The Role of the Law Review in a Performance-Based Research Environment

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I INTRODUCTION

Tēnā koutou katoa. May I thank the Editors-in-Chief for their invitation to meet and talk with you this evening. Their invitation requested that I address the role of the law review in the current environment. I was pleased to agree to their request because, although I retired last year, I have retained a continuing interest in legal education. There is a close and important relationship between law reviews and the development of law as an academic discipline. I had the opportunity to track this relationship when, with Professor Tony Smith, I was asked in 2013 to review the development of legal education over the past 50 years for the New Zealand Universities Law Review.[1] It was apparent from this research that the advent of the law review provided an opportunity for academic staff to publish research that contributed to the development of a distinctive New Zealand jurisprudential literature. This opportunity also enabled legal academics to demonstrate, through their writing, that they were "real" academics, and worthy to be part of the University.

II ADDRESS

Role of the Law Review

Although law reviews have been part of New Zealand's legal environment since 1928, when the New Zealand Law Journal was first published as a journal, the notion of a law review publishing an in-depth analysis of an aspect of the law first arrived in 1953, when the Victoria University of Wellington Law Review was published. This publication was followed by the Otago Law Review in 1965, the Auckland University Law Review in

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1 Margaret Wilson and ATH Smith "Fifty Years of Legal Education in New Zealand: 1963–2013 — Where to From Here?" (2013) 25 NZULR 801.

1967, the Canterbury Law Review in 1980 and the Waikato Law Review in 1993. The New Zealand Universities Law Review was first published in 1963 and was an implicit acknowledgement that legal education was establishing itself as an academic discipline. New Zealand legal academics recognised that the reputation of a law school was related to the quality of its law review.

Of course, the reputation and prestige of the particular law review has always varied. Recently, however, there has been a greater formalisation of the ranking of publications. This development has emerged with the globalisation of the publication industry and the introduction of the performance-based research funding regime. It is also closely associated with the competitive international ranking of universities, which relies on publication in the journals associated with these publishers. The combination of these developments has raised the question — what is the role of the law review and legal research in today's context? Is it a crucial element of the funding of universities, or is it a vehicle to further knowledge? In an attempt to address this question, I have placed the law review in the context of the current tertiary education regulatory framework.

One consequence of the integration of the law school into the university regulatory system has been a loss of control over many academic decisions. Although the New Zealand Council of Legal Education and the legal profession retain a professional interest and some control in ensuring legal education equips the student for the practice of law, the university retains institutional control of legal education. Examples of this control include the organisation of the degree content to fit the seminar model, the time frames for marking assessments and the decisions around face-to-face and online teaching and assessments. There is an ongoing tension between institutional management and delivering a degree that satisfies professional and practice expectations.

I would argue there has been a slow but steady loss of independence and control over legal education since the universities moved to a more corporate managerial model of governance. While there traditionally had been an acceptance that universities should retain a degree of independence from the state to ensure there was academic freedom in teaching and research, this changed in the late 1980s, when public policy became influenced by the values of neoliberalism.

Although much has been written on the impact of neoliberalism on tertiary education, there is relatively little research on the impact on legal education and, in particular, critical legal education. However, the late Professor Michael Taggart wrote an insightful analysis of the impact of Performance-Based Research Funding (PBRF) on legal research, teaching

and culture of the law school in a collection of essays in honour of Sir Kenneth Keith.[2]

Taggart noted the best law teaching is research-informed and that it takes time.[3] He further noted that most students do not care how many publications their teachers have to their name, but they do care about the quality of teaching.[4] Finally, he referred to the current model of publish or perish as exacerbating selfish and self-regarding behaviour,[5] leading to publications of little value to furthering the understanding of law for the local community.[6] Overall, Taggart highlighted that there are fundamental differences between legal academics and the current neoliberal policy advocates as to the purpose of educating lawyers. For legal academics, it is essential students are taught not only the rules, but to think critically and to be open to incorporating new knowledge into their understanding of the legal system.

I have to agree with Taggart's analysis. I do not think much has changed since he wrote of his experience of the impact of the PBRF system on legal research. Although the system has been reviewed in recognition of some of the negative impacts on both academics and the universities, fundamentally the research funding system remains consistent with the ideology underlying the funding of the whole tertiary education system. I thought it may be useful to remind you of the drivers of the current system, because this identifies that the current funding model is based on a political understanding of the roles of legal education and the university within New Zealand society.

Regulatory Context

The traditional the role of the university and its relationship to the state was aptly described in the Hughes Parry Report:[7]

> Just as the State has the responsibility of supporting, without controlling, the universities in the interest of maintaining a free, flexible, and progressive society, so the universities have the responsibility of interpreting their services to society in such a way that, of their own volition, they meet the legitimate needs of the community.

This notion of a reciprocal relationship changed in 1984, when there was a radical shift in the purpose of public policy towards the creation of a society that was to be driven by the creation of economic growth through adopting,

2 Michael Taggart "Some Impacts of the PBRF on Legal Education" in Claudia Geiringer and Dean R Knight (eds) *Seeing the World Whole: Essays in Honour of Sir Kenneth Keith* (Victoria University Press, Wellington, 2008) 250.

3 At 255.

4 At 256.

5 At 258.

6 At 259.

7 David Hughes Parry and others *Report of the Committee on New Zealand Universities* (December 1959) at 11.

in the public sector, the principles of the market to allocate resources. The implications of this policy approach, however, were not only economic. Ruth Butterworth and Nicholas Tarling, Auckland academics who challenged the government's policy during this period, concluded their analysis of the implications of this policy shift in the following terms:[8]

> It has been easy for the public to believe that the main object of the changes since 1984 has been to save money. The "reforms" have often been advanced under that guise. It is, however, a mistaken view. The object is ideological. The millenarian vision of the ideologues involves an unremitting attack on the structures of democratic pluralism. Their central project is the negation of community values and the redefinition of the citizen as merely consumer. The aim involves the destruction of that sense of communal responsibility which infused the creation of the modern democratic state, but which Hayek traduced as an inconvenient hangover from tribal consciousness. When public activity is privatised, the very idea of society is undermined. These are the issues that New Zealanders have to consider.

Butterworth and Tarling understood the changes to the tertiary education sector were merely part of a larger project to reinvent society. The universities, as the primary source of the production of knowledge, were vital to the success of the neoliberal project. One way or another, the universities had to be made to further the neoliberal project. Tertiary education policy was characterised as primarily an individual investment decision from which personal gain would be derived, so the cost should be primarily borne by the consumer/student. The introduction of the student loan system was part of the redefining of the role of the student as the consumer, responsible for the cost of the education from which it was assumed the student benefited financially.

During this period, there was considerable concern that universities would not retain their autonomy and independence. They were, in effect, excluded from the consultations in the 1980s to determine the new regulatory framework that was eventually enacted in the Education Act 1989. It was only after the Universities of Auckland and Canterbury had initiated legal proceedings that they were included in the consultations.[9] The inclusion of the university sector in the consultations produced some wins for the sector and, as demonstrated when the university sector publicly advocated its position, it did have an impact on the decisions. Although the universities lost their central argument — at that time to retain the University Grants Committee as a barrier between the universities and the government — they did make other gains. Recognition of the Committee for University Academic Programmes (CUAP) and the Academic Audit Committee

8 Ruth Butterworth and Nicholas Tarling *A Shakeup Anyway: Government & the Universities in New Zealand in a Decade of Reform* (Auckland University Press, Auckland, 1994) at 250–251.

9 At 151–170.

enabled the universities to retain some control over academic matters and thus maintain some degree of independence and autonomy.

Another major win was the inclusion in the Act of recognition of academic autonomy and freedom of universities.[10] In particular, the specific inclusion of the role of the university to be the "critic and conscience of society". Section 162(4)(v) was seen as important for academics to retain some agency over their professional role. An equally important provision, s 162(4)(b), describes a university being characterised "by a wide diversity of teaching, research, especially at a higher level, that maintains, advances, disseminates, and assists the application of knowledge, develops intellectual independence, and promotes community learning". While the university sector faced considerable opposition during the period leading to the enactment of the Education Act, it appeared to retain academic autonomy and independence and avoid being co-opted into the overall policy objective of commodifying university education for economic purposes.

It was during the 1990s and 2000s, however, that the advocates of neoliberalism introduced another, more effective, means of controlling universities. It was expressed in universities increasingly being characterised as corporate entities and the introduction of a form of managerialism that challenged the traditional administrative culture of universities. This managerialism is seen in the internal culture of the universities changing from a collaborative decentralised system of delivery of academic programmes and research to a highly centralised performative regime.

The increasing use of technology became central to enabling this process. While technology can assist more efficient administration of tasks and delivery of courses, its impact on academic performance is an open question. The transfer to academic staff of administrative tasks once performed by administrative staff is an obvious example of how management decisions may impact on the time academics have to perform academically.

The negative impact of this form of management was summed up by Stefan Collini, a British academic, in the following terms:[11]

> Underlying so many aspects of the policies … is the fallacy of uniformly measurable performance. The logic of punitive quantification is to reduce all activity to a common managerial metric. The activities of thinking and understanding are inherently resistant to being adequately characterised in this way … It is the alienation from oneself that is experienced by those who are forced to describe their activities in misleading terms. The managers, by contrast, do not feel this, and for good reason. The terms that suit their activities are the terms that have triumphed: scholars now spend a considerable, and increasing, part of their working day accounting for their activities in the managers' terms. The true use-value of scholarly labour can seem to have been squeezed out; only the

10 Sections 160 and 161.

11 Stefan Collini "Sold Out" *London Review of Books* (online ed, London, 24 October 2013).

> exchange-value of the commodities produced, as measured by the metrics, remains.

When discussing the challenges presented through the changes in policy, it is important to recognise the changing nature of knowledge also influences the role of universities. Knowledge will always be framed within some context, and the university has a claim to being the appropriate institutional context. It is undoubtedly true that governments attempt to co-opt universities to reflect their ideology and that universities, through their structures and programmes, reflect that ideology. It is also true, however, that on occasion the institutions resist interference that threatens their autonomy. It is often more difficult for individual academics to resist interference, but there are forms of resistance practised by academics.

The law review is one avenue for resistance. Editors of law reviews become important gatekeepers for preserving the critical approach to legal research and education. It is through legal publication of critical research that the role of the university as the critic and conscience of society is preserved. The current pandemic has provided a timely example of the importance of university-based research in the formation of public policy decisions. Importantly, it has illustrated that critical research can provide an informed understanding of the issue facing us and the impact of public decision making.

Within the constant struggle for control of new knowledge, academics have some agency to resist the attempts to undermine the capacity to deliver critical legal education. University administrations, in an essentially hostile political environment, have also not given up entirely on the struggle to preserve as much autonomy and independence as possible. The challenge will be for university management and academics to find a way to work towards a common strategy. For this to happen, academics must have *real* access to decision-making. This also requires academics to have the time to engage with university management. For this to happen, there needs to be rethinking of how to manage universities to achieve the twin goals of efficiency and protecting and promoting the core academic business of knowledge. Butterworth and Tarling noted that "[u]niversities are for thinking", and it is the capacity to think that should be the fundamental objective of universities.[12]

I was assisted in the preparation of this talk by the 2017 article by Kayleigh Ansell and Jayden Houghton "A Brief History of the Review", written to celebrate the Auckland University Law Review's 50th Anniversary.[13] The article highlighted the time and efforts of many to sustain the Review through good times and not-so-good times, when there was a waning of interest in contributing to the Review. The editors have obviously been crucial to the success of the Review. The experience gained from

12 Butterworth and Tarling, above n 8, at 251.

13 Kayleigh Ansell and Jayden Houghton "A Brief History of the Review" (2017) 23 Auckland U L Rev 50.

editing a law review is invaluable. It is very good experience for the judgement calls lawyers must make in their practice, which are often challenging.

I recall my brief experience as Editor of *Recent Law*, a publication of the Auckland Law Faculty in the 1970s. I received a note from a High Court judge assuring me judges did not alight upon their judgments like some seagull. After that, I scrutinised the language of contributors more closely. More importantly, as Editor I had to read all judgments before allocating them to staff for a case analysis. This was the best way of keeping up to date with case law (if time consuming!) I thought the advice Kayleigh and Jayden gave to future editors in their article was particularly appropriate: editors should be ambitious, courageous and tenacious.[14]

It is a truism that law reviews are as good as their editors. The innovative approach of the early Auckland University Law Review editors has been maintained over the years and has contributed to the longevity of the Review. When I submitted my research paper for publication in 1970, I was blessed with editors who decided to look for papers that would of interest to students and lawyers, as well as being relevant to the future. That the editors were prepared to take risks is seen from their selection. Apart from my untraditional topic of collective bargaining, there were articles on Law and Computers,[15] the Aftermath of the Thalidomide Tragedy,[16] Dickens and the Law[17] and the Ross Dependency.[18] It is not surprising that all the editors went on to illustrious careers, including the former Chief Justice, Dame Sian Elias. Rereading the 1970 volume of the Review, I was reminded of how progressive and challenging the articles in that journal must have been to some at that time.

Personal Reflection

I want to conclude on a personal note, namely the impact on myself of having a research paper published in the Review. I am aware that today the assessment by the PBRF panel of a publication's impact can determine the grade your portfolio receives. I confess to not fully understanding the meaning of "impact" in these circumstances, but it normally relates to the short-term value of your research, as determined by the political framework that has been constructed to allocate funding for research. I want, therefore, to argue that the long-term impact of publication on the researcher can be of greater significance in reality. By this, I do not only mean it can determine whether you get promotion or achieve some relief from the constant pressure to publish. I mean the satisfaction of crafting an argument in writing that

14 At 90.
15 BC Brosnahan "The Law and Computers" (1970) 1 Auckland U L Rev 1.
16 KI MacDuff "Thalidomide – The Aftermath" (1970) 1 Auckland U L Rev 53.
17 WB Gould "Dickens and the Law" (1970) 1 Auckland U L Rev 78.
18 FM Auburn "The Ross Dependency – An Undeclared Condominium" (1970) 1 Auckland U L Rev 89.

reflects your research efforts and, importantly, your own ideas. I also mean that your ideas may not receive short term recognition but, with time, their significance is acknowledged.

I still recall the feeling of achievement when my industrial law research paper was accepted for publication. I had become very aware during my final years of study that I wanted to specialise in an area of the law for which there was very limited employment or publishing opportunities. Industrial law had yet to morph into employment law and become an accepted part of legal practice. Also, industrial law had not been available as a course of study and it was only through my Honours seminars that I was given the opportunity to study the law in context. I recall that the first Honours seminar I was offered was on legal regulations. It was suggested that an analysis of why one needed a licence to refrigerate eggs may interest me. Unsurprisingly, it did not, but the changes to the Arbitration Court appeared much more attractive.

For those interested in employment law, you will recall in 1968 the Arbitration Court, by the majority of the worker and employer representatives, awarded a general wage increase. This marked the beginning of the end of the conciliation and arbitration system and the beginning of a period of industrial unrest and development of a new regulatory system consistent with the values of neoliberalism. I have often thought life is about timing and not always of our own making. It is also about making the most of unforeseen opportunities, even if they involve a level of risk.

I admit I was lucky to stumble on an unrecognised area of the legal system that was undergoing systemic change. Subsequently, researching and practicing employment relations become my life's work. The acceptance of my paper for publication gave me confidence to continue my research in this field. The point I want to make is that it should never be forgotten that publication can have an impact on the researcher that, in the long term, can be career enhancing, even if it is not PBRF-recognised.

I am aware that the Review has benefited from the commitment of academic staff who give of their time to nurture students' research. In the current performative environment, there is not always recognition of the value of this work. For me, the teachers who guided my early research interest enabled me to develop a career not obvious to me or anyone else at the time. It was their patience, encouragement and support that started me on this research journey. An American lecturer on a short-term contract, Ed Flitton, began my journey on how to craft a legal research paper on the Arbitration Court.

My legal research education was then further extended by Dr Jim Farmer QC, who taught an Honours paper on industrial law and encouraged me to view the law as more than rules. I recently reviewed early research published in the New Zealand Journal of Industrial Relations and was reminded of how prophetic Jim's analysis of industrial law was at that time.

He clearly understood the whole legal system was due for change and that we should be prepared to understand and be part of that change. It was the research paper for his course that I submitted to the Review, with the long title of "Collective Bargaining in New Zealand Outside the Industrial Conciliation and Arbitration Act".[19]

III CONCLUSION

The challenge for law schools under the current policy environment is to produce quality research and teaching, while negotiating with university managers for sufficient resources to deliver a quality professional education. Although neoliberalism is being replaced by well-being economics, there is little sign that the current policy's primary focus on market ideology, with the undervaluing of a liberal tertiary education, is likely to change. The challenge for legal academics will, therefore, be to continue to respond to the market but also instil longer term social democratic values and skills. Martha Nussbaum, Professor of Law and Ethics at the University of Chicago, recently commented, in the context of research funding schemes in the United Kingdom and the United States that are similar to New Zealand's PBRF scheme, that:[20]

> Resistance to the bureaucratisation of academic scholarship and teaching will be difficult, but it is essential if the culture of the mind and heart that protects both knowledge and citizenship is to survive.

It may be some comfort to New Zealand legal academics to know we are not alone in facing the constant pressure of reconciling the demands to publish in terms of PBRF values, while at the same time delivering a high quality professional education to service the legal profession. The challenge is for the universities and their academic and administrative managers to create the environment that produces both quality research and teaching, while negotiating a funding policy for universities that is accountable to governments and the people. The key in this negotiation is for universities to be accountable, but not controlled by governments and their various policies. This is the reality of the struggle to preserve academic freedom and independence. There is nothing more challenging to those who exercise power than people thinking for themselves, and it is our job to teach people to think and to research and to publish our ideas and analyses. Hence the crucial role of the law review: not always an easy one, but a very worthwhile one.

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19 Margaret A Wilson "Collective Bargaining in New Zealand Outside the Industrial Conciliation and Arbitration Act" (1970) 1 Auckland U L Rev 37.

20 Martha Nussbaum "Critical faculties" *New Statesman* (London, 31 May 2010) at 41.