REFLECTIONS ON APPELLATE LEADERSHIP

Rt Hon Dame Sian Elias[*]

My theme is appellate leadership. I do not mean by that the administrative chores of listings and workflow, which the President of a busy court cannot decently avoid. I mean, rather, the intellectual leadership of a court, which must have the confidence of the community.

Sir Ivor Richardson's twenty-five years of appellate service might be thought sufficient in length alone to justify some such reflection. More importantly, however, that service has been marked by frank explanations in both judgments and extra-judicial writing of his views of judicial method and function, and their limits.

Richard Posner has suggested that "[Judges] rarely level with the public – and not always with themselves – concerning the seamier side of the judicial process". He says: "This is the side that includes the unprincipled compromises and petty jealousies and rivalries that accompany collegial decision-making, [and] the indolence and apathy that life tenure can induce".[1]

Although he has been a fixed star in the judicial firmament for so long that it may seem that Sir Ivor Richardson has had life tenure, no one could accuse him of indolence and apathy. Nor indeed, has it ever been suggested that he has ever compromised in an unprincipled way. But candour about judicial process is rare. And Sir Ivor's openness throughout his judicial service is itself an invitation to think a little about the choices that appellate decision-making throws up.

Sir Ivor's openness I think stems from his clear conviction that "the courts are the people's courts",[2] and that judicial authority is not its own vindication but is a trust discharged only by scrupulous justification through public reasons. It suggests a vision of

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1 Richard Posner *The Problems of Jurisprudence* (Harvard University Press, Cambridge, (Mass), 1990) 190.

2 Rt Hon Sir Ivor Richardson "The Courts and the Public" (1995) NZLJ 11, 13.

the role of the appellate Judge that is restrained and deferential to the democratic process and good government.

These impulses do not spring from the preferences of a black-letter lawyer, isolated from the community. They are grounded in an appreciation of New Zealand society gained from engagement in it in many different capacities before and after appointment to the bench.[3] Sir Ivor Richardson's experiences, particularly in public administration and social policy, may have given him an acute appreciation of the complexities of policy choices.

Renquist CJ adopts Lewis Powell's description of the Supreme Court of the United States as an institution "greater than the sum of its parts". I am not sure that I agree with that description of any court. Indeed, Renquist seems to be describing a court that is less than the sum of its parts when, perhaps unconsciously echoing Posner, he says:[4]

> There must be an effort to get an opinion for at least a majority of the Court in every case where that is possible, in order that lower court Judges and the profession as a whole may know what the law is without having to go through an elaborate head-counting process. To accomplish this, some give and take is inevitable, and doctrinal purity may be muddied in the process …
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> … an appellate Judge's primary task is to function as a member of a collegial body which must decide important questions of federal law in a way that gives intelligible guidance to the bench and bar. Memorable opinions are the by-product of that process, not an end in themselves.

I know that Sir Ivor Richardson during his term as President has placed great emphasis on the collegiate work of the permanent Court of Appeal. It has been one of the reasons why he has been reluctant to see the numbers of Judges of the Court increased,[5] and it has been a reason for sitting regularly in courts of five. His success in leading the Court should not, however, be judged by measures such as the number of individual judgments written.

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3 For example, Sir Ivor was Chairman of the Committee of Inquiry into Inflation Accounting (1975-6), Chairman of the Royal Commission on Social Policy (1987-88), and conducted a review of the Inland Revenue Department (1993-4). Writing extra-judicially, Sir Ivor has expressed the view that it is not inconsistent with judicial office for a Judge to serve in a governmental capacity "if the reason for his appointment is the need to harness to the task in question the special skills which the Judge should possess – characteristically, the ability to dissect and analyse evidence, appraise witnesses, exercise a fair and balanced judgment, write a clear and coherent report, and so on". (Rt Hon Sir Ivor Richardson "Comment on 'Why be a Judge?' by Brennan CJ" (Papers of the New Zealand High Court and Court of Appeal Judges' Conference, Dunedin, 1996).

4 William H Renquist "Remarks on the Process of Judging" (1992) 49 Washington and Lee L Rev 263, 270.

5 Rt Hon Mr Justice Richardson "The Role of an Appellate Judge" (1981) 5 Otago LR 1, 5.

The fact of the matter is that important cases are hard and inevitably provoke divergence in view. And that is how it should be.

I am reminded of Felix Frankfurter's derision about the high hopes that were held for the appointment of Taft as Chief Justice to a very divided Supreme Court. Editorials were written predicting that because Taft was such a charming man, such divisions would evaporate. Frankfurter said to the University of Virginia law students of 1953:[6]

> I really think that's very funny. The assumption of this serious editorial writer that Taft, C J, would just smile and then Holmes would say, "Aye, aye, sir," or Justice Van Devanter would say, "For ten years I've been disagreeing with Holmes, but now that you've smiled at both of us, why we just love each other" ... [M]y impression is strong that a count would show more five-to-four decisions during Taft's time than during White's time; or certainly just as many. Life was pleasant, very pleasant, with Taft as Chief Justice, but judicial conflicts existed because the problems before the Court evoked them … the sparks even carried outside of the conference room to singe the pages of the United States Reports … What Judge worth his salt would have his convictions influenced by whether the Chief Justice is a charming man and a delightful raconteur, or not? That isn't the nature of the problems to be faced. That isn't the nature of the function. That isn't the nature of the enterprise.

Well, as a part timer, may I report that life has been pleasant, very pleasant, with Sir Ivor Richardson as President of the Court of Appeal. There has been no pressure to compromise quality for the sake of bench or bar and no muddying of doctrinal purity. Memorable judgments have been written, a very large number by the President. And if many others bear his unmistakable influence, well true appellate leadership comes not from brokering compromises but from intellectual example in judging.

What makes a good Judge? Felix Frankfurter at the same Virginia Law School chat mused that public misconceptions about judicial function are illustrated by 'the question you hear so often: "Does a man become any different when he puts on a gown?" His answer, he said, was "If he's any good, he does".[7] As Frankfurter suggests, the question misunderstands the proper role of the Judge. Those who are sworn to do right according to law do not exercise personal power according to personal preference. Of course, Judges bring their own experiences to bear when they come to judgment. And, as Brennan CJ once acknowledged, it is "sometimes difficult to be sure where the wisdom of human experience ends and prejudice begins".[8] But the ability to discover and suppress prejudice

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6 Felix Frankfurter "Chief Justices I Have Known" (1953) 39 Virginia L Rev 883, 900.

7 Frankfurter, above, 901.

8 Hon Sir Gerald Brennan "Why be a Judge?" (Paper presented at the New Zealand High Court and Court of Appeal Judges' Conference, Dunedin, 1996) 9.

is a professional responsibility of the Judge. And its demonstration in actual cases requires the provision of reasons for judgment. Reasons are necessary to demonstrate that the case has been decided in accordance with valid legal rules or principles and not to fit the personal beliefs of the Judge. Reasons are "essential to the common law judicial method".[9]

The legitimacy of judicial function in our system is founded upon the fact that the Judge operates in public and must give reasons for decision. These obligations are the best check against arbitrariness or illegitimacy, as Sir Ivor Richardson has frequently acknowledged. In 1981, speaking extra-judicially, he described the duty to give adequate reasons as a protection to all and "part and parcel" of the open administration of justice:[10]

> Judgments are addressed not only to the parties, who are primarily concerned in the result and the immediate reasoning leading to it, but also the wider public who may be as concerned with the implications of the reasoning for the future as they are in the result of the particular case. Clearly judgments should not be arabesques. They should disclose exactly how the Judge decided the case the way he did. So that his reasoning as well as the end decision are open to comment and criticism. The focus is then, as it should be, on the reasons for the decision, rather than on the exercise of judicial authority.

Reasons serve three main ends. They demonstrate to the parties that they have been heard. They enable accountability, through the appellate process or through public criticism. And they promote certainty and consistency by enabling like cases to be decided alike.[11] All three of these ends are important to the common law tradition. Justice between the parties to the particular dispute is only part of the picture. It is an inadequate view of courts that they are publicly funded dispute resolution services.[12] The answer to the question posed in this session by Justice Gault ("Whose Day in Court is it Anyway?") is that a day in Court is not capable of ownership except by the community as a whole. To view litigants as "consumers" and "purchasers" of services is misleading. The service of the courts is due to the community. Where one dispute has been publicly determined, others similarly placed will not need to litigate. Court decisions are therefore a benefit available to all, not simply to those who participate through litigation. Courts are the means by which right according to law is done in society. That is a core function of government. The authoritative ascertainment of what the law is and the encouragement of consistent and proper conduct by public process are substantial public benefits.

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9 Hon Justice Michael McHugh AC "The Judicial Method" (1999) 73 Aust LJ 37, 37.

10 Sir Ivor Richardson "The Role of an Appellate Judge" (1981) 5 OULR 1, 7.

11 McHugh, above.

12 See Hon James Spigelman "Seen to be Done: The Principle of Open Justice" (2000) 74 Aust LJ 290.

The fact that courts are an important function of government has implications for questions of access, court organisation, and judicial method. Elsewhere, I have expressed some doubts as to whether recent initiatives, some of them Judge-led, to cover or reduce costs and improve efficiency in the dispatch of court business have always sufficiently considered this context.[13] It is a theme developed in Australia by Spigelman CJ with some warmth.[14] I do not suggest that better standards of court management are to be resisted. The community is entitled to value for the money it puts into courts. We cannot go on increasing the number of Judges and courtrooms without depriving other important social institutions of resources. The challenge is to strike the appropriate balance between efficiency in dispatch of court business and ensuring that justice is not prejudiced.

Such balancing between efficiency and justice has exercised the President in the administration of the heavy workload of the Court of Appeal. It has led to changed practices in the Court, with greater reliance on written material, considered by the Judges in advance of the hearing. It has led to on the papers consideration of some criminal appeals, now authorised by the Crimes (Criminal Appeal) Amendment Act 2001. It has led to a preference (not inflexible) for avoidance of multiple judgments. It has led to the suggestions aired by Justice Gault in his paper (and foreshadowed in other jurisdictions) of further screening through leave provisions,[15] time limits for oral argument, and skeleton or memorandum judgments. As the decision in *Taito*[16] indicates, it is not always easy to maintain the balance between desirable efficiencies and competing interests of justice. There is a risk of throwing the baby out with the bath water. Litigation through courts is not time efficient nor cost efficient. It is however fair, open, subject to the discipline of reasons, and subject to correction for error through appeal or review. These are considerable virtues.

Sir Ivor Richardson's judging has been characterised by a scrupulousness which is dismissive of "flamboyant rhetoric and evangelical fervour".[17] Fidelity to the principles, values, and limits of adjudication are hallmarks of his judgments.

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13 Rt Hon Dame Sian Elias "Discounting Justice" (Speech to the Legal Research Foundation Annual General Meeting, Wellington, 25 October 2001).

14 Spigelman, above; James Spigelman CJ "The 'New Public Management' and the Courts" (Speech to to the Family Courts of Australia, 25th Anniversary Conference, Sydney, 27 July 2001).

15 A solution foreshadowed as preferable to expansion of the numbers of the Court of Appeal and erosion of the "collegiate character and possibly the public standing of the Court" by Sir Ivor Richardson in "The Role of an Appellate Judge" (1981) 5 OULR 1, 5.

16 *Taito v R Bennet & Ors v R* (19 March 2002) Judicial Committee of the Privy Council, PC 50 and 59 of 2001.

17 Richardson, above, 10.

Judges do not approach decisions in a vacuum. They have the context of statutes, regulations, precedents, scholarly writing, history, and shared community values. Where there is no settled law, or where the conditions have altered so that a former legal rule requires reconsideration, the Judge must call on wider considerations. Principle and analogy are the preferred judicial tools. Not for the sake of an arid symmetry. But to enable comparable experience and standards to be applied in responding to real life issues. No judgment is isolated from the existing order. A Judge is always faced with the need to fit the decision into the existing fabric, both in achieving a just solution for the parties and to maintain the balance for future cases. That is why superficial and "romantic" assessments of Judges as "conservative" or "activist" are so astray. The fact is that the intellectual differences to which these labels are attached are severely cramped by legal context and method. If it is to convince, a decision must be principled and coherent and in accordance with what Brennan J called "the skeleton of principle which gives the body of our law its shape and internal consistency".[18]

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 that the statute or the common law serves. And such consideration requires a register. Sir Ivor Richardson is explicit: "What is important, of course, is that the Judge should have a philosophy of life, a framework of reference against which to probe and test the economic, social and political questions involved".[19]

Such framework is not however a personal one. The search for context begins with legislation. One of Sir Ivor Richardson's main contributions to the development of New Zealand law has been his attention to the centrality of statutes and his insistence on careful consideration of their scheme and purpose. An example is the attention paid to the three statutes relevant to the rating decision in *Wellington City Council v Woolworths New Zealand Limited (No 2)*.[20]

In *Quilter v Attorney-General*,[21] the Marriage Act 1955 was found by Richardson P to be: "So clear that to rely on particular perspectives on human rights and social policy values to accommodate same-sex marriages would require fresh legislation, which is the function of Parliament"[22]

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18 *Dietrich v The Queen* (1992) 109 ALR 385, 403 (HCA) Brennan J, quoting himself in *Mabo v Queensland* (1992) 107 ALR 1, 18 (HCA).

19 Richardson, above, 9.

20 *Wellington City Council v Woolworths New Zealand Limited (No 2)* [1996] 2 NZLR 537 (CA).

21 *Quilter v Attorney-General* [1998] 1 NZLR 523 (CA).

22 *Quilter,* above, 531 (CA) Richardson P.

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. In the cases which have come before the Court of Appeal in the last ten years where reconsideration of precedent has been necessary, Sir Ivor has not shrunk from the duty to keep the law up to date both in exposition of the rules of the common law and in the balancing of values required by contemporary legislation.[23] But in departing from precedent, it is fair to say that the President is cautious. The caution derives first from the consciousness that adherence to past decisions promotes certainty and stability: "People need to know where they stand, what the law expects of them":[24]

> And a Court which freely reviews its earlier decisions is likely to find not only that the Court lists are jammed by litigants seeking to find a chance majority for change, but also that the respect for the law on which our system of justice largely depends is eroded.

Whether the courts should depart from precedent is influenced by the subject-matter of the case and whether the courts have undertaken responsibility for it. Thus, in *R v Hines*[25] Richardson P considered that it was relevant that the case involved fair trial, a subject with which the courts have close experience. In *Dahya v Dahya*[26] Richardson J considered it significant that the legislation there in issue, the Matrimonial Property Act 1976, was "designed to meet conditions and values in our society".[27] The Court had a responsibility to fulfil that purpose in its application of the Act. In *Invercargill City Council v Hamlin* Richardson J was concerned that: "[l]egislation must be seen in its social setting and the common law of New Zealand should reflect the kind of society we are and meet the needs of our society".[28]

In *Slater v Slater* Richardson J recognised that:[29]

> [b]ecause of its central role in our society, family law is inevitably influenced by changes in social attitudes and values.

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23 See, for example, *Invercargill City Council v Hamlin* [1994] 3 NZLR 513 (CA).

24 *Collector of Customs v Lawrence Publishing Co Ltd* [1986] 1 NZLR 404, 414 (CA) Richardson J.

25 *R v Hines* [1997] 3 NZLR 529, 538 (CA) Richardson P.

26 *Dahya v Dahya* [1991] 2 NZLR 150 (CA).

27 Also see *Slater v Slater* [1983] NZLR 166 (CA).

28 *Invercargill City Council v Hamlin* [1994] 3 NZLR 513, 524 (CA) Richardson J.

29 *Slater,* above, 173, Richardson J.

In *Attorney-General v Prince,*[30] Richardson P reviewed the Adoption Act 1955, examining its social setting in 1969 and the changes in the social attitudes since. The values the court has a responsibility to apply are not the personal values of the Judge. They were identified by the President in *R v Hines*[31] as "community values" which are relatively permanent, not transient.[32]

In identifying such values, Sir Ivor has expressed some misgivings. Thus although he recognises that just content is critical to the rule of law,[33] he is skeptical of the extent to which the provision of just law is properly the legitimate role of the Judge. Values shift over time, sometimes rapidly. And they are pitched at a level of abstraction that often entails conflict with other values. Where competing values must be weighed in application of law, "constant fine tuning" is necessary.[34] The problem is acute in cases which require the adjustment of rights and values under the New Zealand Bill of Rights Act 1990 (a matter I deal with further below) but it also arises whenever policy choices must be made under legislation or common law. When the Judge is required to identify and consider enduring community values, Sir Ivor is alive to the risk that his or her personal experiences will skew the perspective. He has referred in his own writing[35] to the example given by Lord Devlin of Judges who have obstructed statutes because of personal hostility to their aims:[36]

> They looked for the philosophy behind the Act and what they found was a Victorian Bill of Rights, favouring (subject to the observance of the accepted standards of morality) the liberty of the individual, the freedom of contract, and the sacredness of property, and which was highly suspicious of taxation. If the Act interfered with these notions, the Judges tended either

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30 *Attorney-General v Prince* [1998] 1 NZLR 262 (CA).

31 *R v Hines* [1997] 3 NZLR 529, 538 (CA) Richardson P.

32 For an application of the approach taken in the dissenting judgment, see Brennan J in *Dietrich v The Queen* (1992) 109 ALR 385 (HCA) Brennan J.

33 Rt Hon Sir Ivor Richardson "Comment on 'Why be a Judge?' by Brennan CJ" (Papers of the New Zealand High Court and Court of Appeal Judges' Conference, Dunedin, 1996) where he said "There are two relevant aspects to the rule of law, both of which are crucial for the maintenance of peace and order in society. The first, and the point usually concentrated on in discussion, is that disputes are resolved according to a priori and settled rules of conduct. *The second and equally important is that to achieve peace and order the government must provide laws that broadly speaking tend to diminish injustice*" [emphasis added].

34 Rt Hon Mr Justice Richardson "The Role of an Appellate Judge" (1981) 5 OULR 1, 12.

35 Richardson, 1996 Judges' Conference, above.

36 Richardson, 1996 Judges' Conference, above, quoting Lord Devlin "Judges and Lawmakers" (1976) 39 MLR 115.

> to assume that it could not mean what it said or to minimize the interference by giving the intrusive words the narrowest possible construction, even to the point of pedantry.

In addition to the concern that Judges may not be well placed to identify community values, it has been a consistent theme in Sir Ivor Richardson's work on and off the bench that some questions are not suitable for judicial resolution:[37]

> Judges must be conscious of the respective roles of the three branches of government reflected in the Constitution Act 1986: Parliament, the Executive and the Courts. The larger the public policy context, the less well equipped the Courts are to weigh the considerations involved and to attempt to resolve any moral quandaries and the less inclined they must be to intervene. That is particularly so where there are public policy ramifications affecting the bases of other relevant common law or statutory provisions. In short, where the consequences reach beyond the limits of the case and beyond a particular response to a particular issue.

In part, this scruple follows from the limitations of an adversary system. Sir Ivor does not subscribe to the view that the role of the Judge is simply to decide fairly on the arguments and authorities put up by the parties[38] (a "limited conception" of function which Sir Frank Kitto described as appropriate for the Judge of a debating society but not a Judge with a duty to decide according to law).[39] But his judgments and writings indicate a firm view that the limitations of the adversary process set limits to the findings of "legislative facts" without which the implications for shifts in law cannot adequately be addressed. They also underscore a deep conviction, expressed in the passage from *Hines* I have quoted, that there is no mandate for judicial decisions that encroach upon legislative or executive prerogative.[40] Sir Ivor's writings suggest that his scruples here are not entirely based on legal balances, nor even entirely on democratic principle, but stem in part from a less suspicious, more appreciative, understanding of the role of the executive in securing good government.[41] The boundaries are not rigid. Sir Ivor acknowledges that the commitments in our constitutional arrangements to representative democracy and responsible government do not themselves provide the "touchstone of justiciability":[42]

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37 *R v Hines* [1997] 3 NZLR 529, 539 (CA) Richardson P.

38 Richardson, "Role of an Appellate Judge", above, 8.

39 Rt Hon Sir Frank Kitto "Why Write Judgments" (1992) 66 Aust LJ 787.

40 See *CREEDNZ v Governor-General* [1981] 1 NZLR 172, 197-198 (CA) Richardson J and *Hawkins v Minister of Justice* [1991] 2 NZLR 530, 536 (CA) Richardson J.

41 See his approach in *Ashby v Minister of Immigration* [1981] 1 NZLR 222 (CA) and in *Petrocorp Exploration Ltd v Minister of Energy* [1991] 1 NZLR 1 (CA).

42 Rt Hon Sir Ivor Richardson "Public Interest Litigation" (1995) 3 Waik LR 1 [the Harkness Henry Lecture of 1995].

> They do not define a no-go area for the courts. The legal answer may be affected by the Judge's perspective of the role of the State and of each branch of government. It may also be affected by the Judge's perspective of the balance in the particular society and at the particular time between individual, group and community rights, responsibilities and interests.

Policy issues do not arise only in public law cases. One of the President's major contributions to the development of the common law in New Zealand has been his appreciation of the public interest in private litigation.[43] It has led to a willingness to adopt innovations in legal methodology: the willingness to appoint an *amicus curial* or admit an intervenor so that aspects of the public interest are represented (as in *Gazley v Attorney-General*,[44] and *Z v Z*[45]); the use of statistical and other empirical information where available (as in *Invercargill City Council v Hamlin, R v Accused*)[46] the calls for counsel to prepare Brandeis briefs in suitable cases,[47] and the use of economic analysis.[48] Although regretting the absence of law and economics analysis in argument in the Court of Appeal to enable policy alternatives to be confronted in a systematic and informed way,[49] Sir Ivor has acknowledged the considerable cost in its presentation.[50] He also accepts that "[e]fficiency concerns are only one factor in an assessment of the public interest" and that community values and issues of fairness must also be taken into account.[51] A substantial contribution by the President to assessment of policy is his reminder that economic efficiency is a substantial public benefit, not to be overlooked in intuitive generalisations about the public interest and fairness.

The Richardson approach does not doubt a judicial obligation to ensure that the law is consistent with community values. He has referred frequently to the need for Judges to accept the responsibility to keep law in step with changing social needs. Legal principles "need to be continually reassessed, modified, and in some cases replaced, to reflect

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43 A theme developed in his Harkness Henry Lecture of 1995, above.

44 *Gazley v Attorney-General* (1996) 10 PRNZ 47 (CA).

45 *Z v Z* [1997] 2 NZLR 258 (CA).

46 *Invercargill City Council v Hamlin, R v Accused* [1994] 3 NZLR 157 (CA).

47 See, Sir Ivor Richardson "Role of Apellate Judges" (1981) 5 OULR 1, and Rt Hon Sir Ivor Richardson "Public Interest Litigation" (1995) 3 Waik LR 1 [the Harkness Henry Lecture of 1995].

48 See Sir Ivor Richardson "Lawyers and Economic Consequences" in *New Zealand Law Society Conference Papers* (New Zealand Law Society, Wellington, 1993) Vol 1, 351.

49 See, for example *Williams v Attorney-General* [1990] 1 NZLR 646, 681 (CA) Richardson J.

50 Rt Hon Sir Ivor Richardson "Law and Economics" (1998) 4 New Zealand Business Law Quarterly 64, 70.

51 *New Zealand Law Society Conference Papers*, above, 358.

contemporary thinking".[52] His method is, however, sceptical and restrained rather than certain and evangelical. It is respectful of legislative and executive function and conscious of judicial limitation.

Such caution is particularly evident in cases based upon the New Zealand Bill of Rights Act 1990. The President has been concerned that the Act be understood in its "historical, social and legal context in New Zealand".[53] This approach is sceptical about comparisons with human rights case from other jurisdictions. It questions whether the "individualistic Lockian view reflected in the international conventions of the 1950s would be adopted in those terms by the international community today" and whether such a view reflects Maori perceptions and the aspirations of other minority community groups.[54]

The New Zealand Bill of Rights Act requires New Zealand Judges to make value judgments that have considerable consequences. These are the choices described for another jurisdiction by Professor Laurence Tribe as involving "fundamental choices of principle, not … instrumental calculations of utility or … pseudo-scientific calibrations of social cost against social benefit".[55] I do not imagine that Sir Ivor would agree that calculations of utility and calibrations of social cost against social benefit have little part in the assessment of human rights violations. He has stressed that the rights affirmed in the New Zealand Bill of Rights Act are not absolute. They must always be adjusted by duties to other individuals and to the community.[56]

In an important article in 1995, Sir Ivor wrote:[57]

> [R]ights jurisprudence is often seen as the passport to justice for all. So much so that to question the prevailing philosophy, to put limits on rights and their protection through the courts, is easily represented as an attack on liberal values. But there are other valid interests and values which should be taken into account. Taking those other interests and values into account does not mean that individual freedom is trampled. Rather it recognises the complexity of interest claims in a modern ordered society.

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52 Rt Hon Sir Ivor Richardson "Changing Needs for Judicial Decision-making". (1991-1992) Journal of Judicial Administration 61, 64, and see Rt Hon Sir Ivor Richardson "Judges as Lawmakers in the 1990s" (1986) 12 Monash LR 35, 44.

53 *R v Jefferies* [1994] 1 NZLR 290, 299 (CA) Richardson J.

54 Rt Hon Sir Ivor Richardson "Comment on 'Why be a Judge?' by Brennan CJ" (Papers of the New Zealand High Court and Court of Appeal Judges' Conference, Dunedin, 1996).

55 Laurence Tribe *Constitutional Choices* (Harvard University Press, Cambridge, 1985) viii.

56 *R v Jefferies*, above, 302-3.

57 Sir Ivor Richardson "Rights Jurisprudence – Justice for All?" in Phillip Joseph (ed) *Essays on the Constitution* (Brookers, Wellington, 1995) 61.

In the same article, Sir Ivor expresses concern that the shift required by the Bill of Rights Act may tilt the playing field against authority and risk other public interest values if a prima facie exclusion rule is applied to evidence linked in any way to a breach. *R v Shaheed*[58] may be thought to answer that concern convincingly. But the need to provide the court with relevant economic and social material in rights cases represents a continuing challenge:[59]

> Section 5 of the New Zealand Bill of Rights Act requires a utilitarian assessment of the public welfare in determining whether setting reasonable limits on a protected right is justified. On its face that involves a Brandeis brief inquiry where the Court undertakes an extensive empirical examination supported by economic, statistical, and sociological data, makes a cost-benefit analysis of the effects of various policy choices and chooses the solution which best reflects a balancing of the values involved.

The conclusion to the article also gives some insight into the Richardson preference for restraint and recognition of the limits of law:[60]

> Finally, concentration on rights has a pervasive influence on relationships. Unless balanced by an acceptance of civic responsibilities, it encourages confrontation and the adjudication of disputes. It de-emphasises the role of egalitarian and community values and the need for an accommodation of interests. While it allows for the ex post facto monitoring of civil liberties, it cannot create the conditions that make a Bill of Rights workable. That must depend on the character and attitudes of the people and on the integrity of their governmental processes.

The reflections I have touched upon are those of a highly principled and disciplined Judge. They are supported by significant scholarship, relentless attention to method, and the imagination without which appellate work would be barren. They are animated by a vision of a New Zealand legal system that is our own, not in any petty triumphalist way, but because it is responsive to New Zealand conditions and values.

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.

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58 *R v Shaheed* (28 March 2002) Court of Appeal, Wellington, CA476/00.

59 Joseph, above, 82.

60 Joseph, above, 83.

Benjamin Cardozo had a comforting perspective on judicial agony. He said that "[t]he work of a Judge is in one sense enduring and in another sense ephemeral". [61]

> What is good in it endures. What is erroneous is pretty sure to perish. The good remains the foundation on which new structures will be built. The bad will be rejected and cast out in the laboratory of the years …
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> I sometimes think that we worry ourselves overmuch about the enduring consequences of our errors. They may work a little confusion for a time. In the end, they will be modified or corrected or their teachings ignored. The future takes care of such things. In the endless process of testing and retesting, there is a constant rejection of the dross, and a constant retention of whatever is pure and sound and fine.

The search for what is pure and sound and fine has exercised Sir Ivor Richardson throughout his judicial career. That is appellate leadership.

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61 Benjamin Cardozo *The Nature of the Judicial Process* (Yale University Press, New Haven, 1921) 178-179.