EIGHTH WILFRED FULLAGAR MEMORIAL LECTURE: NEW GROWTH IN THE LAW—THE JUDICIAL CONTRIBUTION*

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The work of a judge is usually appraised by the litigants in the cases over which he presides, and by the profession—practising, academic and employed—in the judgments which he writes. On either of those assessments, Sir Wilfred Fullagar achieved mightily. There is yet another way in which a judge's work may be assessed, namely, by the influence which he has upon the following generation of lawyers. This evening I pay my humble and respectful tribute to a judge who made manifest to me and to my generation that a profound humanity emanates from a great judge, though he be sitting on high and seized of questions of great moment. With gentle voice and twinkling eye, he coaxed out of counsel whatever they had to offer, and submitted the offering to an intellect which displayed both mastery of law and a deep understanding of his times. He sat on two great benches—the Supreme Court of Victoria and then the High Court of Australia—and it does not diminish the stature of either Court to say that it was enhanced by his presence.

He was a finder and a teacher of the law, and it is appropriate in this forum to consider how judges make the law to grow, and then to divine, if it be possible, how judicial methods may bring forth new law to respond to the needs of our time.

JUDICIAL DEVELOPMENT OF LAW

Springtime is now upon us, the season of new growth. The established bushes of the garden put forth new shoots from the old wood and the newer bushes grow with a wild profusion. In the garden of the law it is perpetual spring: both old and new jurisdictions continually send forth new growth from the precedent principles, sometimes to fill in the small interstices in a lattice of established law, sometimes sprouting urgently and luxuriantly to cover an area bare of legal principle. The manner and the extent of the growth of new law is largely in the hands of the Judges, and their function is attracting increasing attention as they define new principles, and find new application for principles already established.

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Judicial development of the law is not, of course, an undertaking of choice: it is a function performed of necessity in order to answer the imperative demand of novel cases. Judges do not choose the facts of the cases which they decide—the facts have a life of their own, grouping and rearranging themselves around the litigants in an infinite variety of ways, and adding new elements drawn from the contemporary social milieu. A pattern may emerge from time to time, but the law reports bear testimony to the stubborn refusal of facts to confine themselves within a Procrustean bed of principle, or to exhibit an enduring homogeneity from year to year.

And so the established principles of the law must be adjusted one with another, and extended to cover facts to which they had not previously been applied, and thus the instant case is made soluble. "Our common-law system", said Baron Parke,[1]

> "consists in the applying to new combinations of circumstances those rules of law which we derive from legal principles and judicial precedents."

The system requires the ascertainment of the relevant rule of law which, when applied to the particular facts, will syllogistically yield the conclusion.[2]

The judicial method is to search for an established principle, to develop it according to the exigencies of the case, and to apply it to the facts as found. The starting point is a reference to the body of established legal principles. So far as those principles extend, they provide a foundation for judgment, as Sir Owen Dixon said:

> "At every point in an argument the existence is assumed of a body of ascertained principles or doctrine which both counsel and judges know or ought to know and there is a constant appeal to this body of knowledge. In the course of an argument there is usually a resort to case law, for one purpose or another . . . for the most part it is for the purpose of persuasion; persuasion as to the true principle or doctrine or the true application of principle or doctrine to the whole or part of the legal complex which is under discussion. . . . The presupposition is that there exists a definite system of accepted knowledge or thought and that judgments and other legal writings are evidence of its content."[3]

He goes on to add that the search for principle, in the classical period of English law, was accompanied by its development. "There was", he says,

> "a steady, if intuitive, attempt to develop the law as a science. But this was done not by an abandonment of the high technique and strict logic of the common law. It was done by an apt and felicitous use of that very technique and, under the name of reasoning, of that strict logic

[1] *Mirehouse* v. *Rennell* [1833] 1 Cl. & F. 527, 546; 6 E.R. 1015, 1023.
[2] See Kitto J. in *The Queen* v. *Trade Practices Tribunal; ex parte Tasmanian Breweries Pty Ltd* (1970) 123 C.L.R. 361, 374.
[3] Sir Owen Dixon, "Concerning Judicial Method", *Jesting Pilate* (Melbourne, Law Book Co., 1965) 155-6.

which it seems fashionable now to expel from the system."[4]

When a principle is found, developed and applied by a court, it settles not only the instant dispute, but other and future controversies of a like kind. The doctrine of *stare decisis* confers upon the court a law-making power—as broad as the principle which the case demands and with the authority which the court's position in the hierarchy confers. A moment's reflection will show that the solving of a new and difficult case is an occasion of defining a new rule for future application. And this is so whether the jurisdiction is statutory or not. Lord Diplock, speaking of the "Courts as Legislators", had no illusions as to the law-making effect of judicial decisions in the less obvious revenue appeals:

> "Do not let us deceive ourselves with the legal fiction that the Court is only ascertaining and giving effect to what Parliament meant. Anyone who has decided tax appeals knows that most of them concern transactions which Members of Parliament and the draftsman of the Act had not anticipated, about which they had never thought at all. Some of the transactions are of a kind which had never taken place before the Act was passed: they were devised as a result of it. The Court may describe what it is doing in tax appeals as interpretation. So did the priestess of the Delphic oracle. But whoever has final authority to explain what Parliament meant by the words that it used makes law as much as if the explanation it has given were contained in a new Act of Parliament. It will need a new Act of Parliament to reverse it."[5]

The law-making effect of judgments is not reasonably open to doubt, and any attempt to sterilize it is bound to failure. If the courts were unable to develop a principle, their jurisdiction would have to be restricted to cases fitting precisely within the established principles. Or, if a court were given jurisdiction to determine a novel point, but its decision were denied effect in future cases, unevenness and perhaps caprice in judgment would be the inevitable and unacceptable result. So the courts are law-makers—not by desire or by an elective assumption of power, but as a consequence of the due performance of their function.

Of course, the scope for law-making activity varies greatly from case to case and, more significantly, between one area of jurisdiction and another. What is of interest is the "strict logic and high technique"[6] which the judges use—whether consciously or not—in exercising their legislative powers, for the role which our society would confide to the judiciary depends largely upon the suitability of that technique to devise the normative solutions to contemporary problems. Mr Justice Cardozo has described the technique in essays of classical authority.[7] The judge must first

[4] Ibid. 157.
[5] *The Lawyer and Justice* (London, Sweet and Maxwell, 1978) 270.
[6] Maitland's phrase, quoted by Sir Owen Dixon, op. cit. 153.
[7] *Selected Writings of Benjamin Nathan Cardozo 1879-1938* (M. E. Hall ed., New York, Fallon Book Company, 1947).

> "extract from the precedents the underlying principle, the *ratio decidendi*; he must then determine the path or direction along which the principle is to move and develop, if it is not to wither and die."[8]

The high technique of intellects sensitive to legal principle is called for in the extraction of underlying principle from its wraps in the learning of the past. Nice discrimination in stripping away the inessential dicta exposes the precise proposition which carries the imprimatur of precedent. And when that proposition stands exposed, the judge must choose whether to apply it precisely, whether to develop it to suit the needs of the case in hand, or whether to reject it. How he makes that choice is a question to which I shall presently come. But for the moment, consider the significance of the first step of exposing the proposition.

This step in the process furnishes the point of new departure, and it is a point embedded in the trunk or branches of existing law. A body of principle which starts from the existing law cannot be wholly alien to the needs of the society governed by it. No society changes so rapidly that it can sever connection with its history and its laws. Judicial law-making thus commences from a point, the legitimacy of which is axiomatically assured. One may say, and say truly, that such a technique is inevitably conservative, but one cannot say that it is unduly conservative. It so restricts the law-making options which are open to the judiciary as to ensure that new law is grafted on to, and is compatible with, the established legal system. New growth must come out of the old wood, and be sustained by the sap of principle which is common to all branches.

After extracting an available legal principle, the judge decides what to do with it. In the day to day work of the courts, that decision is simple enough. Where the principle was laid down by a superior court and it governs entirely the case in hand, it is the judge's duty to apply it, even though the result is unsatisfactory. Equally, when the available principle, though not binding, governs satisfactorily the facts of the case in hand, the judge does apply it.

Moreover, there is a presumption in favour of extending an established principle to new cases, and the presumption serves two purposes. First, it avoids the necessity for the judge himself to formulate a rule to govern the instant case, and thus the presumption tends to remove the subjective element from judgment. The manifest convenience of this policy has enabled the judiciary to maintain the confidence of the community, without which no curial system could survive. The justice done in the courts is justice according to principle, and not justice according to the idiosyncratic opinions of the judge.

Second, the presumption serves to satisfy the craving of the human mind for consistency and order in the abstract conceptions of the law.

[8] Ibid. 116.

This is not a mere aspiration to philosophical elegance. If a principle, which has achieved justice in a variety of cases, finds expression and unifies the reasons for judgment in those cases, the principle may be presumed to be practical and sound, and some cause should be shown if it is not to be extended to the instant case. The presumption secures like results in comparable cases, an essential feature of a system of justice.

The presumption is defeasible, however. Indeed, if the presumption might be applied to two principles which would on extension to the instant case produce differing results, the presumption is self-defeating and a choice must be made between the principles. The choice is that which serves the public interest. Geoffrey Lane L.J. had such a choice to make in *Ex parte Hosenball*, a case concerning the deportation of an alien:

> "The alien certainly has inadequate information upon which to prepare or direct his defence to the various charges which are made against him, and the only way that could be remedied would be to disclose information to him which might probably have an adverse effect on the national security. The choice is regrettably clear: the alien must suffer, if suffering there be, . . ."[9]

No principle of general application is likely to be so perfect in its operation as to avoid every injustice that time and the rich variety of human activity may produce. Although a judge is not at liberty to choose between applying his personal view of the justice of the case and a principle which binds him to a contradictory solution, a principle which is found to work injustice in case after case is not immune from modification or rejection. It may take time, but the modification emerges and becomes a new stock of descent. Thus, it was nearly forty years after *Re Polemis*[10] when Manning J. announced in *The Wagon Mound (No. 1)*[10a] his inability to apply it "with any degree of confidence to a particular set of facts". The time for change had come, and his observation moved Viscount Simonds, speaking for the Judicial Committee, to say:

> "This cri de coeur would in any case be irresistible, but in the years that have passed since its decision *Polemis* has been so much discussed and qualified that it cannot claim, . . . the status of a decision of such long standing that it should not be reviewed."[11]

The pace of change may be unsatisfying, but judicial changes of principle, cautiously made, profoundly affect legal relationships. Mr Justice Cardozo observed:

> "This work of modification is gradual. It goes on inch by inch. Its effects must be measured by decades and even centuries. Thus measured,

[9] *R.* v. *Home Secretary; Ex parte Hosenball* [1977] 1 W.L.R. 766, 784.
[10] [1921] 3 K.B. 560.
[10a] *Mort's Dock and Engineering Co. Ltd* v. *Overseas Tank Ships (U.K.) Limited (The "Wagon Mound")* (1961) 61 S.R. (N.S.W.) 688, 715.
[11] *Overseas Tankship (U.K.) Ltd* v. *Morts Dock and Engineering Co. Ltd* (The Wagon Mound) [1961] A.C. 388, 415.

they are seen to have behind them the power and the pressure of the moving glacier."[12]

Modification may eradicate a principle or develop it; the judges may resect an earlier growth, or extend it for future use. In either case, there is a judgment to be made and it is not a judgment of a syllogistic kind. Whether the modification is needed because of an inherent defect in the old rule, or whether there is some other reason why the old rule will not satisfactorily serve to solve the case in hand, the modification of the rule is an occasion of judicial law-making. The rule then pronounced governs the resolution of cases of a like kind, whether their constituent facts occurred before or after the new definition. In every case where a judge is not constrained by precedent, the judge is entitled to ask whether the application of a precedent available for application will work injustice in the instant case. More, he is bound to determine that question.

In final courts of appeal, the extent of judicial power to modify the law attains its greatest dimension. In the High Court of Australia, the present Chief Justice declared in *Mutual Life & Citizens' Assurance Co. Ltd* v. *Evatt*:

> ". . . the common law is what the Court, so informed, decides that it should be, . . . For, where no authority binds or current of acceptable decision compels, it is not enough, nor indeed apposite, to say that the function of the Court in general is to declare what the law is and not to decide what it ought to be. In such a case, in my opinion, the common law is as much in *gremio judicis* as ever it was, assisted and instructed now no doubt by all that has happened through the years of its growth: and thus in such a case the two positions of what is and of what should be are in reality coincident. But, of course, the Court is not to depart from what it realizes the common law would provide in order to arrive at some idiosyncratic solution. So to do is to attempt to legislate and to tread forbidden ground."[13]

Lord Reid, avowing that he had never taken a narrow view of the functions of the House of Lords, defined the approach to be taken. He said:

> "The common law must be developed to meet changing economic conditions and habits of thought. . . . But there are limits. . . . If we are to extend the law it must be by the development and application of fundamental principles."[14]

The choice made by a court in the development and application of principles is not made in a vacuum. It is made with the wisdom of past experience, and with the concrete illustration of the way in which the principle would work in the instant case. The court is informed by empirical data, and its formulation of the rule is restricted by the material

[12] *Selected Writings*, op. cit. 115.
[13] (1968) 122 C.L.R. 556, 563 per Barwick C.J.
[14] *Myers* v. *D.P.P.* [1965] A.C. 1001, 1021.

which is to hand. Lord Diplock asserts that judicial law is made by a method peculiarly suited to the task:

> "Judge-made law on the other hand, because litigation is concerned with what is part and incidental, is based upon actual experience of what human beings have in fact done and what were in fact the consequences of their doing so. The Courts have thus the material to piece together a rule of conduct by induction from particular instances of how men do in fact behave in particular circumstances, none exactly the same though common elements in each can be discerned. Such a rule of conduct based on the recognition of the common elements in the actual behaviour of men in their environment is one which potentially is flexible not rigid, adaptable to changing circumstances, not fixed for ever in the fetters of the past."[15]

In the long term, the judicial process is inductive, testing the utility of given principles in the crucible of contemporary experience. Statute apart, the law is not proof against the demands of justice in a changing society though the step of questioning the justice of applying a principle, and modifying the principle according to the public good often goes unremarked, perhaps not perceived; or perhaps subconsciously perceived, but not consciously acknowledged. Yet it is one of the most important aspects of judicial activity. In the particular case, it allows right to be done; in point of precedent, it is the stimulus to new growth. Though it is a commonplace of the judicial process, particularly in appellate courts, the question of justice or injustice is not itself amenable to resolution by rule or precedent. Justice and injustice are concepts which are as valuable as they are intangible, and they colour judicial thinking on any occasion when precedent does not precisely and coercively chart the course of decision.

What is just and what is unjust in a given case may appear differently to different minds, and even experienced ministers of the law may be brought into sharp controversy in propounding the just solution in a given case. No doubt the life and experience of a judge contribute the influences which form his values and determine his opinion. And although divergence of opinion among judges is diminished by their common exposure to the values which the law expresses and protects, differences in background and experience, and natural variations among men, ensure that there will be differences in deciding whether justice or injustice would be done if a precedent available for application were applied in a given case.

And thus the cold mechanics of the syllogism do not exhaust the function of judging. Indeed, it is precisely in those cases where the major premise of the syllogism does not bind the court or does not exhaustively cover the facts of the minor premise, that the serious business of judging begins.

[15] *The Lawyer and Justice*, op. cit. 277.

It is then that the search goes behind the words of the precedent judgment to the basic principle which underlies it, and the true dimension and purpose of the principle is ascertained in order to see whether the principle extends, or ought to be extended, to the instant case; or whether the principle reflects a value which is no longer suited to the governance of contemporary social relations.

> The court is guided by factors which Mr Justice Cardozo enumerated: "My analysis of the judicial process comes then to this, and little more: logic, and history, and custom, and utility, and the accepted standards of right conduct, are the forces which singly or in combination shape the progress of the law. Which of these forces shall dominate in any case, must depend largely upon the comparative importance or value of the social interests that will be thereby promoted or impaired."[16]

With these elements at legitimate play, it is not surprising that Professor Cross warned[17] that "the part played by rules of law in a legal system is a great deal more limited than is sometimes supposed".

How is this to be squared with the notion that rights and obligations depend upon known and existing law, and not upon the discretion of the judge before whom the case is tried? Only by judicial sensitivity to the importance of constancy in the development of legal principle, and judicial skill in stripping away the detritus of comment from the substance of underlying principle. The high technique of the judges consists not in knowing the minutiae of the myriad cases which instance the several applications of a principle, but in seeing the underlying purpose of the principle—the public good which the principle has been developed to protect and advance. The nice adjustments in the common law of libel and slander are fine examples of judicial balancing of the interests of reputation and of free speech, and the cases which this area of the law has spawned reveal the judicial search for the values which the weapons of the law were then forged to protect.

The great judge is a bold judge, not because he chances his arm, but because he so perceives the philosophy and history of the law that he can sweep aside the incidental and reach for the essential, and fashion and refashion the basic principles so that they serve the society of his time. Boldness is a function of both understanding and courage: understanding of the deepest values of society, and courage in rejecting the applications of principle which serve an incompatible value, perhaps current at an earlier time.

And so the significant contribution which judges are able to make to the society of their time is not confined to the application of principles, but includes more importantly the modification of principles to suit the public good of that time. The high technique and strict logic is not restricted to

[16] *Selected Writings*, op. cit. 153.
[17] *Precedent in English Law* (Oxford, Clarendon Press, 1968) 216.

the deductive process. The vitality of the judicial contribution is in the inductive process, deriving the rules for contemporary application from the history and contemporary functioning of society. It goes so often unacknowledged, as Mr Justice Holmes observed:

> "The very considerations which judges most rarely mention, and always with an apology, are the secret root from which the law draws all the juices of life. I mean, of course, considerations of what is expedient for the community concerned. Every important principle which is developed by litigation is in fact and at bottom the result of more or less definitely understood views of public policy; most generally, to be sure, under our practice and traditions, the unconscious result of instinctive preferences and inarticulate convictions, but none the less traceable to views of public policy in the last analysis. And as the law is administered by able and experienced men, who know too much to sacrifice good sense to a syllogism, it will be found that, when ancient rules maintain themselves . . ., new reasons more fitted to the time have been found for them, and that they gradually receive a new content, and at last a new form, from the grounds to which they have been transplanted."[18]

Perhaps it is only in the great judges that we find familiarity with principle, confidence in understanding the needs of contemporary society, and courage to go back and prune out or modify the principles which will no longer serve the public good.

Sir Wilfred Fullagar was such a judge. His legal genius did not consist in his undoubted syllogistic skills, but in his ability to give expression to principles in harmony with his time, wisely governing the relations with which he was judicially concerned.

There are three situations where a judge reasons inductively. The first is where an available principle appears to be no longer apposite, if it ever was. Here, the opinion must be formed that the principle, though available for application directly or by logical extension, should not be applied. The false growth is judicially resected.

The techniques of resection are well known. Cases are held either to have misapplied a basic principle and on that account they are discarded as erroneous, or they are held to be distinguishable from contemporary cases and are left to wither into irrelevant obsolescence, or they are held to mean something different from what they literally said.[19] Resection of precedent to a basic legal principle, stripping away the wilderness of single instances and exposing the fundamental principle, is essential if the law is not to be confined in archaisms by the particular cases which have teased out extensions of the basic principle to circumstances of limited relevance, and if the vitality of the underlying values is to send forth new solutions to problems newly arising.

The second is where an available principle does not precisely cover the

[18] O. W. Holmes, *The Common Law* (Boston, Little, Brown & Co., 1881) 35-6.
[19] *Cartledge* v. *Joplin* [1963] A.C. 758, 772.

case, or where a precedent which is not binding does not appear to yield a just result. A decision is made as to whether the principle should be extended, or a modification made.

The third is where precedent fails and statute is silent or gives inadequate guidance, yet the power to make a decision is committed to judicial judgment. On such occasions, the court fashions a rule from whatever sources are available to it. In their dissenting judgment in *United Engineering Workers Union* v. *Devanayagam* Lord Guest and Lord Devlin said:

> "Experience shows that out of a jurisdiction of this sort there grows a body of principles laying down how the discretion is to be exercised and thus uniformity is created in the administration of justice. In this fashion, as was said in *Moses* v. *Parker* there emerges inevitably a system of law."[20]

How is a new rule fashioned? Lord Shaw gave the answer:

> "The *casus improvisus* is always with us: and in ninety-nine cases out of a hundred it must be settled before Parliament can act. The appeal is not made to laws, for there are none, but to law: call it what you like—the common law, the principles of jurisprudence—anything from the *jus divinum* to common sense, from *recta ratio* to a square deal: it is on and by and with that stuff that judges have to work, and they must do so not as bondmen but as free."[21]

The raw material is fashioned in the hands of a legal craftsman. He seeks the kind of reference point which gives legitimacy to the rule devised. If the question be the criterion to guide the exercise of unfettered discretion which affects the interests of parties—say, a discretion to extend time—the interests of the parties are the primary reference points in fashioning the criterion. If the question be the content of the rules of natural justice to be implied as a condition upon the exercise of a statutory power, a wide range of relevant circumstances falls for evaluation.[22]

Judicial law-making, often associated with the names of the great jurists, is undertaken in the daily work of courts manned by judges who do not pretend to eminence—judges who dutifully decide the cases before them by a familiar procedure.[23] What are the features of this procedure?

The first feature has already been noted: the occasion for making new law is not of the judge's choosing. The law is made when the case assigned to him requires it. Some judges, to be sure, have a sharper eye for a legal point, and are more readily intrigued by a concept than others; but none may move himself to declare the law, unless it be for the purpose of

[20] [1968] A.C. 356, 384.

[21] *Legislature and Judiciary* (London, University of London Press, 1911) 13-14, quoted Jaffe: *English and American Judges as Lawmakers* (Oxford, Clarendon Press, 1969) 21.

[22] See per Gibbs J. in *Salemi* v. *Minister for Immigration and Ethnic Affairs* (1977) 14 A.L.R. 1, 19.

[23] See Judge Learned Hand, "Mr Justice Cardozo" (1939) 52 *Harv. L.R.* 361.

deciding the case in hand. Judges do not seek the power to make law; they accept it when it is needed for the discharge of their functions. This feature of judicial law-making enables Parliament and the public to maintain confidence in the judges as unconcerned with the extent of their own domain.

Next, the judges answer the questions which are asked of them. Even if the delay be longer than the judges and litigants would wish, at least an answer is always forthcoming. No other branch of government is so invariably responsive. And when the answer is given, it is disciplined by the obligation to expose the reasons for it, so that subjective considerations are minimized and made manifest, and the answer is made referable to an objective standard. Detachment is the hallmark of judicial decisions, and it is essential to achieve the fairness which commends those decisions and gives them authority.

The ultimate stage of the judicial method is syllogistic, so that once the facts are found, the judgment depends solely upon the rule selected to govern the case. Unless there be some rule to guide, if not to govern, the power to decide does not bear a judicial character. Where no rule is, or can be made, available to govern or guide a decision, the making of the decision has not been seen as a judicial function. Thus, in the *Tasmanian Breweries case*,[24] the High Court rejected the submission that the Trade Practices Tribunal exercised judicial power, Kitto J. observing that the question committed to the Tribunal for determination did "not depend upon the application of any ascertainable criterion", and that the issue for determination depended ultimately upon the Tribunal's "own idiosyncratic conceptions and modes of thought".[25]

The essence of the judicial method is the application of a rule derived from an external source. The rule may be a binding precedent, a modified principle derived from a precedent, a statute, or a rule constructed from other sources; but it is a rule which does not grow endogenously. The judges so cling to the syllogistic method, they so seek to avoid the exercise of power according to their own idiosyncratic notions, that they devise and express a rule from whatever sources are available, and they thus supply the major premise for judgment.

Before adopting the rule, they entertain open advocacy on behalf of adversaries in litigation. This procedure tends to expose the implications of choosing one rule or another and allows the implications of an adverse consequence to be put powerfully and to be considered deeply before a rule is chosen for application.

For present purposes, perhaps the most significant feature of judicial law-making is that it has grown and been developed in litigation concerning,

[24] (1970) 123 C.L.R. 361.
[25] Ibid. 376.

for the most part, the adjustment of private rights and liabilities. The courts have been comfortable in determining questions of private law, and curial procedures have developed in a symbiotic relationship with private law.

JUDICIAL METHOD AND PUBLIC LAW

A question which now arises is whether the judicial method can and should be applied to the adjudication of issues which arise in the exercise of powers conferred by public law. The question is important, for the rights and liabilities of citizens (whether natural or corporate) depend increasingly upon the exercise of administrative power. Entitlement to a social security benefit, assessments to various taxes, permission to drive a car or build a house, the payment of bounties, acquisition of citizenship, licensing of professions and trades, quotas, permits and licences granted in respect of importing and exporting—the list of administrative controls and activities is large and expanding. Sometimes administrative power is fettered by the statute which creates it; sometimes there are partial fetters upon its exercise; and sometimes it is quite at large.

When the power is precisely defined, the legal issues which have to be decided are indistinguishable from the issues which a court would determine. The several Taxation Boards of Review are engaged day by day in the construction and application of the *Income Tax Assessment Act* 1936 (Cth). The questions which the Administrative Appeals Tribunal determines as to the classification of imports and the application of the Customs Tariff are questions which used to be litigated before the High Court. Clearly enough, the judicial techniques of law-making are applicable to cases of this kind.

Statutes which confer administrative power are not the familiar paths through which lawyers are accustomed to roam, and often there are thickets of administrative practice which have overgrown the statute beneath. Large areas of administration await the exercise of the familiar judicial skills of statutory interpretation: defining the nature and the extent of powers, spelling out the conditions which attend their exercise. We have long gone past the time when statutes were regarded as unwelcome intruders upon the fields of common law and equity, but the statutes which have claimed our attention are those which have to do with private law. A fuller judicial contribution to the illumination of statutes relating to public law will not be made unless the courts are vested with an appropriate jurisdiction.

Of course, the ordinary jurisdiction to grant a prerogative writ, to make a declaration or to issue an injunction may be invoked in proceedings which involve the construction of statutes relating to public law, but that jurisdiction usually gives infrequent, if valuable, opportunity for judicial exegesis.

At least until recent times, and then only in some areas of jurisdiction, the judicial method has not been invoked to control the exercise of discretionary administrative powers. The courts have denied a jurisdiction to control the exercise of a discretion beyond confining the extent of the discretion to its proper scope and object. In *Swan Hill Corporation* v. *Bradbury*,[26] Dixon J. referred to the legislature's reasons for the creation of discretionary powers and charted the limits of judicial control of powers conferred in general terms. He said

> "The reason for leaving the ambit of the discretion undefined may be that legislative foresight cannot trust itself to formulate in advance standards that will prove apt and sufficient in all the infinite variety of facts which may present themselves. On the other hand, it may be because no general principles or policy for governing the particular matter it is desired to control are discoverable, or, if discovered, command general agreement. . . . But courts of law have no source whence they may ascertain what is the purpose of the discretion except the terms and subject matter of the statutory instrument. They must, therefore, concede to the authority a discretion unlimited by anything but the scope and object of the instrument conferring it. This means that only a negative definition of the grounds governing the discretion may be given. It may be possible to say that this or that consideration is extraneous to the power, but it must always be impracticable in such cases to make more than the most general positive statement of the permissible limits within which the discretion is exercisable and is beyond legal control."[27]

In the forty years which have intervened, there has been some change in sentiment. Perhaps the high water mark was reached when Lord Denning zestfully construed[28] the judgments of the House of Lords in the *Padfield*[29] and *Tameside*[30] cases as showing that "when discretionary powers are entrusted to the executive by statute, the courts can examine the exercise of those powers to see that they are used properly, and not improperly or mistakenly. By 'mistakenly' ", said Lord Denning, "I mean under the influence of a misdirection in fact or in law".

Whether or not the administrative oyster is to be prised open by a knife fashioned by the judiciary, an extra-curial sentiment has been developing which would commit to the judiciary the control of many administrative powers. The importance and growth of administrative powers has stimulated the development of that sentiment.

Parliament may, of course, select repositories of administrative power as it sees fit. In theory, the exercise of administrative power is subject to Ministerial control. (I except independent administrative boards). In

[26] (1937) 56 C.L.R. 746.
[27] Ibid. 757-8.
[28] In *Laker Airways* v. *Department of Trade* [1977] Q.B. 643.
[29] *Padfield* v. *Minister of Agriculture, Fisheries and Food* [1968] A.C. 997.
[30] *Secretary of State for Education and Science* v. *Tameside Metropolitan Borough Council* [1977] A.C. 1014.

theory, a chain of responsibility exists: Administrator to Minister to Parliament. But in fact, the Minister leaves the day to day exercise of the powers to administrators who frequently develop a familiarity with administrative problems exceeding that of their Minister.

The reality is that a large concentration of power, affecting a broad spectrum of activities, is vested in administrators who are largely immune from scrutiny in the particular exercise of that power. It is not surprising that there have been calls for judicial intervention, for the experience of man is that the exercise of power in camera[31] and without effective external review is at risk of miscarrying and doing injustice to those affected by its exercise. The call has become more pressing as the ambit of administrative power increases. Foremost in the invocation of judicial intervention has been Lord Scarman. In the 1964 Hamlyn Lectures, which he entitled "English Law—the New Dimension",[32] he pointed to the importance of the new areas of legal concern. He said:

> "To satisfy the conscience of the nation the state has had to move into the empty spaces of the law, the deserts and hill country left uncultivated by distributive justice, and there to make provision for society as a whole, and for those not strong enough to provide for themselves. Thus the welfare state is challenging the relevance, or at least the adequacy, of the common law's concepts and classifications. Fault, trespass, property, even marriage, are now seen to be an insecure base for the development of a law suited to the needs of our society."[33]

and he urged that we seek

> "a new constitutional settlement that makes use of judicial power . . . to use the rule of law in resolving the conflicts that will arise between the citizen and the state in the newly developed fields of administrative-legal activity upon which the quality of life in the society of the twentieth century already depends."[34]

Lord Scarman returned to his theme of a constitutional resettlement of powers recently, when he wrote on "The Judge—A Man for All Seasons"[35] and sought an extended role for the courts:

> "The change of season, . . . calls for a constitutional resettlement—in the sense of a review of the distribution of the decision-making processes in our society. The courts must emerge from their world of private law, i.e. the common law, and accept the responsibility of adjudication in disputes between state and citizen and between one decision-making authority and another. If in place of a single legislative sovereign there is to be an interlocking system of legislative, and other decision-making authorities, disputes must be so formulated and the courts system so organised that the judges can adjudicate between one authority and

[31] See *McPherson* v. *McPherson* [1936] A.C. 177, 200.
[32] See Lord Scarman in *English Law—the New Dimension* 1964 Hamlyn Lectures (London, Stevens, 1974).
[33] Ibid. 70-1.
[34] Ibid. 75.
[35] (1977) 267 *Round Table* 230, 233-4.

another. There would be no invitation to the judges to decide policy, but a recognition that in a conflict situation the judges can help to avoid disorder by adjudication."

In Australia, a similar view has been expressed. Sir Laurence Street observed:

". . . We are not being re-equipped with the requisite jurisdiction to fulfil our basic role. . . . Instead of seeing our main court system moulded to service these new dispute situations we have seen over some years past the setting up of a multiplicity of special courts and tribunals to handle particular dispute situations."[36]

Since 1968, the New Zealand Supreme Court has been vested with a jurisdiction to determine on the merits certain appeals from administrative tribunals. An Administrative Division of the Court was created, with jurisdiction to hear and determine specified administrative appeals.[37] The jurisdiction to hear and determine appeals against tribunal decisions on the merits was conferred with caution.[38] According to the Report of the Royal Commission into the Courts, that jurisdiction is a useful one. They said:

"We believe the High Court has a vital and important role to play in this regard. We appreciate that, to some extent, this may involve the court in matters of policy as well as law, and that in theory there are some risks involved. We believe, however, that the protection of the citizen is of paramount importance and that the successful operation of the Administrative Division to date has demonstrated how well the judges are able to cope with the problems."[39]

In Federal areas, a different solution has been essayed by the Commonwealth Parliament, and jurisdiction to review a broadening range of administrative decisions on the merits has been conferred upon the Administrative Appeals Tribunal.

I am not here concerned to discuss the form of the reviewing Tribunal, but rather to examine the question of substance: are the judicial techniques of law-making satisfactory to develop the rules which might govern or guide the exercise of some administrative power? And, as a corollary, are judges fitted to perform the function which a constitutional resettlement of power would confide to them?

Perhaps, out of an abundance of caution, I should add that I am not here concerned to deal with the problems of fact-finding in administrative proceedings which bear upon, but are distinguishable from, the definition of those rules which govern or guide the exercise of administrative power.

But first, let me define what a constitutional resettlement of power may

[36] Sir Laurence Street, "Address to the 22nd Annual Industrial Relations Conference Dinner", 15 September 1978.
[37] *Judicature Amendment Act* 1968 (N.Z.).
[38] For an early analysis of the problems of this kind of jurisdiction, see Professor K. J. Keith, "Appeals from Administrative Tribunals" (1969) 5 *V.U.W.L.R.* 123.
[39] Report, 93 par. 312(d).

involve. It would not be merely an improvement in the procedures of judicial review. It would interpose the courts (or the judiciary, for I use the terms interchangeably) to control the exercise of some administrative powers, with jurisdiction to set right decisions affecting the interests of citizens which the courts think are wrong decisions, or not the preferable decisions in the circumstances of particular cases. The courts would have the power to substitute their own decisions for the decisions of the administrators.[40]

It is clear that judicial control could be suited only to a limited range of decisions, but the range may be nonetheless significant. The extent of that range depends upon the appropriateness of the judicial method (perhaps modified to deal with the novel subject matter) to resolve disputes between the citizen and the state under statutes relating to public law. The controlling power is now vested for the most part in Ministers of the Crown, but circumstances have conspired against their using it except when the pressures of politics or the anguish of a particular plea promote its exercise. Unlike judicial power, the controlling power is not exercised in response to every application in that behalf. Ministers and their departments rightly develop a relationship which, though respectful of each other's proper sphere, has a commitment of loyalty and support. Neither Ministers nor administrators may choose to abandon the existing distribution of controlling power, and the judiciary will be involved only if Parliament (no doubt with the concurrence if not at the behest of the Executive) thinks it right to do so.

The judiciary itself will not seek the power to resolve public law disputes, for judges are, by an appropriate tradition, the passive repositories of power which others confer upon them. The warrant for conferring power to control administration lies in the safeguarding of the individual as he deals with the anonymous complexity of the modern bureaucracy, and the assistance to the bureaucracy which external judicial review can provide. But does the judiciary possess the experience and skills which might accord fair weight to the public purposes to be served by administrative decision-making? Adjudication seems incompatible with the pursuit of policy so that an attempt to marry both functions in a controlling jurisdiction might create "a position of unstable equilibrium between the judicial and political processes".[41]

It is a tantalizing dilemma. The judiciary, accustomed to standing between the citizen and the state, between the weak and the powerful; of maintaining the unique dignity of the individual; of balancing interests with great nicety; of independence and detachment—that judiciary seems suited to control the growing and important administrative powers. Yet

[40] Cf. s. 43 *Administrative Appeals Tribunal Act* 1975 (Cth).
[41] Geoffrey Marshall, "Justiciability", *Oxford Essays in Jurisprudence*, 1st series, 285.

the assumption of that function is thought to expose the very institution of the judiciary to risk, by requiring it to make its judgments by political rather than legal criteria; by political or economic sentiment rather than by the high technique and strict logic which have been the hallmark of judicial activity and the foundation of public confidence. But the dilemma is partial, and it may be escaped by means which open up new opportunities for judicial development of the law affecting the exercise of the powers of the state.

The risk to the institution of the judiciary arises because, it is thought, cases would have to be decided according to political and economic policies, and policies of that kind are, by common assent, not the business of the judiciary. In *American Federation of Labour* v. *American Sash Co.*[42] Frankfurter J. limited the functions which courts might properly undertake, saying:

> "Courts can fulfill their responsibility in a democratic society only to the extent that they succeed in shaping their judgments by rational standards, and rational standards are both impersonal and communicable. Matters of policy . . . are by definition matters which demand the resolution of conflicts of value, and the elements of conflicting values are largely imponderable."

Professor Jaffe comments:

> "This overstates the case. The policy choices available in applying an authoritative text *can* be rationally stated and their potential consequences rationally described. But one must admit that, after the ground is rationally surveyed, the choice among competing values will involve a personal element. Nor can we avoid the dilemma by the argument that the judges can find purely objective answers in prevailing political, moral, and economic postulates."[43]

And Lord Scarman, anxious though he is to have the judiciary "help to avoid disorder by adjudication", baulks at the judges deciding policy.

These warnings should be heeded. All are supported by the wisdom of experience, and a keen appreciation of the functions for which the judiciary is suited. Yet it seems to me—and I say so timorously—that they appear to diminish the true genius of the judicial method and, in some degree, to mistake the nature of the task which would be confided to the judiciary if it be assigned the duty of controlling the exercise of discretionary administrative power.

The judicial method secures its legitimacy by seeking an appropriate rule from an authority external to the judge deciding the case. So long as the courts are restricted to determining cases dealing with the rights and liabilities of the parties litigant, the search is for an externally derived rule of law, that is, a rule of universal application. But when the question submitted for determination is the exercise of a discretion, the search is

[42] 335 U.S. 537, 557 (1948).
[43] *English and American Judges as Lawmakers* (Oxford, Clarendon Press, 1969) 44.

not for a rule of law, but for a rule to guide the exercise of a discretion; a rule not of universal application, but of presumptive application. The search for such a rule is not to be carried out in the hiding places of the law. It is not awaiting expression in a yet unwritten appendix to the statutes. Just as a legislative authority is an external authority for the making of rules of law, so an executive authority is an external authority for the making of rules to guide the exercise of discretionary administrative power. And thus if there be a policy to be applied, it is formed by the hands of him who has power to make it. The source of the discretionary rule is different from the source of the legal rule, but nonetheless it is amenable to discovery and application.

Lord Scarman's reservation was about the judge deciding policy, but not about his applying policy decided by others. Indeed, it is difficult to see how one might settle administrative disputes by adjudication if the judge were precluded from deciding any case in which there was some policy element.

The technique of searching for an applicable policy would be different from the technique of ascertaining a rule of law. The policy may not be found in the books, but in material of a more diffuse kind. One of the parties before the court, however, would be the administrator who would rely upon an existing policy as supporting his decision, and the onus of demonstrating its existence and establishing its terms should not prove impossible to discharge.

In the traditional model, where a precedent is not necessarily binding, the judge must ask whether the rule to be found in the precedent should be applied, or whether it should be extended to apply, to the instant case. Where an administrative discretion has been exercised, the same question would have to be asked. In either case, the answer must depend upon whether the application of the rule would lead to injustice in the instant case.[44]

Of course, minds may differ on so open a question as injustice, but the possibility of difference does not mean that the judicial technique is inapplicable or that the enunciation of a guiding rule is likely to be an apparent, rather than a real, exercise of judicial authority. Take a case where a judicial discretion has been exercised, and a question arises as to whether the exercise accords with the principles judicially defined to govern its exercise. Such a case was *Ellis* v. *Leeder*, where, as the High Court pointed out, principles had been developed to govern the exercise of a discretion under the *Testators Family Maintenance and Guardianship of Infants Act* 1916 (N.S.W.):

> "That Act confers a discretionary jurisdiction, but it is one controlling substantive rights in property. It is a jurisdiction the exercise of which

[44] See *Re Becker and Minister for Immigration and Ethnic Affairs* (1977) 1 A.L.D. 158, 162-3.

is determined by settled principles and its purpose is to ensure as far as may be that the needs of the testator's family are justly provided for."[45]

Confidence in reasoned judgment is not shattered merely because other minds in the Judicial Committee took a different view as to the appropriate order.[46]

In cases where the application of a rule is inconvenient but not unjust, prudence may determine whether the respective kinds of rules should be applied. Judicial prudence requires caution in declining to apply a legal principle derived from a judicial precedent, for certainty in the law is a desirable objective of the common law system. The same consideration does not necessarily affect the reception and application of a rule of policy.

A refusal by a judge to apply a rule of policy would tend to defeat the policy, even though the policy-maker insisted on maintaining the rule. Exceptions could become the rule, and thus the ultimate policy power could, in a sense, be susceptible of exercise by the judge rather than by the policy-maker. This seems at first sight to lead the judge into making policy, and indeed, into setting up his policy as the effective alternative to that of the policy-maker. The appearance is deceptive. The question for the judge would be whether the operation of the policy is productive of injustice in the instant case, a confined and pragmatic question. It is the question which is customarily raised in the inductive process of judicial law-making, and there can be few areas of possible judicial activity where the question could be more usefully asked and more appropriately answered. A policy-maker may have wide experience, but once the policy is formed, and it is applied administratively in case after case, it is not readily responsive to change. The genius of the common law system has been its responsiveness to empirical data in determining whether injustice is occasioned by applying a particular rule.

Again to quote Mr Justice Cardozo:

> "Every new case is an experiment; and if the accepted rule which seems applicable yields a result which is felt to be unjust, the rule is reconsidered. It may not be modified at once, for the attempt to do absolute justice in every single case would make the development and maintenance of general rules impossible; but if a rule continues to work injustice, it will eventually be reformulated. The principles themselves are continually retested; for if the rules derived from a principle do not work well, the principle itself must ultimately be re-examined."[47]

In the control of administrative decisions, the court would focus on the particular effect of policy in a given case, not for the purpose of enquiring whether the policy is good or desirable in some political or economic sense, but to answer the question whether it is productive of injustice. If

[45] (1951) 82 C.L.R. 645, 653 per Dixon, Williams and Kitto JJ.
[46] *Leeder* v. *Ellis* [1953] A.C. 52.
[47] *Selected Writings*, op. cit. 114.

the exceptions were to become so numerous as to become the rule, the cause would be the intrinsic injustice of the policy. The policy would be rejected because it is unjust, not because it is unsound on some political or economic ground other than justice. True, experience in judicially determining the existence of administrative injustice is lacking, but it may not be fanciful to expect that a judge will be able to recognize it when it is encountered, even if it is not definable in advance. And if one seeks justification for refusing to apply a sound political or economic policy because it works an injustice in an individual case, the justification is found in the indulgence which a confident and stable society allows itself in order to accord a unique importance to each of its citizens.

No doubt there are some administrative discretions which are not guided by a defined policy upon which a court might rely, and those discretions thus fall to be exercised at large. A discretionary rule may not be available either because the power is not amenable to structuring by rule, or because there has been default in the development of a rule.

In the former situation, the power is unsuited to judicial control. For example, the granting of landing rights to a foreign airline may depend upon factors so unforeseeable in advance of a particular case that no rule could be devised to guide a decision-maker. An inability to guide a discretion by rule is not necessarily an argument against the width of the discretionary power. Not all wide discretions should be eliminated nor should every exercise of power be justiciable. Every civilized society blends a measure of law and a measure of discretion in its government. And thus, Professor K. C. Davis speaks of "a government of laws and of men".[48] Nevertheless, he insists that rules, where they are practicable, furnish a safeguard against administrative injustice:

> ". . . how can we improve the quality of justice for individual parties; how can we reduce injustice? Over the centuries, the main answer has been to build a system of rules and principles to guide decisions in individual cases. That is a good answer, as good for the future as for the past. The continued development of rules and principles is both desirable and inevitable."[49]

The devising and proper use of a rule devised do not, of course, either fetter a discretion which is not to be fettered, or prevent the consideration of the circumstances and merits of particular cases.[50] The courts may think it beyond their capacity to devise a policy rule where a policy rule is needed to guide the exercise of a discretionary power in a particular case—it is not always so. The practice of the courts has been to develop a rule

[48] K. C. Davis, "Discretionary Justice" (Baton Rouge, Louisiana State University Press, 1970) 17.

[49] Ibid. 215.

[50] *R.* v. *Port of London Authority* [1919] 1 K.B. 176, 184 per Bankes L.J. *Ex p. Forster; Re University of Sydney* (1963) S.R. (N.S.W.) 723, 732. *R.* v. *Rotherham Licensing Justices; Ex p. Chapman* [1939] 2 All E.R. 710, 712-13.

for application according to the experience gained in particular cases; to adopt the inductive method before resorting to the deductive consequence; to discover the major premise before applying it. It may be said that the ascertainment of rules affecting the public welfare is beyond the capacity of the courts, and in respect of some rules that proposition is undeniable. Nevertheless, if the courts are true to the basic traditions of the common law, they will retain their capacity to devise a rule for the public good, at least where the rule is not one best left to Parliament or the Executive.[50a]

It is only partially true to say that a political question does not cease to be a political question when it is submitted to judicial determination, though the judges may find difficulty in grappling with the relevant concepts. By the very submission of the question to the judiciary, its mode of solution changes. The process of analysis, and analogy, and induction play their part in devising a rule which, in a political context, may be attained by a more intuitive method. Section 92 of the Constitution evoked the observation from the Judicial Committee in the *Banking case*:

> "The problem to be solved will often be not so much legal as political, social, or economic, yet it must be solved by a court of law."[51]

That the courts have solved questions of wide dimension is manifest from the development of the common law rules in respect of contracts in restraint of trade. Indeed, the transition from a feudal economy to the post-industrial revolution economy was accompanied by a development of the law matching the change in trade and business conditions, and until the end of the 19th century the development was substantially unaided by the legislature.[52] A reference to the judgment of Lord Macclesfield* in *Mitchel* v. *Reynolds*[53] shows the extent to which social and economic factors were consciously referred to in the framing of legal principle.

The experience of the Trade Practices Tribunal and of the Restrictive Practices Court has demonstrated the appropriateness of modern judicial methods in dealing with issues of wider dimension than those usually submitted to judicial determination. There is no reason to surmise that some questions of the same dimension, submitted to the courts in a different context, should not receive a like analysis and solution.

The limiting factor is not so much the width of the issues for determination, as the importance of ensuring that the functions of the judiciary and of the executive do not overlap or conflict. If the executive be acknowledged as the source of policy, so that the judiciary is constrained to develop policy only where there is none to hand to solve the instant

[50a] See D. J. Galligan, "The Nature and Function of Policies within Discretionary Power" [1976] *Public Law* 332.
[51] *Commonwealth of Australia* v. *Bank of New South Wales* [1950] A.C. 235, 310.
[52] See R. O. (Lord) Wilberforce, et al, *The Law of Restrictive Trade Practices and Monopolies* (2nd ed., London, Sweet and Maxwell, 1966) 5.
[53] *Then Parker C.J. (1711) 1 P. Wms. 181; 24 E.R. 347.

case, or where the executive policy would be productive of injustice in the instant case, the constitutional resettlement will leave to the executive so much of the policy power as the executive chooses to exercise. At the same time, the resettlement would remit to the courts many of the adjudicative tasks of administration.

In the course of exercising that jurisdiction, the new law, meaning thereby the rules which protect against administrative injustice, would grow and be so moulded as to cover the empty spaces of discretionary power.

Though the judiciary may, without departure from the basic common law tradition, undertake a jurisdiction controlling the exercise of some administrative powers, those powers do not exhaust the entire field of administration. Some administrative powers should be exercised subject only to such control as the Executive or the Parliament reserves. Judicial control is not a panacea for all administrative injustice, nor yet desirable in all areas of administration.

What I have been concerned to demonstrate is the ageless vitality of the common law tradition, which entrusts the judges with an awesome function and equips them with the means to fulfil it. It is a function of doing justice to an individual, of having regard to the particular circumstances of his case, of striving to ensure that the greatest good as perceived by the greatest number is not achieved by injustice to the few. The means are the application of rules, whether derived from external authority, or ascertained by study of the subject in the light of history and tradition. The notion that justice is the purpose of law pervades the judicial process, preserving it from aridity and summoning forth new growth to respond to the human condition of the age.