CONCLUSION

CONCERNING CHOICE: ON THE ROLES OF LAWYERS

Rt Hon K J Keith*

Over the past two days, we have been able, in large part by reference to the stellar career of Sir Ivor Richardson, to consider the role of the lawyer as private practitioner, government lawyer, academic, adviser, commissioner, Judge, and legislator. I comment on some of the choices available to those playing those various roles.

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* Member of the Victoria University of Wellington law faculty 1962-64, and 1966-91; the New Zealand Law Commission 1986-96; and the Court of Appeal since 1996. This comment draws on papers I have given at a number of universities, first at Edinburgh at the urging of Professor Neil MacCormick, who, soon after I was appointed a Judge suggested that I should come and speak on "From Professing to Judging". With his agreement, I addressed "From Professing *to Advising* to Judging". A great deal more could be said, of course.

As I said at an alumni function during the course of the conference, it was a great privilege for me to speak of a one time professor, dean, council member, pro-chancellor, chancellor, and honorary graduate of Victoria University of Wellington. He was also a member and Chair of the Council of Legal Education and a member of the University Grants Committee, in both for some years after leaving the faculty.

Even before Professor Richardson joined the faculty in 1967, his scholarly work was having a significant impact on New Zealand law through his writings on Antarctica, nuclear energy and international law, freedom of assembly, religion, and the status of public servants.

On joining the faculty, his major role was in making tax law, for the first time, the subject of serious academic study in New Zealand. That role extended to the education of many of New Zealand's leading tax lawyers (I saw two of them going head-to-head in the Privy Council just a few months ago), a role recently marked by a conference of the New Zealand branch of the International Fiscal Association.

Sir Ivor Richardson has never really left University, giving lectures here and abroad, attending and participating in seminars, and encouraging young scholars. As well his critical work on the Royal Commission on Social Policy and other Commissions of Inquiry, his writings and judgments provide rich material for academic work.

Throughout he has had great support from Jane and their family. We wish them both all the very best at this time of change.

The first choice relates to the statement of the question to be addressed. Recall Gertrude Stein's last words: what is the question? I begin with the Judges because of the major limits they face in this area. The parties through their exchanges, their legal advice, and then their pleadings and choice of witnesses have the critical role. They define their dispute, at least in the great majority of cases. Some choices in the statement of the question may, however, remain for the Judge, as Justice Keith Mason, President of the New South Wales Court of Appeal, has recently shown. For instance, is a court in custody disputes awarding custody to one or other parent or depriving a parent of custody?[1] There may also be important choices for the Judges about how far they go in elaborating the law in solving the parties' defined dispute: Whether they adhere closely to the facts, on the one side, or, on the other, move beyond counsel's arguments.

To return to the lawyer advising the client, drafting relevant correspondence and preparing the pleadings, they do, it seems to me, have much greater freedom than the Judge. Consider, for instance, the agreement of 1927 under which the Power Company had to provide electricity to the Gore Borough Council at a stated price "for all time hereafter". The Power Company simply gave notice of termination of the agreement. The Court of Appeal, notwithstanding the brilliant advocacy of Alan Galbraith QC, held that "for all time hereafter" meant "for all time hereafter".[2] Would the question have been significantly different had the Power Company given notice that it wished to negotiate an amendment to the long-term agreement given the fundamental changes over the intervening 70 years?

By contrast to the private practitioner, and certainly to the Judge, the lawyer as reformer, adviser, legislator, commentator, or academic generally has a much greater freedom to restate the question. Late in the nineteenth century, for instance, an English barrister reflecting on a survey of workers' compensation legislation from Europe and North America said that the sensible reaction by the law to injuries in an increasingly industrialised and mechanised society was to distinguish between helping the injured worker through compulsory compensation schemes which had no regard to fault and regulating safety in the workplace by safety legislation, inspectors, and appropriate sanctions.[3] In the exercise of his complete freedom to organise his commentary in that way, he, in effect, asked two questions. He, of course, had no power to reorganise the law in that way, and indeed no one was even obliged to listen to him.

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1 Justice Keith Mason "Unconscious Judicial Prejudice" (2001) 75 ALJ 676, 684.

2 *Power Co v Gore District Council* [1997] 1 NZLR 537 (CA).

3 W Gorst Clay "The Law of Employers' Liability and Insurance Against Accidents" (1897) 2 J Comparative Legislation 1.

Commissions of Inquiry, by contrast, have a reasonable expectation that they will be listened to by the governments that establish them and as a consequence, they may be subject to greater restraints imposed by their terms of reference. But that may not be so. Consider the power of the Law Commission to initiate its own inquiries, a matter considered by Sir Ivor in his Frank Guest lecture.[4] The exercise of that power against the wishes of Ministers and their advisers may be followed by a reluctance to respond to the report, but even then its wisdom may prevail as with the personal property securities reform. And, terms of reference will not necessarily be a restraint: they might be read very broadly, as with the Woodhouse Commission or they might, at the request of the Commission, be amended and transformed, as with those of the Danks Committee on Official Information.

A second area of choice concerns the material considered by the lawyers playing their different roles. The Judge, like litigators and others advising the parties to litigation, must be concerned with the particular facts relevant to the dispute they have defined, the question they have asked; in K C Davis' terms, "the adjudicative facts". But what of "legislative facts", to use his contrasting phrase? Or to mention one of Sir Ivor's continuing requests, what about "relevant empirical material" – some of which might straddle Davis' line? This information may be relevant because of broad legislative language (as in *Tucker Wool Processors Ltd v Harrison*),[5] because the common law speaks in general terms, or because a party wishes to move the law along by reference to changing social, economic or other circumstances. On the last consider, for instance, the indication given by the Privy Council in their judgment in *Lange v Atkinson*[6] that the Court of Appeal, in reconsidering that case, weigh considerations of local public policy; the Privy Council there recognised that striking a balance between freedom of expression and protection of reputation calls for a value judgment which depends upon local political and social conditions, including such matters as the responsibility and vulnerability of the press.

That statutory language, those rules of the common law and such requests have produced only modest results in terms of the information presented by counsel so far as I understand the matter. But there are some examples. Justice McGrath considers this matter more fully.[7] A challenge to terms of an employment contract as "unconscionable" led, following urgings from the bench, to the provision of the reports prepared in the

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4 Rt Hon Sir Ivor Richardson "Commissions of Inquiry" (1989) 7 OULR 1.

5 *Tucker Wool Processors Ltd v Harrison* [1999] 3 NZLR 576 (CA).

6 *Lange v Atkinson* [2000] 1 NZLR 257 (CA).

7 Hon John McGrath "Reading Legislation and Ivor Richardson" *Roles and Perspectives in the Law*, 597.

School of Business and Public Management of this University[8] showing the range of provisions of employment contracts relating to overtime, weekend work, and drug and alcohol testing.[9] The absence of relevant information persuaded a majority in the anonymous witnesses case that the Court should not develop the law.[10] The Law Commission, which was already considering the matter, would, it was thought, have better information on which to act. And, relevant contextual material may also be important in the determination of the meaning of agreements.[11]

For reasons relating to the limits of the judicial process, the interests of litigants, the relative skills of those involved and the practical and financial aspects of gathering information, academics, reformers, and other advisers to legislators should be in a better position when a wide range of legislative facts or other empirical material is relevant to the development of the law. Courts, for instance, frequently struggle with limitation disputes by reference to the facts only of the single case, with the consequent danger of generalisations arising from what may well be a particular injustice. By contrast, the Law Commission in its work on limitation was able to survey court files to determine when, in practice, claims are filed.[12] That provided a firm factual basis for recommending changes to the limitation period. So, too, did a most extensive survey of all statutes, in consultation with the administering departments and valuable submissions from them and others, leading to a recommendation for the reversal of the statutory rule about the Crown and statutes – a recommendation which unfortunately has yet to be acted on. That process might be compared with what followed after the High Court of Australia decision in *Bropho v State of Western Australia*,[13] when it made a similar change to the common law rule.[14] Academics can, of course, undertake research like that done by the Commission in

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8 See the series of reports published by the Graduate School of Business and Government Management of Victoria University of Wellington, Wellington. In particular, see Raymond Harbridge, Aaron Crawford, and Peter Kiely *Employment Contracts: Bargaining Trends and Employment Law Update, 1998/1999* (Graduate School of Business and Government Management of Victoria University of Wellington, Wellington, 1999).

9 *Tucker Wool Processors Ltd v Harrison* [1999] 3 NZLR 576 (CA) paras 79-82, Richardson P.

10 *R v Hines* [1997] 3 NZLR 529 (CA).

11 See, for example, *BCCI v Ali* [2001] 1 All ER 961 (HL) paras [36]-[67], Lord Hoffmann.

12 New Zealand Law Commission *The Limitation Act 1950* (NZLC PP3, Wellington, 1987).

13 *Bropho v State of Western Australia* (1990) 171 CLR 1.

14 New Zealand Law Commission *A New Interpretation Act* (NZLC R 17, Wellington, 1990) Part IV.

the two areas mentioned, and indeed a researcher on the Crown and statutes topic did publish an excellent article on that matter.[15]

That issue of the material considered relates to a third choice, about the principles and values which are to influence or even resolve developments in the law, or more broadly in social policy. A body like the Royal Commission on Social Policy through many submissions, meetings, surveys, and research studies was able to gather very extensive information and opinion, in particular, about the values to which many New Zealanders adhered and to reach conclusions on them. The composition, processes, and terms of reference of such bodies give them much greater liberty in those areas than a court as indicated by Sir Ivor in a paper that the Governor-General quoted yesterday.[16] Those bodies are also subject to the discipline that arises from the information and opinion they receive. That combination of greater freedom and discipline is also demonstrated in the principles elaborated by the Legislation Advisory Committee particularly in its reports on *Legislative Change: Guidelines on Process and Content*.[17]

But, it is of course, the case that courts have long stated and acted on principles and values. Where do they get them from? The question of course also arises for law reform bodies. Like courts, they do not have the electorate-based, democratic legitimacy that a government can claim.

Douglas White has raised questions about the Privy Council's use of principle in competition cases.[18] Court decisions relating to freedom of speech and freedom of information provide other instances. Over some centuries now, Parliament has largely left to the courts the development of the law of qualified privilege in defamation cases. The guiding principles appear in very general terms with expressions such as general welfare being used. How are such principles and terms to be given content? In *Lange v Atkinson*,[19] the Court drew on a wide range of sources to emphasise the critical role in our democracy of robust debate about those seeking or holding elected office. The references included general philosophical writings, the electoral system, the Bill of Rights, official information legislation, and related foreign developments and opinion. To provide a contrast, the

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15 See Steven Price "Crown Immunity on Trial – The Desirability and Practicability of Enforcing Statute Law Against the Crown" (1990) 20 VUWLR 213.

16 The Hon Dame Silvia Cartwright PCNZM, DBE "Opening Address" Roles and Perspectives in the Law, 23.

17 Mervyn Probine *Legislation Advisory Committee: Legislative Change: Guidelines on Process and Content* (Department of Justice, Wellington, 1991).

18 Douglas White QC "Facilitating and Regulating Commerce" *Roles and Perspectives in the Law*, 399.

19 *Lange v Atkinson* [2000] 3 NZLR 385 (CA).

Royal Commission on the Electoral System was able to go more directly and fully into these matters in its discussions at the outset of its report of the purposes of general parliamentary elections and the principles that should influence the choice of an electoral system.[20]

Something the same is to be seen in the development by the courts of the law of Crown privilege (later public interest immunity), especially after the enactment of the Official Information Act 1982. The Court of Appeal was then able to place the change of rule it had introduced over twenty years earlier, when it said that it was for the court and not the executive to determine whether government information was to be made available in the court process, firmly in the context of the contemporary movement towards open government in New Zealand, to quote an earlier President.[21] The balancing required was, said Sir Ivor, consistent with the important social policies underlying that Act.[22]

To go on to the fourth choice – the choice of answers – the legislature and its advisers, like commentators, in general have a much greater freedom to reverse a rule or substantially alter it or to propose such actions. In terms of areas of law I have mentioned, that is made clear by workers compensation, accident compensation, limitation, and freedom of information legislation.

The last, for instance, replaced an Official *Secrets* Act by an Official *Information* Act. The legislative principle and rule of secrecy with associated draconian criminal offences were replaced by a principle of openness and access. The Queen's papers had become the public's.

The contrast may also be illustrated by the contribution of Anthony Lester QC, as advocate on the one side, and scholar and legislator on the other, to the introduction of the European Convention on Human Rights into United Kingdom law. The courts could not, or, at least, would not go the whole way given the basic principle about the lawmaking power of the executive (or, really the lack of it) and, in particular, the place of treaties in United Kingdom law. At Lord Lester's urging they did go some distance,[23] but full implementation of the Convention required democratically based legislative action, finally achieved in 1998 in the Human Rights Act 1998 (UK).

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20 Sir John Wallace *Report of the Royal Commission on the Electoral System: Towards a Better Democracy* (Government Printer, Wellington, 1986).

21 *Fletcher Timber Ltd v Attorney-General* [1984] 1 NZLR 290, 292, 294 (CA) Woodhouse P.

22 *Fletcher Timber Ltd v Attorney-General* [1984] 1 NZLR 290, 301-302 (CA) Richardson J.

23 For example, *Derbyshire County Council v Times Newspapers Ltd* [1993] AC 534 (HC); but more so in the Court of Appeal [1992] QB 770.

The final choice I mention concerns the process governing the application of the substantive law, including sanctions for its breach. The elaboration of practical detail for the operation of a legislative scheme is ordinarily a legislative and administrative task – particularly if further state spending is involved, the appropriation of money being for the legislature. As Lord Reid recognised in *Myers v DPP*,[24] even in an area of Judge-made law, like the hearsay rule, the ramifications of possible changes make overall legislative attention the preferable way forward.[25]

Since this conference is being held in the University, I wish to conclude by emphasising the role of the academic, and their great advantages in essentially all the areas I have discussed. As critics – constructive ones I would say – of society, and in particular of law and legal policy, they have the ability to discover and test the detail and to construct the big pictures. They can, for instance, assess the processes at work between the branches of government and the impact on them of influences and obligations from within and without the State. Thinking of Alex Frame's very helpful metaphor, the academic, much more than the rest of us, may undertake both the hard task of excavation and aspire to the vision of the great architects.[26] You will now again have Sir Ivor in the faculty to assist you in those vital endeavours.

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24 *Myers v DPP* [1965] AC 1001, 1021-1022 (HL) Lord Reid.

25 See also *R v Hines* [1997] 3 NZLR 529, 539 (CA) Richardson P; and, more generally, Fuller "The Forms and Limits of Adjudication" (1978) 92 Harv L Rev 353.

26 Dr Alex Frame "Lawyers and the Making of Constitutions: Making Constitutions in the South Pacific: Architects and Excavators" *Roles and Perspectives in the Law*, 277, 283.