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SPECIAL CONFERENCE ISSUE: MMP AND THE CONSTITUTION

THIS ISSUE INCLUDES CONTRIBUTIONS BY:

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Jonathan Bradbury
Andrew Geddis
Philip A Joseph
André Kaiser
Stephen Levine and Nigel S Roberts
Ryan Malone
Raymond Miller and Jack Vowles
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MIKE TAGGART: IN MEMORIAM

PG McHugh, August 2009*

Mike and I were virtually contemporaries, both completing our undergraduate legal education in New Zealand during the turbulent mid-1970s. This was the era of student activism and protest over matters like apartheid, East Timor, Bastion Point and (amazingly as it now seems in these days of massive student debt) education cutbacks. Mike kept his home town as the locus of what became a very distinguished academic career and whilst he flew the common law world intellectually and on air miles he steadfastly remained an Auckland boy from Mount Albert. He always believed and demonstrated so strongly that it was possible for New Zealand academic lawyers to command an international stage from their home.

In the span of his career from 1981 until retirement in 2008, the nature of public law enlarged considerably in all its interconnected dimensions: its content, ambit, intensity, political profile and intellectualising. Viewed as a whole, Mike's *oeuvre* is both a logbook of that massive expansion and a demonstration of his active participation in many of those changes. His commentary incorporated not only New Zealand, on which he was an astute yet loving observer, but also the common law world at large where his reputation was huge, stature that his New Zealand colleagues only began to grasp towards the premature end of his career.

Mike's work showed a strong concern for historical context since at least the late 1980s, illustrated, for example, in his histories of delegated legislation, the *Wednesbury* case and its afterlife, the public law impact of apartheid and, perhaps most of all, his acclaimed book on *Bradford v Pickles*. He was sensitive to the broader field of the history of intellectual thought, understanding the profound importance of another New Zealander, Professor JGA Pocock. Mike's later work and leadership understood the centrality of historical method and he sought consciously yet gently to integrate the writing of the history of public law into this influential scholarship, with its emphasis upon agency and context rather than doctrine. His godfatherly involvement in the New Zealand Lost Cases Project showed his commitment to an emergent New Zealand tradition, one that he strove to ensure was at once national yet also cosmopolitan (for these were never antagonistic possibilities in his scholarship, or, for that matter, his career). Undoubtedly there was emerging his own distinctive contribution to this emergent "school" – one oriented around the 20th century and New Zealand of the last half of the 20th century. Sadly, that scholarship was cut short.

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Alongside (indeed, as part of) his acute historical sensitivity, there runs arterially a commitment to the common law. Throughout his *oeuvre* one sees the common law depicted not simply as an historicised intellectual phenomenon, an inherently dynamic system carrying its own mode of thought and form ofpolitical authority, but ultimately, as a human enterprise straddling several jurisdictions as well as generations. In Mike's scholarship the common law does not grow progressively, although it does have its lucid moments, so much as zigzag. It has the crooked timber of its own humanity in time and place. In this continual and necessarily incomplete endeavour, one finds individuals inhabiting his scholarship to an extent unusual amongst most legal scholars who, most of us, have a strong streak of misanthropy and impatience with an imperfect world that just will not get it right. Not so Mike, in whose published work characters like the luckless litigant Chaffers and the persistent Wiseman breathe his rare, gentle humour and kind though sharp observation. These qualities produce wellrounded and lively views (for Mike had many and is fearless in those); multifaceted, intrepid accounts across time and place that go well beyond replay of the contemporary preoccupation with the adjudicative process. Above all he was always a compassionate scholar. More than mere ideas, there are people with ideas, and sometimes people without them, and they are not only judges. They have choice and agency.

Perhaps the uppermost change in the nature of the public law enterprise in the span of our careers has been its transformation into a form of political leverage that it never was when we studied the sprinkling of canonic British cases like *Ridge v Baldwin*, *Padfield*, and *Conway v Rimmer* as undergraduates. Then the case law hardly had the depth and spread of today and the emphasis was upon the cautious formation of doctrine based upon rigorous case analysis. By the 1980s what Mike terms "classical administrative law" was developing into a more elaborate jurisprudence and some of its modernday features were becoming more evident, such as the public/private divide (*O'Reilly v Mackman*), more relaxed standing,the recasting of *Wednesbury* and other signals of its widening sphere of justiciability. It was also, of course, taking a more strongly indigenised flavour and Mike recorded and commented on this.

We were at the outset of our careers in the early 1980s, in our different ways joining in the retoolingof the common law in more proactive form. To some extent the disposition of young legal academics of that era – a tendency towards the use of public law in pursuit of what then were usually regarded as policy goals – was a response to the surrounding activism and militancy of the civil rights movements as well as a prevalent sense of political inertia. Certainly later steps taken by the Fourth Labour Government (1984–1990) also contributed to the redrawing of constitutional boundaries: the establishment of a Royal Commission on Electoral Reform (1985); the extension of the jurisdiction of the Waitangi Tribunal (1985) and the inclusion of section 9 in the State-Owned Enterprises Act 1986 and the New Zealand Bill of Rights Act 1990. However, in the early 1980s those initiatives and their profound eventual impact were around a corner that we did not realise the country was about to turn.

Certainly in the New Zealand of the Holyoake–Muldoon era, as in the other Anglo-Commonwealth jurisdictions of the 1960s and 1970s, deliberative constitutional change was not on the national agenda. Politicians were not interested in presenting constitutional change to the electorate or voluntarily trimming the discretions by which they sailed. The demands of minor political parties like Social Credit for electoral reform were regarded as a form of bleating that both of the hegemonic major parties could ignore disdainfully. Increasingly and in that political default, there was growing pressure being placed upon the courts to bridle the executive branch. Young pups in the law schools, encouraged no doubt by an undergraduate admiration for the heroics of Lord Denning, were exhorting the courts to use common law technique more imaginatively in areas where there seemed a vacuum. By the early to mid-1980s many of us – Mike and myself amongst them – were urging the courts to develop the common law in response to important aspects of the national condition that traditionally were regarded as juridically impervious "no go" areas. This exhortation was at full steam and the court-led formation of New Zealand administrative law well in train by the time the Fourth Labour Government came to power in 1984. Mike then became specifically concerned with the neoliberal public sector restructuring under Rogernomics and its winding back of the welfare state, including the corporatisation of public assets, specifically the injection of private sector incentivising into the management and (non)regulation of public utilities. The immediate goal was to keep encouraging courts over the hump of nonjusticiability and to nurture a legalism that the executive resisted.

By the mid-1980s a general form of common law inventiveness was on the rise in the law schools at large, with some of our most beloved colleagues falling into its darkest black hole, the allenveloping field of equitable restitution.

When the influence of the critical legal studies movement infiltrated the New Zealand law schools (and that of Auckland in particular), our more polemically gifted colleagues rejected that tactic altogether as complicit with an inherently conservative form of legalism. Certainly, however, to the politically conscious though less confrontational and more bookish of us, deployment of the common law represented an alternative to the militancy and streetchanting of the time. This was a less radical reaction against the conservatism and deferential complacency that seemed the hallmark of New Zealand politics in our youth and undergraduate days and against which many of our contemporary student activist friends had railed. Mike always remained intellectually committed to the "soft form" classical administrative law that formed in this period, not only its New Zealand brand but also Australian and pre-Charter Canadian forms. He saw the emergence of New Zealand administrative law in the 1980s as a truly kiwi exit route from the stalemate of the earlier era.

Certainly there arose in our generation of legal scholarship a much clearer consciousness of the common law as a system of thought, bringing with it more carefully calibrated explorations of its political role and epistemic properties. A lot of this has focused (often too microscopically) upon the adjudicative process, a preoccupation that does not afflict Michael's scholarship even though he engaged issues of judicial agency directly. More latterly, public law scholarship has interlocked

classical administrative law with the new language of rights; an experience that has required the contemporary common law to "reinvent" its way of thinking. From the 1990s, Mike's writings on contemporary legal developments showed how entry into the rights culture had been and continued to be a bumpy and uneasy adjustment, as the currents of the classical and the rights fronts meet and form the prevailing and turbulent climactic conditions for public law today. Until illness forced his retirement Mike kept abreast of those developments, writing with insight and historically informed wisdom. His reservations about hard-form judicial review (the striking down of legislation) and his scathing view of dialogical models of the relations between the judicial and executive/legislative branches were not sentimental attachment to the paradigm of his tooth-cutting early career. He believed in a dialectical rather than dialogical model of the separation of powers.

Early this year a festschrift was published in his honour by Hart Publishing,[1] a publisher with whom Mike has enjoyed a close relationship, its rise also spanning his career. Edited at great speed as his condition worsened, and with considerable efficiency, by the Canadian team of David Dyzenhaus, Murray Hunt and Grant Huscroft, it was presented to him and his family whilst he was well enough to attend. The irony was that he had recently published his own compilation of common law festschriften as well as commentary on (and several contributions to) the genre. The essays within and the title of his festschrift – *A Simple Common Lawyer* – are a testament to his stature. The variety of essays confirms the breadth of his legacy, the deep and influential spread of his roots as a scholar and the tragedy of his early death.

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1 David Dyzenhaus, Murray Hunt and Grant Huscroft (eds) *A Simple Common Lawyer: Essays in Honour of Mike Taggart* (Hart Publishing, Oxford, 2009).

APPENDIX: SOME IMPORTANT, MORE RECENT EXAMPLES OF MIKE TAGGART'S WORK

Private Property and Abuse of Rights in Victorian England: The Story of Edward Pickles and the Bradford Water Supply (Oxford Studies in Modern Legal History, Oxford University Press, Oxford, 2002) ixxiv, 1235 (awarded the JF Northey Memorial Prize for the best book published by a New Zealand lawyer in 2002).

(ed) *An Index to Common Law Festschriften: From the Beginning of the Genre up to 2005* (Hart Publishing, Oxford, 2006).

"Common Law Price Control, State-Owned Enterprises and the Level Playing Field" in Linda Pearson, Carol Harlow and Michael Taggart (eds) *Administrative Law in a Changing State: Essays in Honour of Mark Aronson* (Hart Publishing, Oxford, 2008) 185.

"*Wednesbury* unreasonableness" in Peter Cane and Joanne Conaghan (eds) *The New Oxford Companion to Law* (Oxford University Press, Oxford, 2008).

"Commentary: 'Dialogue' as Inter-Branch Communication" in Claudia Geiringer and Dean R Knight (eds) *Seeing the World Whole: Essays in Honour of Sir Kenneth Keith* (Victoria University Press, Wellington, 2008) 340.

"Proportionality, Deference, *Wednesbury*" [2008] NZ Law Rev 423.

"Vexing the Establishment: Jack Wiseman of Murrays Bay" [2007] NZ Law Rev 271.

(with David Dyzenhaus) "Reasoned Decisions and Legal Theory" in Douglas E Edlin (ed) *Common Law Theory* (Cambridge University Press, New York, 2007) 134.

"Rugby, the Anti-apartheid Movement, and Administrative Law" in Rick Bigwood (ed) *Public Interest Litigation: New Zealand Experience in International Perspective* (LexisNexis, Wellington, 2006) 69.

"The Impact of Apartheid on Commonwealth Administrative Law" [2006] Acta Juridica 158.

"Ruled by Law?" (2006) 69 MLR 1006.

"Turning the Graveyard of Scholarship into a Garden: The Indexing of Common Law *Festschriften*" (2006) 17 Public LR 90.

"Globalization, 'Local' Foreign Policy, and Administrative Law" in Michael Taggart and Grant Huscroft (eds) *Inside and Outside Canadian Administrative Law: Essays in Honour of David Mullan* (University of Toronto Press, Toronto, 2006) 259.

"Prolegomenon to an Intellectual History of Administrative Law in the Twentieth Century: The Case of John Willis and Canadian Administrative Law" (2005) 43 Osgoode Hall LJ 223.

"From 'Parliamentary Powers' to Privatization: The Chequered History of Delegated Legislation in the Twentieth Century" (2005) 55 Toronto LJ 575.

"Alexander Chaffers and the Genesis of the Vexatious Actions Act 1896" (2004) 63 Camb LJ 656.

"The New Zealandness of New Zealand Public Law" (2004) 15 Public LR 81.

"The Tub of Public Law" in David Dyzenhaus (ed) *The Unity of Public Law* (Hart Publishing, Oxford, 2004) 455.

"Gardens or Graveyards of Scholarship? *Festschriften* in the Literature of the Common Law" (2002) 22 OJLS 227.