that the lawyers who tend to become judges have usually led middle-class lives and have acted for and embodied the values of their monied clients. True, as trial judges they may have seen a cross-section of society as witnesses, jurors and litigants. True, they may have some experience and understanding of the functioning of bureaucracies. Nevertheless they are not currently and directly involved at first hand in social and political issues.

Well, that is what is often said. And, of course, we are all influenced and limited by our backgrounds. Lord Devlin makes this point in his latest book *The Judge*[3]: that in the past judges looked for the philosophy behind the statute and what they found was a Victorian bill of rights favouring the liberty of the individual, the freedom of contract, the sacredness of property and a high suspicion of taxation. He went on to say that it is silly to invite the judges to make free with Acts of Parliament and then abuse them if the results are unpleasant to advanced thinkers. Now I certainly would not brand all judges as reactionaries or even conservatives and I do not think that is what Lord Devlin had in mind. What is important is to recognise that the judges are not directly representative of our society in the same sense as are the politicians. They should not be seen as a political force prepared to move into action to undermine the government of the day; and whether of the left or the right. At the same time, the courts must stand between citizen and citizen and between the citizen and the state, and not abdicate responsibility for correcting the abuse complained of to other branches of government. Parliament is then free at any time to deal with the matter for the future by appropriate legislation.

If a judge is to make these value judgments it seems to me important that he should have a frame of reference against which to probe and test the economic and social questions involved. The identification of community values and their reflection in judicial decisions is relatively straightforward where society is homogeneous and there is a single set of values which are held by a great majority of people. That is where there is a clear consensus. And there may be a consensus in relation to particular issues but not to others. For example, despite the occasional criticisms of judicial initiatives in developing procedural safeguards in public law fields, I doubt if there is wide disagreement in New Zealand as to the manner in which the courts have developed the principles of natural justice and fairness. But that may be partly because those principles have an immediate public appeal; and as in so many areas we could benefit from expert advice as to the social and administrative costs of the kinds of orders we are being asked to make. Again, judged simply in terms of public response it seems that the development of the modern law of negligence by the courts has by and large been well accepted. There too it would be useful to have an analysis of the costs to society of those developments — for example in shifting the economic burdens of careless advice and omissions on the part of employees of local bodies on to the ratepayers.

3 Devlin *The Judge* (Oxford, 1979) 15.

So even in those areas where there may be apparent general agreement with judicial initiatives there are further considerations which the judges need to have in mind. And the problem of identifying community values and reflecting them in judicial decisions becomes much more difficult where society is clearly divided on the particular issue: where there are different sets of values — whether economic, moral, political or social — which are strongly, even tenaciously, held.

The point is that a judicial decision is not an empty exercise. The authority and power of the state are invoked. A judge's choice of values in reaching a decision will sometimes involve the acceptance of one set of values and the rejection of another. And a failure to articulate the alternatives may reflect a disguised preference for one set of values, usually the status quo. Thus in a certain proportion of the cases coming before the courts, a judge will be involved in social change and in resolving conflicts between competing social values. This is inevitable in a pluralistic society. In so acting judges are shaping the law to meet the aspirations and necessities of the times. Thus, speaking now of New Zealand, we must recognise that affirmative government is a feature of New Zealand life; that change and continuity sit uneasily together; that we are a multicultural society and in many areas we cannot draw on universally accepted values; and that justice in the abstract cannot always be achieved. In some cases social awareness is just as important as technical competence.

This brings me finally to judgment writing in this type of case. The duty of the judge to give adequate reasons for his decision is a protection to all concerned. Judgments are addressed not only to the parties who are primarily concerned with the result and the immediate reasoning leading to it, but also to other judges, to practising and academic lawyers and to the wider public who may be as concerned with the implications of the reasoning for the future as they are in the result of the particular case. If the extended reasoning as well as the end decision are open to comment and criticism, the focus is then, as it should be, on the reasons for the decision rather than on the exercise of judicial authority. And in articulating public policy in our judgments we must, I think, rely on low-key, rational argument, drawing where we can on commonly held values, and, in those areas where choices are required, on overriding social goals with which readers can identify.

There is a need in a democracy such as ours to strike the right balance between the respective roles of the judicial branch of government, the legislature and the executive. Inevitably there will be frictions. New Zealand judges cannot expect to play what I believe is their constitutional role in developing the law to meet changing social needs without being subject to principled criticism — and at times unprincipled criticism. That, after all, is the price of involvement in contemporary issues of social importance.