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The new public law: Its province and function

Sir Geoffrey Palmer*

This article is the first of a series of lectures given by the former Prime Minister, Professor Sir Geoffrey Palmer in 1991 to public law students at the University of Otago. The full series - which deals with such subjects as the role of the Prime Minister, the media, political parties, politics and defamation, electoral reform and the legislative process will be published in 1992 by John McIndoe in a book.

In this lecture, Professor Palmer ranges widely over themes and developments in public law, emphasising the practical importance for lawyers of studying and appreciating the political and parliamentary processes. He is highly critical of the narrow and traditional view of public law propounded by Dicey and the undue emphasis on the courts at the expense of Parliament, Cabinet, caucus and governmental decision-making. He draws attention to the global nature of public law, the need to be familiar with the constitutional framework of other countries, and New Zealand's international treaty obligations.

I INTRODUCTION

It is a great experience for me to be invited to deliver a series of lectures to the Public Law class here at the University of Otago. I well remember being a visiting fellow at Wolfson College, Oxford, when your Dean, Professor Peter Skegg, was a law don at New College. He was kind enough to invite me to dinner then and he has done so again tonight. The fellowship and collegiality of academic life is not always to be found in politics. But there are other things to be found in politics.

The series of lectures that I am to deliver are reflections on experience - reflections based around the New Zealand constitution. In one way this series of lectures is a carefully contrived plot, because everyone who knows me in academic life knows that I never deliver lectures. I teach socratically. And not only that, I do not give any answers. My students at the Victoria University of Wellington would be pleased to hear these lectures. Then they would know how they should answer some of the questions that I have been asking them in class.

In his delightful little book, *Aspects of the Novel*, E M Forster describes the importance of the angle of narration.[1] The point of view from which the story is told has a great deal to do with the impact of the story itself. So I should say at the outset

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1 E M Forster *Aspects of the Novel* (Arnold, London, 1958) 75.

something of my own angle of narration. My approach to legal education and to the law is distinctly American. Before I went into politics my legal education in the United States and my experience as a law professor there made a profound impact on my way of thinking about the law, more than my New Zealand legal education or teaching experience here. Now that I have retired from politics, for one semester each year I teach law at an American University, the University of Iowa.

The legal academy occupies a different position in the United States from that which it occupies in New Zealand. When I was first a Law Professor in the United States I was somewhat shocked to find that the senior law professors at the university where I was teaching were paid a good deal more than the Judges of the Supreme Court of the State. The same is true today. I thought then it reflected something rather unfortunate about the American system of values, that they did not value the judges in the way we do. I have come to believe now that it reflects something interesting about the nature of the American legal culture. The law professors are not mere commentators on the judges' decisions - rather it tends to be more the other way around. The legal academy in New Zealand, I think, has not yet got to that point. The law enterprise in New Zealand universities needs to develop a more ambitious approach, more interdisciplinary, more expansive and more policy oriented. That is the first angle of my narration.

The second comes from spending nearly twelve years in public life, as a Member of Parliament, and as a party leader. This led to the fortunate experience of occupying a number of offices of constitutional significance, including Attorney-General, Minister of Justice, Leader of the House, Deputy Prime Minister and Prime Minister. I was involved in making a great deal of public law as well as operating the system. This point of view is that of the participant observer. Not many people who analyse public law have had such experiences, and it certainly alters your thinking. You see the game from the other side of the fence to judges and lawyers. And when you are playing it on that side of the fence it does not even seem to be the same game. Let me give just one example.

I found teaching modern administrative law cases within a year of being the Prime Minister an unsettling experience. There is a yawning chasm between the way ministers look at decisions and the way courts look at them. The biggest problem teaching that material was to convey some understanding of the matrix in which administrative decisions are made, something which is difficult for students who have never worked in a bureaucracy. I am not sure that many of the judges know a great deal about administrative reality either, and I do not make that remark solely on the basis of experience as Minister of Justice. To me, modern administrative law looks like the dance of the seven veils, the judges rehearsing all the alluring things they can do to the executive branch of government but seldom actually doing it.[2] For this elegant dance they ask not for the head of John the Baptist but something rather more important - for

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2 O Wilde "Salome" in *Plays* (Penguin Books, Harmondsworth, 1954) 319. See also *Oxford Annotated Bible*, Matthew Ch. 14 verses 1-12. (Revised Standard Version, 1962).

the recognition of the legitimacy of their power. So far they appear to have achieved implicit acceptance of an expanded judicial power, although, like many modern fashions, revisionism may yet set in.

My own perspective on public law may not be unique, but it certainly is unusual. I wrote about, and taught, constitutional law before entering Parliament. This is the third angle of narration - the academic lawyer. As a law professor I had one approach - that I never went into any scholarly field without developing a desire to reform it. I had a lot of fun with the law of torts in that respect. The introduction of accident compensation was something with which I was involved. It was a great adventure getting rid of a big part of the law of torts and providing better help for injured people than the Common Law could provide.[3] For me law reform is what academic law is about. I always thought that Karl Marx had it exactly right when he said: "The philosophers have only *interpreted* the world, in various ways; the point, however, is to *change* it".[4] And I am fortunate because I have had the opportunity to do that in a lot of different areas. The first edition of *Unbridled Power* set out an agenda for reform. It was written for that purpose.[5] The second edition in 1987 was a progress report on the implementation of the agenda, with some further developments based on experience. Those parts of the reform agenda in *Unbridled Power* which have not yet become part of the law of the land, such as proportional representation, may yet be achieved.

Public law is rather different now compared with its state in 1984 when I assumed some responsibility for it. But of one fact I remain convinced - changing the world, even a country as small and simple as New Zealand, turns out to be a great deal more difficult than those who have not tried it imagine. My ideas for constitutional reform in New Zealand have had to be tested in the crucible of political conflict and practical politics. Consequently there is a reform angle of narration here as well.

To that I would add a final point; that those outsiders who try and make sense of what goes on inside, whether they be journalists or scholars, get a great deal of it wrong. Of course, truth is so often a question of impression and judgment. As a former academic turned political practitioner, often I used to find the attempts which were made by those outside to analyse what happened inside unreal. One of the most graphic examples I have come across is Jane Kelsey's attempt to analyse the Labour Government's policy on the Treaty of Waitangi by reference to documents obtained under the Official Information Act.[6] The documents do not tell all the story even if they

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3 G Palmer *Compensation for Incapacity - A Study of Law and Social Change in New Zealand and Australia* (Oxford University Press, Wellington, 1979).

4 K Marx *Theses on Feuerbach, Marx-Engels, Selected Works Vol II* (Foreign Language Publishing House, Moscow, 1958) 405 .

5 G Palmer *Unbridled Power? An Interpretation of New Zealand's Constitution and Government* (Oxford University Press, Wellington, 1979). *Unbridled Power. An Interpretation of New Zealand's Constitution and Government* (Oxford University Press, Wellington, 1987) is the second edition. There is a subtle but deliberate difference between the two editions. The second omitted the question mark.

6 J Kelsey *A Question of Honour - Labour and the Treaty* (Allen & Unwin, Wellington, 1990).

are analysed with detachment. Even people less committed to a point of view than Jane Kelsey, frequently are not able to capture the essence of what went on, or why it went on. It is from that point of view that I want to deliver these lectures.

There has been a good deal of writing in New Zealand on public law and on politics. In fact there has been a lot more writing than is often realised. It is a matter of regret that much of the most useful work has not been written by lawyers. There are a number of books that have come out in recent years There has been Professor Keith Jackson's book *The Dilemma of Parliament*,[7] the University of Otago's own Professor Wood has published a book called *Governing New Zealand*,[8] Steven Levine has edited a book called *Politics in New Zealand*,[9] Hyam Gold has edited a book called *New Zealand Politics in Perspective*,[10] and there is Les Cleveland's book *The Politics of Utopia*.[11] None of those books is by a lawyer although lawyers contributed to two of them - all of those books, however, are relevant to students of public law.

One of the few conceptual works in this area is Professor Richard Mulgan's work *Democracy and Power in New Zealand: a Study of New Zealand Politics*.[12] I do not agree with a lot of what Mulgan has to say, but I do believe his to be the most important of the recent works because it develops a theory. You can agree or disagree with his theory, but at least he provides an intellectual model. Description and analysis have not clarified much about New Zealand's system of government. We do not have a coherent public philosophy in New Zealand neither do we have a developed civic culture. The public do not understand, nor do they like, the existing system of government.

One of the older books that is available and often read by lawyers is Professor Kenneth Scott's work *The New Zealand Constitution*.[13] I was a student of Scott's and I hold his memory in particularly high regard but I cannot help thinking that he was better on greek philosophy than he was on the New Zealand constitution. Although he was teaching in the Political Science Department at Victoria University when he wrote the book, it exhibits the fault that lawyers so often have - a concentration on the formal which obscures the reality. I was recently asked to write a forward for JB Ringer's bibliographic work called *An Introduction to New Zealand Government*.[14] I realised

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7 K Jackson *The Dilemma of Parliament* (Allen & Unwin, Wellington, 1987).

8 G A Wood *Governing New Zealand* (Longman Paul Ltd, Auckland, 1988).

9 S Levine (ed) *Politics in New Zealand - A Reader* (Allen & Unwin, Sydney, 1978).

10 H Gold (ed) *New Zealand Politics in Perspective* (2 ed, Longman Paul, Auckland, 1989).

11 L Cleveland *The Politics of Utopia* (Methuen Publications, Wellington, 1979).

12 R Mulgan *Democracy and Power in New Zealand* (2 ed Oxford University Press, Auckland, 1989).

13 K J Scott *The New Zealand Constitution* (Clarendon Press, Oxford, 1962). Perhaps the book which best gets to grips with realities of the modern New Zealand administrative system is J Roberts *Politicians Public Servants and Public Enterprise* (Victoria University Press, Wellington, 1987).

14 J B Ringer *An Introduction to New Zealand Government* (Hazard Press, Christchurch, 1991).

when reading the manuscript just how much writing there is by many different people giving many different perspectives on the New Zealand constitution.

There is a great deal of writing in the law reviews by lawyers and some special issues devoted to public law, but not many books. Professor Michael Taggart edited a series of essays on administrative law which are interesting[15] and Dr Graham Taylor has recently published a text on judicial review.[16] Dr Paul McHugh has produced a book on the Treaty of Waitangi.[17] Three academic lawyers have joined forces to produce a text on official information,[18] and we are promised a text on New Zealand constitutional law.[19] The New Zealand public lawyers, however, despite the excellence of individual contributions, have not produced much material which makes sense of the entire enterprise.

In all the writing from both the stables of political science and law, there is little consensus. There is an emerging incoherence in the political process which is beginning to bring us to a new era of public law in New Zealand. Public law in New Zealand could easily become infected with post-modernism.[20] By this I mean that nothing makes any sense, there is little meaning in anything, everything depends on your point of view; it is all a question of interpretation, and the interpretation is subjective rather than objective. When you come down to it, the post-modernists say, theory and analysis do not explain anything anyway. It is not a view with which I am in any sympathy; I do believe there is a need for strong public institutions based on clear and ascertainable principles, but I also recognise that the structure of New Zealand's constitutional arrangements is conducive to a drift towards constitutional deconstructionism.

The primary actors in our constitutional system are known as politicians. They are held in low esteem. The fact is partly the result of their own activities but more I think from the nature of the system in which they are obliged to operate. It is compounded by the low level of New Zealand civic culture; it must be said, that even people as well educated as second year law students often seem to be ignorant of how we are governed. They do not have any precise knowledge of what Parliament does, how caucus works, the legislative process or what the essential features of the New Zealand constitution are. Indeed, I have long thought that a solid course in High School Civics could do a great deal to improve the understanding of the New Zealand government and to empower

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15 M Taggart (ed) *Judicial Review of Administrative Action in the 1980s* (Oxford University Press, Auckland, 1986).

16 G D S Taylor *Judicial Review - A New Zealand Perspective* (Butterworths, Wellington, 1991).

17 P McHugh *The Maori Magna Carta - New Zealand Law and the Treaty of Waitangi* (Oxford University Press, Auckland, 1991).

18 M Taggart, I Eagles, and G Liddell *Freedom of Information - New Zealand* (Oxford University Press, Auckland, 1992, Forthcoming).

19 P T Rishworth, W C Hodge and A Ladley *Public Law* (Butterworths, Wellington, 1992, forthcoming).

20 J F Lyotard, *The Post Modern Condition: A report on knowledge* (Manchester University Press, Manchester, 1984).

New Zealand citizens to take some meaningful part in a process which is, after all, conducted on their behalf.

Part of the problem, however, is with the lawyers themselves and with legal conceptions of what public law is. It is in a sense a jurisprudential problem. So, what is "public law?". In the traditional understanding it is about the distribution and exercise of power in the state, or public power. Public law in contemporary New Zealand parlance is both constitutional law and administrative law. Administrative law is supposed to be a child of constitutional law, but such has been its expansionary tendencies, that it tends to dwarf its parent.

There have always been serious problems with the substance and teaching of public law in New Zealand. Those problems I think stem, largely at least, from the arid tradition inherited from the United Kingdom. They come particularly from the dead hand of analytical positivism and its agent in constitutional law, Professor Albert Venn Dicey, and it is upon Dicey that I wish to launch a fully frontal attack now! If you look at Dicey's book, *An Introduction to the Study of the Law of the Constitution*, you find him beginning to discuss what constitutional law is. He gets into a discussion of the distinction between constitutional law and constitutional conventions and he says:[21]

> With conventions or understandings he has no direct concern. [he being the constitutional lawyer, a position for which women need not apply, apparently] They vary from generation to generation, almost from year to year. Whether a Ministry defeated at the polling booths ought to retire on the day when the result of the election is known, or may more properly retain office until after a defeat in Parliament, is or may be a question of practical importance. The opinions on this point which prevail today differ (it is said) from the opinions or understandings which prevailed thirty years back, and are possibly different from the opinions or understandings which may prevail ten years hence. Weighty precedents and high authority are cited on either side of this knotty question; the dicta or practice of Russell and Peel may be balanced against the dicta and practice of Beaconsfield and Gladstone. The subject, however, is not one of law but of politics. And it need trouble no lawyer or the class of any professor of law. If he is concerned with it at all, he is so only in so far as he may be called upon to show what is the connection, (if any there be), between the conventions of the constitution and the law of the constitution.

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21 A V Dicey *Introduction to the Study of the Law of the Constitution* (10 ed, Macmillan, London, 1959) 30 .

As if that were not enough, Dicey goes on to say:[22]

> The duty, in short, of an English professor of law is to state what are the laws which form part of the constitution, to arrange them in their order, to explain their meaning, and to exhibit where possible their logical connection.

If that is the only task of the law professor and the constitutional lawyer, it is a bad line of work to be in. You ought to get out of it. Dicey and his disciples are all concerned to draw the boundaries between law and politics. Law should be neutral, it should be based on a coherent set of fundamental principles. The idea that such immutable principles exist in public law has always seemed to me to be false. The view is based on a set of distinctions which do not hold up. Law is a political instrument, using the word "political" in its broadest sense.

I was introduced to Dicey myself just after completing a Bachelor of Arts in political science. Dicey produced in me a state of intellectual revulsion and he still does. What is worse, he is fundamentally wrong. Too many lawyers and legal scholars of public law have been under his spell for too long. Dicey was dull, I always thought Bagehot was better. Bagehot was the writer who outlined the nature of cabinet government in the nineteenth century in a way which was very enlightening and still is.[23] While the strictures of Dicey have lessened in New Zealand since I was a student, one can see in the fabric of public law in New Zealand, particularly constitutional law, a number of features which tend to deaden the subject and which remove it from practical reality in the eyes of students.

I can sometimes see that glazed look in the eyes of students at Victoria. The subject does not seem to be like contracts, for example, which seems to students to be real. Perhaps the law of contract has rules, perhaps you can find out what they are and apply them. By comparison public law seems smokey and misty; not capable of being understood and therefore not of great importance, especially if you want to get a high paying job in some big commercial firm. Such a view is fundamentally mistaken. Public law is the mainspring from which all the other law flows. Public law sets out the ground rules on which the whole of the society and the whole of the legal system works. Public law is, from a practical point of view, extremely important. Public law is about the legislative process. Public law involves international obligations which play an increasingly important part in shaping our domestic legislation. An important practical point which has been lost sight of, because of this preoccupation with Dicey, is the practical possibility of the lawyer in downtown Oamaru actually advising people on the basis of public law and making some difference.

My contention is that no one can be an adequate public lawyer without understanding not only the laws of the constitution, but also the practice of it, how it

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22 Above n21, 31.

23 W Bagehot *The English Constitution* (Fontana, London, 1963 ed). It was first published in 1867. This edition contains a splendid introduction by R H Crossman, whose practical political experience adds insight to his analysis.

works. If one restricts oneself to the rules recognised by courts, one will understand very little about how we are governed, or how public power in New Zealand is distributed. From the lawyer's point of view, there is a further deficiency in the traditional approach - it teaches you little about how to produce outcomes for clients. If New Zealand public lawyers borrow the approach of the American realists they may at least be able to locate themselves at the ground upon which the match will be played.

The most appropriate insight is Karl Llewellyn's:[24]

> This doing of something about disputes, this doing of it reasonably, is the business of the law. And the people who have the doing in charge, whether they be judges or sheriffs or clerks or jailers or lawyers, are officials of the law. *What these officials do about disputes is, to my mind, the law itself.*

That aphorism has equal application to our constitutional framework and what goes on within it. What MPs, ministers and civil servants do about disputes and policy issues is to my mind public law itself. The way it seemed to me on the inside was that most of the legal profession did not deal in, or have any developed capacity for dealing in, disputes or issues where MPs, ministers and civil servants had decision-making capacity or the ability to influence outcomes.

In making this point, I do not mean to be understood as denigrating modern administrative law, notwithstanding some of the waspish remarks made earlier in this lecture. I was a law student when *Ridge* v *Baldwin* was decided.[25] The edifice which has been erected by the judges since then is an important and enduring (I hope) contribution to our constitutional framework, because it is a much needed check against the executive. But it is court-oriented jurisprudence. The remedies are expensive. The outcomes remain uncertain and exceedingly difficult to predict whatever claims are made on the need for simplicity.[26] Furthermore, there are many outcomes administrative law cannot reach which can be reached by other legal techniques. Cheap and quick results are always preferable to more expensive ones which are long and drawn out. Prevention of the dispute arising in the first place is in normal circumstances the most prized goal for any legal adviser and client.

The truth is that public law in New Zealand has to deal with the sprawling mass of reality about how public decisions are made in New Zealand. Who makes those decisions? What rules do they have to follow in making them? How can those decision-makers be influenced in the content of those decisions? At its broadest, public

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24 K Llewellyn *The Bramble Bush* (Oceana, New York, 1951) 12 .

25 [1964] AC 40. See K J Keith "*Ridge* v *Baldwin* - Twenty Years On" (1983) 13 VUWLR 239.

26 Rt Hon Sir Robin Cooke "The Struggle for Simplicity in Administrative Law" in M Taggart (ed) *Judicial Review of Administrative Action in the 1980s*, above n15, 1.

law in New Zealand is about policy outcomes. The subject needs a new angle of approach - one which is relevant to the law practitioner in the real world.[27]

It is important not to confuse the place where the argument is made with the way in which it is made. The approach being developed here proceeds on the basis that lawyers are expert at clear, logical thinking. That they can analyse and dissect propositions, and develop policy schemes based on carefully defined principles. The traditional intellectual techniques of the law have a significant contribution to make to policy development, both in terms of rigour and in terms of practicality. The world we have now is one of almost limitlessly contestable policy advice. Lawyers need to understand the unique contributions they can make to this field.

My own favourite invention for translating the foregoing insight into reality in New Zealand was the Law Commission.[28] The manner in which the Commission works, by publishing discussion papers and then presenting final reports with draft bills attached, produces carefully thought out policy with ample public participation. The high standard of the Commission's performance in a relatively short time has moved the legal profession some distance in the direction I believe it should travel.

The exercise of public power frequently impacts on the welfare of citizens directly. Decisions by ministers, civil servants, the content of Acts of Parliament, the content of regulations, and decisions made by local government all have a great effect on individuals. The question posed for public law is what can lawyers do about it? Well, they can learn where representations should be made to influence the decisions. Advocacy is not restricted to the courts. Taking cases to court is one of the least effective ways of influencing decisions and one of the most expensive. To ask for court decisions about public law is like closing the stable door after the horse has bolted.

The effective lawyer wants to influence the decision for the client at the beginning, not overturn it at the end. I suspect that many students at the end of their public law courses think that the Court of Appeal of New Zealand is the place to take clients and as often as possible. A prudent lawyer with a client whose activities may be adversely affected by government has many more avenues available. Some of them have opened up only recently. Knowing where to apply those arguments and how to apply them in the most effective fashion is what public law should be about.

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27 Judges sometimes complain about failure in broad thinking by New Zealand lawyers: see Rt Hon Sir Ivor Richardson "The Role of Judges as policy makers" (1985) 15 VUWLR 46, 50:

> And unfortunately in my view many counsel still seem somewhat reluctant to explore wider social and economic concerns; to delve into social and legal history; to canvass law reform committee materials; to undertake a review of the general legislative approach in New Zealand to particular questions; to consider the possible impact of various international conventions which New Zealand has ratified; and so on.

28 Law Commission Act 1985.

Now, the traditional New Zealand constitutional law is strangely silent on a number of key subjects where policy decisions are really made and where power truly resides. Cabinet is a good example. This institution is largely ignored. Public law also says little about political parties, yet who can deny their fundamental importance in the distribution of power in this community? It is also silent on the subject of Caucus, and it has not much to say about the electoral process; on questions of administration and decision-making it is not strong, unless one restricts oneself to judicial review. The media are of vital importance in a modern democracy but do not come within public law's ambit as traditionally understood.

The new focus for lawyers and public law should be on policy outcomes.[29] It comprises the making of carefully crafted arguments which can alter policies while they are in the gestation period, adding to the effectiveness of parliamentary scrutiny of those policies, altering the application of the policies to specific cases within the executive branch of government, providing input to the legislative process to increase the quality of legislation and ensuring client's interests are fully taken into account within the process. Further, my experience suggests there are some existing areas of public law which lawyers have tended to neglect in representing clients. Some may object to such an ambitious sweep for public law as the one I am advocating. It is not, however, a case of whether lawyers are Pericles or the plumber.[30] They must be both. There are many needs for lawyer-like plumbing in constructing even the most holistic Periclean schemes.

While categories can give an artificial sense of order, the situation in which the opportunities occur can be categorised. The categories are:

1 Defining issues for policy attention prior to decision by government.
2 Bringing argument to bear on policies and decisions of executive government before they are adopted or made.
3 Assisting in the process of parliamentary scrutiny of executive action and utilising parliamentary remedies for clients. (This has particular application to the legislative process, but is not restricted to that.)
4 Ensuring existing features of public law are not neglected in advising clients.

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29 This view is hardly new, H Lasswell and M McDougal "Legal Education and Public Policy: Professional Training in the Public Interest" (1963) 52 Yale L J 203. The authors made the following statement at 208-209: "It should need no emphasis that the lawyer is today, even when not himself a maker of policy, the one indispensable adviser of every responsible policy-maker of our society - whether we speak of the head of a government department or agency, of the executive of a corporate or labour union, of the secretary of a trade or other private association, or even of the humble independent enterpriser or professional man. As such an adviser the lawyer, when informing his policy-maker of what he can or cannot *legally* do, is, as policy-makers often complain, in an unassailably strategic position to influence, if not create, policy." (In fairness to Dicey about whom I remarked earlier, it should be noted these two authors are equally sexist).

30 W Twining "Pericles and the Plumber" (1967) 83 LQR 396.

I have constructed a number of questions within these categories, based on my experience inside, against which lawyers can test their range of public law vision. My suspicion is that many lawyers would not be able to honestly answer in the affirmative, although New Zealand realist lawyers should be able to answer "Yes" to all of these questions.

1 Defining issues for policy attention prior to decisions by Government.

Do lawyers know how to go about getting a policy plank adopted in a political party manifesto? Do they have available the constitutions of the political parties?

Do lawyers know how to use the media to the advantage of a client?

How much attention do lawyers pay to the work of the Law Commission and the effect of its proposals on clients?

What analytical attention do lawyers give to pressure group activity and its impact on their clients' affairs ?

2 Bringing argument to bear on policies and decisions of executive government before they are adopted or made.

Are lawyers familiar with the contents of the Cabinet manual and do they use it?

Do lawyers know enough about the Budget process to effectively represent a client who has good reason to suspect that his or her business may be adversely affected by a Budget decision about to be made?

Are lawyers familiar with the structure and membership of Cabinet Committees?

Do they know about Caucus Committees and how to make representations to them?

Do law offices have copies of the manuals of government departments with which the lawyers deal?

How often do lawyers write to ministers of the Crown and when they do, are their representations effective?

Do lawyers know how to appeal over the head of a minister to the Prime Minister?

Do lawyers study carefully the bureaucracy with which they deal? Do they know the department's management structure and the statute law which governs the department's activities?

3 Assisting in the process of parliamentary scrutiny of executive action and utilising parliamentary remedies for clients.

Do lawyers know how to secure the help of MPs for their clients? Do they visit the MP in his or her electorate clinic on behalf of clients?

Do lawyers know how to get a Parliamentary question asked on matters which relate to a client's affairs?

Do private practitioners know how to promote local and private bills to be passed by Parliament?

Are practitioners familiar with the legislative process - do they study bills as introduced on behalf of their clients?

Do lawyers know how to make representations on the content of bills at select committees and equally important, how to be effective?

Are practitioners familiar with the new structure of parliamentary select committees, their powers, jurisdiction and capacity to conduct inquiries?

Do all law offices have an up to date copy of the standing orders of Parliament and speakers' rulings?

Do lawyers know enough about the privilege jurisdiction of Parliament to be able to represent a client in front of the Privileges Committee? Do they know how to do the research?

Do practitioners complain on behalf of clients to the Ombudsmen in respect of unfair and wrong behaviour by central and local government?

Do lawyers know what an inquiry by the Auditor-General could achieve for their clients?

Are lawyers familiar with the new parliamentary remedies against delegated legislation, in particular the Regulations Review Committee and the provisions of the Regulations (Disallowance) Act 1989?

4 Ensuring that existing features of public law are not neglected in advising clients.

Do lawyers make much use of the Official Information Act 1982 to assist their clients?

Do all law offices have a copy of the Directory of Official Information, which must be published every two years, and which contains summaries of all the information held by government agencies?

Do practitioners use the Local Government Official Information and Meetings Act 1987 on behalf of their clients in dispute with local government? Do they know about section 19 which provides a key to the information held?

Do they know how to use the open meetings provision of this legislation?

Do lawyers understand the full implications of the New Zealand Bill of Rights Act 1990 and take it into account when they give advice?

Are lawyers familiar with the content of the Constitution Act 1986?

Are New Zealand lawyers able to find their way around the Australian Constitution Act and the United States Constitution?

How much command do lawyers have of the new Treaty of Waitangi jurisprudence? Do they really understand Maori aspirations and concerns?

I proceed now to unpack some of the thinking behind some of the questions. In a sense the whole of this series of lectures (and the book based upon them) is about these issues, so not all the meaning can be revealed in a single lecture. But I hope to give the flavour of the approach being advocated. Much could be written about the legal utility of all the subjects raised and creative ways in which lawyers can use them. The purpose of a public law course in the universities is to teach people who are going to be lawyers how government works. Of all the things that can happen to your clients in your whole professional career, government can cause more trouble than any other entity. And the range of remedies available against government is greater than against any other opponent. The most potent of those remedies will not be found in courts, important as the courts are.

A graphic example of what I am talking about is to be found in the area of delegated legislation. There is a massive amount of delegated legislation, which is passed by Cabinet, sent to the Governor-General in Council and signed into law at a rate which often reaches double figures each week. Regulations are the law of the land, but they are made by the executive branch of government, often in the interests of the executive branch of government, under power delegated by Parliament, in Acts of Parliament.

The way in which subordinate legislation is now subject to both judicial and parliamentary control provides an arresting example of how the modern constitution works. The doctrine of *ultra vires* has long provided a mechanism for judicial review of regulations in New Zealand, but striking down a regulation in court is not easy, because the tests are tight and parliamentary counsel are not in the habit of drafting regulations outside the power of the enabling statute.[31] They are required to certify to Cabinet that a draft regulation is within power. Sometimes the certificate is qualified and Cabinet is nervous about regulations which come before it in that category.

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31 The leading New Zealand case is *Reade* v *Smith* [1959] NZLR 996.

Consider, however, the parliamentary protections available these days against abuse of the power to make regulations. The select committee called the Regulations Review Committee has powers of the widest character. It is chaired by a member of the Opposition, a convention which has been established under both Labour and National Governments. Making complaints to the Committee is simple. It is by letter to the chair. The complaint must be placed before the Committee at its next meeting and the person or organisation aggrieved must be given the opportunity to address the Committee. There is a right to do all of this unless the Committee decides by unanimous resolution to proceed no further. This provision in Standing Order 390 means that the capacity to pervert the process for reasons of political expediency are eliminated.

All regulations, whenever they were made, stand referred to the Committee. Standing Order 389 provides grounds upon which the regulation can be brought to the special attention of the House and they are much broader than those available in *ultra vires* cases before the courts. The grounds are that the regulation:

- is not in accordance with the general objects and intentions of the statute under which it is made;
- trespasses unduly on personal rights and liberties;
- appears to make some unusual or unexpected use of the powers conferred by the statute under which it is made;
- unduly makes the rights and liberties of persons dependent upon administrative decisions which are not subject to review on their merits by a judicial or other independent tribunal;
- excludes the jurisdiction of the courts without explicit authorisation in the enabling statute;
- contains matter more appropriate for parliamentary enactment;
- is retrospective where this is not expressly authorised by the empowering statute;
- was not made in compliance with particular notice and consultation procedures prescribed by statute;
- for any other reason concerning its form or purport, it calls for elucidation.

These grounds are potent. Reports have been made under these statutory orders of great help to aggrieved people. But there is more: The Regulations (Disallowance) Act 1989 provides that the House of Representative may by resolution disallow any regulations or provisions of regulations. Furthermore, there is provision for automatic disallowance of a regulation if a motion put forward by a member of the Regulations Review Committee is not disposed of within 21 sitting days. While this procedure has yet to be used, it provides heavy artillery in the hands of the Regulations Review Committee. And the experience of the Regulations Review Committee itself in the last few years provide ample evidence that other effective remedies are available.

Consider the case of Mr Edward who owned and operated a chemist shop in Rotorua. It is a story about the imposition of the policy that the user should pay for the cost of government services and the silly effects application of the policy can have in individual cases, if it is not applied with discernment. Mr Edward obtained a second-hand

weighing machine for approximately $500 from the United Kingdom.[32] He installed it outside his shop for public use. The machine had a British certification as an approved weighing instrument. It was rather a sophisticated machine which provided a computer printout. Mr Edward was advised by the Labour Department that he was required to apply for New Zealand certification of the machine and that this would cost him $2,000, a charge made under the Weights and Measures Regulations 1987. Mr Edward went to his MP, who complained to the Regulations Review Committee. The Committee's inquiry was extensive and its report trenchant.

The Committee found it "astonishing" that the machine would have to undergo such expensive accuracy tests. It found that the regulation unduly trespassed on personal rights and liberties and made the rights of persons dependent upon administrative decisions which are not subject to review on their merits. It recommended that such weighing machines should either be excluded from the regulations or that certificates of accuracy issued by other countries belonging to the International Organisation of Legal Metrology should be recognized.[33] The regulations were changed to recognise such certificates and everyone lived happily ever afterwards.[34] Note, that this result was secured under the Standing Orders - the Regulations (Disallowance) Act 1989 was not involved here. What surprises me is how little known these new protective provisions are among the legal profession and how the opportunities now available are little used.

Parliamentary select committees generally are a forum in which people can influence the outcome of legislation. It is exceedingly rare for a bill to come out of a select committee without alteration, and the amendments are a result of submissions. It is always easier, of course, to influence legislation before it is introduced. But that requires some knowledge of what is proposed. Good contacts with government departments, plus the Official Information Act can provide the necessary information.

Where there is some really difficult technical legislative problem, contact could be made with the Legislation Advisory Committee, which is appointed by the Minister of Justice.[35] This body, consisting of Judges, the President of the Law Commission,

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32 Regulations Review Committee *Report in Inquiry into fees charged under the Weights and Measures Regulation 1987*, 1987-90 AJHR Vol XVIII I 16, 9.

33 Above note 32, 12.

34 Weights and Measures Regulations 1987, Amendment No 1, SR 1987/123.

35 For an explanation of the Committee's origins see G Palmer "The New Zealand Legislative Machine" (1987) 17 VUWLR 285, 291. The Terms of Reference of the Committee are as follows: (a) to scrutinise and make submissions to the appropriate body or person upon aspects of bills introduced into Parliament affecting public law of raising public law issues; (b) to report to the Minister of Justice or the Legislation Committee of Cabinet on the foregoing aspects of legislative proposals which the Minister or that committee refers to it; (c) to advise the Minister of Justice on such topics and matters in the field of public law as the Minister from time to time refers to it; (d) to monitor the content of new legislation specifically from an "Official Information" standpoint. This last reference was added when the Information Authority went out of existence, Official Information Act 1982, s 41 (2). See also K J

lawyers from the Department of Justice and the Crown Law Office, private practitioners, and Chief Parliamentary Counsel, is chaired by Dr Mervyn Probine. It acts as a watchdog on the quality of legislation and public law generally. When the Committee does not succeed within the executive branch of government, although it often does, it makes submissions to the select committees. The Legislation Advisory Committee improves the quality of legislation, but it is almost unknown.

Select committees play a vital role in the New Zealand Parliament in scrutinising and correcting proposed legislation, but their powers are extensive in other areas as well. Every issue dealt with by every department is now capable of being inquired into by the relevant select committee. Select committees can examine policy, they can look at expenditure, they can hold hearings on virtually anything they like.[36] The powers they have make them important places for people and organisations who think they have not been given a fair shake. Some of them have ancient and technical jurisdiction, what Sir Edward Coke called the *lex et consuetudo parliamenti*, (the law and custom of Parliament) which is a very complex field involving much ancient learning.[37]

Representing someone who is hauled in front of the Privileges Committee of Parliament is a most challenging assignment. The privileges of Parliament are extensive.[38] I once remember sitting with Sir Robert Muldoon on a Privileges Committee hearing. He was dealing with a journalist, a species of person of whom he was not particularly fond. He suggested at one point that we should put the journalist in the parliamentary dungeon and feed him on Bellamy's pies. This frightened the journalist somewhat, which was its intended effect. Although it did not happen, it could have. The New Zealand Parliament has power to imprison for breach of privilege, although probably not the power to fine, despite the fact it has done so. Some members of the legal profession who become involved in privilege are most uncertain in their approach in my experience.

Appearance at parliamentary select committees by lawyers tends to be rather ineffective - it is their own fault. Mind you, lawyers do not like MPs reading newspapers and that sort of thing at select committee hearings when they are speaking and naturally begin to wonder what is going on. But lawyers tend to address parliamentary select committees as if they are some species of court. They are not and that is not the way to proceed. Knowing how to get your message across in a fairly compelling, brief, and graphic way is one of the elements of advocacy at parliamentary select committees. There is a lot of work available for lawyers who know what they are doing representing people and organisations at parliamentary select committees.

Keith "The New Zealand Legislation Advisory Committee: Choreographer or Critic" (1990) 1 Public Law Review 290.

36 Standing Orders of the House of Representatives 1986, brought into force 1 August 1985. Anyone wanting to know anything about Parliament should consult, D McGee *Parliamentary Practice in New Zealand* (Government Printer, Wellington, 1985).

37 C J Boulton (ed) *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament* (21 ed, Butterworths, London, 1989).

38 Legislature Act 1908, s 242.

It is not only at select committees of Parliament where there is scope for legal talent and help to be had for clients. Lawyers tend to ignore what MPs can do for their clients. How many lawyers go to see MPs in their clinics on Saturday mornings? Often that can be the cheapest, and most effective way of dealing with their client's difficulty. Not many lawyers think of it, in my experience. Quite often representations by MPs in the right quarter can be effective. How many lawyers in private practice know how to get a parliamentary question asked if a government agency or minister has plans which affect the vital interests of the lawyers' client? Again, not very many, in my experience. Yet the parliamentary question can secure commitments which can be of vital importance to clients later.

How many of the standing orders of Parliament are known to public lawyers? Norman Kirk used to tell new MPs in Parliament to learn a standing order a day. There are 413 of them so they take some time to master. The standing orders of Parliament are extensive, but important. Practitioners ought to have a set in their law offices for a number of practical reasons. First of all, if you want to promote a local bill because you are the solicitor for a local Council, the standing orders tell you how to do it. The number of lawyers in New Zealand who have not read the standing orders when they promote local bills is notorious around Parliament. What they mainly do is to write to the Parliamentary Counsel Office, or the Clerk of the House, and ask how to promote a local bill. They ought to know. Some people need to have the law changed by private Act of Parliament. Several private Acts go through the New Zealand Parliament most years and private Acts follow a different procedure. Promoting private Acts of Parliament can be of vital importance to a client and there needs to be knowledge about how to do it.

One of the most useful weapons for any client who is pitted against government is information. The Official Information Act 1982 should be of great advantage to the legal profession; they should study it. It is studied in some detail in the corridors of power in Wellington, but it is studied from a somewhat different point of view. It is studied as to how it can be avoided, evaded or just plain ignored. There is a great deal of unpopularity about the Official Information Act in the eyes of decision-makers, because many of them they do not like to share information. The Official Information Act is based on the theory that information is power, and in a democracy it ought to be shared. While the Act has changed the culture profoundly it is much less closely observed than it ought to be.

When making big policy decisions which may be unpopular it is better to choose the best time to announce them rather than having someone else half announcing them as a result of information they have obtained under the Official Information Act. The Official Information Act is, however, important to the lawyer in private practice. If someone in government (whether it be an agency, department or a minister) proposes to do something which is adverse to a client's interests, the first thing to do is find out what the facts are. And the best chance of finding out what the facts are is to secure information under the Official Information Act. These principles apply to local government as well. Securing information about what local governments want to do is of vital importance to lawyers in the most humble practices. Yet I do not believe that

the cheap and quite quick techniques now available have been used as much as they could have been for professional purposes by lawyers.

Then there are the Ombudsmen. How many lawyers actually send complaints on behalf of their client to the Ombudsmen? In the Ombudsmen's ordinary administrative jurisdiction, an authoritative source told me that something less than 10 per cent of the complaints come from the legal profession. The Ombudsmen, in fact, are effective, and cheap in dealing with wrongs, and at setting wrongs to right. Their "Compendia of Casenotes" make interesting reading.

This brings me to the questions of ministers. Lawyers tend to think Cabinet does not exist, because Dicey told them it was not part of the law of the constitution. But anyone who wants to understand the distribution of power in New Zealand must study Cabinet. Cabinet is where it all happens, and if you have a client who has a real problem and the Cabinet is going to decide the policy in relation to that problem, you had better know how to reach the ministers. Now of course there are some in Wellington who make livings as lobbyists by knowing who the private secretaries are and knowing how to get entrée; I am not talking about that. I am talking about making timely, principled, rigorous representations on behalf of a client about how government policy or agency action may affect that client's affairs. That can be done, it is perfectly proper, but it is not often done. When it is done, in my experience, it tends to be done ineptly because the legal profession simply does not understand how government works.

Consider departments. It is necessary to know something about the structure of the executive branch of government and the departments of state. Some of them, too many of them, have statutes which govern their procedures.[39] Those statutes ought to be studied; but what is more important is that lawyers and students of public law ought to know how advice is tendered to government. Often it will be that the best approach is not to the minister but the public servant. If it is a technical matter, do not worry the minister with it, take it to the person in the department who is most concerned with those technical matters and get it settled at that level. Rather, the present approach too often seems to be to fire a letter off into the bureaucracy and just hope something will happen. You often need a direct representation. You need to know who the decision-makers in the government department are. You need to understand the manner in which advice is tendered by the public service. You need to know in whom the discretions reside. You need to study the manuals of the public service department (available under the Official Information Act), to find out how far down the delegations go.

There are some potent protections for your client's interest in public law institutions which hardly ever come to the knowledge of the legal profession. Take the question of pressure groups. Sometimes pressure groups are very well organised; in the environmental area that is particularly true. The environmental pressure groups have a

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39 Department of Justice Legislation Advisory Committee *Departmental Statutes* (Report No 4) (Wellington, 1989).

lot of information.[40] That may be information of value to your client. How many planning lawyers seeking a consent have gone to see the environmental pressure groups to find out their attitude to a particular matter before taking a step so they can advise their client. So often, money, effort and time spent in planning a strategy at the beginning will avoid lengthy legal proceedings later. With matters touching Maori issues, that is also true.

The Controller and Auditor-General is another person whose jurisdiction the public lawyer should be familiar with.[41] The Auditor-General is the watchdog of public expenditure. The Auditor-General has very substantial powers and can cause all sorts of trouble with a good investigation; if your client has got some complaint about government expenditure, then it may be better to go to the Auditor-General than to write to the minister. The public lawyer properly equipped with knowledge can light fires in so many different areas at once that favourable outcomes may quickly result for clients.

Probably the final repose for the public lawyer who has failed everywhere else, is to have some knowledge of how the political parties run; how they make policies; to whom you go to in order to get planks adopted; how to ensure that your client's point of view is not going ignored in the formulation of policy. If a policy comes out of the political party it tends to be harder for the bureaucracy to knock over later.

The point is perhaps self evident in some respects, but at law school, and in subsequent professional courses, a great amount of time is spent teaching subjects like office and court room practice, civil procedure, and evidence; indeed most substantive courses are concerned with predicting what courts will do. Surely, it is always better to avoid an adverse decision for a client being made in the first place; to ensure that the policy is developed at the beginning in a manner which is most favourable to the client's interest.

I have said a good deal about what public law is about, but let me now say a little about what it is not about, or at least not much. Take the subject of parliamentary sovereignty, a topic which hogs the time of law students and fascinates legal academics. It fascinates no one else. I wish we could stop being preoccupied with it and concentrate on something more useful and real. I can say that after nearly twelve years in the New Zealand Parliament, I never heard that subject of parliamentary sovereignty discussed seriously at all by anyone there, even in the great debate on whether New Zealand should have an entrenched Bill of Rights. The issue was not whether we could, but whether we should. Parliamentary sovereignty is studied by law students to the point of distraction. Then, there is the scope of the Royal prerogative. I have spent a lot of time with the Queen, but never have we discussed the Royal prerogative. It does not come tripping off your tongue at every Cabinet meeting. It is not very often that a minister becomes involved with it - the prerogative is not one of the central ideas of the

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40 G Palmer *Environmental Politics - A Greenprint for New Zealand* (John McIndoe, Dunedin, 1990).

41 Public Finance Act 1977, ss 14-36.

modern democratic state although knowledge of it can be vital in certain classes of case. Then there are the conventions of the constitution. Law students look at them and try to figure out what they are. But inquiries into whether some practice has ripened into a convention or whether it has not are hardly as profitable as a real knowledge of the components of the system and how they fit together.

My experience in Parliament and in government tells me that lawyers are on the whole not knowledgeable or effective in using the avenues available to them. We have a simple, but at the same time, subtle and complex system of government. It is not merely in respect of New Zealand that our conception of public law fails. It fails also if that conception is restricted to New Zealand. No one can sensibly advise business in New Zealand today without understanding Closer Economic Relations with Australia.[42] Indeed, I suggest that the Australian Constitution Act 1900 is something that public law students and law practitioners in New Zealand should be familiar with; they need to understand it because the distribution of power in the Australian Commonwealth is something with which New Zealand business has to deal on a daily basis. You have to know whose rules govern, which requires a knowledge of the powers of the states and the powers of the Commonwealth. It can involve some recondite learning, such as the difference between section 109 of the Constitution Act (dealing with manufactured inconsistency) and section 51 which gives the power to the Commonwealth Government to legislate on certain matters. The residual powers remain with the states. It is to be remembered, too, that free trade in services including legal services across the Tasman is not far away.

I well remember when I was asked to go to Australia to advise the Australian government on accident compensation. A New Zealand Judge, Sir Owen Woodhouse, was the Chairman of the Inquiry. We had considerable difficulties with the Australian Constitution Act, which is strange to New Zealand eyes. The Australian Constitution Act is niggardly in its grants of power to the Commonwealth Government; we wanted to set up an accident compensation system rather similar to the one in New Zealand. We wanted to take away the right to sue at Common Law in Australia, and that was a matter of state power, not of federal power. We had to find some federal power somewhere. So we employed some of the best silks in Australia, and we had them all up to Sydney to our Inquiry and we paid them a great deal of money to find out what the Australian Constitution Act meant. They were not asked to provide written opinions but to come and advise orally. The Australian Constitution Act was the subject of an amendment called the Chifley Amendment 1946, which gave the Australian Government power to pay sickness benefits. They already had the power to pay invalid pensions and the 1946 amendment gave them the power to pay sickness benefits.

The question that we asked an eminent Victorian counsel, who later became a judge in the High Court of Australia, was whether the Australian government could pay people who were injured by accident, sickness benefits or invalids pensions. If such payments were valid then the Australian government could occupy the field and legislate

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42 G Palmer "International Trade Blocs - New Zealand and Australia Beyond CER" (1990) 1 Public Law Review 223.

the Common Law away. The eminent Victorian counsel got out his dictionary and looked up the word "sick" and "sickness". He went through a dictionary definition of those words and then pronounced that he did not think that accident victims were sick. "They're not sick", he said. Sir Owen Woodhouse echoed his "Not sick" with a tone of such injured incredulity it remains with me still. It taught me exactly how lawyer-like you have to be, when you are dealing with the Australian Constitution Act. Close attention to the meaning of words can be everything, even in the highest matters of policy.

We no longer live on a set of islands which are intellectually remote, if indeed they ever were. The practice of law is increasingly internationalised; it is global. New Zealand lawyers have to understand the international trends. It is not just Australia. The international connection in public law looms much larger than that. Developments in Europe have big implications for New Zealand exporters. New Zealand's relations with the nations of the South West Pacific are historically and constitutionally important. Their constitutions should be known to New Zealand public lawyers.

The International Covenant on Civil and Political Rights which has been ratified by New Zealand has also an Optional Protocol which the Labour Government ratified.[43] This issue sleeps now, but it will awaken. The Optional Protocol allows New Zealanders to make complaints to the Human Rights Committee of the United Nations. New Zealand lawyers apparently have not yet discovered it. I have not heard of a lot of advice being given about it. It is a fresh opportunity and one which may have some significant contribution to make on Maori issues.

There is also a strong case for saying that public law in New Zealand should deal with the United States Constitution. This is not for the same reason as we need to understand the Australian Constitution although some of those reasons do apply. Let me give you an example - Brierleys is a big New Zealand company. Brierleys has substantial interests in the United States. The executives and legal advisers of Brierleys in Wellington have to deal on a daily basis with American federalism, with American corporation law, with American tax law and with the power of the American courts. United States constitutional law is probably the most advanced of any of the Western countries and the most sophisticated with dealing with problems of pluralism and discrimination.[44] That is why any educated lawyer should have a basic familiarity with it.

Public law is not immune from globalisation. You only have to look at the so called "long arm statutes" which have been passed by the United States Congress on matters like anti-trust, which purport to extend to New Zealand. Sometimes the New

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43 International Covenant on Civil and Political Rights 999 United Nations Treaty Series 171. Entered into force for New Zealand 28 March 1979. First Optional Protocol to the International Covenant on Civil and Political Rights 999 United Nations Treaty Series 302. Entered into force for New Zealand 26 August 1989.

44 G Palmer "Another Way of Skinning the Rabbit" (1991) 48 Washington and Lee L R 447.

Zealand Government passes legislation to block the application of those laws here.[45] We cannot restrict ourselves anymore to the content of the law in New Zealand because that is not the way that law practice is evolving. Indeed, much of our domestic legislation has its origins in international obligations which New Zealand has undertaken. The Legislation Advisory Committee in 1987 report listed more than 130 New Zealand statutes which were affected in some way by treaty obligations.[46]

The purpose of public law is in fact the same as any other branch of the law. It is to solve people's problems. It is to reduce disputes, it is to ensure that things work. If you approach it in that way, it does not seem to be some arcane branch of metaphysics or something so smokey that you can not see it. In fact, it turns out to be one of the most practical down to earth, concrete subjects in the entire curriculum. The three legs of the great tripod on which New Zealand public law rests - the Constitution Act 1986, the New Zealand Bill of Rights Act 1990 and the Treaty of Waitangi I have not touched on. The omission is deliberate - they deserve separate and extended treatment which they will receive in future lectures.

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45 Evidence Amendment Act (No 2) 1980. See also 432 NZPD 1834 (1980).

46 Department of Justice *Report by the Legislation Advisory Committee, Legislative Change - Guidelines on Process and Content* Appendix B (Report No 1) (Wellington, 1987).