The impact of American ideas on New Zealand's educational policy, practice and theory : the case of law

Sir Kenneth Keith*

In this informative study of American influences on the development of law, legal research and law teaching in New Zealand, concentrating particularly on the last 40 years, the author examines the impact of a number of important people; the relevance of legal materials held by New Zealand libraries; the development of the case method of law teaching; and American contributions to the purposes and content of legal education and research, and to methods and styles of legal reasoning.

I have had a great deal of help in the preparation of these comments from colleagues in the legal profession who have provided me with much relevant information and opinion. Accordingly, in many ways this is not my paper. Rather it is a report compiled by a large number of New Zealand lawyers who have been affected by United States legal ideas mainly by studying there, and who have also been involved in the teaching of lawyers. One thing that has become clear from the process in which I have engaged is that there is a great deal more to be done to investigate this matter. For one thing, the American influence has to be put more particularly than here into the context of United Kingdom and other Commonwealth influences. The influence in the legal educational area has to be seen in the context of influences in the law as a whole. And that in turn has to be related to wider changes in our community and its place in the world, especially over the period on which I am primarily focusing.

As I see it, my task is to look at the interaction of (1) people, (2) materials (especially library resources), (3) teaching methods, (4) the purposes and content of legal teaching and research, and (5) the broader ideas affecting those various matters.

The main emphasis will be on the last 40 years, but it is interesting to take a few fragments from earlier years to indicate changing influences and the wider context.

* Deputy President, New Zealand Law Commission and Professor of Law, Victoria University of Wellington. This is an edited version of a paper delivered by Sir Kenneth at the Fulbright Seminars held in Wellington in September 1988. The Seminars were organised by the New Zealand Council of Educational Research, the Stout Research Centre and the New Zealand Institute of Economic Research to celebrate 40 years of the Fulbright programme in New Zealand. Sir Kenneth himself studied at Harvard Law School 1964-65 as a Fulbright scholar and was a member of the United Nations Secretariat in New York 1968-70.

At the beginning of constitutional government in New Zealand in 1840 there was, along with the existing situation that the colonists found here, a very important Common Law inheritance. The law of England so far as it was applicable to the circumstances of New Zealand came with the first ships[1]. That was true as well of the North American colonies and, to think of the bicentennial celebrations going on at present across the Tasman, of the early actions in Sydney Cove just 200 years ago of Captain David Collins, the first Judge Advocate, and his colleagues in the first courts there[2]. Those responsible for legal processes in the new colonies brought with them the principles of the Common Law, as they had been formulated over earlier centuries, especially in the writings of Blackstone and Coke. Among those principles were those about the rights of indigenous peoples.

Perhaps I can document that last point and also indicate very early American influence in our legal system by mentioning a judgment of the Supreme Court of 1847[3]. The court consisted of the two Supreme Court judges of that time, Chief Justice Martin and Mr Justice H. S. Chapman. In their judgments they referred to Blackstone's *Commentaries* and *Coke on Littleton.* But they referred as well and without any apparent sense of strain to the *Commentary* of Chancellor Kent of New York, an established American text, and to a judgment of the United States Supreme Court delivered by Chief Justice John Marshall. Mr Justice Chapman referred to a particular practice as having been long adopted "by the Government in our American colonies, and by that of the United States."[4] He went on to mention the Charters of the New England Puritans and of Pennsylvania. And, as an international lawyer, I might note that he also made use of a leading Swiss international lawyer of the 18th century, Vattel.

Somewhat similarly in 1863, Henry Sewell (who as well as being the first premier of New Zealand had served as Attorney-General) in writing to Lord Lyttleton about the New Zealand native rebellion referred, without any sense that it was other than perfectly normal, to a judgment of Chief Justice Marshall (a very lengthy quote), to negotiations between the United States and Great Britain after the 1814 war, to "American jurists" in general, to the practice of the Emperor of France in respect of his Arab subjects in Algeria, and to Vattel[5]. Well over a century later, New Zealand lawyers are learning again of the value of American material in assessing and contributing to the

1 See, e.g. English Laws Act 1858.

2 See Sharwood "Justice at Sydney Cove 1788" Bicentennial Australian Legal Convention, Canberra, 1988.

3 *The Queen* v. *Symonds* (1847) N.Z.P.C.C. 387. For another major decision, later in the century, in which U.S. authority was prominent see *In re Aldridge* (1897) 15 N.Z.L.R. 361. American cases are mentioned in at least three other cases in that volume - pp 136 (tax), 585 and 588 (public place), and 682, 683 and 692 (jury) - having been used by experienced counsel, Sir Robert Stout, W.A. Sim (later a judge) and W. D. Stewart (a Minister of the Crown). A most interesting lecture given by Mr Stewart on "English and American Law" in 1876 in Dunedin was published in the Central Law Journal for 1877 (Vol. IV) 175, 198 and 218; extracts appeared in (1876) 1 N.Z. Jurist (N.S.) 86.

4 Ibid., 390.

5 The New Zealand Native Rebellion, Letter to Lord Lyttleton (1864).

development of the law relating to the Treaty of Waitangi. That has become increasingly true in many other areas as well.

Furthermore, later in the century, quite extensive reference is to be found in such New Zealand legal writing as there was to United States material. An Otago colleague has recalled that the New Zealand Jurist, a combination of law reports and law review articles published in the 1870s, included a number of extracts from American sources. Thus, an American criticism of the law of common employment was published along with other proposals for the change of "judicially invented" law which was seen as "manifestly illogical" and causing "enormous wrong" to the working classes[6]. We see here something of the movement of sailing ships, miners, books, and ideas around the Pacific rim. A rough count of references to American cases in the index to the Law Reports late last century and early this century also suggests a higher use of American judgments at that time than was to be found for most of this century.

Around the turn of the century there are two great names, both New Zealanders born in the United Kingdom, who should be mentioned. Both were professors of law at Victoria University. It is clear from Sir John Salmond's writing, beginning in Temuka late last century, that Oliver Wendell Holmes, the great American jurist and judge, had a very considerable influence on him. In the view of Alex Frame, a colleague who is an expert on Salmond, Holmes' *Common Law* published in 1881 appears to have relieved the narrow Austinian positivism which so dominated British legal education of the period. This influence was not entirely one way. Salmond has made enormous contributions to the legal culture of the whole of the Common Law world through two great books, one on torts and the other on jurisprudence. He also produced an excellent third book on the law of contracts which unfortunately has not had the same influence, notwithstanding an outstanding second edition by another of Victoria's professors. The American recognition of his role appeared in his winning of the Ames medal awarded by Harvard University in 1910 for his book on torts. Salmond thought that award his greatest honour. His importance is also to be seen (again to take one of Alex Frame's points) in the fact that when a leading American legal realist of the 1920s and 1930s wanted someone to attack he took "even so enlightened a thinker as Salmond"[7] as his target.

Salmond's influence on another aspect of American legal thinking relates to one of the important analytical tools that lawyers use. W.N. Hohfeld, a member of the Yale Law School Faculty in the early part of the century, wrote a celebrated article about a scheme of the basic legal relationships - rights and duties, privileges and liabilities, and so on. In essence, one commentator has said, Hohfeld's analysis is Salmond's analysis.[8]

The second person to whom I refer does not fit into the overall theme of the influence of American ideas on New Zealand education but he does make very well the point of the international movement of abilities and ideas in education. He is Richard

6 (1876) 2 N.Z. Jurist (N.S.) 155-156, 173-174; and see *McBride* v. *Brogden* (1876) 3 N.Z.C.A. 271. And see supra n.3.

7 Jerome Frank *Law and the Modern Mind* (Brentano's, New York, 1930) 119.

8 Anthony Dickey, "Hohfelds Debt to Salmond" (1971) 10 U.W.A.L.Rev. 59,62.

Cockburn Maclaurin. He was an astonishingly talented man, who took his principal degrees in New Zealand and then at Cambridge late last century in mathematics. While at Cambridge he also studied law and won the Yorke prize for his essay on the nature and evidence of title to realty. He managed to spend some time pursuing philosophy at Strasbourg. Having been for a time the founding Professor of Mathematics, he became Professor of Law and Dean of the Law School and took on the extra honorary title of Professor of Astronomy, while continuing to teach advanced mathematics[9]. As with Salmond, we could not expect that such an amazing talent would stay long at Victoria. He moved first to Columbia University as a Professor of Mathematical Physics (at the urging of Lord Kelvin) and then very quickly became the pre-eminent president of the Massachusetts Institute of Technology. It is the received wisdom (or perhaps mythology) in New Zealand that he made the M.I.T. what it is today.

The general impression is that after the turn of the century, the American influence on legal thinking and writing here waned. It is difficult to be precise about the reasons for such a change. Part turns on individuals. Thus Sir Robert Stout, Premier and Chief Justice late last century and early this, who had extensive American holdings in his very large library, often referred to American material in his judgments and other writings, including his remarkable tribute to Maclaurin[10]. That interest had a major impact on the Victoria library and possibly on Otago's also. But no doubt there are broader political and social reasons that had us in the course of the 1920s and 1930s looking rather more narrowly than we previously had for sources of ideas, at least in the legal and constitutional areas[11]. The period since the 1940s provides major changes in legal influences - changes which of course parallel wider changes in our world position.

Let me consider the last 40 or so years under the headings mentioned earlier -

1. The people;
2. The relevant materials - especially library and teaching materials;
3. Teaching methods;
4. The purposes and content of legal education and research;
5. Methods and styles of legal reasoning.

I have to be selective. I have not mentioned clinical and practical training (narrowly defined) of lawyers nor some of the recent criticisms of the U.S. tradition[12].

9 See J.C. Beaglehole *Victoria University College : an essay towards a history* (Wellington, New Zealand University Press, 1949) 39-43, 99-102.

10 *A Life to Inspire* (New Zealand Times Co. Ltd., Wellington, 1920).

11 The papers by David Hamer and Erik Olssen in Malcolm McKinnon (ed.) *The American Connection* (Stout Centre Conference, Wellington, 1988) 1, 25 document parallel changes in other areas.

12 See, e.g., Derek C. Bok "A Flawed System of Law Practice and Training" (1983) 33 J.L.E. 570.

1. *People*

The largest group in size, and perhaps increasingly the most important qualitatively, is the group of New Zealanders who went to the United States as graduate students. My research and that of my colleagues has identified about 80 New Zealanders who have undertaken graduate work at United States law schools. Many were Fulbright students.

About half of them are now or have been in private practice, a number of them overseas. About 30 are or have been university teachers, again including a significant number overseas. And the balance are or were involved in public service of one kind or another, including politics and the judiciary. Important among these groups are those individuals who have played several parts. Thus some have been in private practice, have done Government advisory work, have taught, have written, and have served as judges. They are increasingly coming into positions of major importance in the law. Thus one of them is a Court of Appeal Judge, two serve on the High Court, one is the Deputy Prime Minister, another a Deputy Secretary for Justice, many are senior partners in major law firms, especially in Auckland, and others are senior members of the bar. Of those engaged in teaching, a number hold very senior positions here and elsewhere. Thus one, Canada's leading academic constitutional lawyer, is a University professor at Osgoode Hall Law School, perhaps the leading law school in the Commonwealth, another is a Distinguished Professor of Law at Rutgers University in New Jersey and a member of a United Nations Commission on Crime Control, and another the Dean of Ottawa Law School; the last two Deans at Otago and the last four at Victoria have all had American graduate experience.

It must be the case that the American experience of this able, educated group will influence their work in an enormous variety of ways - many of which cannot be precisely documented. Consider the material they use in argument and in judgments, the influences on law reform proposals, and the reorganisation and administration of larger firms.

There are two other significant groups of people - more significant for their impact rather than in number. First are visiting American lawyers, especially, but not solely, academics. One or two from the 1950s have plainly had a very large influence on the careers of individual New Zealanders and therefore indirectly on the development of legal theory and legal education here. Allison Dunham, a professor of law at the University of Chicago, was here in the early 1950s, helped persuade at least one student to take his graduate work at Michigan (with major consequences) and gave immediate practical demonstrations of the use of the socratic teaching method, a matter to which I will return[13]. Dean Griswold, the great legal educator from the Harvard Law School, has visited often and, at least in part as a consequence, a number of New Zealanders have studied at his school[14]. Professor Walter Gellhorn of Columbia has made two visits, the first in the course of a world-wide inquiry into the Office of Ombudsmen just when

13 See (1953) 29 N.Z.L.J. 265 on the importance of lawyers studying arts at university, and (1954) 30 N.Z.L.J. 56 on American and New Zealand legal education.

14 See (1951) 27 N.Z.L.J. 344 for an interview with him.

that office was becoming established here and more recently (while in his ninth decade) to study the Accident Compensation Scheme[15]. There have been a number of other Americans who have come to look at that particular development in our social welfare arrangements. This is a case of course of influence going towards the United States but such visits also challenge us to see whether such developments are in fact operating successfully.

Some of these visits have also been important in terms of the development of particular areas of scholarship - such as criminology, aspects of commercial law, public law matters including bills of rights, and perhaps the role of lawyers in relation to nuclear weaponry[16]. In earlier years the influence came as well in one or two cases from very able senior American students[17]. And later of course the influence has spread through the recruitment of Americans and Canadians in significant numbers to law faculty staffs.

The final group of great influence is the small number of New Zealand teachers who around 1950 studied in and visited America and were much influenced by developments there. Kingston Braybrooke from Victoria was a student at Columbia in the late 1940s. Robert Orr McGechan, professor of Jurisprudence and Constitutional Law at Victoria and Dean at the time of his tragic death in 1954, was the first senior Fulbrighter in the law teaching profession. Later there was Jack Northey at Auckland (who had earlier studied at Toronto where the American influence was strong and later assisted many of Auckland's best graduates to study in the U.S.) and still later others of us who were influenced as students or as teachers.

A reading of the list of people suggests a number of other points. One to which I have adverted briefly is the brain drain. We have lost some of our very best and brightest. We can take comfort in the thought that they are making major contributions to their new countries. They can also, I well know, be very helpful in explaining New Zealand to their new compatriots.

A second matter is the time that some influences require to take effect. Only a handful of the 80 students were in the United States before 1960. Given the way in which our institutions work, some of the influences are only now starting to appear.

A third feature of the lists is the geographic distribution of the students. As is to be expected given the size of their law schools and given Victoria's position in the capital city, Auckland and Victoria have provided the bulk of the graduate students. The

15 *Ombudsmen and Others* (H.U.P., Cambridge, 1966); "Medical Malpractice Litigation (U.S.) - Medical Mishap Compensation (N.Z.)" (1988) 73 Cornell L.R. 170.

16 On commercial law, see e.g., Byron Sher (a Fulbrighter) "Contracts and Commercial Law: Teaching and Research in New Zealand" [1965] N.Z.L.J. 222, 248, and S.A. Riesenfeld *The Quagmire of Chattels Security in New Zealand* (Legal Research Foundation, Auckland, 1970).

17 See, e.g., F. Davis (1956) 32 N.Z.L.J. 360 and (1956) 18 N.Z.J.P.A. 45. (Professor Davis is now the Dean of the Memphis State Law School.)

Canterbury involvement, by contrast with Otago's, is very small. Canterbury now has a growing number of American visitors.

A last matter arising from the lists is the influence of non-lawyers: of political scientists such as Lipson and Kelson, of economists such as Monroe Berkowitz and of historians such as Bernard Gordon.

2. *United States materials, especially library materials*

There were lawyers in New Zealand who from the earliest days had access to and used American legal material. In some of the University libraries the holdings of U.S. textbooks and periodicals have been long established. It is only however in the last 20 or so years that library holdings of American materials have really been developed.

Thus the establishment of the various University Law Reviews, including the New Zealand Universities Law Review 25 years ago, provided a basis for exchanges with American law schools. And, importantly, a series of substantial grants from the American Council of Learned Societies in the 1960s provided the basis for the build up of extensive holdings of American Law Reports. There has also been a substantial build up, in the Victoria University Library for instance, of holdings of major textbooks including the multi-volumed works and the volumes of the American Law Institute. To some extent these developments, to pick up a comment made by the Otago Law Librarian, have been promoted by the availability of the *Index to Legal Periodicals* which calls attention in an unremitting way to a vast range of valuable American material.

Statutory material has also grown recently. That is a more difficult and expensive matter, involving considerable selection. Victoria, for instance, has comprehensive holdings only of federal, New York and Californian statutes.

Another important category of material, especially for teaching, is the burgeoning supply of American case books, a development relevant to the next heading.

This very substantial increase of American material has had major significance for a number of matters. Among them are:-

(a) The methods of teaching;

(b) The addition or further development of areas of interest, for example in commercial law, international law, environmental law, public law, native rights, family law, and differing approaches to legal scholarship and analysis, such as the varying schools of jurisprudence including recently feminist jurisprudence, critical legal studies, and the law and economics movement;

(c) The sharpening of the understanding of the law, by way of comparison with more traditional views of the law;

(d) Historical value - some of the core thinking in the basic subjects is best captured in the big books and in the seminal articles in major law reviews;

(e) Quite different attitudes to the role of law. In words of one of my former University colleagues, the American lawyers, or at least the most interesting and best of them, see the ideas with which we are concerned as a springboard for development and not as an impediment to action.

3. *Teaching Methods*

In 1870, on a day famous for law teachers, Christopher Columbus Langdell began his first class in the law of contracts at Harvard Law School with this sentence: "Mr Fox, will you state the facts in *Payne* v *Cave*?" Thus the case method or socratic method of teaching law was launched. It has been much written about[18]. It has been put into its wider educational context. I do not wish to add to that. I should move rather quickly to the New Zealand scene or to that part of it that I know best. But before doing that, to reinforce the earlier point about wide perceptions of a shared legal and cultural inheritance, it is perhaps worth noting that of the 336 cases included in Langdell's first case book on the law of contracts, only 22 were American - mostly from Massachusetts and New York. Virtually all of the rest were English, and many of those had been decided before 1700[19].

In New Zealand - or at least at Victoria University - the case method can be traced back for 50 years. It is discussed in the most interesting way by Professor McGechan in the first article in the inaugural issue of the Victoria University College Law Review published in October 1953[20]. That review itself is an interesting aspect of legal education to which I will return. McGechan justifies the case method elegantly and neatly.

In the course of that account he calls attention to the fact that the four members of the full time faculty at that stage had all had American experience. I have already mentioned that he was the first academic lawyer to be a senior scholar under the Fulbright programme. I have also mentioned Kingston Braybrooke who was probably the second New Zealand graduate student in an American law school[21]. George Barton had been a member of the United Nations Secretariat in New York and Ian Campbell had visited the United States by that time. Professor McGechan also notes that Professor Dunham, from the University of Chicago, was at that time at Victoria helping with the development of this method. But, McGechan was quick to emphasise, it was basically a healthy indigenous development. He stressed that learning by the case method is for the students a positive, active process of working, researching and thinking under guidance

18 See, e.g., Arthur E. Sutherland *The Law at Harvard* (H.U.P., Cambridge, 1967) Ch. VI, and Robert Stevens *Law School - Legal Education in America from the 1850s to the 1980s* (Univ. of North Carolina Press, Chapel Hill, 1983).

19 E. Allan Farnsworth "Contracts Scholarship in the Age of Anthology" (1987) 85 Mich. L.R 1406, 1409.

20 "The Case Method of Teaching Law" (1953) 1 V.U.C.L.R. (No.1) 9.

21 See (1949) 25 N.Z.L.J. 309,319.

from their teachers, or finding the law for themselves from the sources. By contrast the lecture method views the students as receptive, with the negative function of understanding what was being given on the authority of the teacher or the textbook. The case method had advantages both in the training of lawyers and as a form of university education. The student, he stressed, learns by doing. McGechan's report on his sabbatical leave, taken mainly in America, also is of interest.[22]

I think that I may say, without sounding too parochial, that this development occurred much earlier in Wellington than in the other law schools. There was the occasional attempt at Auckland when I was a student in the late 1950s, but it essentially was a completely new experience, and at first a frightening one, when I arrived from Auckland as a senior student in 1960 and was immediately faced by the most vigorous questioning from Don Inglis in his conflict of laws class. I think that Judge Inglis' book on conflicts[23], a most interesting combination of provocative essays (written only as he can write) and edited cases, is the first New Zealand published case book. His teaching method related very much, as he generously acknowledges, to his time as a student at the University of Chicago in the late 1950s. But he also refers back to his earlier Victoria experience. He says :

> I still remember the impact of the socratic method as it was delivered by McGechan. For me personally it was the single most important factor in kindling a real interest in law, mainly, I think, because for the first time it presented us with a challenge to think in legal terms.

Method should not of course be considered apart from purpose. The purpose has already partly been indicated in some of McGechan's and Inglis' comments. I will say a little about that under by next heading. I should first mention other developments in teaching methods and the spread of the socratic and similar methods in New Zealand. By the early and mid-1960s other university law schools were moving in limited ways towards socratic teaching. I have had very vivid accounts of the influence of part-time teachers in this context, returning from the best American law schools and enthusing their students at Dunedin and Auckland. Parallel to that development was the preparation of teaching materials. Some of those go back a very long time. I inherited very fragile stencils prepared by Professor McGechan in the mid 1940s on aspects of the law of war. Jack Northey had multilithed case books in use in administrative law in the early 1960s and he had been preceded in Wellington by Colin Aikman who had built up his materials from those prepared by McGechan for constitutional law.

There are two other matters relating to teaching method. The first is the development of the law review. As the foreword to the first issue of the Victoria University College Law Review shows, it was an educational exercise. The aim was to develop the capacity of students to expound the law clearly in print. The method employed - on the American model - was to use senior and junior student editors. The senior editors were the best students in the final year and the junior editors the best in

22 (1951) 27 N.Z.L.J. 361, and "A New Zealander's Comments on American Legal Education" (1953) 5 J.L.E. 286.

23 B.D. Inglis *Conflict of Laws* (Sweet and Maxwell, Wellington, 1959).

their second to last year. The process was for the work of the junior editor to be criticised as to substance and exposition by a senior editor and then rewritten a number of times. It is interesting to look at the early lists. They include two High Court Judges, one District Court Judge, and an Ambassador, along with a number of other very senior practitioners[24]. The other three law schools later also established reviews, with the Auckland one being the truest to a student educational base on the American model - a model difficult to sustain in full with our undergraduate law degree.

The other development is the growth of mooting, including, over a large number of years now, a national competition and more recently participation by the best New Zealand teams in the Jessup moot competition organised each year by the American Society of International Law and involving a large number of international competitors. Mooting is of course very much part of the Common Law tradition. The development here can to some extent be attributed to American influence - for instance by way of ideas which Julius Stone brought form Harvard to Auckland.[25]

4. *The purposes and content of legal education and research*

Some changes in law courses have obviously been influenced by United States developments. Consider for example the growth in courses relating to civil liberties, environmental law, commercial law, and public law more generally, and , to touch on a point mentioned when I was discussing library resources, different approaches to law - the realists of the 1920s and 1930s, and the more recent legal method, law and economics (the subject of seminar courses at Victoria and Otago this year), and critical legal studies approaches.

The changes in the content of courses have related very much to changes in the content of the law. One that has been mentioned by two of my correspondents is the development of family law and in particular the establishment of the Family Court, very much an idea that was being expressed and manifested at relevant times in the United States. There were changes as well in the structure of the law course with the opening up of options, the introduction of Honours, the greater emphasis on legal writing (although that was something which perhaps had had greater emphasis in New Zealand over the years than in law schools elsewhere) and related greater opportunities for specialisation. All those matters of content and structure can be related to American influences and are interesting, but in a way they are mundane.

The more important questions are those of overall purposes. Why are we even engaged in a University context in teaching law? What does the enterprise really involve? Those are huge questions. I can very briefly address them in the present context, first, by referring to the statements including in recent Victoria University of Wellington and Otago University Law Faculty handbooks indicating the qualities that we are looking for[26], and, secondly, by giving an account of the development of an

24 (1953) 1 V.U.C.L.R. (No 1) 3, 5.
25 (1944) 20 N.Z.L.J. 266.
26 See Appendices 1 and 2.

important part of the Victoria University degree about 25 years ago when the American influence, for me at least, was palpable.

The Law Faculty Handbook statements place major emphasis on process, on the ways in which law works, on the ways in which lawyers go about their business. They relate closely to a dominant legal method tradition encapsulated in the Hart-Sacks Harvard course and materials of the 1960s and to the case method. They reflect the undoubted truth that most, if not all, of the rules that we might put in front of our students at any particular time will long since have disappeared or been altered out of recognition as those lawyers move through their careers. They must have a good grasp of principle. They must have a good overall view of the law. But they need not carry around in their heads massive amounts of ever changing details. The important things are the cast of mind, the methods, the searching after the right questions. I have in the past occasionally concluded my last classes with senior students with Gertrude Stein's famous and instructive last words.

As I began teaching in 1962 the law course had been substantially changed for the first time in many years. A new course in Legal System had been introduced as an introductory subject in place of Roman Law. What should we do in this course? How could we best challenge the able young people who now were coming into out courses on a full time basis as the Universities were becoming better funded and better resourced following the changes to the University structure and the preparation of the Hughes Parry Report?

The then Dean, Colin Aikman, returned from a sabbatical leave, inevitably in the United States, greatly enthused and with an outstanding legal process book prepared by a number of members of the University of Minnesota and University of Wisconsin Law Schools: Carl A. Auerbach, Willard Hurst, Lloyd Garrison and Samuel Mermin, *The Legal Process: An Introduction to Decision-Making by Judicial, Legislative, Executive and Administrative Agencies* (1961). It was very much a book that was concerned with how the law developed. It took as its particular subject matter the law of industrial accidents. It showed how the Common Law judges from early in the 19th century had developed the law, for the most part in a way that looked to the interests of the burgeoning industrial state and gave very little concern to the interests of the workers who were maimed or their families in the event that they were killed. It was possible to examine closely, in the context of the historical development of industry, the law as it was developed by the minds of some great and less than great judges around the Common Law world. There was some splendid writing, for example, by Chief Justice Shaw of the Supreme Court of Massachusetts. There was also some abysmal writing, for instance, by Lord Abinger in the English courts. Legislatures then intervened in a variety of ways to protect workers, for instance around the turn of the century with the introduction of worker's compensation statutes. They were not persuaded that the Common Law courts had got it right. The legislation meant that we were able to see something of the political and parliamentary process and then to move on to examine closely how courts interpret legislation. We also saw the way in which legislation could be implemented not by courts but by specialised tribunals and commissions. That

is to say, the material raised very important questions about the way in which rights and duties are organised and public power is exercised.

We could always be faced with the question, as were were indeed from time to time, why are we discussing this old law, for instance this principle of common employment, particularly when students discovered that Parliament had abolished the doctrine many years before[27]. The same questions had of course at various times been asked rather more firmly about the teaching of Roman Law. They are interesting questions but they are beside the point. What this rich material, in the American book as adapted in various ways for New Zealand purposes, so well presented was an enduring set of questions. There was also the nice coincidence that as we got those cases, statutes and related information into our teaching materials the matter of compensation for injury caused by accident did in fact come on to the live political agenda in New Zealand with the establishment first of the Committee on Absolute Liability for Motor Vehicle Accidents and later of the Woodhouse Royal Commission. There was a very interesting interaction, as a consequence, between the political process and the academy, a contact which has continued in a variety of ways. The most abstruse learning, as it may appear in a substantive sense, may in fact become of immediate practical importance. But, as I say, that is not the main reason for using this material. The main reason is, to repeat, to present the enduring questions of legal method and legal process and to see how those questions are worked out in real social and political contexts.

5. *Legal reasoning - methods and styles*

This final heading is large and frightening. What can I say about the influence of American ideas on the way in which New Zealand lawyers and in particular those engaged in legal education think? What can I say about the way in which they reason and the way in which they put together their legal writing? There are some rather formal ways of looking at this. Where have New Zealanders published, what American sources do they draw on as support for their argument, and in which areas do they write? For some suggestive material, see the essays in J. Elkind (ed.), *The Impact of American Law on English and Commonwealth Law*[28] and for a specific example of current relevance, see G. Palmer, "Defamation and Privacy Down Under"[29]. Some of this evidence does demonstrate substantial changes as a consequence of American influences, whether by way of study there, visits, or merely reading the much more widely available American material.

But I should be looking to broader changes than that. I should do that against a broader background than just legal education. One part of the background is the very large change in New Zealand's place in the world. Over the past 50 years we have appreciated more clearly the imperatives of geography. We are part of the Pacific world[30]. In part that realisation is the return to a perception of a century ago when

27 Workers' Compensation Act 1908, s.2; Law Reform Act 1936, s.18.
28 West Publishing, St. Paul, Minna., 1978.
29 (1979) 64 Iowa L.R. 1209.
30 See also C. E. Beeby on the Carnegie Foundation in Malcolm McKinnon (ed.) *The American Connection*, supra n.10, 38.

miners, seamen, unionists, architecture, trees, books, ideas and even laws travelled around the rim of that great ocean. The simple trading world of just 40 years ago in which most of our primary produce was sent directly to Britain under bulk purchase agreements has been replaced by one in which our trade is more or less equally divided between the United States, Japan, Australia, Europe (principally the United Kingdom), and others. That change must of course have consequences for our business law, especially as Britain too recognises the legal consequences of its return to Europe.

Parallel to (perhaps arising from) those and related changes are great changes in the understanding and operation of the law and legal processes. I wish to mention some great judges. However, I would not want by that mention to underestimate the importance, probably greater, of the lawyer in the legislative process. In New Zealand from the 1960s, consider for instance the roles of Mr. Hanan, the Minister of Justice, and his officials, Dr. Robson and Mr. Cameron, in the enactment of the Crimes Act 1961, the Ombudsmen legislation, the Criminal Injury Compensation scheme, the Indecent Publications Act, and major changes in our divorce, matrimonial property and guardianship law.

In my professional life attitudes to the judicial role have undergone enormous change. Around the mid 1950s, the legal scene in England and here was very static. Judges, it was said, decided according to rule, with very little recognition of the inevitability of judicial development of the law. Their reasoning was frequently wooden and literal. The spirit was often ignored. Robert Stevens, an outstanding Anglo-American, writing of the House of Lords refers to 1940-1955 as "the era of substantive formalism"[31]. But then suddenly (or so it appeared to me soon after I started the study of law and as I was about to go to America for the first time) the English and New Zealand scene began to change - and drastically. That change in part parallels the legislative change that I mentioned and the broader social changes that such legal changes manifest. But great judges were part of it. In England Lord Denning became the head of the Court of Appeal and changed, possibly forever, the perception of the possible role of the English judge. Lord Reid as the senior Law Lord in Britain wrote major judgments through the 1960s and 1970s and dispelled what he referred to as the fairy tale that judges do not make law. We do not, he said in 1972, believe in fairy tales any more. We must accept the fact that for better or for worse judges do make law and tackle the question how they do approach this task and how should they approach it[32].

The writings of three senior New Zealand judges can be used to evidence the changing and widening view held here of the judicial role and the emphasis on developing a law for New Zealand. They also evidence, however, the intangible and ubiquitous character of influences, for one had his first real test outside New Zealand in PT boats in the Adriatic, the second went to Cambridge (England, not Massachusetts) for his graduate work and only the third to the United States, to Michigan[33].

31 *Law and Politics: The House of Lords as a Judicial Body (1800-1976)* (Weidenfeld and Nicolson, London, 1979) Part Three.

32 "The Judge as Law Maker" (1972) 12 J.S.P.T.L. 22.

33 Sir Owen Woodhouse *Government under the law*, J. C. Beaglehole Memorial Lecture (Price Milburn, Wellington, 1979); Sir Robin Cooke "Divergences - England,

Such questioning of, and debate about, the judicial process is very long established in the United States. The discussion is sophisticated, theoretical and practical. The wide role of law and lawyers, while often disputed, has much firmer foundations than in our tradition. We have had clear evidence of this in recent years in the slight quality of much of the debate in the United Kingdom about its possible adoption of a Bill of Rights compared with the excellent standard of the best American constitutional writing. The best American writing illuminates enduring questions about the proper extent of the judicial power, the legal process and the organisation and control of public power. Holmes, Brandeis, Cardozo, Learned Hand and the more recent great judges can all be read and re-read with great benefit and pleasure.

I do not have a conclusion. In a way it would be contrary to what I have gained over the past 25 years to have one. Let me draw to a close with some more quotes. For one of my colleagues, the American tradition and method bring a fundamental appreciation that the law is a positive social force. For another the move from one tradition to another presents boundless vistas not constrained by crabbed caution. The American method, building on the best of the old world inheritance, challenges us to see the law in context, to examine both the detail and the wide picture, and to test the law, so that in our own land it may mediate continuity and change, heresy and heritage, and provide the wise restraints that make us free.

One great graduate of the Harvard Law School who early decided to pursue poetry rather than take a partnership in a major Boston law firm and who later became Librarian of Congress and an adviser to President Roosevelt wrote a marvellous poem for another poet who had just died. He later read it to the editors of the Harvard Law Review, suggesting as had Shelley before him, an interesting parallel between the poet and the legislator. Let me read a few lines of it. For me they state a central challenge to lawyers, to those involved in teaching, as well as to poets : [34]

> The labour of order has no rest:
> To impose on the confused, fortuitous
> Flowing away of the world, Form -
> Still, cool, clean, obdurate,
> Lasting forever, or at least
> Lasting ...

Australia and New Zealand" [1983] N.Z.L.J. 297; and I.L.M. Richardson "The Role of Judges as Policy Makers" (1985) 15 V.U.W.L.R. 46.

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

APPENDIX 1

[Included in Victoria University of Wellington Law Faculty Handbooks in the past]

THE STUDY OF THE LAW *

The law courses at Victoria aim to combine a general liberal education with a grounding in the specific knowledge and skills necessary for the various careers in law. Most law graduates eventually go into private practice. The Law Faculty recognizes that it has a major obligation to provide a kind of education which equips its graduates for such a career. This does not, however, mean that it cannot cater for students interested in other careers. Nor does it mean that a law course should be an apprenticeship course. A narrow technical approach, one that fails to consider law in its social context, has no place in a University and, in any event, is of little use to anyone who hopes to practise law. Technical legal competence is essential but by itself it is not enough.

Law operates not only to order society as we now know it. It is also an affirmative force in the process of orderly social change. Law is not static. Those who understand the law and the processes by which it functions are in a position to make truly important contributions to society. By adapting and using the teachings of the past rather than merely echoing them, they are able to find solutions to new social problems as they arise. Accelerating changes in society, its values and technology, will lead to rapid changes in the law. This means that the study of law cannot realistically be confined to the rote learning of rules. In order to understand those changes, and to help initiate some of them, a lawyer needs a general liberal education. This is provided in part by the arts or science credits which students take at the beginning of their law course. In addition, law teachers are coming to recognise the need to draw upon the insight and techniques of other disciplines both in the teaching of law subjects themselves and in order to ensure that law graduates are able to understand and participate in future developments in the law. Again, this inter-disciplinary approach reflects the belief that law is not a "closed system obedient to some secret internal process but is intimately bound up with the society which it regulates".

A law course should, in the view of the Faculty, develop the following inter-related qualities:

(i) Understanding of the role of law in society:
Some aspects of the role and function of law, and lawyers, in society have been briefly discussed above.

* This section draws heavily on material published by the Osgoode Hall Law School in Canada and by the College of Law of Iowa University in the United States of America.

(ii) Knowledge of institutional environment:
The knowledge of the role of Parliament, local bodies, courts, officials, agencies, and other public or private institutions, their uses and the limits of their effectiveness.

(iii) Analytical skills:
The capacity to analyse legal materials, i.e. to read and understand Acts of Parliament, judicial decisions, and other legal materials; the capacity to analyse a problem, i.e. to separate the material facts from the immaterial facts, to survey the problem from many perspectives; and the capacity to apply relevant legal principles, policies and rules to those facts.

(iv) Research skills:
The capacity to find the relevant law by use of the library and to find other information which is needed.

(v) Communicative skills:
The capacity to listen and to argue and to write effectively.

(vi) Knowledge of the law and its practical implications:
The knowledge of some of the important parts of the law, sufficient knowledge to enable tentative diagnoses of many problems so as to indicate the direction of further analysis and research.

(vii) Professional knowledge and skills:
The capacity to draft court documents and conveyancing documents (e.g. documents giving effect to the buying, selling, mortgaging, and leasing of property); the capacity to anticipate and circumvent legal or factual problems and to help clients organize their affairs to the full advantage within the law; a knowlege of office and courtroom practice.

(viii) Public responsibility:
A sense of professional responsibility to clients, to courts, and to the legal system as a whole.

Different teachers and students at Victoria would place different emphasis on these objectives and no doubt they would also differ on the extent to which these objectives are achieved in the various courses currently taught at Victoria. The emphasis also differs from year to year; so there is very heavy emphasis on analytical skills in the early subjects; and the role and function of law is a central concern of the optional subjects in the third year.

While the law degree contains a common core of subjects which must be taken by all students, it also permits students in the later stages of the course to choose between a number of optional subjects. These optional subjects give the course a certain amount of flexibility. Some students will choose subjects because of their inherent interest. Others may elect to do subjects which relate to some aspects of private practice which they hope to pursue. Those planning to work in the public service, in administration or in business may similarly choose subjects most suitable for their intended career.

Law subjects require students to do a lot of reading and thinking on their own. They are required to develop their understanding of the law and their analytical skills by working their own way through prescribed materials. Most of the early law subjects have tutorial programmes in which students meet in small groups in order to develop

analytical skills through discussion. These skills and the related research skills are emphasised in the small group programme in the second year which is described in the section headed "Legal Writing and Research Programme". They are also required to do written exercises and to give opinions on the problems raised by different fact situations. In addition to this however, some law teachers believe that all lectures, or a large part of them, should be replaced by class discussion. They believe in a variation of the Socratic method of teaching sometimes called "the case method". Under the case method, students are required to read in advance of each class either the judgment given by the Court in some reported case or some other material which they are then asked to discuss in class. Students are required to work things out for themselves rather than to write down the views of the lecturer. Devotees of this method of teaching claim that it is a most effective way of developing skills of analysis and oral communication.

If lawyers are to contribute to and cope with a rapidly changing society they need a general liberal education which encourages them to think for themselves and helps them to understand something of the role of law in society. They also need a variety of professional skills and knowledge. The Faculty hopes that its courses go some way to meet these needs. If they do so, then they provide an education of use and interest to those who do not intend to enter the private practice of the law as well as to those who do.

APPENDIX 2

[Included in Otago University Law Faculty Handbooks in the past]

If I were to try to describe a good lawyer in a phrase I would call him a professional in versatility. This is another way of saying that he has acquired certain abilities that enable him to operate effectively in any enterprise, familiar or unfamiliar, to diagnose its difficulties and contribute substantially to the solution of its problems. His usual field of operation is one in which the legal ingredient is large, and to this ingredient he brings professional knowledge as well as the basic abilities; but the fact that the non-legal ingredient is frequently dominant and the further fact that the situations in which his help is solicited are many and varied give him the habit of tackling new problems with confidence and skill, regardless of their nature.

My listing of the basic qualities is the following:

1. Fact consciousness. An insistence upon getting the facts, checking their accuracy, and sloughing off the element of conclusion and opinion.
2. A sense of relevance. The capacity to recognise what is relevant to the issue at hand and to cut away irrelevant facts, opinions, and emotions which can cloud the issue.
3. Comprehensiveness. The capacity to see all sides of a problem, all factors that bear upon it, and all possible ways of approaching it.
4. Foresight. The capacity to take the long view, to anticipate remote and collateral consequences, to look several moves ahead in the particular chess game that is being played.
5. Lingual sophistication. An immunity to being fooled by words and catch-phrases; a refusal to accept verbal solutions which merely conceal the problem.
6. Precision and persuasiveness of speech. That mastery of the language which involves (a) the ability to state exactly what one means, no more, no less and (b) the ability to reach other men with one's own thought, to create in their minds the picture that is in one's own.
7. And finally, and pervading all the rest, and possibly the only one that is really basic, self-discipline in habits of thoroughness, an abhorrence of superficiality and approximation.

Professor W Barton Leach
Harvard Law School