F W GUEST MEMORIAL LECTURE

THE DYNAMICS OF THE COMMON LAW

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Francis William Guest, MA, LLM, was the first Professor of Law and the first full-time Dean of the Faculty of Law in the University of Otago, serving from 1959 until his death in 1967. As a memorial to Professor Guest, a public lecture is delivered each year upon an aspect of law or some related topic.

INTRODUCTION

Professor Frank Guest was a student of jurisprudence who was concerned with the practical application of law. His legacy of scholarship, practical commonsense and sound judgment has had much to do with the quality of the Otago Law School and the strength of the Dunedin profession.

It would never have occurred to Professor Guest to describe Balclutha as his turangawaewae. And yet the challenge of adapting the law to keep it relevant to today's pluralist society would have been irresistible to him. It is my good fortune not only to enjoy our common geographical roots but to share with his colleagues and successors some thoughts about the dynamics of the common law in New Zealand – both some of the changes that can and must be made and certain of the limits upon that process.

It is a high privilege to join you this evening among the shades of Sir Joshua Williams, Sir Robert Stout, Sir Francis Adams, Professor Guest and other distinguished members of our profession – you form an apostolic succession of which even the Founding Fathers of Otago would have approved.

DISCLAIMER

The spectacle of a practitioner grappling with legal theory brings to mind Dr Johnson's remark in another context – it is "like a dog's walking on its hinder legs. It is not done well; but you are surprised to find it done at all".[1] Such is clearly the view of the distinguished scholar of jurisprudence Joseph Raz:[2]

> Nothing prepares [judges] to rethink radically the fundamental assumptions on which the law is based. Similar observations apply to the submissions before the courts by the [counsel] of the litigants.

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1 Boswell's *Life* Vol 1, 463.

2 *The Authority of Law* (1979) 197 (hereafter "Raz"). I have found the lucidity of his thinking a valuable curb upon my own.

You have been warned. Perhaps this is why to a practising lawyer some of legal theory appears either too narrowly specific or lacking real relevance, when measured against the acid test of particular cases. And yet the tendency of practising lawyers to leave thinking about law to our academic colleagues, rather than brave the currents of today's academic thought, is stultifying.

Whether one regards Economic Theory as a variant on Le Bourgeois Gentilhomme's discovery that he had been speaking prose all his life; whether one has suspicions that Critical Legal Theory is all about the Emperor's clothes; and whether or not one is equipped to comprehend that "$(L-Rx, \phi)$ & $(-L-Rx, \phi)$ is a contradiction"[3] the cost of living in the past is a high one. With a Court of Appeal critical of counsel who:[4]

> 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

they fall behind at their peril.

Neither academic nor practising lawyers can afford to let their discipline be divorced from what is happening about them – whether social events or ideas. To the extent that the law fails to meet society's demands it and those who study and practice it are at best irrelevant and at worst an expensive source of grave injustice, which members of that society will not long tolerate.

The need to de-mystify the law and examine how it does and should work is important for at least two reasons.

- Law is not the personal fiefdom of the profession – academic and practising. It is the property of the community at large. If they feel isolated from it it cannot perform its functions.
- Unless the profession expose themselves to the facts of life and insights available only from outside their own number, the common law will become arcane and increasingly irrelevant to society's needs.

And so perhaps the inadequacies of this address, as an attempt to look at how the profession – academics, practitioners, and judiciary – should go about revising the common law, will serve to make its essential point: of the need to continue debate on these important matters until inadequacies on both sides are cleared away.

The Functions Of The Common Law

I use "common law" in its widest sense, as the judge-made component of our legal system.

3 Raz, op cit n2, 76.

4 Sir Ivor Richardson, "The Role of Judges as Policy Makers" (1985) 15 VUWLR 46 at 50. The first use of the Brandeis brief occurred in *Muller* v *Oregon* 208 US 412 (1908): Abraham *The Judical Process* (4th ed, 1980) 203.

No one really believes that Montesquieu's notion of the separation of powers applies to Westminster type systems of Government.[5] An executive which by Order in Council promulgates some 1648 pages of legislation a year[6] and which exercises total control over the legislature[7] is about as distinct from it as is gin from tonic after they have been swallowed.

It is also realised in a general way – at least since the aphorism of the great Holmes about the absence of a brooding omnipresence in the sky[8] – that there is no rational argument that judicial law making does not occur. But there is a deep seated feeling that this is wrong; that the law maker's role is for the duty elected legislature; and that it is incompatible with the judicial function.

Even Holmes was sufficiently a prisoner of his profession's thinking to argue that "Moral predilections must not be allowed to influence our minds in settling legal distinctions."[9] Such an attitude undoubtedly underlies the New Zealand Law Society's submissions against the enactment of a Bill of Rights and also accounts for many of the existing deficiencies in the common law.

The truth about judicial law making is – as so often – concealed by failure to articulate the point specifically.[10] In fact the proposition about the law maker's role is both right *and* wrong, depending on the context to which it is applied.

Many conventional theorists are so many latter day Medes and Persians whose law changes not, seeing legislation as containing the answer to all social conflict, so that those who interpret the laws have but to exercise sufficient energy and intellect to be able to discern an objectively correct answer to any problem.

Mostly it *is* the business of Parliament to make laws and for the courts to enforce them. The unhappy memory of the United States' Supreme Court's resistance to the New Deal legislation is an abiding one. Yet in many instances both Parliament and the Executive lack the capacity and also the interest to legislate appropriately for society's needs. If the courts fail to do so, society is the poorer.

It is worth examining what the law actually does. Raz[11] has described the functions of law as including

5 cf 8 *Halsbury's Laws of England* (4th ed), para 813 n 2.

6 New Zealand Statutory Regulations 1985 (the latest bound set).

7 See generally Crossman's introduction to the 1962 edition of *The English Constitution,* Bagehot's classic work of demystification exposing the distinction between the theoretical and actual control of government.

8 *Southern Pacific Co.* v *Jensen* 244 US 205 (1916), at 222. See Sir Ivor Richardson "Judges as Lawmakers in the 1990's" (1986) 12 Monash ULR 35.

9 *The Common Law* (1963 ed.), 118. But he had earlier taken the point that: "The law does still and always, in a certain sense, measure legal liability by moral standards [and] is continually transmuting those moral standards into external or objective ones." (ibid 33.)

10 Compare Dworkin "Bork The Radical" *New York Review of Books,* 13 August 1987, at 8. "So everything depends on the level of generality a judge chooses as the appropriate one . . ."

11 Raz, op cit n 2, 169-176.

(a) primary functions, which contain the reason and justification for the existence of the law

- preventing undesirable behaviour and securing desirable behaviour
- providing facilities for private arrangements between individuals
- the provision of services and the re-distribution of goods
- settling unregulated disputes

(b) secondary functions, being those of the maintenance of the legal system comprising procedures for enforcing the law and for changing it.

There may be added the fundamental function of establishing the basis of the legal system – Kelsen's basic norm or Hart's rules of recognition.

I propose to consider in relation to some of these the respective roles of statute and common law.

The first primary function – preventing undesirable behaviour and securing desirable behaviour – is served essentially by the criminal law and the law of torts. The former, which can be traced back to the Twelve Tables and beyond, was in English law an amalgam of statute and common law. In New Zealand criminal law has been taken over almost entirely by the former[12] which has developed a plethora of criminal and quasi criminal offences.[13] The unsuccessful attempt of the Law Lords in the *Ladies Directory* case[14] to constitute themselves *custodes morum* suggests that the creation of new offences is a matter better left to the legislature. The court's function of construing legislation is considered later.

The law of torts, despite some statutory overlay[15], has largely been left to the common law. Imaginative development of the concept of negligence has enabled New Zealand law to develop and keep pace with the needs of modern society.[16] It displays the classic process of renewal of the common law described by Levi[17], from disparate cases to synthesis. See too the adoption in *Mt Albert Borough Council* v *Johnston*[18] of a discoverability

12 See however Crimes Act 1961 s20.

13 The advantage of reserving the criminal category for offences of moral gravity and dealing with purely regulatory ones by an alternative system – such as complaint – has largely escaped the attention of the legislature. Compare however Post Office Act 1959 s156.

14 *Shaw* v *DPP* [1962] AC 220.

15 and the intractable question of so-called breaches of statutory duty.

16 The prospect of the Judicial Committee's reversing *Takaro Properties Ltd* v *Rowling* [1986] 1 NZLR 22, on the basis that the law should go no further than *Dunlop* v *Woollahra Municipal Council* [1982] AC 158 in redressing public sector damage to a member of the public, raises a real question as to its retention. Compare the more realistic attitude of the French *Conseil d' Etat* described in Abraham, op cit n 4, 285.

17 *An Introduction to Legal Reasoning* (1948) 8-27. See also the judgment of the newly established permanent Court of Appeal of New Zealand in *Bognuda* v *Upton & Shearer Ltd* [1972] NZLR 741 rejecting the anachronistic Lord's decision in *Dalton* v *Angus* (1881) 6 App Cas 740.

18 [1979] 2 NZLR 234.

test for time limitation of claims, avoiding the unfair result of a cause of action's becoming statute barred before it was known to have accured.[19].

The paradigm of the next function – providing facilities for private arrangements between individuals – is of course the law of contract.

In every aspect of the judicial process there is a tension between two values recited in the judicial oath: *"I will do right . . . after the laws and usages of New Zealand."* Dr Sealy, wearing his English jersey, puts these matters in focus within that setting.[20].

> The commercial law of this country is something that we have every reason to be proud of. It is one of the truly great English achievements; and a London audience does not need to be told what a very high percentage of the commercial disputes that are daily litigated or arbitrated in the City involve a foreign party . . . Both our legislators and our judges have plainly acknowledged the need from time to time to make a change or correct an unhappy trend in the law so that it could continue to respond to and reflect commercial needs . . . . The Consumer Credit Act 1974, for instance, introduced a comprehensive code of regulation for the provision of credit, but its scope was clearly restricted to *individual* debtors and to the supply of credit under £5,000. In other words, the Act has ensured by these rather arbitrary cut-offs that the law should not interfere – whether by imposing more formalities and paper work, or more statutory rules and restrictions, or by giving wide discretionary powers to the courts – when one business concern meets another business concern to settle some financial deal between them.
>
> [So also with the courts] one can find many passages in the cases which say, in effect: 'Whatever wisdom there may be in the courts' having power under the general law to review peoples' bargains so as to relieve a less fortunate party from some particularly harsh or onerous consequence of his deal, however attractive it may seem to be able to grant remedies in a contractual context by seeking in our discretion to do what is fair with the wisdom of hindsight, we realise that the business world does not want its transactions to be messed about in this way'.

In modifying the common law it would make for great inefficiency if settled doctrines concerning banking, trade and shipping practices were dismantled to achieve a supposedly "fairer" result in a particular case.

The common law of contract, recently re-stated by the wisdom of Lord Wilberforce, gives due recognition to the actual circumstances by admitting evidence as to the matrix of fact as bearing upon construction of a contract.[21]

At the same time, in order to do justice, the common law is able from its particular experience of specific cases – as Parliament is not – to create an appropriate range of sophisticated legal categories. For example, in the case of "implied terms" the law now distinguishes sharply among three different concepts confusingly given the same label. The first is what could

19 cf *Cartledge* v *Jopling* [1963] AC 758 where the House of Lords quite wrongly blamed the legislature for requiring an unjust result. The consequence has been piecemeal legislation and the sad history of *Pirelli's* case [1983] 2 AC 1 and its aftermath. In fact the Limitation Act referred simply to "the date when the cause of action accrued" and its accrual was a matter for the common law to determine. Compare the US jurisprudence: *Urie* v *Thompson* 373 US 163 (1948) and its successors.

20 *Company Law and Commercial Reality* (1984) 3-4.

21 *Prenn* v *Simmonds* [1971] 3 All ER 237, 239-240; *Reardon Smith Line Ltd* v *Hansen-Tangen* [1976] 3 All ER 570, 574.

be called "inferred terms": only those which are in fact available to be deduced from the parties' language within its factual matrix. The second is where a term must be imputed where the contract would not otherwise work. The third is where the contract establishes a certain relationship in which the general law imposes terms even though in a particular case the obligation would not have been agreed to and the contract would work without it.[22]

In this as in other areas of law the developing distinct quality of New Zealand jurisprudence requires to be given due weight. Despite criticisms of the introduction of avowedly discretionary powers as by the Illegal Contracts Act, the Contractual Remedies Act and the Contractual Mistakes Act (in my view the arguments against these measures overstate the certainty of much of the previous regime) they are now part of New Zealand law. The policy which they evince entails a distinct shift away from the notion of rigid certainty (and therefore inflexibility and on occasion injustice) to a regime of greater concern with the particular circumstances of the contracting parties. While the interests of certainty and (particularly where there is an overseas element) congruity with other legal systems is high, there will be occasions when New Zealand law will properly be construed as offering greater flexibility than might be found in other legal systems.[23]

In my view the difference in result between the judgments of the Court of Appeal and of the Judicial Committee in *Aotearoa International Ltd* v *Scancarriers A/S* is not attributable to error of principle on the part of the Court of Appeal. Its decision, although sophisticated, gives effect to the objective intentions of the parties as apparently expressed. Rather the Judicial Committee's conclusion is Procrustean – perhaps unsurprising from a tribunal which, constituted as the House of Lords, is accessible only by leave and is no doubt acutely aware of serving an international clientele.

While New Zealand courts properly recognise the importance of keeping in tune with general legal concepts developing elsewhere within the common law world[25], particularly where international trade is concerned, the Judicial Committee would have done well to remind itself that the proper law of the contract was the law of New Zealand which will on occasion be materially different from English law.

The Judicial Committee has in the past recognised that the common law of different members of the Commonwealth may properly develop in different directions. Compare *Rookes* v *Barnard*[26] and *Australian*

22 See *Liverpool City Council* v *Irwin* [1977] AC 239 as discussed in *Mears* v *Safecar Security Ltd* [1982] 2 All ER 865, 879.

23 See generally Sir Robin Cooke "Divergences – England, Australia and New Zealand" [1983] NZLJ 297.

24 [1985] 1 NZLR 513.

25 See for example *Dominion Budget Rent A Car Ltd* v *Budget Rent A Car Systems (1970) Ltd* (CA No. 29/85 judgment 27 November 1986) per Cooke P at 25-26 as to the desirability of harmonising the commercial laws of New Zealand and Australia. See also *Auckland Regional Authority* v *Mutual Rental Cars* (CP 1373/86 Auckland Registry judgment 31 July 1987 at 53 per Barker J).

26 [1984] AC 1129.

Consolidated Press v *Uren*[27] where a powerful Board, including Sir Alfred North, stated:

> The issue that faced the High Court in the present case was whether the law as it had been settled in Australia should be changed. Had the law developed by processes of faulty reasoning, or had it been founded on misconceptions, it would have been necessary to change it. Such was not the case. In the result in a sphere of the law where its policy calls for decision, and where its policy in a particular country is fashioned so largely on judicial opinion, it became a question for the High Court to decide whether the decision in *Rookes* v *Barnard* compelled a change in what was a well settled judicial approach in the law of libel in Australia. Their Lordships are not prepared to say that the High Court were wrong in being unconvinced that a changed approach in Australia was desirable.

The advantages of retention of New Zealand's links with the Judicial Committee are many[28] but unless it can be sufficiently informed by the presence not only of New Zealand counsel but also, as an invariable practice, of New Zealand members concerning New Zealand conditions, its processes will become increasingly irrelevant.

When the Court of Appeal comes at last to consider the penumbral problem of whether and when there can be concurrent liability in tort and contract the difference of function between the law of torts and the law of contract will be a material factor. It has made clear that it will do more than simply adopt English law.[29]

The third primary function – the provision of services and the re-distribution of goods – involves issues as to the functions of government and of taxation which by New Zealand standards are rarely justiciable. The problems faced by the courts of the United States following *Brown's* case[30] in devising "busing schedules" point to the difficulty of the common law's handling such matters. While the Brandeis brief proposals of Sir Ivor Richardson[31] are certainly required to enable the court to perform properly its functions of construction, the role of the common law in these spheres must be limited.[32]

The final primary function of "settling unregulated disputes" is a matter partly for the legislature and partly for the courts. The establishment of the court system, the allocation of taxes for the purposes of judicial salaries and other expenses is for the legislature. The promulgation of rules of court is properly a matter for the Rules Committee, comprising the Chief Justice, two other Judges of the High Court, the Attorney-General and Solicitor-General plus two Law Society nominees and the Secretary for Justice.[33] The exercise of the inherent jurisdiction is for the common law.[34]

27 [1969] AC 590.
28 See for example "The Privy Council" [1983] NZ Recent Law 414.
29 *Day* v *Mead* CA 90/86 Judgments 31 July 87) referred to in text to n 45 below.
30 *Brown* v *Board of Education* 347 US 483 (1954).
31 Op cit n 4.
32 Even so most State Owned Enterprises will be subject to judicial control pursuant to the Commerce Act 1986: *New Zealand Herald* 17 September 1987.
33 Judicature Act 1908 51B.
34 See for example *Quality Pizzas Ltd* v *Canterbury Hotel Employees* [1983] NZLR 612.

The secondary functions of creating and applying the law belong to legislature executive and judiciary. The resources available to Parliament for consideration of law reform proposals are unlimited. These include Royal Commissions, referenda, working parties, and establishment and funding of the Law Commission. It is for Parliament to appropriate money for the executive to pay salaries to police, prison officers and bailiffs.

For the courts there arises the issue of justiciability.[35] And yet failure by the courts to embark upon law reform will lead to injustice. See for example the powerful remarks of Turner J in *Jorgensen* v *News Media Ltd*:[36]

> The law of evidence is judge-made law, directed to the control of the processes by which the judges daily endeavour to do justice; and . . . if it requires modification, that modification is particularly a matter with which the judges should be entrusted. In this country there were many who when *Myers* v *Director of Public Prosecutions* [1965] AC 1001 was decided found it in their hearts to regret that the views of the majority had prevailed, and that the great days of judicial legislation in the field of evidence seemed to have come to an end. I was one of those who, with the greatest respect to their Lordships who decided it, were less than content with that decision, and for these reasons am of the opinion that neither the long time during which the Courts have consistently rejected convictions as evidence of guilt, nor any reluctance to modify existing rules in a proper case should deter this court from taking what I conceive to be the proper course, viz. the rejection of *Hollington* v *Hewthorn* as a decision to govern the admissibility of such evidence in the future of this country.[37]

I leave to later the final function of the law — of establishing the basics of the legal system.

The principle applied by Turner J is not limited to adjectival law, although subject to greater constraints where substantive law is concerned.

Judicial reticence in embarking, or admitting to embark, on law making no doubt has much to do with Cromwell's revolution and the burgeoning of the status of Parliament. *British Railways Board* v *Pickin* is a recent illustration of Simpson's point that:[39]

> [I]t is very generally agreed today that there are no legal limitations upon the legislative competence of Parliament . . . Dicey announced that it was the law that Parliament was omni-competent, explained what this meant, and never devoted so much as a line to fulfilling the promise he made to demonstrate that this was so. The oracle spoke, and came to be accepted.

Hence the well known strictures of Lord Simonds addressed to Denning L J:[40]

35 See for example *Attorney-General* v *Wilson & Horton* [1973] 2 NZLR 238 where all members of the Court of Appeal joined in a request to the legislature to abolish the cause of action per quod servitium amisit. See generally Marshall "Justiciability" in *Oxford Essays in Jurisprudence* (1961, ed Guest) 265; *Buttes Gas & Oil Co.* v *Hammer* [1981] 3 All ER 616 (HL); *Council of Civil Service Unions* v *Minister for Civil Service* [1985] AC 374; *Oneida* v *Oneida Indian Nation* 470 US 226, 248 (1985).

36 [1969] NZLR 961, 990.

37 See also *McKnight* v *Davis* [1968] NZLR 1164, 1170 lines 6-10 again per Turner J. "Due inquiry for the truth is not to be stifled by outmoded procedural restrictions."

38 [1974] AC 765.

39 "The Common Law and Legal Theory" in *Oxford Essays of Jurisprudence (Second Series)* (1973, ed Simpson) 77, 96.

40 *Magor and St Mellons* v *Newport Corporation* [1951] 2 All ER 839, 841.

> [T]he notion that the court must] proceed to fill in the gaps [is] a naked use of legislative function under the thin disguise of interpretation . . . If a gap is disclosed, the remedy lies in an amending Act.

But it is Lord Denning's views which have prevailed:[41]

> Wherever a statute comes up for consideration it must be remembered that it is not within human powers to foresee the manifold sets of facts which may arise, and, even if it were, it is not possible to provide for them in terms free from all ambiguity. The English language is not an instrument of mathematical precision. Our literature would be much the poorer if it were. This is where the draftsmen of Acts of Parliament have often been unfairly criticised. A judge, believing himself to be fettered by the supposed rule that he must look to the language and nothing else, laments that the draftsmen have not provided for this or that, or have been guilty of some or other ambiguity. It would certainly save the judges trouble if Acts of Parliament were drafted with divine prescience and perfect clarity. In the absence of it, when a defect appears a judge cannot simply fold his hands and blame and draftsman. He must set to work on the constructive task of finding the intention of Parliament, and he must do this not only from the language of the statute, but also from a consideration of the social conditions which gave rise to it and of the mischief which it was passed to remedy, and then he must supplement the written word so as to give "force and life" to the intention of the legislature.

For long it appeared that the courts had relinquished their historical role of keeping the common law relevant. The common lawyers' timidity made the common law arteriosclerotic, as in refusing to acknowledge modern business practices of recording information[42] and accepting that equity was past the age of child bearing.[43]

The Court of Appeal of New Zealand, which now sits frequently as a full court, has accepted that as the highest judicial tribunal in this land it has both the right and responsibility to develop not only the law of evidence[44] but also the substantive law — including equity. As Cooke P stated in *Day* v *Mead*:[45]

> Whether or not there are reported cases in which compensation for breach of a fiduciary obligation has been assessed on the fotting that the plaintiff should accept some share of the responsibility, there appears to be no solid reason for denying jurisdiction to follow that obviously just course, especially now that law and equity have mingled or are interacting. It is an opportunity for equity to show that it has not petrified and to live up to the spirit of its maxims . . .

Somers J observed:[46]

> As we have not had argument on the issue of concurrent liability [in contract and tort] I would reserve it for consideration on another occasion. The ultimate decision will I think be one of policy. Whether it arises in relation to the liability of solicitors

41 *Seaford Court Estates* v *Asher* [1949] 2 All ER 155, 164 E-H.
42 *Myers* v *DPP* [1965] AC 1001 referred to in text above n 37.
43 Harman J's aphorism — see Megarry *Miscellany-at-Law* (1955) 142. See *Re Diplock* [1948] Ch 465, 481; affirmed *Ministry of Health* v *Simpson* [1951] AC 251.
44 Text above n 37.
45 CA 90/86 Judgment 31 July 1987 at 15.
46 Ibid 14.

> or in some other or more general context it will be desirable to have information as to the availability and cost of insurance against tortious liability . . . The cost and the persons who in reality will bear it or the loss are material considerations.

It is the thesis of the present paper that it is not only legitimate but essential that the courts do not leave to Parliament and the Executive all responsibility for law reform but must themselves accept a substantial part of that task. While they will not ordinarily do so as a censor of Parliament, they will in many instances find it necessary to defend both the common law and the will of Parliament against unlawful executive action. Their function is — *almost* invariably — *to give effect to the will of Parliament* and also *to keep the common law appropriate to the needs of New Zealand society.* Since the expression first emphasised is largely metaphorical and the latter is enormously general, questions arise as to how the courts can and should go about their business. Dr Raz expressed the matter accurately: "The subject is inexhaustible and is perhaps the one aspect of jurisprudence which has more than any other affected judicial practices and judicial self awareness."[47]

The conundrum has received no satisfactory answer from any of the distinguished scholars who have devoted their lives to the study of jurisprudence and this slight contribution by a non-academic does not aspire to achieve what they have been unable to accomplish.[48]

All the various "schools" — whether natural lawyers, positivists, realists, economic theorists, critical legal students — miss the simple truth that all of them and many others provide grist to the mill of the common law, which has in addition unlimited other sources of supply.

Of prime importance is precedent, particularly for an inferior court, but the powers of distinguishing and overruling mean that the last word has never been said.[49]

A high interest, as Dr Sealy emphasises, is that of stability so that legitimate expectations may be given effect.[50] Its importance is dominant in contract, wills and trust areas.[51]

Analogy with related areas of law is of increasing importance[52] but the extreme suggestion of Dworkin — that judges are obliged to solve all cases on the basis of a total analogy to all existing statutory and common law rules, entailing a legally binding correct solution to all hard cases — is

47 Raz, op cit n 2, 180.

48 As to what the common law is and various of the ideas which follow I adopt Simpson's chapter, op cit n 39, and especially his description of it as "a body of practices observed and ideas received by a caste of lawyers, these ideas being used by them as providing guidance in what is conceived to be the rational determination of disputes litigated before them, or by them on behalf of clients and in other contexts" (ibid 94).

49 See for example the recent treatment of *Anns* v *Merton London Borough* [1978] AC 728 in *Yuen Kun-Yeu* v *Attorney-General of Hong Kong* [1987] 2 All ER 705, 710.

50 See *Attorney-General for Hong Kong* v *Ng Yuen Shiu* [1983] 2 AC 629.

51 But even in these last the Family Protection Act 1955 and ss 64 and 64A of the Trustee Act 1956 provide balance.

52 *Erven Warnick* v *J Townend & Sons (Hull) Ltd* [1979] AC 731, 743 per Lord Diplock has regularly been applied by the Court of Appeal of New Zealand.

misconceived.[53] Judicial law making and – what is much more frequent – refusal to embark upon law making is not a mechanistic process but an exercise in judgment of what formula is most in keeping with the requirements of the particular case, having regard not only to its circumstances but to the entire legal system within which the judgment is to be made. In such exercise the New Zealand ethos and mores are of prime importance.

The "matrix of fact" concept applies (although at a different level of generality) not only to construing contracts but to the process of judicial law making by interpretation of statutes.

Comparing judge-made law with statutory interpretation Professor Raz stated:[54]

> It is unreasonable to attribute great weight to the actual formulation of the rule in the hands of the courts. Statutory interpretation, turns sometimes on the employment of one word rather than another. Not so the interpretation of precedent. Another result is that it is reasonable to read the rule in its context (i.e. the facts of the case as recorded) *rather than in the abstract as one does a statute or a regulation.*

I cordially disagree. Even in construing a statute it is essential to be sensitive to the social context in which it appears in order to select the appropriate "register of the language employed"[55] and it is "the duty of a court of construction to tune in to such register and so to interpret the statutory language as to give it the primary meaning which is appropriate in that register".[56]

For example a court of general jurisdiction will refuse to make a declaratory order which would require it to "define statutory powers in the abstract without knowledge of the facts and circumstances under which such powers might be exercised".[57] Similarly:[58]

> Where the Arbitration Court is given . . . power [to pronounce upon questions connected with the construction of awards] and is a special Court created for that exercise, it would be wrong for [the High] Court to enter upon the construction of a statute relevant to the construction of an award in isolation.

The elaborate definition of the concept of "market" in the Commerce Act 1986[59] should never have been required had counsel in the United States and Australia, on whose legislation the New Zealand Parliament has drawn, properly performed their task of putting all relevant factual and background

53 See Raz, op cit n 2, 205-206.
54 Ibid, 188 (emphasis added).
55 *Maunsell* v *Olins* [1975] AC 373, 391 per Lord Simon.
56 Idem.
57 *New Zealand Educational Institute* v *Wellington Education Board* [1926] NZLR 615, 617.
58 *New Zealand Plumbers Union* v *Attorney-General* (A 1231/83 Auckland Registry judgment 12 September 1984) per Davison C J.
59 "[A] market for goods or services within New Zealand that may be distinguished as a matter of fact and commercial common sense."

material before the courts. The notion that statutory interpretation can be performed simply by means of a dictionary and the application of logic without reference to the social context should have long disappeared. Section 5(j) of the Acts Interpretation Act 1924 requires no less. It has been followed belatedly by the acceptance here as elsewhere of the so-called purposive principles of statutory interpretation.

THE CONSTITUTIONAL ISSUES

The Diceyan doctrine of an omnipotent Parliament is standard in New Zealand. In all normal circumstances it will be given effect by the courts and those who question it will be regarded as slightly odd or worse. The matter is however a little more complex than Dicey perceived.[60]

The high water mark of the Dicey theory is Jennings' claim that a modern Parliament can – lawfully it seems – "condemn a man to death as it condemned the Earl of Strafford".[61] For reasons that follow, I disagree.[62]

The principle that what Parliament says in accordance with the appropriate procedures is law will ordinarily be accepted and loyally given effect by the courts. The dangers of their failure to act according to the decision of the duly elected representatives of the people are self evident: if they disregarded political realities, at a certain stage the whole system of law would collapse. The courts must rely upon the executive to enforce their judgments; they do not possess a private army. They must rely upon retaining the confidence of the community at large.

There is nevertheless an interesting and important area where the common law has real power even over Parliament. As current Fiji conditions demonstrate, no government will lightly dismiss or act inconsistently with the decisions of the courts.

The proposition that what Parliament says is law is of its nature judge-made and part of the common law. That the courts have authority to state the law is an extra-legal constitutional assumption, the turtle on which stands the elephant "that what Parliament says is law", on which rests the entire statutory fabric.

It is open to the courts to declare that the maxim is not without limits. Legislation to dismantle the courts or to refuse access to them would be revolutionary, as amounting to a material change in the basic norm. So too would legislation such as that contemplated by Jennings.

The courts have long exercised the function of resisting infringement of accepted decencies not only by the executive but by Parliament. In the case of the executive the development of administrative law, particularly during the past two decades, has shown an increasing willingness on the part of the courts to hold the scales between the citizen and the state. The recent *Combined State Services* decision[63] entailed an assertion by the courts of its power to control the prerogative. The exercise of judgment not to

60 See generally Keith "The Courts and the Constitution" (1985) 15 VUWLR 29.
61 *The Law and the Constitution* (4th ed, 1952) 57.
62 *Taylor* v *New Zealand Poultry Board* [1984] 1 NZLR 394, 398 lines 36-43 per Cooke J.
63 Note 35 above.

interfere in that case turned upon a judge-made rule of self restraint on the grounds of non-justiciability.

The judge-made canons of construction of ouster clauses[64] demonstrate the courts' resistance to diminution of their own authority.

Recent activity by the executive in New Zealand near or over the brink of constitutional irregularity has been the subject of such judgments as *New Zealand Drivers' Association* v *New Zealand Road Carriers*[65] and *Fitzgerald* v *Muldoon.*[66]

The process is like that of a spring: as the Crown attempts to depress the court's powers of control of constitutional balance the courts' resistance increases progressively, to the stage where the power of Parliament itself is under consideration.[67]

There are obvious limits to this process. To resist actions of the executive whether in its own capacity or through Parliament requires the exercise of great judgment and restraint by the courts. I have emphasised that to challenge the true will of the electorate as expressed through its delegates in Parliament would be folly.

They have only limited scope to do so in relation to, for example, the third category of Professor Raz' functions – matters of tax and re-distribution of resources. These are for the most part non-justiciable.

But there is a zone within which it is both feasible and responsible for the courts so to resist. This is where there is threat of fundamental injustice to a group of New Zealanders or indeed to an individual.

The constitutional role of the judiciary, echoes in the judicial oath, is to do justice according to the law. The power of law making is to be exercised consistently with this function. So it was that the imbalance between Crown and subject resulting from the rule in *Duncan* v *Cammell Laird*[68] was judicially changed, first in the judgment of the Court of Appeal in *Corbett* v *Social Security Commission*[69] and then by the House of Lords in *Conway* v *Rimmer.*[70] Notable was the decision of the Court of Appeal in *EDS* v *South Pacific Aluminium (No. 2)*[71] of which this audience needs no reminding.

I have referred to the steady rise of the tide of judicial review of governmental action. The concept of a "common law bill of rights" and the jurisprudence of the President of the Court of Appeal in the *Egg Marketing* and other cases[72] provide further instances.

64 See eg Bennion *Statutory Interpretation* (1984) 747-750.
65 [1982] 1 NZLR 374.
66 [1976] 2 NZLR 615, 627.
67 *Driver's Association* at 390 lines 50-53.
68 [1942] AC 624.
69 [1962] NZLR 878.
70 [1968] AC 910.
71 [1981] 1 NZLR 153.
72 Notes 62 and 67 above.

Of particular importance is that the Royal Commission on the Electoral System[73] has found unfairness in our constitutional arrangements from the standpoint of minority groups. Increasingly they are aware of the phenomenon identified by de Tocquville on his visit to America in 1831 as the "tyranny of the majority".[74]

> When an individual or a party is wronged in the United States, to whom can he apply for redress? If public opinion, public opinion constitutes the majority; if to the legislature, it represents the majority and implicitly obeys it; if to the executive power, it is appointed by the majority, and serves as a passive tool in its hands.

Nowhere is this more apparent than in the treatment of New Zealand's indigenous people.

Professor Brookfield's perceptive inaugural address[75] points out that the legitimacy of the Crown's position in New Zealand depends not only on the gazetting of the acquisition of New Zealand by the Crown in the London Gazette on 2 October 1840[76] but also upon the Treaty of Waitangi which gave rise to it. While in the recent *New Zealand Maori Council* case Somers J stated that "the received view of the law is that the Treaty of Waitangi does not form a part of the municipal law of New Zealand as administered by its courts except to the extent it is made so by statute",[77] the judgment of the President accepted as correct the principle "that the court will not ascribe to Parliament an intention to permit conduct inconsistent with the principles of the Treaty".[78]

A potent feature of the application of the common law is the sustained refusal by the judiciary to countenance in this sphere any result which is seen to be unjust. It is significant that the President described the role of the court in that case as "to some extent creative"[79] while acknowledging that the judiciary's ability to perform it was by reason of Parliament's enactment of section 9 of the State Owned Enterprises Act: "Nothing in this Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi."

Notable in the present context is the President's statement that:[80]

> the effect of our present decision, built on the Treaty of Waitangi Act and the State Owned Enterprises Act is that in relation to land now held by the Crown it should never again be possible to put aside a Maori grievance [as had occurred in *Te Heuheu Tukino's* case [1941] AC 308] . . . In short the present decision together with the two Acts [the Treaty of Waitangi Act and the State Owned Enterprises Act] means that

73 *Report of the Royal Commission on the Electoral System: towards a better democracy* (December 1986). The proposals for Proportional Representation, if enacted, would go far to deal with the constitutional imbalance under discussion.
74 *Democracy in America* (1956 ed.), 114-115.
75 *The Legitimacy of the New Zealand Constitution* (unpublished).
76 See *NZMC* v *Attorney-General* CA 54/87 29 June 1987 judgment of Richardson J at 8-9.
77 Ibid 17 per Somers J.
78 Ibid 15 per Cooke P. See also judgment of Chilwell J in *Huakina Development Trust* v *Waikato Valley Authority* (M 430/86 Auckland Registry judgment 2 June 1987).
79 At 47.
80 Ibid 47.

there will now be an effective legal remedy by which grievances wrongly suffered by one of the Treaty partners in breach of the principles of the Treaty can be righted."

While popularity is not something sought after by the judiciary, the welcome which this judgment received from the media, from New Zealand society generally, and – significantly – from the Crown, suggested that the highest court in New Zealand had assessed correctly the construction of the legislation which was appropriate to present New Zealand conditions. From its independent vantage point the Court saw the case as "perhaps as important for the future of our country as any that has come before a New Zealand Court".[81] The recognition by Maori New Zealanders of the role of the Court in protecting their rights is particularly important.

CONCLUSION

This illustration of the Court's capacity to do justice to a minority group, without attracting criticism of becoming politically partisan, evidences the constructive role that the courts can and should play in our society.

Properly applied, the common law provides the flexibility required to serve the day to day needs of New Zealand society. And with Parliament's assistance, it can also deal with major constitutional challenges, which require a balance between the wishes of the majority and protection of the rights of a minority.

An appropriately drafted Bill of Rights, enacted by Parliament, would ensure that the courts can continue to do so effectively, so complementing the role of Parliament, without putting the legal system to risk by exposing it to claims of unorthodoxy.[82]

81 Judgment of President p 2.

82 In submissions to the Select Committee on the Bill of Rights I proposed a declaratory judgment power and cautious treatment of the Treaty of Waitangi, not all of which is justiciable. My present inclination is to include a prospective s 9 equivalent.