SUPREME COURT CONFERENCE

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THE COURT AND THE EXECUTIVE

Hon Sir Grant Hammond KNZM LLD

Introduction

William Shakespeare had a very good grasp of constitution building. In Henry IV, Part II he had Lord Bardolph say this:[1]

> 'When we mean to build,
> We first survey the plot, then draw the model,
> And when we see the figure of the house,
> Then we must rate the cost of the erection;
> Which, if we find outweighs ability,
> What do we then, but draw anew the model
> In fewer offices, or, at least, desist
> To build at all? Much more, in this great work
> (Which is, almost, to pluck a kingdom down,
> And set another up) should we survey
> The plot of situation, and the model;
> Consent upon a sure foundation;
> Question surveyors, know our own estate,
> How able such a work to undergo – '.

It was this sort of facility that has led some scholars to assert that Shakespeare was not just a mere scribbler from Stratford. Whatever the truth of that may ultimately be

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[1] William Shakespeare *Henry IV, Part II* at Act I. Scene III.

found to be, Shakespeare's estate, house, and rooms metaphor is a convenient starting point for this paper.[2]

In New Zealand we have our national estate, and our constitutional house on it, along with requisite subdivisions within that house of governance. We need not now look to convention for these divisions. The Constitution Act 1986 itself recognises three branches of government: the Legislature (Parliament), the Executive (Cabinet and ministers outside Cabinet, plus government departments), and the Judiciary. Each operates independently of the others. There is no dispute at all about this division.

Seen from without we are blessed with a constitutional House that appears functional. And the model is, as Shakespeare put it, "consent upon a sure foundation": there appears to be no present agitation for a different design, let alone the popular momentum which would be required to achieve it. To the extent that there are present difficulties they lie within the construction and dimensions of some of the interior walls of our house.

First, in New Zealand, there has long been raised a valid concern about the power of the Executive when contrasted with the formal power of the Legislature and the checking power of the Judiciary.[3]

A second, if related problem is: which branch determines where the edges or outlines of the particular rooms are to be marked out and again, as Shakespeare would put it, "consented to upon a sure foundation"? This raises issues as to the significance, functions and dimensions of these three constitutional rooms.

Parliament is the easiest to speak to. If Parliament can muster the votes, then it can vote the Executive down. This is highly unlikely in contemporary New Zealand.

Realistically the Executive has overwhelming power as initiator and motivator and is the most "powerful" room in the New Zealand constitutional mansion.

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2 Geoffrey Palmer prefers a different metaphor for New Zealand: a "constitutional caravan" (see "The Bill of Rights After Twenty One Years" (2013) 11 NZJPIL 257).

3 The locus classicus is Geoffrey Palmer's *Unbridled Power* (2nd ed, Oxford University Press, Oxford 1987). There have been changes, but even MMP has not really changed the basic problem.

The relationship between the Executive and the Judiciary (which when push comes to shove really means the final court) is much more difficult. This issue cannot be said to be finally resolved; it is one of those "hanging questions", which bewilder observers from outside the Westminster tradition. Various answers, some descriptive and some normative, have been given to this rather important, if not particularly pressing question.

We can begin by putting to one side the somewhat nihilistic viewpoint of Professor J G Griffiths at the London School of Economics: the relationship is not classifiable; it simply is what it is at any given time.[4] There are three rather more orderly propositions. First, on the orthodox view and, as only one instance, on the very high authority of the late Lord Bingham: if push comes to shove, it is Parliament which determines where the edges are.[5]

Second, if we go to the other extreme, there are those jurists who contend that it is ultimately for the Court to determine where the line of the law falls. If it ever came to it, there are some things that Parliament could not prescribe.

Off parade there are a handful of senior judges – including our own Lord Cooke of Thorndon[6] – who have considered the consequent possibility of the rule of law, that if parliamentary legislation were to violate fundamental constitutional or normative norms, it might be the duty of the court to disapply that "law". And more recently, on parade in the case challenging the hunting legislation, three of the former Law Lords (Lord Steyn, Lady Hale, and Lord Hope) decided to spell this out.[7] Lord Hope, a Scottish Law Lord, took up a powerful claymore in stating: "Parliamentary sovereignty is no longer, if it ever was, absolute. … Step by step, gradually but surely, the English principle of the absolute legislative sovereignty of Parliament … is being qualified."[8] He went on to locate the ultimate constitutional control – Hart's "Rule of Recognition" – in "The Rule of Law Enforced by the Courts".

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4 J G Griffiths *The Politics of the Judiciary* (5th ed, Fontana Press, London, 2010).

5 See, for example Lord Bingham "Governments and Judges: Friends or Enemies?" in *Lives of the Law* (Oxford University Press, Oxford, 2011) 144. See also David Keene "The Independence of the Judge" in Mads Andenas and Duncan Fairgrieve (eds) *Tom Bingham and the Transformation of Law* (Oxford University Press, Oxford, 2009).

6 *Taylor v New Zealand Poultry Board* [1984] 1 NZLR 394, 398.

7 *R (Jackson) v Attorney-General* [2005] UKHL 56.

8 At [104].

This powerful swing of the claymore began lopping off other sacred thistles. Before long the UK Government had been forced to drop a clause in an asylum bill which would have shut off all judicial review and appeal to the courts.

Academics were producing their daggers too. Ronald Dworkin, in a lecture at Cambridge, called on the judges, if the legislation was passed into law, to hold it unconstitutional and to treat it as invalid.[9]

Golly! Stephen Sedley perceptively saw where this could go, and posed a pertinent example: "What would happen in real life if the higher courts treated such a withdrawal of their jurisdiction as unconstitutional ignored it and allowed an asylum seeker's appeal? The home secretary, not recognising their jurisdiction, would proceed with deportation, and the court would arraign him for contempt. How would it end? We do not know, and most of us would prefer not to find out." [10]

Third, in between the two extremes are what might be termed the constitutional mediators. One variant of this third approach is our own Professor Phillip Joseph who has argued that a healthy tension between the executive and the Court is in essence a "jolly good thing", a viewpoint which appears to be shared to a large extent by Bruce Harris.[11]

My purpose in this essay is not to endeavour to establish definitively what the correct school of thought is. This for the reason that despite some posturing, noise making, and occasional pushing and shoving in the United Kingdom, nobody has yet been ejected from the game, let alone the constitutional game there being called off. Both the Executive and the Courts have endeavoured to issue red card offences on occasions. But when I walked past Westminster recently the Union Jack was still stiffening over the Thames on a splendid autumn afternoon.

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9 Ronald Dworkin "Truth, morality, and interpretation" (Heffer Lecture in Philosophy 2004, University of Cambridge, 22 April 2004).

10 Stephen Sedley "On the Move" (2009) 31(19) LRB 3 at 4.

11 Phillip A Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Brookers, Wellington, 2014); and BV Harris "Remedies and Accountability for Unlawful Judicial Action in New Zealand: Could the laws be tidier" (2008) NZ Law Review 483.

In New Zealand there have been some intakes of breath by Ministers and even some hissing and paw waving on occasion.[12] But we have been closer to yellow card offences than red as at Westminster.[13] My sense of it overall is that we do not have a new constitution which has crept up on us as Vernon Bogdanor, the Professor of Government at Oxford would contend has happened in the United Kingdom;[14] nor do we have what might be described as an "unresolved" constitutional framework.[15] We have, in New Zealand, what might be described as a "cheerful truce". The Cabinet Manual, the bible on these things in this country, provides as follows:

> The separation of the Executive and the Judiciary under the New Zealand system of Government means that ministers must exercise prudent judgment before commenting on judicial decisions – either generally or in relation to the specifics of an individual case (for example, the sentence). Ministers, following long established principle, do not involve themselves in deciding whether a person should be prosecuted or on what charge. Therefore, they should not express comment on the results of particular cases or on any sentence handed down by a court. Sentencing is a complex process. Ministers must avoid commenting on any sentences within the appeal period and should avoid at all times any comment that could be construed as being intended to influence the courts in subsequent cases. It is, however, proper for ministers to comment on the effectiveness of the law, or about policies on punishment (that is on those matters where the Executive has a proper involvement), but not where the performance of the court is brought into question.

That said, we do have now or can reasonably be foreseen to have to deal with in the foreseeable future some features of the relationship between the Executive and the Court that are genuinely difficult, and bear mention.

At the risk of having to munch the broken glass of my shattered crystal ball, I discern five features which are most likely to raise concerns between the Court and the Executive.

These are:

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12 See Grant Hammond "Judges and free speech in New Zealand" in HP Lee (ed) *Judiciaries in Comparative Perspective* (Cambridge University Press, Cambridge, 2011) 195.

13 I intensely dislike sporting metaphors applied to affairs of state but it will have to suffice for present purposes.

14 Vernon Bogdanor *The New British Constitution* (Hart Publishing, Oxford, 2009).

15 Geoffrey Palmer has demonstrated what he describes as "the high degree of constitutional elasticity" in New Zealand, which fuelled his notion of a moving caravan. See Note 2, above.

- Getting the boundaries wrong on the part of the Court which can give rise to an undue intrusion by the Court into the sphere of the Executive or Parliament.

- Going the other way, concerns for the Court about the Executive or Parliament intruding (trespassing?) into "justice" in the largest sense. Or to put it more bluntly, a shrinking of the legal estate.

- Ex cathedra pronouncements by the Court or members of it.

- A failure to appropriately or adequately adapt the Court's processes and remedies to the real exigencies of its role in our time.

- An inappropriate approach to "emergency situations", perhaps on the part of both the Executive and the Court. This could perhaps be better put as adapting the legal estate to the post 9/11 world.

Intrusion

There are two very obvious areas which will always attract real concern with respect to the judgments of final courts.

One is judgments which have significant, and perhaps even less significant in these straightened times, resource allocations implications.. The House of Lords, as has been well demonstrated over the two decades or so before it was transmuted into the Supreme Court in England, took a battering with the number of legislative reversals of judgments in tort cases.[16] ACC has removed many of those problems in New Zealand, but even so, there remain some jagged edges in that area.

A second intrusion is things going even indirectly into the actual running and "doings" of Parliament. A good example of this category is the recent Parliamentary reversal of the decision of the Supreme Court in *AG and Gow v Leigh*.[17] That led to an outcome where the Privileges Committee recommended to the Government of the day that a Parliamentary Privileges Bill replace the Legislature Act 1908, the Legislature Amendment Act 1992 and section 13 of the Defamation Act 1992. That

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16 See generally James Lee (ed) *From House of Lords to Supreme Court: Judges, Jurists and the Process of Judging* (Hart Publishing, Oxford 2011).

17 [2011] NZSC 106, [2012] 2 NZLR 713.

bundle of legislation emanated with the support of all sides of the House from a decidedly vexed Parliament.

I attended a closed session of the Privileges Committee along with the State Services Commissioner, at which were assembled the senior ministers and representatives of all parties in the House. I cannot properly repeat what was said. But it was a solid wall of concern and even defiance of the Court. In the result, after due enquiry Parliament took the view that the Supreme Court was not correct in its view of the law.

There is now relatively extensive literature on *Leigh*. And the report of the Privileges Committee itself is an unusually scholarly and close analysis, after extensive submissions had been made to the Committee.[18]

My own view can be put shortly. As to fundamental principles, the privilege of Parliament allows members to perform their duties without outside threat or interference. If one looks for the origins of the dreaded word "necessity" which occupied so much arid argument in the Courts, it is worth recalling that John Hatsell, an 18th century Clerk of the House of Commons said these rights are "absolutely necessary for the due execution of [Parliament's] powers". This had much to do with setting the hare running, so turning description into doctrine.

In any event, the two key underlying principles of modern parliamentary privilege are these. The first is freedom of speech. This goes back to at least Article 9 of the Bill of Rights 1688 ("that the freedom of speech and debates of proceedings in Parliament, should not be impeached or questioned in any court or place out of Parliament"). The practical effect is that no MP can be sued or prosecuted for anything he or she says as part of the proceedings of the House or any of its committees. The standard authorities indicate that this amenity is limited to proceedings of the *House*. The orthodox view is that would include anything said in debates on the floor, or in Standing or Select Committees. It would also include anything put in writing that forms part of a proceeding such as the text of a question or a minister's written answer.

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[18] Privileges Committee *Question of privilege concerning the defamation action Attorney-General and Gow v Leigh* (11 June 2013).

The second key element in parliamentary privilege is the freedom of the House to regulate its own affairs. That is what the Bill of Rights meant by "not to have its proceedings questioned". The authorities sometimes call this "exclusive cognisance" which is accurate but cumbersome, and would not always be understood in Te Kuiti.

I might add that "privilege" itself strikes me as being a somewhat unfortunate term. I suggested to the Committee that it tends to imply a special advantage rather than a special protection. I told the Privileges Committee, "If the opportunity arises to change the term to something else like, "public interest immunity", that would be a better description." The point seems to have passed the draftsman by.

The facts of Ms Leigh's case need not be gone into at length. She was on contract to the Ministry of the Environment from July 2005 to May 2006. In mid-May 2006, a Labour Party activist, Ms Claire Curran, was appointed to oversee her work. This led Ms Leigh to terminate her involvement with the Ministry. In November 2007 questions were asked about Ms Curran's engagement and whether it had been politically motivated. A written question for oral answer was tabled in the House. The responsible Minister sought a briefing from the Ministry. Mr Gow, a Deputy Secretary, briefed the Minister both orally and in writing. The Minister answered the parliamentary question.

Ms Leigh thereupon issued defamation proceedings against the Deputy Secretary. She claimed she had been defamed in his briefing paper and in what he had said to the Minister. The defendant said that his communications were part of a proceeding in Parliament and protected from action by Parliament's freedom of speech.

Interestingly, *all* the New Zealand courts rejected the defendant's argument. That is, the High Court, the Court of Appeal and the Supreme Court, after leave had been granted by it. The Courts all took a narrow forensic view, and held the defence of qualified privilege applied, but was defeasible if it were shown that the defendant was motivated by ill will or took improper advantage of the occasion of the publication.

Quite apart from whatever the law was, I had three major concerns with respect to the *Leigh* imbroglio.

The Privileges Committee correctly summarised my first submission: "As the Hon Sir Grant Hammond commented, the *Leigh* decision does not appear to be grounded in the facts of parliamentary life, but rather it attempts to apply law in the abstract."

Second, even from a forensic point of view, *Leigh* created severe problems which those familiar with the running of defamation actions will recognise. It is elementary that there would be all sorts of disputes about what actually occurred and was said in "the briefing". Routinely these are oral, under urgency and with little if any in the way of corroborative material. Disputes about credibility would inevitably drag a Court into questioning what actually came out in the House.

Thirdly, if it was desired to reverse *Leigh* by legislation I was of the view a simple amendment to the Defamation Act would take care of the problem without the potential difficulties attached to a much broader solution. Nobody suggested that my proposed amendment was not feasible. A major concern I had is that legislation is open to interpretation by the courts and without real precision the whole cycle could conceivably begin again.

As it transpired, both the Privilege Committee and Parliament took the view that there were other matters to attend to at the same time. A broader stratagem was therefore adopted. Parliament enacted a more wide ranging act: the Parliamentary Privilege Act 2014. The enactment came into force on 7 August 2014. It may be of interest that section 10(7) of that the Act states that the section is to apply despite any contrary law and includes a specific reference to the *Attorney General v Leigh* and its citations in the Law Reports![19] So *Leigh* was not subtly rapiered to death; it was bludgeoned to earth.

In many ways, the whole incident was conducted, to employ Hugh MacLennan's famous Canadian phase, in "two solitudes". The Court was in a narrow, forensic mind-set. Parliament was in a much broader, "what are the needs of the populace?" mind-set. The two never really met. Was there a lack of will to do so? Or, did the two sides simply sail past each other?

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[19] The Purposes section of the Act also has references to altering *Leigh* and also *Buchanan v Jennings* [2004] UKPC 36, [2005] 2 All ER 273 (PC). (Incidentally the legislative citation appears to be in error. The Privy Council decision was *Jennings v Buchanan*.

Parliamentary accountability for justice

Traditionally the view was that the judges and, by extension, the civil servants who administer the court system were exempt from even the most routine and non-partisan forms of parliamentary scrutiny. This large assertion of immunity was founded upon the separation of powers notion. Any suggestion of parliamentary or Executive intrusion into "judicial territory" met with fierce resistance.

Then new public management (NPM) arrived. Broadly speaking this is the clutch of government policies, since the 1980s, that have aimed to modernise and render the public sector as a whole more efficient. The underlying hypothesis is that market oriented management of the public sector will lead to greater cost efficiencies for governments without negative side effects on other considerations. It seeks to introduce into the public services the "three M's" to be found elsewhere: markets, managers and measurements.

For a considerable period Justice was immune from this approach. But then it was thought: why so? For instance, the respected UK organisation, *Justice,* said:

> The courts exist for the benefit of the public and provide, and should be seen to provide, a public service, as much as, say, the National Health Service. We would like to see a wider recognition of this fact. The customer in the law courts may not always be right but it is he or she, and not the judges or lawyers, for whom this service is provided.

And Professor Alec Bradley told the House of Lords Select Committee on Relations between the Executive and the Judiciary:

> As an agency of state power, the Judiciary as a body are, or ought to be, accountable for the general manner in which the court system serves the public at large. But methods of ensuring this form of accountability must not be such as to prejudice judicial independence.

The problem was more acute in the United Kingdom where there was not a Ministry of Justice which could operate as, at least in part, a buffer between the Judiciary and the Executive. Judges at first took the usual line that it is for them to decide how much is required in a particular judicial service. There are signs of some modification since the early days. For instance, as recently as March 2014 the Lord Chief Justice of England and Wales (Lord Thomas of Cwmgiedd) acknowledged in a speech to "Justice" that "our system of justice does need reshaping to deal with the fundamental

change that is occurring in the role of the state".[20] Academics and critical commentators took the line that the legal system is different from the general public service in important respects. That is, the maintenance of the rule of law is of a different order of importance from the provision of other public services.[21]

The problems are real enough. For instance, access to justice can be limited by finding ways to weaken the ability of unpopular individuals (illegal immigrants, convicted criminals, asylum seekers and so on) to pursue their claims in court by limiting access to legal advice and representation; the Executive could see that unpopular parties (defendants in particular kinds of criminal cases) are much less likely to win their cases by effectively depriving them of compensation; and it could, in a very worst situation, undermine the quality and authority of the Judiciary.

The situation, it must be said, has not been nearly so difficult in New Zealand as in England, and not least because happily we have weathered the financial difficulties of the last several years somewhat better. Neither can it be suggested that there has been something of a full frontal attack or retrenchment of the legal system as such in New Zealand. Most of the burden has fallen on lower courts who have had to struggle to find ways of coping with distinct areas of retrenchment. This is not entirely a bad thing. There is much in the legal system which is unnecessarily and inappropriately inefficient. Those things can be weeded out.

The difficulty for a final court of appeal is where, if at all, it will intervene and draw lines in the sand, and what the Executive then does about that. To take a simple everyday example, we are all familiar with the problems in the civil jurisdiction (let alone the criminal) of litigants in person. Judicial resistance here has tended to be against in any way encouraging that phenomenon. Yet it is here; and it will not go away. Much better ways have to be found of dealing with the phenomenon.[22]

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20 Lord Thomas of Cwmgiedd "Reshaping Justice" (Speech to the organisation "Justice, 3 March 2014) at [2].

21 See for example Dawn Oliver "Does treating the system of justice as a public service have implications for the rule of law and judicial independence?" (Speech to the Constitutional Law Group, 19 March 2014).

22 And are being found in the UK, the Personal Support Unit, which assists unrepresented litigants for free was described by Lord Dyson at the recent Queenstown Conference as "the Judges Best Friend". (see www.thepsu.org).

What does all this have to do with a final appeal court, floating somewhat magisterially above the day-to-day difficulties of it all? To put it shortly, defending the appropriate legal estate is surely one of the most important tasks of a Supreme Court.[23] This can be done on parade in particular cases; or it can be done off parade in other ways, to which I now turn.

Ex cathedra pronouncements

Fifty years ago there was perceived to be a very sharp constraint upon even the most senior judges making comment on the legal system, the law or where it might go, save on parade. The occasional book yes, as with Sir Alexander Turner's magisterial works on Estoppel or papers at a triennial New Zealand Law Conference or the like. Today the picture is vastly different. There is a proliferation of material relating to a wide range of things legal emanating from judges.

The chief proliferators around the common law world seem to be final court judges, including our own. The less kind amongst us tend to mutter, "well they better do something with their lives"; the more perceptive and thoughtful worry about the implications for appearances, impartiality and judicial recusal. Recently Australian academics have taken up this issue in print.[24] And interestingly Lord Neuberger, the President of the UK Supreme Court, when speaking at the Banking Services and Finance Law Association Conference in Queenstown in August of this year, felt it appropriate, or perhaps even necessary, to begin his address with some observations on this issue.

He said:

> The trouble for a judge who wants to give an interesting or challenging lecture on a controversial point of law is that he may be disqualifying himself from subsequently determining the issue on the ground that he is parti pris. I have always wondered whether that was really a justified concern. The reasons for my scepticism are essentially two-fold. In the first place, we all know that judges are human – well most of us are – and so everyone will appreciate that a judge will often have a preliminary, even a strong preliminary opinion on an issue that he is trying. It could be said to be positively more consistent with open justice that

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23 This of course skirts the real problem: what is appropriate?

24 Susan Bartie and John Gava, "Some Problems with Extrajudicial Writing" (2012) 34 Syd LR 637; for a reply, Chris Finn "Extrajudicial Speech and the Prejudgment Rule: A Reply to Bartie and Gava" (2014) 34 Adel LRev 267.

> such an opinion is known in advance rather than locked away in his brain. In the good, or others may see it, the bad old days when Law Lords Lord Hoffman and Lord Scott were unable to sit on the two appeals challenging the validity of the Hunting Act because they had both expressed views on the topic in the chamber of the House of Lords and voted on the bill. Yet it is highly questionable whether the fact that they had, as it were, "come out" made them any less suitable to sit on the two cases than if they had quietly kept their strong views to themselves.

After some further observations His Lordship went on:

> … I do accept the judges speaking on controversial legal topics have to be very circumspect. I therefore should make it clear that in talking about remedial constructive trusts today, I am intentionally shooting a line, going back to my days as an advocate. Obviously, I do not consider that the line that I am about to shoot or the points which I am about to make are hopeless, any more than I ran hopeless arguments as a barrister – unless they were the only points I had. And I remain ready willing and able to consider with a genuine open mind the question whether we should adopt the remedial construction trust in English law if and when the point arises in the UK Supreme Court. Having made that disclaimer …

It is worth noting that in a little over a month between 1 August 2014 and 10 October 2014 on my count His Lordship made 11 considered speeches of a jurisprudential or substantive character in several parts of the common law world. Our Chief Justice speaks relatively frequently. Sometimes judicial appointments are now actually predicated on the premise that a given appointee will continue to write. Stephen Sedley told us at the New Zealand Higher Court Judges Conference in Nelson in April of this year, that when he was offered a place on the Bench in 1992 he said that he would accept it only if he could go on writing about the law in non-legal journals like the London Review of Books. He recorded, "The Permanent Secretary, Sir Thomas Legge, was unperturbed. 'We have abolished the 'Kilmuir Rules', he said. So provided you are not as rude about Mrs Thatcher as you were in the last issue, there should be no problem."

Whatever may be thought on this broad issue there is in relation to the Supreme Court and the Executive a more difficult issue. When the Supreme Court is on parade – that is, deciding a case or anything to do with it – it is untouchable. It is duty bound to say what it thinks, of course after hearing due argument and considering all that ought to be considered.

But what if, off parade, the Court or more likely a member of it, "sounds off"? I have dealt elsewhere in an essay with probably the most notorious incident to date under this head. Namely Executive reaction to a speech the Chief Justice made on sentencing. The then Minister of Justice, The Hon Simon Power, commented sharply: "It is the judiciary's job to apply the law set by Parliament … This Government was elected on this sentencing policy. Judges are appointed to apply it. The Chief Justice's speech does not represent government policy in any way, shape or form." The Prime Minister of New Zealand, the Rt Hon John Key said on national television on The Breakfast Show that day "releasing the speech puts [the Chief Justice] over the line and that was really the point that the Minister of Justice [made] … There is a line there and hopefully politicians don't stray one side and the judiciary don't stray the other." In speaking later that day on a public radio channel, the Prime Minister said that Dame Sian had strayed "into the Justice Minister's area".

Political sensitivity – perhaps I should say Executive sensitivity – on these things is much more deep seated than judges, even the most experienced judges, may appreciate. Certainly one of the most repeated remarks which I encounter when consulting and before Select Committees in my present Office is, "We do not want judges deciding that". Lord Devlin put it very well when he said, "… [people] have no more wish to be governed by judges than they have to be judged by administrators".[25]

There is an argument that the Chief Justice occupies a unique, stand-alone, position. I will deal with that point shortly.

In relation to the Court itself and the Executive a pertinent and important point is whether, and if so how far, the court should be heard to be expressing its view, ex cathedra, on matters of high policy affecting the law.

When George Tanner QC, the retired Chief Parliamentary Counsel and by then a Law Commissioner, and I jointly drafted our own version of an integrated Courts Bill, the very first thing I endeavoured to insist upon was to have a purpose clause as Clause 1

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[25] Lord Devlin "The Courts and the abuse of power" *The Times* (27 October 1976) as cited in Tom Bingham "Should Public Law Remedies be Discretionary?" in Tom Bingham (ed) *The Business of Judging* (Oxford University Press, Oxford, 2000) 183 at 194.

in that Part of the Bill relating to judges (bearing in mind we were then addressing all courts). We drafted as follows:

> The purpose of this Part is to provide for the appointment of the New Zealand judiciary, which is a separate and independent branch of government with the role of upholding the rule of law.

And in clause 3, quite apart from the Supreme Court, we included a provision that:

> The Chief Justice is the head of the New Zealand judiciary.

When the view was taken that there should not be one Bill but instead what I suggested could alternatively be a Senior Courts Act and a completely overhauled District Courts Act, the "high" provisions relating to judges were, conveniently or otherwise, emasculated by officials in what is now Clause 3 of the Judicature Modernisation Bill, which is presently before the House. The underlying consolidating nature of the whole exercise was confirmed. But Clause 3(d) of the provision presently in the House is distinctly muted (in Christchurch slang "munted" might not be too strong!) to "[improving] the transparency of court arrangements in a manner consistent with judicial independence."

I should be quite clear that whatever may be thought to be wise or unwise in off parade utterances by members of the court individually, my own view is that unquestionably in her role as the head of the judiciary, the Chief Justice has the right and indeed the duty to speak as the occasion may require.

One point alone makes this proposition unanswerable. We have a Constitution Act which unequivocally establishes that the judiciary is a branch of government. It is a ludicrous proposition to say that the head of that branch cannot express, or should not express a view, as to "justice" or some aspect of the administration of it. Indeed this could be seen to contravene the rule of law itself.

For myself I see no difficulty in the Chief Justice advancing views on what "high policy" ought to be whilst of course recognising that, at the end of the day, it is for Parliament to endorse whatever view is to be taken. This extends (as has occurred very occasionally) to appearances before Select Committees. A recent example was the debate over whether there should be a register of judges' pecuniary interests. The difficulty for final court judges and the Chief Justice is then that they may not get

their way over their dearest or deepest concerns. It is then a matter of proceeding not just with good grace but ensuring that the legitimate will of the populous is not thwarted, which would be a matter of the gravest concern. Judicial rearguard actions have generally not faced well in final Courts, anywhere.

Adapting the court's processes and remedies to the real exigencies of its role

Judicial remedies are where the rubber hits the road. To the practitioner, the client, and most importantly, to the public at large, what a court can and will actually do is what resort to the forensic process is all about.

For centuries the accumulated body of private law remedies developed with a few public law remedies shouldering their way in under the umbrella of judicial review.

Then along came the wave of 20th century charters and Bills of Rights, often affecting the most fundamental of social and economic rights. So the question arose: could the old remedial dog wag its tail successfully in this changed setting? Fashioning appropriate remedies is extremely difficult. And here the potential for clashes with the Executive can be hugely pronounced.

A simple graduate school example – admittedly in a constitutional setting – will suffice. Segregation of schools in education in the United States, particularly in the deep south, was altogether disgraceful. As a constitutional issue it was not very difficult. At the substantive level the only issue – given that segregation was never going to be, interminably sustainable – was when the Supreme Court would grant certiorari. And when it did, the outcome – segregation is not permissible - was never going to be in doubt. That was what the court said in Brown 1.[26] The question for Brown 2 – infinitely more difficult – was: what remedy where segregation is persisted in? The Court reserved its decision for more than a year on Brown 2.[27] A huge number of briefs were filed and there was much argument about it all. In the end, in Brown 2 the Court said: "Desegregation must take place with all deliberate speed." The heroes of this litigation were not the members of the Supreme Court. They were the dozens of federal judges who for more than half a century had to (and still are) finding ways of bringing about desegregation in the face of recalcitrance which

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[26] *Brown v Board of Education of Topeka* 347 US 483 (1954).
[27] *Brown v Board of Education of Topeka* 349 US 294 (1955).

showed extraordinary determination and ingenuity. It was in such a context that the famous structural injunction was born which even, in some instances, went so far as judges having to drive school buses to get their orders enforced.

We face nothing like that in the foreseeable future in New Zealand. We would likely agree with Professor Abraham Chayes' famous article on the public law litigation model that from the perspective of the traditional model, that sort of proceeding is recognisable as a law suit only because it takes place in a courtroom before an official called a judge.[28]

But we have plenty to concern and occupy us. When considering the appropriateness of applying private law remedies to Bill of Rights adjudication in particular, we necessarily have to keep in mind that the remedies we are looking at developed primarily in relation to the relatively self-contained events of traditional law suits. But inherently Bill of Rights adjudication can involve a much broader and amorphous constituency, extending in many instances to the nature of our society as a whole and the nation. And certainly in jurisdictions such as Canada the implementation of Charter rulings necessarily renders into explicit and concrete terms the negation of majoritarian outcomes arrived at directly or indirectly by the elected representative. This raises the practical difficulty as to how far judicial institutions can and how far they should go in pursuit of remedial wisdom drawn from a profoundly different and certainly more secure jurisprudential universe. And it raises, or can squarely raise, issues with the Executive where the Executive has had enacted its "thou shall"; when the Court comes along and says "thou shalt not".

It would take a treatise to engage with these issues properly. There is with respect much to be done in this area in New Zealand. In fairness that depends on what cases come along and the basis on which leave is granted, if needed. Then too, the legal profession in New Zealand has not been exactly venturesome. Quite why that is is another subject for another day. The Supreme Court hasn't had much of an opportunity to do much in this area, but it has undoubtably been very cautious, even when faced with an opportunity.[29]

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[28] Abraham Chayes "The Role of the Judge in Public Law Litigation" (1976) 89 Harvard Law Review 1281.

[29] *The Attorney General V Chapulan* [2001] NZSC 120 is a classic example. There, the Court by a 2-3 majority refused public law damages against the State for breaches of the

My own appreciation is that our court has not distinctly crossed the public law divide in the area of remedies, and that is to the national detriment.[30] Nor has it had the occasion, or the will, to grapple with prospective overruling when it prescribes a change in the law. Then too, on the whole the Supreme Court has overall been a minimalist court in the sense that it resolves the case before it but leaves a great many things undecided. It decides cases on relatively narrow grounds, and with narrow remedies.

This is of course defensible. Indeed there are those who would argue that it is exactly the right way to do things today. At the highest level of courts the connection between judging and democratic self-government is a very difficult issue. It should not be taken to be thought of as "governance" in anything like the usual sense. And if it were to be thought of as a kind of "governance" in New Zealand, that would likely go over like a lead balloon.

The real bulwark in New Zealand at the moment is in the public service. I have been agreeably surprised at the way Ministries and other agencies like the Legislation Advisory Committee do grapple at a fundamental level with Bill of Rights issues. The care which is taken has without doubt headed off many issues which might otherwise have ended up in court. This may reinforce Jerome Frank's point all those years ago, that the important action is not with the Judges, but elsewhere.

States of emergency and the role of the court

Inevitably, the horrors of the world since 9/11 have created truly difficult problems for both Executive Governments and the courts everywhere. It would be surprising if there is not more to come.

At the highest level of abstraction, serious thinkers have had to wrestle with the question of what to do when there is a shock to established political and legal systems that is so grave that the normal rules seem no longer to apply or perhaps should not apply. Much older international law and domestic law has revolved around what

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NZ Bill of Rights by the judiciary notwithstanding the application of that Act to all three breaches of Government.

30 Some little progress has been made: *Simpson v Attorney-General* [1994] NZLR 667 (CA) (Baigent's damages) and the rather timid utilisation of declarations in *Moonen v Film and Literature Board of Review* [2002] 2 NZLR 754 (CA).

some have called "states of exception". This is seen to be the only way to legitimately defend a state in peril and against things like dictatorships. Ironically, the ability of a ruler to effectively suspend the rule of law is seen as being the ultimate act of sovereignty. Notice how the term "national security" has been pressed into service for the suspension of "normal" practices. When challenged, administrations usually respond that the quick responses which were needed (violating the normal constitutional order) will however be followed by a progressive normalisation. But to the concerned even a measured immediate response is noted as being rather closely followed by ever expanding justifications for the assertion of executive and unilateral power.[31] A final court will likely be placed in a somewhat awkward position vis a vis the Executive in these episodes.

We have had here some relatively low level instances of this kind of phenomenon. I was frankly very unhappy with the treatment of Mr Zhoui in our legal system up to and including the level of my then own Court, the Court of Appeal, but happily the Supreme Court agreed with me. My own proposition is that I am entirely with Lord Atkin.[32] Emergencies are not a moment when the rule of law should be suspended; they are precisely a moment when the rule of law needs to be strengthened.

As to how that is to be done, my own view of principle is that "states of exceptions" reasoning needs to be abandoned. This can be done as a matter of theory and principle by embedding what is sometimes called "exceptionality" as an instance of the normal; not as a repudiation of normality. Legal ordinances can be and should be drawn to avoid this, as is the case of the South African Constitution. That is, to make it clear that the new form of sovereignty we live in today, with the benefit of its international dimensions, is bound by rules. This has the advantage of bringing together the jurisprudence of mankind and the domestic setting in one voice.

Ironically, even Machiavelli, that so called prince of darkness, could see the danger of exceptions style jurisprudence. He said:[33]

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31 One of the better articles is Schepple, "Law in a Time of Emergency: State of Exception and the Temptation of 9/11" (2004) 6 Journal of Constitutional Law 1.

32 In *Liversidge v Anderson* [1942] AC 206 (HL).

33 Niccolo Machiavelli *The Prince and the Discourses* (Translated by Luigi Ricci and ERP Vincent, Random House, New York, 1950) at 203.

> Now in a well ordered republic it should never be necessary to resort to extra constitutional measures; for although they may for the time be beneficial, yet the precedence is pernicious, for if the practice is once established of disregarding the laws for good objects, they will in a little while be disregarded under that pretext for evil purposes.

In the meantime, our Court will have to suffer – as other final courts have – with the burden of cases thrown up by an outworn philosophy of legislation in this sort of area, until we write the statutes differently. A Court cannot be blamed for poorly designed statute law,[34] but nor can it turn it on its head.

[34] Our Terrorism Suppression Act 2002 is much better in this respect than many overseas statutes; but there is still much to be done.