

Interweavers: The Contribution of the Judiciary to New Zealand Law

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When I first spoke to Sir Geoffrey about giving a paper at this conference (his idea, not mine), I thought I was being asked to speak about the contribution of judges to law reform. It was something of a shock to see that the programme had me addressing the grander and more daunting topic of “the contribution of the New Zealand judiciary to New Zealand law”. At least, *I* thought it was a daunting topic. On Wednesday, at the swearing in of the new Governor-General, I mentioned to a senior member of the government that I would have to slip away early to get going on what I was going to say today. She was brisk. “The contribution of New Zealand judges to law? That’s easy. Judges apply the law.” Well, of course, that’s true, but the difficult question is how judges identify what the law is they must apply. That requires consideration of judicial function and how judges fit into a wider conception of law.

The Law Commission was set up to keep under review in a systematic way the law of New Zealand. At the insistence of its first President, Sir Owen Woodhouse, its function was wider than law reform. I am not sure that the point he was making is in itself one of substance. Law is always changing and reforming. So a Law Commission cannot help but be a law reform commission.

Change, in the end, has to be justified against the existing legal order. Lord Radcliffe thought that any discussion about law reform “ought to come round in the end to the question: what place are law courts going to occupy in a society of the future?”¹ Equally, the question of law reform in the end takes us to an examination of the role in law-making of legislatures, law reform agencies, government departments and the wider community in law. Change in law cannot be separated from our concept of law – and it cannot be separated from our view of our society.

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¹ Cyril John Radcliffe “The Place of Courts in Society” in *Not in Feather Beds* (H. Hamilton, London, 1968) 34.

Though in substance it may not have mattered greatly that we have a Law Commission rather than a Law Reform Commission, as a matter of presentation I think Sir Owen was right to require emphasis on the law as a whole. That is because reform of law is popularly identified with legislative enactment. A view that law is comprised only of enacted legislation is an inadequate understanding of law. Equally, a concentration on legislation to the exclusion of other sources of law is an incomplete strategy for a law reform agency. It is a pitfall that the New Zealand Law Commission has avoided. A conference to mark its first 20 years should therefore push us to reflect on the bigger picture of law in New Zealand.

Although it is no doubt convenient to divide up the wider topic of New Zealand law according to those who contribute in different ways, what I want to concentrate on in speaking of the judicial contribution to law in New Zealand are the connections rather than the differences between judicial decision-making and the other sources of law. Roger Traynor once described courts as “interweavers” in the making of law² and I have taken that as my theme. I do not intend therefore to examine at any length the entrails of New Zealand cases for indications of a distinct New Zealand common law. That is a topic others have explored. I find it less interesting than how we have gone about the business of law-making in New Zealand and how all of us contribute to a concept of law that is bigger than any of its constituent parts.

So I do not intend to rehash here at any length the stale question whether judges make law. Few lawyers doubt it. The topic that I have been given assumes that judges do contribute to the development of law and not, I suggest, simply by provoking legislative reaction or providing input into legislative law reform processes. Lord Bingham has said judges cannot help but make law. He did not mean that they could not help themselves and were incorrigible. Rather, he points out that even a decision of a final appellate court that rejects change makes law because it puts up a highly authoritative roadblock.³ If in *Donoghue v Stevenson*⁴ the majority had been 3:2 against tortious liability (instead of 3:2 in

² Roger Traynor “The Courts: Interweavers in the Reformation of Law” (1967) 42 Cal St BJ 817, reprinted in Roger Traynor *The Traynor Reader: A Collection of Essays by the Honorable Roger J. Traynor* (Hastings College of Law, San Francisco, 1987) 121.

³ Rt Hon Sir Thomas Bingham “The Judge as Lawmaker: An English Perspective” in Paul Rishworth (ed) *The Struggle for Simplicity in the Law: Essays for Lord Cooke of Thorndon* (Butterworths, Wellington, 1997) 3.

⁴ *Donoghue v Stevenson* [1932] AC 562.

favour of such liability), the decision would still have made law. Sir Anthony Mason said of a judge who was overheard to say that he had never made law, that he almost certainly had made bad law, if he did not know what he was doing.⁵ Judges have at times disclaimed any law-making function, perhaps more as a matter of presentation than a matter of conviction. They may well have contributed to public misunderstanding on the score. It has to be acknowledged that in non-legal circles the notion that judges make law often causes surprise. It may be that our own legal history makes us particularly vulnerable to such misconceptions.

Although the English common law arrived in New Zealand in 1840,⁶ the circumstances of settlement meant that we have always depended heavily upon statute law. That is a characteristic shared with other former colonies where the legal infrastructure was sparse.

In New Zealand at 1840, the legal infrastructure was non-existent. In 1839 James Busby had written:⁷

It is not, I fear, easy for one who has never lived beyond the supremacy of established laws, and the exercise of undisputed authority, to form a just conception of a state of things where neither law or authority has existence.

The Instructions to Hobson had advised him to look to the laws of other colonies for precedents in how to adapt English law while retaining its “spirit”, but “servile adherence to them as precedent” was discouraged “except as far as the similarity of circumstances may allow”.⁸ These precepts seem to have been taken to heart by that extraordinary trio who arrived in New Zealand on the *Tyne* in 1841: William Martin, the first Chief Justice; William Swainson, the second Attorney-General; and Thomas Outhwaite, the Registrar of the Supreme Court. Certainly, the first Ordinances the trio drafted were received in London with astonishment. They were radical measures which, in anticipation of reforms which would not be achieved in England for decades, fused law and equity, and greatly simplified English conveyancing and property law. The initial Rules of the new Supreme Court were in the same mould. They replaced the rigidity of English pleading with oral complaints upon which

⁵ Anthony Mason “The Judge as Lawmaker” (1996) 3 JCULR 1, 2.

⁶ Originally the common law attached as a matter of common law doctrine. Its attachment was later confirmed by s 1 of the English Laws Act 1858, which settled the date of reception at 14 January 1840.

⁷ James Busby, to Lord Glenelg (25 Feb 1839) Letter.

the judge was required to “elicit the point in issue by examination of the parties or their solicitors” in private. That experiment did not survive. Pretty soon we were back to formal written pleadings, although thankfully they never quite matched the technical complexity of English pleadings.

Between December 1841 and March 1842, the Legislative Council passed nineteen Ordinances. The Chief Justice was fully engaged in their drafting. Some measure of the role he played is indicated in a letter Henry Sewell wrote in 1857 on the subject of a replacement Chief Justice:⁹

...we want not merely a lawyer, but a Gentleman of high principles, and good tone, who will exercise a salutary influence on the Colony, socially, as well as do his judicial work properly. He should also have a constructive mind, and be ready to do what the Colony most wants, viz. form and improve the law. The Court work of a Colonial Judge is so little as to be of comparatively small account, but the law making work would occupy the mind and time of a very superior man.

Cornford suggests that Swainson had probably sought Martin’s advice on much of the legislation which was passed in the early Crown Colony period touching the administration of justice. His successor, Sir George Arney, was also closely involved in the development of legislation, even being a member of the Upper House early in his period of office as Chief Justice.¹⁰

Our early reliance on statute law has continued. Perhaps as a result, the role of judge-made law may have been partly eclipsed in popular consciousness. We have remained comfortable with legislative amendment and restatement of core common law subjects, as the contractual reforms of the 1970s demonstrate. Our legislature at times has had an enormous output, sometimes of pioneering law reform without parallel in other jurisdictions. In many such reforming statutes, the legislature has been content to confer wide jurisdiction upon the courts, which have been left to develop principles for their implementation in application of common law method. Where legislation has been passed in areas developed by common law, the impulse has often been to achieve systemisation and accessibility rather than reform of the

⁸ Lord John Russell, to William Hobson (9 December 1840) Letter. Published in Great Britain Parliamentary Papers *Correspondence Respecting the Colonization of New Zealand* NZ 3 (1841) (311) XVII 24, 25.

⁹ Quoted in P A Cornford “The Administration of Justice in New Zealand 1841-1846: (A Legislative Chronicle) [Part I] The Fisher Period” (1970) 4 NZULR 18, 34.

¹⁰ Cornford, above n 9, 34.

law. It is rare to detect in such legislation any suspicion about judicial function. Rather, what emerges is a working relationship between statute and common law method in which both combine to produce New Zealand law.

For their part, the New Zealand courts have generally been free of the suspicion that in other jurisdictions has hampered legislative initiative. On occasions there has been some resistance to social legislation. The treatment of the Matrimonial Property Act 1963 is perhaps an example. We have not had experience of the sort of obstruction Roosevelt encountered from the Supreme Court in relation to the New Deal legislation. Nor have we had the sort of hyper-vigilance shown by the English judges Lord Devlin describes, in application of what he describes as a “Victorian Bill of Rights”. It favoured the liberty of the individual, the freedom of contract and the sacredness of property and was highly suspicious of taxation:¹¹

If the Act interfered with these notions, the judges tended either to assume that it could not mean what it said or to minimise the interference by giving the intrusive words the narrowest possible construction, even to the point of pedantry.

In addition to our greater dependence on legislation, the circumstances of settlement and our small society have meant that our judges, from William Martin onwards, have not been aloof from the work of the executive and legislative. Sir Robert Stout, of course, wore all hats at different stages and was responsible for significant legislation, including the Testator’s Family Maintenance Act. Before his appointment, Sir John Salmond had consolidated the statute book and set Maori land law in its present form. After his appointment, he played a significant role in making international law when he represented New Zealand at the Washington Conference on the Limitation of Armaments in 1921-22.

It is true that Sir Michael Myers, when Chief Justice, took the view that it was inappropriate for judges to serve on the Law Revision Commission set up in 1937 and its subcommittees. That policy was reversed under Sir Richard Wild without apparent damage to judicial independence. Judges have continued to serve on Royal Commissions, the law reform committees, and the Law Commission (after its establishment) ever since. The work has included social reform as well as reform of legal issues, as the contributions made by Sir

¹¹ Patrick Devlin “The Judge as Lawmaker” in *The Judge* (Oxford University Press, New York, 1979) 1, 15.

Thaddeus McCarthy to state services, Sir Owen Woodhouse to reform of accident compensation and Sir Ivor Richardson to social justice illustrate.

Writing extra-judicially, Sir Ivor Richardson, whose non-judicial contribution to New Zealand law has been immense¹² has expressed the view that it is not inconsistent with judicial office for a judge to serve in a governmental capacity:¹³

...if the reason for his appointment is the need to harness to the task in question the special skills which the judge should possess, characteristically, the ability to dissect and analyse evidence, appraise witnesses, exercise a fair and balanced judgment, write a clear and coherent report, and so on.

It has not been a one-way street. Perhaps our most successful law reformer, Sir Kenneth Keith, ended up being a judge (and a good judge too). As a result of such exchanges, I think we have a legal culture which has been respectful of the work of other parts of government and in which the judiciary contributes to good government in its widest sense.

Our small society and the close connection with other arms of government may have made us more willing to wait for legislative correction of common law at times. We appreciate that the legislature is in a better position to determine questions of social policy and that judicial method, when dealing with actual cases, is often inadequate to identify all facets of a problem and develop appropriate qualifications to initially appealing solutions. New Zealand judges appreciate that there are limits to what is appropriate for judicial function in keeping the common law abreast of modern conditions. They know that modern society prefers to see elected representatives consider significant shifts in law. I think, generally speaking, New Zealand judges have picked their way well in the minefield between what is appropriate for judicial correction and what for legislative correction of common law.

A second benefit for New Zealand law in our emphasis on legislation has been that some of our more able legal minds have put their energies into legislative reform rather than private professional practice or judging. They have seen how worthwhile contribution to

¹² While on the bench, he was, for example, Chairman of the Committee of Inquiry into Inflation Accounting (1975-6), Chairman of the Royal Commission on Social Policy (1987-88) and conducted a review of the Inland Revenue Department (1993-4).

¹³ Comment on "Why be a judge?" (New Zealand Judges Conference, Dunedin, 1996).

good legislation has been in our legal system. That has been emphatically for the good of New Zealand law.

After the initial period of legislative flowering,¹⁴ it is true that we went into a time of slavish imitation of English legislation.¹⁵ By the 1960s innovative legislation was again a feature of New Zealand law, with an emphasis on what Sir Kenneth Keith has described as “principled and far-ranging reform”.¹⁶ In *Law in a Changing Society* in 1965, a reforming Minister of Justice, Ralph Hanan, laid out a platform for the future. He identified a fundamental cause of the inadequacy of law reform at the time to be the view that “important changes in the common law should not normally be made except in accordance with changes that have taken place in England”. That, he said, was “not good enough”.¹⁷ Under J L Robson as Secretary of Justice, the Ministry of Justice became a magnet for able and committed reformers such as Jim Cameron,¹⁸ later one of the initial members of the Law Commission.

The performance of the courts, it has to be acknowledged, was not as innovative. Cameron has suggested that, despite some stirrings, New Zealand case-law demonstrated “essentially derivative thinking and a narrow application of precedent” for much of the 20th century.¹⁹ J L Robson, writing in 1954, referred to the “settled policy of the New Zealand courts to follow English decisions”.²⁰ As a result of this fidelity he considered that it was only in legislation that a distinctive New Zealand law could be discerned. That verdict is confirmed in an article written by R B Cooke in the 1956 New Zealand Law Journal criticising the New Zealand judiciary for “unquestioning compliance” with English case law.²¹ He advocated closer examination of academic criticism of English case law and consideration of the views of judges from other jurisdictions, including the United States.

¹⁴ Described in Rt Hon Sir Kenneth Keith “Law Reform” in Ian Barker and Graeme Wear (eds) *Law Stories: Essays on the New Zealand legal profession 1969-2003* (LexisNexis, Wellington, 2003), 354.

¹⁵ Described in B J Cameron “Legal Change over Fifty Years” (1987) 3 *Canta LR* 198.

¹⁶ Keith, above n 14, 357.

¹⁷ J R Hanan *The Law in a Changing Society* (New Zealand Department of Justice, Wellington, 1965) 20.

¹⁸ See the tribute paid to Cameron by G S Orr in “Law reform and the legislative process” (1980) 10 *VUWLR* 391.

¹⁹ Cameron, above n 15, 210.

²⁰ J L Robson *The British Commonwealth: the development of its laws and constitutions – New Zealand* (Stevens, London, 1954) 339.

²¹ R B Cooke “The Supreme Tribunal of the British Commonwealth?” [1956] *NZLJ* 233, 235.

With the setting up of the permanent Court of Appeal, the contribution of the New Zealand judiciary to a distinctive New Zealand law became more marked. The judges were, it must be said, in part galvanised by the reforming legislation of the 1960s. They accepted the challenge to look to New Zealand solutions for New Zealand legal problems.

*Corbett v Social Security Commission*²² was an early blow for emancipation from English precedent. A majority in the New Zealand Court of Appeal declined to follow the decision of the House of Lords in *Duncan v Cammell Laird & Co*,²³ holding that a Minister's certificate was not conclusive as to whether relevant documents should be withheld for reasons of confidentiality. In *Jorgensen v News Media (Auckland) Ltd*²⁴ the Court of Appeal refused to follow the decision of the English Court of Appeal in *Hollington v Hewthorn*.²⁵ In *Bognuda v Upton & Shearer Ltd*²⁶ the Court of Appeal thought it absurd to apply the long-standing House of Lords precedent in *Dalton v Angus*.²⁷ Woodhouse J there said that, subject only to the ultimate control of the Privy Council:²⁸

[T]he responsibility of this Court is to decide cases upon the law as it has been developed and made applicable here for contemporary New Zealand needs and conditions. We are not bound to follow a decision of the House of Lords and it would be quite inappropriate to do so where the rule in question has been based (as in the present instance) upon a derivative application of principles that unquestionably are inapplicable in New Zealand.

Things have never really looked back. Perhaps especially under the influence of Cooke J and Richardson J (both in turn Presidents), the Court of Appeal has made increasing use of academic criticism and other published information useful for the determination in hand. It has developed an increasingly international outlook, no doubt prodded in that direction particularly by Sir Kenneth Keith. In this respect, the New Zealand judiciary has gone back to its roots. William Martin and Henry Chapman were highly adventurous in their sources in setting up the New Zealand legal system. From the 1970s, in administrative law,²⁹

²² *Corbett v Social Security Commission* [1962] NZLR 878.

²³ *Duncan v Cammell Laird & Co* [1942] AC 624.

²⁴ *Jorgensen v News Media (Auckland) Ltd* [1969] NZLR 961.

²⁵ *Hollington v Hewthorn* [1943] 1 KB 587.

²⁶ *Bognuda v Upton & Shearer Ltd* [1972] NZLR 741.

²⁷ *Dalton v Angus* (1881) 6 AC 740.

²⁸ *Bognuda v Upton & Shearer Ltd*, above n 26, 771-772.

²⁹ *Reid v Rowley* [1977] 2 NZLR 472; *Daganayasi v Minister of Immigration* [1980] 2 NZLR 130; *Bulk Gas Users Group v Attorney-General* [1983] NZLR 129.

equity³⁰ and negligence, the New Zealand Court of Appeal was in the vanguard of common law development.

To what extent, then, can we say that there is a distinctive New Zealand perspective rather than differences arising out of what Sir Anthony Mason (in considering the distinctiveness of Australian law) has described as “intellectual preferences”? There are those who claim to see a distinctive New Zealand outlook. They refer to such qualities as “egalitarianism,”³¹ a liking for “simplicity,”³² a preference for “status” rather than “contract,”³³ a “pragmatism,” a strain of “anti-intellectualism,” faith in “the state” and in wide judicial discretion.³⁴ I have some doubts about this sort of introspection. It seems to express no more than the truism that law reflects the society it serves and speaks with the same accent. The role judges play in setting the tone of our national law seems to me to be minor indeed.

What I think is rather more important is to appreciate that the contribution of the New Zealand judiciary, like the judiciary of any legal system, is essential to New Zealand law. Viscount Radcliffe once suggested, not entirely in jest, that we should find another name for statute law other than “law”.³⁵ Provocatively, he suggested “para-law” or even “sub-law”. The point he was making was the serious one that if law means little more than the “vast and complicated mass of things [a citizen] is compellable to do or not do by virtue of some Act of Parliament or some order or regulation”, then people will adhere to it only for the purely practical reason of keeping out of trouble. If that is so, “something has gone wrong. Some clue has been lost.”

Exactly the same point can be made of the common law if it is reduced to the dreary congerie of unrelated rules discussed by Lord Reid in his celebrated speech on “The Judge as Law Maker”.³⁶ The common law mischaracterised by Lord Tennyson as a “wilderness of single instances”³⁷ is an even more inadequate view of law as is the statute book standing

³⁰ *Day v Mead* [1987] 2 NZLR 443; *Aquaculture Corp v New Zealand Green Mussel* [1990] 3 NZLR 299; *Mouat v Clark Boyce* [1992] 2 NZLR 559.

³¹ Paul Ryan “The New Zealandness of New Zealand Law” (1972) *Anglo-Am LR* 204, 215-216.

³² Sean Baldwin “New Zealand’s National Legal Identity” (1989) 4 *Canta LR* 173, 177.

³³ Ryan, above n 31.

³⁴ See Michael Taggart “The New Zealandness of New Zealand Public Law” (2004) 15 *PLR* 81, 85-86.

³⁵ “Law and the Democratic State” in Radcliffe, above n 1, 45, 47.

³⁶ Lord Reid “The Judge as Law Maker” (1972) 12 *JSPTL NS* 22.

³⁷ *Aylmer’s Field* (1793).

alone. A vision of law as the rule of rules, whether statute-made or judge-made, misses the point of law. Law responds to a deeply held ethical need. Such need is not adequately met by a collection of orders or rules. Law which meets the expectations of our society needs demonstration in actual cases and it needs constant justification.

Neil MacCormick I think expresses an important insight when he says that any adequate overall view of law must recognise that it is “a form of institutionalised discourse or practice or mode of argumentation”.³⁸ It is an “arguable discipline” in which all norms are “defeasible”.³⁹ Statutes, precedents, custom, scholarly writing, professional opinion and international norms are all sources of New Zealand law⁴⁰ and good judicial method draws on them all and is judged against them.

What is critical is to have a sense of the scope of law. Sir Kenneth Keith has suggested that interpretation of a statute requires consideration of “the statute book as a whole”.⁴¹ That is because, as Chief Justice Barak of Israel has recognised, “[t]he interpretation of a single statute affects the interpretation of all statutes.”⁴²

The same is true of the expressions of doctrines of the common law. In *Jones v Randall* Lord Mansfield said:⁴³

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

All rules in our legal system (statutory or common law) must be linked by what Chief Justice Brennan called the “skeleton of principle” to constitute what we call law.⁴⁴ The rules without the principles do not make sense. If rules do not conform to underlying principle,

³⁸ Neil MacCormick “Beyond the Sovereign State” (1993) 56 MLR 1, 10.

³⁹ Neil MacCormick “Rhetoric and the Rule of Law” in David Dyzenhaus (ed) *Recrafting the Rule of Law: the Limits of Legal Order* (Hart, Oxford, 1999) 163, 176.

⁴⁰ Sir John Salmond identified the sources of law as legislation, custom, precedent, professional opinion and agreement.

⁴¹ Sir Kenneth Keith “Sources of Law, Especially in Statutory Interpretation, with Suggestions about Distinctiveness” in Rick Bigwood (ed) *Legal Method in New Zealand* (LexisNexis, Wellington, 2001) 77, 87-89.

⁴² Aharon Barak “A Judge on Judging” [2002] Harv L Rev 25, 26.

⁴³ *Jones v Randall* [1774] Cowp 37.

they are unlikely to last. The principles of law are derived not only from decided case-law but also from what Pound described as the “general body of doctrine and tradition” which is invoked in judgments and “from which we criticise them”.⁴⁵ Although we tend to describe the underlying principles of law in our system as common law, in fact they are derived also from ancient statutes and charters as well as from the body of doctrine that was absorbed into the common law through decisions of the courts. The common law has ancient roots, but many are not English at all. It has borrowed, adapted, travelled, and grown. It is more in debt to the doctrine of the civilians than we often care to acknowledge.⁴⁶ This body of doctrine and tradition must also be ranked as law because it is observed by the judge in the judicial process. It provides yardsticks against which decisions are taken. Most importantly, it provides the analogies by which the common law judge reasons.

Chief Justice Stone of the United States expressed the view that it is the role of judges to express “the idea of a unified system of judge made and statute law woven into a seamless web by the process of adjudication”.⁴⁷ This is the process of “interweaving” of which Traynor wrote.

Because of our history, in New Zealand we have had little difficulty in accepting that both statutes and common law must be made to work without friction. It has been a short step from this acceptance to a willingness to work from statutory analogies in the development of the common law,⁴⁸ discarding worn-out precedents which do not fit with legislative restatements,⁴⁹ or with legislative identification of where the public interest lies.⁵⁰ In that task modern legislative statements of general principles, such as are enacted in the New Zealand Bill of Rights Act 1990 or the Human Rights Act 1993, are providing context for

⁴⁴ *Dietrich v R* (1992) 109 ALR 385, 403.

⁴⁵ Benjamin N Cardozo *The Growth of the Law* (Yale University Press, New Haven, 1924) 37 quoting Roscoe Pound.

⁴⁶ David Ibbetson *A Historical Introduction to the Law of Obligations* (Oxford University Press, New York, 1999).

⁴⁷ Harlan F Stone “The Common Law in the United States” [1936] 50 Harv L Rev 4, 12.

⁴⁸ See *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants and Investigations Ltd* [1992] 2 NZLR 282, 298 (CA) Cooke P; *Lord Advocate v The Scotsman Publishing Ltd* [1990] AC 812; *R v Uljee* [1982] 1 NZLR 561; *Day v Mead* [1987] 2 NZLR 443; *Lange v Atkinson* [1997] 2 NZLR 22.

⁴⁹ *Fletcher Timber Ltd v Attorney-General* [1984] 1 NZLR 290; *Commissioner of Police v Ombudsman* [1988] 1 NZLR 385; *Choudry v Attorney-General* [1999] 3 NZLR 399.

⁵⁰ *Erven Warnick Besloten Vennootschap v Townsend & Sons (Hull) Ltd* [1979] AC 731.

development of New Zealand common law in a manner similar to that provided by the old charters and statutes of England.

We have never had the dissonance between legislative and judicial effort described by Cardozo in 1921 in the United States. There, he said, courts and legislature “work in separation and aloofness,” paying a penalty in wasted effort and the lowered quality of the product of each.⁵¹ The position in New Zealand is also I think different from that described by Lord Steyn:⁵²

In England we have some way to go to a full-hearted acceptance of the fact that common law and statute coalesce in one legal system; statute law draws heavily on the concepts and techniques of the common law and may be developed accordingly; and, the common law may in turn be developed on the basis of the analogical force of statute law. Possibly the constitutionalisation of our public law, devolution legislation and the Human Rights Act 1998 may speed on an even better understanding of and approach to statute law.

Our history has saved us from treating statutes and common law as oil and vinegar in the development of each.

Even so, it needs to be acknowledged that experience suggests that legislative method and judicial method are insufficient for the maintenance of a healthy system of law, at least in a more complex and populous society than existed in the 1840s in New Zealand. Cardozo thought the solution to the problem he identified in 1921 was what he called a “Ministry of Justice”, an agency to mediate between courts and legislature. In New Zealand our need was not mediation between courts and the legislature, but explanation of law to the wider public and systematic review backed up by adequate research. That is why the Law Reform Commission and then the Law Reform Committees were set up and later reformed and why, in their turn, they were replaced by the permanent Law Commission with its greater capacity for research and systematic review and its wider mandate than legislative reform.

An agency for systematic review of common law as well as statute is essential if law is to be kept in repair and abreast of social developments. The capacity of the courts to undertake ongoing review of out of date judge-made law is seriously circumscribed. Sir

⁵¹ Benjamin N. Cardozo “A Ministry of Justice” [1921] 35 Harv L Rev 113.

Anthony Mason has expressed scepticism about the claims of judges (“more likely a Chief Justice” he says) that it is the responsibility of the courts to keep the common law up to date. He points out that such claims overemphasise the role of the courts as lawmaking agencies:⁵³

The fact is that courts do not initiate cases; they exercise jurisdiction only when called upon to do so by a litigant and then they are required to adjudicate upon the litigant’s claim. A court of first instance is bound by the decisions of the courts higher in the hierarchy, and those decisions or the provisions of the relevant statute will provide the determinative principles of law, except in a very rare case. The cases in which a court is called upon to determine whether a principle of law is appropriate to current conditions of society are relatively few. Generally they are High Court cases. So it is a serious misapprehension to think of the courts, even the High Court, as being engaged in some ongoing review of the common law for obsolescence, so to speak.

Judges greatly appreciate the mediation of the Law Commission. It lifts a burden they cannot properly discharge. The absence of machinery for systematic review may also put pressure on judges to overstep the boundaries in changing the common law or interpreting a statute if inconvenient or unjust consequences would otherwise result. There are dangers for judicial method and legitimacy here. *R v Hines*⁵⁴ identifies the benefits for the system of the development of public policy through Law Commission processes, rather than through judicial decision.

Although it is easy to judge a body like the Law Commission by its success in gaining acceptance of legislative reform, it would be a pity if that were the only measure used. Some of the more significant work of the Commission over the last 20 years has been in its explanation of law to the wider community, in its exploration of community values through its consultative processes, and in the publication of contextual information in its research papers. These have been valuable resources for all who make decisions affecting others, including the courts. The Commission’s attention to the machinery of law, only some of which has led to legislation, has been of great help in judicial decision-making. The Interpretation Act and the Imperial Laws Application Act are the sort of legislation policy-driven departments these days have little leisure to develop and yet they are essential

⁵² Lord Steyn “Interpretation: Legal Texts and their Landscape” in Basil Markesinis (ed) *The Clifford Chance Millennium Lectures: the Coming Together of the Common Law and the Civil Law* (Hart, Oxford, 2000) 79, 87.

⁵³ Mason, above n 5, 7.

⁵⁴ *R v Hines* [1997] 3 NZLR 529.

maintenance for the legal system. The *Maori Fisheries* discussion paper⁵⁵ has been an invaluable resource in important litigation. The *Guide to International Law and its Sources*⁵⁶ is a much-needed compendium of information not easily accessible elsewhere. Where legislation has been enacted following Law Commission recommendations, the reports which led to the recommendations provide helpful context.

The public consultation reported in respect of Women's Access to Legal Services⁵⁷ and Maori Legal Entities⁵⁸ are valuable records of views in the community which it is appropriate for decision-makers to know. These processes are important opportunities for the community to participate in law making and to gain understanding about our legal system. Since the ability of the courts to discharge their functions rests ultimately on public understanding, these initiatives support the legal system as a whole. I hope that the Law Commission continues to fulfil this role. It fills an important gap in the making of New Zealand law and our understanding of the context in which it operates. Judges as well as legislators and the executive benefit from this information. Our sources for understanding community values are limited. The days described by Sir Alexander Turner when communication between the Grand Jury and the Judge at the opening of a session of the Court were thought to provide an opportunity to vent public concerns and for the judge to lobby the community for legislative change are long gone⁵⁹ and assumptions by a judge, particularly at times of social and cultural change, are dangerous.⁶⁰

In *Invercargill City Council v Hamlin*, Richardson J was concerned that “[l]egislation must be seen in its social setting and the common law of New Zealand should reflect the kind of society we are and meet the needs of our society.”⁶¹

The work of the Law Commission helps judges to realise this aspiration.

⁵⁵ New Zealand Law Commission *The Treaty of Waitangi and Maori Fisheries – Mataitai: Nga Tikanga Maori me te Tiriti o Waitangi* (NZLC PP 9, Wellington, 1989).

⁵⁶ New Zealand Law Commission *Guide to International Law and its Sources* (NZLC R 34, Wellington, 1996).

⁵⁷ New Zealand Law Commission *Women's Access to Legal Services* (NZLC SP 1, Wellington, 1999).

⁵⁸ New Zealand Law Commission *Waka Umanga: A Proposed Law for Maori Governance Entities* (NZLC R 92, Wellington, 2006).

⁵⁹ Alexander Turner “Changing the Law” (1969) 3 NZULR 404, 406-407.

⁶⁰ A point made by M H McHugh in “The Judicial Method” (1999) 73 ALJ 37, 46. See also Mason, above n 5, 7.

⁶¹ *Invercargill City Council v Hamlin* [1994] 3 NZLR 513, 524 (CA) Richardson J.

One American commentator has compared the different approaches to judicial function to the different styles of baseball umpires:

There's the "I call it as I see it" approach.

There's the "I call it as it is" approach.

And there's the "It has no existence *until* I call it approach".

These describe ascending levels of self-confidence, or perhaps self-delusion. I am content to put the function of judges on the most modest of these levels. Calling it as we see it is about all that fallible humans can do. How we see it is everything. Sir Kenneth Keith is fond of quoting Matthew Arnold's description of the huge moral virtue of Sophocles in striving always "to see life steadily and see it whole". The whole of the law is difficult to see. It requires collaborative effort to be virtuous in this way. Judges contribute to law in New Zealand – but their part is part only.