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*Te Whare Wānanga
o te Ūpoko o te Ika a Māui*



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Te Kauhanganui Tātai Ture

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by Alex Frame

This book traces the journey overland from Auckland to Taupo of the Governor of New Zealand, Sir George Grey, and the Upoko Ariki (paramount chief) of Tuwharetoa, Iwikau Te Heu Heu, with their respective parties, in the summer of 1849-1850. Alex Frame sheds light on the interaction between the respective cultures of Grey and Iwikau—in particular as to custom and law—in a period before the descent into hostilities between Government and the tribes.

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PUBLIC LAW IN NEW ZEALAND

*K JKeith**

Who saw life steadily, and saw it whole¹

It is a great pleasure to be invited to write the introductory essay for this new journal. Public law, taken broadly, is about the State, its powers, and its relationships. I will reflect here generally on public law in New Zealand and on aspects of public law at Victoria University of Wellington. These reflections about the place and development of public law in New Zealand concern the founding of New Zealand, the relations of Maori (or particular hapu or iwi) to the State, the relations of New Zealand to the United Kingdom, the region, and the world, and the relations of the citizen to the State. The areas are vast.

I discuss, very briefly, one or two matters in each area. My purpose is not to state the law in those areas, but to attempt to give some sense of principle, sources, the balance between continuity and change, some of the principal actors (a number with connections to this university), and the role of the university. I give greater attention to earlier times since major themes recur during those times, since they remind us that public law is long established, and since later events are better known. And to quote Goethe, we must labour to possess that which we have inherited.²

One continuing issue is definitional. What is public law? How is it to be distinguished from private law—if it should be?³ Does it include international law? What is the

* Judge of the New Zealand Court of Appeal; member of the Faculty of Law, Victoria University of Wellington 1962–1964, 1966–1991, and Professor Emeritus of the University; *Membre de l'Institut de Droit International*. Tim Smith, my clerk, provided great research help.

1 Matthew Arnold *To a Friend [Sophocles]*. Sir Alan Danks, chair of the Committee on Official Information (which proposed what became the Official Information Act 1982) and then of the Information Authority, was guided in his public policy work by this idea: see the final report of the Information Authority "Report of the Information Authority for the Year Ended 31 March 1988 and Concluding Report to 30 June 1988" [1987–90] VII AJHR E27 2.

2 Johann Wolfgang von Goethe *Faust* pt I l 682 (1886): "Was du ererbt von deinen Vätern hast, Erwirb es, um es zu besitzen!"

3 Compare the cautionary comments of Lord Wilberforce in *Davy v Spelthorne Borough Council* [1984] AC 262, 276 (HL) with what he had said some years earlier in *Anns v London Borough*

relationship between constitutional law and administrative law? The issue is more than semantic since it has important consequences for teaching, publishing, practice, and, much more deeply, for our mindsets.

Public Law—Administrative Law

On the matter of definition, Frederic William Maitland provides us with an important reminder of the need for clear vision and for being careful with the facts. In 1888 he told his Cambridge students that about half the cases reported in the Queen's Bench reports had to do with rules of administrative law.⁴ But the theoretical condemnation of *droit administratif* by Albert Venn Dicey in his lectures, given a little earlier at Oxford University and published in his hugely influential *Introduction to the Study of the Law of the Constitution*,⁵ long prevailed over the facts. Thus it was not until 1973 that administrative law had a separate part in *Halsbury's Laws of England*, and the term remains unused in the index to the official Law Reports.⁶ While Lord Reid 40 years ago said that "[w]e do not have a developed system of administrative law—perhaps because until fairly recently we did not need it",⁷ the great judgment in which he said that demonstrated in compelling detail that the material for such a system had long existed in great quantity.

There is a related New Zealand story. On 1 October 1940, the Chief Justice, Sir Michael Myers, gave an address to the New Zealand Institute of Public Administration entitled

Council of Merton [1978] AC 728, 754 (HL), and especially with what Lord Diplock had said in the first sentence of his speech in *Gouriet v Union of Post Office Workers* [1978] AC 435, 496 (HL).

4 Frederic William Maitland *Constitutional History of England: Course of Lectures* (Cambridge University Press, Cambridge, 1908) 305.

5 A V Dicey *Introduction to the Study of the Law of the Constitution* (Macmillan, London, 1885).

6 It was adopted in New Zealand in 1953.

7 *Ridge v Baldwin* [1964] AC 40, 72 (HL). He cites about 30 cases, the earliest from 1615. The influence of the new ground-breaking textbooks by S A de Smith (*Judicial Review of Administrative Action* (Stevens, London, 1959)) and H W R Wade (*Administrative Law* (Clarendon Press, Oxford, 1961)) may also be seen. A few years earlier R B Cooke in *Buller Hospital Board v Attorney-General* [1959] NZLR 1259, 1272 (CA) had used the expression "administrative law" in argument in the Court of Appeal—the first recorded use in the NZLR (other than in citations or quotations). As a judge he was also the first to use "administrative law" and "public law" in judgments reported in the NZLR: *Auckland City Council v Blackie* [1977] 1 NZLR 208, 210 (CA) and *Van Gorkom v Attorney-General* [1977] 1 NZLR 535, 543 (SC); for an early contribution to discussion of the issues in New Zealand see his paper "The Rights of Citizens" in R S Milne (ed) *Bureaucracy in New Zealand* (New Zealand Institute of Public Administration, Wellington, 1957) 84. For a more recent New Zealand contribution to the definitional issues see Michael Taggart "The Province of Administrative Law Determined?" in Taggart (ed) *The Province of Administrative Law* (Hart Publishing, Oxford, 1997) 1.

"The Law and the Administration". Like the title, the address itself indicated some reluctance about "this so-called Administrative Law" (referring to Dicey, the University of London prescription for the subject, Lord Chief Justice Hewart, Professor W A Robson, Professor Felix Frankfurter, and E J Haughey), but it did give a sense that matters were moving:⁸

It is no breach of confidence, I think, to say that the question was recently considered by the Council of Legal Education in New Zealand with a view to clarifying the position for the purpose of the University examinations in law, so far as concerns the inclusion in the curriculum of what the law professors are pleased to call "Administrative Law." The practical view taken by the Courts and the practising profession is that there is really no such special branch of the law but that what the academicians call administrative law is properly included in and is part of what is generally called Constitutional law. A compromise was agreed upon by adopting for recommendation to the University authorities an amendment to the prescription of Constitutional Law for the LL.B. examination by adding these words: "A general knowledge of the principles of Administrative Law with special reference to New Zealand, that is to say of the legislative and judicial powers of administrative officers or departments, and of judicial review of executive and administrative action." A corresponding amendment was suggested in the prescriptions for the LL.M. examination. These prescriptions follow very much upon the lines of Professor Frankfurter's definition.

Professor R O McGechan,⁹ in commenting on administrative law decisions given in 1949–1951, mentioned the following as one probable reason for the increase in the number and importance of those cases:¹⁰

8 Rt Hon Sir Michael Myers "The Law and the Administration" (1940) 3 NZ J Publ Admin 38, 44. Sir Michael says by way of preface (at 39) that his recollection of the political side of the administration of the affairs of the country went back to Sir George Grey, whom he knew as a youth in his teens and before. To bring the personal connections forward, Colin Aikman was the assistant to Sir Michael in the New Zealand delegation at the 1945 Conference which prepared the United Nations Charter; see for example Colin Aikman "Personal Postscript to the San Francisco Conference" in Margaret Clark (ed) *Peter Fraser: Master Politician* (Dunmore Press, Palmerston North, 1998) 191.

9 Professor R O McGechan was Professor of Jurisprudence, Roman Law, Constitutional Law, International Law, and Conflict of Laws at Victoria University College from 1942 until his tragic death on his way to an international relations conference in 1954.

10 R O McGechan "Survey of New Zealand Decisions in Administrative Law 1949–1951" (1951) 14 NZ J Publ Admin 57, 57 (one of a series he began in 1942 and which was continued by Professor C C Aikman through to 1967 with the help of junior colleagues). See also J L Robson and K J Scott "Public Administration and Administrative Law" in Robson (ed) *New Zealand: The Development of its Laws and Constitution* (Stevens, London, 1954) 84, 90 and generally Peter Spiller "The History of New Zealand Legal Education—A Study in Ambivalence" (1993) 4 Legal Educ Rev 223.

The first is the education—self-education and formal education—of New Zealand lawyers in matters of Administrative Law. Twenty years ago there was little appreciation of the potentialities of litigation in this field outside local government matters. When I first arrived in New Zealand, about twelve years ago, what immediately struck me by way of contrast to Australia was the fact that nearly all lawyers balked at any Court action where departments of government were involved. They protested that even if they won the Government would merely alter the regulations and deny them and their clients the fruits of their victory. But the work has come in in ever increasing volume and with constant work has come confidence in the ability to do this and that to a client's advantage. Lawyers have educated themselves to some effect it would seem. At that time no administrative law was taught in the New Zealand University law course. In 1941 it was introduced for the first time and I well remember the difficulty my colleagues had in inducing even the judges of those days to see that it really was a necessary part of every lawyer's stock-in-trade. In the short space of ten years every lawyer of my acquaintance has become convinced that it is one of his important bread and butter subjects. Litigation on these matters is more likely to increase than to diminish.

The prediction in the final sentence has certainly been borne out, with the law reports now routinely including as many public law cases as contract ones.

Public Law—The Law of Nations

We can get some sense of the law, especially public law and its capacious roles, as it was in 1840 by recalling William Blackstone (1723–1780) and John Marshall (1755–1835), two major figures of our legal and constitutional heritage. In the year that Captain James Cook made landfall near Gisborne, William Blackstone was publishing the fourth and final volume of his *Commentaries on the Laws of England* (1765–1769). It has had a huge impact on the structure, content, teaching, researching, and practice of the law in the common law world, particularly in the United States before as well as after its independence.¹¹ Two passages in particular bear on the relationship of different legal systems.

The first is about the extension of the law of England to newly acquired plantations and colonies. Rights there were founded upon the law of nature, or at least the law of nations. Blackstone distinguished between lands claimed by occupancy only, when found uncultivated, and those which, already cultivated, were gained by conquest or ceded by

11 See David J Boorstin *The Mysterious Science of the Law: An Essay on Blackstone's Commentaries* (University of Chicago Press, Chicago, 1941, republished with a new foreword 1996) xv: "Blackstone's work—as explained and elaborated by numerous American editors—became the bible of American legal institutions". For a valuable account of the influences on Blackstone in the preparation of the *Commentaries* see Alan Watson "The Structure of Blackstone's Commentaries" (1988) 97 Yale LJ 795.

treaty.¹² The colonists in the first case carried English law with them, but only so much of it as was applicable to their own situation and to the conditions of the infant colony. By contrast, in conquered or ceded countries that already have laws of their own "the ancient laws of the country remain, unless such as are against the law of God, as in the case of an infidel country".¹³ The American plantations, he said, were principally of the latter sort and therefore the common law of England as such had no authority there, they being no part of the mother country but distinct (though dependent) dominions. While the facts of colonisation do not match Blackstone's categories and the law of the old and the new have been applied and mixed in ways which differ from his prescription, his statements are nevertheless suggestive.

Blackstone's second passage does not face the same difficulties. It is about the place in local law of "the law of nations" (it was not for another 60 years that Jeremy Bentham invented the expression "international law"):¹⁴

[T]he law of nations (wherever any question arises which is properly the object of it's jurisdiction) is here adopted in it's full extent by the common law, and is held to be a part of the law of the land.

At the beginning of the 19th century John Marshall, the great American Chief Justice, similarly treated the law of nations (the expression used in the United States Constitution and early federal legislation) as part of the law he was to apply in deciding a dispute about jurisdiction over a foreign warship in a United States court. To return to the definitional issue, he used the expression "public law" as equivalent to, or at least as including, what we would now refer to as international law:¹⁵

It seems, then, to the Court, to be a principle of public law, that national ships of war, entering a port of a friendly power open for their reception, are to be considered as exempted by the consent of that power from its jurisdiction.

The same usage is to be found five years later on the other side of the Atlantic in a major judgment of the great admiralty judge, Sir William Scott (later Lord Stowell), also concerned with jurisdiction over a foreign vessel, this time on the high seas and engaged in the slave trade. In *Le Louis*¹⁶ he recognises two principles of "public law" as

12 William Blackstone *Commentaries on the Laws of England* introduction s IV *104–105.

13 Blackstone, above, introduction s IV *105.

14 Blackstone, above, IV ch 5 *67.

15 *Schooner Exchange v McFaddon* (1812) 2 US 478, 488.

16 *Le Louis* (1817) 2 Dods 210, 243.

fundamental—the perfect equality and entire independence of all states, and their equal right to the uninterrupted use of the unappropriated parts of the ocean for their navigation.

Public Law—The Colonising of New Zealand

I come now to New Zealand, to a decision of first importance, given in 1847, about the source and the grant of private title to land. H S Chapman J, in resolving, with Martin CJ, basic questions about those matters, prefaced his discussion of the substantive law with a most interesting passage about legal method and the sources of the law he was to apply:¹⁷

As this question involves principles of universal application to the respective territorial rights of the Crown, the aboriginal Natives, and the European subjects of the Queen; as moreover its decision may affect larger interests than even this Court is up to this moment aware of, I think it is incumbent on us to enunciate the principles upon which our conclusion is based with more care and particularity than would, under other circumstances, be necessary.

The intercourse of civilized nations, and especially of Great Britain, with the aboriginal Natives of America and other countries during the last two centuries, has gradually led to the adoption and affirmation by the Colonial Courts of certain established principles of law applicable to such intercourse. Although these principles may at times have been lost sight of, yet animated by the humane spirit of modern times, our colonial Courts, and the Courts of such of the United States of America as have adopted the common law of England, have invariably affirmed and supported them; so that at this day, a line of judicial decision, the current of legal opinion, and above all, the settled practice of the colonial Governments, have concurred to clothe with certainty and precision what would otherwise have remained vague and unsettled. These principles are not the new creation or invention of the colonial Courts. They flow not from what an American writer has called the "vice of judicial legislation". They are in fact to be found among the earliest settled principles of our law; and they are in part deduced from those higher principles, from charters made in conformity with them, acquiesced in even down to the charter of our own Colony; and from the letter of treaties with Native tribes, wherein those principles have been asserted and acted upon.

In referring to the United States, he had Chief Justice Marshall particularly in mind. He cited one of his judgments, as well as American practice, Chancellor James Kent's *Commentaries on American Law*, and Blackstone. Chief Justice Martin also quoted from Kent and from a recent New South Wales decision which depended on Vattel's *Droit des Gens*.

¹⁷ *The Queen v Symonds* (1847) NZPCC 387, 388.

Those brief references show that Blackstone, Marshall, Kent, Chapman, and Martin, writing in the decades before and immediately after 1840, drew in a wide-ranging way on principle, humane spirit, state practice (including treaty making and founding charters), and legal opinion in stating what they understood to be the law and, as judges, in deciding the cases that came before them.

In that broad context it is hardly remarkable that at that time the Treaty of Waitangi was seen as a treaty. Nor is it surprising that, at least in part because of the Treaty, the Crown (as opposed to foreign states) was considered to have sovereignty over New Zealand, that the Crown had the fundamental title to land, and that the Crown was the only source of new titles.¹⁸ And the Treaty, the founding charter, the early land ordinances, and the practice and early court decisions were all in accord that the fundamental title to land held by the Crown was subject to existing property rights according to Maori custom.

This is not the occasion to add to the very extensive writing on the matters of title to property and the Treaty, except to recall two matters. The first is that the Treaty is not to be seen as exceptional in its time. Rather it is to be seen in the context of extensive treaty making in the 19th and earlier centuries between European states and the United States on the one hand and states outside Europe and the Americas on the other. So between 1826 and 1910, France, Germany, Great Britain, and the United States signed at least 65 treaties with island countries in the Pacific.¹⁹

The second matter to recall is that on the one occasion when the Treaty of Waitangi and land claims based on pre-1840 sales were considered by an international tribunal,²⁰ the Tribunal plainly distinguished between the Crown's imperium (as against the world), its dominium (the underlying Crown title), and other proprietary rights including ownership.²¹

One major matter of public law arising in those early decades does justify some attention: the broader relations between British and colonial governments and Maori,

18 As was made plain in *Symonds*.

19 See further K Keith "The Treaty of Waitangi in the Courts" (1990–91) 14 NZULR 37, 38–41 and Tom Bennion's excellent *Treaty-Making in the Pacific in the Nineteenth Century and the Treaty of Waitangi* (LLM Research Paper, Victoria University of Wellington, 1987).

20 In the *William Webster* case.

21 See Fred K Nielsen (ed) *American and British Claims Arbitration* (Government Printing Office, Washington, 1926) 537. Solicitor-General John Salmond contributed to the preparation of the British case, as valuably described by Alex Frame in his *Salmond: Southern Jurist* (Victoria University Press, Wellington, 1995) ch 10.

particularly in the wars of the 1860s. How was the "dependent dominion" (in Blackstone's words) or the "domestic dependent nation" (if Marshall's term is to be applied) to be seen? I refer to two documents, written within months of one another. The longer one was written on Boxing Day 1863. I quote from it at some length since it addresses issues of continuing significance. Henry Sewell, who had been briefly the first Premier, wrote to Lord Lyttelton a letter which he published the next year (referring to himself as Late Attorney-General of New Zealand).²² Sir George Grey, he wrote, may be justified in taking up arms against the Waikato and forcing them to abandon the King movement, and yet it may be tyranny to punish them for it, as for a political crime.

This question involves a consideration of what are the respective rights and obligations of two races placed in political relation to each other as ourselves and the natives. The case is anomalous, but, I think, a pretty exact parallel will be found in the case of the American Indians and their relations with the United States. The United States inherited from ourselves the principles on which these relations are established; and they are of general and universal application.

He then quoted Chief Justice Marshall in *Worcester v Georgia*²³ where Marshall confirmed the existing rights of those already in possession to their lands, not even pausing to answer his rhetorical questions:

Did these adventurers by sailing along the coast and occasionally landing on it, acquire for the several governments to whom they belonged, or by whom they were commissioned, a rightful property in the soil from the Atlantic to the Pacific, or rightful dominion over the numerous people who occupied it? Or has nature, or the great Creator of all things, conferred these rights over hunters and fishermen, on agriculturists and manufacturers?

Henry Sewell then turned to the situation here:

Did the New-Zealanders, any more than the American Indians, imagine that by placing themselves under the guardianship of the British Empire they forfeited their inherent rights to govern themselves according to their own usages, and to retain the ownership of their land? As to the latter the treaty of Waitangi expressly reserves to them their territorial rights. As to the former, it is true they surrendered to the Queen the "Kawanatanga"—the governorship—or sovereignty; but they did not understand that they thereby surrendered the right of self-government over their internal affairs, a right which we never have claimed or exercised, and could not in fact exercise. The acknowledgement of sovereignty by the New-Zealander was the

22 Copy published as the Hocken Library Facsimile no 14 (1974). With this letter he sent the Suppression of Rebellion Act, the New Zealand Settlement Act, and the Loan Act, all just passed by the General Assembly.

23 *Worcester v Georgia* (1832) 10 US 214.

same in effect as in the case of the American Indians. It carried with it the exclusive right of pre-emption over their lands, and the exclusion of interference of foreign nations. No doubt it imposed on us the right and the duty of extending our law to them so soon as they should be able and willing to understand and accept it; but it could not authorise us to inflict on them, as ordinary citizens, the penalties of laws, which they never heard of, expressed in language of which they are ignorant. It could not for instance subject them to the penalties of Popish Convict Recusants for refusing to take the oath of allegiance, as has been absurdly argued in this colony; a doctrine which has even received countenance from the Supreme Court.

I have searched the records of this colony and find everywhere intimations of similar doctrines to those enunciated by American jurists as to our relations with the Native race. Practically we have adopted the same rule. We have left to them the internal management of their own affairs; we have refused to extend the jurisdiction of our courts to the settlement of their disputes. We deny them the electoral franchise. When we go to war with them we make treaties of peace; and we have always heretofore extended to them the rights of belligerents. In the very case of the insurgent tribes at Taranaki, [Colonel] Browne proposed to them terms of peace which some of them accepted. The Colonial Government seeks now to escape from the logical conclusion drawn from this fact by treating Col. Browne's offer as a condonation of a supposed treason.

Sewell follows with a passage from an 1844 despatch by Lord Stanley, the Colonial Secretary, to Governor FitzRoy:

I know of no theoretical or practical difficulty in the maintenance under the same sovereign of various codes of law for the government of different races of men. In British India, in Ceylon, at the Cape of Good Hope, and in Canada, the aboriginal and the European inhabitants live together on these terms. Native laws and native customs, when not abhorrent from the universal and permanent laws of God, are respected by English legislatures and by English courts; and although problems of much difficulty will occasionally arise out of this state of things, they have never been such as to refuse all solution, or as to drive the local authorities on the far more embarrassing difficulty of extending the law of England to persons wholly ignorant of our language, manners and religion.

The French were taking a similar position in Algeria and section 71 of the New Zealand Constitution Act 1852 empowered the Crown to set apart native districts where the natives might enjoy their own customs and usages so far as not repugnant to humanity. It was "flimsy reasoning" to say that, because the Queen's sovereignty extended over the whole

colony, therefore all within it were subject to her Majesty and all were therefore subject to the same law.²⁴

Near the end of his lengthy letter, Sewell returns to the Suppression of Rebellion Act 1863:

To apply the law of Treason to Natives who have taken up arms against us under the circumstances which I have narrated, is in itself repugnant to justice and reason. To punish by death belligerents taken in arms, who surrendered themselves as prisoners of war, and who were complimented by the General on their conduct as brave men, would be an outrage on humanity. To extend this penal provision to the case of all persons concerned in the rebellion, no matter in what degree; to authorize the infliction of this punishment by military Courts, composed possibly of inferior officers, in a summary way without ordinary Constitutional guarantees to insure a prisoner a fair trial, is to make law that which is in itself a violation of first principles of law.

The rights of belligerents and their protection, as well as the protection of non-belligerents, are the subject of the second document relating to warfare in New Zealand—the "solemn rules" for pursuing the fighting sent to Colonel H H Greer, the British commanding officer, by Henare Wiremu Taratoa during the Waikato War on 28 March 1864.²⁵

Rule 1. If wounded or captured whole, and butt of the musket or hilt of the sword be turned to me, he will be saved.

Rule 2. If any Pakeha being a soldier by name, shall be travelling unarmed and meet me, he will be captured and handed over to the directors of the law.

Rule 3. The soldier who flees, being carried away by his fears, and goes to the house of the priest with his gun (even though carrying arms) will be saved; I will not go there.

Rule 4. The unarmed Pakehas, women and children, will be spared.

24 The existence of distinct legal systems may be found in Ordinances of the 1840s such as the Native Exemption Ordinance 1844, the Fines for Assaults Ordinance 1845, and the Sale of Spirits Ordinance 1847; in the Maori Councils Act 1900; and still in a limited form in the Maori Community Development Act 1962, ss 30–36. The Preamble to the 1900 Act records the wish of Maori communities to have a simple machinery of local self-government enabling them to frame for themselves rules and regulations on matters of local concern or relating to their social economy as may appear best adapted to their own special wants. The communities were given powers to make bylaws and powers to enforce them by fines. 1900 is also the year of enactment of the Municipal Corporations Act.

25 A J Harrop *England and the Maori Wars* (Whitcombe and Tombs, Australia/ New Zealand, 1937) 218–219.

The end. These are binding laws for Tauranga.

Taratoa was killed at the battle of Te Ranga in June; the copy of the rules of conduct found on his body ended with the words from Romans 12:28 "if thine enemy hunger, feed him; if he thirst, give him drink".

Just two months later the first Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, motivated by the same humanitarian concerns and memories of the Battle of Solferino in 1859, and with some of the same protections as those promulgated by the Maori, was signed in Geneva.²⁶

Vessels on the High Seas

A decade on from Sewell and Taratoa, the Court of Appeal faced an argument by Robert Stout²⁷ that New Zealand courts did not have jurisdiction over crimes committed on the high seas on foreign vessels. The appellant, Charles Dodd, had been convicted by a Dunedin jury of manslaughter committed on board an American barque, the *Oneco*, on the high seas about 500 miles from Tasmania, the closest land. For his client Robert Stout argued that the courts had no jurisdiction over offences on a foreign vessel on the high seas, even if committed by British subjects. He said the question divided into three: the opinion of the jurists, the legislation, and the cases. The ship was to be treated as American territory and, in terms of the first source of authority, Phillimore, Chitty's Vattel, Wheaton, Kent, Dana's Wheaton, and Story all denied jurisdiction unless there was an express municipal law to the contrary. Consistently with the positions adopted by Chief Justice Marshall and Sir William Scott earlier in the century, the three judges of the Court of Appeal were unanimous that there was no jurisdiction. While the Court under the relevant legislation had jurisdiction "where the Admiral hath jurisdiction" and that jurisdiction applied to all parts of the high seas, "that applicability [was] limited by the nationality of the vessel. He has no jurisdiction over a foreign ship ... [T]he deck of a foreign ship cannot be within his local jurisdiction".²⁸

26 Convention for the Amelioration of the Condition of the Wounded in Armies in the Field (22 August 1864) 129 CTS 361; 55 BFSP 43.

27 Then a young Dunedin practitioner and part-time lecturer in common law of the University of Otago (the first university in New Zealand, founded in 1869) and later to be Premier, Chancellor of the University of New Zealand, chairman of the Council of the Victoria University College, and Chief Justice.

28 *R v Dodd* (1874) 2 CA 598, 604–605.

Extending the Authority of the State

By the final years of the 19th century Robert Stout was a member of ministries which engaged, in the words of one of his colleagues, William Pember Reeves, in "state experiments", introducing major labour legislation (including factories legislation and provision for the compulsory conciliation and arbitration of labour disputes), the beginnings of the welfare state with old age pensions, women's suffrage, land reform, legislation facilitating Maori self-government, testator's family maintenance legislation, and continued major state investment in railways, roading, and immigration.

A growing, confident nation also looked outward, both dismissing the possibility of federation with the other Australasian colonies and seeking to acquire colonies and influence in the Pacific. The last even included Richard John Seddon in 1897 informing President McKinley of New Zealand's displeasure at any American intention to acquire New Zealand.²⁹ Congress finalised the annexation of Hawaii the following year, and soon after, following the Spanish American war, American power was firmly planted in the Pacific. While Samoa, which had been sought by New Zealand, was in 1899 divided between Germany and the United States, (German) Western Samoa came under New Zealand administration after the First World War as a mandated territory, and in 1900 the Cook Islands became a New Zealand colony.

A more expansive view of New Zealand authority was also appearing in the courts. Robert Stout, now as Chief Justice, and three of his colleagues ruled in 1906 that an industrial award could regulate relations between employers and employees on a New Zealand ship in a foreign port.³⁰ They managed, although with considerable differences between them, to reach that conclusion notwithstanding a very restrictive ruling given by the Privy Council in 1891 on the power of colonial legislatures to make law with extra-territorial effect.³¹ Professor McGechan later condemned the decision as "probably the worst piece of judicial reasoning the Privy Council has [perpetrated] since laymen ceased to sit on it".³²

That more expansive view appeared in another form in judicial, professional, and executive reactions to decisions of the Privy Council: the protest of bench and bar of 25

29 J Drummond *The Life and Work of Richard John Seddon* (Whitcombe and Tombs, Christchurch, 1907) 325–326.

30 *In Re Award of the Wellington Cooks and Stewards' Union* (1906) 26 NZLR 394 (SC).

31 *MacLeod v Attorney-General of New South Wales* [1891] AC 455 (PC).

32 R O McGechan "Status and Legislative Inability" in J C Beaglehole (ed) *New Zealand and the Statute of Westminster: Five Lectures* (Victoria University College, Wellington, 1944) 65, 86.

April 1903 following the decision of the Privy Council in *Wallis v Solicitor-General*,³³ the stinging attack of the Chief Justice only a little more than a year later in his article published in the *Law Quarterly Review* asking "Is the Privy Council a Legislative Body?";³⁴ and the draft resolution put by Sir Joseph Ward, the Prime Minister, to the 1911 Imperial Conference.³⁵

That it has now become evident, considering the growth of population, the diversity of laws enacted, and the differing public policies affecting legal interpretation in His Majesty's overseas Dominions, that no Imperial Court of Appeal can be satisfactory which does not include judicial representatives of these overseas Dominions.

In the course of the discussion of that draft resolution and a related Australian one proposing a single Imperial Appeal Court with jurisdiction over Great Britain and Ireland as well, the Prime Minister called for Dominion judges to sit in cases from that Dominion. He made particular reference to native lands cases, "the subject of tremendous differences of opinion". The Lord Chancellor, Lord Parmoor, agreed: "I should like very much to have a New Zealand judge present when a New Zealand case, especially one of that kind, was being heard". Later in the debate the Prime Minister said that having a New Zealand judge on the tribunal would meet a strong feeling in New Zealand. Dr J G Findlay, the Attorney-General, added that there could be no doubt that the Privy Council had "on various occasions entirely misinterpreted certain branches of the law in New Zealand". The draft resolutions were withdrawn, the conference agreeing on a number of proposals including the following:³⁶

1. At present, the House of Lords is the Supreme Court of Appeal for the United Kingdom, and the King in Council (in effect the Judicial Committee) is the Supreme Court of Appeal for the rest of the Empire.

33 *Wallis v Solicitor General: Protest of the Bench and Bar* (1903) NZPCC 730; *Wallis v Solicitor-General* (1903) NZPCC 23.

34 Robert Stout "Is the Privy Council a Legislative Body?" (1905) 21 LQR 9. See also his "Appellate Tribunals for the Colonies" (1904) 2 Commonwealth L Rev 3.

35 Cd 5745, 213–244 (also [1911] I AJHR A4) and Cd 5746–1, 236. In the first decade of the century 29 appeals were heard and 12 allowed. It was not until the decade of the 1990s that those figures were exceeded: New Zealand Law Commission *The Structure of the Courts* (NZLC R7, Wellington, 1989) 275.

36 While the number of available judges was increased, no further step appears to have been taken along the lines indicated in para 2. It was another 50 years before the change indicated in para 8 was effected.

2. It is proposed to take a first step towards combining these Courts into a Supreme Court of Appeal for the Empire, and towards strengthening them by adding to the number of Judges composing them.
3. The scheme is that the Home Government should add two selected Judges to the Lords of Appeal. There would then be six Law Lords devoting their whole time to sitting in the two Courts.
- ...
8. It is further proposed that, in accordance with the wishes expressed by the Dominion Representatives, the practice of the Judicial Committee shall be modified so that in Dominion cases any dissentient Judge may be free to give his reasons if His Majesty's consent is given to this change.

Sir Joshua Strange Williams was appointed to the Privy Council on his retirement and sat in 1914 and 1915, hearing appeals from Australia, Canada, Jamaica, and Jersey, but not, it seems, any from New Zealand. Sir Robert Stout and Sir Michael Myers, the only other New Zealand members between the Wars, also appear not to have sat on any New Zealand appeals.

In a less confrontational way than his Prime Minister, Attorney, and Chief Justice, Sir John Salmond, the Solicitor-General, both as counsel in the Court of Appeal and as a scholar in the *Law Quarterly Review*, attempted to limit the impact of the Privy Council's restraints.³⁷ But the legal limits on power, the division among the judges, and the related uncertainty did provide a real basis for the caution that appeared after the Great War.

Going Independent, but Reluctantly

That legal caution came together in the inter-war period with more inward-looking government policies, especially in international relations, sometimes captured in the proposition, attributed to William Ferguson Massey, that while some might trust the League of Nations he trusted the Royal Navy. Indeed, until the election of the first Labour Government in 1935, the only public difference between the very loyal Dominion and the "mother country" in respect of Imperial foreign policy was New Zealand's opposition to the MacDonald Government's initiative in 1924 (by means of the proposed Geneva Protocol) to strengthen the powers of the Council of the League of Nations to deal with threats to international security. Australia and New Zealand feared that the proposed

³⁷ In *Semple v O'Donovan* [1917] NZLR 273 (SC), *R v Lander* [1919] NZLR 305 (CA) (where the Chief Justice dissented, distinguishing *MacLeod*), and "The Limitations of Colonial Legislative Power" (1917) 33 LQR 117.

changes would threaten both the belligerent maritime rights of the Royal Navy and their "white" immigration policies.³⁸

The caution, so far as it relates to New Zealand's constitutional and international status in the inter-war period, can be illustrated by three matters, two involving Sir John Salmond. He advised the Government, which acted on the advice, that it required additional legal authority from the United Kingdom to meet its responsibilities under the League of Nations mandate for Western Samoa. The New Zealand position was more conservative than that adopted by Australia and South Africa.³⁹

Two years later, now as a judge of the Supreme Court, Sir John attended the Washington Disarmament Conference as a member of the British Empire delegation. The other Dominion representatives were incensed when he said in an interview in Washington that the Dominions had no international existence and recognition separate from that of the Empire, whatever conventional practices might properly develop to ensure Dominion representation within that overarching unity. As Alex Frame valuably describes, Sir John explained by a fiction New Zealand's separate membership of the League of Nations in his report to Parliament on the conference:⁴⁰

By the special and peculiar organization of that body, self-governing colonies are admitted in their own right as if they were independent States [T]hey are entitled by express agreement to be treated, so far as practicable, as if they were independent.

The third mark of caution concerning status appears in the long delay in the adoption of the Statute of Westminster 1931 and the attitude to the Balfour Declaration of 1926 in which the Imperial Conference defined the position and mutual relations of the group of self-governing communities composed of Great Britain and the Dominions:⁴¹

They are autonomous Communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs, though united by

38 See for example G Lorna Lloyd *Peace through Law: Britain and the International Court in the 1920s* (Boydell Press, Woodford (Sussex), 1997) chs 3, 7.

39 Alex Frame *Salmond: Southern Jurist* (Victoria University Press, Wellington, 1995) 189–197 and Mary Boyd "The Record in Western Samoa to 1945" in Angus Ross (ed) *New Zealand's Record in the Pacific Islands in the Twentieth Century* (Longman Paul, Auckland, 1969) 115, 125–126.

40 "Conference on the Limitation of Armaments: Report of the Hon Sir John Salmond, Delegate for the Dominion of New Zealand" [1922] I AJHR 1922 A5 15. See also Frame *Salmond: Southern Jurist*, above, 202–210 and Alex Frame "Sir John Salmond 1862–1924" in Vincent O'Sullivan (ed) *Eminent Victorians: Great Teachers and Scholars from Victoria's First 100 Years* (Stout Research Centre, Wellington, 2000) 73, 82.

41 "Imperial Conference 1926: Summary of Proceedings" [1927] AJHR I A6 8.

a common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations.

The law did not, however, conform with that agreed position. The 1931 Statute was accordingly designed to remove the remaining legislative incapacities. While it had that immediate effect for Canada, Australia, South Africa, and the Irish Free State, Australia, New Zealand, and Newfoundland retained the option of whether and when to take that step. As J C Beaglehole said, "this particular statute [was not] very highly esteemed in New Zealand when it was first enacted".⁴² J G Coates, the Prime Minister of the time, and his Attorney-General, Sir Francis Dillon Bell, thought the Balfour Declaration "a rotten formula" and Bell referred to "the damned Statute of Westminster" and ventured to express the hope that Parliament would never at any time seek to come under the Statute.⁴³

Beaglehole made his comment in the preface to a book of an outstanding series of lectures given at Victoria University College in 1944 in response to the announcement earlier that year in the Speech from the Throne that Parliament was to be asked to adopt the Statute of Westminster. The lectures were given by two historians (F L W Wood and Beaglehole), a lawyer (McGechan) and a political scientist (Leslie Lipson) "for it seemed right that the Statute should be discussed from several different points of view".⁴⁴ The lectures highlight the interaction between history, economics, law, and political science, and between internal autonomy and international status, political understandings and legal form, and defence, trade, and foreign policy. While those lecturers were unanimous in their support for adopting the Statute, it was not until 1947 in the next Parliament that that action was taken.⁴⁵

On to the World Stage

From that glittering scholarly exchange, even while war was still raging, I turn to the tumultuous developments and events of the last 60 years. They are better known than some of the matters I have touched on and much has been written about their massive legal consequences in the wide world and in New Zealand, in some cases by the principal

42 J C Beaglehole (ed) *New Zealand and the Statute of Westminster* (Victoria University College, Wellington, 1944) vii.

43 Michael Bassett *Coates of Kaipara* (Auckland University Press, Auckland, 1995) 111–112; W Downie Stewart *Sir Francis Dillon Bell: His Life and Times* (Butterworths, Wellington, 1937) 262–263.

44 Beaglehole, above, viii.

45 Statute of Westminster Adoption Act 1947 (NZ).

actors themselves, notably Sir Geoffrey Palmer, Lord Cooke, and Sir Ivor Richardson.⁴⁶ I am also mindful of the 400-year-old warning of Sir Walter Raleigh that whosoever, in writing a modern history, should follow truth too near the heels, it may happily strike out his teeth.⁴⁷

From all that material I simply comment on the role of two lawyers who gained their spurs in the immediate post-war world and make some brief comparisons between the state of public law in the years when I was first a law student and the present day.

The comment relates to the overlapping roles of two lawyers from the Department of External Affairs in those early years. C C Aikman was at San Francisco in 1945 as a member of the New Zealand delegation to the Conference which prepared the Charter of the United Nations, made the major New Zealand speech on the adoption of the Universal Declaration of Human Rights, replaced Professor McGechan in the Faculty, and was a major adviser on, and architect of, the Constitutions of Western Samoa and the Cook Islands. He was joined by R Q Quentin-Baxter, who had recently served as associate to Sir Erima Northcroft, the New Zealand judge on the Tokyo War Crimes Tribunal, and had attended the 1949 Geneva Conference which adopted the four Conventions for the protection of victims of armed conflict. He was to follow Aikman into the university, while continuing his advisory work, notably in the nuclear testing cases in the International Court and in the preparation of the Niue Constitution and elsewhere in the Pacific.⁴⁸ Both also made contributions to law reform processes, Aikman in the Public and Administrative Law Reform Committee in New Zealand and Quentin-Baxter especially in the United Nations International Law Commission.⁴⁹

46 Even to attempt a list of contributors could involve making invidious distinctions, but it may not be too parochial to mention the 25th anniversary issue of the Victoria University of Wellington Law Review ((1978) 9 VUWLR 355–485) and the special issues of the Review on the Ombudsman ((1982) 12 VUWLR 207–324) and in honour of Sir Guy Powles ((1987) 17 VUWLR 279–431).

47 Sir Walter Raleigh *The History of the World* (Macmillan, London, 1971) (1614) 80.

48 Alison Quentin-Baxter, his wife, another who was an officer of the Department of External Affairs and a member of the Law Faculty, contributed and continues to contribute in major ways to constitutional reform in particular in New Zealand, Niue, the Cook Islands, the Marshall Islands, Fiji, and currently St Helena; see, for example, her essay on "The Problems of Islands" (2000) 31 VUWLR 427.

49 See the Special Memorial Issue in honour of Professor Quentin-Baxter (1987) 17 VUWLR 1–178; see also (1985) 15 VUWLR 1.

With other academics who had significant public sector experience,⁵⁰ they gave their students and the wider legal profession a sense of major changes in the way the law was being made and of the natural and growing impact of international law, notably the law of self-determination and human rights, on national constitution making and law reform. The fact that they taught the range of public law subjects also meant, to revert to Blackstone, that they proceeded on the basis that the law of nations was part of the law of the land. Their careers, their interests, and the size of the law faculties provided a guard against the narrowness of vision that can be found in countries of greater size with greater specialisation.

I return to 1956, to the beginning of my legal education.⁵¹ There are, on the one side, many important elements of continuity and of heritage. The issues of the 1956 New Zealand Law Journal for August and September include, for example, articles on the (then) new Companies Act⁵² and on family protection,⁵³ matters which were the subject of Law Commission work in the 1990s. There are also articles by I L M Richardson on the right of assembly,⁵⁴ and by R B Cooke, jousting with Professor A G Davis, about precedent and in particular about the authority in New Zealand of House of Lords decisions.⁵⁵ It was the barrister, few would be surprised to hear, rather than the professor who was arguing that the New Zealand courts should be looking for the more just result, rather than always following the decisions of the House of Lords in the interests of certainty and uniformity. The issues of the Victoria University College Law Review of 1956, the only other established legal periodical at that time, list among the junior student editors two who have only recently retired from, respectively, the Court of Appeal and the office of Chief Ombudsman. That Review had already published some excellent articles which are of continuing validity, on the case method by R O McGechan,⁵⁶ on legal writing by I D Campbell⁵⁷ and on precedent by E K Braybrooke.⁵⁸ The law reports, over this period,

50 Notably for those of us who studied at Auckland, Professor J F Northey (University of Auckland, 1954–1983); see, for example, his essay on the "New Zealand Constitution" in J F Northey (ed) *A G Davis Essays in Law* (Butterworths, London, 1965) 149.

51 For an excellent example of a then and now review by a great public law teacher see Clark Byse "Fifty Years of Legal Education" (1986) 71 Iowa L Rev 1063.

52 E C Adams "The New Companies Act 1955" (1956) 32 NZLJ 236; 249; 270.

53 "Family Protection: Some Recent Cases" (1956) 32 NZLJ 209; 225.

54 Ivor L M Richardson "The Right of Assembly" (1956) 32 NZLJ 265.

55 R B Cooke "The Supreme Tribunal of the British Commonwealth?" (1956) 32 NZLJ 233.

56 R O McGechan "The Case Method of Teaching Law" (1953) 1(1) VUCLR 9.

57 I D Campbell "Legal Writing" (1955) 1(3) VUCLR 7.

show some elements of continuity. We find for instance a young Cooke appearing in the Court of Appeal before his father,⁵⁹ as happened again in 1994.⁶⁰ And there is an important case decided in August 1956 about fisheries and the Treaty of Waitangi.⁶¹

But, of course, a reading of the journals and law reports of the current day presents a very different world from 1956, as indeed does any survey of the law schools and the statute book. The change has perhaps been even greater in those two areas. While in 1956 there were two notable public law professors at Auckland and Victoria who taught constitutional and administrative law (still a single subject) and international law, they had only five full-time colleagues, all in Auckland and Wellington. And although the 1956 statute book included an Electoral Act, it was essentially an updated 1893 Act (with the important additional element of entrenchment). The 1993 Act is radically different.

The huge changes are to be seen not just in the statute book, the law reports, the periodicals and other legal writing, and the law schools. They are to be seen even more in the outside world.

Leading the enormous changes that have occurred in the 40-year period are the changes in science and technology which have given reality in so many ways to Marshall McLuhan's phrase "the global village".⁶² Consider the changes in the communication of people, ideas, and money; or the number of overseas phone calls, overseas travellers, or transfers of the New Zealand dollar on the world financial markets each day. While those changes have brought great advances and opportunities, massive population growth and movement, huge demands on natural resources, new diseases, and terrifying new weapons of war bring with them great threats to the environment, human and animal health, and human survival, through wars, national and international, and terrorism. Then there are sweeping changes in trade, particularly those affecting New Zealand. In 1956 the Treaty of Rome setting up the European Common Market⁶³ was still only a prospect—but a very real one with major consequences for New Zealand, given that the great bulk of its

58 E K Braybrooke "Are the Rules of Precedent Rules of Law?" (1956) 1(4) VUCLR 7; he came in on the side of the barrister rather than the professor in the debate on the authority of the House of Lords.

59 *New Zealand United Licensed Victuallers Association of Employers v Price Tribunal* [1957] NZLR 167 (CA).

60 *Accident Compensation Corporation v Curtis* [1994] 2 NZLR 519 (CA).

61 *Inspector of Fisheries v Weepu* [1956] NZLR 920 (SC).

62 Marshall McLuhan and Edmund Carpenter (eds) *Explorations in Communication: An Anthology* (Beacon Press, Boston, 1960) xi.

63 As it was called when established in 1958.

exports still went to the United Kingdom. That major commercial and financial connection no doubt was one reason for the English-aligned view to be found in the journals and reports of the time. In the 1956 New Zealand Law Journal one of the original members of the New Zealand Law Commission castigates the courts for their "timid and conservative" attitude to law reform.⁶⁴

The political alignment of the world then was also very sharply different from now. The explosions of Suez⁶⁵ and Hungary were about to occur when Professor Davis was defending the priority and certainty of the common law as stated by the House of Lords. By the time of the last issue of the New Zealand Law Journal in 1956 those explosions had occurred and there is to be found a letter by H J Evans calling for New Zealand contributions to a standing United Nations Peace Keeping Force.⁶⁶ Evans was then a practitioner in Gisborne and was in the news fully 40 years later as an originator of the project to have the World Court declare nuclear weapons unlawful, a process facilitated by the remarkable, unpredicted ending of the Cold War in 1989.

Others much more knowledgeable than I have summarised and analysed the amazing changes through which the world is going. Many of those accounts, notably that of Paul Kennedy in his *Preparing for the 21st Century*,⁶⁷ conclude that the way in which the world has been organised politically and legally for about the last 300 years must be changed. The nation state to which we have become accustomed is either too large or too small for many of the tasks which it is to carry out. That opinion reflects not only huge technological, demographic, and economic change, but also changes in politics, ideology, and the role of the State.

The Challenge to the Teacher of Public Law

What is the role of the university, and in particular of the public law teacher, in all of this? The university statutes provide a felicitously worded guide. The role of the university is to maintain, advance, and disseminate knowledge by teaching and research.⁶⁸ Professor

64 B J Cameron "Law Reform in New Zealand" (1956) 32 NZLJ 72, 73. As Gordon Orr remarks, Jim Cameron is a largely unsung major contributor to the reform of New Zealand law from the 1950s until the 1990s, whose name should always be linked with those of J R Hanan and J L Robson in any assessment of law reform: Gordon S Orr "Law Reform and the Legislative Process" (1980) 10 VUWLR 391, 394–395.

65 See for example Malcolm Templeton *Ties of Blood and Empire: New Zealand's Involvement in Middle East Defence and the Suez Crisis 1947–57* (Auckland University Press, Auckland, 1994).

66 "Correspondence" (1956) 32 NZLJ 352.

67 Paul Kennedy *Preparing for the 21st Century* (Random House, New York, 1993).

68 See for example the Victoria University of Wellington Act 1961, s 3.

William Twining in his 1994 Hamlyn Lectures, in a chapter headed "What Are Law Schools For?", quoted from a report of senior Western academics drafted by Professor Edward Shils:⁶⁹

Universities have a distinctive task. It is the methodical discovery and the teaching of truths about serious and important things ...

Those basic ideas about the nature of the university get further elaboration in this country in the 1990 amendments to the Education Act 1989, in particular in the definition of academic freedom, including the freedom of academic staff and students, within the law, to question and test received wisdom, to put forward new ideas, and to state controversial or unpopular opinions.⁷⁰ I would stress in particular the freedom to put forward new ideas. There is also the responsibility to be a critic and conscience of society. The critic can of course be constructive.

We should always be searching for a broader frame of reference, a systematic way of approaching and handling matters. A related thought from a student, colleague, and friend from long ago urged all lawyers, not just public lawyers, to think as if they were physiologists and not simply pathologists. That broader approach for a public lawyer should focus on the principles underlying our legal, constitutional, and political systems. Ministries, other public bodies including standing and ad hoc inquiry bodies, and various lobby groups have indeed engaged in expressing and developing those principles in the last two decades. Consider for instance the principles underlying the state sector reforms, corporatisation and privatisation, the role of the Treaty of Waitangi, official information, the introduction of the Bill of Rights, parliamentary reform, the electoral system, regulation making, and treaty making. Consider too the principles for the allocation of public power, its exercise and control, and the huge role of international law (we are slow to realise just how much law is "made elsewhere")⁷¹ described and in some degree prescribed in the Legislation Advisory Committee's *Guidelines on Legislation*⁷² with the authoritative

69 William Twining *Blackstone's Tower: The English Law School* (Stevens/ Sweet and Maxwell, London 1994) 49, citing Edward Shils *The Academic Ethic* (University of Chicago Press, Chicago, 1983) 3. See also Twining's challenging *Globalisation and Legal Theory* (Butterworths, London, 2000).

70 Education Act 1989, s 161(2)(a).

71 T H Bingham "There is a World Elsewhere" (1992) 41 ICLQ 513.

72 Ministry of Justice *Legislation Advisory Committee Guidelines on Process and Content of Legislation* (Wellington, 2001).

support of the *Cabinet Manual*.⁷³ University lawyers have made some major contributions of real quality to those matters, but not in all areas, and too often only by way of reaction.

To conclude, I return to Matthew Arnold and Sophocles. As lawyers we must be concerned with the details of fact, circumstance, and law. Recall the serious consequences of Dicey's carelessness with the facts or, to come to a current public policy issue, the ignoring of the facts by some critics of New Zealand's personal injury compensation scheme.⁷⁴ But we must not become engrossed in the detail simply for its own sake. Recall the country that went mad on cartography and made a map as large as its territory.⁷⁵

Two earlier professors in this law school—Richard Cockburn Maclaurin⁷⁶ and R Q Quentin-Baxter⁷⁷—made marvellously evocative use of architectural images to make us think about the law and its processes. Another lawyer, who decided to pursue poetry rather than take a partnership in a major Boston law firm and who later became the Librarian of Congress, compared the poetic and legal enterprises by using the metaphor of the slowly growing coral reef.⁷⁸ Another great legal scholar in speaking of constitutional dilemmas used similar ideas on the dedication of a new law school building:⁷⁹

This magnificent building, which exemplifies the creative spirit in architecture, bodies forth in symbol the nature of law itself. For does not law, like art, seek to accommodate change within the framework of continuity, to bring heresy and heritage into fruitful tension? As Alfred North Whitehead has observed, a society maintains its civilization by preserving its symbolic code while giving expression to forces that, repressed, could break the society asunder. And so the basic dilemmas of art and law are, in the end, not dissimilar, and in their resolution—the resolution of passion and pattern, of frenzy and form, of convention and revolt, of order and spontaneity—lies the clue to creativity that will endure.

73 Cabinet Office *Cabinet Manual 2001* (Wellington, 2001).

74 See Don Dewees, Davies Duff, and Michael Trebilcock *Exploring the Domain of Accident Law: Taking the Facts Seriously* (Oxford University Press, Oxford, 1996).

75 J L Borges "Of Exactitude in Science" in *A Universal History of Infamy* (Penguin, London, 1975).

76 Richard C Maclaurin *On the Nature and Evidence of Title to Realty* (Clay, London, 1901) vi–vii, but compare also his use of Newton's famous words about the boy playing on the foreshore when speaking about theoretical physics; see for example Kenneth Keith "Richard Cockburn Maclaurin 1870–1920" in Vincent O'Sullivan (ed) *Eminent Victorians: Great Teachers and Scholars from Victoria's first 100 Years* (Stout Research Centre, Wellington, 2000) 49, 50.

77 R Q Quentin-Baxter "The Governor-General's Constitutional Discretion: An Essay towards a Re-definition" (1980) 10 VUWLR 289, 290.

78 Archibald MacLeish *Reasons for Music*; see his "Apologia" (1972) 85 Harv L Rev 1505, 1509.

79 Paul A Freund *On Law and Justice* (Harvard University Press, Cambridge, 1968) 23.

