

SIR JOHN SALMOND AND THE MORAL AGENCY OF THE STATE

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New Zealand scholars have yet to develop a "tradition" of writing legal history outside the historiographically problematic field of Treaty claims. This essay uses Sir John Salmond as emblematic of the methodological features that such a tradition might carry. Any self-congratulatory and Whiggish vision of a good-hearted people incapable of anything other than a fundamentally decent past – itself a fiction punctured by the Treaty claims processes – should be discarded. Instead the New Zealand constitutional and legal system should be seen as a site of ongoing struggle, reflection and constant engagement amongst a series of actors whose thought – so much as that was articulated – is to be regarded as important as their action. A non-corrupt legal system is not the outcome of a complacent so much as vigilant past. Sir John Salmond's concern with the moral agency of the State not only placed him inside the mainstream of early twentieth century political thought, its "Idealist" thread in particular. It also underpinned his intendency of the Crown Law Office, as Dr Hickford's subsequent (and important) essay demonstrates.

There are many kinds of history, or, rather, ways of writing history. As a polity the settler-state of New Zealand has had a short but dramatic life of a little over one hundred and fifty years, despite the self-effacing fiction that, for Anglo-settler New Zealand anyway, this is and has been a place where history does not happen.¹ In my generation, which is to say the last quarter of the twentieth century, that fiction has gone or is, at least, dissolving. Generalisations are crass and hazardous, but I believe it can be stated that nationally there is now awareness that in those 150 years of the Anglo-settler polity there have occurred numerous histories not just of the settler-state itself but also of groups and individuals within it. There is widespread realisation – even if many do not understand the how or why - that the country's past has been problematic. This awareness of the complexities

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1 PG McHugh "Constitutional Voices" (1996) 26 VUWLR 499.

and multiplexities² of the New Zealand past has been a major by-product of the Treaty of Waitangi claims process, although it may well have happened without that. Though it may be no more than vague, New Zealanders realise that one cannot talk of a single national meta-history, but of a variety of histories, a range of different experiences of the same past. And these histories are not all coterminous with the life of the settler polity, even though necessarily it has presence in most if not all of them. They are not simply histories of colonialism, although most entail some form of engagement with the process by which the Anglo-settler community, organised as a polity, asserted then achieved its primacy over these islands.

Yet, in the past generation, there are two types of history, or, more aptly, two ways of writing and thinking about history, that have failed signally to emerge as this country has moved into a heightened general consciousness of its difficult past. These are the types of history known as legal history and the history of political thought. Both, of course, are a form of intellectual history. For the most part the New Zealand academy, unlike that of its fraternal "well-behaved"³ common law jurisdictions, Canada and Australia, has never begun to take its intellectual and legal past with the seriousness or engagement that has been developing in those countries.⁴ Size, of course, may give some explanation. There has been an intellectual acceptance of the importance of history in national life – witness the historical Treaty claims processes – but it has not been matched by a willingness to inject intellectualism into that past. Our history – I speak inside the Anglo-settler paradigm, of course – has always been about what people did rather than what they thought. The Kiwi past is a practical place, a physical frontier and not an intellectual one.

The exception has been the vexed area of settler-State relations with Māori. Here legal history has certainly figured, though usually in a juridical and Whiggish manner geared around the lawyer-infested processes of claims settlement.⁵ In my generation and mostly through the forensics of the

2 The term "multiplex" means to send two or more messages or signals along one communications channel at the same time. History that is multiplex entails a variety or multiplicity of narrative paths or routes through the same period of time: crudely, different histories from the same events.

3 The term used by Peter C Oliver *The Constitution of Independence: The Development of Constitutional Theory in Australia, Canada, and New Zealand* (Oxford University Press, Oxford, 2005) *passim*.

4 In that respect the Lost New Zealand Cases project, an initiative at VUW of Dr Shaunnagh Dorsett, Geoff McLay, Mark Hickford and Damen Ward with Richard Boast represents a major forward step. This Project, which is being financially assisted by the New Zealand Law Society, aims to put onto a database unreported cases and legal material (such as law officers' opinions) from the nineteenth century. This material from the colonial and early national era is almost wholly unexplored and will provide scholars with a rich source from which a new tradition of New Zealand legal history might be built.

5 Andrew Sharp and I began talking then writing about this form of history as we watched the Ngai Tahu and Tainui settlements legislation embed as law a particular view of the past. This form of legal history I described as "Whig": PG McHugh "The Historiography of New Zealand's Constitutional History" in PA Joseph (ed) *Essays on the Constitution* (Brookers, Wellington, 1995) 344 (which, bizarrely, the editor described as a "polemic") and "Law, History and the Treaty of Waitangi" (1997) 31 *New Zealand Journal of History* 38. Andrew termed it "juridical": "History and Sovereignty: A Case of Juridical History in New

Waitangi Tribunal there certainly has emerged a very strong idea of how law was used in the management of Anglo-settler-State relations with Māori, particularly over land and especially during the late nineteenth and early twentieth centuries. This form of legal history has been problematic, at least as an authentic account of the past, as opposed to a device to resolve authentic issues in the present. And in the same time New Zealand has been given some fine histories of charismatic Māori figures, such as Te Kooti and Te Whiti, recounted in terms in which the power of their thought and creed – a potent brew of nativism and received Christianity – has figured strongly. In the sphere of Māori engagement with the settler-state polity, law and political/religious thought have had prominence. There has been a matching capacity to see that those manifestations live and have changed in time. Indeed that very profile underlines the comparative absence and neglect of law and political thought from the companion field of Pakeha New Zealand history. This paper and what is essentially – and felicitously – a companion-piece, the excellent one by Dr Mark Hickford, address that absence.

The conference at which the first version of this article appeared was a centennial celebration of Sir John Salmond's appointment to a chair at Victoria University, or College as it then was. This paper takes that event as setting the stage for elaboration of the themes I have just presented. It seeks to recapture the intellectual milieu of Sir John Salmond and New Zealand in the very early twentieth century, in particular his conception of the role of the State. Salmond, briefly as a Professor at this University then later, and more centrally in his career, as Solicitor-General in Wellington (in the remarkable wooden building that now houses the Law School), was at the heart of the early New Zealand State as well as an intellectual who had thought about the nature of law and the basis of legal and constitutional authority.⁶ To put Salmond in his context, it is necessary to connect him with the general current of Anglo-Imperial political and legal thought of that time, for we are apt to forget that this was an era when there was extensive fraternal dialogue amongst intellectuals of the

Zealand/Aotearoa" in Michael Peters *Cultural Politics and the University in Aotearoa/New Zealand* (9 ed, Dunmore Press, Palmerston North, 1997) 159. This discussion was elaborated by WH (Bill) Oliver in "The Future Behind Us: The Waitangi Tribunal's Retrospective Utopia" in RA Sharp and PG McHugh (eds) *Histories, Power and Loss* (Bridget Williams Books, Wellington, 2002) 235. Giselle Byrnes develops this in *The Waitangi Tribunal and New Zealand History* (Oxford University Press, Melbourne, 2004). For the influence in Australia of the New Zealand debate about the respective (overlapping and/or misunderstood) spheres of law and history see Bain Attwood "The Law of the Land or the Law of the Land?: History, Law and Narrative in a Settler Society" (2004) 2 *History Compass* 1.

6 My article endorses – and reflects – Mike Taggart's important call for a contextualised intellectual legal history of modern administrative law (in its national and pan-national manifestations): "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* 223-67. This call is associated, in turn, with the "Cambridge contextualist" approach towards the history of political thought articulated most eminently by Professors JGA Pocock and Quentin Skinner (for an example of the discussion of the profound impact of Pocock and Skinner see R Lamb "Quentin Skinner's 'Post-Modern' History of Ideas" (book review) (2004) 89 *History* 424-433).

British and American Empires, the lawyers not least.⁷ There was a busy and active intellectual conversation inside these worlds of the academy and upper reaches of the legal profession, a world in which Salmond moved without signs of evident discomfort. And at the time when Salmond wrote his early editions of *Jurisprudence* the focus of British political thought had turned directly towards consideration of the rise and role of the State. Salmond absorbed that concern and it is evident in his published work and performance of the role of Solicitor-General.

Together my essay and that of Dr Hickford demonstrate that there is a bridge between the Salmond of *Jurisprudence* and the pressed Solicitor-General of his mid-career. This lay in his conception of the ethical agency of the State, a position he set out in *Jurisprudence* and one that underpinned his management of Māori claims and litigation inside the Crown Law Office. Further, Salmond grasped the complexity of the identity of the "Crown", not as a single all-purpose entity but as an embodiment, albeit a fictionalised one, of that moral being, the State. In that regard his intendancy of the Crown Law Office underlined his comprehension that a constitution was not simply a set of hard rules enforced through courts, but a form of vigilance encompassing a wider range of ethically-informed actors striving for and talking in a similar consistent "register" and operating as a constitutional corps. The Crown, in short, was to him personified through its bureaucratic processes, particularly with regard to those guiding and attending its performance of its lawful obligations and duties. Ethical integrity required bureaucratic rigour and propriety as well as consistency and independence, and this Salmond brought to Crown Law. As Mark Hickford shows, Salmond was vitally aware of the non-complacent effort that this service to the State required. His ideological adherence to the State as a moral being thus entailed a grasp of what has been recently termed "constitutional realism".⁸ That is, he understood that other actors alongside legislators and the judges drove the constitution.

By his published thought and conduct of office, it may be observed that Salmond was certainly outside the Diceyan paradigm that has dominated the mainstream historiography of twentieth century Anglo-Commonwealth public law. Typically that history has been written as one in which a binary (and to some extent oppositional) set of actors – Parliament and the courts – has almost exclusive prominence. Salmond did not deny the importance of that relationship but he did not see it as the constitutional entirety or as a rigid blueprint, the only tensile thread in the constitution. Instead, Salmond, as jurist, was in the mainstream of early twentieth century British political thought about the role of the State. Most accounts of British political thought in that period have

7 For instance Richard Cosgrove *Our Lady the Common Law: An Anglo-American Legal Community, 1870-1930* (New York University Press, New York, 1991).

8 Matthew SR Palmer "What is New Zealand's Constitution and Who Interprets It? Constitutional Realism and the Importance of Public Office-Holders" (2006) 17 PLR 133 and "Using Constitutional Realism to Identify the *Complete* Constitution: Lessons from an Unwritten Constitution" (2006) LIV American Journal of Comparative Law 587.

tended to exclude the lawyers from that debate, insisting that the enquiry into the nature of the State was not conducted in legal or juristic terms. I will use Salmond to show that debate about the role of the State also had juristic elements, particularly if one has a wide conception of the range of constitutional actors. In his case at least, the Diceyan paradigm, long and Whiggishly presumed to have straight-jacketed Anglo-Commonwealth constitutional thought,⁹ was not necessarily dominant.

It is a modern-day Kiwi conceit to imagine a solitary John Salmond scratching away at his desk in wind-swept Temuka, a picture of intellectual isolation the sense of which his work everywhere contradicts. This image of Salmond plays to a self-patronising national stereotype cultivated by Pakeha New Zealand during the twentieth century. It is the image of the gritty anti-intellectual but practical Kiwi underdog toiling manfully and honestly to impress an underwhelmed metropole.¹⁰ However such characterisation is essentially a form of cringing national self-depiction that neutralises the cosmopolitanism not just of Salmond but also of those around him. It constructs and patronises his world as one where he, the out-of-place boffin, is surrounded by hayseeds. Folksy nationalism displaces any search for Salmond's intellectual context and setting. Professor Farrar's paper at this conference brought out the importance of reading in societies in rural Otago during the late nineteenth and early twentieth centuries and is a strong warning against such underestimation. And we do as well also to bear in mind the intellectual breadth as well as depth of those who taught and wrote about law at the end of the nineteenth century. Sir John Salmond brought sophistication and intellectual traction to his engagement with and participation inside the early twentieth century New Zealand constitution. He may have been a major intellectual figure but he was not, nor did he see or feel himself as a Boffin Alone. He may even help us take our intellectual history seriously.

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Centennial reflections do not always generate happy memories. They can see indignities and indignation being directed towards the author being remembered. Albert Venn Dicey's reputation experienced a considerable mauling during the centennial of the publication of his key work, *The Law of the Constitution* (1885). Since then sledging or salvaging Dicey has become something of a mini-industry amongst academic public lawyers in the United Kingdom. Many of the woes that

9 It is my belief – not traversed here, and reiterated towards the end of this article – that the "Diceyan dialectic" is essentially a post-War device that emerged as an attempt to explain the contemporary phenomenon of the rise of common law judicial review in the 1960s and 1970s. It has been, in short, an historiographic tool for modern times that present-day users have projected Whiggishly back into a past (like Salmond's one) where it might not have had quite the same intellectual dominance or purchase.

10 This is the imagery sometimes associated (popularly rather than accurately) with John Mulgan's *Man Alone* (1937). See Vincent O'Sullivan author entry "Mulgan, John (1911-45)" in Roger Robinson and Nelson Wattie (eds) *The Oxford Companion to New Zealand Literature* (Oxford University Press, Melbourne, 1998) and Stephen Harris "Individualism and its Discontents: *Man Alone* in Contemporary New Zealand" (2000) 3:2 Kotare, electronic journal online at www.nzetc.org.

seem to have afflicted and stilted the progress of English public law in the twentieth century and beyond are often attributed to the negative influence of his identification of the twin pillars of Anglo-Commonwealth constitutionalism: the sovereignty of Parliament and the rule of law. Dicey famously and regularly associated administrative authority and jurisdiction with the French *droit administratif* and, in consequence, dismissed it as something alien to the English legal system. He did this even though the phenomenon was rising in his time and, as we will see, drawing considerable comment from the professoriate. As those two principles occupied the entire field of constitutional authority, there was in the Diceyan vista no distinct legal residue for authority to be exercised by administrative agencies.¹¹ Legislators (from which, of course, the executive was recruited) and judges represented his narrow cast of constitutional actors. That highly influential approach has been described as having generated a "binary" or "bi-polar" understanding of the nature of constitutional authority,¹² this bi-polar syndrome recently manifest in the argumentation in the Cambridge Law Journal over the "true" basis of judicial review of administrative authority. Does judicial review signify the courts' interpretation of Parliament's intention – the sovereignty pole – or is it a phenomenon inside the common law constitution applying key and ostensibly enduring principles of justice derived from the rule of law? Locked to the Diceyan dialectic, most constitutional histories of the twentieth century (a small field anyway) use it as the historiographical dynamic through which to describe and explain change, the rise of administrative law not least. It has been the window through which the history of public law in the twentieth century has been viewed; but, as was soon recognised, it was a partial one that gave little presence to the State.

In many respects the problematic nature of that polarity is, I believe, an outcome of Dicey's exclusion of any concept of the State from his formulation of the nature of constitutional authority. This absence of any conception of the administrative State was a consequence of his view of liberty as essentially negative in character and his sympathies with the Benthamite utilitarians' insistence upon the limited role of the State.¹³ He told us:¹⁴

Constitutional law as the term is used in England, appears to include all rules which directly or indirectly affect the distribution or the exercise of the sovereign power in the state. Hence, it includes

11 Matthew Lewans "Rethinking the Diceyan Dialectic" (unpublished paper presented to the Discussion Group, Centre for Public Law, University of Cambridge, 13 February 2007).

12 See David Dyzenhaus "The Genealogy of Legal Positivism" (2004) 24 OJLS 39.

13 In his American lectures of 1898 reprinted in England in 1905 as *Lectures on the Relation between Law and Public Opinion in England during the Nineteenth Century* (Macmillan and Co, London, 1905) Dicey lauded the mid-century Benthamite reformers who had promoted the cause of individualism and issued a warning against the dangers of creeping collectivism. His argument is summarised in Martin Loughlin "The Functionalist Style in Public Law" (2005) 55 U Toronto LJ 361, 364-7.

14 AV Dicey *Introduction to the Study of The Law of the Constitution* (1 ed, Macmillan and Co, London, 1885) 24 [*Law of the Constitution*].

(among other things) all rules which define the members of the sovereign power, all rules which regulate the relation of such members to each other, or which determine the mode in which the sovereign power, or the members thereof, exercise their authority.

Dicey then proceeded to give an account of sovereign authority inside the British constitution in those "bi-polar" terms – the sovereignty of Parliament and the common law. There was no conception of the State at all in that description except to the extent that Parliament and the courts represented its constitutional entirety. Exactly, in other words, the all-encompassing nature of his constitution that left no room for administrative authority.¹⁵

In characterising sovereignty as the supreme power to command and eschewing any exploration of the nature of the State, except to insist upon its passive role as the protector of negative liberty, Dicey was perpetuating a key predicate of the influential jurist, John Austin. He placed himself squarely inside the tradition of classical liberalism. It is that omission, I believe, which underlies the problematic character of his dialectic that has blighted – or (the Dicey diehards believe) blessed – the conceptualisation of Anglo-New Zealand public law at the end of the twentieth century.

Dicey's rigid distinction between constitutional *law* (enforced by the courts) and constitutional *morality* (not enforced by the courts but by and amongst the constitutional actors themselves) undoubtedly fuelled – indeed it may well have induced – the belief amongst political theorists of the late nineteenth and early twentieth centuries (and their historians) that argumentation about the role of the State lacked any strong juridical element. At that time there was a significant turn towards reflection upon the nature and functions of the State. This trend was evident in the terms in which political debate and discourse was conducted in the pre-War period 1880-1914. It was an idiomatic turn that cut across political affiliation: "Individualists" (like Herbert Spencer), "Collectivists" (like Sidney and Beatrice Webb), "Idealists" (like TH Green and Bosanquet) and "Pluralists" (like Laski) all raised – though plainly they answered quite differently – questions about the State and its role. Yet this shift has been described as one that "primarily involved the terms of political argument, *not* the language of legal enactment and constitutional process."¹⁶ Political thinkers took the view of legislation as instrumental, that is to say as instrumental towards achievement of particular ends (the end rather than the use of law being the debate) and dismissed the common law's notion of the Crown as sovereign. This may have been the outcome of historical processes and a "national genius" that many across the spectrum could validate drawing upon "diffused Burkeanism".¹⁷ However,

15 For an account of contemporary administrative law's absence of a conception of the state, contrasted with the law of Crown contracting see Janet McLean "The Crown in Contract and Administrative Law" (2004) 24 OJLS 129.

16 James Meadowcroft *Conceptualizing the State: Innovation and Dispute in British Political Thought 1880 – 1914* (Oxford University Press, Oxford, 1995) 17.

17 S Collini *Public Moralists: Political Thought and Intellectual Life in Britain 1850-1930* (Oxford University Press, Oxford, 1991) 293.

validation of the historical constitution took debate about the role of the modern (that is, the pre-War) State nowhere. On the executive side, the Crown, said Ernest Barker was no more "than a bundle of officials" united under the rubric of "a mysterious Crown".¹⁸ Elsewhere Barker noted that strictly speaking the "State" as such did "not act in England"; Ministers of the Crown could do so but not even the Prime Minister could be said to wield the "authority of the state."¹⁹ Maitland agreed that the "State" had been "slow to find a home in English law books".²⁰ Whilst most thinkers agreed that the law had played an integral role in British history they also felt that the British polity had reached a juncture where a more deliberative position on the role of the State was needed. Whilst the Whig tradition, with its celebration of constitutional form as the outcome of historical forces, could be remoulded in Idealism and Pluralism,²¹ in legal terms its consequence – the murky and irresolute nature of the Crown – was unhelpful to a debate about the nature and direction of the State. Dicey's famous excoriation of early twentieth century "collectivism" was not conducted in constitutional language, for that language – which his own work had so heavily influenced – was not equipped for contemporary rhetorical warfare about the role of the State.

This essay argues that jurists of that period were more concerned with the emergence of the State and its juridical presence than has been usually acknowledged by historians of political thought, at least until recently in a paper by Martin Loughlin. Sir John Salmond was an important – and New Zealand – representative of that incorporation of concern into legal thought and praxis. To grasp the penetration of that concern into the juridical sphere requires assessment not merely of what the thinkers were saying, the jurists included, but of how the lawyers similarly concerned with the rise of the administrative State were acting, as in their involvement in law reform and charitable works. The explanation that all actors regarded law in a primarily instrumental manner concentrates on one constitutional phenomenon – the passage of legislation – and neglects other dimensions of constitutional activity (as shown, for example, by the Hickford essay in this volume). Moreover there are issues as to how legislation was or was not being drafted and enacted that will also disclose positions as to the juridical identity of the early-twentieth century State. Invocation of the smoky curtain of the "Crown" begs as many questions as it purports to deflect. This essay is an antipodean overture towards an enquiry into the role of the State in public law and thought of the early twentieth century. It notes the influence of British Idealism in the late Victorian period, and suggests that Salmond absorbed its essential concerns. Certainly that was on a diluted basis, rather than his full membership of any "Idealist" school, putting Salmond inside (what we will see Martin Loughlin

18 Ernest Barker "The Discredited State" (February 1915) *Political Quarterly*.

19 Ernest Barker "The Rule of Law" (May 1914) *Political Quarterly*.

20 FW Maitland "The Crown as Corporation" in HAL Fisher (ed) *The Collected Papers of Frederic William Maitland* (Vol III, Cambridge University Press, Cambridge, 1911) 259.

21 Julia Stapleton *Englishness and the Study of Politics: The Social and Political Thought of Ernest Barker* (Cambridge University Press, Cambridge, 1994).

calling) the "Functionalist" school that rejected the Diceyan dialectic's blindness to the State. In his thoughts and conduct Sir John Salmond had a clear juridical sense of the State and its moral agency.

Wrapped up in this essay are observations about the nature of contemporary Anglo-New Zealand public law thought and its fixation with Dicey. It seems Dicey's own generation was more prepared to reject his rigid taxonomy of constitutional form than the post-World War Two generations of public lawyers. With concerns of their own about the over-reaching administrative State, they returned to Dicey's view of the minimalist State, taking his predicates as axiomatic and imbuing them retrospectively with historiographic properties. The knack of Dicey's comeback lay in the retroactive belief encouraged by post-War public lawyers. This was the illusion that he had never really been out of the limelight of twentieth century constitutional thought. Just as Salmond's constitutional thought sought to incorporate the State, his late twentieth century counterparts sought to suppress or bridle its reach, thinkers and actors all caught in their own historicity.²² Dicey eclipsed, the angry and irrelevant old man of the new twentieth century, becomes Dicey the Diehard at its end.

We know that Dicey examined the young John Salmond when he was studying constitutional law in England.²³ Dicey sought to organise the teaching of constitutional law on Austinian principles, to put it on a scientific basis, a goal that Salmond also avowed for his own work in the wider field of analytical jurisprudence. This was a time when the teaching of law was being put on a professional basis by people such as Dicey and Salmond.²⁴ Their treatises were aimed mainly at a student readership but sought also to make the larger case for the study of law as a discipline in itself. So in the academy in the late nineteenth century law was also being disengaged from the study of history with which it had been previously fused. The first chapter of *The Law of the Constitution* was largely an explanation of how the constitutional lawyer differed from a constitutional historian and a political philosopher. Dicey undoubtedly took (and Whiggishly celebrated) the Burkean premise that the British constitution was the outcome of historical processes rather than a single gestative or deliberative act. Yet he also severed that historical explanation from the legal foundation of the constitution, confidently presenting its underlying predicates – the rule of law and sovereignty of the Crown-in-Parliament – as principles so incontrovertible and self-evident as to lie beyond historical validation.²⁵ In a sense Salmond's *Jurisprudence* took that cue. He did

22 See Michael Taggart "The Nature and Functions of the State" in P Cane and M Tushnet (eds) *The Oxford Handbook of Legal Studies* (Oxford University Press, Oxford, 2003) ch 6 for a fine account of the role of the State in contemporary Anglo-Commonwealth public law and practice where "rolling back the State" has travelled beyond the incrementalism of court-led development of judicial review (the major constitutional phenomenon of the 1970s and 1980s) to the legislative policies of corporatisation and privatisation.

23 Alex Frame *Salmond: Southern Jurist* (Victoria University Press, Wellington, 1995) 25.

24 AV Dicey "Can English Law be Taught at the Universities?" (Inaugural lecture delivered at All Souls College, 21 April 1883, published by Macmillan and Co, London, 1883).

25 See now, endorsing this analysis, JWF Allison "History in the *Law of the Constitution*" (2007) 28 JLH 263.

not rest constitutional authority on historicist grounds – that is to say, as the outcome of historical endurance – and in that regard he grasped and indeed fortified Dicey's avowed dismissal of historicism.²⁶ Reading Salmond's work one would never be aware that there had happened the great Whig tradition of the nineteenth century glorifying the English constitution as the triumphal outcome of its own history; nor was it important to the nature of his text that it had.

In breaking with one of the central approaches towards constitutional form, and certainly what had been and was a defining feature of the English tradition of political thought until then, Salmond located himself very generally inside a rationalist approach, despite some cautious engagement with the empiricists, mainly Locke and Bentham. When one looks at the vast array of writers cited in *Jurisprudence* one is struck by Salmond's implicit identification with those that stressed the primacy of reason as the source of knowledge. He even explained the doctrine of precedent in terms of its underlying rationality: ultimately with him, the force of reason prevails over that of experience.²⁷ This was not, however, the shunning of empiricism, as Salmond's citation of prominent English empiricists such as Locke, Bentham and Spencer showed. It was just that the aspect of empiricism represented by Burke and what I have here termed "historicism"²⁸ never convinced him as a reason or explanation in itself for constitutional authority. Where it intruded (as in the historical treatment of the Crown as corporation sole), his intellectual dissatisfaction with that epistemic property of common law thought was plain. In his view law and constitutional form were more than the outcome of mere historical experience. They carried an inherent rationality that his work set out to uncover.

26 The opening of Dicey's *Law of the Constitution*, above n 14, 1-3 cites Hallam and mocks the sentimental Whig tradition of "the spirit with which our grand-fathers and our fathers looked upon the institutions of their country": "[I]t was to them not a mere polity to be compared with the government of any other state, but so to speak a sacred mystery of statesmanship."

27 Salmond "The Theory of Judicial Precedents" (1900) 16 LQR 376, 378 and 389:

We must admit openly that precedents make law as well as declare it ... we must recognise a distinct law-creating power vested in them and openly and lawfully exercised ... Whence do the courts derive those new principles, or *rationes decidendi*, by which they supplement the existing law? They are in truth nothing else than the principles of natural justice, practical expediency, and common sense ... It is surprising how seldom we find in judicial utterances any explicit recognition of the fact that in deciding questions on principle, the courts are in reality searching out the rules and requirements of natural justice and public policy.

Likewise Salmond characterised custom as founded on reason: "custom is the embodiment of those principles which have commended themselves to the national conscience as principles of truth, justice and public utility". *Jurisprudence, or the Theory of the Law* (Stevens and Haynes, London, 1902) 137 [*Jurisprudence*].

28 I have used the term somewhat simplistically. In fact it has a tradition of meaning more complex than that suggested here, although its foremost association has mostly been with Burke: see P Weiner (ed) *Dictionary of the History of Ideas* (Vol II, Charles Scribner's Sons, New York, 1973-1974) 456-464.

There is a paradox here and one that bears further inquiry beyond this passing observation. The Salmond of *Jurisprudence* was self-evidently a common lawyer and deeply inside that tradition, one based on the conception of law as the outcome and articulation of experience. Salmond acknowledged the particular character of the common law system as the outcome of the historical forces that had shaped the administration of justice inside it. The empirical nature of its method was plain. But he purported also to universalise the principles and classifications that it had rendered. That is, he saw its features as indicative of the inherently rational jurisprudence that a civilised State would produce over time. But the outcomes that the jurisprudence supplied – its rules and doctrine that had to be organised and classified so that its whole might be grasped – were not to be justified merely by force of their historical character. They would also have to be consistent with reason. Fortunately (like Blackstone)²⁹ he believed the common law did display strongly that underlying rational pattern. Writing *Jurisprudence* was his demonstration of that, with Salmond situated simultaneously inside and outside the common law tradition.³⁰

Salmond followed in the Diceyan pattern by eliminating historicism from his account of constitutional authority, a task that was not un-incidentally connected to their professional goal of carving out law as a distinct discipline inside the academy. But Salmond plainly had more difficulty excluding the philosophical even whilst stressing the limits of analytical jurisprudence and especially, by his last edition, its separation from ethical jurisprudence. It is that dimension of his work that I want to examine further here, albeit in a highly exploratory manner.

Salmond was described by Herbert Hart as being amongst the first and most important English jurists to break from the Austinian tradition.³¹ One of the features of the "command" or imperative view of law developed by Austin, and underlying Dicey's *The Law of the Constitution*, was the absence of an ethical element. Law, by that view, consisted of the commands handed down by the sovereign with the lawyer's task being the neutral forensic search for and setting out of those commands. One of the major aims in writing *Jurisprudence*, Salmond proclaimed, was to inject an ethical element into analytical jurisprudence.³² The core of that mission appeared in his key and clear conception of the moral agency of the State in the administration of justice. In addressing the

29 On Blackstone see Michael Lobban *The Common Law and English Jurisprudence 1760-1851* (Clarendon Press, Oxford, 1991).

30 It is intriguing here to raise the suggestion that Salmond was moving from a "Protestant Baconianism" view of legal knowledge towards the more fragmented one (that the professionalised and professorialised view of law that was emerging in the United States and, to a lesser extent, United Kingdom at that time: see Christopher Tomlins "Framing the Field of Law's Disciplinary Encounters: A Historical Narrative" (2000) 34 *Law & Society Review* 911-972). The McVeigh and Dorsett paper in this volume is an attempt to put Salmond into this context, namely that of a profession and professoriate with a new positivising view of legal knowledge, services and education.

31 HLA Hart "The Separation of Law and Morals" (1958) 71 *Harv L Rev* 593.

32 *Jurisprudence*, above n 27, 55.

question of the role of the State, Salmond was thoroughly inside a preoccupation of political philosophers of his time and certainly well outside the Austinian and Diceyan box.

John Salmond was appointed Professor of Laws at the University of Adelaide in 1897 and remained there until 1906 when he came to Wellington, the occasion we remember at this conference. Whilst his relations with the bench in Adelaide may have been strained,³³ what was, I suggest, intellectually more important and formative about this era was the common room of the University and his colleagues in other Australian law schools. Australian universities of that time were hardly the bustling campuses of today. Two academics merit particular mention: William Mitchell (1861-1962) and William Jethro Brown (1868-1930). Mitchell was appointed Professor of English Language and Mental and Moral Philosophy in 1894, and held this chair at Adelaide until 1922. Brown was a foundation lecturer in law at Tasmania (1893), eventually becoming professor, before moving to England (where, like Salmond, he had received his legal education) in 1900 and returning to Adelaide as Salmond's immediate successor for the period 1906-1916. It must be remembered also that at this time those who taught law did not necessarily have educational qualifications in the discipline.³⁴ These two academic contemporaries shared with Salmond a background of birth into humble low-church Protestant families with an evangelical bent (a not uncommon feature of the *fin de siècle* Australian academy). They are linked also with what is known as "Australian Idealism", a school of political philosophy in the late nineteenth century that had roots in the "British Idealism" associated with TH Green (1836-1882) and his followers, notably Bernard Bosanquet and David Ritchie. It is my argument that Salmond absorbed a considerable amount from the Idealists, in particular their conception of the moral agency of the State and the imperative that awareness placed upon the individual to participate in its moral mission.³⁵

33 Ibid, 56-59.

34 For instance the founding Dean of the Melbourne Law School, WE Hearn (1826-1888, Dean 1873-1888) taught and published in the fields of modern history and classical political economy as well as law: JA La Nauze "Hearn, William Edward (1826-1888)" in *Australian Dictionary of Biography, Volume 4* (Melbourne University Press, Melbourne, 1972) 370-372. Hearn's influence on Salmond, not least his attempt to systematise the nature of law in a proto-Hohfeldian manner, has been noted in Alex Frame "Property and the Treaty of Waitangi: A Tragedy of the Commodities?" in Janet Maclean (ed) *Property and the Constitution* (Hart Publishing, Oxford, 1999) 224, 225. Hearn, also shared with the other Australian academics, birth into a low churchman family. It is worth recollecting also that Salmond's successor at Victoria College, Richard Cockburn Maclaurin (1870-1920) taught both law and mathematical physics!

35 Apart from the Idealists discussed in the text of this paper, Salmond used and cited the work of David Ritchie (see John Morrow "Liberalism and British Idealist Political Philosophy: A Reassessment" (1984) 5 *History of Political Thought* 91, 104-108) and John William Burgess (on Burgess, "an Aristotelian in political theory and a German idealist in philosophy", see BJ Loewenberg *American History in American Thought: A History of the Faculty of Political Science, Columbia University – Christopher Columbus to Henry Adams* (Simon and Schuster, New York, 1972) 346). I have found no references to TH Green or Bosanquet.

I do not want to be understood as claiming Salmond for the Idealist school. The first edition of *Jurisprudence* on which I concentrate here was self-avowedly not a work of political theory. Salmond gave little bite for those seeking any deeper philosophical provenance for his position on constitutional authority. Still, one can identify general features of his intellectual outlook and see in the conduct of his professional life strong resonances of Idealism as it infiltrated broader late-Victorian notions of public law.

In part Salmond was surely caught inside the very general *fin de siècle* re-awakening to questions surrounding the nature of the State and its role, the idiomatic turn that cut across the political spectrum:³⁶

The state was seen no longer as a necessary evil or mere protector of property rights and the sanctity of contracts. By the 1890s and 1900s the state was beginning to be viewed as an integral part of economic and political life. It was no longer just restraining or clearing obstacles to the free economic activity of individuals, but was actively and consciously promoting a better life for all its citizens.

This was a belief that gripped members of New Zealand's long Liberal Government (1891-1912) even if they were not able to intellectualise it in the manner of Attorney-General Findlay, who worked closely with Salmond, his draftsman and Solicitor-General. Findlay set out his creed one evening in a speech at Palmerston North where he attacked the JS Mill view of liberty as negative and extolled the positive role of the State in providing the true liberty that came with a more egalitarian society.³⁷ The speech involved a public rejection of classical liberalism and certainly tended towards acceptance of the key tenets of Idealism, suggesting a deeper ideological thread inside the Liberal Government beyond simple acceptance of the new more active role for the State. Certainly Salmond was inside that general trend in the political thought of his time, but I believe the influence of Idealism was strong and deeper than his merely being swept along with the general tide of late-Victorian thought.

In the last quarter of the nineteenth century liberal philosophy turned against the individualistic orientation of classical liberalism that saw liberty as negative in character and which, in extolling freedom of trade, contract and individual responsibility, limited State action to the prevention of harm. By that view, liberty was negative and the role of the State was not to intrude. The new turn in liberalism sought to counter what was seen as the atomistic individualism of Herbert Spencer by

36 Andrew Vincent and Raymond Plant *Philosophy, Politics and Citizenship: Idealism and the Welfare State* (Martin Robertson and Co, Oxford, 1985) 76. See John Morrow "Ancestors, Legacies and Traditions: British Idealism in the History of Political Thought" (1985) 6 *History of Political Thought* 491, warning against conflation of the conception of the State with argumentation as to its role.

37 The speech of 21 April 1910 is recounted with extracts in Frame *Southern Jurist*, above n 23, 83-87. Findlay noted in closing that the New Zealanders would not be captured by "large doctrinaire schemes of social reform" but that the natural pragmatism of their "national character" was the "best guarantee against any sudden or radical changes".

stressing the importance of mutual collaboration through liberal institutions. Its first flourish was in the work of the Idealists who followed and developed the work of TH Green. Idealists saw humans as fundamentally social beings in a manner and to a degree they thought had not been adequately recognized by Spencer and his followers. Green revived a form of formal political philosophy which dealt with the nature of the State and the rationale for obedience to it, and hence generated specific goals for State action.³⁸ Indeed Spencer excoriated Idealism as the ideological justification for what he called in *The Man Versus the State* (1884) "the New Toryism", a political theory ostensibly justifying government interference that was incompatible in its scope and depth with human freedom, development and ultimately happiness.³⁹ Mitchell and Jethro Brown minted an Australian version, but I concentrate on Green not only as the intellectual instigator of this re-orientation but because I have not had access to the Jethro Brown work *The Austinian Theory of Law*, afterwards cited by Salmond as a refutation of Austin.⁴⁰

Green had grown concerned by the unfolding of a kind of liberalism that was no more than the apologia for the middle classes to gain for themselves a political power that matched the sort of economic power they were wielding in a society ever industrialising, "a society recklessly ignoring the social destructiveness of unregulated capitalism".⁴¹ Worried about the tension appearing between advocates of liberalism and the champions of the movement for the enfranchisement and organisation of the working classes in their struggle for political power, he sought to refashion liberalism in a manner that addressed the interests of the middle classes without sacrificing the interests of the labouring classes.⁴² He did this through a notion of the common good that fused with the freedom of the individual. A contemporary scholar summarises Green's position:⁴³

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- 38 Paul Harris and John Morrow "Introduction" to Paul Harris and John Morrow (eds) *TH Green Lectures on the Principles of Political Obligation and Other Writings* (Cambridge University Press, Cambridge, 1986) 8. Morrow "Liberalism and British Idealist Political Philosophy", above n 35, 94 stresses that while Green shared the classical liberal concern with the individual, he saw personal development as occurring within a community: "Green maintained that the goals men sought to realize in their own lives were shared with others; the good was a common good". His follower Bosanquet put the state in a much more central position, holding that individual satisfaction could only be attained by fulfilling one's function within the more complete who represented by the state (see *ibid.*, 99).
- 39 David Boucher and others "British Idealism and the Political Philosophy of TH Green, Bernard Bosanquet, RG Collingwood and Michael Oakeshott" (2005) *British Journal of Politics and International Relations* 97.
- 40 I have had access to W Jethro Brown *The Underlying Principles of Modern Legislation* (J Murray, London, 1912) which reveals Brown's progression from an Idealist position towards one more associated with anarchism and pluralism. He published *The Austinian Theory of Law* in 1906.
- 41 Avital Simhony "A Liberalism of the Common Good: Some Recent Studies of TH Green's Moral and Political Theory" (2005) 7 *British Journal of Politics and International Relations* 126, 127.
- 42 *Ibid.* Also Avital Simhony "TH Green's Community of Rights: an Essay on the Complexity of Liberalism" (2003) 8 *Journal of Political Ideologies* 269. Simhony argues that though Green places community at the heart of liberalism, this move is bound up with reconstructing the institution of rights which, in turn, is bound up with transforming some key liberal ideas, such as "interest" and "state interference". Transformed

Rightly understood, the common good plays a double role: both as a principle of justice, expressed in a system of rights, as well as an idea of community understood as cooperative individual-developing social life. Justice as the common good is, in point of fact, constitutive of community, and, what is more, is essential to its realisation. That is, justice is a communal bond. Individual freedom is now reconceived as a certain kind of self-determination: exercising our capacities in pursuit of self-chosen and morally worthwhile goals, in the attainment of which we make the best of ourselves. Green thus sought—by making the common good constitutive of liberal society—to rid liberalism of its earlier association with self-centred individualism.

Green was concerned by the Austinian notion of sovereignty that did not carry with it any conception of the role of the State beyond the description of the sovereign as the possessor of supreme coercive power. Whilst he was prepared to accept that the State as sovereign held that ultimate power, he did not regard it as exhaustive.⁴⁴ It did not account for the habitual obedience accorded the sovereign. Sovereignty could only be exercised, he said:⁴⁵

... in virtue of an assent on the part of the people, nor is this assent reducible to the fear of the sovereign felt by each individual. It is rather a common desire for certain ends ... to which the observance of law or established usage contributes, and in most cases implies no conscious reference on the part of those whom it influences to any supreme coercive power at all.

Thus the administration of justice by the State facilitated the pursuit of the common good and did so without reference solely to coercion. Further, Green said that the sovereign should not be regarded as an abstraction – as in Austin's account – but "in connection with the whole complex of institutions of political society". The State must be perceived as the "sustainer" of those institutions and "thus as the agent of the general will" if it is to command habitual obedience. "And obedience will scarcely be habitual, unless it is loyal not forced."⁴⁶

In putting the State back at the centre of political philosophy Green stressed its role as a moral agent for the common good, particularly through its administration of justice. Whereas the classical liberals viewed liberty and community as antagonistic, the new trend initiated by Green and his followers saw liberty as being concerned with the pursuit of the basic qualities of human life. It was collaborative rather than negative and the administration of justice by the State was a core means

both in form and content, rights are constitutive of and are essential to the realisation of Green's ideal of community. Indeed, the community of rights is itself a common good.

43 Simhony, *ibid*, 127.

44 Harris and Morrow, above n 38, 9.

45 TH Green "Sovereignty and the General Will" in TH Green *Lectures on the Principles of Political Obligation* (published posthumously, 1886; Batoche Books, Kitchener, Ont, 1999) 60, 71-2.

46 *Ibid*, 103.

towards its achievement. Whilst there is ongoing debate as to the extent to which Hegel influenced the British Idealists, that core notion of the moral agency of the State carried his imprint. It remained a key supposition of British political philosophy as it developed in the early twentieth century.

Like Green, Salmond accepted that the imperative theory of Austin contained "an element of the truth", but it was not the "whole truth" as it was "the product of an incomplete analysis of juridical conceptions". Most crucially it disregarded "that *ethical* element which is an essential constituent of the complete conception".⁴⁷ It omitted a relation that his work made foundational, this being the "special relation between law and justice". The "elimination from the implication of the term law all elements save that of force" was an "illegitimate simplification" for "the complete idea of law contains at least one other element which is equally essential and permanent":⁴⁸

This is right or justice. If rules of law are from one point of view commands issued by the state to its subjects, from another standpoint they appear as the principles of right and wrong so far as recognised and enforced by the state in the exercise of its essential function of administering justice. Law is not right alone, or might alone, but the perfect union of the two. It is justice speaking to men by the voice of the state. ... It is for the expression and realisation of justice that the law has been created, and like every other work of men's hands it must be defined by reference to its end and purpose.

Salmond saw the administration of justice as a core function of the State. The State, he said, should be "defined by reference to such of its activities and purposes as are essential and characteristic".⁴⁹ Its primary and essential purposes were *war* and the *administration of justice*.⁵⁰ The ethical centre of the State lay in its protection of its own integrity from external enemies (war) and maintenance of order within. The administration of justice was "the right and privilege of the members of the body politic itself".⁵¹ This could be accomplished without law, he observed,⁵² but law supplanted private discretion in performance of that function. The development of a legal system consisted "in the progressive substitution of right pre-established principles for individual judgment", which "to a very large extent" grew up "spontaneously in the tribunal themselves".⁵³ Gradually from various sources there was collected "a body of fixed principles which the courts apply to the exclusion of their private judgment". The administration of justice thus moved from asking what was "right" in the justice of the particular case, to enquiring into the principles already

⁴⁷ *Jurisprudence*, above n 27, 55.

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*, 184.

⁵⁰ *Ibid.*, 185 (Salmond's italics): "Every society which performs these two functions is a political society or state, and none is such which performs them not."

⁵¹ *Ibid.*, 189.

⁵² *Ibid.*, 17 and 23.

⁵³ *Ibid.*, 18.

set for determination of justice in that particular case. And so, he said, "[j]ustice becomes increasingly justice according to law, and courts of justice become increasingly courts of law."

For Salmond, the administration of justice thus represented the ethical function of the State. The function was ethical in itself. As State law emerged it was "marked and measured by the exclusion, in courts of justice, of individual judgment by authority, of free discretion by rule, of liberty of opinion by pre-established determinations".⁵⁴ Further, the law represented an organic and dynamic process that had to be aware of the problems of rigidity and conservatism. In the absence of law the administration of justice as dispensed by private judgment "would automatically adapt itself to the circumstances and opinions of the time".⁵⁵ The courts of justice, however, were "fettered by rules of law ... not of the present, but of times past in which those rules were fashioned". Circumstances might change and "that which is taken today for wisdom may tomorrow be recognised as folly by the advance of knowledge". Law was "by nature stationary" and needed to be "kept in harmony with the circumstances and opinions of the time, which for better or worse are in process of constant change":⁵⁶

If the law is to be a living organism, and not a mere petrification, it is necessary to adopt and to use with vigilance some effective instrument of legal development. The quality of any legal system will depend on the efficiency of the means so taken to secure it against a fatal conservatism.

This was the function of legislation, Salmond said. It was "the substitution of new principles for old by the express declaration of the State, [and was] ... the instrument approved by all civilised and progressive races, none other having been found comparable to this in point of efficiency".⁵⁷

Since Salmond had a clear conception of the State's ethical role as the source of justice inside its political community, one might have thought that this entailed a legal identity or personality for the State itself as well as legal rights for the citizen against it. A "legal person" was, he said, any subject-matter to which the law attributed "a merely legal or fictitious personality". This "extension, for good and sufficient reasons, of the conception of personality beyond the limits of fact – this recognition of persons who are not men" was "one of the most noteworthy feats of legal imagination":⁵⁸

The law, in creating legal persons always does so by personifying some real thing. Such a person has to this extent a real existence, and it is his personality alone that is fictitious.

54 Ibid.

55 Ibid, 30.

56 Ibid, 30-31.

57 Ibid, 31.

58 Ibid, 343.

For historical reasons, however, the law of England had "chosen another way" than to personify the State as a corporation (which was "the conclusion to which a developed system of law might be expected to attain"⁵⁹):⁶⁰

The community of the realm is an organised society, but it is no person or body corporate. It owns no property, is capable of no acts, and has no rights nor any liabilities imputed to it by the law. ... How, then, are we to account for this failure of the law to make so obvious and useful an application of the conception of incorporation and legal personality? Why has it failed to recognise and express in this way the unity and permanence of the state?

The explanation was an historical one with which Salmond had barely suppressed impatience as an outcome that did not accord with reason, the sole basis upon which he implicitly believed historicism could be justified.⁶¹ The "real personality of the King" had rendered "superfluous any attribution of fictitious personality to the state itself". The citizens of the State, he said "are not fellow-members of one body politic and corporate, but fellow-subjects of one sovereign lord". The King was "in law no mere mortal man" but as the Crown he represented "a body politic, that is to say, a corporation sole". The "visible wearer of the crown" was "merely the living representative and agent for the time being of this invisible and undying *persona ficta*, in whom by our law the powers and prerogatives of this realm are vested".⁶²

Even, however, were the State to be personified at law as a corporation, that would be a fictitious result generated by law:⁶³

A society is not a person, but a number of persons, and an organisation is not an organism. The so-called will of a company is in reality nothing but the wills of a majority of its directors or shareholders. Ten men do not become in fact one person, because they associate together for one end, any more than two horses become one animal when they draw the same cart.

59 Kelsen took the position that the state was essentially organised on the same basis as the corporation and that as a state ungoverned by law was unthinkable, there must at least be rules of law defining which acts of which individuals might be attributed to the state: *General Theory of Law and the State*, (trans A Wedber, Harvard University Press, Cambridge, Mass, 2001) Part I, ch 9 and Part II, ch 1.

60 Ibid, 362.

61 Maitland had much less tolerance for this position, famously excoriating the notion of the Crown as corporation sole and mocking it as "parsonification" (deliberately echoing WS Gilbert), see above n 20. Maitland noted that the conception of the "Crown" as opposed to the monarch was itself of recent vintage, and that other common law jurisdictions, such as the American colonies incorporated by Crown charter and Australia, had no difficulty with incorporating the state to make it a full "implead-able" bearer of rights and duties. Salmond's critical view here matched Maitland's, although the New Zealander's evident impatience is rhetorically less flamboyant.

62 *Jurisprudence*, above n 27, 363.

63 Ibid, 350.

This was a view of the personality of the State with which William Jethro Brown took specific issue, since he believed that the State had a real existence that eventually legal theory would be obliged to acknowledge.⁶⁴ Owing much to TH Green, Bosanquet and other Idealists, he responded also to concepts of pragmatic social engineering. Brown saw the modern State as an organic, indeed psychical, entity whose members ought to join in selfless service and thus find a humanitarian faith to fill the vacuum created by hedonist materialism. Government, guided by society's most enlightened members, should secure welfare and efficiency. "In the reconstructed doctrine of individual rights", he argued, "the common good takes the place of consent as the justification for the exercise of authority".⁶⁵

Yet, Salmond's formulation of the moral agency of the State was one that enhanced rather than diminished the specific agency of those inhabitants responsible for its administration of justice: to apply his analogy, each was a "horse", or more appropriately, an independent moral actor responsible for the performance of their own task in that sphere, rather than an organ of a single being. It was precisely because the State was not a single autonomous being but a fictitious person whose justice was administered through principles developed by its law as applied by the relevant actors that its moral or ethical role was met (even through the lame historically-embedded fiction of the Crown as corporation sole). Salmond's implicit belief that individual actors had to be aware of and grasp their role in maintaining the moral integrity of the State seems critical to any grasp of his various professional personae through practitioner, law professor, statutory draftsman, Solicitor General, judge and diplomatic envoy.

Salmond was clear that the State preceded law (which, recall, he saw as the civilised and civilising outgrowth of its administration of justice), but nonetheless it could have presence in its own legal system through the fiction of personification. And as a moral agent it could and should be the subject of legal rights and duties. However, he drew a distinction between the *enforcement* and the *fulfilment* of rights and duties against the State:⁶⁶

The only legal rights that receive no enforcement at all are those which are available against the state itself, and the only legal duties of this description are those which are owing by the state itself. A subject

64 Brown, *The Underlying Principles of Modern Legislation*, above n 40, 145-146 citing Salmond *Jurisprudence* (2 ed, Stevens and Haynes, London, 1907) 288. Jethro Brown saw the state as organic and sought "to illustrate the theory of State personality by reference to the social will", a concept he drew directly from TH Green and Bernard Bosanquet: "The making of laws by the legislature and their interpretation by the courts, as well as all the administrative actions of government, are effected by individuals who possess no inherent authority but derive their right to exercise their functions, mediately or immediately, from the community of which they, like the humblest citizen, are a part. They are the 'organs' of the 'social organism'." See also "Personality of the Corporation and the State" (1905) 21 LQR 365.

65 Michael Roe "Brown, William Jethro (1868-1930)" *Australian Dictionary of Biography, Volume 7* (Melbourne University Press, Melbourne, 1979) 447-448.

66 *Jurisprudence*, above n 27, 242-243.

may claim his rights against the state, no less than against another subject. He can institute proceedings against the state for the determination and recognition of such rights in due course of law, and he can obtain judgment in his favour, declaring that certain rights are his as against the state, or awarding to him compensation for the infringement of them. But there can be no *enforcement* of that judgment. What duties the state recognises as owing by it to its subjects, it fulfils of its own free will and unconstrained good pleasure. The strength of the law is none other than the strength of the state, and cannot be turned or used against the state whose strength it is. The rights of the subject against the state are therefore imperfect. They obtain legal recognition but no legal enforcement, either direct or indirect.

Thus the subject has a right against the State not because that right "will be maintained by any form of forcible constraint, but because it will be recognised and respected in due course by the State in the administration of justice".⁶⁷ The State, in short, could be expected to conduct itself with the same moral probity that its administration of justice required of all citizens.

In a recent article Martin Loughlin has explored the reaction in the late nineteenth and early twentieth centuries against the prevailing orthodoxy of analytical legal positivism, as underpinned by the political values of classical liberalism and exemplified in the work of Dicey. He describes this new turn as a "functionalist" approach, one that did not constitute a distinct programmatic school, so much as a "style" or (to adapt Neil Duxbury's description of American legal realism⁶⁸) mood in English legal thought. This functionalist approach was "a practical, reformist approach, offering solutions to a variety of legal challenges facing modern government and spanning the range from institutional reforms to alternative modes of interpretation and methods of legal reasoning". It was a broad church and not without its contradictory elements and crosswinds, but its basic thrust was against the tenets of classical liberalism which, although it "no longer provided the official ideology of the twentieth-century administrative state, ... [the] precepts [of which] remained built into the foundations of public law thought".⁶⁹ In challenging the atomistic assumptions implicit in the construction of individualism and by reworking the central political concepts of liberty and community, the functionalists "aimed to set in place a different, more accurate appreciation of the relationship between individual, state, and society".⁷⁰ At the ideological end of their spectrum, functionalists regarded the extending role of the State in social life as a progressive and positive trend. They greeted the rise of the administrative State as a step towards the positive provision of liberty.

67 Ibid.

68 Neil Duxbury *Patterns of American Jurisprudence* (Oxford University Press, Oxford, 1995) 69. His views of this movement have not been uncontroversial: Brian Leiter "Is there an American Jurisprudence?" (1997) 17 OJLS 367, particularly at 375-378.

69 Loughlin, above n 13, 366.

70 Ibid.

Loughlin traces the origins of functionalism to late-Victorian political thought, involving not only the British Idealists (who re-awakened interest in the positive role of the State) as a primary influence but drawing also upon the traditions of British empiricism, positivism, Scottish common sense (philosophy), and German idealism.⁷¹ To reiterate, he describes it as a broad church that retained the positivist method of Austinian thought whilst re-orienting it towards less atomistic and more collaborative communitarian goals. There were, he argues, several features of the functionalist style. Not all of these might be applied to Salmond but several of them certainly appear in his work, making him a functionalist of at least a faint stripe. One cannot put Sir John Salmond in full Idealist colours (as those of Mitchell and Jethro Brown) – that is, at the stronger end of the Loughlin spectrum – but it is possible to see him in the early editions of *Jurisprudence* as implanting elements drawn from their central conception of the State into the tradition of analytical jurisprudence. He was, in other words, a jurist responding cautiously to the mood and public law concerns of his own time, synthesising analytical with Idealist modes, his feet in one tradition (the analytical) but his eye towards and apprehending another. In any event, Loughlin's depiction of a loose functionalist school defies the usual characterisation of the nature of Anglo-Dominion political and constitutional thought at the beginning of the twentieth century and which this paper noted in opening. That is, the turn towards the State in political thought in the late-Victorian period was not bereft of a legal dimension but was absorbed into legal thought and practice. Sir John Salmond is our case – a New Zealand one – in point.

Amongst the features of functionalist style that Loughlin identifies and which might be seen as directly applicable to Salmond are the following:⁷²

- (1) That the institutions and practices of public law can and should be sued for the purpose of promoting human improvement;
- (2) That law is not a transcendent phenomenon that stands outside of society to impose ideal standards against which that society is measured; rather, law is a function of society and must evolve as society evolves;
- (3) That because government exists to promote social solidarity, sovereignty does not invest subjective rights in the institutions of government: government is the subject of duties;
- (4) That because public law is concerned with the realisation of these duties, lawyers should not get too bound up in the promotion of form (concepts) over substance (ends);
- (5) That public law must be interpreted purposively (that is with regard to its function).

71 Ibid, 362-363.

72 Ibid, 363-364.

Those features entailed an approach towards the nature of law that Salmond undoubtedly provided in *Jurisprudence*. Underlying this work is the belief by Salmond, and shared with Jethro Brown, that lawyers were personally as well as professionally engaged in an ethical and institutionalised exercise. One finds amongst the functionalist lawyers of this period considerable activism in the institutional life of the public and charitable spheres; Mark Hickford's paper shows in detail how Salmond translated that belief in public service into his legal practice.

Along with that commitment to the public life of the community, Salmond also shared the functionalists' key underlying belief in the moral agency of the State,⁷³ but he did not (at least in his public iterations) travel with them to the extent of characterising the State as having a positive and active role in the preservation of liberty through the pursuit of the common good. Salmond's views on the nature of constitutional law and change certainly did not exclude that role for the administrative State (the rise of which functionalists saw as enhancing rather than diminishing liberty). His view of constitutional change was, essentially, a neutral one that did not commit him overtly to the more ideological end of the functionalist tendency. As I have said already, if we are to make him one of Loughlin's early twentieth century functionalists, it must be in faint hues. This would mean that ultimately his position on constitutional change was empty as an explanation of the phenomenon.

The law, he said, "will develop for itself a theory of the constitution, as it develops a theory of most other things that may come in question in the administration of justice". The following passage has been seen as prefiguring⁷⁴ the *grundnorm* of Kelsen:⁷⁵

The constitution as a matter of fact is logically prior to the constitution as a matter of law. In other words constitutional practice is logically prior to constitutional law. There may be a state and a constitution without any law, but there can be no law without a state and a constitution. No constitution, therefore, can have its source and basis in the law. It has of necessity an extra-legal origin. For there can be no talk of law, until some form of constitution has already obtained *de facto* establishment by way of actual usage and operation. When it is once established, but not before, the law can and will take notice of it. Constitutional facts will be reflected with more or less accuracy in courts of justice as constitutional law.

This is recognition of the fact of constitutional change. It acknowledges the dynamic nature of constitutional activity. As such it is perfectly able to accommodate the rise of the administrative State and the State's active pursuit of liberty to achieve the common good.⁷⁶

73 This was also a key belief of Kelsen, whose approach to analytical jurisprudence had much in common with that of Salmond. He also believed in the obligation to participate in the life of the *polis*.

74 Frame *Southern Jurist*, above n 23, 66-67.

75 *Jurisprudence*, above n 27, 203.

76 *Ibid*, 205.

Although the constitution *de jure* and the constitution *de facto* are not necessarily the same, they nevertheless tend towards coincidence. Constitutional law and practice react upon each other, each striving to assimilate the other to itself. The objective facts of state organisation tend to mould legal theory into conformity with themselves. They seek expression and recognition through legislation, or through the law-creating functions of the courts. Conversely, the accepted legal theory endeavours to realise itself in the facts. The law, although it necessarily involves a pre-existing constitution, may nevertheless react upon and influence the constitution from which it springs. ... The will of the body politic, as expressed through the legislature and the courts, will commonly realise itself in constitutional fact no less than in constitutional theory.

Yet, this amounted to no more than a statement that change would happen and that constitutional law would ultimately move with it. It was not an account of how change occurred. It simply indicated descriptively that it would happen and have an impact upon the constitution. Law and constitutional fact would tend to coalesce. He thus identified the phenomenon of change, but went no further.

The Diceyan dialectic has been used frequently in Anglo-Kiwi public law thought over past years as a means to explain constitutional change, in particular the emergence of judicial "activism" or, to put it in more neutral terms, the judicial branch's rise in constitutional prominence in the final quarter of the twentieth century. Idealism and its functionalist synthesis also sought to address and accommodate constitutional change in that era, its central concern being the emergence of the administrative State. The appearance of a functionalist school in the early twentieth century, for all its looseness and the various hues of its membership, would signify a disruption to the continuity of the Diceyan dialectic in its dominance of Anglo-Commonwealth political thought. By the late twentieth century the concern of public law was with the control of an emerged and burgeoning administrative State; and so Dicey, that arch opponent of the interventionist State whose anchor was anachronistically in the world of classical liberalism, provided a conceptual wherewithal by which it might be bridled. The image that contemporary commentators like to provide of the continuity of the Diceyan dialectic in public law practice and thought may say more about their agenda than describe an actual truth in the history of that site of thought and action. This may be no more than to say that accounts of public law inevitably rest on their own contemporaneity: but that surely is the point of Salmond's insistence that law and constitutional fact would tend to coalesce, and would do so in the ethical manner that he both prayed and portrayed.

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Salmond's position on the moral agency of the State should not be downplayed, as it facilitated – or at least added intellectual gravitas to – the developing law of Crown liability that was in such a plastic and formative condition in his era. Salmond – like Maitland – would be unimpressed by the failure of the common law to develop in the century after they wrote a conception of the State

(called the "Crown") as a corporation aggregate. They lived in an era before the proliferation of administrative law which, in its notion of the disaggregate Crown and its Ministers,⁷⁷ exacerbated the sillinesses both had seen and described in the conception of it as a corporation sole. Salmond, and Maitland, believed in the moral agency of the State. That notion, evident in *Jurisprudence*, also and clearly guided his professional conduct. It was an important step away from the Austinian and Diceyan position, even if his breach with that tradition was no more than partial. And it fully suited the nature of New Zealand public life at the time. Accounts of that historical setting have been given in other papers at this symposium, so instead of recounting that I offer in closing a series of brief and probably disconnected examples to supplement Professor Frame's stronger examples (drawn from Salmond's conduct in wartime where he was plainly motivated by self-depiction as an agent for the State against its external enemies).

1. The Crown Suits Amendment Act 1910 widened the liability of the Crown in tort. The legislation was prompted by two episodes involving the State Coal Department. The first involved its commission of a continuing nuisance that was rendering neighbouring land incapable of being let; and the second involved an accident between one of the Department's new lorries and a vehicle driven by an individual named Barton. Having established Crown liability in tort in 1877 in a reformist manner that made such actions considerably less problematic, the New Zealand Parliament pared it back in 1881, restoring the old forms of proceeding by petition and fiat.⁷⁸ By the beginning of the twentieth century, with the rise of what William Massey (as Leader of the Opposition) termed "socialistic or trading Departments",⁷⁹ this restrictive position on Crown liability came to be reconsidered in the light of the two incidents. The 1910 Act addressed this aspect of the rise of the administrative State in the heyday of the expansionist policies of New Zealand's long Liberal Government (1891-1912). Attorney-General Findlay said:⁸⁰

The present Bill is to widen the right of the subject to obtain redress from the Crown in a number of important directions; and I think members will recognise that the time has come when this extended right should be conferred upon our people, because the state has of late years extended its operations widely, and I have no doubt will continue to do so in the direction of carrying on public utilities.

I have tried to locate legislation files or internal memoranda on this legislation but neither the Crown Law Office nor the Parliamentary Counsel Office can find any archival material casting Salmond as a primary figure behind this legislation. But, at the least, the passage of this legislation

⁷⁷ See McLean, above n 15.

⁷⁸ The Crown Redress Act 1877 and The Crown Suits Act 1881. See AE Currie *Crown and Subject* (Legal Publications, Wellington, 1953) 5-7.

⁷⁹ Second reading debate, House of Representatives, on the Crown Suits Amendment Bill (21 November 1910) 153 NZPD 860.

⁸⁰ Second reading debate, Legislative Council (24 November 1921) 153 NZPD 860, 930.

is consistent with his belief (alongside that of his Minister) that the State could be the subject of rights and duties that its administration of law would fulfil (whilst not being capable of enforcement). Salmond was hardly the master architect of principles of Crown liability as they were being developed and legislated at this time (across the well-behaved Anglo-Dominion jurisdictions); but his work did articulate a disposition towards clarifying and facilitating the liability of the State. He gave intellectual traction to processes that were happening around him, and doubtless contributed to its practical manifestation in legislation.

2. In *Park v Minister of Education*⁸¹ Salmond J considered the phenomenon of delegated legislation, concern about which was growing amongst public lawyers between the Wars.⁸² In this case Salmond J struck down as ultra vires regulations that gave the Minister power to cancel the teaching certificate of any holder guilty of immoral conduct or gross behaviour. In this case, after an inquiry by the Wellington Education Board, the teacher was cleared of charges of disloyalty and insubordination. The Minister had been unhappy with that inquiry and proposed a further one under his own aegis and with a view towards cancellation of her certificate under the regulations. Salmond J held that the regulatory scheme of the Act would be undermined were the Education Acts of 1908 and 1914 regarded as empowering regulations that in their outcome would short-circuit the statutory.⁸³ This is an early example of the concept of vires being applied in the public sphere and the notion of the disaggregate Crown – injunctive relief against a Minister rather than the Crown itself.

3. *Frazer v New Zealand Waterside Worker's Federation*⁸⁴ was a high-profile case concerning the effect of a privative clause. Section 96 of the Industrial Conciliation and Arbitration Act 1908 provided that "No award, order or proceeding of the Court [of Arbitration] shall be liable to be reviewed, quashed, or called into question by any Court of judicature on any account whatsoever". Justice Salmond, in another professional capacity, was presumably responsible for the drafting of that provision. Nonetheless he indicated it to be "settled law that the taking away of certiorari does not extend to certiorari to quash on the ground of want or excess of jurisdiction". The following passage has clear anchor in *Jurisprudence* and his emphasis upon the ethical role of courts in overseeing the administration of justice:⁸⁵

81 *Park v Minister of Education* [1922] NZLR 1208 (SC).

82 For a history of this concern see Michael Taggart "From Parliamentary Powers to Privatization: The Chequered History of Delegated Legislation in the Twentieth Century" (2005) 55 U Toronto LJ 577.

83 *Park*, above n 81, 1214-1215 Salmond J.

84 *Frazer v New Zealand Waterside Worker's Federation* [1924] NZLR 689 (SC, Full Court).

85 *Ibid*, 703. The case is reprinted in the first volume of *New Zealand Law Reports Leading Cases* (1923) 1 NZLRLC 321.

The existence and exercise of this controlling authority on the part of the Supreme Court is so essential a point of civil freedom and public policy that an intention to take it away in the case of any Court of special and limited jurisdiction cannot properly be imputed to the Legislature merely because of the use of general language which is reasonably capable of a mere [sic] restricted and reasonable interpretation.

4. Whilst the above examples may be regarded as practical manifestations consistent with Salmond's published position on the role of the State, the most important account of his integration of thought with practical action occurs in Mark Hickford's essay on Salmond's management of Māori claims during his intendency of the Crown Law Office. If in the writing of New Zealand history what our major figures say is to be regarded as far less important than what they do, Hickford shows that it is possible to unite Salmond's management with his text and, also, to see him in the broader context of State formation in early twentieth century New Zealand.⁸⁶

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I close on a personal note. The present Dean of the Victoria University of Wellington Faculty of Law, my close friend Professor ATH Smith, has several times remarked to me on the absence of law from the general political histories of New Zealand. I raised this once with Professor Belich, now the undoubted doyen of our national historians. He replied that his two-volume general history had avoided law mainly because he knew so little about it, raising again the observation with which this article opened. He said that there was an absence of any platform or even nascent tradition of New Zealand legal history from which the generalist historian might work, apart (of course) from those in the Crown-Māori relations area. Professor Smith has identified what he sees as a major omission from those national histories, namely an account of how New Zealand developed a non-corrupt legal system. This is something that is often – indeed, invariably – taken for granted, yet it is not a necessary outcome of any people's political history, no matter the back-patting self-belief that such decent people as the Kiwis (that is, white Pakeha New Zealand) could not have produced any other type but one oriented around the "fair go". To the extent that it occurs (and my experience is that it is not inconsiderable) such self-congratulation validates the tendency towards obliterating the need for history. That is to say, that historical outcome is seen as the self-evident and ongoing expression of national temperament and genius, the only kind of outcome that such a good-hearted and well-

86 At the Salmond Symposium, 18-19 August 2006, Victoria University of Wellington, Professor DV Williams suggested rhetorically that Salmond's involvement in the drafting of ss 84-87 of the Native Land Act 1909, which prevented claims to customary title being justiciable against the Crown, justified demonising him in the same way that Chief Justice Prendergast had been excoriated at the end of the twentieth century for his judgment in *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur (NS) 72 (SC). One might accuse Salmond of earnestness and perhaps a low-church lack of humour, but his attitude towards Māori claims was far from being a craven servant of a conniving oppressive settler-state intent on acquiring Māori land by a show of justice, as Dr Hickford's essay in this journal demonstrates so comprehensively.

behaved polity could have generated.⁸⁷ Other possibilities – other histories, dark and ominous, are excluded, as though there never were moments or times when the settler-State might have turned down a shadowy path (such as we now imagine South Africa as having taken with apartheid). This paper, along with that of Dr Hickford, is aimed at that omission. Sir John Salmond is one of the most important legal figures in our national history. The circumstances of his time did not turn the New Zealand State's pursuit of ethical ends into a constitutional struggle in the sense of England in the 1640s, colonial British America in the 1770s or South Africa in the 1980s, but nor did he see those circumstances as encouraging complacency. Salmond saw that the ethical integrity of the State required constant vigilance and commitment from those actors implicated in its constitutional processes, and he situated himself accordingly. It was a position drawn from and driven by his cosmopolitan intellectualism, rather than a sentimental and folksy proto-nationalism. His commitment to the State as an ethical enterprise surely would have been tested by the loss of his son in the Great War but that is a private side of the man about which we still know little, and may never know more. Outwardly and in the public sphere, his commitment to the moral agency of the State was manifest in what he said and what he did.

87 This adverts to an observation in my essay "Constitutional Voices", above n 1, that for most of the twentieth century, to the extent that the country had developed an account of its constitutional past, it was founded on the implicit belief that it had not had any history other than the Whig one of normal unexceptional development – the suburbanisation, as it were, of constitutional growth. To the extent that this complacency gripped the country's sense of its constitutional past, it has been unseated most evidently by the political resurgence of Māori and presentation of alternative histories of the experience of settler-state governance.

