TOWARD A HISTORY OF NEW ZEALAND LEGAL EDUCATION

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THE AMERICAN AND ENGLISH MODELS

American academics have long written about the history of legal education in their own country, but it is only comparatively recently that Commonwealth academics have become interested in the development of legal education in Britain and in other parts of the Commonwealth. Partly, this is due to the comparative longevity of full time legal education in the United States and also to the comparative importance that United States academics tend to place on legal education and academics as shaping the law compared to the work of judges and lawyers. The adoption of "the case method", for instance, is often seen not just as a change in legal education but in the law itself.[1] In the words of Reimann, sometime in the late Nineteenth century, American legal academic established as a "real profession".[2]

Writers like Twining[3] and Sugarman[4] have written of the difficulty of establishing a legal education tradition that can approach that found in the United States. They write of the comparatively late development of law as an autonomous discipline in the English academy. But they also write of the ambiguous position of legal academics who on the one hand are distrusted by the profession that they serve as "too academic" and by academic colleagues in other parts of the University who see them as "not academic"' enough. There is a constant struggle for resources with other parts of the University and a battle for control of the content of legal education.

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1 See William P LaPiana *Logic and Experience : the Origin of Modern American Legal Education* (Oxford University Press, New York, 1994).

2 See Mathias Reimann "A Career in Itself: The German Professiorate as a Model for American Legal Academica"", Mathias Reimann(ed) *The Reception of Continental ideas in the common law world* 1820-1920 (Duncker & Humblot, Berlin, 1993) 166.

3 William Twinning *Blackstone's Tower : the English Law School* (Sweet & Maxwell, London, 1994)

4 David Sugarman "Legal theory, the Common Law Mind and the Making of the Textbook Tradition" in William Twinning (ed) *Legal Theory and the Common Law* (Oxford University Press, Oxford1986)

Twining and Sugarman identify the continuance of a very strong textbook tradition in the English legal academy long after the American academy had turned from the production of treatises to the production of more theoretical and more critical but less doctrinal work that has dominated the main American journals since the Realists. The British textbook tradition seemingly based around the need to establish credibility with the academics senior legal partners, the profession and the judiciary. Twinning in his Hamlyn lectures, however, describes with some pride how the English legal academy has transformed itself since the 1960s into a profession in its own right, even if in comparison to the American law schools, they are still poorly resourced.

Also there is another legal education context, one that of the national law school, established in newly independent Commonwealth countries which although staffed at the beginning by largely expatriate lawyers, play a key role in the development of indigenous law in those countries. [5] It seems to the present writer much might be gained by comparative studies of those law schools in Africa or in Asia with the New Zealand experience.

Of course, our tradition is different too. The original staff of this law school, while they would have seen New Zealand as a Dominion with its own law, would have seen it only as independent within the context of the larger Empire and English legal system. New Zealand share this with Canadians and Australians New Zealand lawyers, despite the legal nationalism of the last twenty years remain firmly within the English tradition. This is not just because our highest court, the Privy Council sits in London with largely English judges, rather it is because state legal tradition that the Privy Council represents is as much ours as it is English. A history of the Commonwealth legal history or New Zealand's place within such a history is still really to be written.

NEW ZEALAND LEGAL EDUCATION: A HISTORY OF AMBIVALENCE?

1 Parallels to and Departures from the English Model

There is much in the pattern of legal education in New Zealand and at Victoria that accords with Twinning's vision of English legal education tradition. Indeed one of the few New Zealand academics have taken an interest in our legal education history entitled his article "The History of New Zealand Legal education: A Study in Ambivalence"[6] From a Victoria Law Faculty with 1000 students, which is now one of five law faculties, with

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5 See the essays in William Twinning *Law in Context: Enlarging a Discipline* (Claredon Press, Oxford, 1997)

6 Peter Spiller "The History of New Zealand Legal Education; A Study in Ambivalence" (1993) 4 Legal Education Review 223. Professor Spiller's article and his chapters in Peter Spiller, Jeremy Finn and Richard Boast *A New Zealand Legal History* (Brookers, Wellington, 1995), provide a useful summary of the mechanical changes to legal education over the century.

essentially complete control over their own curricula with very lightly felt supervision from the Council of Legal Education, it is difficult to appreciate how much of a struggle establishing such an independent Law Faculty was for my predecessors.

The initial struggle of course was as in England to establish that there was a need in the first place for University studies and that University studies should be given priority over practical training. The report of Sir John Salmond's address to the 1906 Graduation ceremony made this plain?[7]

> Professor Salmond, speaking on the education of lawyers, remarked that almost all law students were engaged either in a legal or other office, "from morn to dewy eve," and devoted the remnants to their study. He considered that this practical experience was gained only at a severe loss. He recommended that no law student should enter an office for at least a year after he had commenced his course. He also wished to impress on employers the duty of giving their clerks sufficient leave to prosecute their studies. Every law student was entitled to a month's holiday, which should be given in the time preceding the November examination. He also saw no reason why the clerks should not have an opportunity to attend lectures during the day. He appealed with confidence to the legal profession to fulfil a duty which they owed to the public and to Victoria College. He did not hesitate to say that the Legal Practitioners Act of 1899, which allowed solicitors, after five years' practice, to take status of barristers without further examination, was an instrument of degradation of legal education in this colony; it was a premium on idleness, incompetency, and ignorance. We should not stoop to get into an honourable profession by the back door. He argued that students should not be satisfied with the degree of LL.B, but should pursue their studies further.

The other struggle was for proper resources. In 1928, a very disillusioned Professor Adamson appeared before the 1928 Royal Commission on University Education[8]

> There is at present no Law School in New Zealand. Seventeen years ago I was appointed to Victoria College, one of my duties being to organise a Law School. When I arrived I found the Law School was a myth, and it has remained so ever since. It is probably now too late to determine whether or not provision for teaching for the law degree should be made in all of our centres, but I am convinced that there ought to be only one Law School in New Zealand- i.e. a proper Law School in which every department is under the charge of an expert in his special branch of the law.

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7 *The Evening Post*, Wellington, 30 June 1906, 5.

8 "Report of Royal Commission on University Education in New Zealand" [1925] AJHR E 7A, 51.

Certainly in both the early pieces reproduced in this volume (Richmond's piece on ethics and Adamson's own piece on the relationship between the University and the Profession) there is a strong element of trying to articulate the importance of academic study to a seemingly unbelieving public or to a profession that doubts the contribution that the legal academy can make. It is also remarkable that Professor Richmond chose to speak of the importance of legal ethics, still very much the concern of the profession and the academy at the end o the century.

Professor McGechan's report to the 1947 Law Conference and the reaction to it, show something quite different from ambivalence - that the battle to establish the Law Faculty's independence was fierce even if localised to the gentle surroundings of the Law Conference or the meeting on the Council of Legal Education in the Wellington Supreme Court Library.

One of Professor McGechan's greatest contributions, if now a little forgotten, was in the constant fight to reform the system of examining that he fought in the Council of Legal Education, which was founded as an advisory board to the Senate of the University of New Zealand following the 1928 Royal Commission. He argued that the Academy needed control of what was taught and how it was taught. The tone of the battle is perhaps best preserved in the University archives, and the Minutes of the Council of Legal Education. In letter after letter, Professor McGechan also strove during the 1940s and early 1950s to muster academics at the four colleges to ward off various attempts to water down the academic component of the law degree and most noticeably the amount of Arts units that needed to be studied (hence the importance of Professor Dunham's articles in the New Zealand Law Journal about the importance of Arts units and the far more independent nature of American legal education in general).

It is to the credit of legal academics like McGechan, Campbell and Aikman that the war was ultimately won to academic satisfaction. New Zealand has never returned to the English position that one does not need a law degree to practise. Given our desire in many areas to follow English models, this was a remarkable academic victory. It alone indicates that there was much more to the battle over New Zealand legal education than we often think.

2 *Garrow and the New Zealand Textbook tradition*

Twining and Sugarman present the textbook tradition in England as a major contrast with the American legal academy. There are clear parallels in the New Zealand legal academy. Academic careers are still founded on the writing of textbooks rather than the production of more theoretical works. At the moment junior Faculty at Victoria are involved in the writing of textbooks in a wide range of subjects from ethics to equity, intellectual property to consumer law. Garrow is in many respects still the academic

model.[9] In contrast, Victoria academics have stayed away from replicating the textbook tradition of Salmond and Williams, the production of books that explore the common law generally, and in general application, rather than just to New Zealand.

While there is undoubtedly an element in this work of proving one's worth to the profession, there is also a strong note of legal nationalism in the process. New Zealand academics following the lead of people like Garrow have been in the vanguard of assembling and arguing for a distinctly New Zealand law. Inglis' text on *Family Law*,[10] for instance was perhaps the beginning of thinking about a New Zealand family law. Ian Campbell's piece on legal writing shows the broad role that he saw his writing fulfilling. His own book on Adoption is perhaps better not understood not as a stand-alone effort but as part of a project to chart the relationship of the common law to the social welfare state.

3 *The American Influence.*

If one were to distinguish the Victoria legal tradition from a New Zealand or Commonwealth generic model, it would be the conscious adoption by the teachers at Victoria of North American as opposed to strictly English models of legal education. Connections with the United States are a recurring pattern in our legal education. Salmond was well known and admired in the United States and, of course, Maclaurin left Victoria for the United States (but as a scientist rather than to a lawyer bound ultimately for MIT). It was not however until after the Second World War that there was a conscious adoption of United States models.

This did not mean that English legal models were not at the forefront of Victoria's thinking about legal education. As Lord Cooke's obituary of Professor Williams indicates, English universities often continued to be our main frame of reference. It meant rather that the academics in the 1950s, 1960s and 1970s strove to take what was best in the American legal education - the Socratic method, the mooting programme, interdisciplinary study and the requirement that law students studied arts units- for the New Zealand legal context.

In reading either McGechan's account of his trip to United States law schools or his Foreword to the first law review, or his statement of the objectives of the new Victoria teaching approach based on what he had seen, or his Fulbright application,[11] to bring

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9 Garrow's work included, for example: *Notes on Contract* published 1912, *The Crimes Act 1908, Annotated* published 1914, *The Crimes Act 1908, Annotated* 2nd ed, published 1927, *Principles of the Law of Evidence in New Zealand, Property Part 1*, published 1913, *The Law of Personal Property Vol II*, 2 ed, published 1926, *Law of Trusts and Trustees*, published 1919, *Law of Wills and Administration*, published 1932.

10 B D Inglis *Family Law* (2 ed, Sweet & Maxwell (NZ) Ltd, Wellington, 1968 and 1970).

11 Held in the Victoria archives.

Professor Dunham to New Zealand there is no ambivalence. Rather there is an excitement and unbounded enthusiasm for the possibilities of legal education. This enthusiasm was seemingly shared by his colleagues Braybrooke, Campbell and Williams and his successors – Aikman, Inglis, Richardson, McKay Palmer and Keith who were all influenced by the United States legal academy.

Sir Kenneth Keith's 1988 article in this journal charts some of that influence, an influence that grows yearly as yet more and more New Zealanders (not just from Victoria) go to study in the United States.[12] Much more work could still be done on that relationship. It is also possible to overstate that influence. England and English legal thought were never completely displaced. Many of the Faculty's most distinguished teachers like Aikman or Barton took their postgraduate degree in England. Lord Cooke is, for instance, both of Thorndon and Cambridge in the County of Cambridgeshire. But interestingly even those educated in England, or in New Zealand alone, often expressly adopted "the case method". Don Mathesion's opening words to his torts class in the 1960s included "we shall be using the case method".

The most graphic example of the influence and its limits, is the Faculty's *Legal System* course, which since 1962 has been the mark of the Victoria legal experience. Unfortunately the development of that course is not easy to display in a collection like this, but *Legal System* is worthy of study in its own right. The original course was a legal process one in the sense of the Wisconsin legal process movement.[13] Through an examination of accident law, it sought to use the classic Socratic case method to develop an understanding of the social and political sources that shape the law. That course clearly impacted on the submissions that members of the Faculty made to the 1967 Woodhouse Commission that led to New Zealand's Accident Compensation system. The 1967 and 1971 versions of the casebook, for instance, show the imprint of both American thinking about accident law and about legal education. That imprint is also clear in the material referred to in John Thomas' article. Indeed as John Thomas, and Professors Ellinger and Keith indicate, the 1970s were in fact a time of great innovation and thinking about legal education and its relationship to research.

As *Legal System* developed as a course over the 1970s and 1980s it was, however, stripped of the social context material so that the course taught to the present writer in 1987

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12 Sir Kenneth Keith "The impact of American ideas on New Zealand's Educational policy, practice and theory: the case of law" (1988) 18 VUWLR 327

13 Indeed the course was based on Carl A Auerback, Willard Hurst, Lloyd Samson and Samuel Mumin *The Legal Process: An Introduction to Decision-making by Judicial, Legislative and Executive and Administrative Agencies* (1961), see above 12, 337. The book was bought back by the Dean Colin Aikman from sabbatical leave in the United States, see Keith, above n 12.

was a legal method course that presented legal method as a scientific and self contained exercise. Paradoxically, at the very same time that United States law schools were expanding the interdisciplinary study of law that had so attracted McGechan and his successors. The economic analysis of accident law which Calabrasi was making popular in the early 1970s[14] never made it to Legal System and is still struggling to impact on the teaching or research of the Faculty even in 1999. One year in the 1970s the staff originally allocated to teach Legal System assigned *The Bramble Bush*,[15] Karl Llewellyn's great introduction to the study of law that for many still epitimises American legal education. The bookshop obtained the texts, but the teachers changed and by class time the bookshop had over 100 books that no one would use!

More of the contextual approach was maintained in the *Torts in Transition*[16] casebook, but after Palmer's departure, its influence began to wane even there in Torts itself.[17] For a while the social context material was pushed into another course, *Law in Society*, which was later abolished (in 1994) by the Faculty. *Law in Society*, which at the time it was introduced was celebrated as the recognition of the importance of wider approaches to law,[18] resulted in the exclusion of those approaches.

There is perhaps an interesting historical parallel. As Alex Frame has detailed Salmond's original work on jurisprudence[19] and especially on legal fictions[20] predated the work of Holhfeld and Fuller. But yet realism did not come to the New Zealand or indeed English legal academy until the 1950s. Could it be that while our tradition is full of innovation it also exhibits a strong tendency to return to positivism?

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14 See G Calabrasi and J Hirschoff "Towards a Test for Strict Liability in Torts" (1972) 81 Yale LJ 1055

15 Karl N Llewellyn *The Bramble Bush: on our law and its study* (Oceana Publications, New York, 1951).

16 P D McKenzie, G W R Palmer, R S Clark (with assistance of G P Barton) *Tort in Transition: a New Zealand Collection of Cases and Materials on Tort in the Accident Compensation Era* (Fourth Estate Book, Wellington, 1976).

17 See the current case book Hodge, Aktin, Pardy and McLay *Tort in New Zealand* (Oxford, Auckland, 1997), which largely excludes accident law or accident compensation except to the degree it interacts with traditional common law approaches, and broader contextual approaches. Although in the editor's defence more of such material is planned for the next edition and supplementary material at Victoria has included both Holmes' *Common Law* and his "The Path of the Law" lecture, now reprinted at (1997) 110 Harv L Rev 991. Alas, Calabarasi is kept for the torts LLM class or the advanced undergraduate class.

18 Wade Mansell "On the Paucity of Causes for Jigs in Legal Study" (1977) 8 VUWLR 369.

19 See Alex Frame *Salmond Southern Jurist* (Victoria University Press, Wellington, 1995)44-53.

20 See Alex Frame "Fictions in the Thought of Sir John Salmond" (1999) 30 VUWLR 159.

THE LEGACY OF STOUT AND SALMOND

In making his case to the Government that funds should be made available to create two chairs in law, one of which would be filled by John Salmond, then Professor at Adelaide University, Sir Robert Stout argued that Wellington, being the centre of the then new Dominion's government and the home of its Supreme Court, was *suprema a situ* as a centre for specialist legal education in New Zealand.

Stout's idea that Victoria would be *the* Law College, of course, never came to pass. However, the subsequent century has shown that there was truth behind Stout's argument, legal education in Wellington has often been sustained by its close links with both the Wellington profession, the Government and Government departments. More importantly, Stout's political skill gave Victoria two full time chairs in law, which the other colleges struggled over the next fifty years to match. That comparative staffing advantage, even if the numbers at Victoria were still tiny, combined with its natural advantages, made Victoria the leader in legal education in New Zealand.

Salmond's one year at Victoria shines like a beacon over the century he has been gone. His academic output astonishes both in terms of its quality and its quantity. Salmond, however, presents the dilemmas of a capital law school. As the current Solicitor-General pointed out in his vote of thanks to Alex Frame's *Eminent Victorians* lecture on Salmond, as well as being our first professor, Salmond was also our first defector. He made an immense contribution to government as Chief Drafting Officer and then as Solicitor-General and ultimately in the judiciary. He was the first of many who at the very peak of their academic careers left to pursue public service either directly in the employment of the Government or indirectly through services at the bar and ultimately the bench. Others have left to pursue distinguished academic careers overseas. Many have followed careers outside the University as distinguished as that of Salmond. Indeed two former Deans serve on the Court of Appeal, one as President; another professor became Prime Minister. Rather than proving ourselves just to the profession, we have needed over the century to prove ourselves true to Stout and Salmond's vision of the scholar active in the affairs of state - a heavy load indeed- and it is remarkable that so many of my predecessors have borne it so lightly.