Reclaiming a New Zealand Legal Tradition

THE RT HON DAME SIAN ELIAS GNZM QC

The production of the Auckland University Law Review (AULR) in its early years is something I have described before.[1] It was chaotic and hand to mouth. Those involved were however driven to keep faith with the aspirations with which Dr Northey, our Dean, had set up the Review as a vehicle for student writing on the law. He hoped that the papers produced for seminars in the newly introduced Honours programme would provide a good source of publishable material and perhaps that the prospect of publication would encourage students to enrol for Honours. Quite apart from this strategic aim, he looked to provide students with encouragement to get their teeth into projects of interest with some serious research and thinking. It was a means of creating excitement about law in those learning it. It now seems strange to think that there might not be an outlet of this sort for student work. It is encouraging and worthwhile, as very many contributors have found over the decades since.

But although the Review is now a permanent fixture and well-established, the effort required in this last year has been well out of the ordinary. The motivation and enthusiasm of authors and production team led by Henry and Hugo as Editors-in-Chief is to be celebrated.

One of the more difficult challenges has indeed been the launch. At the time of writing these remarks, I do not know whether we can pull the event off as planned – and re-planned. But the 2021 AULR itself will emerge as a welcome reassurance of continuity and, as always, great interest. Jack Northey would have been pleased. In my remarks for the Symposium, I thought I might reflect on some matters that interested him in his own work.

Those like me lucky to have gone to university in New Zealand in the sunlit and carefree 1960s were taught by lecturers who believed in the matter of New Zealand. To their students they demonstrated in their own lives the delight of learning. I do not want to be too romantic about this. I will refer to some of the complacent blind spots of the time and the gaps in the education, particularly in relation to our legal history. It is also right to acknowledge

1 Sian Elias "Looking Back, Looking Forward: Reflections on Fifty Years in the Law" (2017) 23 Auck U L Rev 14.

immediately the advantages we had in legal education in the 1960s, and I will touch on some of the challenges for legal education today. But I will always be grateful for the great excitement in legal thought that I encountered at this law school and which has stayed with me all my life. We were encouraged to think differently about things that mattered and to make those ideas real. We were the beneficiaries of the revolution in law teaching that saw law faculties at the universities evolve from vocational "part-time night schools"[2] to become centres of learning about law staffed by professional teachers of law. We absorbed the lesson that learning law is a life-long undertaking. Jack Northey, gruff but passionate, set the tone.

Jack Northey himself was a teacher of law and constitutional lawyer deeply interested in the New Zealand legal tradition and its connections to a wider world of ideas. At a time when most New Zealand graduates remained fixed on the United Kingdom for post-graduate study and experience, Northey was one of the first to look to North America, taking his doctorate at the University of Toronto under the supervision of Bora Laskin. He was also someone who had grown up at a time of flowering for New Zealand arts and education, and amid growing national identity and optimism. This time followed the constitutional emancipation achieved through adoption of the second Statute of Westminster, the reflections prompted by the centenaries of both the Treaty of Waitangi and the New Zealand House of Representatives, and the experiences of the Second World War and its aftermath, including New Zealand's participation on the world stage in the setting up of the United Nations and adoption of the Universal Declaration of Human Rights. This background shaped Northey's interest in constitutional law.

In my remarks I touch on three matters that were important to Jack Northey: legal education; the evolution of the New Zealand constitution; and the New Zealand legal tradition and its history, which we are perhaps rediscovering after a period of national amnesia in the doldrums of the mid-twentieth century.

Learning law

I agree with the American philosopher of law who said that "if law is a fit subject for university study, it deserves to be studied not merely for its practical consequences but also for the insight that it offers as to

2 As Northey described the old system of legal education in his introduction to JF Northey (ed) *The AG Davis Essays in Law* (Butterworths, London, 1965) at vii.

human life".[3] And if insight into human life is why we study law, we cannot be narrow or too specialist in the approach we take. We have to be able to see the wood, while tending to individual trees. It is necessary for a student of law to study what a colleague likes to call "the law-making enterprise"[4] as a whole.

We need to understand that law is constantly in motion so that a snapshot of what the law is at any time, even if attainable, is not valuable for a life to be spent in law. A student of law – or a practitioner or judge – has to be familiar with the theory and doctrine by which law is ordered.[5] But law is anchored to the society it serves and its changing needs – law has to be conscious of their movement.[6] Today, when courts are less central in the law-making enterprise than they once were, those who study, teach and practice law have to cultivate a sense of the legal order as a whole. That does not mean it is possible to avoid reading case-law – and I want to suggest why reading cases is absolutely necessary – but today lawyers need to be aware of all the ways in which law develops and is applied and observed.

The law-making enterprise is especially dependent today on the output of legislators. That means we also have to read legislation – a precept often neglected by practitioners. I wonder also whether students of law pay enough attention to what John Laws called "the morality of legislation":[7] what makes good law in a constitutional order. The process of legislating and the content of legislation have principles and values just as the common law has (which are often sourced or explained in common law). The morality of legislation may be obscured by the persistence of the positivist view that

---

3 Morris R Cohen "Law and Scientific Method" in *Jurisprudence In Action – A Pleaders Anthology* (Baker, Voorhis & Co, New York, 1953) 115 at 129.

4 KJ Keith "1883 to 2008: Law and Education Then and Now" [2009] NZ L Rev 69 at 76.

5 Although law is a practical subject, PS Atiyah was plainly right to say in his Hamlyn lectures that it is "quite impossible that it could exist at all without theory": PS Atiyah *Pragmatism and Theory in English Law* (London, Stevens & Sons, 1987). Similarly, Oliver Wendell Holmes thought there was too little theory in law, rather than too much. He regarded theory as "the most important part of the dogma of the law, as the architect is the most important man who takes part in the building of a house. It simply means going to the bottom of a subject": Oliver Wendell Holmes Jr "The Path of the Law" (1897) 10 Harv L Rev 457 at 476.

6 As described by Benjamin Cardozo in the Storrs lectures: Benjamin Cardozo *The Nature of the Judicial Process* (Yale University Press, New Haven, 1921). See also John Salmond "The Theory of Judicial Precedents" (1900) 16 LQR 367 at 389 and Lord Reid "The Judge as Law Maker" (1972) 12 JSPTL 22

7 John Laws "The Good Constitution" (2012) 71(3) CLJ 567.

legislation, especially primary legislation, is an act of will which is unconstrained. Whatever may be the formal position, legislators in a constitutional order, like judges in development of the common law, are constrained to do as they ought. John Locke, expressed this obligation:[8]

> Whoever has the supreme power of any Commonwealth is bound to govern by established standing laws, promulgated and known to the people, and not by *extempore* decrees. There must be independent and upright judges, who are to decide controversies by those laws. And all this is to be directed to no other end but the peace, safety, and public good of the people.

In New Zealand we have, I think, a tradition of taking the morality of legislation seriously in the process of enactment. That is to be seen in guidelines such as are provided by the Cabinet Manual and by the long-standing Legislation Advisory Committee, now succeeded by the Legislation Design and Advisory Committee. One of the good things to come out of the pandemic is to see academic engagement with the difficult choices being made in legislative response to it for consistency with legal values including with the manner of enactment at a time of understandable pressure.[9] This is discharge of the responsibility Peter Birks believed the law schools had to "guard the rationality of law".[10]

So, what is the best way to impart knowledge of the law as a system? Kenneth Keith once identified the process that mattered as being "reading (including researching), thinking, and writing". And, he added, "talking".[11] How much scope is provided in the law school of today for reading, thinking, writing and talking? This is not, I think, an idle question.

The challenges within which law schools operate today are well-known. It is now more than ten years since Michael Taggart wrote of the distortions risked by the performance-based research funding model.[12] From outside, the pressures on law schools seem

---

8 John Locke *The Second Treatise on Civil Government and A Letter Concerning Toleration* (Blackwell, Oxford, 1948) at ch IX, § 131.

9 See Claudia Geiringer and Andrew Geddis "Submission to Privileges Committee on New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Bill 2020".

10 Peter Birks "Adjudication and interpretation in the common law: a century of change" (1994) 14(2) LS 156 at 156.

11 Keith, above n 4, at 78.

12 Michael Taggart "Some Impacts of the PBRF on Legal Education" in Claudia Geiringer and Dean Knight (eds) *Seeing the World Whole: Essays in Honour of Sir Kenneth Keith* (Victoria University

only to have intensified since he wrote. Successive government policies which rebalance the costs of higher education according to perceptions of private as well as public benefit in education has led to pressure on Vice Chancellors to boost income from studies like law because of the path it is seen to offer to higher incomes. In turn, the need to sell legal education to students as paying consumers may be incentivising courses thought to have higher vocational appeal and may be increasing specialisation. The same pressures lead to emphasis on rating law schools which creates distortions of its own. I do not absolve the legal profession from contributing to the present climate, but I think it is a climate that undermines the profession.

These pressures risk disfiguring the legal education which starts the student on a path of learning for life, in which what matters are not only the rules of the moment, but the method by which law will change to meet new circumstances and the needs of our society and its traditions. It is very much in the interests of us all to continue to teach and learn with wider ambition.

A life in law requires intellectual curiosity and insight into why law matters in any society. The reason law is valued is inescapably bound up with caring for others and caring how our society treats us all.[13] In a society such as ours that is increasingly diverse and has long-standing claims for plurality, second thoughts grounded in our circumstances are needed. If students and teachers of law do not speak for the New Zealand legal tradition, who will? If they do not develop an understanding of the New Zealand legal tradition, how will it be maintained and how will it adapt and flourish to meet the needs of our society? TS Eliot said of tradition that it cannot simply be inherited. It has to be obtained through great labour.[14] Law schools must start students on this great labour.

It is the 'great labour" of reading on which I want to conclude talking about law schools. Twenty years ago in his Hamlyn lectures William Twining pointed to the "distinct limitations" of using law reports as a main route for understanding law. He accepted the intrinsic interest of cases and saw them as a "neglected resource" for

---

Press, Wellington, 2008). See also William Twining *Blackstone's Tower: The English Law School* (Sweet & Maxwell, London, 1994).

13 Neil MacCormick pointed out that "we would have no call for norms about conduct at all if we did not care how to live with other people, or care about how other people live with us.": Neil MacCormick *Legal Reasoning and Legal Theory* (Clarendon Press, Oxford, 1994) at 270.

14 See JC Beaglehole "The New Zealand Scholar" in Peter Munz (ed) *The Feel of Truth: Essays in New Zealand and Pacific History* (Reed, Wellington, 1969) at 237.

other disciplines.[15] But he was dismayed that, despite its importance, legislation "comes a poor second to the law reports in legal studies" and that other sources of law are even more neglected. The neglect, he thought, arose because "[a]cademic legal culture is extraordinarily sophisticated in its use of cases and still quite primitive in its use of other materials". He looked for some redress.

It is of course important for law to be seen whole. And we need to be purposeful in teaching the use of legislation and other sources of law. But at the risk of falling into the company of those described by Twining as "case-mad", I think it important to recognise the benefits in introducing students to law through cases. The dominance of legislation is a relatively recent phenomenon when compared with the length of the common law.[16] And much legislation is either restatement of the principles stated and explained in cases or needs to be fitted within common law principles in application. To ignore this need for "interweaving"[17] is to treat statutes as isolated expressions of will rather than arising out of a particular constitutional and legal context. It is to risk the coherence and consistency which is a principal purpose of any decent legal order.

Case law also grounds applied law in the facts of human life, aspirations and social context. It makes the principles and their realisation vivid. Reading cases promotes thinking, discussion and talking. It suggests new connections and springboards to fresh thinking. Without cases, the study of law would be arid. If you do not believe me, look at some of the great writers of the common law – judges and academics – and see the deep satisfaction and fun they have through intelligent reading of legal reasoning in cases across categories of law. So I am sorry to hear that casebooks have fallen out of favour. And I regret the diminished opportunities for exchanges between students and teachers which appears to be a casualty of class sizes and the loss of tutorials in some law schools. They are teaching methods important for the "talking" rightly prized by Kenneth Keith.

---

15 Twining, above n 12, at 107.

16 PS Atiyah points out that most legislation in England before the 1820s or 1830s consisted of private or local acts. He quotes Maitland's statement in *The Constitutional History of England* that, in the "age of reason," "the British parliament seems rarely to rise to the dignity of a general proposition": PS Atiyah *The Rise and Fall of Freedom of Contract* (Oxford University Press, Oxford, 1979) at 91-92. Atiyah says that even in 1836 Lord Melbourne "could declare that 'the duty of a Government is not to pass legislation but to rule'": at 53-54.

17 The judicial role in an age of statutes was described by Roger J Traynor "The Courts: Interweavers in the Reformation of the Law" (1967) 32 Sask L Rev 201.

It is not possible to pretend that reading law (and thinking and talking about it) does not take great effort and much time. Maitland made the point in relation to the history of the constitution, which is to be found across different parts of the law at different times in history:[18]

> Life we know is short, and law is long, very long, and we cannot study everything at once; still no good comes of refusing to see the truth, and the truth is that all parts of our law are very closely related to each other, so closely that we can set no limit to our labours.

All parts of law are interconnected and unless students of law read across categories, they will miss important clues and insights for fresh applications and arguments in different areas of law. Digests and textbooks are wrong more often than may be imagined in their summaries of what cases stand for. In my experience headnotes can never be relied on and are often a real menace. And the organising of cases according to subject-matter classifications that are useful for some purposes will cause those who rely on indexes or search engines to miss nuggets of reasoning of real value which explain the principles and values of law.

Many years ago, when as a very junior lawyer I was working one weekend in the beautiful old library of the Auckland Supreme Court overlooking Parliament Street (now demolished), I bumped into one of the judges. He had a volume of the Meeson & Welsby reports under his arm. He told me he had popped in to consult Baron Parke. "As you know", he said, "one of the six great Victorian judges". It must have been obvious that I did not know. So, he said, kindly, "I'll send you a note." A few weeks later I received a 22-page letter typed on foolscap (which we still used in those far-off days) which enlightened me.

One of the fascinating bits of information it contained was the uncompromising view of Baron Parke that the only way to learn law was to begin with the Year Books and read all the reports published since. Sir Robin Cooke had vast knowledge of law. So many years later I asked him what he thought of Baron Parke's advice. He laughed about the Year Books (and indeed John Baker has since said that "trying to glean law from the year books is like trying to learn the rules of chess or cricket merely by watching video-recorded highlights

18 CHS Fifoot *Pollock and Maitland* (University of Glasgow, Glasgow, 1971) at 16.

of matches").[19] But Sir Robin did agree that a wide reading of the law reports across categories to follow the development of doctrine and principle was the best grounding for a life in law. And in his own judgments as an appellate judge, as in the judgments of Lord Denning, or Lord Wilberforce or other great judges, you will see wide knowledge of cases and the legal reasoning used in them behind the confident statements, restatements and departures.[20] You will also see a love of law peeping through and glimpse, from time to time, something touching the ideal.[21]

A constitutional scholar

Jack Northey taught the interconnected subjects of constitutional law and administrative law. Administrative law had only been acknowledged as a separate topic of study in 1940, such was the influence of AV Dicey.[22] The authorised course copied the elements of administrative law that had been used by Felix Frankfurter, when a professor of law at Harvard. Frankfurter had said of Dicey's denial of a separate system of administrative law that it was "brilliant obfuscation" that illustrated the truth of the view that "many a theory survives long after its brains are knocked out".[23] There was, therefore, revolution in the air of law as well as a whiff of revolution on the streets.

---

19 JH Baker "Why the History of the English Common Law has not been finished" (2000) 59(1) CLJ 62 at 79.

20 As Lord Cooke said of Denning, "If he seemed to create new law, as plainly he did seem to do not infrequently, that was because he discerned in the judgments of his forerunners underlying principles, and wrought their logical extensions or syntheses, expressed with an endearing simplicity of language": Lord Cooke of Thorndon "The Judge in an Evolving Society" (1998) 28 VUWLR 467 at 468.

21 Oliver Wendell Holmes refers to this sense on more than one occasion in letters. In one of them, written to Benjamin Cardozo towards the end of his life, Holmes wrote: "I have always thought that not place or power or popularity makes the success that one desires, but the trembling hope that one has come near to an ideal. The only ground that warrants a man for thinking that he is not living a fool's paradise if he ventures such a hope is the voice of a few masters ... I feel it so much that I don't want to talk about it."

22 In 1940 the then Chief Justice, Sir Michael Myers acquiesced reluctantly in inclusion in the curriculum of a course on what he said, "the law professors are pleased to call "Administrative Law"": Michael Myers "The Law and the Administration" (1940) 3 The New Zealand Journal of Public Administration 38 at 44.

23 Felix Frankfurter "Foreword" (1938) 47 Yale L J 515 at 517.

I took Northey's course in Constitutional and Administrative Law in 1968, with the constitutional part taught by Professor Jock Brookfield. Northey's administrative law section was taught by the then newly imported case-method. It was a heady time to be studying administrative law. The courts had only just embarked on the task of cleaning up the fetters they had earlier imposed on themselves. The cases then turned on whether decision-makers had duties to act judicially (or "quasi-judicially"), whether errors were apparent on the face of the record, whether errors went to jurisdiction (and whether jurisdiction was used in the "narrow" sense of usurpation of power). The work of simplification then advocated by Robin Cooke has taken most of my professional life and is still not complete. But Jack Northey was proud to point to New Zealand cases which were ahead of London and which indicated the way ahead. It was liberating to be shown that we could go our own way.

Although Jack Northey would have been deeply interested in the progress of New Zealand administrative law in recent years, he might have been disappointed to see how tentative we remain about a sense of the New Zealand constitution. Some of the questions he considered in his own writing on the constitution remain wide open. Some have been touched on in recent controversies in the courts. They include the extent to which the New Zealand Parliament has inherited the untrammelled sovereignty asserted by the Parliament of the United Kingdom[24], how compliance with any manner and form requirement can be supervised by the Courts without infringing the privileges of Parliament,[25] and the ability of Parliament to bind itself (a matter of importance to Northey because of the entrenched Electoral Act provisions and then current proposals to enact a statement of rights).[26]

Northey would have been surprised to see a recent decision of the Court of Appeal which treated the New Zealand Constitution Act 1852 (Imp) 15 & 16 Vict c 72 as marking the "transplantation" to

24 A point assumed in a number of dicta but questioned by Northey.

25 A matter thought to be capable of proof by evidence by JF Northey *The New Zealand Constitution* (Butterworths, Wellington, 1965) at 167-170 but which has recently been suggested to have been affected by the terms of the Parliamentary Privileges Act 2016: see Timothy Shiels and Andrew Geddis "Tracking the Pendulum Swing on Legislative Entrenchment in New Zealand" (2020) 41 Stat L Rev 207.

26 A question not reached by the *Supreme Court in Ngaranoa v Attorney-General* [2018] NZSC 123, [2019] 1 NZLR 289 because of the majority decision that the Electoral Act entrenched only the age of voting. The Attorney-General had however conceded that if the wider qualification of electors had been entrenched the legislation would be invalid and could be declared so by the Court.

New Zealand of the unfettered constitutional powers enjoyed by the Parliament of the United Kingdom since the "Glorious Revolution".[27] Well, not quite.

As Northey described in his article "The New Zealand Constitution," published in 1965, responsible government was not set up until 1856.[28] Even then, the legislative capacity of the General Assembly was limited to laws "not repugnant to the laws of England" and was limited by powers reserved by the Crown.[29] The New Zealand Constitution Amendment Act 1857 (Imp) 20 & 21 Vict c 53 conferred power to amend the Constitution Act itself, except in relation to reserved sections.[30] But there remained considerable doubt about the powers of constitutional amendment in New Zealand because of the terms of the Amendment Act and the terms of the Colonial Laws Validity Act 1865.[31]

It was not until 1947, with the long-delayed adoption by New Zealand of the Statute of Westminster II and enactment of the New Zealand Constitution Amendment (Request and Consent) Act 1947 (Imp) 11 Geo VI 1947 No 44 (at the request of New Zealand), that such doubts were resolved. The 1857 Amendment Act was repealed, and the New Zealand Parliament was expressly given power to repeal any part of the 1852 Constitution Act. The distinction between "reserved" and other provisions was removed. If the New Zealand

---

27 *Kiwi Party Inc v Attorney-General* [2020] NZCA 80, [2020] 2 NZLR 224 at [22].

28 The date on which it "was accepted that Ministers from the elected majority would assume responsibility for internal policy" (a category which did not include native policy until after the Imperial troops were withdrawn).

29 The legislature could make laws for the "peace order and good government of New Zealand" but such laws could not be "repugnant to the law of England" and were subject to the powers of the Governor to refuse assent or reserve Bills (on his own initiative or in accordance with Instructions) or to require amendments. The 1852 Act reserved twenty-one sections alterable only by the Imperial Parliament.

30 Northey, above n 25, at 158-159.

31 The Colonial Laws Validity Act 1865 (Imp) 28 & 29 Vict c 63 made it clear that repugnancy applied in respect of United Kingdom legislation and not common law. But it preserved the invalidity of colonial legislation inconsistent with the sections reserved to the imperial power. Even so, as explained by Northey, above n 25, at 158-159 in respect of non-reserved matters the power of amendment in respect of the "constitution, powers, and procedure" of each representative legislature was only available if the amendment was made "in such manner and form" as was required "from time to time" by imperial legislation, letters patent, or orders for the time being in force. It was a matter of controversy whether this manner and form restriction meant that the power of alteration in New Zealand required an enactment of the UK Parliament to alter the New Zealand Constitution Act since it was imperial legislation.

Parliament has indeed inherited the prize which was secured by the Imperial Parliament following the 1688 Revolution, the date of inheritance cannot be before 1947. The Court of Appeal misspoke.

Evolution of the New Zealand constitution

The story of how the colonies of the British empire moved to become independent is told by Beaglehole in two lectures on the Statute of Westminster.[32] The thirteen colonies in North America had initially been willing to accept the authority of the King but not their subordination to the British Parliament. Beaglehole says they were forced to revolution because "the facts of colonial life had outgrown the constitutional theory".[33] In relation to agitation for self-government in Canada in the 1830s, the theory seemed at first similarly inflexible and might have lost another empire. Lord John Russell's initial impulse was that it was logically impossible to split sovereignty; there could not be two Parliaments and two sets of ministers advising the Crown.[34] But eventually he backed down from seeing the matter as one driven by theory. And while imperial self-interest, especially in matters of defence, trade, and foreign affairs, continued to drive imperial policy, in respect of matters of internal self-government constitutional theory subsided.

Responsible government was achieved in the mid-nineteenth century in Canada, the Australian colonies, New Zealand and Cape Colony without revolution. But the project of full political and constitutional emancipation for the Dominions, as they were by then styled, did not get seriously under way until the 1920s.

Constitutional theory remained refreshingly absent from the twists and turns in the path to the Statute of Westminster. The report of the 1926 Imperial Conference proposed the use of convention and statute (including repeal of the Colonial Laws Validity Act) to achieve full independence. It defined the future association of Great Britain and the dominions in a formula adopted by the Committee on Inter-Imperial Relations chaired by Lord Balfour:[35]

---

32 JC Beaglehole "The Old Empire and the New" in *New Zealand and the Statute of Westminster: Five Lectures* (Victoria University College, Wellington, 1944) 1; and JC Beaglehole "The Statute and Constitutional Change" in *New Zealand and the Statute of Westminster: Five Lectures* (Victoria University College, Wellington, 1944) 33. The lectures predated and looked to New Zealand's late adoption of the Statute of Westminster.

33 Beaglehole, "The Old Empire and the New", above n 32, at 9.

34 Beaglehole, "The Old Empire and the New", above n 32, at 19.

35 Imperial Conference *Balfour Declaration* (1926) at 3.

> 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 a common allegiance to the Crown and freely associated as members of the British Commonwealth of nations.

The Statute of Westminster II was passed in 1933, although, as already discussed, its application to New Zealand was not requested until 1947. That was a lag caused by constitutional conservatism and affection for empire which seems unaccountable now, and which became inconvenient to everyone in the end.

This history shows that a constitution can evolve without drama, by agreement, and by modification of behaviour to meet the needs of a society. It shows that constitutional theory has to fit real life and has no *a priori* force. The means employed in relation to the independence of the colonies were agreement and removal of impediments by convention or by statute where necessary. It was an intensely practical process once the simple principles of the association between Great Britain and the dominions were identified. I am reminded of the lack of fuss with which the House of Lords accepted the fact of constitutional evolution in *Factortame (No 2)*.[36] Constitutional law reflects the reality around us, not abstract theory. Although the story of the emancipation of the colonial legislatures is one of constitutional change, as Beaglehole pointed out such change "does not proceed by a life of its own":[37]

> Law, to be of any use, must answer the intelligible needs of society. The constitutional law of an empire must answer the intelligible needs of that empire. We do well to be vigilant about our constitutional rights and our constitutional duties, but that is not to presuppose that the constitution is some silk-wrapped mystery, laid in an Ark of the Covenant round which alone the sleepless priests of the Crown Law Office treat with superstitious awe.

Despite adoption of the Statute of Westminster in 1947, the outdated 1852 Act remained in place as the foundation of the New Zealand constitution. It was largely ignored and positively misleading in continuing to trail what John Beaglehole described as "the last ragged ends, faded and lifeless of clouds of gubernatorial glory".[38] I was startled at an international conference some years ago when an

---

36 *R v Secretary of State for Transport, ex parte Factortame (No 2)* [1991] 1 AC 603 (HL).

37 Beaglehole, "The Statute and Constitutional Change", above n 31, at 50.

38 Beaglehole, "The Statute and Constitutional Change", above n 32, at 41.

eminent constitutional scholar and judge pointed to the constitutional stability of New Zealand in having one of the oldest constitutions in the world. She was speaking of the 1852 Imperial Act, which by then had been replaced by the home-grown 1986 Act. The remark, however, was startling to me not so much because it overlooked the 1986 Act but because I had never thought of the 1852 Act as describing the New Zealand constitution in any adequate sense. And nor does its successor, the Constitution Act 1986.

Perhaps anticlimactically for those who like more high ceremony in such things, the 1986 Constitution Act simply recites that "the Parliament of New Zealand continues to have full power to make laws".[39] The meanings of "continuity" and "fullness" in this context have never required close consideration in New Zealand law but may seem worth further attention in the future.

This history of constitutional emancipation and patriation shows that the process was practical and largely unheroic. There is no echo of the "Glorious Revolution". And Dicey does not seem to have featured significantly, despite his continued grip on constitutional discourse today.

Whether, following the Statute of Westminster, the New Zealand Parliament and the Parliaments of the Australian colonies obtained all the powers of the Parliament at Westminster has not perhaps been authoritatively determined, but is generally assumed. Sir Owen Dixon, the Chief Justice who casts such a long shadow over Australian law, thought however that it did not follow.[40] Jack Northey

---

39 Constitution Act 1986, s 15. Parliament is defined in s 14 as "the Sovereign in Right of New Zealand and the House of Representatives" and is "the same body as that which before the commencement of this Act was called the General Assembly (as established by s 32 of the New Zealand Constitution Act 1852 of the Parliament of the United Kingdom) and which consisted of the Governor-General and the House of Representatives."

40 Dixon considered that it was necessary to understand that "the principle of parliamentary supremacy was a doctrine of the common law as to the Parliament at Westminster and not otherwise a necessary part of the conception of a unitary system of government. There was no inherent reason for supposing that in virtue of the Colonial Laws Validity Act, 1865, the same supremacy over law should be conferred on a colonial legislature as the Parliament at Westminster possessed at common law. Nor, as I think, was there any warrant for making the preliminary assumption which seems to have been made at first in South Africa that in a Dominion Constitution combined with the State of Westminster a unitary system of government in a sovereign state must involve such a parliamentary supremacy over the law. It is as well to recall that it was not until after the Revolution Settlement that the complete supremacy of the Parliament of Great Britain over the law was acknowledged": Owen Dixon "The Common Law as an Ultimate Constitutional Foundation" in *Jesting Pilate: And Other Papers and Addresses* (The Law

expressed similar doubts, pointing out that William Wade's then recently published view that obedience to statutes is a rule "above and beyond the reach of statute" does not necessarily apply to the New Zealand legislature, created by Act of the United Kingdom Parliament, "which does not share the historical and common law basis for the legislative powers of the United Kingdom Parliament".[41] The Constitution Act 1986 does not purport to be constitutive of a new legal order.

These are matters we can hope will never arise for judicial determination. I have spoken on other occasions of the dangers of making up the constitution on the hoof – as indeed I think the courts may be being asked to do too often. We have seen how in the United Kingdom the *Brexit* litigation has convulsed the political and legal order, fuelled it has to be said by the tone and nature of some of the academic comment, now fully answered at least to my mind by Paul Craig.[42] But this sort of convulsion illustrates a lack of shared constitutional understandings and the apparent, but wrong, conflict it sets up between law and politics. It carries great risks to constitutional and social stability. I don't enlarge further on these matters here. But they indicate why it is necessary for us to examine and re-examine our own constitution and its historical and social context, as Jack Northey did in his own work.

Constitutional doldrums in the 1960s

Northey's article on "The New Zealand Constitution" in 1965 aimed to set in perspective two then recent proposals for constitutional reform. The first was an attempt by the Constitutional Society to have a written constitution adopted and a second chamber of Parliament re-established. The second, launched a few years later, was a less ambitious proposal to enact an interpretative statement of human rights, patterned on the Canadian Bill of Rights 1960. This proposal was expressed in the New Zealand Bill of Rights Bill 1963 (52-1). The Minister of Justice, Ralph Hanan, had allowed the Bill to go forward to a Select Committee. Both proposals were not supported by

---

Book Company, Sydney, 1965) 203 at 206. Lord Cooper in *MacCormick v Lord Advocate* 1953 SC 396 (IH) at 411 described the sovereignty of Parliament as a very peculiar notion which had no application to the law of Scotland.

41 Northey, above n 25, at 166-167.

42 Paul Craig "The Supreme Court, Prorogation and Constitutional Principle" [2020] PL 248; Paul Craig "Response to Loughlin's Note on Miller; Cherry" [2020] PL 282.

the Constitutional Reform Committee, by which they were eventually considered, when it reported in 1964.

Northey's constitutional context for these initiatives started with the establishment of responsible government in 1865. Jarringly to our eyes in 2022, there is no mention at all of the Treaty of Waitangi. The absence of the Treaty from legal consciousness was indeed my experience at Law School and for some years afterwards in legal practice.

Re-reading Northey's article, reminded me about those quixotic efforts for constitutional reform in the 1960s. Both the proposals for a written constitution and the proposal for an interpretative Bill of Rights secured no public support. I had read this material when writing my dissertation in 1969. Re-reading them opens a window on a world that has passed but also illustrates what I want to say later about the need to reclaim the New Zealand legal tradition.

Only the Constitutional Society supported the Bill of Rights. It endorsed Ralph Hanan's remarks on its introduction that a statement of rights and liberties "could be of value in bringing before ordinary people the basis of our way of life". Even so, the Society thought that the Bill was "no substitute for a written constitution protected by a bicameral legislature". The few other submissions opposed the proposal. The New Zealand Law Society reported that only one District Law Society saw any merit in the proposal, and it thought the proposed legislation failed to achieve its purpose. All the other District Law Societies had expressed themselves to be "unequivocally opposed". Professor Aikman urged that New Zealand should wait for adoption of the expected Conventions on Human Rights (the sequence eventually taken when the New Zealand Bill of Rights Act was adopted to give effect to the International Covenant on Civil and Political Rights). The few other submitters were also opposed (although some like Kenneth Keith were to become prominent supporters later for the Bill of Rights Act 1990).

Matters have moved on and there is perhaps little of direct interest in this backwater of legal history. But the material includes one submission I do not remember reading. Perhaps in 1969 I had thought it off the point. It was from the New Zealand Maori Council and it raised the status of the Treaty of Waitangi.

The submission referred to the fact that "for many years Maori leaders have been advocating the enactment of the Treaty of Waitangi as a statute of New Zealand" to overcome the "lip service" paid to the

Treaty. It was felt that "by writing it into the law of the country it would become more of a reality".[43]

The Council's submission had been preceded by correspondence with the Minister of Justice, Ralph Hanan, which the Council annexed to its submission. The Council had written that the Bill "would hardly be complete without reference to the Treaty and to the obligations entered into by the Crown on that occasion". The Minister was not persuaded and wrote back to advise that the government had concluded such a reference would be not appropriate. His reasons illustrate the changes we have lived through in the years since. The Treaty was, Mr Hanan said, "not sufficiently all-embracing to apply, as a matter of law, to a nation which now includes substantial numbers of people whose origins are widely different from those of either of the then contracting parties":

> To speak of the Treaty in the Bill might appear to discriminate between the Maoris and the Queen's subjects of other non-European ethnic groups who are entitled to all the rights and privileges conferred by the Bill.

Instead, the Minister advised that the recitals had been recast to say "And whereas the New Zealand nation is founded upon the principles that all its citizens of whatever race are one people ...".

The New Zealand Maori Council, undeterred, persevered with a submission to the Constitutional Reform Committee. It was short:

> (1) The New Zealand Maori Council believes that there is good reason to acknowledge the validity of the compact signed by our ancestors, as it is a specific demonstration of those principles of individual and social freedom and equality proclaimed by the Bill of Rights. The Treaty set a standard by which the actions of governments and men may still be judged.
>
> (2) The history of our country shows that the British origin of the majority of our people has given a special place in our society to the ideals, attitudes and values of the British people. This special preference is still amply demonstrated in the way in which immigration is controlled. We can therefore see no reason why the Treaty, which recognises the special place of the other major partner in our nation, should not be added to the Bill and take its place alongside the recital of the highest ideals of British justice.

43 Constitutional Reform Committee "Report of the Constitutional Reform Committee 1964 on the Petition of JB Donald and Others and on the New Zealand Bill of Rights" [1964] III AJHR I14.

> (3) The Treaty of Waitangi occupies, in the Council's view, the central place in the history of our society, as it set the tone of unity in diversity, of cooperation in national affairs, of mutual respect for our differences, and of freedom for the individual to make his own way of life. We seek no special privileges for Maoris, but the extension of the same spirit that the Treaty embodies to all those who have come to live on these shores.
>
> The New Zealand Maori Council therefore submits that, as the Treaty of Waitangi is an expression of the principles of justice and freedom to all for which the Bill provides guarantees, it should be referred to in the Bill of Rights and its importance as the basis for the relationship between the Government and the Maori people acknowledged.

I have told you something of this exchange because it seems to me so very sad. It suggests a time when the New Zealand government distanced itself from responsibility for the Treaty in its reference to its "then contracting parties". It illustrates the amnesia about the Treaty despite continuing Māori efforts to have it recognised (and continuing struggle to achieve measures of self-government, largely ignored). These topics remained invisible even to students of constitutional law like me in the 1960s.[44]

It is hard to imagine that such ignorance could have survived any real exposure to New Zealand legal history or indeed general New Zealand history. It is worth counting the cost. I do not think public controversies such as we have had over Māori self-government or foreshore and seabed ownership or claims in relation to loss of land would have been met with such incomprehension and at times hostility if their lengthy history had been more widely known. Or if they had been seen, as many can be seen, as arising out of wrongs rather than being seen as arising out of the disappointments of those unfortunately on the wrong side of history.

---

44 See Geoffrey Palmer "A Bill of Rights for New Zealand: A White Paper" [198 5-1985] I AJHR A6 [White Paper]. In the 1985 White Paper, the proposed legislation would have recognised and affirmed the Treaty of Waitangi "as part of the supreme law". Legislation was to be interpreted consistently with the Treaty of Waitangi wherever such interpretation was open. Where it was not, the Treaty prevailed. When the Bill proposed was watered down as ordinary legislation which yielded to statutes which could not be read consistently with the Treaty, Māori did not support inclusion of the Treaty in the statute. The proposal indicates however a substantial shift in the years between 1964 and 1985.

Remembering our legal history

In 1938, Joseph Heenan, Under Secretary at the Department of Internal Affairs, set up a Centennial Branch of the Department. He was determined that the 1940 centenary would be marked not by "junkets and pageants" but by publications about the history and matter of New Zealand. The story of how he assembled a talented group of writers, historians and artists (which remained after the centenary as the Historical Branch of the Department) is told by JC Beaglehole in his essay "The New Zealand Scholar".[45]

In the flowering of national consciousness which followed the centennial, it was realised, when Parliament was preparing to mark the centenary of representative government, that there was an embarrassing gap in published histories in relation to the foundation and development of the institutions of government. As a result, AH McLintock was appointed as Parliamentary Historian. He took the view that "an adequate interpretation of the origin and growth of New Zealand as a nation state" required "a steady and purposive output of well-documented monographs, modest in compass and supported by an exhaustive examination of relevant source material". In this, perhaps unconsciously, McLintock reflected the views of the English legal historian, Frederick Maitland, who similarly urged close attention and reassessment of primary sources as a necessary first step.[46] Only after this work based on source material had been produced did McLintock think it would be possible to look to general histories shorn of legend and distortion.[47]

I did not encounter McLintock's *Crown Colony Government* as a law student. For constitutional law our text was KJ Scott's *The New Zealand Constitution*[48], published in 1962. It does not refer to McLintock's history and it does not mention the Treaty of Waitangi. Scott made it clear that his was a work of "constitutional analysis" which contained "only as much history as is necessary for an understanding of the present constitutional system". In this method, Scott followed AV Dicey who thought, in conformity with the

45 Beaglehole, above n 14, at 237.

46 FW Maitland "Why the History of English Law Has Not Been Written, Inaugural Lecture delivered at Cambridge on 13 October 1888" in HAL Fisher (ed) *The Collected Papers of Frederic William Maitland Downing Professor of the Laws of England* (University Press, Cambridge, 1911) vol 3 475 at 480.

47 AH McLintock *Crown Colony Government in New Zealand* (Government Printer, Wellington, 1958). *Crown Colony Government* was intended to be the first in a series of volumes.

48 KJ Scott *The New Zealand Constitution* (Clarendon Press, Oxford, 1962).

analytical school of jurisprudence of John Austin, that it was important to maintain a strict distinction between history and law, in order to keep the focus on the constitution "as it now stands". The constitution as it then stood in 1962 in Scott's book began and did not stray far from the New Zealand Constitution Act 1852. It is a dull read.

Under the influence of Austin and the positivist history was more generally separated from law. Even John Salmond, who was no positivist, regarded the study of history for its own sake as "mere antiquarianism". Today it is more generally accepted that the separation of law and history damages both. Legal concepts and ideas are central to social, economic and political histories. Indeed, the recent work of scholars such as John Baker[49] and Christopher Brooks[50] has demonstrated the popularity of law, litigation, and legal culture in early modern England and challenged assumptions that law is a tool of the propertied elite of little relevance to social and political relationships.[51] History also explains the development of the institutions and doctrines of law. It provides context and cautions and may occasionally illuminate matters of legitimacy essential to any legal order.

Although lawyers are understandably interested in what has been described as the "genealogy of doctrine" in legal history, social and institutional histories are equally important in understanding our legal order. New Zealand law was, for example, shaped initially by the early circumstances of lack of institutional capacity in law and the challenges of geography and sparse settlement. Echoes of these early circumstances can be seen in legal development or adaptation in such matters as the law relating to rivers and coastlines, approaches to informal marriages, burial of the dead, and to meet the challenges to land conveyancing and use caused by absentee ownership and the imperative in the colonial economy to make land productive.

Because of the similarity of experiences, colonists in New Zealand followed legal ideas circulating in Australia and North America. They were known through exchanges made possible through voyaging links, correspondence and reading, and the movement of people (including during the Californian and

49 John Baker *English Law under Two Elizabeths: The Late Tudor Legal World and the Present* (Cambridge University Press, Cambridge, 2021).

50 Christopher W Brooks *Lawyers, Litigation and English Society Since 1450* (Hambledon Press, London, 1998).

51 See Christopher Hill *Liberty against the Law: Some Seventeenth-Century Controversies* (Penguin Press, London, 1996).

Australasian gold rushes). Those who lived through the early years of colonisation were active participants in the lively debates of the period about such matters as the effect of the Treaty, the nature of Māori land, and their own rights and interests according to British and New Zealand law. These questions were not the preserve of lawyers alone. Contemporary evidence for this popular engagement with law and legal concepts is to be found everywhere – in newspaper articles and published correspondence, and in the legal arguments advanced by bush lawyers as well as qualified lawyers in legislative debates, court proceedings, petitions to governors and the House of Representatives, correspondence with officials, and evidence to Royal Commissions.

In the past we neglected the primary New Zealand sources to hand, such as the materials found in the appendices to the Journal of the House of Representatives and the decisions and minute books of the Native Land Court. These materials are increasingly available through digitalisation and have now been drawn on, in particular, by historians providing reports to the Waitangi Tribunal. Their transformative effect on our legal history is best illustrated in the insights to be gained from Richard Boast's marvellous volumes on the work of the Native Land Court.[52]

It seems incomprehensible that our texts on land law in the mid-twentieth century began with the doctrine of tenure (that "great mediaeval muddle" as Maitland described it) rather than with tikanga, the Treaty, the Land Claims Ordinance 1841 and the Instructions and Letters Patent. In other former colonies there were similar experiences. The Canadian legal historian, Jim Phillips, has described a similar emphasis placed on British origins, with Canadian texts on land starting with imported English land law.[53] In the High Court of Australia, Gummow J has referred to his impression that Australian lawyers had been "bemused by the apparent continuity of their [English] heritage into a way of thinking which inhibits historical understanding".[54]

Although Blackstone was treated as authority for the reception of English law on settlement of an "uninhabited country", he himself

---

52 Richard Boast *The Native Land Court 1862-1887: A Historical Study, Cases and Commentary* (Thompson Reuters, Wellington, 2013); Richard Boast *The Native Land Court. Volume 2 1888-1909: A Historical Study, Cases and Commentary* (Thompson Reuters, Wellington, 2015) and Richard Boast *The Native/Māori Land Court. Volume 3 1910-1953: Collectivism, Land Development and the Law* (Thompson Reuters, Wellington, 2019).

53 Jim Phillips "Why Legal History Matters" (2010) 41 VUWLR 293 at 296. See, in relation to Australia, AR Buck *The Making of Australian Property Law* (Federation Press, Sydney, 2006).

54 *Wik Peoples v Queensland* [1996] HCA 40, (1996) 187 CLR 1.

acknowledged "very many and very great restrictions" in that doctrine.[55] And New Zealand was emphatically not an "uninhabited country" as the terms of British involvement (in the Treaty, Charter and Instructions to Governors) made clear. Māori were acknowledged to be proprietors of the whole of the country.

Bruce Kercher, an Australian legal historian, has written about experiences in studying law in Sydney at about the same time I studied at Auckland. He too notes the absence of local legal tradition in the subjects he studied and the "British" sources the courses started with. But when later, as an academic, he started to search for what he described as "the sometimes-elusive local quality in Australian law", he was surprised that the more he looked closely at the question, "the more the date of strict English orthodoxy seemed to slip away into the future".[56]

This is an important insight which is valid in New Zealand too. It may be that the mid-20th century, when I first came to law, was in fact a low point in awareness of a New Zealand legal tradition. In Australia and New Zealand historians have now pointed out that many of the outcomes that continue to vex our legal systems in relation to the treatment of indigenous populations were disputed all the way. It was not until 1889 that the Privy Council decided that the Crown was the owner of all lands in New South Wales because "there was not land law or tenure existing at the time of annexure to the Crown".[57] That conclusion was not inevitable.[58] It had been the subject of passionate debate among colonists and imperial officials for decades.[59] And, as the historian FLW Wood remarked reflecting on the novel problems grappled with by governors and officials in the Australian colonies, "the right always had a champion".[60]

It was well understood that even within the United Kingdom there was significant divergence and difference within the legal order, as has been described by a number of legal historians.[61] William

55 William Blackstone *Commentaries on the Laws of England* (9th ed, Garland Publishing, New York, 1978) vol 1 at 108-109.

56 Bruce Kercher *An Unruly Child: A History of Law in Australia* (Allen & Unwin, St Leonards, 1995) at ix.

57 *Cooper v Stuart* (1889) 14 App Cas 286 (PC) at 291.

58 It soon became apparent that Cook's reports about Aboriginal numbers and connection to land were tragically astray. But by then the colonies had been established.

59 Kercher, above n 56, at 5.

60 FLW Wood "The Historian in the Modern Community" in Peter Munz (ed) *The Feel of Truth: Essays in New Zealand and Pacific History* (Ah & AW Reed, Wellington, 1969) 255 at 266-267.

61 See Frederick Pollock *Oxford Lectures and Other Discourses* (Macmillan, London, 1890).

Martin, the first Chief Justice of New Zealand, pointed out in a note entitled "Observations on the Proposal to Take Native Lands Under an Act of the Assembly" that following the New Zealand Wars there were "many systems under the sovereignty of the Queen both in Britain and in its overseas territories." The sovereignty of the Queen, he said, had never been established "in any real or practical extent" in the "greater part" of the North Island at the time of the wars.[62] He and other contemporaries questioned the legality of the Crown's Taranaki purchases which had led to war and the confiscations that followed. Similarly, the legality and morality of applying the English criminal law to crimes among native peoples was the subject of considerable controversy in New Zealand, Australia, and other parts of Empire.[63] Again, the eventual positions adopted were not inevitable and there were always voices for a different path.

We need to remember this history because it affects the legitimacy of present controversies and prevents simplistic presentations or caricatures of starkly opposed forces and motives, which may impede goodwill in our time and ways forward in the future. We should remember, too, the authentic appeal of justice through law that we see voiced in our history by those who valued and sought the shelter of law – among them Tawhiao, Te Kooti, and the Moriori remnants who wrote in 1862 from Rekohu to the Governor, "Bring us the law. We are living without the law."

It is a sad fact that many of the injustices and errors of the past could have been reversed at a number of stages in our history with good will and effort – and often a little law. In New Zealand, many of the problems were not revealed until decades had passed because life did not change for many Māori and the losses of land or resources were not known. It is unfortunate that the early cases to come before the courts, and which arguably set us on the wrong track in relation to land, did not involve Māori ownership interests but rather conflict between European purchasers. Conflicts themselves often arising out of the mess created by the aftermath of the Old Land Claims investigations or the Crown waiver and then reassertion of the doctrine of pre-emption.[64]

---

62 William Martin "Observations on the Proposal to Take Native Lands Under an Act of the Assembly" [1864] I AJHR E2 at 6. See also William Martin *The Taranaki Question* (2nd ed, Dalton, London, 1861) at 89-108.

63 See Ned Fletcher "A Praiseworthy Device for Amusing and Pacifying Savages?" (PhD Thesis, University of Auckland, 2014).

64 Historical research undertaken in recent years for the Waitangi Tribunal has revealed the history of the Crown assumption of surplus lands (the land beyond that permitted to be retained by the Old

It is also worth reflecting on the manner in which Māori property in land was rendered into Crown-backed title when the transition was undertaken from the 1860s. Despite contemporary insights that the proposals were inadequate to translate overlapping and layered interests and despite available analogies in English law,[65] opportunities to do better were missed. There was no inevitability about the path taken, a path which has left a bitter legacy. Richard Boast has described native title in New Zealand as having been "buried under such a colossal mountain of statute that it has essentially nowhere to go". But such statute is not immutable. The insights gained from modern scholarship in legal history may bear on future directions in law as well as demonstrating the justice of long-standing claims. Such histories are therefore important learning for those engaged in the law-making enterprise and those who live with the consequences of the path we have taken.

Land Claimants or in respect of which their claims were disallowed for non-fulfilment of conditions and disputed land claims in relation to waiver of pre-emption). Fitzroy was aware of the controversy and promised to return the surplus lands but was recalled before he could do so. Loss of lands as surplus was often not known to the original Māori proprietors, many of whom continued to occupy them until years later they were evicted by someone with a Crown grant. Many Māori did not find out about the loss of lands treated as surplus until they applied to the Native Land Court for title in the 1860s and 1870s. Royal Commission investigations were flawed and superficial. Opportunities to remedy matters from land that had not been granted or out of the large amounts of scrip land available were not taken. The amount of land lost as surplus was huge. Francis Dillon Bell (a Commissioner in one of the Inquiries), put the surplus lands from the pre-Treaty claims at 57,000 acres and from the waiver purchases at 40,000 acres. See Bruce Stirling and Richard Towers *"Not With the Sword But With the Pen": the Taking of the Northland Old Land Claims. Part 1: Historical Overview* (Crown Forestry Rental Trust, Wai 1040 A9, Te Paparahi o Te Raki (Northland) Inquiry, July 2007). In relation to the work of the Native Land Court, see Donald Loveridge *The Origins of the Native Land Acts and Native Land Court in New Zealand* (Crown Law Office, Wai 1040 E26, 2000); Bryan D Gilling "Engine of Destruction? An Introduction to the History of the Māori Land Court" (1994) 24 VUWLR 115; Richard Boast "Māori and the Law, 1840-2000" in Peter Spiller, Jeremy Finn and Richard Boast (eds) *A New Zealand Legal History* (2nd ed, Brooker's, Wellington, 2001); Richard Boast *Buying the Land, Selling the Land: Governments and Māori Land in the North Island 1865-1921* (Victoria University Press, Wellington, 2008).

65 Francis Dart Fenton at one stage raised the possibility of providing for legal interests in the nature of easements to meet the customary interests. Earlier, Robert Fitzroy in evidence to the House of Lords Select Committee on New Zealand in 1838 compared the layered interests of Maori in land as comparable to the commons of England. But by 1840 in England the law had been converted away from "the messy complexities of coincident use-right", as has been described by EP Thompson *Whigs and Hunters* (Allen Lane, London, 1975).

Conclusion

Maitland thought that a study of legal history would free us from "superstitions" and teach us we have "free hands" in shaping law in our times.[66] In that study, close attention to archival sources is sound policy, as Maitland, Plunkett, Baker and other historians suggest. Only with sure grasp of the primary materials can we aspire to general histories shorn of mythology and prejudice. It will be recalled that was the course advocated by McLintock in the projected large study for the history of New Zealand government and constitutionalism at the time of the centenary of the establishment of responsible government.

Much of this painstaking archival scholarship has already been undertaken or started by scholars such as Richard Boast and David Williams and by the historians who have produced reports for the Waitangi Tribunal. Some of this material, such as the important paper written by Donald Loveridge on the Native Land Court legislation, needs to be published. Some may need to be revised for publication. Gaps remain to be addressed with further archival work. There are dots to be connected from the research already undertaken for particular localities and purposes. We need better biographies of many of those who have worked within the New Zealand legal order.[67] We need to bring together the stories of the land and the people and their expectations of law. And, with that foundation, perhaps it will be time for new general histories of law in New Zealand to add to the excellent work published in the last twenty years.

The looming bicentenary in 2040 is reason to undertake some systematic project on New Zealand legal history. We should take our lead from the inspiration of Joseph Heenan who decided that the centenary in 1940 should not be squandered in "junkets and pageants". We should be hungry for a "home in thought"[68] in New Zealand law. It is true that the New Zealand legal tradition, like any tradition, can be obtained only by great labour. But if we are not tomorrow to be "paralysed" by "the day before yesterday",[69] it is

66 Letter from Frederic Maitland to AV Dicey regarding the study of legal history (1896) in CHS Fifoot *Frederic William Maitland, A Life* (Harvard University Press, Cambridge, 1971) at 143.

67 Such as the work undertaken by Bryan Gilling in relation to the Native Land Court judges of the nineteenth century. See Bryan Gilling *Nineteenth century Native Land Court judges* (Waitangi Tribunal, Wai 64/G5, 1994).

68 The cry of Robin Hyde.

69 The reason given by Maitland for studying legal history.

labour we should undertake now. If it is to be well done, we need to make a start.

The Law Schools and the profession should rise to this challenge. In his inaugural lecture in 1888 FW Maitland looked to legal practitioners to undertake the archival research he saw as necessary in writing the history of English law. Is it too optimistic to hope that young (and perhaps not-so-young) lawyers in New Zealand will understand how worthwhile such work is and how well it sets them up for a life of excitement in law? Legal history aids in understanding what has been referred to as "the intelligent working" of a legal system.[70] It helps us avoid being blown about by every wind of doctrine or theory or isolated legislative doom. But perhaps the best reason to study or work in legal history was given by TFT Plucknett: "Legal history", he said, can make a student "happy for life by an interest in what can be the most enthralling of studies".[71]

70 William Holdsworth *Some Lessons from our Legal History* (Macmillan, New York, 1928) at 6.

71 TFT Plucknett "Legal History in England" (1954) 2 JSPTL 191 at 199.