
Criticism of Judges by Politicians: Reflections from New Zealand

Noel Cox

Introduction

The criticism of judges and of courts by politicians is not new. However, the constitutional balance require limits to be kept on such criticism. Recent events in New Zealand have highlighted the difficulties inherent when political leaders criticise judges and courts, and indeed when judges speak publicly in such a way which might be construed as being critical of Government policy. This paper will consider the question of when it might be appropriate for politicians to criticise judges, and the constitutional implications of such action. It will also consider the circumstances in which judges may comment on political and policy matters. Ultimately, some element of political criticism of judges is probably desirable, for it shows that the judiciary is not subservient to the political elements of government. It is necessary however for any such criticism to be tempered by a need for balance. Too much criticism will undermine public confidence in the judiciary, and hinder it's effective operation; too little criticism may likewise weaken public confidence in the impartiality of the judiciary.

Recent events heightening tensions between the Judiciary and Politicians

The question of the immunity of judges from political criticism – if such an immunity exists – has recently been raised in New Zealand by a number of political events. There was some criticism of judges and of elements of the judiciary during the debate on the abolition of appeals to the Privy Council – including claims that the Privy Council was “out-of touch”, or that the Court of Appeal was activist or less capable than it should be when dealing with commercial appeals. In an address to the Legal Research Foundation, the Solicitor-General, Terence Arnold, QC, called for this criticism to end, for it undermined the judiciary as a whole.¹ The Attorney-General, Margaret Wilson, made a similar comment,² though since she was advocating the abolition of the Privy Council

¹ Terence Arnold, “Update on the Supreme Court”, Annual General Meeting, Legal Research Foundation Inc., Auckland, 7 August 2004. Text available at <<http://www.crownlaw.govt.nz/uploads/UpdateSC.PDF>>.

² Hon Margaret Wilson, “The Supreme Court Bill”, Press Release 14 October 2003:

(and, in so doing, had herself criticised the Privy Council) her own motivation might have reduced the weight of her call. The insecurity this litany of criticism has caused, heightened by the overly political nature of the recent court reform (implemented despite considerable opposition from the legal profession, business, Maori, and most political parties), and the suspicions this has engendered, continues.³

The National Party has said it will abolish the Supreme Court when it is returned to power and if the Judicial Committee of the Privy Council agrees to take New Zealand back,⁴ and critics have questioned the Supreme Court's long-term credibility. The Chief Justice, Dame Sian Elias, acknowledged that the Supreme Court, which she heads, faces a long-term struggle to establish its credibility.⁵ This fragility makes the courts in general vulnerable to political criticism.

Opportunities to criticise the courts and judges have occurred on a number of occasions recently. The recent Court of Appeal ruling which led to acrimony between the Government and Maori over the foreshore and seabed moved the Government to break with convention by openly criticising the courts. More recently, Deputy Prime Minister Michael Cullen suggested that the courts were challenging the supremacy of Parliament.⁶ Whether this was motivated by the Court of Appeal decision, or whether it had a more general basis, it was a significant statement of attitude. These events raise serious questions about the nature of criticism of judges and the judiciary. More importantly, these raise questions about the respective roles of Parliament and the courts in New Zealand.

... the development of New Zealand law has been stifled. The Privy Council cannot fulfil this function for us because of the narrow range and limited number of cases it hears, and most importantly because of its lack of understanding of the context within which cases arise.

³ See Jim Farmer, "The Judicial Process in New Zealand" (Legal Research Foundation, Auckland, 2001) 8; Noel Cox, "The abolition or retention of the Privy Council as the final Court of Appeal for New Zealand: Conflict between national identity and legal pragmatism" (2002) 20(2) *New Zealand Universities Law Review* 220-238; Noel Cox, "A New Supreme Court of New Zealand" (2003) 12(3) *The Commonwealth Lawyer* 25-28.

⁴ Tracy Watkins, "National takes swipe at new court", *Daily News*, 1 July 2004; Tracy Watkins, "Criticism mounts as top court opens", *Dominion Post*, 1 July 2004.

⁵ Chief Justice, The Right Honourable Dame Sian Elias, "Speech at the Special Sitting of the New Zealand Supreme Court", 1 July 2004. Available at <<http://www.justice.govt.nz/supremecourt/Chief%20Justice%20Supreme%20Court%20s%20speech%201%20July%202004.pdf>>.

⁶ Hon Michael Cullen, "Human Rights and the Foreshore and Seabed", Human Rights Commission Speakers Forum, Wellington, 1 June 2004. Available at <<http://www.beehive.govt.nz/ViewDocument.cfm?DocumentID=19914>>. See also Hon Michael Cullen, "Observations on the Role of Government" <<http://www.beehive.govt.nz/ViewDocument.cfm?DocumentID=17678>>.

Judges and Criticism – a Rationale for Limitations

The primary function of the judiciary is to determine disputes either between subjects or between subjects and the State. Judges must apply the law and are bound to follow the decisions of the legislature as expressed in statutes. In interpreting statutes and applying decided cases they do, however, to a large extent make, as well as apply, law. The fiction that judges merely expound, or discover, the law, is too thin to bear serious scrutiny – particularly when the courts are in an activist phase (as the Court of Appeal arguably was under Lord Cooke of Thorndon).⁷ Their decisions are potentially controversial and may be at odds with what the Government, or some politicians, might wish.

One of the fundamental principles of the Constitution is the independence of the judiciary. Judicial independence is secured by law and by public opinion. The most important legislative provisions are the Constitution Act 1986, and the Judicature Act 1908. Judges are entitled to make decisions according to law regardless of fear or favour – either of litigants or of the Crown.

This independence is protected by, and is a product of, the constitutional position of the courts. The courts are The Queen's courts. Their proceedings are in her name, and by her judges.⁸ They are not servants of the Government-of-the-day. The executive branch of Government does not involve itself in the judicial process. As Sir Edward Coke, Lord Chief Justice of the Court of Common Pleas, said in *Prohibitions del Roy*, almost 400 years ago:

The King in his own person cannot adjudge any case, either criminal, or treason, felony, etc., or betwixt party and party, concerning his inheritance, chattels or goods, etc., but this ought to be determined and adjudged in some court of justice according to the law and custom of England. God had endowed His Majesty with excellent science and great endowments of nature, but His Majesty was not learned in the laws of his realm of England, and causes which concern the life, or inheritance, or goods or fortunes of his subjects, are not to be decided by natural reason, but by artificial reason and judgment of law, which law is an art which requires long study and experience, before that a man can attain to the cognizance of it. The law is the golden met-wand and measure to try the causes of the subjects; and which protected His Majesty in safety and peace.⁹

⁷ See, generally, Peter Spiller, *Court of Appeal of New Zealand 1958-1996: A History* (Wellington, Brookers, 2002).

⁸ The combined effects of the Judicature Act 1908, Constitution Act 1986, common law and convention.

⁹ (1607) 12 Co Rep 63; K&L 108; 77 ER 1342.

Thus the Crown, having entrusted the administration of justice to the courts (as the judges are the trained experts), is protected against the consequences of itself making arbitrary or erroneous decisions. The legislatures also are not courts and cannot judge.¹⁰ It follows that politicians should only criticise the actions of judges with caution, since the politicians lack the requisite technical skills and experience to fully appreciate judicial reasoning. The notion that all are equal before the law implies that the Crown, if a litigant, will be treated essentially the same as any subject. For this reason Ministers of the Crown, and also Members of Parliament, should not be seen to placing undue influence on judges. This influence can include criticising the judges.

While members of the public, commentators, the media, and others are not inherently bound by similar constitutional constraints, they generally take their cue from politicians, and refrain from direct criticism of judges and courts. This is based on respect for the rule of law, and a belief that courts should be free of undue influence on their decision-making processes. Similar restraint isn't necessarily found elsewhere. American politicians, academics, lawyers, journalists, pundits, and sometimes even other judges rarely hesitate to criticize judicial rulings and/or judges with whom they disagree. This occurs despite a belief in the independence of the judiciary, and is perhaps a result of a more political selection process – including electing judges. The traditions in the mature democracies of Western Europe and in the evolving democracies in Eastern Europe are usually quite different than the American approach. New Zealand is traditionally closer to the British practice, which largely shields judges from political criticism. This allows the courts to administer the law in a way which ensures the maximum level of public support.

However, the criticism of judges and their decisions, whether by politicians or others, is not inherently wrong. American Bar Association (ABA) President Jerome Shestack said in 1998, “I have no objection to healthy criticism. Every lawyer who appeals is criticizing a ruling”.¹¹ But, when criticism is misleading and the judge in question is prohibited from public response by ethical rules, judicial independence is threatened. This is especially so if criticism is from a political figure.

Criticism of judges and their decisions is a necessary part of the justice system.¹² When judges engage in misconduct or are unable to adequately perform their duties, criticism may be needed to highlight or to address the failure. Also, as Shestack pointed out, the appeals process is a form of criticism that is inherent to the justice system, without which questionable rulings could not be reviewed.¹³

¹⁰ *Liyanage v The Queen* [1967] 1 AC 259 and *Harris v Minister of Interior* 1952 (4) SA 769.

¹¹ ABA Chief Decries Judge ‘Intimidation’, AP. Available online at <<http://wcinet.com/th/News/020298/National/93543.htm>>.

¹² See Richard Ekins, “Politicians are right to criticise judges”, *New Zealand Herald*, 13 September 2004.

¹³ ABA Chief Decries Judge ‘Intimidation’, AP. Available online at <<http://wcinet.com/th/News/020298/National/93543.htm>>.

When public criticism takes the form of uninformed rhetoric about a particular judge or decision, the danger that the judge (and ultimately the judiciary) will suffer adverse consequences, including impaired independence, becomes a problem.

When politicians, lawyers, or citizens publicly criticise a judge or decision, the judge is generally precluded from responding by ethical rules.¹⁴

It generally is undesirable for a judge to respond to criticism of her or his own actions by appearing in the news media. This policy has been developed to insure the dignity of the administration of justice, to prevent interference with pending litigation, and to reaffirm the commitment to an independent judiciary dedicated to making decisions based on facts and law as presented in court. These considerations underlie the ethical restrictions relating to a judge's ability to engage in public comment. These ethical restrictions often prevent a judge from responding to criticism, even when the criticism is misinformed or unjust. Unless someone, such as a law society or bar organization representative, addresses the claims, the public gets a biased view of the judge or case at issue. The ABA's suggested response to the threat posed by misleading criticism which cannot be addressed by judges personally is that "state and local bar associations should develop effective mechanisms for evaluating, and, when appropriate, promptly responding to misleading criticism of federal judges and judicial decisions in each federal judicial district".¹⁵ In New Zealand, the New Zealand Law Society, and the New Zealand Bar Association have on occasion restated their respective roles in this respect. That may be fine for responding to criticism of judges or courts by independent commentators or the news media, but not necessarily sufficient when the source of the criticism is another branch of the government.

Criticism by Politicians

By convention, Ministers of the Crown have refrained from criticising judges decisions, the Crown having delegated exclusively to the courts the judicial role. The legislative branch of government is also precluded from direct interference in the judicial process. The Standing Orders of the House of Representatives prohibit Members of Parliament from criticising judges.¹⁶ Even the Attorney-General or Minister of Justice do not comment on individual court cases and decisions, as to do so could be seen as interfering with judicial independence.

In recent years there have been a number of occasions when MPs have criticised decisions made by judges. By convention, the judges have not traditionally been able to

¹⁴ See, in the more robust US situation, "Prohibition on Judicial Response" Code of Conduct for United States Judges, Canon 3 (A)(6)": <http://www.ajs.org/cji/cji_judicialresponse.asp>.

¹⁵ See *An Independent Judiciary*, Report of the Commission on Separation of Powers and Judicial Independence, American Bar Association, July 4, 1997.

¹⁶ Standing Orders of the House of Representatives (1999), no 114.

defend themselves from criticism. This was the role of the Attorney-General. But because (in New Zealand practice) the Attorney-General is also a politician, and may have been reluctant to censure colleagues, or to defend court judgments with which they were politically opposed, the judiciary now sometimes defends itself. The Chief Justice or other chief judge will respond if the criticism is felt to be unfair, personally directed at particular judges, or damaging to public confidence in the judiciary. This can result in the type of situation which we have seen recently (though in a different context), where the Prime Minister and Attorney-General and the Chief Justice have appeared to have been at odds over the new Supreme Court.

The Court of Appeal ruling which led to acrimony between the Government and Maori over the foreshore and seabed¹⁷ moved the Government to break with convention (not for the first time) by openly criticising the courts. Deputy Prime Minister Michael Cullen accused the courts of challenging Parliament's sovereignty.¹⁸ This was not an off-the-cuff remark, but a deliberate statement during celebrations to mark the 150th anniversary of the establishment of Parliament. Some of the criticism may be imputed to political spite, but it also highlights the comparatively fragile nature of the relationship between the courts and the political branches of government. This tension tends to become more apparent when the courts are perceived as activist – and particularly so when judicial policy may be perceived (rightly or wrongly) as being contrary to the prevailing ethos of the Government.

Former president of the Auckland District Law Society, and law commissioner, Donald Dugdale, has observed that:

The worry, particularly so long as Chief Justice Sian Elias is there, is that they [the Supreme Court] will take the bit between their teeth and bring to a head something of a seething dispute as to the relative powers of court and Parliament, which, if it's quietly brushed under the mat, we sort of jog along with quite happily for generations.¹⁹

The present Government has perhaps exasperated the situation by establishing a Supreme Court which may feel inclined to activism. After all, one of the justifications for the Supreme Court was that it would be able to provide firmer and more decisive leadership in the development of the law than the Privy Council did.²⁰ This would lead, almost inevitably, to charges of judicial activism, and an increased likelihood of conflict between the political branches of government and the courts.

The legal profession has not remained silent in the face of criticism of the judiciary. The criticism labelled against the proposed Supreme Court led to the then President of the New Zealand Law Society issuing the following statement:

¹⁷ *Attorney-General v Ngati Apa* [2003] 3 NZLR 643 (CA).

¹⁸ Hon Michael Cullen, *New Zealand Parliamentary Debates*, 24 May 2004, p 13191.

¹⁹ Tracy Watkins, "National takes swipe at new court", *Daily News*, 1 July 2004.

²⁰ Hon Margaret Wilson, "The Supreme Court Bill", Press Release 14 October 2003:

Political attacks on judges should stop. The independence of the judiciary is the cornerstone of our legal system. The courts are independent of the executive branch of government and independent from Parliament. This independence is fundamental to their constitutional functions and of vital importance in protecting rights ...

As we enter a new era for the New Zealand courts, the Law Society will fiercely defend and advance the independence of the judiciary to ensure that judges continue to enjoy security of tenure, financial security and administrative independence.

The public must feel confident of the integrity and impartiality of our judiciary. They must be able to see that judges are secure from ministerial and parliamentary pressure. It must be clear that they are autonomous in their own field.²¹

Criticism by Ministers of the Crown, and by MPs, seriously challenges the independence of the courts, since it harms the perception of independence, and serves to inhibit judicial freedom of action.

The previous President of the New Zealand Law Society also commented on the role of the Law Society and judicial criticism:

The Society has been concerned that the controversy surrounding the court's establishment and appointment of its judges could be seen by the public as an indictment of the New Zealand judiciary.

The Society has an established role to speak out when judges are criticised. Convention dictates not only that judges cannot defend themselves, but it also limits political criticism of judges.²²

However, no specific comment has been made by the New Zealand Law Society on Dr Cullen's more broadly-based comments, possibly because it was more difficult to address.

Criticism by Others

It is clearly desirable that judges should not only be independent of the Government, but also free from liability to vexatious actions for acts done in the exercise of their duty.²³

²¹ Chris Darlow, President, New Zealand Law Society, 23 December 2003.

²² Christine Grice, President, the New Zealand Law Society, 14 October 2003.

²³ There are very few New Zealand examples of cases based on a claim of judges acting without jurisdiction; *Nakhla v McCarthy* [1978] 1 NZLR 291 (CA).

Judges cannot be sued for their conduct on the bench, meaning that they can make decisions without fearing that parties who do not agree with them will try to punish them by suing them. The immunity of judges was recently extended to include inferior judges.²⁴

The effectiveness of the administration of justice depends in a large measure on public confidence. The reporting of inaccurate or unjust criticism of judges, courts, or our system of justice by the news media erodes public confidence and weakens the administration of justice. It is vital that non-litigants as well as litigants believe that the courts, their procedures and decisions are fair and impartial. This is perhaps less of a problem in New Zealand than the political criticism of judges, since the news media has traditionally kept within narrow bounds of behaviour – possibly because of fear of contempt of court action. This may however change in light of the political example.

Circumstances where Criticism is Justified

In all European countries, criticism which takes the form of expression of disagreement with an opinion or a particular course of action, is tolerated.²⁵ This is as true of the common law courts in England, as it is of the civil law courts.

It has been said that, “Today, we can say of the UK judges that they are not fragile flowers that will wither in the heat of controversy and hence they do not fear criticism nor need they seek to sustain unnecessary barriers to complaints about their operations or decisions. This stable position is aided by the settled tradition among the press and the public to refrain from making scurrilous criticism of judges.”²⁶ This would appear to be generally true of New Zealand also. Judges have been criticised for misconduct, and rightly so. But criticism is moderated by the dictates of policy. Too much criticism – which might undermine the standing of the courts in general – is avoided.

The American Bar Association’s Commission on Separation of Powers and Judicial Independence a few years ago recognized this dilemma of needing to respond to criticism, but not to all criticism. The ABA Commission suggested state bar associations focus on these circumstances:

²⁴ District Court judges were until the amendment in 2003 (to s 119 District Courts Act 1947) immune only where they had not exceeded jurisdiction or acted without jurisdiction.

The difference between High and District court judges had been rationalised in that superior court judges can never be outside jurisdiction since they have “jurisdiction even to decide they have jurisdiction”.

²⁵ Michael Addo (ed), *Freedom of Expression and the Criticism of Judges: A Comparative Study of European Legal Standards* (Ashgate, Burlington, 2000) p. 16.

²⁶ Michael Addo (ed), *Freedom of Expression and the Criticism of Judges: A Comparative Study of European Legal Standards* (Ashgate, Burlington, 2000) p. 41.

- a. When the criticism is serious and will most likely have more than a passing or de minimis negative effect in the community;
- b. when the criticism displays a lack of understanding of the legal system or the role of the judge and is based at least partially on such misunderstanding;
- c. when the criticism is materially inaccurate, the inaccuracy should be a substantial part of the criticism so that the response does not appear to be nit-picking.²⁷

This approach would appear to be sensible, though less applicable in an environment where judges have traditionally been subject to less criticism.

Circumstances where criticism is not justified

When criticism threatens to undermine public confidence in the judiciary, and there is little or no factual basis for the criticism, it is unacceptable. This is especially likely if the criticism is by Ministers of the Crown. But criticism by MPs can also have serious effects, especially if directed against a whole court, and not a specific judge or judgment.

Criticism of a judgment or a series of judgments by Ministers of the Crown which is made in unduly emotive terms, or which inaccurately describes the judicial decision-making process or judgment, undermine the independence of the courts. Criticism of the courts for over-stepping the proper bounds between applying the law and making it, is equally improper, unless it is clear that the criticism is correct, and not merely a politically-motivated attack.

Even where criticism of judges or courts can be perceived as politically motivated, there may still be some justification, for example, if the courts are being criticised as inefficient or activist – and there is clear evidence that this is so. The latter ground – activism – is however difficult to deal with. It is based on a particular perception of the proper bounds of a court. This is not clear, as there is some uncertainty as to what precise limitations there are upon the sovereignty of Parliament.²⁸ In a country with no

²⁷ American Bar Association Commission on Separation of Powers and Judicial Independence, “An Independent Judiciary: Report of the ABA Commission on Separation of Powers and Judicial Independence” (ABA Commission on Separation of Powers and Judicial Independence, Washington, 1997) Available at <<http://www.abanet.org/govaffairs/judiciary/report.html>>.

²⁸ See, for instance, Lord Woolf of Barnes, “De Droit public – English style” [1995] *Public Law* 57; Sir John Laws, “Law and Democracy” [1995] *Public Law* 72; Sir Robin Cooke, “Fundamentals” [1988] *New Zealand Law Journal* 158. See also Louis Knafla, *Law and Politics in Jacobean England: The Traits of Lord Chancellor Ellesmere* (Cambridge University Press, Cambridge, 1997) 306-309: it was more fitting “that Acts of parliament should be corrected by the same pen that drew them than to be dashed in pieces by the opinion of a few judges”.

entrenched Constitution (barring the Electoral Act 1993, and that is a procedural entrenchment only²⁹), this is a critical issue.

Comments by Judges on Political and Policy matters

Judges are free to criticise the common law, for in essence their role requires this. They are at least entitled to comment on the structure, form and content of the common law, and this inherently involves the consideration of policy to some degree. The criticism of statute law, and of regulations, is more problematic, since this involves the consideration of legislation by the executive or legislative branches of government.³⁰ Judges are free, however, to comment on the workability of legislation, even if they are barred, by convention, from criticising the underlying policy considerations which led to it.³¹

Judges also, from time to time, criticise the social or economic environment which led to particular cases coming before their courts. This can involve judges criticising the conduct of government agencies, or even of government policy. This is legitimate in so far as the comments do not suggest that the appropriate agency has adopted a policy which is mistaken, or that legislation is based on a mistaken policy initiative. These considerations are for the executive and legislative branches of the government respectively.

Judges may freely comment on any matter which inhibits their ability to make independent, unbiased and well-reasoned decisions. This may include questions of judicial funding.

Conclusion

There should be no doubt that the legal profession has special responsibilities in upholding the independence and integrity of the courts. The Canadian Bar Association's *Canons of Legal Ethics* put it this way: "Judges, not being free to defend themselves, are

²⁹ s 268.

³⁰ There is, in New Zealand "substantial deference to the legislature by the courts" – Rt Hon Dame Sian Elias, "Another Spin on the Merry-Go-Round", Institute for Comparative and International Law, University of Melbourne, 19 March 2003. Available at <<http://www.justice.govt.nz/pubs/speeches/19March2003.pdf>>.

³¹ Janet McLean has persuasively argued that there is no illegitimacy in judicial measurement of legislative and executive measures against human rights standards: See Janet McLean, "Legislative Invalidity, Human Rights Protection and s 4 of the New Zealand Bill of Rights Act" [2001] *New Zealand Law Review* 421, 442-448. However, Prime Minister Jim Bolger criticised Dame Silvia Cartwright for "straying into politics" with her comments on poverty: "If the judge wants to enter the political fray, she should have put her name on to the list before the candidates closed ...", 20 September 1996.

entitled to receive the support of the legal profession against unjust criticism and complaint”.³²

Personal attacks, criticisms laden with political threats, criticisms that misrepresent and distort the nature and context of judicial decisions, and assigning of blame to judges for the ills of society, damage the integrity of the judiciary and threaten the doctrine of judicial independence. This is especially so when the criticism comes from politicians, and is aimed not at individual judges, but at a particular court, or the judiciary as a whole. Judges are entitled to comment on political and policy matters which are directly relevant to their jurisdiction.

It is a pity that the debate has been reduced to the level of party or personal argument. We might look again at Sir Edward Coke, and his fight for the development of a robust and independent common law, and ask whether the balance between the courts and the executive may be in danger of becoming unstable. Independence requires prudence and restraint from both sides, and an understanding of the reasons why this should be so.

[Dr Noel Cox is a Senior Lecturer and Discipline Chairman of Law, at the Auckland University of Technology, New Zealand, and a barrister of the High Court of New Zealand]

³² In force 1 January 1992, canon 2(2).