Looking Back, Looking Forward: Reflections on 50 Years in the Law

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I LOOKING BACK

Sir Robin Cooke in 1960 complained about the lack in New Zealand of "a critical law review like those published overseas".[1] Its absence had, he thought, "militated against the debate of legal issues".[2] The obvious site for such publications was the law schools. But they were not in a position to make such contributions until the teaching of law became an academic discipline taught by professional teachers of law. The tipping point was not reached until the mid-1960s. The study of law became not something simply to be endured by those taking up a legal career. Rather it came to be seen as an important object in itself, and something to be kept up throughout a life in law.

Until then the study of law was a part-time business. I entered Auckland Law School in 1966 and was one of a handful of students to complete my degree full-time. The teaching of law was still in transition from practitioner-instruction to instruction by full-time teachers of law. The shift to modern law schools was sudden — Sir Kenneth Keith has pointed out that in 1956 there were only seven full-time teachers of law in New Zealand.[3] All of them were either in Wellington or Auckland. The new lecturers were concerned not so much to impart knowledge of the rules in force but knowledge about the principles of law. They were concerned less with vocational training but with advancing learning about law. The new breed of lecturer (a number of whom, like Professor Northey, had been influenced by North American legal studies) stressed method in the legal enterprise.

The transformation that occurred in the mid-1960s came about at a time when the permanent Court of Appeal found its feet and started to develop consciously a New Zealand voice in law. The work of the courts was also changing. Before 1960 the law reports are full of disputes about sale and purchase of land, or sale of goods. From the early 1960s the type of cases coming before the courts started to change. There was a new focus on matters of government and social issues, in part prompted by reforming social legislation in fields such as family law. With these changes, it is not

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1 RB Cooke "The Changing Face of Administrative Law" (1960) 36 NZLJ 128 at 128.

2 At 128.

3 KJ Keith "1883 to 2008: Law and Legal Education Then and Now" [2009] NZ L Rev 69 at 75.

surprising that there was what Thomas Gibbons describes as an "explosion" of legal scholarship and scholarly attention to what was going on.[4] The Auckland University Law Review was part of the response to demand for commentary and critical analysis.

The Auckland University Law Review was not the first Review to be set up. Victoria had published a Review since 1953 and the New Zealand Universities Law Review and Otago Law Review were established in 1963 and 1965 respectively. Auckland was the first to be edited by students and to provide a vehicle for publishing papers written by students.

Of course, the Auckland University Law Review did not get off the ground as a student movement. Even at that time of student revolution, the Review was a faculty-led initiative. The setting up of the Law Review took place at about the same time that the Honours degree was introduced in Auckland. Professor Northey hoped that the papers produced for Honours seminars would be a good source for the Review and that a vehicle for their publication would in turn stimulate interest in the Honours degree.

Although edited by students, I suspect that the heroes of the Review in its early years were the faculty members who took responsibility for each issue. My recollection is that in the early days of the Review student support was sometimes a little desultory. I was an editor with Raynor Asher in 1970. It was a near-run thing whether we could put together a full Review. We were obliged to publish a piece by Francis Auburn, then a Faculty member.[5] Professor Northey was not pleased. But it was not the first or last time such padding was necessary. We found that a number of students who had obtained good marks for Honours papers were reluctant to see them published or perhaps they were reluctant to put in the additional work to get their papers into publishable form. Since it has to be said that the editorial standards were not particularly intrusive or high in the early days of the Review, I am not sure that the additional effort would have been arduous. The criticisms levelled by commentators such as Judge Posner of the student-edited Reviews in the United States (which are of course not confined to publishing student writing) seem to have little relevance to the New Zealand experience.[6] We did not even have a style guide.

The difficulty in getting articles for publication that we experienced in 1970 may have been because the benefits of publication were not then as obvious as they now seem in a world that puts more store on cultivated CVs. Many of the authors published in the early days of the Review ended up with academic careers or were embarking on further legal studies overseas — something not then as common as it is today — and may have been aware that publication would assist in obtaining admission to postgraduate programmes. Getting copy no longer seems to be a problem.

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4 Thomas Gibbons "The Explosion of New Zealand Legal Scholarship in the 1960s" (2004) 12 Wai L Rev 46 at 46.

5 FM Auburn "The Ross Dependency — An Undeclared Condominium" (1970) 1(3) Auckland U L Rev 89.

6 See Richard Posner "The Future of the Student-Edited Law Review" (1995) 47 Stan L Rev 1131; and Richard Posner "Law Reviews" (2006) 46 Wasburn LJ 155.

Anyway, I do not think it is too severe to suggest that the early years of the Review were a little shambolic. Apart from the scramble to find articles fit to print, the physical product was not exactly polished. In fact, looking at the early volumes brings back the difficulties in producing written work in those days. It was even before the apparent magic of self-correcting electric typewriters. Looking at the early editions of the Law Review brings to mind the fuzzy carbon-copy reproductions of the days before photocopiers. The presentation later available with improved technology greatly raises both readability and the tone of the Review. The early volumes also provide an illustration of how far we have come in the last 50 years in terms of advertising and indeed the way we were.

It seems miraculous that the Review survived these modest beginnings to become a fixture of New Zealand legal publication that has lasted for 50 years. It is still the only Law Review published in New Zealand edited by and mainly contributed to by students. I am not sure whether that makes it a more penetrating or at least unconstrained critic of developments in New Zealand law. My impression is that the origin of most of the published material in papers written for course assessment may cramp the scope for cutting edge deconstruction. Case commentaries provide more scope. William Young J was delighted to hear of the case-note entitled "*Elias in Wonderland*"[7] and has ideas of using it as a subheading in one of his judgments.

But in looking back and forward what I want to concentrate on is not the physical Review but the contribution the Review has made to the history of ideas about law in New Zealand and the currents that agitate legal thinking. Looking back it is perhaps not to be expected that a Review that concentrates on publishing student writing, especially that initially produced to fulfil course requirements, would continue to be mined for insights into the future in the way of Reviews that publish the work of mature scholars. Even so, it is interesting to note that some of the articles in the Review are cited in appellate judgments, and occasionally long after its first publication.

David Vaver's article on medical privilege in the 1969 Review[8] is one that has stood the test of time, as perhaps is to be expected of one of New Zealand's most prominent academic exports. It was cited by McGrath J in a 2006 Supreme Court case, 37 years after its first publication.[9] Few articles in the LQR wear as well as that. A 1989 article by Ronald Pol on oppression under the Credit Contracts Act[10] was cited by Hammond J in the Court of Appeal in 2010.[11] Gerald Lanning's 1997 article on a possible fiduciary relationship in dealings between the Crown and Māori[12] was

7 John Palmer "Elias in Wonderland" (2001) 9(2) Auckland U L Rev 594.
8 David Vaver "Medical Privilege in New Zealand" (1969) 1(2) Auckland U L Rev 63.
9 *Complaints Assessment Committee v Medical Practitioners Disciplinary Tribunal* [2006] NZSC 48, [2006] 3 NZLR 577 at [97], n 78.
10 Ronald Pol "Credit Contracts: The Factors Going to Oppression" (1989) 6(2) Auckland U L Rev 139.
11 *Bartle v GE Custodians* [2010] NZCA 174, [2010] 3 NZLR 601 at [46].
12 Gerald Lanning "The Crown-Maori Relationship: The Spectre of a Fiduciary Relationship" (1997) 8(2) Auckland U L Rev 445.

referred to by William Young J in his reasons in *Paki (No 2*).[13] And Jeff Simpson's 2012 article on the source of Government authority[14] was cited by O'Regan P in the Court of Appeal in *Minister for Canterbury Earthquake Recovery v Fowler Developments Ltd*.[15]

Perhaps more importantly than influence on judicial reasoning, at least two articles published in the Review were authored by writers who ended up being in positions to bring about the reforms they advocated. That was true of Margaret Wilson who as a student wrote an article in 1970 on collective bargaining outside the framework of the Industrial Conciliation and Arbitration Act.[16] The article was critical of the way in which the Arbitration Court had:[17]

> … lost much of its flexibility and began to develop what was in effect a system of precedent; that is, it tended to look to previous awards as a guide instead of considering the case before it on its merits.

This approach had been exacerbated by the legislative role given to the Court in setting General Wage Orders. Wilson suggested then that "collective bargaining could well be the future of industrial relations".[18] And indeed, as Minister in the Labour Government she brought about that reform in 2000 in the Employment Relations Act.

Peter Blanchard's article in the inaugural Review in 1968 was about requisitions in land transfer.[19] His conclusion was that although purchasers from time to time found the then-standard requisition clause to be "annoying", it was "unlikely to result in great hardship".[20] Blanchard however suggested three changes to improve the clause,[21] two of which he was later in a position to see adopted in the standard ADLS agreement.

One of the interests in reading through back numbers of the Review is to spot the authors who have become notable academics or practitioners or judges and to identify the stars of the future. It is common to encounter student authors whose published writing was on topics far removed from those they later devoted themselves to in practice.

The preeminent public law scholar of the past 50 years, Michael Taggart, contributed a piece in 1977 on contributory negligence and breach of contract.[22] Another example is DAR Williams's passionate denunciation of the amendment to the Crimes Act in 1966 to allow judges to comment on

13 *Paki v Attorney-General (No 2)* [2014] NZSC 118, [2015] 1 NZLR 67 at [257], n 414.
14 Jeff Simpson "The Third Source of Authority for Government Action Misconceived" (2012) 18 Auckland U L Rev 86.
15 *Minister for Canterbury Earthquake Recovery v Fowler Developments Ltd* [2013] NZCA 588, [2014] 2 NZLR 587 at [77], n 36.
16 Margaret Wilson "Collective Bargaining in New Zealand Outside the Industrial Conciliation and Arbitration Act" (1970) 1(3) Auckland U L Rev 37.
17 At 42.
18 At 51.
19 Peter Blanchard "The Requisitions Clause" (1968) 1(1) Auckland U L Rev 1.
20 At 13.
21 At 13–14.
22 MB Taggart "Contributory Negligence: Is the Law of Contract Relevant?" (1977) 3(2) Auckland U L Rev 140.

the failure of an accused to give evidence at trial.[23] Raynor Asher attempted valiantly in an article in 1971 to make sense of *R v Strawbridge*[24] and the relationship between offences of strict liability and *mens rea*. That is a topic that still from time to time agitates our legal order, as can be seen in the recent decision of the Supreme Court in *Cameron v R*.[25] I did not sit on Cameron so may be wrong but I think Asher's article was not cited to the Supreme Court. Strict and absolute liability in crime were also the subject of an earlier article written by someone later better known for his work in town planning and public law, AP Randerson.[26] His article was written before *Strawbridge* muddied the waters even further. I do not think Tony Randerson is to be blamed for not solving the matter once and for all. It is fair to acknowledge that the states of mind necessary for criminal responsibility is a subject in which judges find over-complication irresistible. Randerson's concluding remarks that questions of *mens rea* and defences are inescapably matters of statutory interpretation[27] is probably preferable to the more sophisticated developments of doctrine that are attempted from time to time.

By contrast with authors whose subsequent careers in commercial law or arbitration or resource management law provide a contrast with the criminal topics that took their fancy as students, it is interesting how some writers precociously seem already to have settled on their life's passion. Margaret Wilson and Peter Blanchard were in that mould. Another notable example is Paul Rishworth who in 1986 contributed a paper on "Reasonable Limits on Fundamental Freedoms: A Study of Section 1 of the Canadian Charter of Rights and Freedoms".[28] It laid the foundations for his highly influential position that s 5 of the New Zealand Bill of Rights Act 1990, modelled on s 1 of the Canadian Charter, established our Bill of Rights as a statement of "reasonable rights".[29]

Such rare maturity aside, it is however probably fair to say that most student writing published in the Review follows early interests and the particular courses or seminars in which the papers were originally produced rather than arising out of enduring passion. If the Review is also something of a barometer of the issues of the day, inevitably some of the topics now seem a little dated as waves of enthusiasm recede or are overtaken. But some of the writing accurately points to further development and remains worth mining, particularly where the law has remained unsettled in the intervening years. Oddly enough, there are also some shifts in law which seem to have

23 David AR Williams "Judicial Comment on the Failure of an Accused to Give Evidence" [1967] Auckland U L Rev 69.
24 *R v Strawbridge* [1970] NZLR 909 (CA).
25 *Cameron v R* [2017] NZSC 89.
26 AP Randerson "Status Offences" (1968) 1(1) Auckland U L Rev 37.
27 At 54.
28 Paul Rishworth "Reasonable Limits on Fundamental Freedoms: A Study of Section 1 of the Canadian Charter of Rights and Freedoms" (1986) 5(3) Auckland U L Rev 340.
29 See for example Paul Rishworth "Interpreting and Invalidating Enactments Under a Bill of Rights: Three Inquiries in Comparative Perspective" in Rick Bigwood (ed) *The Statute: Making and Meaning* (LexisNexis, Wellington, 2004) 251 at 277.

passed almost unnoticed in the Review, at least until change arrived. The Treaty of Waitangi, for example, was as invisible in this collection as it was in the wider profession until the 1980s.

Some writing has been remarkably prescient. One such piece is Peter Woodhouse's 1969 article on family law in society.[30] It looked to the establishment of a specialist Family Court, a repositioning of family disputes around conciliation services and the introduction of the single ground for divorce that a marriage has irremediably broken down. Many of these ideas were eventually adopted in the Family Proceedings Act 1980 after more than a decade of reform pressure in which many of the students who were involved in the Auckland University Law Review were involved. The reforms to family law are one of the great changes I have lived through during my life in law. But the point I make here is that a number of the papers published in the Review dealt with matters of social and legal change, since achieved.

Some of the matters flagged in the pages of the Review remain as unsolved challenges in the legal order. Into that category I would place John Priestley's 1967 article about pre-natal torts and the legal personality of the foetus.[31] Niggles about indefeasibility under the Torrens system still continue to be felt from time to time, as is illustrated by articles in 1967 and 1969,[32] taking different approaches and as is illustrated by court decisions such as *Regal Castings Ltd v Lightbody*[33] and *Westpac New Zealand Ltd v Clark*[34]. Despite such doubts, one of the points of stability in the legal system in the past 50 years has been the endurance of *Frazer v Walker*.[35]

It is perhaps not surprising that a Review dominated by student writing sourced from papers produced for the LLB (Hons) degree should be dominated by substantive legal topics. It is unusual to encounter procedural topics and even evidence is largely absent before the advent of the New Zealand Bill of Rights Act and later the enactment of the Evidence Act. An honourable departure from substantive legal topics is Bruce Brosnahan's 1970 paper on "The Law and Computers".[36] It foresaw the modern legal databases we now take for granted but which were then largely undreamed of. Brosnahan suggested that "[t]he computer could serve as a very useful device for the retrieval of information from legal documents such as statutes and the law reports."[37] This was cutting edge stuff, even though now looking back at the article it is hard not to laugh at the assumption that punch cards and BASIC would be the means of access.

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30 PFA Woodhouse "Family Law in Society" (1969) 1(2) Auckland U L Rev 44.

31 JM Priestley "Personality and Status in the Womb" [1967] Auckland U L Rev 33.

32 See IR Ross and NC Anderson "Communis Error — The Continuing Fallacy" [1967] Auckland U L Rev 80 at 80, taking the view that the Privy Council in *Frazer v Walker* had "perpetuated a fallacious interpretation of *Assets Co Ltd v Mere Roihi*". Compare LL Stevens "The *In Personam* Exceptions to the Principle of Indefeasibility" (1969) 1(2) Auckland U L Rev 29.

33 *Regal Castings Ltd v Lightbody* [2008] NZSC 87, [2009] 2 NZLR 433.

34 *Westpac New Zealand Ltd v Clark* [2009] NZSC 73, [2010] 1 NZLR 82. See *Nathan v Dollars & Sense Ltd* [2008] NZSC 20, [2008] 2 NZLR 557.

35 *Frazer v Walker* [1967] NZLR 1069 (PC).

36 BC Brosnahan "The Law and Computers" (1970) 1(3) Auckland U L Rev 1.

37 At 2.

It is difficult to put ourselves back to remember how primitive our research capacity was in the first 20 years of the Review. In my last couple of years at law school we were thrilled to have the world of academic writing opened up by the University's acquisition of the Index to Legal Periodicals — in hard copy of course! Researching cases was hit and miss because of the inadequacies of the indexes to the Law Reports. When in the late 1980s I had to set to and check for references in the courts to the Treaty of Waitangi, there was no help but to flip through the volumes of the Law Reports for cases in which one of the parties had a Māori name. We did not see what was coming and how it would revolutionise legal research — at least if you know what you are looking for. So Bruce Brosnahan was ahead of the pack.

So too was Laurie Newhook ahead of the pack when in 1971 he wrote about the revolution that could be accomplished by a computer-based system of land registration.[38] In the end, however, the electronic reform introduced in 2003[39] went very much further than Newhook could possibly have envisaged in 1971. Then he had looked to "no change in overall conveyancing and registration practice" but rather "speedier, more accurate land dealings" through access to information.[40] Terminals he thought would be situated in registry offices and assistant registrars would continue to register instruments. Newhook thought such a system would give confidence to mortgagees and proprietors to rely on duplicate copies of titles. In fact, as we now know, the revolution accomplished by computerised records has been much more thoroughgoing. It has done away with duplicate title documents and for the most part inspection of documents by the Registrar prior to registration. In most transactions the Register is updated immediately by practitioners without examination of the instrument other than by the practitioners involved.

Among the first articles published in the early years of the Review was Grant Hammond's piece on "Privacy and the Press".[41] By contrast to many of the contributions which remain of interest principally as juvenile or tentative writings of those who have gone on to greater things, this article still strikes me as important and mature scholarship. It made the case for a remedy for unwarranted invasion of privacy by the press. Although the press in New Zealand had not given cause for alarm, Hammond accurately saw that the arrival of sensational reporting to be seen in the UK and Australia required some advance preparation here too.[42] He saw the deficiency in development of protection for privacy interests as being "primarily due to a lack of initiative on the part of both bar and bench".[43] In his view there was no impediment to judicial development of a remedy in tort in which the

38 LJ Newhook "Computerising the New Zealand Land Registry Office" (1971) 1(4) Auckland U L Rev 1.
39 By the Land Transfer (Computer Registers and Electronic Lodgement) Amendment Act 2002.
40 At 25–26.
41 RG Hammond "Privacy and the Press" [1967] Auckland U L Rev 20.
42 At 28–29.
43 At 31.

interests of the press, the interests of the private citizen and the constitutional issue of the freedom of the press would be taken into account.

It took another 38 years, but eventually in *Hosking v Runting* a majority of the Court of Appeal accepted a tort of invasion of privacy.[44] It was notable that in the intervening years the New Zealand Bill of Rights Act had been enacted without inclusion of a right of privacy (a circumstance that was important in the minority dissenting opinions)[45] and the lineaments of the tort are not yet perhaps settled today. Uncertainties include the need on which the majority in *Hosking v Runting* was itself divided about whether publicity must be "highly offensive" as well as an invasion of a "reasonable expectation of privacy".[46] They also include the extent to which the protection applies in public spaces. The English Court of Appeal has declined to follow *Hosking* in relation to photographs of children in public places[47] and there is some doubt as to the availability of injunctive relief.[48] But as the young Grant Hammond remarked in 1967, this uncertainty and movement in balancing different interests is the method of the common law. I come to flag later that I see the preservation of space for the private more generally as one of the biggest challenges for law in the next decades. In that perspective, the interest of the Hammond article continues.

I have mentioned that I think it is striking that it is not until the 1990s that articles about the Treaty of Waitangi and Māori feature in the Review. It is true however that an early article concerning Māori land by JR Holmes appeared in the first volume of the Review.[49] The article does not attempt any reassessment of the place of the Treaty or the treatment of Māori Land under the Māori Affairs Act 1953, which built on Sir John Salmond's 1909 restatement.[50] The article raised a question as to the future of separate tenure altogether, pointing out the disadvantages of fragmentation of ownership:[51]

Perhaps the best solution would be to reform Māori tenure, particularly through incorporation, and at the same time to continue conversion to build up units of an economic size which could gradually be brought under European tenure at a pace appropriate to the increasing skill of Māori farmers and the increasing awareness of land values by Māori owners. Then at some time in the future the incorporations could be changed to ordinary land companies. This is essentially a compromise solution but

44 *Hosking v Runting* [2005] 1 NZLR 1 (CA) per Gault P, Blanchard and Tipping JJ; Keith and Anderson JJ dissenting.

45 See [181] and [208]–[222] per Keith J; and [262]–[271] per Anderson J.

46 Gault P and Blanchard J, at [117], saw there being two key elements to the tort of invasion of privacy: the existence of facts in respect of which there is a reasonable expectation of privacy; and publicity given to those private facts that would be considered highly offensive to an objective reasonable person. Tipping J, at [256], said he would "prefer that the question of offensiveness be controlled within the need for there to be a reasonable expectation of privacy".

47 *Murray v Express Newspapers plc* [2008] EWCA Civ 446, [2009] Ch 481 at [45]–[61].

48 See *Hosking v Runting* at [158] per Gault and Blanchard JJ and at [258] per Tipping J; and comments in *Television New Zealand Ltd v Rogers* [2007] NZSC 91, [2008] 2 NZLR 277.

49 JR Holmes "Fragmentation of Maori Land" [1967] Auckland U L Rev 1.

50 Native Land Act 1909.

51 Holmes, above n 49, at 19.

there are so many conflicting interests tied up in the Māori land structure that it seems dangerous to advise bold moves either to eliminate it altogether or to turn it into a more or less permanent institution.

The two-pronged method of reform briefly outlined above would enable Māori land to be used efficiently and at the same time allow it to be phased out in a controlled manner as the need for the separate tenure disappears.

Well, that was written before the Land March and before Te Ture Whenua Maori Act was enacted in 1993. Yet it would be unwise to think these issues are yet settled, as the Land Bill currently before Parliament may suggest.[52] It would therefore be bold to think that the ideas expressed by Holmes are artefacts of the past.

II LOOKING FORWARD

In attempting to look ahead to the questions that may exercise those writing in the Review in the next 50 years, I do not try to undertake the sort of blue skies speculation of a Bruce Brosnahan. How artificial intelligence and technology will transform our world are not matters for which I have sufficient imagination. Rather, I have thought it might be instructive to look at some of the transformative movements that have affected law during the lifetime of the Review and to consider where those waves may still go. The matters I touch on are interconnected and perhaps I may be excused a preoccupation with courts.

One of the waves to have occurred in the last 50 years is the huge shift in the make-up of our society. This has implications for our legal order.

Assumptions of shared values and shared history are no longer accurate, if indeed they ever were. It may always have been a bit optimistic to think that a shared tradition could make up a constitution which can provide social glue and shared values — at least if it is made up of a ragbag collection which includes Magna Carta, the 1689 Bill of Rights and the 18th century Act of Settlement, together with a scattering of more modern texts, the principles of the common law and some 19th century dogma and a Treaty acknowledged to be a "foundational document".[53] It is even more difficult to expect common values to be found in these beginnings today.

There are potentially real risks in leaving our unwritten constitution to be developed on the hoof — as can perhaps be illustrated in the Brexit

52 Te Ture Whenua Maori Bill 2016 (126).

53 Constitutional Advisory Panel *New Zealand's Constitution: A Report on a Conversation — He Kotuinga Korero mo Te Kaupapa Ture o Aotearoa* (November 2013) at 28. See also *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 at 210 per Chilwell J ("the Treaty was essential to the foundation of New Zealand"); and *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA) at 702 per Casey J and at 714 per Bisson J.

litigation in the United Kingdom.[54] The place of the Treaty is one such area of difficulty. So too is understanding of the working parts of the constitution — legislature, executive and courts. Particularly difficult is the dissonance between the role of the executive under our Westminster system and the reality described by Trevor Allan that it is popularly seen in presidential terms.[55] Diplock LJ may have said that "it is 350 years and a civil war too late for the Queen's courts to broaden the prerogative"[56] but that view is now challenged by what Stephen Sedley has described as the "meta-doctrine of executive supremacy that marginalises both the legislature and the courts".[57]

Today, I wonder whether the obscurity of our constitution is something we can continue to afford. So far there has been no appetite in New Zealand to have a constitutional conversation. But in its absence a lot of pressure will come on the courts, legal academics and the legal profession to mediate social conflict through discovery and explanation of constitutional values. Their effectiveness depends on how law and the courts are viewed.

Courts can provide social glue, as I think we have seen at times in our history. But only if their functions are respected and if they are seen as impartial and just. I do not think there is room for complacency here. The functions of the courts are not well understood and the place of the High Court in maintaining the constitutional balances through its supervisory jurisdiction is very difficult to communicate.

So the constitution is the first area I would expect to see a critical Law Review addressing in the next few decades. The second related wave concerns the legal limits to power. During the past 50 years, there has been a revolution in the way in which power is used and how it is checked, the most significant developments being legislatively led.

Some of these changes have been to substantive law as is illustrated by employment law and family law. Employment legislation required fairness in dealings between employers and employees.[58] Family legislation has addressed the discrimination faced by women.[59] Problems of discrimination and inequality however continue in these areas of law and in others. They may be exacerbated by the growing diversity of our community. This presents challenges for law if it is seen to be a tool of discrimination and oppression by minorities or by those who are already

54 *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, [2017] 1 All ER 593. Of particular note was the media response to the High Court decision ([2016] EWHC 2768 (Admin), [2017] 1 All ER 158).

55 TRS Allan "Doctrine and Theory in Administrative Law: An Elusive Quest for the Limits of Jurisdiction" [2003] PL 429.

56 *British Broadcasting Corp v Johns* [1965] Ch 32 (CA) at 79.

57 Stephen Sedley "Construct or Construe" (2012) 34(16) London Review of Books 19.

58 The Employment Relations Act 2000 has as an object "to build productive employment relationships through the promotion of good faith in all aspects of the employment environment and of the employment relationship", including "by recognising that employment relationships must be built not only on the implied mutual obligations of trust and confidence, but also on a legislative requirement for good faith behaviour" and "by acknowledging and addressing the inherent inequality of power in employment relationships": s 3.

59 One of the guiding principles of the Property (Relationships) Act 1976 is that "men and women have equal status, and their equality should be maintained and enhanced": s 1N.

disadvantaged. The perception of criminalisation of distinct populations is potentially a flash point for civic unease.

Some of the changes concerning the use and checks on power have impacted on procedural justice. Legislation has opened up access to public information and required reasons to be given to those who are affected by public decisions.[60] Rulings of the Ombudsman compelled disclosure of police information to defendants, which transformed criminal trial. It seems extraordinary thinking back to those times to remember the huge disadvantages defendants and their counsel were under in testing evidence for the prosecution without access to the records of the investigation. Criminal procedure adopted by the Judges to achieve fair trial was galvanised by the enactment of the New Zealand Bill of Rights Act and the recognition that fair process is a human right.

This climate of openness and justification has changed the culture and method of government. In turn the climate has affected the way in which courts operate. I remember the sense of disbelief that ran around the profession when in 1968 it was held in *Denton v Auckland City Council* that it was a breach of natural justice for a planning report provided to the Council not to be disclosed to the applicant for a planning consent.[61] As a young lawyer I once watched a dramatic exchange in the New Zealand Court of Appeal in 1981 between the Court and the Solicitor-General. The Court insisted on being provided with material relied upon by the Minister in making his decision in the Aramoana smelter case.[62] It was a close-run thing. The Solicitor-General had to go back for instructions. The relief of the Judges when the Court was eventually advised that the Minister acquiesced was palpable. It was a constitutional moment.

The climate of openness has also affected the methodology of the courts. Legal reasoning has developed greatly from the sort of arid exercises in application of precedent and the black letter of the text that were common in 1967 and which were rightly deprecated by Lord Reid in his celebrated "*Fairytale Speech*" in 1972.[63] It amazes me to think that this speech, which did so much to dispel fusty notions and get judges and lawyers to confront the law-making enterprise they are inevitably engaged on, was as late. It was two years after I was admitted and five years after the Law Review was launched. The point is that there has been a shift in the way law is delivered.

In Australia the High Court has recently had to consider the essential characteristics of courts. It identified four irreducible features:[64]

(1) the reality and appearance of the court's independence and impartiality;

60 Official Information Act 1982.

61 *Denton v Auckland City* [1969] NZLR 256 (SC).

62 See *Environmental Defence Society Inc v South Pacific Aluminium Ltd* [1981] 1 NZLR 146 (CA); and subsequently *Environmental Defence Society Inc v South Pacific Aluminium Ltd (No 2)* [1981] 1 NZLR 153 (CA).

63 Lord Reid "The Judge as Law Maker" (1972) 12 JSPTL 22.

64 *North Australian Aboriginal Justice Agency Ltd v Northern Territory* [2015] HCA 41, (2015) 256 CLR 569 at [39] per French CJ, Kiefel and Bell JJ. See also Robert French "Essential and defining characteristics of courts in an age of institutional change" (2013) 23 JJA 3 at 11.

(2) the application of procedural fairness;
(3) adherence, as a general rule, to the open court principle; and
(4) as a general rule, the provision of reasons for decision.

These qualities do not come cheaply. In the past they have been a price society has paid for good government. There is today a question as to the extent society observes and values these qualities and is prepared to pay for them.

In a recent paper to the Criminal Bar Association I have pointed out that many levers in the administration of justice are now in the hands of those who are managing for outcomes other than correctness of decision making and fairness in process.[65] The Supreme Court of the United Kingdom has recently found it necessary to speak forthrightly about the risks to the rule of law in the transformation of government. It has pointed to lack of understanding about the importance of the rule of law in the assumption that:[66]

> … the administration of justice is merely a public service like any other, that courts and tribunals are providers of services to the "users" who appear before them, and that the provision of those services is of value only to the users themselves and to those who are remunerated for their participation in the proceedings.

Confronting this assumption is a challenge for the New Zealand legal order too. I have spoken on other occasions about the risks to the legal order and to the constitutional balances of the view that courts are simply part of the services provided by government and that they can be managed to meet government objectives. I do not suggest that encouraging alternative ways to deal with legal disputes or efficiency in the use of the public resources tied up in courts is wrong. They are clearly entirely sensible. But it is necessary to ensure that the legal order remains coherent and equal in application and that discretion, wherever it is exercised over others, is exercised lawfully, fairly and reasonably.

Looking back, a further shift in law in the last 50 years has been the change from court-centredness. Many disputes are now diverted away from courts. I think that provides some challenges for the visibility of law in our society. Law needs to be understood in a wider institutional framework. Much law is applied and developed out of public sight. This I think means that the supervisory jurisdiction of the courts I have mentioned is more, rather than less, important. In speaking to the Criminal Bar Association a week ago I raised some concerns about managerial justice in the context of criminal law and questioned whether it raises the risks of discrimination and injustice. Other areas of law — administrative decision making and even the resolution of private law disputes — are increasingly undertaken outside the courts and are accompanied by anti-lawyer and anti-court rhetoric which, as

65 Sian Elias "Managing Criminal Justice" (paper presented at the Criminal Bar Association Conference, University of Auckland, 5 August 2017), available at <www.courtsofnz.govt.nz>.
66 *R (Unison) v Lord Chancellor* [2017] UKSC 51, [2017] 3 WLR 409 at [66].

Hazel Genn has argued, is potentially destructive of fundamental values in the legal order.[67]

Further change in the last 50 years has occurred in administrative justice. In my life in law — a span that almost entirely covers that of the Law Review — there has been no more dramatic development than in administrative law. It was not until 1940 that the Chief Justice, Sir Michael Myers, agreed that "what the law professors are pleased to call 'Administrative Law'" could be included in the curriculum for the LLB degree in New Zealand.[68] The view of the profession and the judges was that there was "really no such special branch of the law" and that administrative law was an aspect of "Constitutional Law".[69] The compromise reached by the expansion of the curriculum for Constitutional Law to include "the principles of Administrative Law" is still with us.

It is amazing to remember how recent many of the foundational cases really are. When I studied administrative law in 1967 through Jack Northey's casebook, *Ridge v Baldwin*[70] was only three years old. *Ex parte Lain* was decided that year.[71] *Anisminic*[72] and *M v Home Office*[73] lay ahead. In New Zealand, the acceptance in *Bulk Gas Users Group v Attorney General*[74] of the implications of the rather Delphic decision in *Anisminic* was more than a decade further off.

The direct impact of judicial review in securing administrative justice is slight. If it was "inevitably sporadic and peripheral" when the first edition of de Smith was published in 1959,[75] it is no less so today. Discretion is systematised by policy statements, manuals and other forms of so-called soft law which protect against arbitrariness and provide fair processes. Checks are provided within government and by adjudicators who observe the principles of natural justice. Access to official information and reasons for decisions have revolutionised administrative law by laying bare the justification for exercise of power. Effective redress for administrative error for most people does not entail access to a court possessing general supervisory jurisdiction. These changes accomplished in the last 50 years are important and all to the good. Such non-judicial systems are more effective in securing the end of good governance than judicial review. In another paper I have speculated that we can expect such systems to increase and for the courts to become more relaxed about allowing space for non-judicial bodies to choose an interpretation or evaluation reasonably open to them.[76]

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67 Dame Hazel Genn *The Hamlyn Lectures 2008: Judging Civil Justice* (Cambridge University Press, Cambridge, 2010).

68 Michael Myers "The Law and the Administration" (1940) 3 NZ J Publ Admin 38 at 44, as cited in K J Keith "Public Law in New Zealand" (2003) 1 NZJPIL 3 at 5.

69 At 44, as cited in Keith, above n 68, at 5.

70 *Ridge v Baldwin* [1964] AC 40 (HL).

71 *R v Criminal Injuries Compensation Board, ex parte Lain* [1967] 2 QB 864 (QB).

72 *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 (HL).

73 *M v Home Office* [1994] 1 AC 377 (HL).

74 *Bulk Gas Users Group v Attorney-General* [1983] NZLR 129 (CA).

75 SA de Smith *Judicial Review of Administrative Action* (Stevens & Sons, London, 1959) at 1.

76 Sian Elias "The Unity of Public Law?" (paper presented at the second biennial Public Law Conference, Cambridge, 13 September 2016) at 15–16, available at <www.courtsofnz.govt.nz>.

But that should not be at the expense of the centrality of the supervisory jurisdiction of judicial review in ensuring adherence to the rule of law.

Exclusion of judicial review is dangerous because judicial review secures the rule of law. Judicial scrutiny should not be thought of as inimical to good administration. Usually cases provide independent vindication of official behaviour.

My view is that there is public virtue in this demonstration and in the exposition of how decisions have been taken, even where correction is not necessary. In societies under stress or with conflicting expectations, we need to ensure that law is fit to take the strain. Peter Birks once said that in "flat, secular, plural, sophisticated" democracies law is "lifeblood … and … constantly under scrutiny".[77] He also thought it was a means of achieving equilibrium. Other commentators have expressed similar views. In cases of public controversy we have seen examples of the courts setting out the claims and providing time for the legislature to act. *Quilter v Attorney-General*,[78] the same sex marriage case, is an example. As perhaps is some of the Māori litigation of the 1980s. The flash points of the future may well be matters concerned with the environment and social justice, including equality of treatment before the law and substantive equality.

What I think should not be underestimated is the didactic role that litigation may have played in cases of high anxiety. Amartya Sen has stressed the importance of public reasoning in evaluative judgements.[79] Demonstration of all arguments and the values acted on by men and women in our society is, he suggests, demonstration of the public rationality of law.[80] Judicial review is a principal contribution of legal process to the rule of law. In high stakes cases, those of real public anxiety, the dispassionate processes of the supervisory jurisdiction are particularly important.

In 1993 Sir Robin Cooke in the Court of Appeal observed that the New Zealand Bill of Rights Act was intended to be woven into the fabric of New Zealand law.[81] Certainly in thinking of the huge changes in law in the last 50 years the galvanising effect of the New Zealand Bill of Rights Act could not be left out. It seems to me however that the weaving is taking rather longer than Sir Robin Cooke envisaged. Outside criminal law and immigration reference to the Act seems spotty by comparison with the use made of the Human Rights Act 1998 in the United Kingdom in private law.[82] Habermas's view that rights have become the "architectonic principles of the

77 Peter Birks "The academic and the practitioner" (1998) 18 LS 397 at 402.

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

79 Amartya Sen *The Idea of Justice* (Penguin Books Ltd, London, 2009).

80 At 392–399.

81 *R v Goodwin* [1993] 2 NZLR 153 (CA) at 156.

82 See for example *Campbell v MGN Ltd* [2004] UKHL 22, [2004] 2 AC 457; and *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557. Note also the view of Lord Bingham in dissent in *Van Colle v Chief Constable of the Hertfordshire Police* [2008] UKHL 50, [2009] 1 AC 225 at [58] that "one would ordinarily be surprised if conduct which violated a fundamental right or freedom of the individual did not find a reflection in a body of law ordinarily as sensitive to human needs as the common law", later cited in *Smith v Ministry of Defence* [2013] UKSC 41, [2014] AC 52 at [98] per Lord Hope (with whom Lord Walker, Baroness Hale and Lord Kerr agreed).

legal order" is not yet fulfilled in New Zealand.[83] Some of the disappointments have been in scope beyond criminal law; others have been in what I consider to be the failure of the courts to use s 6 properly.

Finally, I would identify as a wave that is not yet spent the impact of modern technology on personal freedom. A principal challenge in our time is the law's response to privacy in the digital age and the age of surveillance. The Supreme Court has only just touched on the difficulties.[84] It has to be said that it is difficult to see how this genie is going to be put back in the bottle. Yet the problems of preserving space for what is private is inextricably tied up with dignity values and what it is to be human. I expect the student writers of the next decades to look closely at this challenge.

III CONCLUSION

We have a great tradition in New Zealand in law. John Salmond, one of the outstanding legal figures of his day, was said by Herbert Hart to have been among the first to break out from the shadow of John Austin and to stress the moral content of law.[85] Salmond, well ahead of his time, acknowledged the "law-creating power" of the judge which he thought were to be exercised according to the "principles of natural justice, practical expediency, and common sense".[86] He thought that the observance of judges of their own obligations was one "secured and enforced by the pressure of public opinion, and more especially of that professional opinion of the bar".[87] Legal writing, to be truly useful, must provide this sort of criticism, as Sir Robin Cooke, with whom I began my remarks, saw in advocating the need for Law Reviews in New Zealand. Neil McCormick, one of the outstanding legal scholars of our age, described law as a form of institutionalised discourse or practice or mode of argumentation.[88] Law Reviews are critical in that institutionalised discourse.

83 Jurgen Habermas *Between Facts and Norms* (Polity Press, Cambridge, 1996) at 247.
84 See for example *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305; *Tararo v R* [2010] NZSC 157, [2012] 1 NZLR 145; *Dotcom v Attorney-General* [2014] NZSC 199, [2015] 1 NZLR 745; and *R v Alsford* [2017] NZSC 42, [2017] 1 NZLR 710.
85 HLA Hart "Positivism and the Separation of Law and Morals" (1957) 71 Harv L Rev 593 at 605.
86 John Salmond "The Theory of Judicial Precedents" (1900) 16 LQR 376 at 379 and 389.
87 John Salmond *Jurisprudence* (7th ed, Sweet & Maxwell, London, 1924) at 55.
88 Neil McCormick "Beyond the Sovereign State" (1993) 56 MLR 1 at 10.