"Sailing in a new direction": the laws of England in New Zealand

Simply by sailing in a new direction
You could enlarge the world.

Allen Curnow, "Landfall in Unknown Seas" 1943[1]

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The Rt. Hon Dame Sian Elias
Chief Justice of New Zealand

My title is taken from a poem by Allen Curnow, dealing with the discovery of our islands by Abel Tasman. It was written in 1943 during an intellectual flowering which accompanied the 100th anniversary of the founding of New Zealand. It was an intoxicating time. Robin Hyde expressed the mood: "We are hungry for the words that shall show us these islands and ourselves; that shall give us a home in thought".[2]

John Beaglehole in his incandescent essay "The New Zealand Scholar",[3] written in 1954, made the point that this transition is one all colonial people must make. It is the theme of Robert Frost's "The Gift Outright", quoted by Beaglehole.[4]

> The land was ours before we were the land's.
> She was our land more than a hundred years
> Before we were her people. She was ours
> In Massachusetts, in Virginia,
> But we were England's, still colonials,
> Possessing what we still were unpossessed by,
> Possessed by what we no more possessed.
> Something we were withholding made us weak
> Until we found it was ourselves
> We were withholding from our land of living,
> And forthwith found salvation in surrender.

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1 J Bornholdt, G O'Brien and M Williams (eds.) *An Anthology of New Zealand Poetry* (Oxford University Press, 1999) 401.

2 Quoted by J Beaglehole "The New Zealand Scholar [the Margaret Condliffe Memorial Lecture, Canterbury University College, 21 April 1954]" in P Munz (ed.) *The Feel of Truth* (Reed, 1969) 244.

3 Ibid., 237.

4 Ibid., 282.

As Beaglehole and Frost suggest, there is a lag between political independence and independence of thought. The process of transition may be lengthy. It does not come about at once or in all things at the same time.

Of course in New Zealand we are in 2002 a very long way down the track. Certainly even those of us of settler stock surrendered to the land a long time since. In thought the process may have been slower. In 1954 Beaglehole was tentative. He spoke of his "gathering conviction" that we had in New Zealand "something interesting", not yet a harvest, but a seed-bed. He "ventured to hope". Today, prodded perhaps by the historians, poets and writers discussed by Beaglehole, the seed-bed he discerned has flourished. Those of my generation do not doubt that in art, in literature, in politics we have a home in thought at home. That is not to suggest that we have cut adrift from our wider heritage. But we have built upon it.

This evening, under instructions not to bore you with too much law, I thought I might touch on these themes of transition and possession within our legal system. There are two reasons why this seems an appropriate time to take stock. First, we are in this year 150 years from the granting of representative government to New Zealand under the 1852 New Zealand Constitution Act. That was an Act of the United Kingdom Parliament which served as our basic constitutional document – unbelievably – until 1986. It was the beginning of independence. Secondly, the New Zealand Government has announced in the speech from the throne that in this session it will introduce a bill to set up a Supreme Court in New Zealand as our final appeal court, in substitution for the Privy Council. Some reflection on the New Zealand legal system seems in order.

After New Zealand became a Crown Colony in 1840, the establishment of a legal system and the provision of laws appropriate to local conditions had to await the arrival of the first Chief Justice. In the meantime, the adoption of the temporary expedient of applying "the laws of New South Wales so far as they can be made applicable" was resented greatly. Such laws were thought by local residents to bring a "penal taint" to the new colony.[5] Independence of thought from Australia was therefore an early New Zealand characteristic which preceded sporting rivalry.

In April 1841 the first Chief Justice of New Zealand, William Martin, left England on the Tyne. With him were William Swainson, who had been appointed the second Attorney-General, and Thomas Outhwaite, who was to become the Registrar of the Supreme Court. None of them had visited New Zealand. Nor were they greatly experienced in the practice of law. The Chief Justice had been admitted to the bar as a member of Lincoln's Inn only three years earlier. He had practised in chancery chambers in London settling conveyances, settlements, and trusts.[6] He was 34 years old. Swainson was 32, a barrister of Middle Temple with a conveyancing practice. The voyage

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5 A McLintock *Crown Colony Government* (Government Printer, 1958) 132-133.

6 G Lennard *Sir William Martin: The Life of the First Chief Justice of New Zealand* (Christchurch, 1961) 3.

lasted almost five months. The men spent their time diligently studying Maori, and framing laws for the consideration of the Legislative Council. They were committed evangelical Christians who were animated by the spirit of reform of the age. They were, as Lady Martin in her reminiscences described them "young and full of life". They needed to be.

The New Zealand to which they were sailing had been reluctantly acquired for the Crown the year before. The main consideration in the acquisition was the need to establish a legal order. The lawlessness of many of the "riff-raff" who had settled in New Zealand was notorious throughout the Pacific. They pepper the reports of the British Resident, James Busby in the period before the Treaty of Waitangi was signed. By 1839 Busby had good cause to write sadly:[7]

> It is not, I fear, easy for one who has never lived beyond the supremacy of established laws, and the exercise of undisputed authority, to form a just conception of a state of things where neither law nor authority has existence.

Lord Glenelg, the Colonial Secretary, explained the decision to make New Zealand a colony in terms of the need to establish legal order and to avoid the repetition in New Zealand "of the calamities by which the aborigines of American and African colonies have been afflicted".[8]

The Instructions to Captain Hobson to treat with Maori were in the name of Glenelg's successor, Lord Normanby, but they were drafted by James Stephen, the brilliant Undersecretary for the colonies. Because of his scruples about colonisation and concern for Maori, he earned the enmity of Edward Gibbon Wakefield, promoter of the New Zealand Company, who referred to him as "Mr Oversecretary Stephen" or "Mr Mother Country".[9] But we have much cause to be grateful that the establishment of the colony was under the direction of a man of Stephen's capacity and idealism.[10] He had entered the Colonial Office to work for the abolition of slavery (and he drafted over one weekend the Slavery Emancipation Act 1833).[11] He encouraged colonial law to avoid the complexities of English laws and procedures and to adapt to the conditions of each colony.

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7 Busby to Glenelg, 25 Feb 1839 quoted in E Fletcher *A Rational Experiment: the bringing of English Law to New Zealand* (unpublished Master of Arts thesis, Auckland University, 1998) 56.

8 Lord Glenelg to Lord Durham 29 December 1837, Great Britain Parliamentary Papers NZ 1 1840 (582) VI, Appendix 8, 148-149 quoted in Fletcher, above at n 7, 91.

9 McLintock, above at n 5, 37.

10 Stephen considered that "no strenuous effort for the good of mankind was ever yet made altogether in vain": P Knaplund *James Stephen and the Colonial System, 1813 – 1847* (Madison, 1953) 20. He was Benthamite in sympathies and open to change.

11 Knaplund, above at n 10.

Normanby's Instructions stressed that Hobson was to act scrupulously in his dealings with Maori. New Zealand was not to be annexed[12]

> unless the free and intelligent consent of the natives, expressed according to their native usages, shall first be obtained.

With that consent, Hobson was to obtain sovereignty over New Zealand in exchange for the benefits of law. Maori were to be "carefully defended in the observance of their own customs, so far as compatible with the universal maxims of humanity and morals".[13] A right of pre-emption in the Crown for sale of Maori land would protect Maori from unfair sales and enable the Crown to set up a system of title for lands which had been alienated.

The Treaty of Waitangi was entered into on 6 February 1840. I doubt that ever a nation started out in such beauty. The headland looks across the sweep of the Bay of Islands. Colenso says that the noise of the cicadas was deafening on that day.[14] The circumstances of the signing are dramatic. It is not necessary to recount here a tale which has been so well told before. The three short articles of the Treaty follow the Instructions given to Hobson and met the realities of 1840. While allowances have to be made for selective and coined language, my own impression is that both texts, Maori and English, reconcile surprisingly well and identify the crucial rights, obligations and privileges. What was clear is that the Treaty was a start only. Given the relative numbers of Maori and non-Maori it was obvious that New Zealand could only be governed with the consent of Maori for the foreseeable future.

A considerable inducement to Maori in entering into the Treaty was the promise of law. That is clear from the debates and follows on from earlier petitions for British protection. At Waitangi, in his influential speech, Tamati Waka Nene asked Hobson to remain among them as "a father, a judge, a peacemaker".[15] The protection of Maori custom, however, was assured. The meaning of clause 2 of the Treaty, promising the rangatiratanga of their possessions to Maori was closely questioned and was explained by the representatives of the Crown as preserving custom and the authority of the chiefs.[16] Pluralism in law through preservation of custom was common in colonial law.[17] It was confirmed in its application to New Zealand by the new

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12 Normanby to Hobson 14 August 1839 (no 16) Great Britain Parliamentary Papers NZ 3 1840, quoted in Fletcher, above at n 7, 108.

13 Ibid., 109.

14 W Colenso *The Authentic and Genuine History of the Signing of the Treaty of Waitangi* (Wellington, 1890).

15 Ibid., 27.

16 Fletcher, above at n 7, 122.

17 P McHugh *The Maori Magna Carta: New Zealand Law and the Treaty of Waitangi* (Oxford, 1991) 85-86:

> "The plurality of legal systems within British territory was hardly a novel possibility in 1840 as New Zealand was poised to become the Crown's newest colony. The legal monoculture today – "one law for everyone" – is a relatively

Secretary of State for the Colonies, Lord Stanley. With the exception of customs "in conflict with the universal laws of morality", Stanley could see no reason[18]

> why the native New Zealanders might not be permitted to live among themselves according to their national laws or usages, as is the case with the aboriginal races in other British colonies.

Neither the first nor the third articles of the Treaty of Waitangi was therefore intended to impose upon Maori the laws applicable to European subjects. The Colonial Office understood that obtaining the rights and privileges of British subjects did not deprive Maori of their customs, any more than the cession of sovereignty stripped away custom.[19]

British sovereignty was also separately proclaimed over both islands; in the north on the basis of cession, in the south on the basis of discovery. Whether the basis of acquisition was cession under the Treaty of Waitangi or settlement would cause debate for the future and raise questions about the application of English law and Maori custom.[20] But, for its part, the Colonial Office in supplementary instructions to Hobson, confirmed that the title to British dominion over New Zealand rested "on the deliberate act and cession of the chiefs, on behalf of the people at large."[21] It was said that no tribes throughout the empire had stronger claims than Maori to the protection of the British Crown: they were a people in whom "the arts of government have made some progress . . . with usages having the character and authority of law".[22]

In 1841, when the Tyne slipped into Auckland harbour, the realities of life in New Zealand presented substantial challenges for the establishment of the

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> recent attitude, one which should not be applied retrospectively to British imperial history. This history is one in which legal pluralism was the norm rather than the exception. ….. British sovereignty *of itself* did not supplant the Maori customary law with English law. If the guarantee in the Maori version of the Treaty of Waitangi of te tino rangatiratanga was no more than an assurance that the Chiefs' cession of sovereignty would not displace their customary law, then this was a promise which to a great extent English imperial constitutional (colonial) law was able to keep."

18 Great Britain Parliamentary Papers NZ 2 1844 (556) XXIII Appendix 19, 475 quoted in Fletcher, above at n 7, 223.

19 Thus, Stephen emphasised, in considering the Cape Colony Ordinance of 1828 which conferred the protection of English law upon Hottentots that the different wants and conditions of the two races required them to be placed, to a certain extent, under different systems of law: Fletcher, above at n 7, 117.

20 See, *R v Symonds* (1847) NZ PCC 387 and William Martin *The Taranaki Question* (Dalton, 3rd ed., 1861).

21 Russell to Hobson 9 December 1840 (no 17) Great Britain Parliamentary Papers NZ 3 1841 (311) XVII, 27 quoted by Fletcher, above at n 7, 139.

22 Ibid.

"settled form of government" and the protection of custom and law promised by the Treaty.

In 1840 there were approximately 100,000 Maori in New Zealand, and 2,000 settlers. By 1842 the settler population had grown to 11,000, most of whom were in New Zealand Company settlements at Wellington, Nelson, Wanganui, and New Plymouth, well to the south of the capital in Auckland.[23] Both Maori and non-Maori had expectations of law in the Crown Colony it was going to be very difficult to fulfil.

In vast tracts of the country, Maori were undisturbed in their traditional social organisation. Plunder to avenge injury was the usual vindication of right. Warfare, at least in parts of the country where Christian teaching was not accepted, continued. Collective responsibility for the depredations of individuals was accepted. Land was held collectively. Interests in land could be elaborate and could cross hapu territories. They could include usufructory rights, often seasonal, to particular resources; possessory rights to occupy habitations, cultivations and fisheries; and tribal rights under the mana rangatira.[24] The complexities of Maori systems of social organisation and in particular their relationships with land were only dimly perceived. Land purchases undertaken before 1840 remained to be investigated. The Crown's exclusive right under Article 2 of the Treaty of Waitangi to acquire Maori land (and sell it to settlers) required the establishment of a system. More settlers were on the way, with more pressures upon Maori land. Protection of those Maori customs not inconsistent with principles of humanity, suppression of those that were (cannibalism and warfare, but not initially slavery because of its role in Maori social organisation), and protection of the law raised questions of boundaries requiring negotiation and persuasion.

The challenges in responding to settler expectations were almost as great and perhaps more pressing. Respectable settlers expected the benefits of established law and were indignant at the lack of legal machinery to resolve civil disputes and a realistic enforcement capacity to suppress lawlessness.[25] Nor were there many settlers who had any knowledge of the law and who could be expected to provide any real assistance to the new court system. A letter written to Henry Chapman in 1841 described the legal profession in Wellington. They comprised five practitioners. One was dismissed as a "flippant fool". A second was "no lawyer". One knew the principles of the law but not its practice. A further was "most imperfectly educated" and unlikely to improve, with cross-examinations so bad as to be "sure to lead to the ruin of his client". The last was described as a "Scotch Attorney, not over bright and

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23 McLintock, above at n 5, 134.

24 See Waitangi Tribunal *Mohaka River Report* (Brooker and Friend, 1992, Wai 119) 16.

25 This preference to conform with "remembered law" is a feature of a number of frontier societies: see for example J Reid *Law for the Elephant: Property and Social Behaviour on the Overland Trail* (San Marino, 1997). In Kororareka ("the hell hole of the Pacific") a vigilante movement was set up in 1838 in an attempt to establish some sort of order.

abundantly fat and idle".[26] (While some of these men were to come to sticky ends, others went on to found New Zealand legal dynasties.)

This unpromising backdrop does not seem to have deterred Martin or Swainson. Hobson had been instructed to draw up laws for the "peace order and good government" of the colony "in a simple and compendious form, avoiding as far as may be all prolixity and tautology".[27] That was a task that the two newcomers fell to with enthusiasm.

From December 1841 until March 1842, the Council passed 19 ordinances. The Instructions to Hobson had advised him to look to the laws of other colonies which had adapted English law, while "retaining the spirit of English law". But "servile adherence to them as precedent" was discouraged "except as far as the similarity of circumstances may allow".[28]

The first ordinances were received with some astonishment in London. They were radical measures by the standards of the day. The two Supreme Court Ordinances (the first was disallowed in London)[29] established the Supreme Court. It had jurisdiction in common law and equity, anticipating the English restructuring by decades. The Property and Conveyancing Ordinances greatly simplified English conveyancing and property law. The Land Claims Ordinance 1841 established that the domain lands of the Crown were "subject to the rightful and necessary occupation and use thereof by the aboriginal inhabitants". As the Judicial Committee of the Privy Council was to say about this enactment, it was legislative recognition that the title of the Crown was "subject to the rightful and necessary occupation" of the aboriginal inhabitants, "and was to that extent a legislative recognition of the rights confirmed and

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26 Revans to Chapman 13 June 1841 quoted in R Cooke (ed.) *Portrait of a Profession* (Reed, 1969) 23.

27 Instructions of 1840 [to William Hobson] in *Ordinances of New Zealand (1841 – 1849)* (New Zealand Government Printer, 1850) 9.

28 In a letter from Lord John Russell dated 9 December 1840 enclosing Letters Patent and Instructors to Governor Hobson of 1840 published in Great Britain Parliamentary Papers under *Correspondence Respecting the Colonization of New Zealand* NZ 3, (1841) (311) XVII 24 at 25.

29 Stephen took the view that colonial judges should hold office at the Queen's pleasure, not during good behaviour, as the ordinance had it. He also took the view that permanent appointments were too risky because of the smallness of colonial societies and the attendant risks of judges being captured or allied to one faction or another. Nor did the office approve of the ordinance's restriction of audience in the courts to barristers and solicitors who had been admitted in the United Kingdom and Ireland. Those who gained qualifications in New Zealand or other colonies were not to be excluded. Nor were Judges to be empowered to make rules of Court. The Colonial Office required such rules to be contained in ordinances, so that they could be properly scrutinised in London. A modified ordinance eventually was enacted in January 1844 (notice of disallowance of the old ordinance having been withheld on Swainson's opinion that it was within "the spirit and the letter of Lord Stanley's despatch" to do so until a new ordinance could be passed). An attempt to overturn a decision delivered after eventual announcement of the notice but before promulgation of the new ordinance was dismissed by the newly arrived Justice Chapman. The new legal order had survived its first challenge. (See P Cornford "The Administration of Justice in New Zealand 1841-6" (1970) 4 New Zealand Universities Law Review 120, 121).

guaranteed by the Crown by the second article of the Treaty of Waitangi". It meant that the title of the Crown was impressed with the occupation rights of Maori.[30]

The Rules of the Supreme Court were in the same mould. They provided for proceedings to be started by oral complaint to a Registrar. The other party would then be summonsed to appear before a Judge "unless satisfaction shall have been previously made to the plaintiff".[31] Written particulars were to be delivered with the summons setting out the demand "in a simple and compendious manner, specifying items dates and amounts".[32] Even more radically, the Judge was then required to "elicit the point in issue by examination of the parties or their solicitors" in private. It was for the Judge to:[33]

> …reduce into writing the material statements of the respective parties, taking notice of any defence that would be available by the law of England as administered by Courts either of law or equity, which writing shall be signed by the parties.

The defendant could at any time, in the presence of the Judge, tender satisfaction. If the plaintiff failed to recover as much at the trial, he paid the defendant's costs.[34] Modern case-management indeed! I regret to say that we have never been quite as streamlined in our procedures again, although we did manage to avoid the importation of English forms and fictions.

In the early cases decided in the Supreme Court both Martin and Chapman,[35] the first puisne judge, were adventurous in their sources. Chapman was an admirer of Story. The Full Court decision in *R v Symonds* draws on Blackstone, Kent's Commentaries and the US Supreme Court decision in *Cherokee Nation v State of Georgia*[36] as illustrating the common law principle that while the Crown is the exclusive source of title to land its title is subject to native rights which "cannot be extinguished (at least in times of peace)

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30 The Act was not, however, of itself sufficient to create a right in the native occupiers "cognizable in a Court of law" (*Nireaha Tamaki v Baker* (1900) NZ PCC 371). That had to await the enactment of the Native Rights Act 1865 and the establishment of the Native Land Court in 1865 with power to determine interest in land over which native title had not been extinguished "according to the ancient custom or usage of the Maori people so far as the same can be ascertained".

31 Supreme Court Rules Ordinance, s 14.

32 Supreme Court Rules Ordinance, s 30.

33 Supreme Court Rules Ordinance, s 28.

34 Supreme Court Rules Ordinance, s 32.

35 Henry Chapman was an even more ardent reformer than Swainson or Martin. Chapman had come to law at the age of 37, after an energetic career as a pamphleteer and journalist in the cause of political reform. He had worked with John Stuart Mill on the *London Review* and had edited *The Montreal Daily Advertiser* in Canada. He was very much influenced by Bentham. His excellent library was a boon to the Supreme Court.

36 (1831) 5 Peters 1.

otherwise than by the free consent of the Native occupiers". In *Nireaha Tamaki v Baker* the Privy Council treated the New Zealand Supreme Court's excursion in *Symonds* into American case-law somewhat stiffly:[37]

> The judgments of Marshall, C.J., are entitled to the greatest respect although not binding on a British Court. The decisions referred to, however, being given under different circumstances do not appear to assist their Lordships in this case. But some of the judgments contain dicta not unfavourable to the appellant's case.

In 1846 a further Ordinance constituted the Governor and the Executive Council as a Court of Appeals, "until there shall be within the Colony a sufficient number of Judges to constitute a Court of Appeals".[38] The same Ordinance gave the Court of Appeal power to grant leave to appeal to the Privy Council where the amount exceeded £500 or where the Court of Appeal had overruled the Supreme Court.[39] No appeals to the Court of Appeal were taken during the period of Crown Colony government. Only one appeal to the Privy Council is reported.[40] The Full Court judgment of Martin and Chapman was overturned.

During the period of Crown colony government, considerable effort was made by Martin to persuade Maori of the benefits of submission to English law. There was no question of wholesale application of English law. The government and Maori acted on the assumption that English law would apply to Europeans and in inter-racial disputes only. Even in the cases of cannibalism and warfare, the government was forced to act by cajoling and hectoring rather than by coercion.[41]

The trial of Maketu for murder was a substantial test for the system. He was the first Maori to be tried for a serious offence, and the first to be hanged. The trial took place in the first sitting of the Court after the arrival of the Chief Justice. The Chief Protector of Aborigines, George Clarke, wrote of the impression the procedure of the Court made. The proceedings were

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37 *Nireaha Tamaki v Baker* at 384.

38 Supreme Court Rules Ordinance (passed 12 October 1846), s 3.

39 Supreme Court Rules Ordinance (passed 12 October 1846), s 8.

40 *R v Clarke* (1851) NZ PCC 516.

41 See Fletcher, above at n 7, 209-212. Slavery and chiefly authority in matters of life and death caused difficulties because of the place of such arrangements in maintaining Maori society. But the work of the missionaries was bringing about rapid change in such matters. And the early Governors and the Chief Justice used every opportunity to instruct and persuade. They were helped by the avidity with which Maori seized on news and rapidly disseminated it throughout the country. Governor Fitzroy remarked that "all proceedings of importance, whether at the Bay of Islands, or Cook's Strait, or elsewhere, are, in a few weeks, the subject of discussion throughout the country". (R Fitzroy *Remarks on New Zealand in 1846* (Wellington, 1965) 13). The Government publication *Te Karere* was also used to pass on information.

translated and witnessed by a large number of Maori (none of whom had any doubt about Maketu's guilt).[42]

But the inapplicability of English law in general to Maori was acknowledged. The Chief Protector of Aborigines described their frustration with legal technicalities and court delays, their abhorrence of imprisonment, and the "irreconcilability" of English punishments with Maori preference for compensation, if wronged.[43]

The inadequacies of law enforcement agencies and the constant wrangling over land also led to further disenchantment. As Swainson reported, it was difficult to persuade Maori not to take the law into their own hands when the court system was inadequate.

Some measures were introduced to address Maori participation in the legal system. Ordinances made provision for Maori membership of juries and for unsworn testimony (which was to be given such weight as Justices of the Peace or any jury deemed appropriate).

But the crucial piece in the plan to obtain Maori acceptance of law gradually was the Native Exemption Ordinance 1844. It aimed to attain "gradual" and "willing" acceptance by Maori of "the laws and customs of England". In the meantime, special laws more in accordance with Maori custom were proposed.

Thus the Ordinance provided for the participation in charging and arrest of Maori of two of the principal chiefs of the tribe to which the offender belonged. Because of Maori horror of imprisonment, bail was provided for as of right on provision of security in all cases except in the case of murder or rape. In the case of theft, no sentence was to be passed upon conviction if payment of four times the value of the goods stolen was made into Court before sentence. The value of the goods was to be paid to the victim, with the balance going to the Treasurer. No Maori was to be imprisonment for judgment debts in any civil proceedings. A further Fines for Assaults Ordinance enabled up to one-half of any fines imposed to be paid to victims, in explicit recognition of native preference for utu.

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42 Swainson described the impression produced in W Swainson *New Zealand and its Colonisation* (London, 1859) 58-59:

> The quiet calmness with which the inquiry was conducted; the patient painstaking care of the Chief Justice; the grave attention of the jury; the solemn stillness of the awful moment which immediately preceded their utterance of the prisoner's doom; and the dread language of the law, in which the prisoner was afterwards condemned to die, affected the anxious multitude with visible emotion.

43 Clarke considered that the English law was inconsistent with the promises of the Treaty of Waitangi. He proposed legislative recognition of native custom and usages, except where repugnant to humanity, and the setting up of a system of native courts to administer custom. In cases where Europeans were involved an appeal might be provided (see Fletcher, above at n 7).

In introducing this measure to the Chiefs at a great gathering in Remuera, Governor Fitzroy explained that he did not wish to interfere with native custom. Rather he hoped to persuade by reason the abandonment of those customs in time. Key in this strategy, as Fletcher has argued,[44] was an emphasis on the benefits of individual responsibility, the dispassionate administration of justice and the collective security to be obtained from a common legal system.

The Native Exemption Ordinance, which Governor Fitzroy acknowledged had been "framed on no precedent", came to be considered in London in a new climate. War had broken out in the North of New Zealand. Fitzroy was recalled and Governor Grey, an ambitious trouble-shooter, was sent out to New Zealand in 1845. Stephen was sympathetic to the Ordinance, but thought it would provoke settler hostility too far. Lord Stanley considered that the "zeal" of the reformers had "rather outrun discretion". Although the Ordinance was not formally disallowed, the new Governor was instructed to revise it.

Attempts to adapt English substantive law to meet the needs of Maori stopped under Grey. Instead, Maori assessors were introduced to sit in Resident Magistrates Courts. Grey fostered an impression in London that Maori and European were subject to the same law and, in 1852, that "both races already form one harmonious community . . . insensibly forming one people".[45] That impression was not correct and was to have fatal consequences in the reaction to the land disputes ahead.

You may be wondering why I have given you this survey of New Zealand's early legal history. In part, it is because I wanted to take the opportunity to say aloud here the names of some of those who shaped our nation and who served both our countries. They are men we should remember to honour. In part it is because these early beginnings are not widely known, even in New Zealand among those with firm views about our constitutional fundamentals. More importantly, the themes that exercised Stephen and Martin and Fitzroy still exercise us. They include recognition of Maori custom within our law and questions as to the inevitability of a unitary legal system. How we have dealt – or not dealt – with such themes is part of the story of the New Zealand legal system. They are not yet played out. Finally, in these beginnings I think we can identify elements that are distinctive in the New Zealand approach to law, and which may shape its further development.

The promise of law has always been central to our sense of nationhood. The expectation of justice through law and of a system which is responsive to our different communities is a considerable tradition for any legal system to live up to. We know that there are times in our history when those expectations have been disappointed. But perhaps what matters more than the lapses, is the faith with which we started out.

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44 Fletcher, above at n 7, 234.

45 Ibid., 240.

Other characteristics to be discerned from our early legal history include an emphasis on statute law, which has informed our common law method; a willingness at times to respond to local exigencies with adventurous solutions; a preference for simplification of procedure; a degree of pragmatism (perhaps as one commentator has suggested at the expense of conceptual thinking); a willingness to borrow; and an affection for colonial links and institutions.

An early preference for statute law has continued throughout New Zealand legal history. It has led to the close attention to statutory construction and scheme which has been a characteristic of New Zealand legal method. The Interpretation Ordinance of 1851, drafted by Swainson provided that:

> The language of every Ordinance shall be construed according to its plain import, and where it is doubtful, according to the purpose thereof.

Our 1999 legislation continues to direct that:[46]

> The meaning of an enactment must be ascertained from its text and in the light of its purpose.

The emphasis on statutes has I think affected our approach to the common law. We have had no difficulty in New Zealand in accepting that both operate within a single legal system.[47] We have been comfortable in reasoning from statutory analogies in the development of the common law.[48]

The statutes we apply continue to include a number of United Kingdom statutes and the common law as at 1840, as subsequently modified by judicial decision. The application of English law to the colony had been affirmed in *R v Symonds* as a matter of common law, a view consistently expressed whenever the matter has arisen in New Zealand courts subsequently.[49] In 1854 however the legislature also gave statutory recognition to the application of English law as at 1840. The English law recognised was both statute and common law, so far as they were applicable to the circumstances of New Zealand. The 1908 statute to the same effect[50] continued in force until some order was introduced by the Imperial Laws Application Act 1988, after a substantial sifting by the Law Commission to discard irrelevant statutes.

It has to be said that the list of the statutes retained in the 1988 Act reads rather oddly, beginning with the Statute of Marlborough 1267. The statutes

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46 Interpretation Act 1999, s 5.

47 Cf. the comments made about England by Lord Steyn "Interpretation: Legal Texts and their Landscape" in B Markesinis (ed.) *The Cliford Chance Millenium Lectures: The Coming Together of Common Law and Civil Law* (2000) 86.

48 For Example see *Lewis v Wilson & Horton Ltd* [2000] 3 NZLR 546 (CA)*;* and the Official Information Act 1982.

49 *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur (NS) 72; *Waipapakura v Hempton* (1914) 33 NZLR 1065; *Re the Bed of the Whanganui River* [1962] NZLR 600; *Re the Ninety Mile Beach* [1963] NZLR 461.

50 English Laws Act 1908.

listed are all declared by the legislation to be "part of the law of New Zealand". Strangely, s 5 of the 1988 Act provides that:

> After the commencement of this Act, the common law of England (including the principles and rules of equity), so far as it was part of the laws of New Zealand immediately before the commencement of this Act, shall continue to be part of the laws of New Zealand.

I hope never to be called upon to decide what this means in a particular case. Indeed, the reference to the common law was contrary to the recommendation of the Law Commission which saw "no reason for, and some harm in, this direction to the courts".[51] The reasoning of the Law Commission suggests a more expansive, less English, view of the sources of the common law:[52]

> The courts of course apply, without any statutory direction, common law principles and rules, drawing on judicial decisions in many different jurisdictions over time and up to the present day.

In addition to the older Imperial statutes which pre-dated 1840, New Zealand continued to operate under a number of enactments of the British Parliament for long after it had representative government with the power to enact its own legislation.

The Constitution Act 1852 continued to apply in New Zealand until it was replaced in 1986 with the home-grown New Zealand Constitution Act. Until 1947, when New Zealand eventually adopted the Statute of Westminster, 15 entrenched sections of the 1852 Act remained could only be amended by the UK Parliament. Such English amendment was proposed in 1939 to obtain a reduction in the salary of the judges. Happily, in a burst of enthusiasm for constitutional principle which I would not count on today, the proposal was dropped before that happened. Even though from 1947 no provisions were entrenched, until a number of provisions, such as the requirement to reserve the salary of the Governor-General for the consideration of the Queen, while nominally in force were simply being ignored. It is hard to imagine a country more careless of its constitutional framework.

One of the sections of the 1852 Constitution Act which continued in force until 1986 was s 71, which empowered the setting aside of Maori Districts within which native laws, customs and usages would be observed if not repugnant to the "general principles of humanity", and notwithstanding repugnancy to the laws of England. No such districts were ever established, but the provision is an indication of the original attitude to Maori law and custom. It is an

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51 New Zealand Law Commission *Imperial Legislation in Force In New Zealand* (Law Commission LC1, 1987) paragraph 15.

52 Ibid.

approach which did not survive the tidal wave of settlement but which lingers in Maori claims under Article 2 of the Treaty of Waitangi.

As the enduring application of the 1852 Constitution Act suggests, it may be doubted whether any country has been as reluctant to accept independence as New Zealand. At New Zealand insistence, the 1931 Statute of Westminster provided that it would not have effect in New Zealand until adopted by statute. The existing constitutional arrangements were thought by New Zealand to be "thoroughly satisfactory". Concern was expressed in the New Zealand Parliament about "ingratitude" towards England. Anxiety about the continued access to the Privy Council was demonstrated in the debates. One MP referred to the right of appeal as one which "has always given a sense of satisfaction to a litigant who may be of the opinion that he has not received what he considers justice in New Zealand".[53]

Only one MP in the debates struck a different note. The Reverend Mr Carr raised questions of international interdependence. He chided the House for a "petty parochial spirit" in cutting themselves off from foreign nations. He welcomed a "move towards political autonomy among the component parts of the British Commonwealth" and suggested it was time to shed "swaddling clothes" and develop "a soul of our own".[54]

But that view did not prevail. Beaglehole said of the Statute of Westminster:[55]

> We thrust the horrid thing away: only to find, in the course of the next fifteen years, that an adult who insists on going through the forms of being a child is a nuisance to everybody.

In enactment of its own statutes New Zealand swung between periods of local adaptation or invention and periods of slavish imitation. While at times we have been prepared to go further afield,[56] imitation has been largely reserved for British statutes. At times there has been marked reluctance to legislate except to follow a British lead. The approach has been characterised as "legal cringe,"[57] and at times it may have been. But some good statutes are part of our law as a result. On the other hand, too often we preferred to adopt some bad law rather than strike out alone. The Companies Act 1933 was acknowledged to be patterned on an English Act which was "not above criticism". But the government declined to attempt improvement because of a wish to capture the benefits of English case-law. The explanatory note to the Bill commented:

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53 (1931) 228 New Zealand Parliamentary Debates 642 per The Honourable Mr Buddle.

54 (1931) 229 New Zealand Parliamentary Debates 580.

55 Beaglehole, above at n 2, 245.

56 For example, see the establishment of an ombudsman, and the use of North American models in the Companies Act 1993.

57 B Cameron "Legal Change over Fifty Years" (1987) 3 Canterbury Law Review 198.

> If the criticisms of the Imperial Act … prove to be well-founded and substantial they will inevitably be followed by amending legislation in England, and it will then be a simple matter for the New Zealand Legislature in its turn to adopt those amendments. This view has the support of the responsible officials of the Imperial Board of Trade.

Jim Cameron, an tireless toiler for sensible law reform in New Zealand, has commented that it is surprising how often "what might be called the textbook argument" for and against reform was put forward at this time. The assumption was that law reform needed to follow United Kingdom precedents to ensure that New Zealand derived "full benefit" from English cases and textbooks.[58]

Of course, there were times when cringe subsided and some pioneering legislation was enacted by the New Zealand Parliament.[59] From 1875 to 1910 when, for example, the Testators Family Maintenance Act struck off in a new direction, New Zealand picked up the partial codification of the criminal law which had been rejected in England, and Native Land legislation was rewritten. And in "Law in a Changing Society" in 1965, a reforming Minister of Justice, Ralph Hanan laid out a platform for the future. He identified a fundamental cause of the inadequacy of law reform at the time to be the view that "important changes in the common law should not normally be made except in accordance with changes that have taken place in England". That, he said, was "not good enough":[60]

> The most fitting attitude, it may be suggested, is to retain the utmost respect for the principles of justice and wisdom that underlie the common law but no longer to test proposed changes by the measure of English law. Reforms in the content of the law ought not to have to await reform made in England, nor should English reforms necessarily be copied in New Zealand.

From the mid-1960s major statutory reforms have often struck out in new directions from the law in England. There were substantial family law reforms in the 1960s. The death penalty was abolished by the Crimes Act 1961, a major codification. Criminal Injuries Compensation, the Ombudsman legislation, the Official Information Act 1982, major overhaul of the law relating to contracts, the Treaty of Waitangi Act 1975, the Matrimonial Property Act 1976, the new Constitution Act 1986, the New Zealand Bill of Rights Act 1990, reform of the electoral system, the Companies Act 1993, labour law reform and extensive reform of resource management law indicate the vitality of New Zealand statute law in the last decades. A loosening of statutory links

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58 Ibid., 205.

59 These periods are described by Cameron: "The Law Reform Committees 1966-86" (1988) 13 New Zealand Universities Law Review 123.

60 R Hanan *Law in a Changing Society* (Universal Printers, 1965) 20.

between New Zealand and England has also been accelerated with British adherence to European directives.

The performance of the courts, like that of the legislature, has varied. We have generally been deferential. The rebellion precipitated by *Wallis v Solicitor-General*[61] was an exception. There, the New Zealand bench was so stung by its reversal by the Privy Council that the Chief Justice led his colleagues in a formal court sitting to protest. The attack still crackles off the pages of the New Zealand Privy Council Cases.[62] After a point by point demolition, Stout CJ concluded:

> The matter is really a serious one. A great Imperial judicial tribunal sitting in the capital of the Empire, dispensing justice even to the meanest of British subjects in the uttermost parts of the earth, is a great and noble ideal. But if that tribunal is not acquainted with the laws it is called upon to interpret or administer, it may unconsciously become the worker of injustice. And if such should unfortunately happen, that Imperial spirit that is the true bond of union amongst His Majesty's subjects must be weakened. At present we in New Zealand are, so far as the Privy Council is concerned, in an unfortunate position. It has shown that it knows not our statutes, or our conveyancing terms, or our history. What the remedy may be, or can be, for such a state of things, it is not at present within my province to suggest.

I would like to think that in more recent years we have borne reversals with rather more good grace, and even at times real gratitude for errors properly corrected.

Cameron has suggested that, despite some stirrings, New Zealand case-law demonstrated "essentially derivative thinking and a narrow application of precedent" for much of the 20th century.[63] He points to a comic aspect to the contortions to keep in line with "the latest gospel from London", citing *Re Rayner*[64]. There in 1948 the Court of Appeal indicated it would reverse a previous decision in order to follow *Young v British Aeroplane Co*[65] in which the English Court of Appeal held that it could not reverse its prior decision.

From the formation of the separate Court of Appeal in 1957 such slavish adherence to English precedent has passed. It took some time, but it was eventually established that the courts of New Zealand are bound only by decisions of the Privy Council in New Zealand cases. Decisions of the Privy

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61 (1903) NZ PCC 730.

62 See April 25, 1903 NZ PCC 730.

63 Cameron "Legal Change over Fifty Years", above at n 57, 210.

64 [1948] NZLR 455.

65 [1944] KB 718.

Council on appeals from other jurisdictions, as with the decisions of the House of Lords, are given very careful consideration. But in a few cases we have gone our own way.

In 1987, Lord Cooke, then president of the Court of Appeal, whose contribution to the development of a distinctive New Zealand law will not I am sure be equalled in my lifetime, felt able to express the view that:[66]

> New Zealand law, both that made by our parliament and that made by our judges, has now evolved into a truly distinctive body of principles and practices, reflecting a truly distinctive outlook.

The Privy Council has itself recognised the distinctive character of New Zealand law in a number of cases, most dramatically perhaps in *Invercargill City Council v Hamlin*:[67]

> But in the present case the Judges in the New Zealand Court of Appeal were consciously departing from English case law on the ground that conditions in New Zealand are different. Were they entitled to do so? The answer must surely be Yes. The ability of the common law to adapt itself to the differing circumstances of the countries in which it has taken root, is not a weakness, but one of its great strengths. Were it not so, the common law would not have flourished as it has, with all the common law countries learning from each other.

Today, the former Chief Justice Chief Justice, Sir Thomas Eichelbaum, has expressed the view that there is no evidence that the Privy Council has stifled the development of New Zealand legal initiatives. He sounds however a note of caution:[68]

> In fairness, the effect of the restraint imposed by the mere presence of the right of appeal to the Privy Council should not be under-estimated. In the absence of fairly obvious differentiating local circumstances, the likelihood must be considerable that their Lordships sitting at Downing Street will apply the law with which they are comfortable when at the House of Lords. Any New Zealand judgment which consciously departs from "English law" does so at the risk of reversal. Thus it surprises not that the number of

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66 R Cooke "The New Zealand National Legal Identity" (1987) 3 Canterbury Law Review 171, 182.

67 [1996] 1 NZLR 513 at 519-520.

68 Sir Thomas Eichelbaum "Brooding Inhibitions – or Guiding Hands? Reflections on the Privy Council Appeal" in P Joseph (ed.) *Essays on the Constitution* (Brookers, 1995) 127.

> instances where New Zealand judges have deliberately courted that risk is relatively small.

The suggestion that appeals to London may result in self-inhibition by the New Zealand courts (or, as Robert Frost put it, some "withholding from our land of living") is an intriguing one. While we retain such appeals, it is impossible to know if it is real. Does it matter? There will be differing views on that. But there is no doubt that the vitality of the common law has been greatly enhanced by the independence of the legal systems of the former colonies.

The common law has never been a seamless whole. English law as received in New Zealand has now become New Zealand law, just as Australian law is Australian. Lord Bingham, in discussing the future of the common law, has described it as flowing now in a number of channels. He identifies the "diminished role" of the Judicial Committee of the Privy Council as having given freedom to the courts of Australia, Canada, India and elsewhere to develop principles of their own. As a result, the common law is strengthened by the dialogue, the process of "learning from each other" described in *Invercargill City Council v Hamlin*.

Whether or not we retain appeals to the Privy Council (and there are arguments for both positions), it is clear that the links of our common legal tradition will endure. New Zealand law will not sail on rudderless. It will continue to steer in accordance with the method of English law. That is our heritage. And although we may have to consider novel questions, they will still be addressed and resolved by the techniques of the common law. That point, the stability of the common law method, was made in his Hamlyn lectures by Dean Griswold in 1965 in discussing law in the United States.[69] The problems may be different, but the task is the same. The judges of the common law construe and apply constitutional and statutory provisions[70]

> to the end that controversies between men and men, and between men and their governments, may be rightly resolved. What they do they do in the spirit of the common law, though the questions they have to decide may be ones which would have startled the judges who formulated the common law. . . . With the tools and the terms of the common law, we proceed, usually on a case by case basis, in the common law tradition.

The great virtue of common law method is the provision of reasons which convince. It is a substantial discipline. That is why we are always in dialogue with each other, through the provision of reasons for judgment and across formal jurisdictional boundaries. We recognise that we need all the help we can get. More often than not, when decisions in novel cases have to be measured against principle, we will agree. Our common heritage pulls

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69 Erwin N Griswold *Law and Lawyers in the United States* (Massachusetts, 1965).

70 Ibid., 151.

together. So too does the increasing internationalisation of law, whether commercial law or human rights law. Where we do not agree it will be because, after anxious consideration, there are reasons to differ. And the expression of those differences is critical to the continued vitality of the common law.

The laws of England sailed on the Tyne in a new direction to New Zealand. But they did not enter a new world. Their world, like the world of Curnow's explorer who made the same journey, was enlarged.

Sian Elias
12 November 2002