# INTRODUCTION

# A PERSPECTIVE ON BALANCE AND THE ROLE OF LAW

*Matthew S R Palmer**

## *I HONOURING SIR IVOR*

The conference that gave rise to this volume was held in honour of the Rt Hon Sir Ivor Richardson, on the eve of his retirement as President of the New Zealand Court of Appeal. Sir Ivor is a former Chancellor, and a former Dean and Professor of Law, at Victoria University of Wellington and holds an Honorary Doctorate from the University. It was, therefore, particularly appropriate for the Victoria University of Wellington Law School to host the conference, which drew together a distinguished set of speakers and participants from around New Zealand and around the world. Victoria University also announced at the conference that Sir Ivor would be joining the Law School as a Distinguished Fellow, on his retirement from the Court of Appeal.

The theme of the conference, and of this volume, is "Roles and Perspectives in the Law". This theme was chosen in recognition of the variety of roles that Sir Ivor has played in the law. He has been:

- A law practitioner, in private practice and in the service of the Crown;
- A law academic, including being Dean of the Victoria University Law School;
- A Judge of the High Court and, for over twenty years, a Judge and then President of the Court of Appeal; and

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* Pro Vice Chancellor and Dean of Law, Victoria University of Wellington and Director of the New Zealand Centre for Public Law. My thanks to Denise Blackett and Sandra Petersson at the New Zealand Centre for Public Law for their contributions to the successful running of the Conference in April 2002, and to Geoff McLay, Caroline Morris, David Carter, and Denise Blackett at the Victoria University of Wellington Law Review, and to Victoria University Press, for their hard work in the publication of the papers. Special thanks to Justice Sir Kenneth Keith for his understated, unerring guiding hand and, of course, to Sir Ivor Richardson for constituting such a wonderful reason for the occasion of the conference and this publication.

- An adviser to governments on law, including Chair of the Royal Commission of Social Policy and the review of the organisation of the Inland Revenue Department in New Zealand, and as adviser to the governments of Western Samoa and Mauritius.

Through these roles, Sir Ivor Richardson has left an indelible mark on law and through it, on New Zealand society, culture, economy, and polity. He has contributed a sense of careful and balanced justice to everything he has touched. He has taken seriously the statement by the then Lord Chancellor, Lord Hailsham in 1971, quoted at Sir Ivor's judicial swearing in ceremony in 1977:[1]

> Law is not a sacred mystery revealed in an archaic language only to a few initiates. Law is a social science, and lawyers must learn to regard themselves as social scientists. The principles of justice do not change, but their application in terms of positive law must alter with changes in society and circumstance. This presupposes a race of lawyers, a breed of Judges, not aloof from the society of their time but alive to its realities.

## *II CONFERENCE THEMES*

Associated with each different role in the law is a different perspective. In this conference, we invited experts to bring to bear on an area of law the perspective(s) of their own role or roles as academic, practitioner, judge, or adviser. The presenters were:

- Overseas practitioners and academics: Lord Lester of Herne Hill QC, Professor Cheryl Saunders from the University of Melbourne, and Professor Benedict Kingsbury from New York University.
- Judges and former judges: Judge Carrie Wainwright of the Maori Land Court, Sir John Wallace, Justice Tom Gault of the Court of Appeal, and Chief Justice Sian Elias.
- New Zealand practitioners and advisers: Andrew Butler, Geoff Harley, Rob McLeod, Alison Quentin-Baxter, Sir Geoffrey Palmer, Alex Frame, Douglas White QC, Alan Galbraith QC, Jack Hodder, and Kit Toogood QC; and
- Academics: Professor Mason Durie from Massey University, Bob Dugan from Victoria University of Wellington, and Professor John Burrows from the University of Canterbury.

Each session was so ably chaired by a member of the Victoria University of Wellington Law Faculty that the conference consistently ran to time! – thanks to: Mereana Hond, Andrew Erueti, Cathy Iorns, Susy Frankel, Geoff McLay, Kate Tokeley, and Petra Butler.

1 "Swearing in of Mr Justice Richardson" [1977] NZLJ 282, 282.

At the final session, Sir Ivor himself, Lord Lester, Justice Sir Kenneth Keith, and I made concluding comments. George Barton QC's speech at the conference dinner in the Grand Hall of Parliament Buildings was also a highlight, and is reproduced in this volume.

The regard, respect, and affection in which Sir Ivor is held manifested in the consistently high quality of each conference paper and manifests in the revised versions collated for this volume. There are usually a few papers or even sessions at any conference that bore or disappoint. Remarkably, that was not the case here. There was stimulation, as well as reflection. There were sharp exchanges, such as those over appellate judicial issues, and warm emotion, such as in the indigenous session.

There was also a significant element of risk in terms of coherence at the conference. Not only were we bringing together people with quite different views of the same subject, but we were also bringing together a wide diversity spanning eight distinct areas of law:

- Human rights;
- Indigenous rights – Treaty of Waitangi;
- Collecting Taxes;
- Making Constitutions;
- Facilitating and Regulating Commerce;
- Facilitating and Regulating Employment;
- Intepretation of Legislation; and
- Appellate Judicial Issues.

The choice of these areas of law derived from Sir Ivor's own interests in law over the course of his career. Other than as a festschrift, such a diverse collection of topics would rarely find their way together as the structure for a conference. Yet that proved to be the most valuable dimension of the conference. The juxtaposition of different areas of the law reminded the conference of the importance of underlying principles, tensions, and values that run through the law. Most noticeably, the in depth consideration of a series of such vastly different areas of law, in close succession, produced a greater sense of the law itself as a holistic entity. Tax lawyers and human rights lawyers listened to and engaged with each other. Indigenous rights were discussed along with employment obligations. The discussions, and papers in this volume, remind us that underlying the law is a deeper set of principles than the increasing professional incentives for specialisation, whether in practice, in government, in academia, or judicial life.

Rather than simply summarising the key substantive points of each paper, I seek, in this overview, to follow the spirit of the conference in providing my own perspective on

the overarching conceptual linkages between the different papers and different areas of law covered in the conference and in this volume. This overview does not seek to summarise the papers (a task better undertaken by the commentators in each part). Rather, I provide a view of certain themes running through the law, as exposed in the contributions to this volume. In particular, I explore the notion of balance in the law.

## *III BALANCE AND THE ROLE OF LAW*

### ***A Patterns Between Areas of the Law***

The patterns discernible from the different areas of law examined at the conference are interesting. In employment law, the interests of employees and employers can be directly opposed to each other, while the State has an interest in striking a balance in the law yielding justice for employees, and facilitating economic growth resulting from employers' decisions. In commercial law, the State's interest again is in regulating the rules of commercial interactions to facilitate economic performance, while appropriately protecting the interests and rights of the participants. In taxation law, human rights, and indigenous rights law, the interests of the State can stand in direct opposition to those of individual citizens, and groups of citizens.

The fact that a democratic State seeks to represent the collective interests of society, as a whole, does little to mask its essentially coercive power in taxing citizens, impinging on civil and political rights, as well as indigenous rights. Of course, that coercive power is also present in the tools by which the State regulates employment and commercial activity. Coercion is, after all, the essence of law. But in employment and commerce, the primary relationships and transactions take place between independent private (non-State) actors. In taxation, human rights and indigenous rights, the State is a direct (even primary) actor itself. It is this inherent conundrum of how to use coercion to regulate the use of the most powerful coercive force in society that lies at the heart of the task of constitutional design.

Another pattern emerged from the conference sessions. Intuitively, taxation, employment, and commercial activity appear to be conceptually linked together, separate from human rights, indigenous rights, and making constitutions. But how? Taxation is a quintessentially government activity - why would it gravitate towards commercial and employment law? For a start, these areas more directly concern cold hard cash, rather than more nebulous "rights". They are economic, rather than social or political or cultural. But I think there is something else going on here.

There is an inchoate sense amongst lawyers and policy-makers (that could be vaguely discerned in the morning and afternoon teas at the conference) that taxation, employment, and commercial law can rightfully be characterised as hard, "black letter", "real" law. This distinguishes them from human rights, indigenous rights, and constitutions, which some

see as little more than politics. I suggest that the distinction between these areas of law is related to different dimensions of the notion of "balance".

### *B The Role of Law and Balance in the Law*

Throughout the sessions of the conference, and the papers in this volume, it is clear that a fundamental role of law is in constituting the rules that strike a balance between diametrically opposed societal interests.

Where interests are in opposition to each other, the law that regulates must strike a balance between them at some point – though that point may be located far away from the interests of one of the sets of interests. Employment law may favour employees' or employers' interests to a greater or lesser extent – demonstrated through the transformation of the Labour Relations Act 1987 into the Employment Contracts Act 1991 and into the Employment Relationships Act 2000. Taxation law may favour the taxpayer or the revenue. The law relating to indigenous people may favour the indigenous people or other societal groups. The law relating to civil and political rights may provide protections for individuals and groups of individuals or it may favour governments.

As the papers in this volume demonstrate, there can be serious and ongoing normative policy arguments about where a balance is appropriately struck by law. But there is a qualitative difference in those debates, as they relate to different areas of law. And it is this that I suggest constitutes a large part of the distinction between the "black-letter" commercial, employment, and taxation law and the "red-letter" socio-political legal areas of human rights, indigenous rights, and constitutions.

While the normative policy debates in commercial, employment, and taxation law are serious, the issues are generally well-identified and the arguments well-rehearsed. They have been litigated in the common law relating to commerce and employment over several centuries and, more recently, on the basis of statutory rules. Taxation law is so coercively prescriptive and so historically bound up with the core constitutional role of Parliament that its statutory form seems part of the natural order of things. There is no question but that law is the natural mechanism of effecting social control of these spheres of social activity. The question of where the balance is struck is a comfortable question for the law to deal with, because it is clear that it is struck through law.

Matters are different for constitutions, indigenous rights and, though to a lesser extent in New Zealand now, human rights law - which I label "red-letter" for the purposes of this overview. In these areas, there has been strident disagreement not only about where the balance should be struck in each area, but about whether law is the appropriate instrument to strike the balance. New Zealanders rejected an entrenched Bill of Rights as they were too worried about giving power to the unelected judiciary. The role of the courts in interpreting legislative references to the Treaty of Waitangi has generated much political

angst. The New Zealand constitution is still rooted in flexible, evolutionary conventions and retains a fond affection for the notion of parliamentary sovereignty that Britain has left in its historical wake.

So yes, in these "red-letter" areas the question of where a balance should be struck is very real and much debated. But the debates are still struggling, to varying degrees in different areas and different jurisdictions, with where that balance should be struck and whether law should strike the balance. Perhaps these two aspects are related - the more settled a society is on where a balance should be struck in an area of life, the more it will presumably be comfortable for it to be struck in authoritative fashion - through law.

There are two further dimensions of balance in the law that are also related to the above distinction. If the question of where law's balance should be struck is answered, two other, subtler questions remain: With what clarity should law's balance be struck? And who should strike that balance in the law? The first of these questions is tied to the age-old tension between doing justice in the interest of the individual case, and providing certainty and predictability through upholding a clear general rule. And the second question is associated with which changes to the law should be made by Parliament and which by the judiciary? The conference sessions on employment law, commercial law, and taxation law repeatedly emphasised the importance of both of these dimensions of balance in the law. Both are less relevant to indigenous rights and constitutions, and even human rights, because in those areas the key debates still concern the earlier questions of where to strike a balance and whether to strike it through law.

Below I examine, in relation to each of the areas of law examined at the conference and in this volume, whether there is a settled role for law, and the relationship of that question to the dimensions of balance in the law. In exploring the notion of balance, I am heartened by its resonance with Sir Ivor Richardson's personal quality of careful (even judicious!) balance in his approach to the law in all his various roles.

## *IV SETTLED ROLES FOR "BLACK-LETTER LAW"*

### *A Employment Law*

Fierce, but well-rehearsed, policy debates rage in employment law over where a balance should be struck between opposing interests. Jack Hodder is upfront about his perspective that employment is a contractual arrangement and cannot be divorced from a commercial context. He argues that the Court of Appeal's adoption of United Kingdom case law in finding an implied term of mutual trust and confidence in employment law is misconceived. Similarly, it is clear where Kit Toogood QC's sympathies lie in his review of the ebb and flow of policy directions in redundancy law.

It may be true, as Gordon Anderson comments, that both authors fail to take "an employee" perspective. But the remarkable thing to me about the Hodder and Toogood papers is that their criticisms are rather resigned in tone on the substantive merits of the implied term and redundancy law. Though they clearly do not like where the balance is or has been struck, they do not challenge law's role as the instrument for striking the balance. Rather, their energy is saved for the question of who strikes the legal balance and how clearly it should be struck.

Kit Toogood QC argues that after taking a wrong turn with *Brighouse*, the Court, and in particular Sir Ivor, has returned to the values of consistency, certainty, and predictability in its formulation of redundancy law. Both papers, Mr Hodder's most explicitly, are concerned with the extent to which judges should be making such changes to the law, rather than Parliament. Gordon Anderson, in commenting on these papers, notes that the Court of Appeal had had to deal with such issues in a politically divisive and confrontational environment, with little parliamentary guidance. Mr Anderson is surely right that the Court was bound to take a leading role in clarifying the law. The normative question of the legitimacy of the Court bearing that responsibility has real bite.

So, sure, there are often changes in the substance of "real" law, as Gordon Anderson points out with respect to the radical changes in the substance of employment statutes, and as Jack Hodder and Kit Toogood catalogue with respect to judicial changes in the law governing implied terms and redundancy in employment. But the core interactions in these areas of law seem to be more certain in revolving around clear interests – paying or receiving income, the interests on either side of the employment relationship. The issues are identified, the policy arguments clear, and after the interests are weighed, law is the instrument for striking the balance. Because this is well-established, the issues of how clearly the balance is struck, and who strikes it, are as important as where law's balance is struck.

### *B Taxation Law*

I detect the same pattern in the papers on taxation law. Geoff Harley's entertainingly erudite examination of taxation law issues traverses a number of historical examples of unusual taxes (on clocks, on hearths, on windows) in making the point that (tax) law induces people, consciously and subconsciously, to change their behaviour. But these startling examples are ancient indeed. His core concern relates directly to the clarity with which a balance is struck in taxation law and who strikes it.

Although taxes are popularly linked with certainty (as well as death!), there are clearly choices available to the judiciary in how to characterise legal transactions for the purposes of assessing their taxability. Dr Harley is determined and trenchant in his demolition of those judges who *themselves* determine the "true nature" of a transaction or "the substance"

of an arrangement. He is equally generous and supportive of Sir Ivor Richardson's important contribution of certainty to the taxation law of New Zealand:[2]

> Through his career, Sir Ivor Richardson has faithfully and carefully applied the principles concerning the need to establish the true nature of the bargain by reference to the contractual terms actually used.

Similarly, Rob McLeod points out that the approach of the courts to the interpretation of tax legislation is a key determinant of balance between the revenue and the taxpayer. Should Judges take a literal approach to Parliament's words? Should Judges resolve ambiguity in favour of the taxpayer? Should Judges follow Sir Ivor Richardson's emphasis on the scheme and purpose of legislation? This clearly relates to certainty - how clear the law's balance is struck. Mr McLeod supports Sir Ivor's approach as the one likely to lead to resolutions that best reflect the intention of Parliament. And the merits of that approach are intimately bound up with question of whom it is that should be striking a balance

### *C Commercial Law*

In relation to commercial law, Douglas White QC traverses Court of Appeal decisions on the record industry, primary production, telecommunications, electricity transmission, and securities law. Yet his focus is not on the balances that should be struck regarding specific policy issues in these areas but on how they should be struck. He concludes that Sir Ivor Richardson's judgments "demonstrate a clear appreciation of economic concepts, wider public interest factors, and the interest of the commercial community in decisions which promote efficient, fair, and effective outcomes".[3]

Similarly, Alan Galbraith QC's paper identifies the core requirements of the quality of court decision-making in relation to commercial law, as procedural, not substantive: An appropriately qualified decision-maker, working with the best available information and working within an efficient system. He examines the question of judicial specialisation versus generalism, a tension which sparked excited debate at the conference. He also proposes procedural changes to discovery and statements of evidence procedure. Mr Galbraith concludes that "The suggestions which I have made would not, in my view pre-empt or compromise any required balancing of values, but instead would improve a process which, to its detriment, is increasingly avoided by commercial litigants".[4]

I think it is no accident that it is only Benedict Dugan and Bob Dugan's wide-ranging treatment of the fundamental challenges that the Internet poses to law reform, and Susy

2 Dr Geoff Harley "Collecting Taxes" (2002) 33 VUWLR, 755, 792.

3 Douglas White QC "Facilitating and Regulating Commerce" (2002) 33 VUWLR, 817, 839.

4 Alan Galbraith "Facilitating and Regulating Commerce: The Court Process" (2002) 33 VUWLR, 841, 853.

Frankel's examination of the Commerce Act's intellectual property exceptions, that tackle the substantive policy questions of where the law should strike a balance. These are areas of commercial law that are new; not yet "settled" in terms of drawing the policy battle-lines. Especially in relation to the Internet, it is not clear what role the law should have. As Benedict Dugan and Bob Dugan state, "For the legal community, the Internet is a big event".[5] They argue that New Zealand policy-makers should basically give up the challenge of regulating the Internet by legislation: "Given the constraints on law reform in New Zealand, the obvious and easiest legislative option is continued inaction. Indeed, in view of the severe resource constraint, there may be no realistic alternative".[6] More fundamentally perhaps, we still have to identify the key choices to be made between opposing interests and what the arguments on each side are, let alone the relevance of law in striking that balance.

## V EMERGING ROLES FOR "RED-LETTER LAW"

In the "red letter" areas of human rights, indigenous rights, and constitutional law, there is much less general agreement about what role the law has. Identifying what the issues are is less clear, as is determining the appropriate legal instruments to use, or what the arguments favouring different interest groups are. No wonder our adversarial and precedent-abiding common law tradition has more difficulty accepting these as areas of "law" of equal status to the "black-lettered" variety! In these areas, we are still arguing about what is the appropriate issue spectrum along which a balance should be struck, and where that balance should be, and whether the law should strike the balance at all. We have not yet progressed to the relatively more refined debates over how clear the balance should be, or who should strike it.

### A Human Rights

The area of human rights is more advanced in crystallising its issues and defining its arguments than indigenous rights or constitution-making in New Zealand. Claire Charters says as much in her comment when she concludes that the debate on human rights is shifting from analysis of where the ideal balance is struck between democracy and human rights to the evolution of a coherent theory that seeks to advance both. There is now an established legal framework in New Zealand for viewing the opposing interests concerning human rights: the New Zealand Bill of Rights Act 1990. New Zealand's legal policy debates over human rights issues are showing signs of growing maturity.

5 Benedict Dugan and Bob Dugan "The Internet and the Law" (2002) 33 VUWLR, 853, 883.

6 Benedict Dugan and Bob Dugan "The Internet and the Law" (2002) 33 VUWLR, 853, 885.

Comparison of Canada's now well-established 1982 Charter of Rights and Freedoms, New Zealand's regime, and the United Kingdom's recent Human Rights Act 1998, are instructive when compared with Australia. The experience of the former three jurisdictions with fundamental rights instruments has moved the debate on from whether to have such an instrument, to whether the instruments strike the right balance in particular areas. In this regard, the contrast is instructive when considering the papers presented by Lord Lester QC and Dr Andrew Butler regarding the United Kingdom and New Zealand respectively, and Professor Cheryl Saunders examining comparative lessons for Australia. While acknowledging as a matter of course the need for balance, Lord Lester QC and Dr Butler focus on the legitimate interests of protecting rights of individuals and enabling government action respectively within the framework of the United Kingdom Human Rights Act 1998 and the New Zealand Bill of Rights Act 1990.

Dr Andrew Butler's paper makes us pay more serious attention to the limitation side of this equation than we have in the past. As a former academic and now practitioner on behalf of the Crown, he examines the limits on rights inherent in the purposes of section 5 of the New Zealand Bill of Rights Act 1990. Section 5 recognises that rights and freedoms may be "subject to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". Most arrestingly, Dr Butler maintains that in pursuing a purpose of creating a "culture of justification", the Bill of Rights Act celebrates the importance of limitations on rights and freedoms as much as the rights and freedoms themselves. The maturity of debate that this contribution suggests is consistent with an increasingly blackening hue to the letter of human rights law in New Zealand, and the correspondingly sophisticated treatment of the questions of how clearly a balance should be struck in this area and by whom it should be struck.

The contributions by Lord Anthony Lester QC and Professor Cheryl Saunders demonstrate the comparative contrast between New Zealand and the United Kingdom and Australia, in the area of human rights law. Lord Lester is clearly delighted with the novel existence of a legal framework for resolving human rights issues in the United Kingdom. He celebrates the way in which "[t]he Human Rights Act weaves Convention rights into the warp and woof of United Kingdom common law and statute law".[7] And indeed, it seems increasingly clear that the Human Rights Act symbolises not only the blatant incursion of public law into fields of private law, but also a sea-change in British constitutional culture. Dicey's notion of the Westminster constitution founded on parliamentary sovereignty seems truly relegated to history and colonial nostalgia, as Lord Lester concludes that:[8]

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7 Anthony Lester QC "The Magnetism of the Human Rights Act 1998" (2002) 33 VUWLR, 477, 503.

8 Anthony Lester QC "The Magnetism of the Human Rights Act 1998" (2002) 33 VUWLR, 477, 505.

> It may be subversive in the eyes of the legislative and executive branches to suggest that British guiding constitutional principles are, in the words of Oliver Wendell Holmes, 'raised above the reach of statute and State', but in reality our adherence to European and international human rights law has had that effect.

Lord Lester acknowledges the fundamental balancing nature of the legal exercise which the Human Rights calls for: "During its brief life, the Act has created a magnetic field in which all three branches of the government must work to secure a fair balance between individual rights and the general interest of the community".[9]

In the absence of agreement in Australia on whether there should even exist such an instrument, Professor Cheryl Saunders' argument is that it is possible to strike an appropriate balance between human rights interests and the interests of the State, while using the framework of a rights instrument. She argues that Bills of Rights can maintain the ability of governments and Parliaments to act in the public interest through:

- recognising broad circumstances in which rights may be limited;
- providing some direction to courts on their exercise of judicial review; and
- preserving to some degree a capacity for action by a legislature that wishes to derogate from, override, or simply fail to comply with a protected right, where it is prepared to take responsibility for that.

This illustrates the point that the human rights debate in Australia is still at the point of defining the issues, with uncertainty about where a balance should be struck and what the law's role in striking it should be.

Caroline Morris's commentary makes an important point about noting the limits of legal instruments. She examines case law from the United Kingdom Human Rights Act and New Zealand Bill of Rights Act, and concludes that they have done little to enhance women's rights and, in some cases, have actually harmed them. This reminds us that rights instruments are all very well from the various perspectives of lawyers, but in acknowledging the interests of government, they ground the effectiveness of rights in what is essentially a policy debate between competing interests and principles. And that means that the values of decision-makers come to the fore, as the key to determining the resting point of legislative and judicial balancing acts between rights and their limits.

### *B Indigenous Peoples Rights*

Indigenous peoples rights are a paradigmatic case of the lack of a coherent legal framework for dealing with opposing interests. At the conference, and based on an article

9 Anthony Lester QC "The Magnetism of the Human Rights Act 1998" (2002) 33 VUWLR, 477, 485.

since published in the University of Toronto Law Journal,[10] Professor Benedict Kingsbury provided a simple, but profound overview of five competing conceptions of how to approach indigenous issues:

- human rights and non-discrimination;
- minority rights;
- self-determination;
- sovereignty;
- indigenous peoples.

Professor Kingsbury argued that each approach has its own internal logic, but the multiplicity of approaches results in incoherence because we have no means of reconciling between approaches. This is not necessarily bad – the ability to swap between paradigms in light of changing circumstances accords with New Zealand's constitutional culture of incremental and flexible pragmatism. It would, however, pose problems were we to adopt a written constitution as the framers and judicial interpreters would need to settle on one paradigm. In the meantime, a key lesson from Professor Kingsbury's framework (or lack thereof!) is the importance of focussing on principle: the reasons why an action, policy, or law is set with respect to an indigenous issue – not just on what it is. This reflects the lack of agreement in New Zealand as to where the balance should be struck between indigenous and non-indigenous people and what role law should have in striking that balance.

There are gradations in the lack of agreement about indigenous issues. After all, following Parliament's lead in referring to the Treaty of Waitangi in legislation, the Court of Appeal has created a significant Treaty jurisprudence. Despite widespread political and popular angst about that, and a reluctance to repeat the experiment, the Treaty clearly has some sort of place in the law, even if the nature and location of that place is not entirely clear. Professor Mason Durie suggests that the value conflicts in the application of the Treaty of Waitangi to social policy are still less resolved than those in the application of the Treaty to resource ownership. "At the heart of the issue was the potential for a conflict between the tradition of universal provision and the rights associated with indigeneity".[11] In particular, recognition of Maori as having privileged rights under the Treaty runs counter to the democratic principle that all people are equal. As Professor Durie notes, the

10 Benedict Kingsbury "Competing Conceptual Approaches to Indigenous Group Issues in New Zealand Law" (2002) 52 U Toronto L J 101.

11 Mason Durie "Universal Provision, Indigeneity, and the Treaty of Waitangi" (2002) 33 VUWLR, 591, 593.

sticking point in this balancing act comes when the reason for recognition of Maori interests is asserted to be indigeneity itself, rather than social and economic disadvantage or the settlement of past injustices:[12]

> For the State, the challenge is not whether indigeneity should be recognised by the Crown across all sectors (such recognition has evolved over a number of years), but how to reconcile the two obligations: to be fair to all citizens and at the same time to endorse indigeneity.

Professor Durie goes further than simply identifying this problem. He offers an elegant and conceptually attractive approach to a solution: as a party to the relationship of citizenship, the State has an obligation to enable active participation by citizens in society. Valuing indigeneity means enabling Maori people to participate in *te ao Maori.* This is consistent with the wider symbolism at the heart of the Treaty of Waitangi: the promise of a mutually beneficial relationship between Maori and the Crown.

Judge Carrie Wainwright of the Maori Land Court is also concerned with relationships. She examines the issue of Maori representation, which causes difficulty at all levels of Maori society and is significant to government and the courts in relation to Treaty settlements, resource management decisions, and consultation processes: Which person or entity should represent the point of the view of the collective? Judge Wainwright concludes that:[13]

> [t]hese cases were not really about legal issues at all: they were about relationships. They were about the breakdown in connections between people in the face of enormous strains that their internal structures were unable to manage.

She points to mediation, by the Waitangi Tribunal and Maori Land Court, as a promising avenue for resolution of these problems (or, at least, more promising than litigation). Mereana Hond's evocative analysis of the role of mediation in relation to indigenous issues in her commentary notes: "[i]t may be that success is found purely in the fact of an enhanced understanding of the other in contrast with the concrete and detailed determinations we expect from litigated disputes".[14] More broadly, she notes:[15]

> All this takes place within the broader context of the Treaty and how we define the relationship of Maori and Pakeha in a contemporary setting. The question remains whether the door is open for conversations

12 Mason Durie "Universal Provision, Indigeneity, and the Treaty of Waitangi" (2002) 33 VUWLR, 591, 689.

13 Carrie Wainwright "Maori Representation Issues and the Courts" (2002) 33 VUWLR, 603, 613.

14 Mereana Hond "Resort to Mediation in Maori to Maori Dispute Resolution: Is it the Elixer to Cure all Ills" (2002) 33 VUWLR, 579, 581.

15 Mereana Hond "Resort to Mediation in Maori to Maori Dispute Resolution: Is it the Elixer to Cure all Ills" (2002) 33 VUWLR, 579, 591.

> between institutions, experts, and law makers about how to define and reconcile rights and responsibilities under the Treaty of Waitangi and do so in a way that does not rip people apart.

I consider that a "relationships" approach to the Treaty of Waitangi offers the best prospect of a generally acceptable approach to striking the balance with respect to indigenous people's interests in New Zealand.[16] But it needs further exploration, by Maori and government policy-makers, by politicians and by the courts. It does not yet have enough recognised support to sustain a legal framework. In fifteen years time, it might.

### *C Constitutional Design*

I believe that the introduction of the Mixed Member Proportional (MMP) electoral system was the most radical constitutional reform since independence was thrust upon New Zealand. Sir Kenneth Keith presented Sir John Wallace's paper on MMP at the conference due to Sir John's required absence. However, it attracted more media attention than any other paper at the conference, and for good reason. As chair of the Royal Commission on Electoral Reform in 1986, and founding President of the Electoral Commission in 1996, Sir John's paper offers a valuable personal perspective of New Zealand's experience with MMP. This carefully worded sentence attracted particular attention:[17]

> Though at the time of the Royal Commission Report I supported the waiver of the threshold, I now incline to the view that New Zealand's voting public is so unhappy and cynical about political conduct that anything which can have an aura of clever practice is better avoided.

Sir John rebuts allegations that there was any political pressure on the Commission in its formulation of views, and notes that electoral reform occurred more quickly than he had expected, but that voters in the referenda appeared to have good reasons for their decisions. He also considers that voters appear to have been pleased with the representativeness effects of MMP, surprised by the amount of time taken to form the first MMP government, disappointed that MP behaviour did not improve, and outraged at the choice of coalition partner by New Zealand First in 1996. He believes that the Royal Commission was right to think that government would need to be more negotiable and that although the legislative process would be slowed down it would remain effective.

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16 Ken Coates and Paul G McHugh *Kokiri Ngatai: Living Relationships The Treaty of Waitangi in the New Millenium* (Victoria University Press, Wellington, 1998); Matthew Palmer "International Practice" in Alison Quentin-Baxter (ed) *Recognising the Rights of Indigenous Peoples* (Institute of Policy Studies, Wellington, 1998); and Matthew Palmer "The Treaty of Waitangi in Legislation" [2001] NZLJ 207.

17 The Hon Sir John Wallace QC "Reflections on Constitutional and Other Issues Concerning Our Electoral System: The Past and the Future" (2002) 33 VUWLR, 719, 738.

For the purposes of this overview it is interesting to find that such an important aspect of New Zealand's constitution is well-embedded in the legal system. MMP was effected through the Electoral Act 1993 and subsequent amendments. There is no question that that legislation is the appropriate vehicle for striking the macro-balance of reconciling voters' interests in choosing their representatives. It also seems settled that the law providing for MMP must be very clear and that it is made by Parliament. It is also interesting, though, that the choice of voting system is not left only to Parliament. Unlike the other areas of law examined here, there is a general political and public expectation that electoral systems are fundamental enough, that voters should be directly involved in their adoption. Sir John himself supports holding a new referendum on the electoral system after there has been sufficient experience of the new system (which is clearly not the case as yet) provided that the an independent body devises the questions.

In her comment on this session Catherine Iorns Magellanes suggests that the one overarching theme from these papers concerns the value of the process employed for constitutional change. She notes that process affects the product of constitutional change and its acceptance by society. This must clearly be right. Alison Quentin-Baxter emphasises particularly the importance of popular involvement in the process of constitutional change. She draws on her long and distinguished perspective as constitutional adviser in the Pacific. She stresses the importance of ensuring that, as a nation, citizens are involved in the process of constitution-making:[18]

> A constitution cannot take root in the hearts and minds of the people who live under it unless they are kept fully informed about the process of making it, and take part in that process as much as possible.

Alison Quentin-Baxter also emphasises the importance of ensuring that a constitution takes into account geography and history, the legal system, and the pre-existing form of government, as well as the culture of society. In particular, she considers that in a divided society, majority rule needs to be tempered with mechanisms to protect the special interests of communities within it.

So while aspects of New Zealand's constitution, such as MMP, are embedded in law, from this "macro" perspective, it seems clear that New Zealand's constitution is an arrestingly flexible nymph. As Sir Robert Stout said almost 100 years ago: "It has been the glory of the British Constitution that ... allows for growth, development, and adaptation".[19]

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18 Alison Quentin-Baxter "Making Constitutions, From the Perspective of a Constitutional Adviser" (2002) 33 VUWLR, 661, 681.

19 *In re the Award of Wellington Cooks and Stewards Union* (1906) 25 NZLR 394, 412. Quoted in Waldo Hilary Dunn and Ivor L M Richardson *Sir Robert Stout: A Biography* (AH & AW Reed, Wellington, 1961) 165.

Alison Quentin-Baxter's comparison with Pacific constitutions illustrates that major issues and interests in the overall design of New Zealand's constitution are still sufficiently ill defined to resist an established legal framework. New Zealand simply does not have the degree of organised legalism in its constitution that most other nations do.

Sir Geoffrey Palmer clearly agrees with this. He writes simultaneously from several perspectives: as a lawyer, an academic, a former politician (and even in one footnote, as my father!). In order to escape the complexities of unravelling these different roles, he decides that certain themes are constant for him irrespective of the role. He sounds a note of frustration that the complexity of these variables makes a definitive view of their individual effect difficult to justify – finding that similar approaches are taken to defamation law, irrespective of the presence or strength of a superior law constitution with a Bill of Rights. What is clear is his concern about the "unclear and indeterminate" nature of New Zealand's constitution and his conviction that more reforms are necessary – including a written constitution, and an entrenched Bill of Rights, including the Treaty of Waitangi.

Dr Alex Frame's continuum of different approaches to the task of constitution-building puts this approach in context. Dr Frame suggests that constitutional "architects" design constitutions by creating principles, structures, and processes informed by reason, in order to better society. By contrast, the approach of the constitutional "excavator" is that of "scholars lovingly excavating and uncovering the institutions and values of our peoples with a view to adapting and renewing the best of these for our present and joint needs" – discovering the customary ways underlying a particular society and bringing them to prominence and coherence.[20]

Dr Frame notes the startling example of Sir George Grey, as an architect par excellence, drafting the 1852 New Zealand Constitution Act in a hut at the foot of Mt Ruapehu, after declining to implement the 1846 Act which would have treated all lands not *occupied* by Maori as waste lands of the Crown. Otherwise, though, Dr Frame suggests that the New Zealand constitution is peculiarly suited to the exertions of excavators given the vital role of constitutional conventions and the continuing vitality of the common law here.

At this point it might be worth contemplating whether the macro-balance that is struck by a constitution should be embedded in law or not. The above consideration of other areas of law suggests that a society needs to have a reasonable level of consensus about where a balance should be struck in order to be confident enough to place that responsibility in the hands of the law. That seems to be the case with some aspects of New

20 Dr Alex Frame "Lawyers and the Making of Constitutions: Making Constitutions in the South Pacific: Architects and Excavators" (2002) 33 VUWLR, 699, 701

Zealand's constitution such as MMP and human rights. It hopefully will become the case with the Treaty of Waitangi. But New Zealanders have now enjoyed a long cultural embrace of the nymph of pragmatic evolutionary flexibility. The sun has not yet set on our constitutional "red-letter day". I suggest that we are not yet ready to dispose of those subtle constitutional conventions in favour of judicial authority over the definition of our constitutional foundations.

## *VI JUDGES AND JUDGING*

As we move from "black-letter" law to "red-letter law" we move from certainty about the role of law to uncertainty. At the outer edges of uncertainty, we hesitate to expose our uncertain normative policy prescriptions to the more established order that the law would impose. We grudgingly cope with shifting political sands on the basis of their democratic roots and shy away from the harder-edged authority of the courts to judge individual cases. Yet it is the "black-letter" areas of law, where the role of law is more established, that generate a more mature normative debate about the extent of the clarity of the law and the role of Judges versus Parliament to make law.

### *A Judges*

The court system contains a number of checks and balances within it to construct Judge-made justice. The appellate system is an important one. Justice Gault, as he then was, before succeeding Sir Ivor as President of the Court of Appeal, gave a paper that well illustrates the range of management frustrations that can plague a court. Public criticism of costs and delays in the court system are often mutually inconsistent. The increased pressure on the Court of Appeal's workload is clear, from its delivery of decisions on 78 appeals in 1960 to 458 in 2000, and the increase in judgments per Judge from 31 to 53. But Justice Gault considers that while the pressure on the Court is greater than it should be, it is not yet critical. And he outlines a number of areas that could be profitably explored in the interests of the efficient management of the court system without compromising the interests of justice - notably in the areas of leave to appeal, confining oral argument, and abbreviated judgment writing.

One of the more heartfelt passages in Justice Gault's paper is the one that comments on the Judicial Committee of the Privy Council's then recently issued advice on *Taito,* that was critical of the Court of Appeal's system of dealing with legal aid applications for appeals.[21] If nothing else, this passage illustrates that judicial comments in appeals have an effect on the courts below.

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21 Hon Thomas Gault "Whose Day in Court is it Anyway?" (2002) 33 VUWLR, 1051, 1055.

In some ways, the vertical disagreement value of appeals is mirrored by the possibility of horizontal disagreement by dissent. Victoria Heine's paper contains a valuable empirical analysis of dissents in the Court of Appeal during Sir Ivor Richardson's presidency. This endeavour reflects the continuous emphasis that Sir Ivor himself has put on the importance of empirical analysis in legal decision-making. Ms Heine finds that the data supports the contention that Sir Ivor had a commitment to consensus, as rates of multiple judgments and dissent have been historically very low. With a nod to Justice Thomas, it is also clear that the individual propensity of particular Judges to dissent is a factor in determining the rate of dissent.

Dr Petra Butler's comments illustrate the constitutional importance of the system of judicial management when individual judges have different proclivities. Dr Butler comments on the German constitutional right of a citizen "not to be deprived of his/her lawful judge", which sounds strange to New Zealand ears. So does the systematic way in which a German court is required to develop a management plan for the allocation of Judges to cases. Yet Dr Butler's point that such a system is seen in Germany as necessary for compliance with the rule of law and assuring the existence of an independent judiciary, has constitutional force.

### *B Judging*

If the appellate structure and institution of dissents play an important role in the nature of judicial behaviour, the judicial role of statutory interpretation plays a crucial role. As Rob McLeod noted in relation to tax law, a Judges' ability to interpret legislation is a crucial dimension to the clarity with which the law's balance is struck. It also shades into the question of who should strike the law's balance. At a macro-level, the same set of issues apply to our constitution: putting our constitutional rules into legislation makes them more susceptible, we have thought, to clear definition by Judges, rather than vague but flexible evolution through practice.

Justice McGrath's paper traces the way in which statutory interpretation has developed in New Zealand since Ward's identification in 1957 of the primacy of the literal rule, the golden rule, and the mischief rule. Justice McGrath acknowledges the rise of section 5(j) of the Acts Interpretation Act 1924, and the purposive approach to statutory interpretation. Ironically, that evolution is now so complete that the Interpretation Act 1999 is able to invoke it merely by providing that "[t]he meaning of an enactment must be ascertained in light of its text and in the light of its purpose".[22] Sir Ivor Richardson's place in leading that judicial evolution is clear, as it is in the related developments in interpretation: Judicial

22 Interpretation Act 1999, s 5(1).

reference to parliamentary materials, to international legal instruments, and to factual material at an appellate level. As Professor John Burrows notes:[23]

> The strongest contribution of the purposive approach has been to allow words to be given strained or unusual meanings so that they can be held to extend to the facts in question when the purpose of the legislation makes that desirable.

But Professor Burrows also warns of a new interpretative kid on the block, emanating from the growing ascendancy of public law values in New Zealand and the United Kingdom. In Lord Hoffmann's words:[24]

> Fundamental rights cannot be overriden by general or ambiguous words … [I]n the absence of express language or necessary implication to the contrary the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual.

I suggest, on the basis of the judgments in *R v Poumako*[25] and *R v Pora*,[26] that the New Zealand Court of Appeal appears to be "toying with intent" with this approach, which Professor Burrows characterises as "interpretation in accordance with the fundamental values of our system".[27] He acknowledges that it is limited by Parliament's ultimate ability to legislate with clear language and by the need for statutory words to be capable of bearing the meaning attributed to them. But he argues that it is artificial to regard interpretation on the basis of values as based on Parliament's intention.

Professor Burrows is clearly right that the values approach to statutory interpretation has constitutional significance. As Kate Tokeley notes, it shifts power from Parliament to the judiciary. If we trust our judiciary to discern and determine the values that are fundamental to our society and constitution, then this poses little problem and indeed helps to safeguard those values. But as noted above the question of who should strike the balance can have real bite in "black-letter" areas of law. In "red-letter" areas, the role of law itself can be too uncertain to be allowed to express a balance at all.

The value-based approach to statutory interpretation appears to involve jumping straight to a judicial power to determine whether the law's role is uncertain or not, as well

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23 Professor John Burrows "The Changing Approach to the Interpretation of Statutes" (2002) 33 VUWLR, 981, 985.

24 *R v Secretary of State for the Home Department; ex parte Simms* [2000] 2 AC 115, 131 (HL) Lord Hoffmann.

25 *R v Poumako* [2000] 2 NZLR 695 (CA).

26 *R v Pora* [2001] 2 NZLR 37 (CA).

27 Professor John Burrows "The Changing Approach to the Interpretation of Statutes" (2002) 33 VUWLR, 981, 990.

as self-interested resolution of the question of who should strike law's balance. This has the potential advantage of introducing greater consistency of principle into our law. It has the potential disadvantage of creating instability between the branches of our government, if judicial dismissal of parliamentary sovereignty were to be resisted by both the executive and legislature. The cost-benefit analysis of these factors will be determined by the wisdom of the judicial decisions. And this, in turn, as Kate Tokeley suggests, emphasises the potential effect of subjectivity in interpretation and the need to examine the quality of appointment processes to judicial office.

It is, therefore, appropriate that Chief Justice Elias gave the final paper of the conference on the importance of "intellectual leadership of a court, which must have the confidence of the community".[28] She carefully traces the underlying qualities of Sir Ivor's leadership of the Court of Appeal:[29]

> We have cause to be grateful for such fidelity to the principles of adjudication: the recognition that judicial determinations must be legitimate and that courts cannot have agendas; the understanding that the judges are not law reform commissioners and lack the methods and the mandate to solve every social or economic problem; and the fixed allegiance to the effort of judgment.

In traversing Sir Ivor's approach to judicial leadership, the Chief Justice provides a valuable insight into her own admirable brand of leadership. This must necessarily go to the heart of the judicial role that is exposed by the conflict between a values-based and purposive approach to statutory interpretation:[30]

> Where the law is unsettled, judicial development in interpretation of statutes and in extension of the common law cannot be avoided … In that task, the Judge cannot escape consideration of the policies which the statute or the common law serves. And such consideration requires a register … Such a framework is not however a personal one … Where legislative guidance as to the frame of reference does not provide an answer, however, the Judge is forced to the values inherent in the common law and, beyond them, to the contemporary social values with which the common law must be consonant if it is to have legitimacy.

## *VII CONCLUSION*

Chief Justice Elias states that "[c]ourts are the means by which right according to law is done in society".[31] This overview has provided a personal perspective of the extent to

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28 Dame Sian Elias "Reflections on Appellate Leadership" (2002) 33 VUWLR, 1065.

29 Dame Sian Elias "Reflections on Appellate Leadership" (2002) 33 VUWLR, 1065, 1076.

30 Dame Sian Elias "Reflections on Appellate Leadership" (2002) 33 VUWLR, 1065, 1070.

31 Dame Sian Elias "Reflections on Appellate Leadership" (2002) 33 VUWLR, 1065, 1068.

which the role of law is clearly established in different areas of "black-letter" law, and not so clearly established in different areas of what I call "red-letter" law.

Where the role of law is clearly established, such as in the "black-letter" areas of employment, commerce, and taxation, law is the instrument which society uses to strike balances between competing interests. In those areas of law, the subtle questions of how clearly law's balance is struck, and who strikes law's balance are also prominent.

In "red-letter" areas of law, where the role of law is less well-established, debate tends to focus on whether law, and the courts, are the appropriate instrument by which to strike a balance. In New Zealand human rights, there is now an increasingly established place for law through the legal framework of the New Zealand Bill of Rights Act 1990. The debate over indigenous rights and the Treaty of Waitangi is far less certain, and is not yet able to sustain a coherent legal framework, though that may change in the next fifteen years. And I believe that the New Zealand cultural predisposition towards pragmatic evolutionary flexibility is likely to impede adoption of a legalised framework of constitutional design for some further time. The current rise of value-based interpretation of statutes by the judiciary, emanating ironically from the ascendancy of public law values, poses an important challenge to that belief. Its success, in New Zealand, will largely depend on the wisdom and judgement of our judiciary; or more accurately, of course, in the words of Sir Ivor Richardson:[32]

> In the end a reflection of the needs of society and the striking of the right balance between the judicial branch of government and the legislature and the executive, is a matter of judgment: initially the judgment of the courts but ultimately the judgment of society to whom, however, indirectly, the judges are responsible.

Law seeks to govern human behaviour and human behaviour is not and should not be divided into neat categorical boxes. As the Governor-General, Dame Silvia Cartwright, said in opening the conference: "The real delight of the law is that its study and practice is triggered by the uncertain behaviour of human beings".[33] Some categorisation is necessary in law, to enable the human mind to comprehend a sphere of life unified and distinguished by some principle in its regulation. But the messiness of human behaviour and our activities requires principles, and therefore law, capable of transcending artificial boundaries with an underlying coherence of deep principle.

The quality of papers, quality of discussion, and juxtaposition of areas of law at this conference helped illuminate that coherence at this conference. In particular, as evident

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32 Rt Hon Sir Ivor Richardson "The Role of an Appellate Judge" (1981) 5 OULR 1, 10.

33 The Honourable Dame Silvia Cartwright PCNZM, DBE "Opening Address" (2002) 33 VUWLR, 447.

from the papers published here, and despite the diversity of perspectives that comes with diversity of roles, there is a wonderful constancy in the process of the underlying dynamics of legal evolution. That constancy derives from the importance of the values and philosophy of life of those who contribute to its evolution. And that, after all, is a fitting tribute to the ongoing essence of principled and coherent decency and common sense exhibited in Sir Ivor Richardson's own career that has structured our discussion.