The Judge as Law Reformer

by

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I. INTRODUCTION

In recent years increasing emphasis has been placed on law reform and the methods best suited for adapting and developing the law to present and future circumstances. At a time when support throughout the Commonwealth is being given to bodies such as the Law Commission, the Australian Law Reform Commission and in New Zealand, the Law Reform Council and its attendant committees, there are still "some influential lawyers who doubt the need for any special organisation believ[ing] that the common law still retains its capacity for growth and adaptation which should be left in the safe hands of judges . . . ."[1] Indeed, Lord Denning M.R. in *Siskina* v. *Distos Compania Naviera S.A.*[2] concluded:

> To the timorous souls I would say in the words of William Cowper:
> 'Ye fearful saints, fresh courage take,
> The clouds ye so much dread
> Are big with mercy and shall break
> In blessings on your head.'
> Instead of "saints" read "judges". Instead of "mercy" read "justice". And you will find a good way to law reform.

This paper is directed to discussing the role of the judge as law reformer and in particular the effectiveness and extent to which the judiciary can competently reform the law when faced with issues involving questions of policy, whether social or political. The difficulty is to identify those areas in which a judge may properly reform the law. This issue is not new but is one which concerns the judiciary and which has prompted some eminent judges to write, expressing their views on what appears to be an increasingly prevalent consideration.[3]

[1] See L.C.B. Gower, "Reflections on Law Reform", (1973) 23 U. Toronto L.J. 257.
[2] [1977] 3 W.L.R. 532, 554 (1968-1969).
[3] Sir Alexander Turner, "Changing the Law", 3 N.Z.U.L.R. 404; Lord Reid, "The Judge as Law Maker", [1972] 12 J.S.P.T.L. 22; Lord Devlin, "Judges and Lawmakers", (1976) 39 M.L.R. 1.

It is evident that much of the difficulty relates to the ever-pressing controversy as to the functions and role of a judge.

II. The Functions And Role Of A Judge

In "The Judge as Law Maker",[4] Lord Reid drew attention to the different lines of approach taken by the judges of the English Court of Appeal. His Lordship distinguished between "black letter lawyers", careful men who like to go by the book; and those who want to press on, who are by nature legal reformers; and lastly, those who are impatient with technicalities and who are not content unless common sense prevails. This shows the initial difficulty. Each judge may approach his task and the question before him with a different view as to what his function should be, and though all may be equally good lawyers they will not always reach the same result.[5] Each judge may bring to the issue before him his own subjective view as to his role and function — a point which becomes increasingly obvious when discussing law reform. Not every member of the judiciary is committed to the cause of reform. An oft-quoted, but illustrative example is the following statement made by Viscount Simonds in *Midland Silicones Ltd.* v. *Scruttons Ltd.*:[6]

> The law is developed by the application of old principles to new circumstances. Therein lies its genius, its reform by the abrogation of those principles is the task not of the courts of law but of Parliament.

For this particular judge, heterodoxy or heresy "is not the more attractive because it is dignified by the name of reform" — the judge has to decide what the law is, not what it ought to be. Despite this difficulty some appreciation of the judicial function must be obtained.

Both Lord Devlin[7] and Lord Reid[8] agree that the first essential characteristic of any judge is impartiality and a sense of justice. Balance, patience, courtesy and detachment are the watchwords. This would appear obvious and necessary for the effective working of an adversary system where the judge is from first to last exposed to the parties. It is argued[9] that impartiality arises through the disinterested application of known law. Though an impression of even-handedness is given, merely to apply existing legal principles may indicate a narrow and unnecessarily limited view of judicial function, leaving little

[4] *Loc. cit.*, 22-23.
[5] *Ibid.*, 23. Though it will be discussed in relation to precedent (infra) the importance of this observation in relation to certainty should not pass unnoticed.
[6] [1962] A.C. 446, 468.
[7] *Loc. cit.*, 3, 4.
[8] *Loc. cit.*, 23.
[9] Particularly by Lord Devlin, *loc. cit.*, 4.

room for the ardour of the law reformer.[10]

In an address to the Holdsworth Club at Birmingham University,[11] Lord Diplock argued that the source of the common law is found in the bold, imaginative judgments of the nineteenth century judiciary, whilst in the last thirty years it has been the Law Reform Committee, through nearly a score of Law Reform Acts, which has adapted the common law and equity to the needs of contemporary society. "Each of these Acts announces the twentieth century failure of the judges to show courage and imagination."[12] Whilst the judiciary may be of unimpeachable integrity, if Lord Diplock's view is correct it appears that the judicial function is not as extensive nor the judiciary as imaginative as it used to be. Reasons must be sought.

The first explanation is that Parliamentary activity has increased and with it has come great extensions of statute law. A comparison of any volume of the Law Reports today with a nineteenth century volume will show how much judicial activity is now concentrated upon legislation, and how relatively little is devoted to the establishment of private rights at common law.[13] This indicates a change in emphasis and suggests a narrower and more delineated judicial function. It has been very recently asserted[14] that the judiciary is responsible for the constant and radical changes in the law of contract. This may be true of England and Australia but increasing statutory intervention in New Zealand[15] would suggest that future judicial activity will be concentrated upon legislation and that reform will be initiated outside the judiciary and implemented through Parliament.

Secondly, in *Myers* v. *D.P.P.*[16] Lord Reid stated, "if we are to give a wide interpretation of our judicial functions, questions of policy cannot be wholly excluded." Faced with an issue of policy which he felt reluctant to resolve, Lord Reid in effect fell back on the concept that judges should not make the law — his technique was to rely on the doctrine of precedent:[17]

[10] See *Cassell & Co. Ltd.* v. *Broome* [1972] A.C. 1027, 1107, per Viscount Dilhorne: "As I understand the judicial functions of this House, although they involve applying well-established principles to new situations, they do not involve adjusting the common law to what are thought to be the social norms of the time. They do not include bowing to the wind of change. We have to declare what the law is not what it ought to be."

[11] "The Court as Legislators" (1965), noted in G.W. Keeton, *English Law: The Judicial Contribution* (1974), 336.

[12] *Idem.*, per Lord Diplock.

[13] G.W. Keeton, *op. cit.*, 337.

[14] A.L. Diamond, "Law Reform and the Legal Profession" (1977) 51 A.L.J. 396, 397: "There can be no argument about it; today's law of contract is different from that of a hundred years ago, and the judges are responsible for most of the differences." A more apt example in New Zealand might have been in the Law of Torts, particularly negligence.

[15] For example, Illegal Contracts Act 1970; Contractual Mistakes Act 1977.

[16] [1965] A.C. 1001, 1021.

[17] *Idem.*

> The most powerful argument of those who support the strict doctrine of precedent is that if it is relaxed judges will be tempted to encroach on the proper field of the legislature, and this case to my mind offers a strong temptation to do that which ought to be resisted.

The importance of precedent is twofold. First, it may reduce judicial flexibility and inhibit development and reform if respect is accorded to decisions whose relevance may be doubtful when applied to changing and future circumstances. *Farrell* v. *Alexander*[18] provides an excellent illustration. The English Court of Appeal was faced with its prior decision of *Zimmerman* v. *Grossman*[19] in which the words "any person" were given the same interpretation as "a person" in *Remmington* v. *Larchin,*[20] despite the change of wording from "a" to "any" effected by section 85(1) of the Rent Act 1968. Unembarrassed by authority Scarman L.J. would not have read section 85(1) as limited to a landlord but as meaning any person — nor did he consider that the court in *Zimmerman* was under any obligation to follow *Larchin.* Unable to find that *Zimmerman* was per incuriam, as the interpretation was still reasonable, Scarman L.J. refused to overrule the decision despite the justice of the plaintiff's case and the clear and obvious need for reform. His Lordship stated:[21]

> To some it will appear that justice is being denied by a timid, conservative, adherence to precedent. They would be wrong. Consistency is necessary to certainty — one of the great objectives of the law. The Court of Appeal — at the very centre of our legal system — is responsible for its stability, its consistency, its predictability.

Lord Denning M.R., whose approach drew "immense sympathy"[22] from Scarman L.J., thought the Act was plain and clear — it covered the case. Had Lord Denning M.R. been in the majority he would have overruled *Zimmerman* on the basis that the Court of Appeal should not be bound by prior decisions which are wrong,[23] though it is unlikely His Lordship intended to create a fourth exception to *Young* v. *Bristol Aeroplane Co. Ltd.*[24] but rather that *Zimmerman* was per incuriam the 1968 Rent Act, for he had previously commented, "when there is a conflict between a plain statute and a previous decision, the statute must prevail."[25] Though acknowledging that the legislation revealed a gap which should be closed, Lawton L.J., who held the balance of power, surmised,[26] "I would close [it] at once if I could,

[18] [1976] 1 Q.B. 345.
[19] [1972] 1 Q.B. 167.
[20] [1921] 3 K.B. 404.
[21] Supra, n.18, 371.
[22] *Idem.*
[23] *Idem.*, 359.
[24] [1944] K.B. 718. In a note, (1976) 92 L.Q.R. 321, 322, it is suggested that an extension to the "leap-frogging" procedure might be worth considering.
[25] Supra, 359. Lord Denning M.R. did not think it right to compel the plaintiffs to appeal to the House of Lords at their own expense, "when the result is a foregone conclusion."
[26] *Ibid.*, 366.

but in my opinion, I could only do so by stretching the law." There is implicit agreement with Scarman L.J. that such a course would damage the law in the long term. In *Farrell,* consistency, stability and predictability were thought more important than justice and reform. Thus precedent reveals two inconsistencies — that the law shall be certain and that it shall move with the times. *Farrell* does not reinforce or support the notion that "precedent combines enough certainty to allay the fears of the conservatives with enough flexibility to satisfy the demands of those who seek for justice",[27] but it does illustrate that precedent may inhibit reform, and narrow the judicial function.

Secondly, reliance on precedent allows a judge to "depersonalise" his role. No doubt Lord Reid in *Myers* v. *D.P.P.* evaluated the underlying policy, but rather than place responsibility on his personal evaluation, he preferred to indicate that the result was dictated by the weight of precedent. It might be argued that despite the inhibiting effect on reform, the discriminating application of precedent or the choice between various interpretations of statutory language marks a development of the law and a concern not only for what the law is but what it ought to be. Only on the basis that the law ought to be certain is *Farrell* an explicable decision.[28] Nevertheless it is evident when discussing the role of a judge that it is an area of quicksand, where inevitable differences are recognisable in philosophy and approach. To be cynical, a judge's perception of his function may vary from case to case. Thus Viscount Simonds, in contrast to his stance in *Midland Silicones*, stated in *Shaw* v. *D.P.P.*,[29] "[but] I say that her [common law's] hand is still powerful and that it is for Her Majesty's judges to play the part which Lord Mansfield pointed out to them." The impact of personality continues to be strong. The difference in judicial attitudes is unavoidable. Judges will never think alike. There are the timorous souls and the bold spirits.

III. Judicial Law Reform — Immediate Difficulties

Before the Court of Appeal in *Gouriet* v. *Union of Post Office Workers*[30] the Attorney-General would not concede in argument, "that the right way of changing the law is by a decision of one court looking at one case". When applied to the New Zealand Law Reform Council or the Law Commission, law reform is not simply an occa-

[27] Diamond, *loc. cit.*, 397.

[28] The importance of certainty would explain Scrutton L.J.'s judgment and Lawton L.J.'s citing of *The Merchant of Venice*:

> "T'will be recorded for a precedent,
> And many an error, by the same example,
> Will rush into the state; it cannot be."

[29] [1962] A.C. 220.

[30] [1977] 1 All E.R. 696, 709.

sional reform, or day-to-day running repairs, but a much more deliberate process. It has been said to be[31] "a conscious systematic and continuous effort to clarify the law, to remove anomalies and imperfections and to adjust the law to what we conceive to be the circumstances and need of the day and the morrow". But it is the very nature of judicial law reform that it cannot be systematic or continuous. The courts, without power to initiate reform, have to await the chance and opportunity of litigation to right an injustice or clarify obscurity, in contrast to law reform by statute. In *Gouriet* the Attorney-General argued[32] "only Parliament which is able to look at all aspects of the matter can conduct such a review". The contention is one which bedevils advocates of judicial law reform. The argument is that the judiciary is less well-equipped than the Legislature to consider and resolve issues of law reform. Scarman L.J.,[33] then Chairman of the Law Commission, considered that a judge dealing with a case has only such evidence as is given in court and his own knowledge of the law. These resources without the array of social inquiry open to law reform provide an insufficient basis for judicial intervention in the process of reform. A surer touch is required than the judgment of a Court. In contrast Lord Reid,[34] when comparing the common law with legislation surmised:

> If you think in months, want an instant solution for your problems and don't mind that it won't wear well, then go for legislation. If you think in decades, prefer orderly growth and believe in the old proverb more haste less speed, then stick to the common law.

The validity of these conflicting views must be tested. In doing so, the vital issue is to identify those areas in which a judge may properly reform the law. It is proposed to look closely at a few decisions and draw from them relevant conclusions.

IV. Reform Involving Minimal Policy Considerations

When discussing the judiciary's function, Turner J.[35] argued that the reform of adjectival law is a matter the responsibility for which ought to rest primarily upon the judiciary, whilst more recently Lord Devlin[36] thought in relation to evidence and procedure that it should be established as a convention that Parliament should not intervene in this aspect of the common law. The explanation must be that reform of adjectival or "lawyers' law" may involve minimal considerations of policy. Evidence and procedure are areas where the judiciary and

[31] D.J. Riddiford, "The Future for Law Reform in New Zealand" [1971] N.Z.L.J. 276.
[32] Supra, 709.
[33] In M. Zander (ed.), *What's Wrong With the Law* (1970), 92.
[34] *Loc. cit.*, 28.
[35] "Changing the Law" (1968-1969) 3 N.Z.U.L.R. 404, 423.
[36] "Judges and Lawmakers" (1976) 39 M.L.R. 1, 13.

the lawyer might alone be expected to bring the necessary expertise and experience, and where outsiders to the legal profession might be thought to show little interest, perhaps stemming from the extreme technicality. However it is questionable that there is a section of the law identifiable as "lawyers' law" where policy considerations do not intrude. As Scarman L.J.[37] more expressly states, "there is no cosy little world of lawyer's law in which learned men may frolic without raising socially controversial issues". It is preferable or more convincing to think not in terms of "lawyers' law" but of areas in all aspects of the law where policy considerations are minimal. This suggestion is worth considering in the light of *Dragecivich* v. *Martinovich,*[38] a decision on which Sir Alexander Turner placed reliance.

Since 1927 applications for new trials on the ground of discovery of new evidence had been guided by the rule in *Orbell* v. *Mossman.*[39] In the Court of Appeal, North P.[40] and Turner J.[41] thought the rule had been "expressed in too general terms" and that the time had come to relax in some measure its rigidity. The reasons for the relaxation were threefold. First, the rule had been expressed without sufficient regard to the nature of the case and the particular circumstances in which it was sought to introduce new evidence. Secondly, judges are sitting increasingly without juries and are deciding questions of fact. Finally, guided by the overriding consideration of the interests of justice, the issue could safely be left to the discretion of the judge who would exercise caution in granting a new trial. *Dragecivich* is illustrative of judicial technique. The old rule was seen as unsatisfactory. Reasons for reforming this situation were identified. They were balanced against the fear of perjury and the public interest that there should be an end to litigation — the reasons for the old rule — but the Court of Appeal, determining that there should be greater flexibility, adopted the three conditions proposed by Lord Denning in *Ladd* v. *Marshall.*[42] It must be shown that the evidence would not have been obtained with reasonable diligence for use at the trial. It must be such that if given it would probably have an important influence on the result of the case. Finally, the evidence must be apparently credible, although it need not be incontrovertible. *Dragecivich* illustrates the judges as law reformers providing an acceptable solution by amending a rule where it no longer accords with changing circumstances. Though the Court of

[37] *Law Reform: The New Pattern* (1968), 27, and at 28: "I challenge anyone to identify an issue of law reform so technical that it raises no social, political or economic issue".
[38] [1969] N.Z.L.R. 306.
[39] [1927] N.Z.L.R. 353.
[40] Supra, 308.
[41] *Ibid.*, 310.
[42] [1954] 3 All E.R. 745.

Appeal successfully reformed the law, *Dragecivich* must be approached with caution. It is open to criticism that the reform was narrow and its effect was to mend and patch an aspect of the law where outsiders to the profession show little interest. Indeed there must be limits, for judicial reform must be a process of evolution and the working out of compromises. If wide reform is needed or the law is to be extended, it must be by the development and application of fundamental principles. But as Professor Diamond[43] points out, "once [judges] go beyond the issue in dispute they risk the application by later judges of the dread label of 'obiter dicta' to their more far-reaching pronouncements". Whilst a court may recognise injustice arising from an application of existing law, the second bridge must be crossed by devising a rule in which better results will be achieved in the generality of cases. There are limits to what can be done. *Myers* v. *D.P.P.*[44] suggests the necessary reform may be beyond the judiciary. "The only satisfactory solution is by legislation followed on a wide survey of the whole field . . ." or, as Lord Wilberforce states in *Launchbury* v. *Morgans,*[45] "[a]ny new direction, and it may be one of many alternatives, must be set by Parliament". Despite this criticism there are aspects of the law which still remain the reserve of the lawyer but which should be identified not as "adjectival" or "lawyers' law" but as areas involving minimal policy considerations where the Legislature may act only intermittently and with great delay. The real issue is the competency of the judiciary to reform the law when confronted with questions of social or political policy.

V. Questions Of Policy

A comparison is often drawn[46] between Commonwealth judges and the judiciary of the United States Supreme Court. Taking its life from a written constitution, the Supreme Court fills a legislative vacuum in which it is not only one of the three branches of government, but also a major policy maker. Constantly called upon to resolve vital policy issues, its decisions generally reflect differences of policy and values, which give the judgments a political as well as judicial character. This is evident in the line of decisions stemming from *Plessy* v. *Ferguson*[47] through *Brown* v. *Topeka Board of Education*[48] to the recent decision in *Bakke's*[49] case in the field of race relations and civil rights. Not only

[43] *Loc. cit.*, 398.
[44] Supra, 1021, per Lord Reid.
[45] [1973] A.C. 127, 137.
[46] W. Friedman, "Some Jurisprudential Reflections on Four Recent Decisions of the House of Lords" in *Judicial Law Making England* (1967); Lord Devlin *loc. cit.*, 5.
[47] 163 U.S. 537 (1896).
[48] 347 U.S. 483 (1954).
[49] *Regents of the University of California* v. *Bakke* June 28, 1978.

is the judges' judicial experience important but their political beliefs and philosophy are also highly relevant. In contrast, the majority of Commonwealth judgments are dispassionate in tone, exhibiting a reluctance by the judiciary to be involved in controversy or to express or make explicit the policy implications of their decisions. Nevertheless questions of policy do arise, but not all members of the judiciary may adopt the same approach as Lord Denning M.R. did in *Dutton* v. *Bognor Regis U.D.C.*:[50]

> In previous times, when faced with a new problem, the judges have not openly asked themselves the question: What is the best policy for the law to adopt? But the question has always been there in the background . . . . Nowadays we direct ourselves to considerations of policy.

Three recent cases bring the issues of judicial law reform into focus. In each the courts were forced to confront policy considerations.

In *Gouriet* v. *Union of Post Office Workers* the question was whether there was jurisdiction to hear an application for an injunction by a member of the public who sought to enforce the existing criminal law, despite the Attorney-General's refusal to give consent in relator proceedings. The plaintiff, John Gouriet, was secretary of a right-wing pressure group, the National Association for Freedom, who sought the aid of the Attorney-General who held office in a Labour Government to stop the proposed boycott by the Union of all postal communications between Britain and South Africa as a protest against the latter's policy of apartheid. In this charged political atmosphere the Court of Appeal at the interlocutory appeal granted an interim injunction. Whilst Lord Denning M.R. stated,[51] "it is very debatable whether [the Attorney-General] has directed himself properly in regard to all the considerations on the matter", Lawton L.J.[52] was more explicit if not radical: "Until such time as there is some explanation as to why the Attorney-General did not intervene, then in the face of it his failure to do so must have been for some reason which was not a good reason in law." At the hearing two main issues emerged. First, of vital constitutional importance — did a court have jurisdiction to question the Attorney-General's refusal to give consent? Secondly, whether the plaintiff, with no particular interest other than his interest as a member of the public, was entitled to bring the action after the refusal of consent. On the first issue Lord Denning M.R.[53] was convinced the discretion to refuse was not absolute or unfettered. It could be reviewed by the courts and indirectly overridden to the extent that if leave were refused in a proper case the plaintiff could himself apply to the court for a declaration or, where appropriate, an injunction.

[50] [1972] 1 Q.B. 373, 397.
[51] Supra, 703.
[52] *Ibid.*, 705.
[53] *Ibid.*, 716.

However Lawton[54] and Ormrod L.JJ.[55] did not accept that a court had jurisdiction over the discretion of the Attorney-General. But this did not bar relief. Where there was no discernable reason why threatened breaches of the criminal law should not be restrained, but consent had been refused in relator proceedings, it was open to a member of the public who might be inconvenienced or suffer material loss by reason of the breaches to bring proceedings in his own name for a declaratory judgment that the threatened action would in fact constitute a breach of the criminal law.[56] The significance of *Gouriet* to law reform is manifest.

First, an appellate court thought itself competent to consider an area of political controversy. If Lord Denning M.R. had been in the majority, the reasons for which the Attorney-General had refused his consent would have to be aired in court, and a judge sitting *in banco* would decide whether those reasons[57] were given in bad faith, because of party politics, or whether the information was laid by a pressure group of which the Attorney-General disapproved or whether they were sufficient cause for the refusal of consent. It is a recognised principle[58] that "a person entrusted with a discretion must . . . direct himself properly in law", excluding irrelevant considerations and exercising the discretion reasonably and in good faith, but Lord Denning M.R. is apparently suggesting that the judiciary is possessed of sufficient assurance and skill to resolve or at least consider contentious political issues. Even on the majority approach, Lawton L.J.[59] envisaged that if "the Attorney-General elected to reveal the factors of public interest which were not discernable, the court in the exercise of its discretion would assess the new information and judge accordingly".

Secondly, the Court of Appeal felt competent to consider what was in the public interest. The Attorney-General had submitted in argument[60] that in coming to his decision he had had regard to many different factors of some of which the courts have no knowledge: "I have to consider broader questions of public interest in making my decision". Lawton L.J. considered this "the basic problem"[61] of the case, acknowledging that considerations of public interest have to be

[54] *Ibid.*, 723.
[55] *Ibid.*, 730.
[56] *Ibid.*, 725 per Lawton L.J.
[57] *Ibid.*, 715.
[58] *Associated Provincial Picture Houses Ltd.* v. *Wednesbury Corporation* [1948] 1 K.B. 223, 228, 229, per Lord Greene M.R.: "The decision must be proved to be unreasonable in the sense that the Court considers it to be a decision that no reasonable body could have come to."
[59] Supra, 726.
[60] *Ibid.*, 707.
[61] *Ibid.*, 726.

taken into account in the discharge of the Attorney-General's duties, that he has sources of information which are not and could not be available to the court and finally, that he may be in a better position than judges to weigh the factors affecting public interest. But what could not be accepted was that the Attorney-General in relation to law enforcement through the civil courts, is the sole arbiter of what is in the public interest. Not only did the Court of Appeal consider itself sufficiently competent to reform the law in the shifting sands of controversy, but the judgments reveal a willingness to indicate the implications of the decision, and the fear that without judicial intervention "the law would become a dead letter".[62] *Gouriet* went on appeal to the House of Lords and from their Lordships' judgments can be distilled the following warnings.

First, decisions relating to public interest are not such as courts are fitted or equipped to make.[63] It is entirely appropriate that proceedings relating to public interest should be vested in a public officer who can have regard to information unavailable to a court.[64] Secondly, decisions that are of a type to attract political criticism and controversy are outside the range of discretionary problems which the courts can solve.[65] Lord Wilberforce's warning might be taken as meaning either that a court should not become enmeshed or involved in controversy, or that the issue was non-justiciable, in the same manner as the Home Secretary viewed immigration in *R.* v. *Home Secretary, Ex parte Hosenball*:[66]

> Whether an individual's presence in this country is a danger to this country is not a legal decision. It is not a justiciable issue or a matter of law; it is a matter of judgment. Judgment should be exercised by the government, subject to the House of Commons, and not by a tribunal which is not under the control of the House.

The difference in interpretation is not resolved by Lord Wilberforce's comment:[67] "Judges are equipped to find legal rights and administer on well-known principles, discretionary remedies. These matters are widely outside those areas." Finally, if a public officer such as the Attorney-General commits a serious error of judgment by withholding his consent, the remedy must lie in the political field by enforcing his responsibility to Parliament,[68] and not in the legal field

[62] *Ibid.*, 717, per Lord Denning M.R. This was the answer to the question the Master of Rolls posed, 'What then does it it all come to?". In *Harder* v. *Tramways Union* [1977] 2 N.Z.L.R. 162, Chilwell J. considered the Court of Appeal's decision in *Gouriet* to be an "enlightened view" and though His Honour played down the policy considerations they were still recognisable: "This court is not unmindful of the different views held by some and particularly some in the Unions as to what . . . ought to be the limited role of this court."

[63] [1977] 3 All E.R. 70, 84, per Lord Wilberforce.

[64] *Ibid.*, 119, per Lord Fraser.

[65] *Ibid.*, 84, per Lord Wilberforce.

[66] [1977] 1 W.L.R. 766, 780.

[67] *Gouriet*, supra, 84.

[68] *Ibid.*, 119-120, per Lord Fraser.

through the courts. It would be a political and not a legal error in failing to weigh correctly different aspects of the public interest. In reality this remedy is probably illusory where the Attorney-General could count on the majority's support in Parliament. Closely associated with these warnings must be the concern expressed by Lord Fraser[69] that judicial intervention might have destroyed the Attorney-General's chance of averting the threatened illegal conduct by negotiation, or of selecting a more opportune time for confrontation or of subsequent prosecution before a jury (where the onus of proof is heavier than in a civil action). It is apparent that the House of Lords is pointing to a conclusion which Scarman L.J. reached previously in *Farrell* v. *Alexander*:[70] "The task of law reform, which calls for wide-ranging techniques of consultation and discussion that cannot be compressed into the forensic medium, is for others."

Subsequent to *Gouriet* the Court of Appeal and House of Lords clashed once more on the efficacy of the judicial law-reformer in *Siskina* v. *Distos Compania Naviera S.A.*[71] Could the procedure in which the courts issue a "Mareva" (an injunction) to prevent an overseas debtor who has assets in the jurisdiction from defeating his creditor's claim by removing those assets from the jurisdiction, be applied to a claim against Saudi Arabian cargo owners removing the insurance proceeds of the vessel Siskina, sunk in the Mediterranean, from out of the jurisdiction, despite the inability of the creditor to point to some cause of action? Lord Denning M.R.[72] and Lawton L.J.[73] considered the situation fell entirely within the Rules of the Supreme Court Ordinance 11 Rule 1. However the Master of the Rolls concluded[74] that even if the Rules of Court do not now provide for it, the judiciary ought to be bold enough to extend the jurisdiction to authorise service on persons out of the jurisdiction. Rather than allow the debtor to decamp with the assets, Lord Denning M.R. brushed aside criticism of judicial legislation usurping the function of the Rules Committee and relied[75] on "an inherent jurisdiction to lay down the practice and procedure of the Court to restrain the removal of the insurance money 'finding this' a good way to law reform". Bridge L.J. (dissenting) and the House of Lords (overruling the Court of Appeal) were united in their criticism.

The first objection[76] was that the jurisdiction of the Rules Com-

[69] *Idem.*
[70] Supra, 371.
[71] [1977] 3 W.L.R. 532 (C.A.); [1977] 3 W.L.R. 818 (H.L.).
[72] *Ibid.*, 549.
[73] *Ibid.*, 556.
[74] *Ibid.*, 554.
[75] *Idem.*, "To wait for the Rules Committee would be to shut the stable door after the steed had been stolen."
[76] Supra, 828, per Lord Diplock; 830, per Lord Hailsham (H.L.).

mittee is statutory, and for judges to pre-empt its functions is for the Court to usurp the function of the Legislature. Secondly, a matter which is crucial to identifying those areas of law reform upon which a judge may properly pass judgment, the Rules Committee is presided over by the Lord Chancellor, contains judges of the Court of Appeal and High Court as well as members of the legal profession, and officials from the Lord Chancellor's department. To usurp the Committee's[77] function

> is to remove a function properly exercised by a representative body able to examine a question from all relevant points of view and hand it over to a particular panel of judges deciding an individual case after hearing arguments from advocates representing the interests of opposing litigants.

Such a result would be highly undesirable. To the same effect Bridge L.J. had commented:[78]

> We cannot hope to be fully seized of all the considerations which should affect a decision not only as to whether the jurisdiction should be enlarged but also, if it should, as to any appropriate conditions and limitations subject to which it should be exercised.

This observation should not be viewed as limited to the *Siskina* case.

Bridge L.J. and the House of Lords accorded in rejecting the major policy consideration expressed in Lord Denning M.R.'s judgment, that following entry into the European Community the Court was obliged under the Treaty of Rome to harmonise the laws of member states to the extent required for the proper functioning of the Common Market. Comity was in favour of granting the injunction.[79] Bridge L.J.'s reluctance stemmed from the danger,[80] "that the court, being in no position to undertake a comprehensive review of the international implications of the jurisdiction claimed, may proceed on false assumptions in this regard". Lord Diplock,[81] examining the Treaty, indicated harmonisation must result from the initiative of the Council of the Community through the machinery of Article 100 and not from the individual member states. The treaty provides little encouragement for judges to "jump the gun" by introducing their own notion of a suitable harmonisation.

Gouriet and *Siskina* point unerringly to a conclusion that a wide judicial function brings the judiciary into considerations of policy, raising doubts that a panel of legal specialists, however eminent, can formulate law reform proposals in a controversial area of the law. The inclination of the House of Lords to retreat from reform where there are important social or political implications marks a voluntary withdrawal which may leave the judiciary with a function no greater

[77] *Ibid.*, 830, per Lord Hailsham.
[78] Supra, 560 (C.A.).
[79] *Ibid.*, 552 (C.A.).
[80] *Ibid.*, 569 (C.A.).
[81] Supra, 827 (H.L.).

than that indicated by Lord Hailsham:[82]

> Courts exist, after all for the decision of particular disputes according to the law as it exists at the relevant time. Matters of policy are often better left to the appropriate authorities entrusted with the task.

Judges are not as a body the complete law reformer. The task of reform calls for wide-ranging techniques and expertise which it is unreasonable to expect the judiciary to bring to bear within the confines of a case after hearing counsel's arguments. Despite pessimism engendered by their Lordships, it would be wrong to conclude that the judiciary is incapable of enacting reform. New principles are being examined against present circumstances and, if socially or politically valuable, are being enacted or extended.

In certain areas questions arise which outsiders to the legal profession regard as controversial, upon which anyone can form an opinion and where deference is unlikely to be accorded to the views of a judge. In sensitive and perhaps emotionally and morally charged areas, is the judiciary expected to discern and assess the extent and direction of social change and then reform the law so as to accord with public opinion? Whilst courts can be assured of technical learning and legal research, the judiciary may not possess sufficient social awareness or have at its disposal provision for social research. Yet placed in this position the judiciary's response may be enlightened. The divisive and sensitive issue of the abortion law engenders in the community every sort of response.[83] Without legislative guidelines Chilwell J. and the Court of Appeal in *R.* v. *Woolnough*, when construing "unlawfully' within section 183(1)(b) of the Crimes Act 1961, had to estimate the limits within which the termination of a pregnancy could be regarded as legally justified — not to say who was right or wrong as between the extreme views held by different sections of the community, but to draw the line as to where the activity was criminal.[84] The community would accept that the "back-street" abortionist falls on the wrong side of the dividing line,[85] but there would be no consensus relating to the carrying out of therapeutic abortions as to which are justified as within the law, and which are regarded as unlawful.[86] Chilwell J.'s test was, "whether it is necessary to preserve the woman from serious danger to her life or to her physical or mental health, not being the normal danger of pregnancy and childbirth".[87] This test was a con-

[82] *Ibid.*, 831.
[83] *R.* v. *Woolnough* [1977] 2 N.Z.L.R. 508 at 519, per Woodhouse J.
[84] *Ibid.*, 516.
[85] *Ibid.*, 519.
[86] As Richmond P. aptly stated (*Ibid.*, 517-518): "The Courts have to do their best to draw a line at a point where the procuring of a miscarriage ceases to be merely a matter of debate, from a religious, moral, or ethical point of view, and becomes activity of a kind which warrants its designation as criminal."
[87] *Ibid.*, 511.

siderable extension of Macnaghten J.'s direction to the jury in *R.* v. *Bourne,*[88] which focussed only on the preservation of the mother's life. The Court of Appeal judgments reveal differing responses and approaches.

Wild C.J.,[89] though accepting it was reasonable to accept the mental health factor to loom larger in decisions as to the justification for terminating pregnancies, thought Chilwell J.'s direction did not conform to the law. If the test was to be enlarged it was the function of the Legislature not the Courts. Richmond P.[90] narrowed the case to the question whether, "in the case of early pregnancy the court ought to extend the concept of 'life' to include a bone fide intention to preserve the 'health' of the mother from serious harm". In the circumstances of the case His Honour saw no sufficient reason why this should not be done, though it was impossible to lay down any general principle. In a challenging judgment Woodhouse J.[91] considered that "unlawfully" in section 183 could not be "constrained by any conventional use of the doctrine of precedent", and it would be dangerous to assume that acceptable solutions would follow from the use of a legal strait-jacket. An "evolutionary process" had to be applied to this "shifting and developing concept", to ensure that the contemporary significance of earlier cases was evaluated with regard to the particular social environment and circumstances in which they were decided. The decision not to follow *Bourne* marked Woodhouse J.'s personal evaluation of the underlying controversy, achieving this through legal re-interpretation.

There is no doubt that the Court of Appeal, particularly Woodhouse J., made a conscious attempt to keep the law amenable to shifts of public opinion. Whether the Court correctly interpreted modern thought is highly contentious. The different tests enunciated in *Bourne* and *Woolnough* certainly indicate an awareness of the changing tide of opinion. In the circumstances, *Woolnough* is an attempt to charter an acceptable course through the shifting sands of controversy, despite the unanimous feeling of the judges that reform in this contentious area was the responsibility of Parliament.

VI. The Suggestive Function

Until now the role of the judiciary in reform has been considered only from the standpoint of reforms attempted or introduced in the judgments. However the importance of suggestions made by a judge

[88] [1939] 1 K.B. 687.
[89] Supra, 524.
[90] *Ibid.*, 517.
[91] *Ibid.*, 520.

in some part of the law which he has under consideration should not be overlooked. Judicial suggestion may catalyse reform by a higher court, by a law reform body or by Parliament. It is not proposed to dwell at length on this aspect of the judicial role in reform, other than to cite Richmond P. in *R.* v. *Woolnough*:[92]

> I hope that this judgment will illustrate the uncertainty of the present law. Unless more definite guide lines are enacted by Parliament the Judges will be called upon to determine such difficult questions as whether an abortion is justified on the sole ground that the woman is a victim of rape or other unlawful intercourse, or that it is carried out to prevent the birth of an abnormal child. It is anticipated, however, that many of these uncertainties will be removed by Legislation after the present Royal Commission has presented its report to His Excellency the Governor-General.

Though not resolved, the uncertainties outlined by Richmond P. were legislatively considered, as shown by the section 6 meaning of "unlawfully" in the Crimes Amendment Act 1977.

VII. Appraisal Of The Judge As Law Reformer

In considering the judge as a law reformer, the concern has been to identify those areas in which a judge may properly reform the law, and once isolated, the effectiveness and extent to which the judiciary might reform the law. Judges will never all think alike. Inevitably, recognisable differences in philosophy and approach result in different views of judicial role and function, and though of the utmost integrity, the decisions considered indicate the judiciary is not as imaginative or its function as extensive as it used to be. This decrease in judicial function may be attributable to the increase in Parliamentary activity and the continued reliance on precedent, which reveals two incompatible objectives — that the law shall be certain and that it should move with the times. Whether or not these are the correct reasons, the House of Lords in *Gouriet* and *Siskina* displayed a marked willingness to retreat from issues of policy. The significance of this retreat is that it may be unwise to rely on judicial reform as the predominant vehicle for adapting the law and bringing it into currency with changing conditions, as the effect of these decisions is to render judicial reform inherently unsatisfactory by exposing the following weaknesses:

(i) No matter how enlightened the judge nor how detailed counsel's arguments, the judiciary is seldom in a position to take account of all the implications which a suggested reform will have on the development of the law. Judges are not seized of all considerations affecting the decision. Law reform is not an exclusively legal

[92] *Ibid.*, 519.

topic nor are judges the complete law reformers.[93] Their technical learning and expertise do not give the judiciary the awareness necessary to weigh adequately matters of public interest or of social and political importance. Reform should be undertaken by Parliament or a law reform body, which are better suited to ascertain the consequences, and in highly contentious areas, to discern the direction of social change or the consensus of public opinion. The task of law reform cannot be compressed into the forensic medium.

(ii) Though there was little time between the appeals, *Gouriet* and *Siskina* indicate that until approved at the highest levels, reform by the judiciary is of uncertain stability. Associated with this is the danger arising from having five decisions in an appellate court — and the uncertainty, if not confusion, which may be engendered.[94] Also, a judge can at best only carry out a "patching" job restricted to the circumstances of the case. Application of broad principles results in obiter dicta and the risk of further uncertainty.

(iii) Law reform, to be really effective, must be a conscious, systematic and continuous effort to clarify the law and remove anomalies and exceptions. The reforming decision by its very nature is quite fortuitous. The accidents of litigation may not throw up the right cases or the right judges.[95] In *Farrell* v. *Alexander* the parties might have settled out of court rather than suffer the costs of an appeal to the House of Lords. Nevertheless if that had been the case, a person in the position of a Mrs. Farrell would still have been caught by the unjust rule of *Zimmerman* until such time, which might have been years, before an appropriate opportunity arose in the courts to right the injustice. Reform must not depend on luck and fortuitousness or arise and be borne at the expense of individual litigants.

It is important that these criticisms should not be taken as implying that a judge is to have no function as a law reformer. Rather they are designed to create an appreciation of those areas in which he can introduce reform.

It should be noted that:

(i) Judges are competent to reform the law in areas where they can be

[93] *Launchbury* v. *Morgans*, supra, 137, per Lord Wilberforce: "Liability and insurance are so intermixed that judicially to alter the basis of liability without adequate knowledge (which we have not the means to obtain) as to the impact this might make on the insurance system would be dangerous and, in my opinion irresponsible." Also at 142-143 per Lord Pearson and at 151 per Lord Salmon.

[94] Lord Reid: "We dare not be clear in case we are wrong", reported by L.C.B. Gower, "Reflections on Law Reform" (1973) 23 U. Toronto L.J. 257, 259.

[95] Diamond, *loc. cit.*, 348.

expected to bring the necessary expertise and experience, where there are minimal considerations of policy and where outsiders to the legal profession might show minimal interest. *Dragecivich* provides an excellent example. "Blackletter" or "lawyers' law" are confusing terms, for areas of minimal policy considerations may arise in all aspects of the law and are not confined to one delineated section such as evidence or procedure, despite the proclivity of the judiciary to class these as "lawyers' law".

(ii) Even in the shifting sands of controversy, *R.* v. *Woolnough* indicates that with care and sensitivity a court can reform the law so that, in the circumstances of a particular case, an approach may be divised which relates the law to contemporary circumstances without establishing a general principle or deciding the merits of two extreme views. Judges who develop the common law must not abandon entirely the responsibility for keeping it in tune with the times.

(iii) In exercising what has been termed a suggestive function, the judiciary may act as the catalyst for, or initiator of, proposed reforms.

(iv) A valuable contribution might be made by a judge as part of a committee, pooling his judicial expertise with the social and political acumen of others.

VIII. Conclusion — The Changing Pattern Of Law

The apparent reluctance of the judiciary to become involved in law reform suggests a changing pattern in the law. Whether or not one agrees with Sir Leslie Scarman's[96] argument that English law (and presumably New Zealand law) is not the common law supplemented by statute, but statute supplemented by the common law, there is no doubt that the flood of parliamentary activity makes increasing incursions into fields once thought to be the domain of common law and the judiciary. This growth of enacted law indicates that reform will be undertaken at the Parliamentary source, no doubt in accordance with the advice and guidance of law reforming bodies and possibly the judiciary. The statute book, not the court decision will be the source of reform. The judiciary must be seen in perspective as one agent in the whole process of law reform. "The province of the modern judge", notes Professor G.W. Keeton,[97] "is more restricted than that of his predecessors [although] the part which he plays in the development of the law, and his assessment of the extent and direction of social change make his task no less exacting than others." It may be

[96] *Law Reform — The New Pattern* (1968), 49.
[97] *English Law: The Judicial Contribution* (1974), 363.

that with the growth of legislation the judiciary's role may be to adopt a wider interpretation of a reform statute, taking care not to ignore the circumstances and context in which the statute stands but endeavouring to ascertain and implement the policy declared by the statute. Certainly this approach would accord with the spirit of section 5(j) of the Acts Interpretation Act 1924.

In conclusion, had the judiciary shown willingness and competency to reform the law in areas of policy, reform might safely be left to the forensic medium of a court. However the main message of this paper is that reform is not simply a legal problem, nor is a judge the complete law reformer.

To those fearful of non-judicial law reform I would say in the words of William Cowper:

> Ye fearful saints fresh courage take,
> The clouds ye so much dread
> Are big with mercy and shall break
> In blessings on your head.

Instead of "saints" read "sceptics". Instead of "clouds" read "statutes". Instead of "mercy" read "reform". And you will find a better way to law reform.