F. W. GUEST MEMORIAL LECTURE

THE COURTS AND PUBLIC CONTROVERSY

THE RIGHT HONOURABLE SIR ROBIN COOKE*

The F. W. Guest Memorial Trust was established to honour the memory of Francis William Guest, M.A., LL.M., who was the first Professor of Law and the first full-time Dean of the Faculty of Law at the University of Otago, serving from 1959 until his death in November 1967.

It was felt that the most fitting memorial to Professor Guest was a public address upon some aspect of law or some related topic which would be of interest to the practitioners and the students of law alike.

It is an honour to give the annual salute to the late Professor Francis William Guest in this strong law faculty in this distinguished university.

The subject of this Guest memorial lecture is less chosen than dictated by a chain of circumstances. Guest was of genuinely philosophical cast of mind, but he diluted his philosophy with a liberal measure of the practical and might be expected to approve, at any rate in principle, of something with that object. The two previous judicial speakers in this series, Sir Alexander Turner[1] and Sir Ronald Davison,[2] had in common in their themes an emphasis on the ever-growing significance, both in number and in importance, of cases between citizens and agencies of the State. Sir Alexander indeed was so concerned about a swamping of the courts that he counselled the continuance of what he described as a severe restriction on standing to bring administrative law proceedings; but the deluge has yet to occur in this field as in others, and in any event opinion has probably since hardened against flood-protection measures. For his part the Chief Justice accepted the inevitability of more work in administrative law, even more original jurisdiction, while suggesting more use of expert assessors and the like in suitable cases.

Both these speakers understandably proceeded on a general level. They have covered that ground, and admirably, and I cannot usefully add anything, as the third Judge is supposed to say. But what does seem called for now is some account, from the point of view of one on the Bench, of the kind of practical problems which have been encountered lately, and of the approach that has been brought to them. It is a familiar observation that in very recent years the courts, including the Court of Appeal, have found themselves increasingly required to cope with matters of

* The Right Honourable Sir Robin Cooke is a Judge of the Court of Appeal in New Zealand. The above text is the substance of the Guest Memorial Lecture delivered at the University of Otago on 2 August 1982.

1 "The Quest for Justice in the Welfare State" (1977) 4 Otago LR 1.
2 "The Role of the Courts in Modern Society" (1979) 4 Otago LR 277.

the older Parliament buildings. I can see all the demonstrations and occasionally catch a glimpse of a cabinet minister. Nor perhaps spiritually; for after the opening of Parliament, providing as it does an opportunity to prove the usefulness of scarlet robes and full-bottomed wigs, we go to the cathedral to pray for them. (As is only to be expected, the judiciary seem to attend in greater numbers than the ministers.) In general, however, apart from State luncheons, Speaker's receptions and other more or less formal occasions, there is not much contact between Members of Parliament and Judges. Some would much applaud this state of affairs. I am not so sure; it might be good for both sides to see that the others are not as narrow-minded as they sometimes think.

It is time to come to something with a more direct Otago connotation. There are an infinite number of possible topics about which I am not going to talk, and high on the list is the Clyde dam. Only recently have I seen the judgment of Mr Justice Casey, and then because it was cited to us in another case. Such of the media as one usually sees in Wellington — I cannot speak with confidence about the South Island papers — have evidently not had the space to report it to any extent, because of the prior need to report reactions to and comments upon it. I have formed no view at all as to whether or not I agree with it: partly because, although apparently not the subject of an appeal, it might call for judicial consideration some time. One thing that can be said with complete confidence, however, is that it was a courageous decision. No matter whether or not it commands universal agreement, and while recognising the view that its consequences may be highly inconvenient to numbers of people, one can regard as basically healthy a judicial system producing a Judge who is prepared on such an issue to decide the law as he sees it, irrespective of fear or favour.

The issue of regional as well as national significance on which it is legitimate to say something is the National Development Act, with special reference to the proposed Aramoana aluminium smelter. The 1979 Act was unique in its provisions that challenges to the validity of proceedings thereunder should be brought directly in the Court of Appeal. The Court is essentially an appellate one, and it is crucial that this should remain its main function. Any suggestions for adding other functions will always have to be scrutinised with a jealous eye. In this instance the legislature saw special reason, namely the urgency and nature of the issues, for providing that in the very small number of cases likely to arise under that Act, a single Court hearing and in the Court of Appeal should be required; with sundry time limits and provision to ensure speedy disposal. Two projects under that Act — Aramoana and the Motunui synthetic petrol plant (that is in Taranaki) — have led to litigation.

As regards practicability the jurisdiction has proved perfectly manageable. With the co-operation of counsel and the parties and a determination on all sides not to waste time, the cases have been dealt with expeditiously and without (it seems to me) skimping attention to any crucial point. Those last words are chosen deliberately; contrary to the apparent wishes of some commentators, the judgments have not included disquisitions on points not essential for the determination of the

case. The main disadvantage has been the absence of decisions and interlocutory procedure at first instance in another court. So we have not had the benefit of the winnowing out of lesser points that can be achieved thereby, nor the very important help of another court's opinion on the more difficult points. In this situation it is perhaps a matter of good fortune that there has been complete unanimity in each of the decisions and near unanimity in the reasoning.

The first rulings were on procedural points, but they may have some effect beyond the scope of litigation under the National Development Act. In *Environmental Defence Society* v *South Pacific Aluminium Ltd*[6] it was held that in proceedings properly brought for a declaration as to the validity of an Order in Council there is a jurisdiction to order discovery and interrogatories against the Crown. That the jurisdiction is discretionary was given emphasis, on which basis certain interrogatories were disallowed as oppressive. If you are not sure what fishing interrogatories are, reference to the set put forward in that case will provide a model precedent.

Discovery of documents was a different matter. Often this can be crucial in litigation. If counsel should ever happen to fail even to consider applying to have the other side disclose their documents, a serious risk of liability for negligence would be incurred, although obviously there will be some cases where counsel can rightly advise that no good purpose would be served by an application. The decision that the discretion should be exercised in the *Environmental Defence Society* case to order the Crown to make a limited discovery, on the footing that only the more immediately relevant among its mass of documents need be listed, was again not one of any great difficulty. In retrospect, however, it emerges as perhaps the most important decision that we have made in the National Development cases. For, without seeing the crucial documents, the Court could never have felt any real confidence in the possibility of holding the balance equally between citizen and State.

The next stage was the filing of an affidavit of documents in compliance with the order for limited discovery. The affidavit was accompanied by an objection, signed by the Deputy Prime Minister, to the production of a number of the documents — indeed all the really important ones — on grounds stated in full terms. The theme stressed throughout was sufficiently conveyed by some of the early words: ". . . they comprise a class of documents which ought not to be produced because they relate to consideration at the highest levels of the Executive of matters concerned with the policies of the Government". Such terminology gave the Court some concern. The Act laid down quite an elaborate series of criteria to be considered before an Order in Council could be made enabling a project to proceed under the "fast track" machinery there provided. By contrast the terms of the objection seemed to emphasise Government policy rather than the statutory tests. The opportunity to challenge such an Order in Council, apparently vouchsafed by the Act itself, would be a hollow thing if inspection were refused. At all events, while recognising that the jurisdiction to order inspection should be

6 [1981] 1 NZLR 146.

sparingly exercised against a Ministerial objection, and especially so where Cabinet papers are involved, the Court thought it right to order inspection in this instance. We were encouraged by high English and Australian precedents, although the cases were not precisely in point.

The initial order was limited to production for inspection by the members of the Court. It was promptly complied with next day, when each of the three members who sat in that case inspected in turn and privately a file of comparatively modest dimensions delivered to the Court office in an envelope and with all due security.

It had been realised that inspection might show that the statutory tests had been scrupulously complied with.[7] And so, in substance, it proved. The terms of the objection had been perhaps a little misleading, although of course not purposely. The attention of Cabinet had been directed to the applicability or otherwise of the provisions of the Act in a clear and carefully prepared paper. It was possible to imagine quibbling objections to the approach in the paper, but little or nothing more. We held that notwithstanding the terms of the Ministerial objection the interests of justice did not require any disclosure to the plaintiffs, who would suffer no injustice by non-disclosure. The documents were returned, without prejudice to *the Crown's* right to apply for their admission in evidence.

It seems a little odd that a New Zealand academic commentator should see that result as an anti-climax. So it may have been to those who wished to strike down the Order in Council, but if any thought be given to the public interest surely it is more satisfactory that the Government should be found on investigation to have acted with a careful regard for the law.

As it turned out, that reservation of the Crown's right may have been decisive in the litigation. Counsel for the Society was permitted to engage in some cross-examination of the Secretary of Cabinet on his affidavit. A mixture of skilful questions and an understandable tendency for the distinguished witness to reply in generalities, without revealing the actual contents of documents, produced a situation in which it was evident to the Court that a wrong impression was being created. We suggested to the Solicitor-General that the Crown might wish to reconsider the position and instruct him to put in the Cabinet paper. There was an adjournment for something approaching an hour. It was as tense and worrying a time as I remember in a court. Had the Crown not changed course, there might have been no alternative as the evidence stood to finding that the statue had not been complied with. The plaintiffs had managed to obtain some answers which, without further explanation, provided some support for their case. It would hardly have been just to find against them on material that they had not been allowed to see. An insistence on what used to be called Crown privilege, rather than economic fluctuations, might therefore have stopped the smelter project in its tracks. Another commentator, who has written in an otherwise penetrating note of ". . . this forensic *minuet*, an excess of judicial *politesse* . . .", must have been sheltered from the atmosphere of the case by ivory walls.

7 See ibid, at p 157.

In the event it was otherwise. The Solicitor-General applied for leave to put the paper in evidence. This greatly limited the range of arguments available to *E.D.S.* The remaining arguments of that Society plainly failed.[8] But there were arguments of another kind, one of them formidable, by another plaintiff society, *CREEDNZ,* well known no doubt to many in this audience. To these we addressed ourselves in the judgments reported in 1981 1 NZLR 172.

So far as the arguments sought to invoke the rules of natural justice or fairness, they probably never had much chance of success. The Courts lean towards the rules — one is sorry, incidentally, that outside the Courts time is still being spent by some in trying to draw fine theoretical lines between natural justice and fairness, rather than helping to evolve the substance of the obligation. But to show that the rules should apply to collective decisions at the highest level of Government cannot be easy. Although not inconceivable, it would be somewhat unusual to recognise a right in individuals or groups to be heard on matters of public or private interest by the Cabinet or the Executive Council before a decision is taken on an issue where far-reaching economic considerations are crucial. And clearly enough it would have been inconsistent with the scheme of this Act, which allowed rights of participation in Planning Tribunal hearings at a later stage. As for the allegation of predetermination, the Minister who could be expected to approach the vital Cabinet meeting without being in some degree influenced by all the political debate that had gone on for months before is not to be found in this world.

The much more difficult question was whether the plaintiffs had shown that the Executive Council had failed to take into account considerations which in law they were bound to take into account. A strong body of affidavit and deposition evidence was presented against the scheme, emphasising the economic risks. The case for the project, on the other hand, had largely to be gathered from newspaper reports of statements by Ministers, tendered in evidence by the other side for another purpose altogether. In the end, thanks largely and paradoxically to that material, the defence came rather shakily through. Presumably the plaintiffs would now assert that later events have underlined what their experts said. I am in no position to express a view about that.

What one would hope, as a lawyer concerned to see a balanced and effective system of administrative law, is that it is now more throughly appreciated that this branch of law is not limited to mere technicalities. If it is evident that an authority has grounds which could fairly be regarded as reasonable for acting as it has, the law should ask for no more as regards the factual basis of the action. However eminent the authority, it would be an abdication of responsibility for the law to be content with less. The Courts have not the slightest inclination to intrude into the discretionary sphere properly belonging to the Government. Even a bill of rights would not alter that. At the same time, it is one of the functions of the Courts to see, as far as they can, that Executive discretions are exercised in accordance with the intentions of the relevant Acts of Parlia-

8 Ibid at p 216.

ment. To perform this function adequately it is essential to be able to understand the real basis of the Executive decision.

Hard on the heels of the *Aramoana* cases came another that seemed to underline that proposition. It was the Springbok tour case, *Ashby* v *Minister of Immigration*,[9] heard and determined later on the same day as the *Aramoana* judgments were delivered. There may have been time for coffee between the cases. The plaintiffs sought to show that the Minister could not lawfully grant the side temporary entry permits. By statute the Minister has an apparently unfettered discretion to grant a permit to a visitor (not being a prohibited immigrant) who satisfies him that he desires to enter New Zealand for any of various purposes. These include "pleasure". Extraordinarily enough it was common ground that such was the purpose of these rather unfortunate young men, perhaps not much more generally welcome here than the English at Agincourt and in the event less successful.

The case, commenced belatedly, swiftly reached the Court of Appeal. The main argument in the High Court appeared to have been that the International Convention on All Forms of Racial Discrimination, to which New Zealand is a party, deprived the Minister of power to grant entry permits to teams from a country where apartheid was practised. That was really a hopeless argument, in the light of the well-settled principle that international treaties are not part of domestic law until incorporated therein. However, in the High Court judgment there were references to the effect that the Convention was at least a relevant consideration (an expression not then analysed, as the argument did not call for its analysis) but that it could be assumed that the Minister was not ignoring it.

The case was presented in a rather different way on appeal. It seemed to us, from the press cuttings in evidence, that the Minister may well not have had specific regard to this Convention, as distinct from the Gleneagles Agreement which, unlike the Convention, dealt expressly with sporting contacts. We thought it right to give the opportunity to the Crown to put in an affidavit on this new point. The result, despite some initial demur, was a helpful and candid affidavit from the Minister. In short it showed, as expected, that he had not specifically considered the Convention but had considered the declared opposition of both the United Nations and the New Zealand Government to apartheid. The Court was thus able to decide the case on a realistic factual basis. I believe that this was an advance.

Of course our decision — in essence that the Minister was not bound by implication to consider a convention of doubtful bearing on the subject — does not please everyone. Any other decision, though, would have been sheer romanticism. To read as implied in the statute "after having regard to New Zealand's international obligations" would be to force in a concept so vague that no responsible draftsman would have inserted it deliberately. Months or years might elapse while the obligations were being ascertained, yet the section is concerned with temporary permits. The possibility was expressly left open, however, that an international agree-

9 [1981] 1 NZLR 222.

ment (such as Gleneagles) might have such a direct and obvious bearing that Parliament could not have meant the Minister to ignore it. Accordingly it was disappointing to read in *The Times* that *Reuters* had reported that the New Zealand Court of Appeal had decided that the Minister could do exactly as he liked.

In the decisions selected for mention I have tried to bring out a thread of realism. This may apply also to the only others to which time permits a specific reference, the Royal Commission cases. The plural is appropriate because the *Thomas Commission* decision is to be delivered on Friday. The Full court judgment, from which in part it is an appeal, is reported in 1980 1 NZLR 602. You will not expect me now to say more about that case specifically. Nor, as regards the *Erebus* case,[10] to comment on the strange and sad events on the judicial scene that followed the case, adding something akin to a Greek tragedy to that of the disaster itself. The present relevance of such cases is connected with the need for both realism and restraint in the approach of the Courts to litigation touching major public controversy.

Realism in this sense. There is an argument for hands off commissions of inquiry. Notwithstanding that in New Zealand they have a statutory basis and potentially a very wide range of activity indeed, some purists would urge that their essentially inquisitorial function should exempt them altogether, or at least for all practical purposes, from judicial review. I can only say that, with respect, I find this argument a little naive. The reports of commissions can have an effect on reputation and standing more damning than any judgment. The general public can regard them as no less conclusive than that of a court of some other duly constituted statutory authority. It does not seem too much to treat these great powers as subject to very broadly similar obligations of reasonableness and elementary procedural safeguards; provided of course — and these things are no less important — that full allowance is made for the familiar advantage of seeing and hearing the witnesses and that the analogy with the judicial process is not pressed to the point of rigidity.

In some quarters it has been said that after the recent controversies Judges may not be willing to accept appointment to commissions of inquiry. There are even suggestions that to do so is inconsistent with the judicial role. I must beg to differ. Wherever judicial qualities are called for — that is to say, typically, a calm and objective factual judgment on evidence — in my opinion a Judge should be willing to serve. The essential corollary is a judicial approach. In times past Judges have discharged the role with success. To mention a few New Zealand examples: Sir David Smith, Sir Robert Kennedy, Sir Thaddeus McCarthy, Chief Judge Jamieson — whose death after distinguished and varied service, sometimes in controversial inquiries, has just been announced. We can be confident that the pattern has not been lost.

In cases where the Courts as such are directly concerned with public controversy, the art of being neither too far ahead nor too far behind general community opinion — itself often a myth and even when not hard enough to gauge — will always be a challenge. Lord Devlin may

10 [1981] 1 NZLR 618.

have hinted in his collection of addresses that Lord Denning had got the balance wrong, committing the judicial sin of enthusiasm. Perhaps so, but one of Lord Denning's major achievements was, by his extremism, to pave the way for acceptability of the less obtrusive creativeness of great Judges like Lord Reid and Lord Wilberforce.

But in the end judicial creativeness, social engineering and so forth, is of secondary moment. What remains, and will always remain, the most important judicial quality of all is an understanding impartiality. To that one is sure that the New Zealand Courts must be determined to dedicate themselves, whatever the social or constitutional changes. The most disturbing criticism of Lord Denning is that developed particularly by some Scottish academic lawyers. Not that he has been an iconoclast, but to put it bluntly, that he has been a bigot. Denning towers above his critics. But the very making of such charges is symptomatic.

The task of impartiality is getting harder. I have mentioned some decisions that seemed relatively easy, but others are of almost excruciating difficulty. The law reports of fifty years ago sometimes have a faintly halcyon air. They had cases about the Sale of Goods Acts. Even the reported litigation of the slump era does not on the whole convey an impression of social restlessness. Ours is a society of controversy. In attuning themselves to its demands the Courts must keep constantly in mind that true impartiality does not come easily or naturally: it has to be striven for.