Politics, the legal system and the NZ-UK relationship

Dr David Erdos, 2006

Too often commentary on NZ-UK constitutional interchange focuses on the alleged “weakening” of this relationship. For example, recent stories within the mass media have examined New Zealand’s departure from the Privy Council. The supposed inevitability of New Zealand becoming a republic is also a perennial concern. Whatever one’s view on these two issues, it is important to place both within a context which gives acknowledgment to the strong and durable constitutional linkages between our two countries. In particular, it is vital to emphasize the valuable nature of dialogues which can and are taking place across a range of constitutional issues including those relating to parliamentary practice, the legal system, language rights and the electoral system.

My own research has focused on a comparative examination of the changing relationship between the “political” branches of the state and the legal system (including, in particular, the judiciary). As a result of a scholarship provided by the NZ-UK Link Foundation I have been able to spend a number of months based at Victoria University of Wellington during which time I looked at archival material, interviewed relevant actors and engaged with the work of colleagues working on similar topics within the disciplines of law, politics and policy studies.

A preliminary finding from this work points to the need to examine the complex interaction between a range of factors in order understand the multifaceted and increasingly close relationship between “politics” and the legal system not only in the NZ case but also further a field. For example, it is certainly the case that legislative changes occupy an important part of the story of what is known in the social science literature as the “judicialization” phenomena. In particular, reforms of the Fourth Labour Government (1984-90) granted important new powers to the judiciary including inclusion of reference to the vague “principles of the Treaty of Waitangi” in legislation and passage of a statutory Bill of Rights. Undoubtedly Labour’s embrace of this new agenda reflected in part an “aversive” response to perceived authoritarian excesses under the bombastic and combative Premiership of National’s Robert Muldoon. The parallels with Labour’s embrace of a similar agenda in the UK in the wake of Margaret Thatcher’s leadership are uncanny.

Legislative change *per se*, however, cannot provide a complete explanation of the changes which have been witnessed. For example, without the Court of Appeal’s innovative jurisprudence under the Presidency of the late Sir Robin Cooke it can be argued that statutory reference to the “principles of the Treaty of Waitangi” could have been a dead letter. Similarly, it is of interest to note that, despite the wide nature of rights protected in the *NZ Bill of Rights* (1990), it has so far only had a substantial effect within two areas - freedom of expression and the criminal law. Finally, it is important to note that some of the most high profile judicial decisions impacting on

Governmental decision-making have related to interpretation not only of statute but also of the common law. A prime instance of this is the *Ngati Apa* case in 2003 where the Court of Appeal found that Māori customary title of the foreshore and seabed may not have been extinguished despite previous judicial, executive and parliamentary assumptions to the contrary.

These facts point to the importance of examining other factors including judicial attitudes and the strength or weakness of structures which support systematic and strategic litigation by certain actors in order to explain concrete outcomes. Thus, it appears that extensive (and at times expansive) interpretation of the freedom of expression and criminal rights areas of the *NZ Bill of Rights* have not been a result of the peculiar strength of such provisions compared with clauses relating, for example, to anti-discrimination. Rather it may be that such an outcome relates more to a greater judicial comfort with dealing with these matters coupled with the financial muscle of media organizations and (due to the availability of legal aid) criminal lawyers which enable them to pursue costly litigation strategies.

Whether such a hypothesis is correct clearly depends on substantially more argumentation and debate than this space allows. Whatever the outcome, however, such work will certainly be aided by examination of very similar issues relating to interpretative outcomes under the UK's *Human Rights Act* (1998) - itself substantially modelled on its NZ cousin. That, if nothing else, demonstrates the continued strength and importance the NZ-UK relationship and the vital need for an organization such as the Link Foundation to nurture it.

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