

# THE JUDGE AS LAWMAKER:

## AN ENGLISH PERSPECTIVE

The Rt Hon Lord Bingham of Cornhill

The role of judges as lawmakers has over the years been the subject of much discussion. There appear, broadly speaking, to be four schools of thought on the subject.

The first school would hold that judges have no role as lawmakers: their function is to declare the law, not to decide what it should be. The business of law making is, on this view, exclusively a matter for Parliament. The most prominent standard-bearer of this school, at any rate in England, in relatively recent times was Lord Simonds. Responding to an invitation by Lord Denning to overrule the English rule on privity of contract, he said:

"To that invitation I readily respond. For to me heterodoxy or as some might say, heresy, is not the more attractive because it is dignified by the name of reform. Nor will I easily be led by an undiscerning zeal for some abstract kind of justice to ignore our first duty, which is to administer justice according to law, the law which is established for us by an Act of Parliament or the binding authority of precedent. The law is developed by the application of old principles to new circumstances. Therein lies its genius. Its reform by the abrogation of these principles is the task not of the courts of law but of Parliament."<sup>1</sup>

Even better known is his description of Lord Denning's plea for a purposive approach to statutory interpretation as "a naked usurpation of the legislative function under the thin disguise of interpretation."<sup>2</sup> But Lord Simonds, even if he spoke more memorably than most, was not a lone voice. In 1951, Lord Jowitt, the Lord Chancellor, when asked in Australia what the House of Lords would do if there was an appeal in the recently decided case of Candler v Crane, Christmas,<sup>3</sup> replied:

<sup>1</sup> Scruttons v Midland Silicones [1962] AC 446 at 467-9

<sup>2</sup> Magor and St Mellons Rural District Council v Newport Corporation [1952] AC 189.

<sup>3</sup> [1951] 2 KB, 164

"We should regard it as our duty to expound what we believe the law to be and we should loyally follow the decisions of the House of Lords if we found there was some decision which we thought was in point. It is not really a question of being a bold or a timorous soul; it is a much simpler question than that. You know there was a time when the earth was void and without form, but after these hundreds of years the law of England, the common law, has at any rate got some measure of form to it. We are really no longer in the position of Lord Mansfield who used to consider a problem and expound it *ex aequa et bona* - what the law ought to be .... I do most humbly suggest to some of the speakers today that the problem is not to consider what social and political conditions do today require; that is to confuse the task of the lawyer with the task of the legislator. It is quite possible that the law has produced a result which does not accord with the requirements of today. If so, put it right by legislation, but do not expect every lawyer, in addition to all his other problems, to act as Lord Mansfield did, and decide what the law ought to be. He is far better employed if he puts himself to the much simpler task of deciding what the law is."<sup>4</sup>

On this view, judges are what Montesquieu called "the mere mouthpieces of the law."<sup>5</sup> As Lord Wright put it, the judges proceed "from case to case, like the ancient Mediterranean mariners, hugging the coast from point to point and avoiding the dangers of the open sea of system and science"<sup>6</sup>. It is a role which has attracted distinguished support. Lord Devlin, for example, wrote:

"In the course of their work judges quite often disassociate themselves from the law. They would like to decide otherwise, they hint, but the law does not permit. They emphasise that it is as binding upon them as it is upon litigants. If a judge leaves the law and makes his own decisions, even if in substance they are just, he loses the protection of the law and sacrifices the appearance of impartiality which is given by adherence to the law. He expresses himself personally to the dissatisfied litigant and exposes himself to criticism. But if the stroke is inflicted by the law, it leaves no sense of individual justice; the losing party is not a victim who has been singled out; it is the same for every body, he says. And how many a defeated litigant has salved his wounds with the thought that the law is an ass!

So I am not distressed by the fact that at least nine-tenths of the judiciary spends its life submerged in the disinterested application of known law ....."<sup>7</sup>

If the army of judicial camp-followers who would once have adhered to the declaratory view of their function has by and large melted away, the view nonetheless retains support among some lay bodies. For example, a business group in New Zealand, opposing the abolition of appeals to the Privy Council from New Zealand, recently submitted:

<sup>4</sup> See Zander, The Law-Making Process, 4th ed.(1994) at 347.

<sup>5</sup> Esprit de Lois XI,6.

<sup>6</sup> The Study of Law (1938) 54 LQR 185

<sup>7</sup> The Judge (1981) at 4.

"However, it may be noted that the sovereignty argument for abolition wrongly assumes (as do some judges) that judicial decision making is of great political and constitutional significance. In fact, judges are at most only [interstitial law-makers, that is they fill in narrow spaces left in the laws enacted by parliament.] To invoke a wider role on "sovereignty" grounds is to endorse the concept of a law-making rather than a law-interpreting role for judges. Being unelected, judges should not assume a law-making role, which is properly the province of parliament. With our sovereign legislature, it is always open to reverse judicial decisions by legislation if that is supported by a majority in Parliament. The proper role of the courts should be seen within that context."<sup>8</sup>

A somewhat similar view, although qualified later on in the same passage, was expressed by the Chief Justice of New South Wales:

"Fourthly, it is expected of judges that they will apply neutral and general principles to the resolution of individual disputes; they have no mandate to act as ad hoc legislators who, by decree, determine an appropriate outcome on a case-by-case basis".<sup>9</sup>

The second school acknowledges that judges do make law, but urges that this role should be so far as possible covert and imperceptible to the general public. It is a school which might not deserve to be singled out for special mention were it not for the eminence of the support which it has attracted. Lord Radcliffe wrote:

"If judges prefer to adopt the formula - for that is what it is - that they merely declare the law and do not make it, they do no more than show themselves wise men in practice. Their analysis may be weak, but their perception of the nature of law is sound. Men's respect for it will be the greater, the more imperceptible its development."<sup>10</sup>

"I think that the judge needs to be particularly circumspect in the use of his power to declare the law, not because the principles adopted by Parliament are more satisfactory or more enlightened than those which would commend themselves to his mind but because it is unacceptable constitutionally that there should be two independent sources of law-making at work at the same time."<sup>11</sup>

Lord Scarman, somewhat more obliquely made the same point:

<sup>8</sup> New Zealand Business Roundtable, July 1995, para 1.9.  
<sup>9</sup> Individualized Justice - The Holy Grail, The Hon A M Gleeson  
<sup>10</sup> Law and its Compass (1960) at 39  
<sup>11</sup> Ibid, at 216

"Great judges are in their different ways judicial activists. But the Constitution's separation of powers, or more accurately, functions must be observed if judicial independence is not to be put at risk. For, if people and Parliament come to think that the judicial power is to be confined by nothing other than the judge's sense of what is right (or, as Selden put it, by the length of the Chancellor's foot), confidence in the judicial system will be replaced by fear of it becoming uncertain and arbitrary in its application. Society will then be ready for Parliament to cut the power of the judges. Their power to do justice will become more restricted by law than it need be, or is today."<sup>12</sup>

The third school, to which most modern common law judges belong, acknowledges that judges do make law, and regards this as an entirely proper judicial function, provided it is exercised within certain limits. So general is the acceptance of this approach today that citation is scarcely necessary. But one recalls that in his famous lecture to the Society of Public Teachers of Law on "The Judge as Lawmaker" Lord Reid in 1972 said:

"So we must accept the fact that for better or for worse judges do make law, and tackle the question how do they approach their task and how should they approach it."<sup>13</sup>

Speaking judicially, the New Zealand Court of Appeal adopted much the same line:

"While accepting that it is inevitably the duty of the Court to extend the scope of common law review if justice so requires, we are not satisfied that in this field justice does so require, at any rate at present..."<sup>14</sup>

The limits within which this lawmaking role should be pursued is considered below.

The fourth school not only acknowledges a lawmaking role for the judges, but glories in that role and asserts a right to pursue it wherever established law impedes the doing of justice in an individual case. The most obvious proponent of this school, whose name will instantly spring to the lips of all lawyers, is Lord Denning, who may indeed be said to have no peer in this respect. Indeed, viewing his judicial career in retrospect, he can be seen to have adopted an agenda of reform, as he himself has expressly claimed. This activity would seem to fall within Lord Devlin's definition of dynamic or creative law-making, by which he meant "the use of the law to generate change in the consensus"<sup>15</sup> of opinion upon a given topic within society.

<sup>12</sup> Duport Steel v Sirs [1980] 1 All ER 529 at 551.

<sup>13</sup> Journal of the Society of Public Teachers of Law, Vol 12, NS 1972, 22.

<sup>14</sup> Burt v Governor General of New Zealand, 16 July 1992, Court of Appeal.

<sup>15</sup> Op.cit., at 2.

It is not surprising that the first, declaratory, school has little judicial support today. This may owe something to the clash of personalities between Lord Simonds and Lord Denning, the haughty figure of Simonds being less endearing than the warm personality of Denning, and the mandarin prose of Simonds being a little strong for most modern stomachs, particularly when compared with the apparently simple and highly imitable prose style of Denning. But the reasons for rejecting the declaratory view are more fundamental than that. The declaratory approach is radically inconsistent with the subjective experience of judges, particularly appellate judges, of the role which they fulfil day by day. They know from experience that the cases which come before them do not in the main turn on sections of statutes which are clear and unambiguous in their meaning. They know from experience also that the cases they have to decide involve points which are not the subject of previous decisions, or are the subject of conflicting decisions, or raise questions of statutory interpretation which apparently involve genuine lacunae or ambiguities. They know, and the higher the court the more right they are, that decisions involve issues of policy. Lord Denning was among the first to acknowledge this obvious truth in Dutton v Bognor Regis UDC:

"It seems to me that it is a question of policy which we, as judges, have to decide. The time has come when, in cases of new import, we should decide them according to the reason of the thing.

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. It has been concealed behind such questions as: Was the defendant under any duty to the plaintiff? Was the relationship between them sufficiently proximate? Was the injury direct or indirect? Was it foreseeable, or not? Was it too remote? and so forth.

Nowadays, we direct ourselves to considerations of policy ....."<sup>16</sup>

Lord Cooke of Thorndon has spoken in similar vein:

"From the point of view of an appellate judge hearing cases day by day it seems more than a decade since the pretence of legal formalism was abandoned and much more open emphasis began to be placed on working out a philosophical approach - to use a somewhat pompous term to describe conscious value judgments .....

<sup>16</sup> [1972] 1 QB 373 at 397

Direct debate of policy considerations, and with an eye to interests transcending those of the immediate parties, has become common-place. Without exaggeration it may be said to be regular fare in the Court of Appeal."<sup>17</sup>

The truth is that judges cannot adhere to the declaratory principle even if they would. Take, for example, the authority perhaps most familiar to common lawyers world-wide: Donoghue v Stevenson.<sup>18</sup> No one could fail to recognise that narrow 3-2 decision as having made law, and most would have little doubt that it made good law. But if the majority had been the other way the decision would still have made law. Such a decision might not have stood the test of time, and one would incline to see it as a bad decision. But until reversed or modified such a decision would have precluded a successful action by a plaintiff in a similar position, in England and Scotland and in these parts of the Commonwealth which then followed House of Lords decisions. A negative decision would, no doubt, have been less innovative, and therefore the subject of less comment and development, than the decision actually made. But it would have placed a highly authoritative roadblock in the path of a plaintiff and so would have made law. The same is true whenever a court, on legal or policy grounds, declines to grant relief. Even if it be true, as Lord Goff has attractively suggested, that statements of the law are no more than working hypotheses,<sup>19</sup> it remains true also that an authoritative statement of the law on a point not the subject of an existing authoritative statement makes new law.

The inadequacy of the declaratory principle as an explanation of the judicial role is even more evident when one looks at the objective record of what judges have done. In England, the last quarter century has seen fundamental, judge-made changes in the law relating to public interest immunity; sovereign immunity; forum non conveniens; restitution; tax avoidance schemes; preemptive interlocutory remedies; the currency in which judgment may be given; and, pre-eminently, judicial review. Other examples could be given. Attention could also be drawn to the creative, if somewhat erratic, approach of the English courts to questions of negligence where the victim has suffered economic loss.<sup>20</sup> In New Zealand the creative role of the judges has been even more evident. It has been well described by Lord Cooke, and has been shown to include

<sup>17</sup> The New Zealand National Legal Identity, Canterbury Law Review, Vol 3 (1987), 171.  
<sup>18</sup> [1932] AC 562.

<sup>19</sup> "Judge, Jurist and Legislature", 1987 Denning Law Journal 79 at 80.

<sup>20</sup> For an interesting survey, see Goldsmith, "The retreat from the retreat from Anns?", paper delivered to the 11th Commonwealth Law Conference, Vancouver, August 1996.

distinctive developments in the fields of crime, family law, real property, personal property, contract, employment and, not least, the law of tort. Lord Cooke has claimed for New Zealand "a distinct national legal identity."<sup>21</sup> That this is no idle boast has been accepted by the Privy Council itself:

"But in the present case the judges in the New Zealand Court of Appeal were consciously departing from English case law on the ground that conditions in New Zealand are different. Were they entitled to do so? The answer most surely be "yes". The ability of the common law to adopt itself to the differing circumstances of the countries in which it has taken root, is not a weakness, but one of its great strengths. Were it not so, the common law would not have flourished as it has, with all the common law countries learning from each other."<sup>22</sup>

In 1988 Lord Cooke said: ——— *because he never understood laws.*

"The stage has now been reached in which virtually every major field of law New Zealand law is radically, or at least very considerably, different from English law. In many respects Australian or Canadian legal experience and ideas are now more relevant for us, as we work out our legal destiny."<sup>23</sup> *downwards*

To the extent that this is so, it is so as a result of conscious decision-making by the judges.

It would be very hard to reconcile the House of Lords' Practice Statement of 1966 with the declaratory principle in its purest form. It would also be hard to see how, if this principle were adopted, it could be useful to discuss the amendment of English procedure so as to permit prospective overruling of previous decisions, so as to lay down a principle to govern future cases but not the case before the court.

The second, "do good by stealth", approach to the judicial function no doubt has a considerable measure of practical wisdom to support it. But most judges, and their critics, would today think it generally preferable, for better or worse, to be open about what they are doing. As Lord Cooke has said,

<sup>21</sup> The New Zealand National Legal Identity, supra, at 180.

<sup>22</sup> Invercargill City Council v Hamlin [1996] 2 WLR 367 at 376

<sup>23</sup> Fundamentals, New Zealand Law Journal, May 1988, at 158.

"I am against hidden policy factors. Major premises should not be inarticulate, although they do not need constant restatement. A just decision is surely more likely if the judge recognises a responsibility to be frank."<sup>24</sup>

Professor Atiyah also has powerfully argued against judicial illusionism.<sup>25</sup>

If, as is accepted, it is generally incumbent on a judge to give reasons for his decision, then it must surely follow that such reasons should be full and genuine. This duty is sometimes perhaps more honoured in the breach than in the observance. One cannot resist the suspicion that on occasion a duty of care is denied because the court apprehends that, if a duty were held to exist, insurance would be impossible or prohibitively expensive to obtain in future. But such a reason is rarely explicitly stated, probably because the court has had no evidence before it of what the insurance position might be if a duty of care were held to exist. It is, surely, an abnegation of the judicial role if a judge allows himself to be influenced in his decision by considerations to which he does not allude.

Adherents of the third, currently majoritarian, school would acknowledge that a range of different road signs may in different situations be appropriate, ranging from "No entry" and "Stop" to "Give way" and "Slow". The debate is as to which of these injunctions applies in differing circumstances, and with what degree of compulsion.

There are, however, various situations in which most judges, even of the reformist, majoritarian tendency, would regard one or other of these signs as apposite. Such situations would include the following:

(1) Where reasonable and right-minded citizens have legitimately ordered their affairs on the basis of a certain understanding of the law. As Lord Reid put it:

"And there is another sphere where we have got to be very careful. People rely on the certainty of the law in settling their affairs, in particular in making contracts or settlements. It would be very wrong if judges were to disregard or innovate on what can fairly be regarded as settled law in matters of this kind."<sup>26</sup>

<sup>24</sup> Fairness (1989) 19 VUWLR at 421.

<sup>25</sup> Degree and Policy, Israel Law Review, 1980.

<sup>26</sup> Op, cit., at 23



2) Where, although a rule of law is seen to be defective, its amendment calls for a detailed legislative code, with qualifications, exceptions and safeguards which cannot feasibly be introduced by judicial decision. Such cases call for a rule of judicial abstinence, particularly where wise and effective reform of the law calls for research and consultation of a kind which no court of law is fitted to undertake.

(3) Where the question involves an issue of current social policy on which there is no consensus within the community. As Lord Reid again put it,

"When public opinion is sharply divided on any question - whether or not the division is on party lines - no judge ought in my view to lean to one side or the other if that can possibly be avoided. But sometimes we get a case where that is very difficult to avoid. Then I think we must play safe. We must decide the case on the preponderance of existing authority. Parliament is the right place to settle issues which the ordinary man regards as controversial. On many questions he will say: "That is the lawyers' job, let them get on with it". But on others he will say: "I ought to have my say in this. I am not going to accept dictation from the lawyers". Family law is a good example. It is not for judges to say what changes should be made on big issues."<sup>27</sup>

(4) Where an issue is the subject of current legislative activity. Where Parliament is actually engaged in deciding what the rule should be in a given legal situation, the courts are generally wise to await the outcome of that deliberation rather than to pre-empt the result by judicial decision. Lord Radcliffe thought the judges should walk warily in fields where Parliament regularly legislated or had recently done so.<sup>28</sup> Cardozo thought the judge should "legislate only between gaps. He fills the open spaces in the law."<sup>29</sup>

(5) Where the issue arises in a field far removed from ordinary judicial experience. This is really another way of saying that whereas the judges may properly mould what is sometimes called lawyers' law, they should be very slow to lay down far-reaching rules in fields outside their experience. They should be alert to recognise their own limitations.

Even where a judge recognises that a change in the law is called for, he is well advised to walk circumspectly. On the whole, the law advances in small steps, not by giant bounds. Many judges will seek to adopt the approach of Bacon, in his declaration that

<sup>27</sup> Ibid. at 23.

<sup>28</sup> Not in Feather Beds, 1968, at 216.

"the work which I propound tendeth to pruning and grafting the law, and not to ploughing up and planting it again".

The fourth (Denning) approach to judicial lawmaking is perhaps open to four objections, at any rate when pursued by anyone other than Lord Denning. The first objection is that if judges make too free with existing law, or are too neglectful of precedent, the law becomes reprehensibly uncertain and unpredictable. It is often said, rightly, that legal certainty is a chimera. So it is. But that is no reason for rejecting any attempt to achieve a measure of certainty where possible. Again, it is appropriate to quote Lord Reid:

"People want two inconsistent things; that the law shall be certain, and that it shall be just and shall move with the times. It is our business to keep both objectives in view. Rigid adherence to precedent will not do. And paying lip service to precedent while admitting fine distinctions gives us the worst of both worlds. On the other hand too much flexibility leads to intolerable uncertainty."<sup>30</sup>

It is a question of balance.

The second objection to this approach is that too much depends on the temperament and predilections of the individual judge. As Samuel Johnson, one of the wisest legal commentators of all time, expressed the point:

"To permit a law to be modified at discretion is to leave the community without law. It is to withdraw the direction of that public wisdom by which the deficiencies of private understanding are to be supplied."<sup>31</sup>

The same point has been made, rather more recently, by the Chief Justice of New South Wales:

"The greater the scope for the exercise of individual discretion and the application of subjective value judgments, the less will be the assurance, essential for public confidence, that the outcome of the case depends as little as humanly possible upon the identity of the judges who decide them. This is not to suggest that the law was ever capable of working in a fashion that is unaffected by the views and attitudes of individuals. But, other things being equal, the object ought to be to minimise the effect of this element of the system, not to maximise it."<sup>32</sup>

<sup>29</sup> Benjamin Cardozo, The Nature of the Judicial Process (1921).

<sup>30</sup> Ibid, at 26

<sup>31</sup> Boswell, Life of Johnson, OUP (1976) at 496.

<sup>32</sup> Op. cit.

The third objection to this approach is that a judge who works to a pre-determined agenda necessarily deprives himself of the capacity to respond to the merits of the particular case as it unfolds before him. Where, as in time is bound to be the case, the judge's agenda is known, the trial process is to some extent subverted, since the advocate on one side will know that he has to overcome an obstacle, not necessarily inherent in the case itself, but arising out of preconceived views held by the judge.

The fourth objection is that judges are not, by and large, fitted to be law reformers. This is a point well made by Lord Devlin:

"The disinterested application of the law calls for many virtues, such as balance, patience, courtesy, and detachment, which leave little room for the ardour of the creative reformer. I do not mean that there should be demarcation or that judges should down tools whenever they meet a defect in the law. I shall consider later to what extent in such a situation a judge should be activist. But I am quite convinced that there should be no judicial dynamics."<sup>33</sup>

He added, with reference to social reform,

"If judges were men endowed for such a task they would not truly be judges. In every society there is a division between rulers and ruled. The first mark of a free and orderly society is that the boundaries between the two should be guarded and trespasses from one side or the other independently and impartially determined. The keepers of these boundaries cannot also be among the outriders. The judges are the keepers of the law and the qualities they need for that task are not those of the creative lawmaker. The creative lawmaker is the squire of the social reformer and the quality they both need is enthusiasm. But enthusiasm is rarely consistent with impartiality and never with the appearance of it."<sup>34</sup>

Although judges bind themselves to do right to all manner of people, they are to do so according to the laws and usages of the realm and not according to their own personal conceptions of what is wise or just.

It would seem that judges of the third, majoritarian, school should be described as activists within

Lord Devlin's definition:

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<sup>33</sup> Op. cit at 5  
<sup>34</sup> Op. cit at 17

"By activist law making I mean the business of keeping pace with change in the consensus. Dynamic or creative law making is the use of the law to generate change in the consensus."<sup>35</sup>

Lord Cooke has shown some distaste for the label "activist", which he described in an obituary of Lord Diplock as "a term of dubious import but often having a connotation of trendy".<sup>36</sup> He was anxious to make plain that a paper which he delivered on "Fundamentals" was not intended as an incitement to judicial activism.<sup>37</sup> When an Associate Professor described the New Zealand courts, and particularly the Court of Appeal, as activist from the late 1970's or early 1980's,<sup>38</sup> Lord Cooke does not appear to have regarded this as a compliment.<sup>39</sup> In 1992, he described "activist" as "a misleading expression, as judges cannot initiate action".<sup>40</sup> But the opposite of active is passive, and the opposite of activism is inertia. No informed commentator could accuse Lord Cooke of being a passive judge, nor suggest that his record is one of inertia. He has himself acknowledged that:

"The inevitable duty of the Courts is to make law and this is what all of us do every day. Doubtless some make more than others, but it could not seriously be contended that Judges at any level are merely applying black-and-white rules."<sup>41</sup>

In the law, nothing is the work of one court or one man; and it would be invidious for anyone, particularly an extra-terrestrial commentator, to seek to allocate praise. But if it be true (as it plainly is) that the common law in New Zealand has developed along distinctive lines peculiarly suited to the culture and customs of the people (not least the Maori people), and if it be true (as again it plainly is) that the common law as developed in New Zealand commands high respect throughout the entire common law world, no commentator (whether indigenous or extra-terrestrial) could fail to recognise the immense contribution, wise and scholarly as it has been, of Lord Cooke as lawmaker.

<sup>35</sup> Op. cit at 2

<sup>36</sup> Obituary, Lord Diplock [1985] NZLJ 252.

<sup>37</sup> Op. cit. supra, at 164

<sup>38</sup> Hodge, Lions under the Throne, 1994, at 108.

<sup>39</sup> Foreword to "Courts and Policy: Checking the Balance", LRF Conference 1994.

<sup>40</sup> Employment and Accountability: The Quest for Administrative Justice, Commonwealth Law Bulletin, October 1992, at 1331.

<sup>41</sup> Dynamics of the Common Law, 9th Commonwealth Law Conference 1990, at 4.