Living with the Waikato Foundation Principles, 20 Years On

By Professor John H Farrar*

I was Dean of the School of Law from 2004-2008. I was near to conventional retirement age but was approached over the Deanship. I had always been interested in the Waikato experiment of establishing the first new law school in New Zealand since the 19th century and accepted the Deanship as something of a challenge.

The Committee established by the University to consider the setting up of a Law School produced the report, Te Mātāhauariki, in 1988. This report clearly identified three objectives for a Waikato Law Degree.[1] These objectives have been subsequently labelled principles.[2] They were:

1. To provide a professional legal education;
2. To teach law in its context which meant the social, economic and political environments within which the law was made and practised;
3. To develop a bicultural approach to legal education so that the Māori perspective was reflected in all aspects of the curriculum and the activities of the School.

It is unusual for a New Zealand law school to have clearly stated objectives or principles and once identified it did not necessarily prove easy to reconcile the three objectives. Also objectives can be changed but when they are classed as principles they perhaps are more resistant to change. The history of the first 20 years of the Waikato Law School reflects this tension.

I. Objectives or Principles?

According to the *New Shorter Oxford English Dictionary*,[3] an objective seems to have originated as a military term – the point to which an advance of troops is directed. In everyday usage, it basically means something that one's efforts or actions are intended to attain, something in the nature of a purpose, goal or target. Thus it is a practical concept of decision-making and management and it is implicit in this that objectives can and do change in the light of experience.

Principles on the other hand are more of a philosophical nature. Aristotle in his *Metaphysics*[4] regarded a principle as a starting point for reasoning. Professor Ronald Dworkin[5] thought of a le-

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1 Margaret Wilson, "The Making of a New Legal Education in New Zealand: Waikato Law School" (2001) 1 Wai L Rev at 1, 4, 18.

2 When I came in 2004, they were sometimes referred to in this way although I notice that the language of Te Mātāhauariki and Margaret Wilson was much less constricted.

3 Vol 2.

4 Book II, Part 2.

5 Ronald Dworkin *Taking Rights Seriously* (Cambridge MA: Harvard University Press, 1977) at 22, 82.

gal principle as some ethical standard recognised by the law and contrasted this with a legal policy which was an economic, social or political goal at which the law is aimed.

Judged by these criteria, professionalism seems to be more of an objective than a principle in either sense. Biculturalism seems to be a social or political goal or policy rather than a principle and law in context is more of an approach to legal education. As such, it can be an objective but it is hardly a principle.

II. Professionalism

All law schools espouse professionalism to some extent and there is an increasing tendency to teach legal skills. Some law schools, particularly those that adopt a law context approach, often adopt a very critical approach to the legal system and the legal profession. However, to do so is not inevitable. One of the most impressive law teachers that I had was Sir Otto Kahn-Freund. Sir Otto had been a Labour Court Judge in Weimar Germany before the rise of the Nazis and was a man of broad liberal culture. When I was a student at University College London he was a Professor at the London School of Economics and I attended his lectures. Later he was appointed Professor of Comparative Law at Oxford. He always fitted law into its social, economic and political context and he was often critical, but his criticism had an intellectual rather than an ideological basis, although I think that politically he was probably a socialist or social democrat. His criticisms were usually constructive,[6] as I have tried to be.

The traditional roles of a lawyer have been to act as adviser, organiser of transactions, advocate and resolver of disputes. From the beginning the Waikato Law School, more than any other New Zealand Law School, has put emphasis on the skills necessary to fulfil these professional functions.[7] In this respect it shared something in common with the Bond Law School[8] of which I have also been Dean.

In the last 20 years, most people, including lawyers and law students have become computer literate. Developments in technology have made the law more accessible to ordinary people. Some of the mystery which often surrounded law and legal process has been removed. Legal services have undergone and are undergoing change. The modern emphasis is less adversarial and more cooperative, with the rise of informal networks and the sharing of information.

Richard Susskind in his book, *The End of Lawyers? – Rethinking the Nature of Legal Services*[9] considers this question and summarises his thinking in the following diagram:

6 Sir Otto Kahn-Freund "Comparative law as an Academic Subject" (1966) 82 LQR 40 and "On Uses and Misuses of Comparative Law" (1974) 37 MLR1. See also *Selected Writings* (Stevens, London, 1978).

7 Wilson, above n 1 at 18-19.

8 Bobette Wolski *Skills, Ethics and Values for Legal Practice* (2nd ed, Lawbook Co, 2009). Bobette Wolski "Why, how and what to practice: integrating skills teaching and learning in the undergraduate law curriculum" (2003) 52 Journal of Legal Education 287.

9 Richard Susskind *The End of Lawyers? – Rethinking the Nature of Legal Services* (OUP, Oxford, 2008) at 29.

The first is the traditional one-on-one professional service, tailored to the need of the particular client.[10] As time goes by there is a tendency to standardise legal transactions – such as conveyancing of property.[11] The third stage of systematising involves the reduction of many transactions to systems which are stored online.[12] Some of these can even be purchased commercially.

Susskind then talks about the packaging of services for clients where document assembly systems are given to the client. This is a way of the lawyer entering the client's domain, but it can also be thought of as a form of "do it yourself". From this, the transition is to the final stage – commoditisation.[13] This is where a legal service is made available online to a broader public. An example would be debt collection systems. Other examples are standard form contracts.

The challenge for all law teachers is how to accommodate the information revolution. There is a growth of e-learning. People are increasingly accessing online material in lectures. "Death by PowerPoint" is a common format for lectures.[14]

At Waikato Law School these developments enabled the introduction of video streaming of lectures of the first two years of the LLB to our satellite campus in the Bay of Plenty. This initiative arose out of the need to expand the School and to meet the needs of students in that area. It was difficult to meet that need with fulltime staff and video streaming met the needs of those students. Lectures became accessible to students at any time and were coupled with face to face tutorials required by the Council of Legal Education. This meant that many mature students could enrol for law outside a major centre for the first time. There was some resistance to this from the other law schools[15] but it is arguably the way of the future. In the Waikato environment the first two years of the degree can lead to a Diploma in Law as a self standing qualification. This format has ongoing appeal to people who do not necessarily contemplate a legal career but wish to have some knowledge of the law. Thus the Waikato Law School has been a pioneer and innovator.

Whether technology is improving legal education and the legal profession is debateable. My feeling is that we are winning some things and losing others. There is easier access to a range of material but a lack of willingness to do in depth research in a library, and what is more important, a lack of willingness on the part of clients to pay for it. Our sense of professionalism may need to change and be less scholastic in the future. It has been stated[16] in a recent study by a group from University College London, examining the use of two popular research sites, that users are not reading on line in the traditional sense. New forms of 'reading' are emerging as users 'power browse' through titles, contents pages and abstracts for quick wins. "We are evolving from being cultivators of personal knowledge to being hunters and gatherers in the electronic data forest."[17]

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10 Ibid, at 29.

11 Ibid, at 30.

12 Ibid, at 30.

13 Ibid, at 31-2.

14 JH Farrar *Legal Reasoning* (Thomson Reuters, Wellington, 2010) at ch 20.

15 This was largely based on conservatism and the feeling that students would miss face to face encounters with lecturers. It reflected a lack of understanding of modern students, and their preferences.

16 University College London, "Information Behaviour and the Researcher of the Future," 11 January 2008, <www.ucl.ac.uk/slais/research/ciber/downloads/ggexecutive.pdf>.

17 Nicholas Carr *The Shallows – How the internet is changing the way we think, read and remember* (Atlantic Books, London, 2010) at 138.

III. BICULTURALISM

Biculturalism in sociology involves two originally distinct cultures in some form of co-existence. When one thinks of biculturalism one thinks of New Zealand and Canada where biculturalism often entails bilingualism. The partnership between Māori and Pakeha was envisaged by the Treaty of Waitangi. The history of the Treaty and its significance is a massive topic in its own right and is the subject of many books and articles. The most recent is *The Treaty of Waitangi in New Zealand's Law and Constitution*[18] by Matthew Palmer in 2008. In his book, Palmer shows how the English and Māori translations of the Treaty differ in significant respects and how there are differences between Waitangi Tribunal findings, judicial interpretation and Cabinet decisions. Nevertheless, there is a core of common sense emerging. Palmer summarises this as follows: [19]

> The Treaty of Waitangi, and its principles, should be interpreted broadly, generously and practically, in new and changing circumstances as they arise;
>
> As an agreement upholding the Crown's legitimacy, in governing New Zealand for the benefit of all New Zealanders, in exchange for the Crown's active protection of the rangatiratanga, or authority of hapu, iwi and Māori generally to use and control their own interests, especially in relation to land, fisheries and te reo Māori and their other tangible and intangible taonga or valued possessions.
>
> The Crown must also ensure that Māori enjoy the rights and privileges of pakeha New Zealanders.
>
> Since this agreement involves a continuing relationship akin to partnership between the Crown and Māori, the parties should act reasonably and in good faith towards each other, consulting with each other, compromising where appropriate, and reasonably redressing past breaches of the Treaty."

This is an interesting and convincing attempt at synthesis.

In the history of the Waikato Law School, biculturalism proved to be a difficult goal. This was due to intrinsic difficulty in the concept and the fact that in the 20 years there have been shifts in the interpretation of the concept. It is arguable that there has been a shift from biculturalism to bi-ethnicism and then from bi-ethnicism to neotraditionalism.[20] Originally biculturalism was identified with post colonial theory and was associated with decolonisation, ethnic liberation and cultural revival.[21] However, there was a shift of emphasis to separate ethnic identification[22] and this was part of a general movement from class-based to identity-based politics.[23] It is arguable that the movement to ethnic discourse changed biculturalism in a fundamental way. Culture and ethnicity were merging and the ethnic groups' interests were politicised.[24] At this stage the idea

18 Matthew Palmer *The Treaty of Waitangi in New Zealand's Law and Constitution* (Victoria University Press, Wellington, 2008).

19 Ibid, at 356.

20 Unpublished paper by Dr Elizabeth Rata, "The Failure of Biculturalism, Implications for New Zealand Education" but also see Leah Whiu, "Waikato Law School's Bicultural Vision – Anei Te Huarahi Hei Wero I A Tatou Katoa: This is the Challenge Confronting Us All" (2001) 9 Wai L Rev at 265. Leah's article draws on earlier work by Makere Papuni-Ball and Stephanie Milroy. Leah argues strongly for an indigenous research agenda, transformative theory of action and a feminist critique of how knowledge is valued. I valued Leah as a colleague and agree with some of her arguments but on balance I find Dr Rata's analysis convincing.

21 Rata, above n 20 at 3; Whiu above n 20 at 267.

22 Rata, ibid, at 4.

23 Ibid, at 4.

24 Ibid, at 5.

developed that non-Māori can never have a full understanding of Māori tikanga. This is in spite of the fact that most modern Māori are genetically part Pakeha.[25]

The next stage of development was a shift from ethnic to tribal identity.[26] Although tribalism had always been a characteristic of Māori culture and politics, it has become particularly important with the Waitangi Tribunal Treaty settlements and tends to separate Māori from Māori. As such, it is a potentially divisive factor in both Māori and national politics. It is difficult to reconcile these developments with the idea of International Human Rights, where the individual rather than the group, has hitherto been regarded as the bearer of human rights and citizenship.[27] However, the United Nations Declaration of Indigenous Peoples Rights 2007 now gives some recognition to group rights.[28]

Biculturalism is often contrasted with multiculturalism. Multiculturalism is the acceptance of multiple ethnic cultures[29] and since 1987 New Zealand has pursued a multicultural immigration policy. New Zealand, like Canada, has got itself into a complex situation because of a clash of bicultural and multicultural policies. By contrast with New Zealand and Canada, the United States of America does not have a clear policy on multiculturalism. Instead there is an idea of a melting pot in which all the immigrant cultures are mixed and amalgamated without state intervention. When I was Dean, I asked the Te Piringa group to give me their views on how biculturalism and multiculturalism could be reconciled. There was a long silence. Perhaps they cannot be reconciled.[30] No wonder then that successive Deans of the Waikato Law School have faced difficulty in the implementation of this objective.[31]

On the other hand this question has proved to be of interest to an increasing number of international students who have studied at Waikato. A lot of this interest sprang from the appointment of Professor Michael Hahn as Director of International Relations and Dr Robert Joseph's new paper on indigenous people's rights and international law. I would also like to pay tribute to the pastoral work done by former Waikato Law School law lecturer, Doug Tennent, particularly with Pasifika students.

25 Standard Classification of Ethnicity, 2005.

26 Rata, ibid, at 8.

27 Sarah Joseph and Adam McBeth (eds) *Research Handbook on International Human Rights Law* (Edgar Elgar, Cheltenham, 2010); Shelley Wright *International Human Rights, Decolonisation and Globalisation* (Routledge, London, 2001) at ch 2.

28 New Zealand has now signed this declaration.

29 Wikipedia – "Multiculturalism" Accessed 6 September 2010, 1:45 pm; Christine Inglis Multiculturalism: New Policy Responses to Diversity, Management of Social Transformation, UNESCO Policy Paper No 4.

30 However, for an attempt to reconcile them under the Rule of Law see Justice ET Durie, "The Rule of Law, Biculturalism and Multiculturalism" (2005) 13 Wai L Rev at 41. 'Justice, Biculturalism and the Politics of Law" in Margaret Wilson and Anna Yeatman (eds) *Justice and Identity: Antipodean Practices* (Bridget Williams Books, Wellington, 1995) at 33.

31 Wilson, above n 1.

IV. Law in Context

The study of law in context often overlaps with law and society and socio legal studies. In fact there is conceptual overlap but not identity in these approaches.[32] They are also linked with the sociology of law but not all law teachers who adopt a law in context approach think of themselves as sociologists.[33] I was an original member of the Socio Legal Group of the then Society of Public Teachers of Law in the United Kingdom. This was in the 1970's. Since then, law in context has tended to hive off into separate approaches – sociology of law, socio legal studies, law and economics, critical legal studies and feminist legal studies. However, as a general approach it is arguable that we are all law in context teachers now. It is rare for law to be taught in an entirely "black letter" way without reference to context. Nevertheless, as Philip Selznick has stated "in the background to any question of context is the question of transcendent values which need to be identified."[34]

Members of the Waikato Law School have participated actively in law and society conferences in Australasia, and when I was Dean, the intention was to form an Australasian Law and Society Association and possibly to convert the New Zealand Yearbook of Jurisprudence into a Law and Society Review. Somehow this has not happened which is a pity.

V. Conclusion

The first 20 years have been a brave experiment which is a history of success and failure. The Law School has established itself with the local profession and judiciary and enhanced its national and international profile. It has suffered from a lack of resources from the beginning and I hoped to do something about this. At one stage there was the possibility of securing matching funding from the Labour Government towards a Law and Management Building which would have provided much better facilities for the Law School. The University failed to pursue this at the appropriate time. The matter of Te Mātāhauariki Research Institute represents another instance of a lost opportunity. When I became Dean I found this bore an uneasy relationship to the School, but was successful in recruiting Professor Alex Frame as Professor of Law and Director of the Institute. Alex was strongly committed to the bicultural goal and very active in research on the Te Matapunenga project[35] but relied on the University to secure continued funding for research. This did not happen and we are still waiting to see the publication of the records of the last rites of that Institute. These matters leave me with a strong sense of regret.

The Waikato Law School will only succeed in the future if there is greater commitment by the University and New Zealand to its mission. At a gathering at Taupo in 1998 Alex Frame called for "a wide-ranging, careful, co-operative cultural scholarship which refuses to succumb to adversarial posturing, political window-dressing, bureaucratic convenience, academic rivalry, or racial

32 Philip Selznick, "'Law in Context' Revisited" (2003) 30 Journal of Law and Society 177; Roger Cotterell and Philip Selznick, "Selznick Interviewed: Philip Selznick in Conversation with Roger Cotterell" (2004) 31 Journal of Law and Society 291-317.

33 MDA Freeman *Lloyd's Introduction to Jurisprudence* (8th ed, Sweet & Maxwell 2008) at 858.

34 Selznick, above n 32 at 185-6.

35 This is a compendium of reference to the concepts of Māori Customary Law.

prejudice".[36] I say Amen to that and support it as a pathway for the evolution of a common law for Aotearoa/New Zealand.

36 Alex Frame *Grey and Iwikau – A Journey into Custom, Kerei Raua Ko Iwikau Te Haerenga Me Nga Tikanga* (Victoria University Press, Wellington, 2002) at 75; see also Andrew Sharp, "Why be Bicultural?" in Margaret Wilson and Anna Yeatman (eds) above n 30 at ch 8.