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COMMISSION FOR THE ENVIRONMENT

The Minister for the Environment Mr Young recently announced an extension of the role of the Commission for the Environment. In particular he said that:

The role of the Commission has been extended so that it may make independent submissions to statutory planning authorities.

Greater emphasis will be placed on the Commission's overview role of departmental environmental policies and operations.

The use of environmental impact reports on projects with which the Government is involved and the public audit of these reports by the Commission has been reaffirmed.

The practice of varying the procedures when this provides greater simplicity without diminishing the public's rights of participation has been confirmed.

The role of the Commission in initiating public discussions, seminars and departmental studies has been confirmed.

The Commission will continue its increasing role in environmental education.

Confirmation of the continued use of environmental impact reporting procedures is particularly welcomed. These reports, prepared by the government department or the authority concerned with a project for independent audit by the Commission often provide the first hard information the public has on the extent, implications and need for that project. Without that information comment can be at best unspecific and at worst, uninformed.

Enabling the Commission to make independent submissions is a useful supplement to town planning procedures. A system that sees government decisions made after taking into account environmental impact reports and the Commission's audit or assessment, but planning decisions made without them because the reports are not admissible evidence has an element of unreality about it. But whether the expanded role of the Commission will help remains to be seen.

After all, making a submission and giving evidence are not the same. While the Minister may encourage the Commission to make submissions to a statutory planning authority those authorities have their own rules of practice concerning evidence. The Minister says that these submissions will be made "within the procedures for the submission of the Crown case". It is doubtful whether that will be sufficient. If the Commissions submission is to have a sound evidential base, then, particularly where it disagrees with the Crown case, it needs independent standing. But perhaps the Minister intends this anyway. Let us hope so for this matter bears also on the relationship between the Commission and the Planning Tribunals established by the Town and Country Planning Act 1977.

It had earlier been suggested ([1978] NZLJ 201) that this relationship was unclear. It still is. It is conceivable that both Commission and Planning Tribunals could carry out their respective inquiries and advise their respective Ministers without any interchange at all. This would be a senseless duplication of effort and one that would be cured neither by the Commission making a submission without supporting evidence, (or with evidence supporting its own conclusion only) nor by the Planning Tribunal attempting to carry out the type of assessment for which the Commission is specifically staffed and in which it has considerable expertise. Just how the Commission will function in this context needs to be more specifically resolved.

The remaining expansions of activity are directed to a similar end. The overview of depart-

mental policies, education, and initiation of public discussion should encourage the constant flow of ideas so necessary for environmentally sound planning. The charge has been made that overexposure to other departments will gradually change the Commission to an environmental Uncle Tom. However, we agree with the Minister who said that "The Commission manages well its combination of independent and departmental responsibilities. It provides essential advice for Government decision making and acts as a focus and a stimulus to effective public contribution to policy making". The key words are "effective public contribution to policy making". Collecting the public contribution will be a futile exercise if it is not passed on. The departmental link is just as important as the public one.

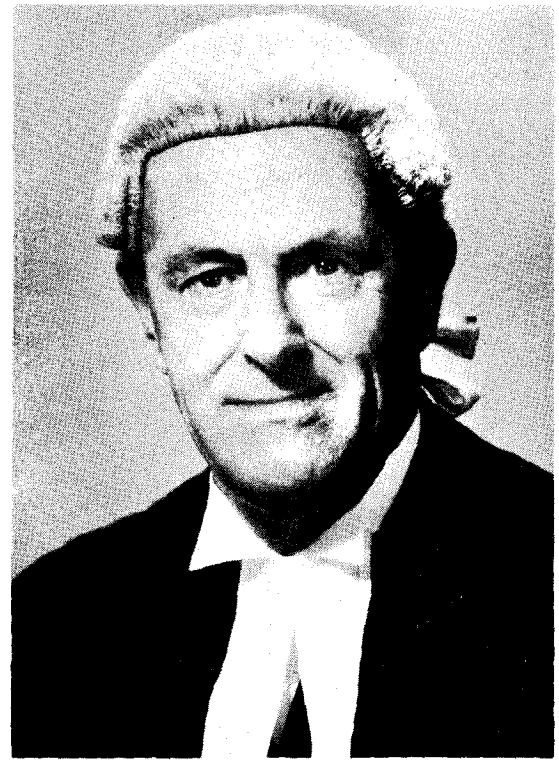
One note of caution should be sounded. The Minister has, throughout, emphasised that there will be no diminution of the public's right to contribute to policy making and planning and in fact the Commission draws much of its strength from this contribution. He did not mention that the effectiveness of this contribution will depend on the information made available, particularly by government departments. The Commission for the Environment should not be looked on as any form of substitute for a more adequate disclosure of information than is the case at present.

Tony Black

JUDICIAL

TRIBUTE TO THE LATE SIR RICHARD WILD, GBE, KCMG, ED

The following tribute was paid to the late Chief Justice of New Zealand Sir Richard Wild GBE, KCMG, ED at a special sitting of the Supreme Court at Wellington on 8 June 1978.



Sir Ronald Davison GBE, CMG, Chief Justice

We are gathered here in this Court today to pay tribute to the life and service of Herbert Richard Churton Wild.

Member of Her Majesty's Most Honourable Privy Council;

Knight Grand Cross of the Most Excellent Order of the British Empire;

Knight Commander of the Most Distinguished Order of St Michael and St George;

The ninth Chief Justice of New Zealand.

I speak this afternoon not only for the Judges who are sitting with me in this Court, and the retired Judges present who have attended on this occasion, but also on behalf of all other Judges throughout New Zealand, who have by reason of their duties been unable personally to attend but who have specially requested that they be associated with this tribute. As I gaze around this crowded Courtroom, I am aware that there are many here this afternoon who, by their very presence on this occasion, are in their own way paying to the memory of Sir Richard Wild a tribute more eloquent than any words of mind can fully express.

Sir Richard served as Chief Justice from 1966 to 1978. He was not spared to run a lengthy term of office, such as was the lot of some of his predecessors:

Sir William Martin served 16 years;
Sir George Arney 18 years;
Sir James Prendergast 24 years;
Sir Robert Stout 27 years;
Sir Michael Myers 17 years.

But any reduction in term, as compared with giants of the past, was more than made up by the

purpose and achievement which he compressed into his all too short 12 years.

The pages of New Zealand judicial history yet to be written will record the rightful place to be filled by Sir Richard in the administration of justice of this country, but already the judgment of his contemporaries has marked him as one of the great Chief Justices in New Zealand history.

Eloquent tributes to Sir Richard's life and service have already been paid in the press throughout this country, but it is well to remember that Sir Richard's service was not confined within New Zealand, but extended to a much wider field of judicial activity.

He was active in his participation in the affairs of the Asian Judicial Conferences. He chaired the sixth Asian Judicial Conference when New Zealand was host country.

He represented New Zealand with honour, and distinction, in the councils of various judicial bodies throughout the word, and he maintained a strong New Zealand link with the Privy Council by seconding New Zealand Judges from time to time to sit on that body, and by sitting himself as occasion allowed. As recently as last July, Sir Richard took place in an historic sitting of the Privy Council, when both he and Sir Garfield Barwick, Chief Justice of Australia, sat together on the Council for the first time. The event was marked by a speech by the Lord Chancellor recording the significance of the occasion.

On 25 May, on learning of Sir Richard's death, Lord Diplock, presiding at a sitting of the Judicial Committee of the Privy Council, paid tribute to Sir Richard when he said:

> "The Judicial Committee has been privileged to have him sitting in this country, despite his onerous judicial duties in New Zealand. The first time he sat was in 1969, when he was made an Honorary Bencher of the Inner Temple. He has since sat on the Judicial Committee twice; in 1972 and as recently as last summer. His contribution had been of the utmost value and he was regarded with the deepest respect."

Sir Richard entered upon his office in 1966, after a career which, to his contemporaries and friends, had already marked him out as a worthy holder of high judicial office. After gaining his degree in law with Honours at Victoria University, and in the course of so doing gaining prominence in various fields of sporting endeavour, he entered private practice in 1939 only to close his office at the outbreak of war. He served with the New Zealand Expeditionary Force from 1940-1945, rising to the rank of Brigade Major. It is reported that General Freyberg once referred to him as "my gallant Wild": such was the nature of the man. At the end of the war he returned to New Zealand. He resumed his practice of the law where he rapidly made his mark as a skilful and incisive counsel. In 1955 he was appointed Judge Advocate General In 1957 he was appointed Solicitor-General and called to the inner Bar. His energy and administrative ability soon attracted to the Crown Law Office competent young lawyers eager to further their skills and learning under his direction, and many of these young men have now made their mark in various fields of law.

Throughout his career in the law and until his appointment as Chief Justice, Sir Richard served on the Councils of the Law Society in many capacities, but reference to this service will be made more appropriately by another speaker.

Following his appointment as Chief Justice, Sir Richard early placed his stamp upon that office and the course of his administration was clearly charted when he said at his swearing-in:

> "I come to this responsible office with a profound belief in the fundamental importance of the Courts of Justice in sustaining the whole edifice of society. Their role is not only, as I think too many imagine, to punish the offender. It is also to uphold and protect the citizen and his freedom, even against the State itself.
>
> "The Rule of Law administered by the Courts effects a reconciliation of individual liberty with the controls involved in the modern State. The machinery and administration of the Courts will require to be adapted to changing times but their high place must be maintained and their functions preserved so that, in the words of the oath you have just witnessed, right may be done to all manner of people according to law."

How truly he followed that course which he set himself is now a matter of history. He was zealous in defending the role of the Courts in controlling the unwarranted exercise of executive action. He upheld the role of the Courts in administering the law and opposed the usurpation of the role of the Courts by administrative tribunals. He fiercely upheld the independence of the Courts and was always strong to defend the traditional rights, privileges and dignities of holders of Judicial office. He was a firm administrator. He led from the front where the work load was heaviest – there he was to be found. He introduced numerous innovations and reforms into the working conditions of his Judges and in so many ways improved the administrative area of the administration of justice.

But in his dealings with people he was a man of warm humanity and boundless compassion. He was a man respected by his acquaintances and loved by his friends. He was a man who brought honour to the office of Chief Justice.

How better can I pay tribute to the life and

service of Sir Richard than to do so in the words of Stephen Spender written in 1909:

"I think continually of those who were truly great –
The names of those who in their lives fought for life,
Who wore at their hearts the fire's centre.
I Think Continually of Those
Born of the sun, they travelled a short while towards the sun,
And left the vivid air signed with their honour."

Such a man was Sir Richard Wild. He was a man who was truly great. He fought for life for the individual within the law, for the rights of the common man. He was inspired by the fire in his heart to do justice, and after his all too short career as Chief Justice, he, too, left the vivid air of this land signed with his honour.

We, the Judges of this Court, have been enriched by our associations with him. The law has been wonderfully served during his term of office. In humble tribute to his memory we express our grateful thanks for his selfless life of service to the law and to New Zealand.

To his family gathered here today we express our deep sorrow in the untimely passing of a beloved husband and father. We trust that you will be in some measure comforted and uplifted in spirit by the knowledge of the high esteem in which Sir Richard was held, and by these tributes to his memory paid in this Court today.

The Hon. P I Wilkinson, Attorney General. May it please your Honours, At this sitting of the Supreme Court we meet to pay our respects and record our tributes to the late Chief Justice. It is my privilege to record publicly on behalf of the Government and people of New Zealand, our appreciation of the most distinguished service that Sir Richard Wild gave to this country. While we meet here primarily to remember him as a lawyer – as a practitioner, as Solicitor-General and as Chief Justice – we also remember that the man whose memory we honour today served this country and its people in other fields as well, with a dedication and a capacity that is given to few.

Much has already been written and said of the career of Sir Richard in the press and by public men, for his retirement is so recent and his death occured a little more than a fortnight ago. For your Honours the Judges, his Honour the Chief Justice has spoken; the President of the New Zealand Law Society is to follow me, and will speak of his service to the profession. I therefore content myself by speaking of him in a general way, but with a particular reference to his direct service to the Crown which was given first in the New Zealand Army, and then as Solicitor-General. First, though, I mention what I feel can fairly be described as his foremost characteristic: complete dedication to whatever cause he undertook or served.

At the outbreak of war when he closed his office – and, as he was a sole practitioner, there was no-one to carry on for him – and joined the Army. He served overseas in the Middle East and Europe from 1940 to 1945 with distinction, and he rose to become Brigade Major, and was mentioned in dispatches. He continued to serve the Army in peacetime and his Efficiency Decoration bears witness to that and the reference in the foreword to the first – (and so far only) – edition of the New Zealand Army's Code of Military Law records the Army's indebtedness to Major H R C Wild, Assistant Director of the Army Legal Service. He was later Director, and later still became the Judge Advocate-General to the Army, and the Judge Advocate of the Fleet to the Navy.

In 1957 he was appointed Solicitor-General. He left a partnership in one of the most prominent and substantial legal firms in New Zealand to do so, and his impact upon the legal service of the Crown was immediate and effective. The Crown Law Office was completely re-organised and revitalised Outside staff were recruited, as well as those from within the Public Service; the range of work the Office did was greatly expanded; in particular – as a matter of deliberate policy – he put its staff where he thought it essential they should be: – in Court as advocates. His own advice and service to the Government was immensely valued. Such was his capacity and reputation that, nine years after he became Solicitor-General, he was appointed Chief Justice. It was while Solicitor-General, that several of his most striking qualities became publicly apparent:

First, his organisation and leadership. He inspired loyalty in those he led because he wanted each of them personally to do well and they sought for excellence because that was his standard.

Next his practical wisdom. His opinions and advice were all the more effective because they always recognised realities – they were not esoteric expositions of what ought to be. Though the law was fully and soundly stated, he always went on to say what ought to be done in a practical way.

His own words written 20 years ago were "to give the best service (as legal advisers) we must not treat matters sent to us as merely academic legal exercises, but as real problems calling for the best advice we can give from practical experience and judgment as well as legal knowledge".

There was his determination and energy when he tackled something; and if it was his duty to

tackle it, then he did so – whatever it was. He applied himself with unrelenting energy to it until it was done, for he never left things undone – until the day he left office. He abhorred procrastination and he applied himself with promptness to everything. Sir Francis Drake's prayer read by the Bishop at Sir Richard's funeral was never more aptly quoted, for Drake was also a man who, when once he started upon a task, continued at it until it was thoroughly finished.

Then there was his lucidity and conciseness of expression – both in the written and spoken word. He believed in – and used – simple straightforward language, logically and concisely ordered. Whether in opinions or in legal argument, jury work, private conference, or public speech he sought always to make his point clear to those he addressed.

His work for the Law Society gives us another striking illustration of this quality. The Society sought a coat of arms and many Latin tags were put forward to be part of it as in keeping with the law's history and tradition. Sir Richard, on the contrary, urged something in simple clear English which everyone could understand, which is why the Law Society's coat of arms today reads "Be just and fear not".

Finally, but perhaps most importantly, his passionate belief in the fundamental importance of the administration of justice to an ordered and democratic society. He was no Lord Denning, but he did not believe that justice should be merely a rigid acceptance of existing rules. While applying as one must, existing rules, he believed one should strive in proper cases to adapt them to make them more in keeping with the day's attitudes and needs. He often spoke publicly on such issues; and his concern for the process and the content of the law to keep pace with modern attitudes towards individual freedom, equality and humanity, became very plain in his judicial work.

As Chief Justice many of those qualities of which I have spoken became clearer; and in particular his determination that Court business should be dealt with promptly became even more marked; he believed that no matter how right the final decision, if it were too long delayed it might, to the litigant, be drained of all practical value; so he applied his determination and energy to the increasingly difficult task of keeping down delays in judicial work. His own efforts were unexcelled and he sat constantly all over the country. He presided over the New Zealand Court system in the greatest period of stress and trial in its history. That the system functioned as well as it did under such unprecedented strain was very largely due to his leadership.

He was a man of strong personality and strong character. If results could only be obtained at the cost of some personal unpopularity then he did not shrink from doing what he felt must be done; and it was inevitable that he should have produced a strong reaction in the attitudes of some. Nevertheless I believe there will be general agreement that he was a great man in the legal history of New Zealand.

Shortly before Christmas he was struck down in a manner which was cruelly ironic for a man who placed such store on physical fitness. Those who maintained contact with him during the twilight period between his life and his death will testify to his responses which indicated a still acutely functioning brain and continued preoccupation with his love for his life's work. In the end, however, in the words of Churchill, in his moving obituary for King George VI – death came as a friend.

To Lady Wild and Sir Richard's children we offer in their loss, the solace of knowing that all in the law respected him greatly.

L H Southwick QC, President, New Zealand Law Society. I am grateful to your Honours for the opportunity of addressing the Court on this occasion. I have with me today vice-presidents of the New Zealand Law Society and presidents of many of the district societies. Thus my remarks are made on behalf of a very wide sector of the legal profession in New Zealand. I am also able to speak for past presidents of the society – Sir Denis Blundell, Mr Denis McGrath, Mr Stanley Tong and Mr Lester Castle. I was particularly asked in Auckland yesterday to associate the Right Honourable Sir Alfred North with what I now say.

The late Sir Richard Wild enjoyed a remarkable career, and left an impressive record. Looking back over his life, no-one would be surprised at my claim that he possessed not only a keen intellect but displayed a remarkable strength of mind. These attributes of character coupled with an exemplary dedication to the law, led to his having a noteworthy career at the Bar, in private practice, as a Queen's Counsel, and as Solicitor-General.

These same great gifts also manifested themselves in the way in which he served his fellow practitioners on the Council of the Wellington District Law Society, and as its president.

Sir Richard was also a vice-president of the New Zealand Law Society and held that office when he became Chief Justice of New Zealand. The president of the society at that time, Sir Denis Blundell, has asked that he be associated with my remarks today and has said that he is particularly anxious to have recorded his appreciation of and thanks for Sir Richard's work with the Law Society. I regard it as an honour to be able to record here the thanks of the legal profession in New

Zealand for Sir Richard's work with the Law Society.

As Chief Justice, Sir Richard Wild's strength of mind doubtless led him, on occasions, to an impatience with irrelevancies. What is more important, however, is that that same ability gave him a very clear appreciation of the significance today of the rule of law. I believe that his appreciation of the importance of the rule of law, coupled with his determination to ensure and to preserve the independence of the judiciary, are the outstanding characteristics by which he will be remembered.

He appreciated with clarity an essential feature of the rule of law. By this I mean, he appreciated fully that government under the rule of law must demand proper legal limits on the exercise of power. His words on many occasions make it clear that he saw that powers first approved by Parliament must be granted within definable limits. He addressed his mind to the significance of these definable limits and saw them as the very basis of our way of life, knowing that those limits had to have standards imposed upon them capable of examination, acceptable to the public conscience and in fact regarded as the very due of a free people.

I remember Sir Richard Wild speaking of these things at a Commonwealth conference in Edinburgh, and from what he said I know that he regarded these standards as necessary, not only in the minds of those who make the law but as providing an effective measure against which to assess the actions of those who administer it. He knew that those standards were themselves sanctions against any departure anywhere from what they required.

It is my belief that Sir Richard Wild's clear understanding of the need for these definable standards, permitted him to exercise a strong-minded instinct for justice directed to those standards. He looked for this instinct to manifest itself in Parliament, and I know that he saw to it that this instinct was infused into the work of the Courts over which he presided. Sir Richard Wild knew the importance of the task of the Courts in passing judgment, not only on the validity of Acts of Parliament but also upon the administration of those responsible for the law flowing from Parliament. It was in this area that he looked to standards based upon an appreciation of the rule of law and endeavoured to infuse that into his judgments.

I therefore acknowledge humbly the significance of the work of Sir Richard Wild. We tend to push the rule of law aside as being a platitudinal thing with relevance only in the lives of lawyers. Occurrences in the world around us, however, and even in this country, must make us all appreciate that the importance of the maintenance of the rule of law today is greater than perhaps it ever has been. I believe that the example set by Sir Richard Wild in his determined attitude towards the maintenance of the rule of law, is an example which we can accept today as we meet to pay tribute to his memory.

That strength of mind which I see as such a remarkable part of the personality of Sir Richard Wild is a great attribute, but it can also be a dangerous one. To be truly great, such an attitude needs to be founded in a strong and sound moral conviction. I believe that Sir Richard Wild's grounding in the teachings of the Christian church gave to him that sound moral strength which permitted his strength of mind to be the great attribute it was.

I conclude by extending to Lady Wild and to the members of her family the sympathy of those for whom I speak – the legal profession in New Zealand. I have admired and respected Lady Wild's courage over the past months. I thank her for sharing with my profession the life of a great Chief Justice.

MARITIME LAW ASSOCIATION OF AUSTRALIA AND NEW ZEALAND

A New Zealand Branch of the Maritime Law Association of Australia and New Zealand was established at an inaugural meeting meeting held in Wellington on 19 May 1978.

Maritime law has been assuming an increased prominence and importance in New Zealand in recent years, and the number of persons practising in this field, whether as legal practitioners or as shipowners, cargo owners or marine insurers, has been growing rapidly. This development has heightened the need for an effective means of liaison among those involved, and for the discussion and understanding of different points of view. It was considered that the development of a Maritime Law Association could fill this need.

Extensive promotional efforts by Messrs I M Mackay and P W Graham showed a high degree of interest for the promotion of an Associa-

tion in New Zealand. As a Maritime Law Association is already well established in Australia, it was considered desirable to join with the Australian Association, and to form a New Zealand branch. This proposal was enthusiastically received by the Australian Association, which readily arranged for the amendment of its rules, and even its name, to permit the admission of New Zealand members and the formation of a New Zealand branch.

All of this work culminated in the meeting held on 19 May, when the branch was formally established and officers elected.

Officers elected are:

Patron: The Honourable Mr Justice Beattie

Chairman: Mr I M Mackay (Wellington)

Deputy Chairman: Mr P W Graham (Wellington)

Secretary: Mr A D MacKenzie (Wellington)

Treasurer: Mr T J Broadmore (Wellington)

Council: Messrs B H Giles (Auckland); D B Gordon (Tauranga); R M Hall (Dunedin); J B Laird (Wellington)

The objects of the Association are to advance reforms in and to promote international unification of maritime law, and to provide a forum for the discussion and consideration of problems affecting maritime law. An active branch programme is planned, and already a weekend seminar has been arranged, to be held at Massey University, Palmerston North on 11–13 August 1978, on the Hague-Visby Rules and the Hamburg Rules and their effects on the law of carriage of goods by sea.

Individual membership of the Association is open to persons interested in the objects of the Association and corporate membership is open to firms and companies involved in commercial and maritime activities or specialising in maritime and commercial law. Membership is not confined to members of the legal profession.

Subscription rates are:

Individual members:	$30.00 pa
Corporate members:	$90.00 pa

Any persons or firms interested in membership or attending the Massey Seminar are asked to communicate with the Secretary, P O Box 1334, Wellington.

CASE AND COMMENT

Discovery against the Crown

The decision of Jeffries J in *Arataki Honey Ltd v Minister of Agriculture & Fisheries* (judgment 13 April 1978, M565/75, Supreme Court, Wellington) denied that discovery was available against the Crown under R 161 of the Code in respect of the powers conferred on the Minister of Agriculture & Fisheries by the Apiaries Act 1969, s 30. Under the provision the Minister is empowered to declare an area a restricted area if the honey produced is likely to contain poison.

It was argued by the applicant, who had applied for review under s 4 of the Judicature Amendment Act 1972 that the powers exercisable by the Minister were conferred upon him as a persona designata and that no Crown interest was involved. This distinction was discussed in *Bird and Others v Auckland District Land Registrar and Others* [1952] NZLR 463. There F B Adams J had held that the Minister acted in his official capacity and that the rights and interests of the Crown, and not the Minister, were at stake. Further, s 27 of the Crown Proceedings Act 1950 which enables discovery to be ordered against the Crown may be relied on only if the proceedings are brought in terms of s 14 (2) of that Act.

O'Regan J followed that decision in *Fiordland Venison, Ltd v McIntyre* (unreported, 25 May 1976, A 146/76, Supreme Court, Wellington). It was also the conclusion reached by Upjohn J in *Merricks v Heathcoat-Amory and Another* [1955] ChD 567 where an argument had been advanced that the Minister of Agriculture's functions were not those of an officer representing the Crown, but were those of persona designata or a private individual. That argument was rejected and the injunction sought was refused.

Jeffries J appears to have located the *Merricks* decision without the aid of counsel. It reinforced the New Zealand decisions which were followed. The motion under R 161 was dismissed.

An alternative route to discovery was attempted by invoking s 10 of the Judicature Amendment Act 1972, as amended by s 14 of the Judicature Amendment Act 1977. At a conference presided over by a Judge a party may be required by s 10 (2) (i) to make discovery. Though Jeffries J was ready to make an order for a conference, he was not prepared to anticipate what the presiding Judge might do. There was a distinct possibility that it might be argued that Crown prerogatives remained available despite s 10 (2) (i). It will be recalled that civil proceedings, as defined in s 2 (1) of the Crown Proceedings Act excludes an application for review under Part I of the Judicature Amendment Act 1972. The latter portion of the text which follows was inserted by the Judicature Amendment Act 1972, s 14:

> "any proceedings in any Court other than criminal proceedings: but does not include proceedings in relation to habeas corpus, mandamus, prohibition, or certiorari or proceedings by way of an application for review under Part I of the Judicature Amendment Act 1972 to the extent that any relief sought in the application is in the nature of mandamus, prohibition or certiorari."

The Crown would presumably argue that s 14 overrides s 10 (2) (i) of the 1977 Amendment Act as to the powers of a Judge presiding at a conference in terms of s 10 (2). It may be idle to speculate on the material which the Minister is seeking to protect from discovery, but it would be regrettable if the applicant was prevented from securing the very material without which his application for review would be doomed to fail. Cases such as *Ellis v Home Office* [1953] 2 QB 135; [1953] 2 All ER 149 and *Broome v Broome* [1955] P 190; [1955] 1 All ER 201 show how a litigant can be disadvantaged by the upholding of a claim to privilege. They undoubtedly influenced the House of Lords when in *Conway v Rimmer* [1968] AC 910; [1968] 1 All ER 874 the more liberal rule as to privilege was adopted.

N F Northy

COURTS

THE JUDICATURE AMENDMENT ACT 1977

By Dr JA SMILLIE, *Senior Lecturer in Law, University of Otago.*

Sections one to nine of the Judicature Amendment Act 1977 effect a number of miscellaneous amendments to the Judicature Act 1908 *(a)*.

Of more particular interest to the writer are ss 10 to 14 which amend Part I of the Judicature Amendment Act 1972. Part I of the 1972 Act created a new procedure for judicial review of administrative action, the application for review, thereby giving effect to the recommendations of the Public and Administrative Law Reform Committee *(b)*. The object of the 1972 Act was to create a new and simplified procedure for judicial review which would avoid the procedural complexity surrounding the prerogative remedies of certiorari, prohibition and mandamus and the remedies of injunction and declaration, and remove the need for an applicant to choose between these remedies in deciding which procedure to adopt. The object seems to have been to create a single new review remedy which would cover all the grounds and forms of relief available on judicial review for the existing public law remedies *(c)*. It soon became apparent that this attempt at reform was both clumsy and inadequate *(d)*, and the 1977 Amendment Act was directed at remedying some of the more obvious deficiencies. Unfortunately it is submitted that the latest amendment suffers from the same kinds of failings as the 1972 Act.

A. The range of application of the statutory remedy: "Statutory power" and "Statutory power of Decision"

The central provision of the 1972 Act is s 4 (1) which provides that:

> "On . . . an application for review . . . in relation to the exercise, refusal to exercise, or proposed or purported exercise by any person of a statutory power, [the Supreme Court may grant] any relief that the applicant would be entitled to, in any one or more of the proceedings for a writ or order of or in the nature of mandamus, prohibition or certiorari or for a declaration or injunction, against that person in any such proceedings."

(a) The number of permanent Judges of the Supreme Court is increased from 21 to 22 (s 2), and the number of permanent Judges of the Court of Appeal is increased from 2 to 3 (s 5) with provision for the appointment of additional Judges to the Court of Appeal on a temporary basis (s 6). Provision is made for the Court of Appeal to sit in divisions (s 7), and s 8 empowers a single Judge of the Court of Appeal, sitting in Chambers. to make incidental orders and directions in respect of any civil matter pending before the Court. Section 9 inserts a new s 19A into the principal Act which amends and codifies the rules for determining whether an action shall be tried before a Judge and jury or before a Judge alone, and also abolishes the civil jury of four.

(b) See *Fourth Report of the Public and Administrative Law Reform Committee* (1971) paras 11-28; *Fifth Report* (1972) paras 18-22 and Appendix. The 1972 Act closely follows the Committee's draft Bill (see Appendix to Fifth Report (1972)), which in turn was based heavily upon the Judicial Review Procedure Act enacted by the Ontario Legislature in 1971. The Ontario model has also been followed in British Columbia: Judicial Review Procedure Act 1976 (BC).

(c) See *Eighth Report of the Public and Administrative Law Reform Committee* (1975) para 26.

(d) See Mullan, "Judicial Review of Administrative Action" [1975] NZLJ 154 for a full review of the 1972 Amendment Act.

Clearly the availability of the new procedure is limited to exercises of "statutory power". This term was defined in s 3 of the 1972 Act as follows:

> " 'Statutory power' means a power or right conferred by or under any Act–
>
> "(a) To make any regulation, rule, bylaw, or order, or to give any notice or direction having force as subordinate legislation; or
>
> "(b) To exercise a statutory power of decision; or
>
> "(c) To require any person to do or refrain from doing any act or thing that, but for such requirement, he would not be required by law to do or refrain from doing; or
>
> "(d) To do any act or thing that would, but for such power or right, be a breach of the legal rights of any person."

The term "statutory power of decision" used in para (b) of the definition was also defined in s 3:

> " 'Statutory power of decision' means a power or right conferred by or under any Act to make a decision deciding or prescribing –
>
> "(a) The rights, powers, privileges, immunities, duties, or liabilities of any person; or
>
> "(b) The eligibility of any person to receive, or to continue to receive, a benefit or licence, whether he is legally entitled to it or not."

It was immediately apparent that the definition of "statutory power" did not embrace all exercises of power which were reviewable under one or other of the old remedies *(e)*. Obviously the new remedy and procedure was not available in respect of *non*-statutory powers.. Consequently domestic bodies whose powers are derived from contract rather than statute were not subject to the application for review procedure. But although the prerogative remedies of certiorari, prohibition and mandamus are not available in respect of domestic tribunals *(f)*, the equitable remedies of injunction and declaration will issue to enforce contractual rights. Nor did the application for review procedure apply to the exercise of non-statutory prerogative powers of a public nature delegated directly by the crown *(g)*, although such powers have been held to be reviewable by certiorari *(h)* and declaration *(i)*.

Furthermore, the term "statutory power" as defined in s 3 did not even embrace all exercises of *statutory* power which were reviewable under the traditional public law remedies. Predictably *(j)* the Courts held that the term "statutory power" as defined included only exercises of power that result in a decision which has immediate and binding effect. It did not cover statutory functions which are preliminary or investigatory in nature and culminate in a preliminary decision which has no final legal effect *(k)*, or a report or recommendation which some superior body must confirm or adopt before it can have binding and determinative effect *(l)*. Yet the courts have asserted the power to grant the traditional remedies in respect of ultra vires decisions which must be acted upon by a superior authority before they can have any legally binding effect *(m)*.

Nor could the application for review procedure be used to request the court to interpret and declare the meaning and applicabilty of a statutory provision to the applicant's case unless the application of the provision to the applicant's particular circumstances involves the making of a "decision" by some official or tribunal *(n)*. In such circum-

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(e) Ibid at 159-160.

(f) Eg *R v National Joint Council for the Craft of Dental Technicians, ex parte Neate* [1953] 1 QB 704; *The State (Colquhoun) v D'Arcy* [1936] IR 641; *Re McComb and Vancouver Real Estate Board* (1960) 32 WWR (NS) 385 (certiorari and prohibition); *Armstrong v Kane* [1964] NZLR 369 (mandamus).

(g) *Daemar v Gilliand*, unreported judgment of McMullin J, noted [1978] NZ Recent Law 37: The entry of a stay of proceedings by the Attorney-General is a prerogative act and not the exercise of a "statutory power" reviewable under the Judicature Amendment Act 1972.

(h) *R v Criminal Injuries Compensation Board, ex parte Lain* [1967] 2 QB 864.

(i) *Laker Airways Ltd v Department of Trade* [1977] QB 643.

(j) See Mullan, [1975] NZLJ 154 at 159.

(k) *Daemar v Gilliand* note (g) supra: decision by a Magistrate refusing to commit an accused for trial did not finally determine the rights and obligations of the parties and therefore did not come within the meaning of "statutory power" as defined in s 3.

(l) *Thames Jockey Club Inc v New Zealand Racing Authority* [1974] 2 NZLR 609 (SC), [1975] 2 NZLR 768 (CA): exercise by the Racing Authority of its power under the Racing Act 1971 to recommend action to the Minister of Internal Affairs was not the exercise of a "statutory power" as defined in s 3 of the Judicature Act 1972.

(m) See eg *Estate and Trust Agencies (1927) Ltd v Singapore Improvement Trust* [1937] AC 898; *R v Kent Police Authority, ex parte Godden* [1971] 2 QB 662: *Bell v Ontario Human Rights Commission* [1971] SCR 756; *Lower Hutt City Council v Bank* [1974] 1 NZLR 545 (prohibition); *R v Botting* (1966) 56 DLR (2d) 25; *R v Coleshill Justices, ex parte Davies* [1971] 1 WLR 1684 (certiorari); *R v Race Relations Board, ex parte Selvarajan* [1975] 1 WLR 1686 at 1700 per Scarman LJ (certiorari, prohibition, declaration).

(n) *Re Lamoureaux and Registrar of Motor vehicles* (1972) 32 DLR (3d) 678 (suspension of a drivers' licence which arose automatically from statute rather than pur

stances an originating summons for a declaratory order remains the appropriate remedy.

In view of the failure of the statutory remedy to cover all the situations in which relief was available under the existing public law remedies, it is fortunate that the 1972 Act did not abolish the procedures for obtaining the prerogative remedies provided by the Code of Civil Procedure *(o)*. However the Judicature Amendment Act 1972 had the curious effect of compounding the existing problems of choosing between declaratory relief and the extraordinary remedies by adding a further problem of choosing between the traditional procedures prescribed by the Code of Civil Procedure and the Declaratory Judgments Act, and the application for review procedure provided by the 1972 Act. The applicant who was in any doubt as to whether the action complained of involved the exercise of a "statutory power" was well advised to ignore the application for review procedure in favour of the traditional remedies and procedures *(p)*.

Section 10 of the 1977 Amendment Act aims at removing the problems arising from the incomplete coverage of the new remedy by extending the definitions of "statutory power" and "statutory power of decision". First, the definition of "statutory power" has been extended to include the power "to make any investigation or inquiry into the rights, powers, privileges, immunities, duties, or liabilities of any person" *(q)*. The definition of "statutory power of decision" has also been extended to include decisions which merely "affect" rather than "decide or prescribe" the rights, powers etc. of any person *(r)*. These amendments ensure that the application for review procedure is now available to challenge the exercise of powers of investigation and recommendation which do not culminate in decisions of immediate binding effect.

Secondly the application of the new procedure has been extended to cover decisions of incorporated voluntary associations. Section 10 (1) achieves this result by amending the initial words of the definition of "statutory power" to read:

> " 'Statutory power' means a power or right conferred by or under any Act or by or under the constitution or other instrument or incorporation, rules, or bylaws of any body corporate . . . ."

Section 10 (3) extends the definition of "statutory power of decision" in the same manner.

In view of the expressed aim of the Public and Administrative Law Reform Committee to "enable relief to be granted [on an application for review] if any one of the five remedies named in s 4 (1) might have been available hitherto" *(s)*, s 10 of the 1977 Amendment Act is both clumsy and inadequate. It is clear that the statutory remedy is still not available in every situation in which one or other of the five remedies named in s 4 (1) is available. There is no obvious reason for extending the availability of the application for review procedure to decisions of *incorporated* domestic bodies but continuing to exclude *unincorporated* voluntary associations from the ambit of the remedy when it is clear that at common law declaratory and injunctive relief may be granted in respect of ultra vires decisions of unincorporated domestic bodies *(t)*. Non-statutory prerogative powers of a public nature remain outside the scope of the Act, and the application for review proce-

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suant to a "decision" made by a public official did not involve the exercise of a "statutory power" under the almost identical definition contained in the Judicial Review Procedure Act 1971 (Ontario)); *Rotorua Aero Club Inc v Air Services Licensing Authority*, unreported judgment of Barker J, noted [1977] NZ Recent Law 216 (an opinion by the secretary to the Licensing Authority as to the meaning of an Order in Council is not a "decision" which can be questioned on an application for review). See also *Elson-White v Auckland Education Board*, unreported judgment of Cooke J, 18 December 1975, Auckland, No A 756/75 and noted in the *Ninth Report of the Public and Administrative Law Reform Committee* (1977) p 6.

(o) Section 6 provides that proceedings for mandamus, prohibition or certiorari in relation to the exercise etc *of a statutory power* shall be treated and disposed of as if they were an application for review. Section 7 provides that proceedings for declaratory or injunctive relief in relation to the exercise of a statutory power shall be treated as an application for review only if the Court considers it appropriate on application by a party.

(p) See eg *Lower Hutt City Council v Bank* [1974] 1 NZLR 385 (Wild CJ), [1974] 1 NZLR 545 (CA) where in proceedings commenced after the Judicature Amendment Act 1972 came into force the Courts issued a writ of prohibition under R 463 of the Code of Civil Procedure to restrain the council in the exercise of a power of decision which did not have immediate binding effect. Section 6 of the Judicature Amendment Act 1972 was not referred to, presumably because it was accepted that the Council's decision did not involve the exercise of a "statutory power" as defined in section 3.

(q) Section 10 (2) adding a new para (e) to the definition of "statutory power" contained in s 3 of the 1972 Act.

(r) Section 10 (3).

(s) *Eighth Report* (1975) para 26.

(t) Eg *Fisher v Keane* (1878) 11 Ch D 353; *Labouchere v Earl of Wharncliffe* (1879) 13 Ch D 346; *Abbott v Sullivan* [1952] 1 KB 189; *Millar v Smith* [1953] NZLR 1049; *Walton v Holland* [1963] NZLR 729; *Nagle v Feilden* [1966] 2 QB 633; *Trivett v Lee* [1976] 1 NSWLR 312; *Reid v Rowley and The New Zealand Trotting Conference*, unreported decision of NZ Court of Appeal, 14 February 1977, No CA 12/75.

dure is still unavaible to challenge the applicability of automatic statutory consequences which involve no exercise of official discretion.

These problems of incomplete coverage all follow from the use of the term "statutory power" to limit the range of application of the new statutory remedy. There is no readily apparent reason for restricting the use of the remedy to any such defined category of powers. The terms "statutory power" and "statutory power of decision", together with their original definitions, were adopted from the Ontario Judicial Review Procedure Act 1971. But the Ontario Act only limits the availability of *declaratory* and *injunctive* relief under the new procedure to exercises of "statutory power", the apparent purpose being to ensure that the statutory procedure is restricted to the public law uses of these remedies. The Ontario Act places no such restriction on the use of the statutory procedure for relief in the nature of certiorari, prohibition and mandamus – such relief is available under the Ontario Act in all circumstances in which the prerogative writs were available prior to the Act. The New Zealand Public and Administrative Law Reform Committee gave no indication in its Reports that it realised that it was departing from the Ontario model in making the availability of *any* kind of relief under the new procedure dependent upon proof that the application related to the exercise of a "statutory power". Once the Committee appreciated that restricting the availability of relief on an application for review to exercises of "statutory power" gave rise to problems of incomplete coverage and compounded the problem of choosing between procedures which the 1972 Act was designed to remove, it is difficult to understand why the Committee did not recommend that this limitation on the scope of the new procedure be abolished. Indeed it seems particularly illogical to continue to limit the new remedy to exercises of "statutory power" while at the same time extending the meaning of this term to include decisions of incorporated domestic bodies – exercises of power which are clearly not "statutory" in any sense.

These problems have been avoided in other Commonwealth jurisdictions which have undertaken reform of the procedures for obtaining the public law remedies. In both New South Wales *(u)* and the Canadian province of Nova Scotia *(v)* the old judicial review remedies have been preserved but much simpler procedures have been adopted. Relief continues to be available in the same circumstances as before, without reference to any complicating factor such as the "statutory power" limitation. In both jurisdictions it is now possible to combine applications for all the judicial review remedies in one single proceeding, and a claim for damages can be joined with an application for a prerogative order *(w)*.

A similar approach was recommended for New Zealand by the Supreme Court Procedure Revision Committee in its *Draft Revised Code of Civil Procedure (x)*. The Committee recommended that all applications for orders in the nature of mandamus, injunction, prohibition, certiorari, or quo warranto, whether made under the Code provisions or by way of application for review under Part I of the Judicature Amendment Act, should be commenced by way of the single new procedure recommended for originating civil proceedings in the Supreme Court – by statement of claim and notice of proceedings under Part II of the Revised Code. Any of the named extraordinary remedies could be claimed in combination in a single proceeding, together with any other relief including damages and declaration *(y)*. In any such proceeding the Court would be empowered to make such interim orders as it thinks fit *(z)*.

In its *Ninth Report*, the Public and Administrative Law Reform Committee strongly opposed adoption of Part VI of the *Draft Revised Code of Civil Procedure*. The Committee declared *(aa)*:

> "We adhere to the opinion . . . that it is better, as well as more convenient for practitioners, to be able to consult a single source, the Judicature Act itself, for
>
> "(1) The nature of the remedy available on review and
>
> "(2) The procedure for obtaining that remedy.
>
> "We strongly recommend that the amendments proposed in the draft Bill included in our Eighth Report be adopted, and that the Revised Code should not include provisions which overlap or are different from those contained in that Bill."

But it has been demonstrated that the Judicature Act, even as amended, does not constitute a single source which exhaustively specifies the nature of the remedies available on review and the procedure for obtaining them. On the other hand,

(u) Supreme Court Act 1970 (NSW) and the Rules of the Supreme Court contained in the Fourth Schedule to the Act.

(v) Nova Scotia Rules of Civil Procedure 1972.

(w) For a discussion of these reforms see Mullan, "Reform of Administrative Law Remedies – Method or Madness" (1975) 6 Federal Law Review 340 at 356-365.

(x) Part VI, Extraordinary Remedies and Applications for Review (October 1975) clause 2.

(y) *Draft Revised Code of Civil Procedure*, Part VI, clause 2 (2).

(z) Ibid, cl 3.

(aa) *Ninth Report* (1977) para 19.

adoption of Part IV of the *Draft Revised Code* would give rise to one single simplified procedure by which all the public law remedies could be claimed, in combination with each other and with any other form of relief, in every situation in which one of the traditional remedies was available at common law. However passage of the Judicature Amendment Act 1977 suggests that the Public and Administrative Law Reform Committee has carried the day, and that any improvement of the existing procedures must be effected by further amendment of the Judicature Act.

The obvious model for New Zealand to follow in this regard is the Draft Procedure for Judicial Review Bill recommended by the English Law Commission in its *Report on Remedies in Administrative Law (ab)*. The Law Commission followed the Ontario and New Zealand legislation in recommending the creation of a new form of procedure called an "application for judical review" by which application could be made for any one or more of the remedies of mandamus, prohibition, certiorari, declaration or injunction *(ac)*. However the Commission expressly rejected the idea of limiting the availability of any of these forms of relief to exercises of "statutory power" or any other defined category of functions: the new procedure would be available in every situation in which the applicant would, prior to the Act, have been entitled to one of the named remedies *(ad)*. It is submitted that New Zealand should follow these overseas examples by deleting all references in the Judicature Amendment Act to the term "statutory power", thereby completely removing the present limitation on the scope and availability of the application for review procedure.

All references to the term "statutory power of decision" – one of the five definitions of "statutory power" which is itself separately defined in s 3 – should also be deleted. One curious feature of the 1972 Act which has been perpetuated in the 1977 Amendment is that the application of certain sections of the Act is expressly restricted to the exercise of a "statutory power of decision". These are s 4 (2) which allows the Court to set aside a decision where the applicant would be entitled to a declaration of invalidity; s 4 (5) which empowers the Court to refer a decision back to the official with directions for reconsideration; s 5 which empowers the Court to make an order validating a decision where the sole ground for relief is a defect in form or a technical irregularity and no substantial wrong or miscarriage of justice has occurred; and s 10 (2) (j) which authorises the Judge to direct that the record of the decision under review be filed in Court.

The Public and Administrative Law Reform Committee seemed to regard "statutory power of decision" as a more limited category of power quite separate and distinct from the other defined categories of "statutory power" *(ae)*. It is possible to identify some rational basis for limiting the operation of s 10 (2) (j) in this manner. If the Committee assumed that the term "statutory power of decision" embraced only decisions of a judicial or quasi-judicial nature, restricting the operation of the power to direct that the record of the decision be filed in Court for the purposes of review for error of law makes some sense *(af)*. But there is no apparent good reasons for excluding functions of the kind described in paras (a), (c), (d) and now (e) of the definition of "statutory power" from the operation of ss 4 (2), 4 (5) and 5 of the Act.

In fact, however, it is extremely doubtful whether the definitions, as drafted, achieve the Committee's stated aim. As Mullan points out, it is difficult to conceive of any decision-making power embraced by one of the other defined catergories of "statutory power" which would not also fall within the definition of "statutory power of decision" *(ag)*. This is particularly so in view of the 1977 Amendment Act which extends "statutory power of decision" to include exercises of power which merely "affect" rather than "decide" or "prescribe" an individual's rights, powers etc. As the reason for restricting the operation of certain sections to a more limited category of functions is obscure and it is doubtful whether

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(ab) Law Com No 73, Cmnd 6407 (March 1976) Appendix A.

(ac) Ibid, cl 1.

(ad) The Commission did feel that the need to restrict the grant of injuctive and declaratory relief under the new procedure to the public law uses of those remedies, but achieves this result without reference to any such troublesome term as "statutory power". Clause 2 of the Draft Bill provides that a declaration or injunction may be granted on an application for judicial review if the Court considers it just and convenient having regard to all the circumstances of the case, and in particular, the criteria which determine whether a particular case falls within the normal public law area in which the prerogative orders are available.

(ae) See *Fifth Report* (1972) Appendix at p 8: " 'Statutory power of decision' is a more limited definition, which is necessary for ensuring that the powers given to the Court by [sections 4 (2), 4 (5), 5 and 10 (2) (j)] do no extend to cases covered by paragraphs (a), (c) and (d) of the definition of 'statutory power' ".

(af) If this were in fact the case, it may tend to undermine the writer's later observations on the effect of the new s 4 (2A): see text accompanying n (ak) infra.

(ag) See Mullan, [1975] NZLJ 154 at 162-163.

the present definition achieves this aim, it is submitted that all references to the term "statutory power of decision" should be deleted from the Act.

B. Other changes effected by the Judicature Amendment Act 1977

(i) *Section 4 (2A)*

Section 11 (1) of the 1977 Amendment Act inserts a new s 4 (2A) into the 1972 Act. This provides:

> "Notwithstanding any rule of law of the contrary, it shall not be a bar to the grant of relief in proceedings for a writ or an order of or in the nature of certiorari or prohibition, or to the grant of relief on an application for review, that the person who has exercised, or is proposing to exercise, a statutory power was not under a duty to act judicially; but this subsection shall not be construed to enlarge or modify the grounds on which the Court may treat an applicant as being entitled to an order of or in the nature of certiorari or prohibition under the foregoing provisions of this section."

This is a most curious provision. The Committee's stated object *(ah)* in drafting the provision is merely to give express statutory recognition and approval to the tendency of some courts *(ai)* to grant certiorari and prohibition for breach of implied procedural requirements (viz fairness or natural justice) by tribunals exercising administrative rather than judicial functions. The need for such a provision in order to achieve the Committee's purpose is questionable. The Courts clearly have jurisdiction to make a declaration that a non-judicial tribunal has acted in breach of the requirements of natural justice or fairness, and s 4 (2) of the 1972 Act provides that where an applicant for review is entitled to a declaration of invalidity the Court may instead make an order in the nature of certiorari setting the decision aside *(aj)*. However s 4 (2A), as drafted, may also have a wider and apparently unexpected effect. Complete removal of the judicial function requirement would seem to allow relief in the nature of certiorari and prohibition to issue to *non*-judicial tribunals for *non*-jurisdictional errors of law apparent on the face of the record *(ak)*.

(ii) *The Court's power to direct reconsideration under s 4 (5)*

Section 11 (2) of the 1977 Amendment clarifies the extent of the Court's power under s 4 (5) of the 1972 Act to refer the subject matter of an application for review back to the tribunal with directions for reconsideration of the decision or any part of it. The Committee felt that the original provision gave rise to some uncertainty as to whether the power to direct reconsideration of a decision was *ancillary* to s 4 (1) and therefore exercisable only where the Court also actually *granted* one of the forms of relief specified in s 4 (1), or whether the power was *independent* of s 4 (1) and exercisable in circumstances, where the Court was unwilling to grant any other remedy *(al)*. The 1977 Act gives effect to the Committee's preference for the latter view. The amended s 4 (5) makes it clear that provided that Court is satisfied that the applicant is *entitled* to relief under s 4 (1), the Court may direct reconsideration under s 4 (5) either in *addition* to or *instead* of granting any other relief *(am)*.

Section 11 (3) of the 1977 Act inserts a new s 4 (5A) which makes it clear that the Court may make an interim order under s 8 to prevent any action being taken in pursuance of the decision pending reconsideration *(an)*.

Section 11 (3) also inserts a new s 4 (5C) which provides:

> "Where any matter is referred back to any person under [section 4 (5)], the act or omission that is to be reconsidered shall, subject to an interim order made by the Court under [section 4 (5A)], continue to have effect according to its tenor unless and until it is revoked or amended by that person."

This is another odd provision. Maintaining

(ah) *Eighth Report* (1975) para 27.

(ai) Eg *R v Birmingham City Justice* [1970] 1 WLR 1428; *R v Liverpool Corporation, ex parte Liverpool Taxi Fleet Operaters' Association* [1972] 2 QB 299; *Lower Hutt City Corporation v Bank* [1974] 1 NZLR 545.

(aj) The only possible extension effected by s 4 (2A) would result from the fact that the operation of s 4 (2) is restricted to "statutory powers of decision", while s 4 (2A) applies to the perhaps wider category or "statutory powers".

(ak) Unless restriction of the operation of s 10 (2) (j) to "statutory powers of decision" is interpreted as precluding the Court from obtaining and scrutinising the records of non-judicial decisions: see text accompanying n (af) supra.

(al) *Eighth Report of the Public and Administrative Law Reform Committee* (1975) para 28.

(am) In fact the Committee's concern may have been groundless. In each of the three cases in which the question arose, the Court indicated that it was prepared to order reconsideration under s 4 (5) without granting relief under s 4 (1): *Karamu Land Co Ltd v Attorney-General* [1974] 2 NZLR 583; *Clark v Wellington Rent Appeal Board* [1975] 2 NZLR 24, 32; *Glenpark Homestead Ltd v North Canterbury Catchment Board* [1975] 2 NZLR 71, 89.

(an) White J had already asserted this power in *Karamu Land Co Ltd v Attorney-General* ibid.

(ao) The provision confers a wide descretion on the

the legal force of the decision under challenge and preserving the validity of action taken in pursuance of it during the interim period before it is amended or revoked after reconsideration by the responsible official makes sense where the Court directs reconsideration without granting any other relief. But where a direction for reconsideration is made *in addition to* an order in the nature of certiorari setting the decision aside, a literal reading of s 4 (5C) would negate the effect of the primary remedy of certiorari. This would mean that the Court must *always* make a specific interim prohibitory order under s 8 wherever it wishes to deny legal authority to action taken in pursuance of a decision during the interval pending reconsideration, even if other relief under s 4 (1) has also been granted.

(iii) *Interim orders – section 8*

Section 12 of the 1977 Amendment Act substitutes a new s 8 which clarifies and expands the Courts' powers to make interim orders to preserve the status quo pending final determination of an application for review. Section 8 (1) now provides that the Court may, on the application of any party, make an interim order prohibiting the respondent from taking any further action pursuant to the decision; staying any proceedings, civil or criminal, in connection with any matter to which the application for review relates; or declaring that any licence that has been revoked or suspended by the decision under challenge, or will expire before final determination of the application for review, still continues in force *(ao)*.

The new s 8 (2) is an important provision which for the first time authorises the grant of interim relief against the Crown. Section 14 (2) of the Judicature Amendment Act 1972 expressly made the whole of the 1972 Act, including s 8 which conferred upon the Court a general power to make such interim orders as it thought proper, subject to the Crown Proceedings Act 1950. It was therefore assumed that the prohibition upon the grant of injunctive relief against the Crown contained in s 17 (1) of the Crown Proceedings Act would apply to prevent the Court from making a mandatory interim order against the Crown pursuant to s 8 of the Judicature Amendment Act. Although s 17 (1) of the Crown Proceedings Act empowers a Court to make a declaration against the Crown in lieu of an injunction, the Courts have held that declaratory orders are necessarily final orders definitive of the rights of the parties and have refused to grant interim declarations of right against the Crown *(ap)*. In its *Eighth Report* the Public and Administrative Law Reform Committee recommended that s 14 (2) of the Judicature Amendment Act 1972 be amended to make it clear that s 8 overrides and amends s 17 (1) of the Crown Proceedings Act 1950, so that binding interim orders under s 8 can be made against the Crown *(aq)*. Parliament did not adopt this recommendation. Instead the 1977 Amendment Act adopts the compromise position recommended by the English Law Commission *(ar)*. The new s 8 (2) now provides that while the Court's power under s 8 (1) to make prohibitory interim orders with coercive effect does not extend to the Crown, in a case where the Crown is respondent the Court may make an interim order *declaring* that the Crown *ought not* take any further action pursuant to the decision under challenge until the application for review is finally determined. Although it may be doubted whether the Legislature's refusal to permit the issue of binding interim orders against the Crown is warranted, the interim declaratory order will almost certainly achieve the desired object. There is no reason to doubt that the Crown will respect and comply with the terms of an interim declaration in the same way as it complies with a final declaratory order.

(iv) *Requirements of procedure and pleading – section 9*

Section 13 of the 1977 Amendment Act substitutes a new s 9 which clarifies requirements of procedure and pleadings on an application for review. Section 9 (1) now provides that an application for review shall be made by motion accompanied by a statement of claim. The statement of claim must state (a) the facts on which the appli-

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Courts and the decision of Barker J in *Young v Bay of Islands County Council*, Supreme Court, Auckland, 13 December 1977, No A 83/77 indicates that the Courts may be anxious to preserve the flexibility of the interim remedy. Barker J expressed the view that while the rules which govern the issue of interim injunctions (see *American Cyanamid Co v Ethicon Ltd* [1975] AC 396) may be of assistance in some cases, they should not be treated as binding in this context.

(ap) *Underhill v Ministry of Food* [1950] 1 All ER 591; *International General Electric Co of New York Ltd v Commissioners of Customs and Excise* [1962] Ch 784 (CA); *Amax Potash Ltd v Government of Saskatchewan* (1975) 65 DLR (3d) 159 (CA). Cf *Harder v New Zealand Tramways Union*, Supreme Court, Auckland, 28 April 1977, where Chilwell J, without comment on the question, made an interim declaration against a private citizen.

(aq) *Eighth Report* (1975) para 30 and Appendix p 4.

(ar) *Report on Remedies in Administrative Law* (1976) Cmnd 6407, p 23 and clause 3 (2) of the Draft Bill at Appendix A.

cant bases his claim for relief; (b) the legal grounds on which the claim is based; and (c) the nature of the relief sought. In these respects the Act merely gives express statutory recognition to the pleading requirements imposed by the Courts since 1972 *(as)*. In addition, s 9 (6) now expressly requires that each respondent file a statement of defence.

(v) *Interlocutory process on an application for review – section 10*

Section 14 of the 1977 Act substitutes a new s 10 which incorporates a number of reforms. Section 10 (1) empowers a Judge to at any time, either on the application of a party or on his own initiative, call a conference of the parties or their counsel. This power to call a prehearing conference presided over by a Judge is a useful measure which should enable complicated cases to be determined as fully and as expeditiously as possible. Section 10 (2) provides that "[a]t any such conference" the presiding Judge may, inter alia, settle the issues to be determined; decide what persons shall be cited and served as respondents; give directions as to filing of statements of defence, affidavits and other documents; require a party to make admissions in respect of questions of fact or provide further or better particulars; order a party to make discovery of documents or permit a party to administer interrogatories; direct that the record of the decision under challenge be filed in Court; and fix a time and place for the hearing.

Once again, however, the section is drafted rather clumsily. As drafted by the Committee and first introduced into the House of Representatives, the Bill made the exercise by a Judge of any of the powers listed in s 10 (2) dependent upon the calling of a conference. In practice, this would have *curtailed* the powers of direction previously available to a Judge in review proceedings under the provisions of the Code of Civil Procedure *(at)*. This problem was identified by the Statutes Review Committee, but remedied in rather a clumsy manner by adding s 10 (3) which provides:

> "Notwithstanding any of the foregoing provisions of this section, a Judge may, at *any time before the hearing of an application for review has been commenced*, exercise any of the powers specified in subsection (2) of this section *without holding a conference under* subsection (1) of this section."

Certain of the particular powers conferred by s 10 (2) warrant closer consideration. Doubts have been expressed in England as to whether the English Courts have power under the Rules of the Supreme Court to order discovery or interrogatories in applications for prerogative relief commenced by originating motion *(au)*, and s 10 (2) (i) of the Judicature Amendment Act is presumably intended to dispel any such doubts in New Zealand. In fact, however, it is clear that applications for the extraordinary remedies commenced by motion under R 466 of the New Zealand Code of Civil Procedure are "actions" as defined in s 2 of the Judicature Act 1908 *(av)* and consequently the rules relating to delivery of interrogatories and orders for discovery, production and inspection of documents are fully applicable to such proceedings *(aw)*. By virtue of s 10 (2) (k), which provides that the Judge may exercise "any powers of direction or appointment vested in the Court or a Judge by the rules of Court in respect of originating applications", all of these powers, together with the power conferred by R 184 to order the deponent of an affidavit to attend for cross-examination, are available to the Judge in an application for review under the Act.

The new s 10 (2) (j) is also a curious provision. Section 10 of the 1972 Act provided:

> "On an application for review of a decision made in the exercise or purported exercise of a statutory power of decision, the Court may direct that the record of the proceedings in which the decision was made, or any part of the record, be filed in an office of the Court."

Presumably this provision was intended to facilitate review for error of law apparent on the face of the record. In the most recent New Zealand case in which the matter was considered, the Court took a relatively narrow view of what comprises the record for the purpose of review of patent error of

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(as) See *NZ Engineering etc Industrial Union of Workers v Court of Arbitration* [1973] 2 NZLR 535 (Wilson J); *Pagliara v Attorney-General* [1974] 1 NZLR 86, 88-89 (Quilliam J); *Thompson v Post Office Appeal Board*, unreported judgment of Wild CJ, Supreme Court, Wellington, 19 September 1974, No M96/74.

(at) The new s 9(7) provides that the normal rules of Court shall apply to applications for review *subject to* Part I of the Judicature Amendment Act 1972 as amended.

(au) See Law Commission's *Report on Remedies in Administrative Law* (1976) Law Com No 76, Comnd 6407, para 15; *Barnard v National Dock Labour Board* [1953] 2 QB 18, 43 per Denning LJ (certiorari). Cf *Coni v Robertson* [1969] 1 WLR 1007 (originating summons).

(av) Eg *Barker v Marks* (1888) 6 NZLR 529 (CA); *In re Harris* (1905) 24 NZLR 730.

(aw) Eg *Wallace and Fiord Hospital Contributors v Southland Hospital and Charitable Aid Board (No 1)* (1889) 8 NZLR 259, (orders for discovery and inspection of documents in mandamus proceedings); *In re the Auckland Piano Agency Ltd* (1928) GLR 249 (order for discovery in motion for injunction under R 466).

law. In *Clark v Wellington Rent Appeal Board (ax)* the Board filed in Court a set of documents labelled "Record of Proceedings" which included not only Clark's application, the landlord's response, the Board's formal decision and a brief statement of its reasons, but also the transcripts of the evidence presented by the applicant at the hearing before the Board. In the review proceedings, counsel for the applicant submitted that as the transcripts of evidence were tendered as part of the record the Court could inspect them for error. O'Regan J rejected this argument, concluding:

> "There is nothing . . . [in the cases] which give countenance to any suggestion that the transcript of the evidence adduced before the tribunal (whether referred to the formal order or not) forms part of the record. In those circumstances, I conclude that the evidence adduced before the board is not part of the record . . . " *(ay)*.

Section 10 of the Judicature Amendment Act 1972 was not referred to.

The Public and Administrative Law Reform Committee considered that the slightly amended form of the new s 10 (2) (j) would overcome the problem confronted by the applicant in *Clark's* case. The Committee observed: "The legislative amendment which the Committee has suggested defines what constitutes the record and eliminates the difficulty which confronted the applicant in this [*Clark's*] case" *(az)*. The new provision reads:

> "In the case of an application for review of a decision made in the exercise of a statutory power of decision, [a Judge may] determine whether the whole or any part of the record of the proceedings in which the decision was made should be filed in Court, and give such directions as he thinks fit as to its filing."

Clearly this provision does *not* define what constitutes the record of the proceedings for the particular purpose of review for patent error of law, and it is clear from *Clark's* case that the mere fact that a document is filed in Court as part of the record of the proceedings, or even that the tribunal *itself* regards a document as part of the record *(ba)*, is not decisive of this question. It is submitted that s 10 (2) (j) does not affect the decision in *Clark's* case, and that if it was intended to empower the Judge to extend the scope of the record for the purpose of review to include transcripts or notes of evidence, an express provision to this effect was necessary.

C. Important omissions from the Judicature Amendment Act

Two important matters which were not dealt with by the 1972 Act remain untouched by the 1977 Amendment Act.

First, in New Zealand it is still impossible to join a claim for damages arising from an illegal act by a public authority with either a motion under the Code of Civil Procedure for one of the prerogative remedies or an application for review under the Act *(bb)*. The English Law Commission recognised that cases may arise where it is convenient to dispose of a claim for damages and an application for prerogative relief in the one proceeding. Although the Commission conceded that "normally oral rather than affidavit evidence is desirable for the proof and assessment of damages" *(bc)*, it recognised that "there may be cases where the court, having decided in exercise of its review jurisdiction that illegality has occurred, and being satisfied that the claim for damages is one recognised by the law, may find that there is no remaining dispute that the damage resulted from the illegality or as to the fact or extent of damage or as to the quantum of damages" *(bd)*. Consequently the Commission's *Draft Bill* makes express provision for joining a claim for damages with an application for judicial review *(be)*. The reformed rules of civil procedure recently adopted in New South Wales and Nova Scotia permit a claim for damages to be joined with an application for a prerogative remedy *(bf)*, and the *Draft Revised Code of Civil Procedure* prepared by the New Zealand Supreme Court Procedure Revision Committee also makes such provision *(bg)*. The continued failure of the Judicature Amendment Act to permit a claim for damages to be made in the same proceedings as an application for review leaves an important gap in the new procedure and perpetuates one of the problems of choice which the legislation was designed to remove.

(ax) [1975] 2 NZLR 24.

(ay) Ibid at 31.

(az) *Eighth Report* (1975) p 16.

(ba) Cf *Gold Coast City Council v Canterbury Pipelines (Aust) Ltd* (1968) 118 CLR 58: intention of the arbitrator held to be the decisive factor in determining whether a document forms part of his award for the purpose of review.

(bb) A claim for damages can, of course, be joined with an action for an injunction or a declaration.

(bc) *Report on Remedies in Administrative Law* (1976) Law Com No 73, Cmnd 6407, p 25. But see *Palmer v Hunt* [1941] NZLR 515 where Myers CJ stated that if both parties agree evidence may be taken *viva voce* in proceedings for an extraordinary remedy commenced by motion, and the Judge retains a discretion to override the objection of a party.

(bd) Ibid.

(be) Ibid. Appendix A, clause 4.

(bf) See supra footnote (w).

(bg) Part VI, Rule 2 (2).

Secondly, no attempt has been made to deal with the problem of locus standi *(bh)*. Although it could possibly have been argued that by combining all the previous remedies within one new statutory remedy, s 4 (1) had the practical effect of removing the more restrictive locus standi requirements in respect of particular remedies (so that, for example, on an application for review requesting relief in the nature of mandamus the Court could grant such relief to an applicant who would not have locus standi for mandamus under the pre-existing law but would have standing for an order of certiorari), the Courts appear to have rejected this view. The Courts seem to have preferred the more restrictive view that in order to be entitled to a particular form of relief on an application for review the applicant must establish that he had locus standi for that particular form of relief under the pre-existing law *(bi)*. There are strong arguments in favour of this more restrictive interpretation of the effect of s 4 (1) *(bj)*, and it seems to represent the intention of the Public and Administrative Law Reform Committee responsible for the draft Bill upon which the Act is based *(bk)*.

It would be unfair to criticise the Committee for failing to recommend abolition of the different locus standi requirements for the various remedies in favour of a single statutory test of standing for all the forms of relief available in an application for review. A wide formula of the kind recommended by the English Law Commission which effectively leaves the matter of standing to the discretion of the Courts *(bl)* would seem to be rather meaningless, while development of a more specific single test of standing involves difficult policy choices which necessarily make agreement as to the precise terms of the test hard to secure *(bm)*.

However the most urgent need for reform in this areas relates to the standing requirements applicable to groups and organisations claiming to represent public or sectional interests, and it is hoped that the Committee feels able to make a clear recommendation on this matter in the near future. There is much to be said for the compromise approach adopted by the Australian Government in the Administrative Appeals Tribunal Act 1975 (Cth). Section 27 provides that an organisation or association of persons, whether incorporated or not, shall have standing to apply to the Tribunal for review of a decision "if the decision related to a matter included in the objects or purposes of the organisation or association", provided however that the organisation was formed and its objects or purposes included the matter in question at the time the decision was given.

Conclusion

The most serious deficiency of Part I of the Judicature Act 1972 is its failure to achieve the Public and Administrative Law Reform Committee's stated aim of providing a single simplified procedure by which any of the public law remedies may be claimed, either singly or in combination, in every situation in which one of the traditional remedies was previously available. This continuing problem of incomplete coverage results from the limitation of the availability of the application for review procedure to exercises of "statutory power". The problem can be cured quite simply by removing this limitation upon the scope and application of the statutory procedure. The Act should also be amended to enable a claim for damages to be made and disposed of in the same proceedings as an application for review.

(bh) Despite a specific request by the Minister of Justice that the Public and Administrative Law Reform Committee consider the question particulary the operation of standing requirements "in relation to such bodies as environmental committees which claim to represent special interests": *Eighth Report* (1975) para 23.

(bi) See eg *Envirvonmental Defence Society Inc v Agricultural Chemicals Board* [1973] 2 NZLR 758, 763; *Waikouaiti County Ratepayers and Householders Assn Inc v Waikouaiti County* [1975] 1 NZLR 600, 600-607; *Bates v Waitemata City*, unreported judgment of Speight J, Supreme Court, Auckland, 29 April 1975, No A480/75.

(bj) See Mullan, [1975] NZLJ 154 at 161.

(bk) See *Fifth Report* (1975) at p 6 and Appendix pp 7 and 9. It is interesting to note however that one member of the Committee apparently anticipated that s 4 (1) would achieve the wider effect discussed above: see JF Northey, "A Decade of Change in Administrative Law" (1974) 6 NZULR 25 at 44 n 94, 45 n 1 and accompanying text.

(bl) *Report on Remedies in Administrative Law*, Appendix A, clause 1 (3) of the Draft Bill: "The court shall not grant any relief sought on an application for judicial review unless it considers that the applicant has a sufficient interest in the matter to which the application relates."

(bm) See eg the Law Reform Commission of Australia's Discussion Paper on *Access to the Courts – I Standing: Public Interest Suits* (October 1977). This paper also demonstrates that even if a firm policy choice is made, the task of drafting a formula which is certain of achieving the desired effect remains an extremely difficult one: see especially p 17.

HUMAN RIGHTS

WORLD DEVELOPMENT, CHANGE AND THE CHALLENGE OF HUMAN RIGHTS

By Dr NEVILLE LINTON, *senior lecturer at the Institute of International Relations of the University of the West Indies in Trinidad. His field of interest is international politics with particular reference to the role of the Third World. He has been specialising recently in the foreign policy of the Commonwealth in the Caribbean race in world politics and international tourism. He has taught at New York State University and the University of Alberta and done consulting and research work in Britain and Africa. Dr Linton is a Guyanese and worked briefly as a civil servant before entering academic life. Dr Linton's paper was presented at the 1978 New Zealand Law Society Conference at Auckland.*

There is an unusual amount of attention being given to issues of human rights over the last year. This development is heartening, although one must wonder whether it is not but a political fashion wave inspired by President Carter and reflecting more the power of the chief executive of the US than an objective new wave of concern. Be that as it may, issues of human rights have in fact been coming more into the forefront of public international debate in the last few years, not only in the high sounding moral tones of American and other western leaders but in terms of very forthright demands for a really brave new world. The first round of this new debate was not actually articulated in the terminology of human rights; rather people spoke of the end of imperialism, the abating of exploitation, the changing of the rules and patterns of international economic intercourse and the establishment of a new international order. Only latterly have these same issues been increasingly discussed within the accepted framework of the principles of "human rights".

Post World War II, global international relations were dominated by the concerns of the great powers, ie the cold war in all its forms – political, economic and cultural – and the further development of the capitalist imperialist world economic system. This is not surprising since the modern world system was essentially a creation of western Europe and thus the values of international relations are rooted in the principles evolved from Western philosophy and economies. Particularly of importance in our context are the ideas of liberal western political thought which, stemming from the seminal ideas of Plato and Aristotle entrenched the idea of a society based on "natural" distinctions and thus on inequality. Hence flourished the concept of individualism with which in the English-speaking world the names of Hobbes, Locke and Bentham are associated and which ideas remain firmly established in societies which are heirs to those traditions. Hence also the counter attack by, first of all, Rousseau who made a point which is very important for our purposes – that civil liberty is impossible without a high degree of economic equality, and then there was John Stuart Mill who proposed a major role for the State if one was to ensure economic and social rights for the majority. Of course the Marxists more than anyone else have contributed to the spread of an awareness of the implications of the links between economic organization and social organisation.

But while post-war politics were initially dominated by the priorities of the great powers there has been, since the sixties, a steadily increasing emphasis on the problems of what is called the "third world", the most central of which is the problem of development. This was recognised by President Carter in his acceptance speech when he said that people everywhere had become "increasingly impatient with global inequalities". On another occasion Secretary Kissinger, who hitherto had focused on the cold war, noted, in a speech to UNCTAD in May 1976, that "the future of peace and progress may be determined by the necessities imposed by our economic interdependence" and therefore saw "an urgent need for co-operative solutions to the new global problems of the world economy". What this all adds up to is that the failure to live up to the principles of the UN Charter have brought us to an era which has to deal with what is probably the most explosive of all foreign policy issues – the demand for a new world economic order. It certainly is a complicated issue but it is an issue with a moral imperative – and thus a human rights issue.

Traditionally one can divide human rights into two main groupings – "civil and political" rights and "economic social and cultural" rights. The whole conception of human rights exists because of a *recognition* of the basic similarity of needs and a belief in the *capacity* of human beings to

meet those needs. As far as material needs are concerned we tend to isolate the basic physical needs as being "food, clothing, shelter and medical care". The difficulty in meeting these basic human needs comes from the fact that they can, generally, only be obtained through property, commodities or services which have monetary value in most societies. Moreover the mode of organisation of capitalist economic systems in particular, is such that access to these basic goods is hardly available under conditions of freedom. We tend to see freedom in political terms but economic structures also limit freedom, since they allocate resources and values; and the economic power – brokers use their power as to affect the freedom of both the general public and government. There is usually for instance the freedom of the co-operation to raise prices but no freedom of the consumer to lower them. Where basic needs are concerned it is obviously not an answer to suggest that the consumer should do without them if he does not like the price.

It is for this reason then that there is an attack on the world economic structure – to reform it so that basic human needs can be met. Domestically political scientists have long pointed out that there seems to be a relationship between the class structure of the "power institution" – social, political and economic – of the society and the tendency of those institutions to support a particular distribution of wealth in a given society. In short more stratified societies will show a more varied income pattern than those which are less class conscious. What is interesting in the international arena is that the spread of institutions of global parliamentary diplomacy – the international political organisations – means that the "poor" or "lower classes" of the state system do have representation in the main global institutions, indeed often dominate in numbers, and so are trying to engineer changes in international wealth distribution. By contrast in most domestic legislatures actual members of the lower classes are not represented as members in any significant numbers. But, of course, the third world states are not represented, in a controlling capacity, in the international economic institutions which matter – either public or private, and so have to use, for the most part, the powers of persuasion rather than of force.

To put the matter bluntly, the international state structure, as historically organised, produces want and is non-welfare oriented; it produces insecurity and the loss of freedom for many a small state. Moreover the dispersed, multi-level and competitive international system means that individual state actors need not feel guilty about what happens to the economy of another state in the "neutral" play of forces. Thus "New Zealand" does not feel that it has to have any guilt feelings about starvation in India – but an examination of the way the leading grain cartels operate make it clear that supply and demand are managed to the investors' interests and are not controlled by the "need" for food. Thus if basic human food needs are to be met there will have to be international systematic arrangements to ensure that food gets where it should get. What would be necessary in a world which is serious about food needs is an approach which not only permits the so-called "free" play of market forces and the domestic subsidising of the farmer, but also equally ensures that food is available to all at reasonable prices. Hence the need for a substantial World Food Fund and for stock-piling.

The average Westerner is only gradually beginning to appreciate the realities of the workings of both his domestic economy and the international economic system. Accustomed, in the twentieth century, very often to some democracy and welfare at home he is slow to grasp that abroad his country was associated with imperialism and exploitation, and that his economy was not built purely through the virtues proclaimed in his history books. Thus the problem is how to establish economic and social human rights in a very unequal world – a world of differences in population, national resources and skills – and thus different power. The difference in power and tastes leads to an unequal use of world resources and to unequal expectations and differing interpretations of experience.

It needs to be appreciated to what an extent our vision is affected by how we see history. For the people of west European descent, since the seventeenth century, the world has been their oyster – they roamed the seas and land at will, migrated at will, despoiled at will – indeed played God, for they transferred whole populations – like the Africans, annihilated others – like the American Indian, and, as the age of science developed, the environment was manipulated in the same arrogant fashion. Arrogant, because the value behind the activities was crassly materialistic and showed little consideration for the cultural values and sensibilities of those who were weaker in economic or military strength. Arrogant because it was a pure power game. Thus the problem is how to re-educate the inheritors of this western culture into living as equals in an aroused world. The problem is that equality necessarily will mean a stabilising of standards of living or even a reduction – it will mean an appreciation by the "rich" states that their wealth necessarily meant that others were poor, that some of the standards were artificially high and often involved an unseen cost. Thus, for instance, tropical foods are extremely cheap in the north and, traditionally, third world resources were virtually raped, if one looks at the terms on

which they were exploited. Equalisation of the quality of life on a world scale probably will mean a decrease in the endless, and often wasteful variety of consumer goods in "developed" countries since investment would be more related to needs than hitherto.

The imperial phase of the west has left the third world with inequitable and unacceptable resource depletion, environmental abuse and a frustrated population. But the phase has made the world one, has aroused slumbering cultures, and while initially that may seem as an intolerable challenge to some voices in the west, in the long run it is clearly beneficial to all. For equalising opportunity will release talents and intellectual power now wasted – a world divided on a rich/poor basis is poor in the best sense of the term for we are not really developing the rich civilisation that we are capable of – nor the really high standard in quality of life. A world in which the brain power of both the female population and the non-white peoples is engaged will make twentieth century civilisation look pale. The contribution of Japan in the short space of one century is a harbinger of the futures that await us if we are bold.

Much of the third world is prepared to be bold – hence the challenge to the west. Indeed they have no options, exactly because the populations, or significant sections of them, are aroused in their ambitions. The elites of many of these countries are eager to rush into modernity and thus their focus in human rights is less on the relationship between the state (or other power structure) and the individual, and more on the international system which thwarts independent and self-reliant economic and cultural development. Thus the stress is on "liberation" rather than "freedom" – the liberation of whole peoples from an international system of social, political and economic exploitation. As collectivities they are seeking the dignity of true equality. Thus as the *Herald Tribune* noted in an editorial last year (12 January 1977), many humane leaders of third world countries genuinely "cannot understand a concern for political rights that is greater than a concern about poverty and they suspect our motives".

Much of the human rights debate in recent years has centred around charges from western democracies that civil and political rights are being abused in the third world. This is undoubtedly true in many countries within and without the third world since true democracy has been achieved very rarely and very slowly in the long pull of history. What is of interest in whether the development process necessitates any restriction of civil and political rights and, if so, which ones and why. It is important first of all to make clear what is meant herein by the term "development". Development involves a consciousness about welfare and implies the raising of the level of living of the masses of the people so as to provide the basic necessities for life – ie food, shelter, clothing, health care, and for progress – ie employment, secure livelihood, better or more education, cheap transport and support for the non-material aspects of life. By contrast "growth" focuses on the expansion of the economy as measured by aggregate figures of commodity production.

When Europe and the US were emerging as industrial societies the emphasis was on growth rather than on development in the above sense. The rule was devil-take-the-hindmost and the welfare of the masses was certainly not the goal. Moreover populations were increasing slowly and labour was even scarce – as against the high rates of growth of labour force today. Emigration at a high rate was possible for whites, and with far less restriction; the agricultural revolution preceded the industrial for the most part, and there were no trade unions making wide-ranging demands. Despite these advantages there was not much true democracy at this stage.

In terms of the economy the claim of "free enterprise" has long ago been shown to be a myth – the actual model of the "competitive" system was of elites using social and political position to secure economic advantages; and using economic success to entrench monopolies, whenever competition seemed to be threatening their elite position or national power. In fact if one looks at the "stage" theorists such as Auguste Comte, Marx and, latterly, Walt Rostow, it would seem that there is no alternative but to have a phase of exploitation which, hopefully, is followed by an age of surplus in which a welfare state is possible, out of which comes your "mature" society where the emphasis is on services and quality of life; and production is an automatic, steady, scientifically controlled process. Of course, most of this analysis did not take into account the possiblity of global planning and organisation. The issue today is that the "developing" states are calling for such a global approach and I am suggesting that with such an approach, and given modern know-how, the exploitative first phase need not be as inhumane as it has been hitherto.

A proper development approach therefore would require international and domestic regulation. It would imply redistribution of goods and know-how and services between states and within states. The pregnant question of many a western liberal is whether redistribution necessitates coercive political structures – internationally and domestically. To deal with the latter first it should be recognised that economic development usually requires changes in the social and institutional structure which are often resisted by the historically privileged. What is often missing amongst the

entrenched elites is a capacity to transcend self-interest and to make the faculty of compassion, to which they give much lip-service, a reality in their actions when the challenge comes – governments are therefore tempted to use forces in such circumstances.

Conditions vary in third world countries – they range from poverty-stricken and resource-poor lands as in some parts of the Sahel, through those of swollen population and vast size as India, to countries with low population densities, or medium economic ranking as in Trinidad and Tobago. Most of them have had no history of democracy or popular participation since they were either colonies or ruled by autocracies. Very often the nation is not ethnically uniform and has not been welded into a common nationality; indeed many only have historically been kept together by force. Many were also, at the birth of their development consciousness, backward and predominantly agricultural countries. The general circumstances therefore are such that, if the country is to see relatively rapid growth and industrialisation, the chances are that strong, centralised direction is needed.

The development phase involves all sorts of controls, particularly when undertaken in countries suffering the disabilities which third world countries have. Controls and acceptance of a common discipline for the sake of development do not necessarily mean that basic civil and political rights have to be suppressed and no one who has looked at the writings of thinkers such as Franz Fanon or Julius Nyerere can have any doubt that in the third world there are leaders who believe that it is possible to mobilise the people for development while keeping to democratic tenets.

A distinction however, has to be made between a situation where there is the full and free sway of all the classic civil and political rights and the preservation of the basic core of these rights. The complaints in developing countries when governments move into a mobilising phase are often about rights which are dispensable in the circumstances, eg the unrestricted right to property or to strike. There are usually complaints from a privileged class which enjoyed both rights and a high level of income at the expense of the rights and income of the masses. A third world country whose developing strategy makes for an exchange of this relationship is, arguably, on the right path. If that path often involves the socialisation of the means of production – a method which suppresses one of the fundamental structures in which social inequality is based – then it is adding to freedom rather than reducing it. If that path involves a redistribution of income and property in such a way as ensures that the basic needs of the majority of the population are met, then it deserves to be seen as a progressive step.

If the state however, uses its power to foster elite consumption and privilege, to limit the options of those lower down, and to establish an elite which sets the goals and roles of the society, with no popular participation then we have an unacceptable situation even though we may have growth. It is depressing how consistently the leading western states, driven by the imperatives of the capitalist ideology, have favoured third world states of this latter sort – the Brazil and Irans of this world, and have been critical of those seeking the other routes such as Cuba and Guyana in the Caribbean. In this respect it is worth repeating here what might be considered to be the irreducible minimum in basic rights – the right to peaceful assembly and expression, the right to a government based on the expressed will of the people, the right to take part in the government, the right to a fair trial, the right to be not subjected to arbitrary arrest, detention or exile, the right to education and the right to freedom of information.

At times in some third world countries these rights are abused and the responsible government might indicate that it has no option since it is forced into repression because of its inability to maintain stability due to the absence of a redistributive and welfare programme which would pacify the masses. It might further be implied that the government is not wholly responsible since it is itself a victim of the international economic system, and, for instance, finds it difficult to establish welfare programmes since, in such circumstances, capital for investment is usually not forthcoming from bilateral or multilateral agencies.

It is a well-established fact that the IMF, its insistence on balanced budgets and tight constraints on social spending, imposes the sort of discipline which makes impossible a policy of development as defined earlier in this paper. One of the most important and pressing issues on the international agenda is the need to transform the outdated policies of the major multilateral economic institutions which are geared towards fostering growth along traditional lines. The influence of these agencies is wider than their own operations since at times western governments tend to require IMF accreditation of a state as a prerequisite for their own bilateral lending – the US for instance recently adopted this posture.

Thus one can see a scenario in which certain third world government leaders are really pathetic and desperate men, who do not have recourse to the outlets that others such as Cecil Rhodes had, to wit, "imperialism" and who, faced with discontent, instability and economic chaos, turn to repression or dictatorship. The policy is justified publicly in terms of ideological discipline or

rationalised by the explanation of cold war pressures, great power intervention or destabilisation. Moreover repression in today's world may have to be harsher since publics are more aware and there are more individuals (and romantics) willing to turn to daring measures – guerrillas, hijacking, kidnapping etc. Thus the insight of the Teheran Declaration is an important one which needs to be publicised widely and discussed; they said, inter alia "since human rights and fundamental freedoms are indivisible, the full realisation of civil and political rights without the enjoyment of economic, social and cultural rights is impossible".

To return then to the international arena where some significant progress is possible, since there is global acceptance of human rights ideals, global institutions do exist, and global interdependence is a pressing and obvious reality and no longer of the realm of rhetoric. It is now practically accepted that twentieth century underdevelopment is not just the first stage towards development as contemporary stage theorists optimistically suggested, but rather an independent structural situation essentially created by the imperatives and dynamism of the developed societies. Moreover most underdeveloped countries cannot make progress by following the route of the now developed countries – the international and national, social, economic, and political environments are different and, it is even arguable, the route is ethically not desirable.

The concept of world development is, admittedly, a new one and our failure to date in making significant progress is understandable. Only with the first Development Decade in the sixties was the debate joined. Then came the polarisation demonstrated at UNCTAD and Non-Aligned Movement Meetings and the beginning of attempts at dialogue with the adoption of the NIEO by the Seventh Special General Assembly and at the north/south talks (the Conference on International Economic Co-operation). Now that we have serious examination of the implications of world development the difficulties and complications are becoming clear but so also are the opportunities and possibilities.

One development is the tendency to speak more and more in terms of both a third world and a fourth world with the former seen as being on the road to development and the latter being a zone of non-development. This demonstrates the continuing tension between looking at the problem from a one-world perspective and looking at it sectorally, between looking at the entities we call states and looking at the other reality of peoples – equal in potential capacity and contribution – located in various territories around the globe, and whose human rights should all be met.

There will be increasing pressure over the next decade for a redistribution of the worlds goods, services, profits and production centres so as to change the pattern as to who becomes industrialised and, therefore, capable of achieving sustained growth. Such a redistribution is a sine qua non for a world based on equity. Such a redistribution however should be accompanied in third world countries by domestic policies consistent with true development. Recently even the president of the World Bank, Robert McNamara has been making this point. He said in a speech (6 June 1977) after the North/South Conference, that "while economic growth is a necessary condition of development in a modern society, it is not in itself a sufficient condition. The reason is clear: economic growth cannot change the lives of the mass of people unless it reaches the mass of the people". The amount of transformation of the world economy which would foster a healthy pattern of development in the third and fourth worlds is such that there is bound to be a restricting effect in the first world – the more the developing countries achieve economic strength the less of the international financial pie would be available to the first world. The more democratic the international economic system becomes the more there will be a willingness to distribute not only "goods" but also "bads" equitably around the world. That is the natural price of equity, of providing human economic and social rights for all.

Third world societies are all "underdeveloped"; third world regimes however vary considerably in their respect for democracy and concern for development. Third world countries also range from food-poor Africa, through energy-poor Asia, resource-rich Latin America to energy-rich Middle East. A serious global approach to world development will separate those regimes which are dedicated to the improvement of the lot of their peoples from the rest. It will put the end to the theory, which has intellectual credibility, that there is a direct relationship between the process of economic "take off" under twentieth century conditions and increased repression by government. It will give opportunity to end the relationship between western economic and military assistance and third world dictatorships.

Democracy and human rights are to be seen and need to be achieved at two levels: within nations and between nations. The fantastic growth of a world system over the last century puts a great priority on dealing with the democratisation of the international system. Such a process with the redistribution of wealth and opportunity which it would give, and the strengthening of the role of international institutions which it should engender, ought to provide a favourable environment for a speedier achievement of democracy and human rights within states.

World transformation will not be easy but it is on the agenda and the struggle is engaged. There are alternative scenarios to a new, equitable world system and much of the present manoeuvering are in the direction of these less admirable developments. There is for instance the possibility of the seduction of those states which are rich in resources into the club of the elites as lesser partners, eg the Arab States which have oil, and conservative Latin American and Middle Eastern states which are rich in raw materials. Mutually beneficial alliances can be made between capital rich countries and resource rich states and these can be on terms which do not favour global transformation as they enhance and extend the life of the first world in its position of dominance, and perpetuate the present situation where foreign aid is a sop, a charity dribbled out, rather than a substantial fund collected as an international tax. Such a road will lead eventually to catastrophe as the poor states become even more pauperised – the impact of the new oil prices on the third world is a case in point. It is quite possible that such a world could live easily with its ghettos, will continue to push for policies of population control, and to accept poverty as a "fact of life" and to speak, fulsomely, about "human rights".

Human rights are norms and are relative to the objective conditions and to history. Hitherto there were evidences more of our ambitions than of our possibilities. But in today's world these norms are achievable – the trouble is that so much of our thinking and practice have been conditioned by the past. The challenge of human rights in the next few decades is one that will prove whether we value these norms and to what extent scientific man has kept his humanity.

CRIMINAL LAW

CHILDREN, MURDER AND DUE PROCESS

By RODNEY HOOKER

The recent amendment to the Children and Young Persons Act 1974 which now permits an indictment to be presented against children who have committed an offence of murder or manslaughter and thus reverses the Court of Appeal's decision in *R v C* (unreported 29 July 1977 CA 61/77) is notable not for how it treats children but rather for the way in which it demonstrates the ambivalence in our national approach to juvenile deviance (in this article the term "juvenile" is used collectively to describe children and young persons).

The principal Act presumes that juveniles are not self determinant. They are therefore not fully accountable in law for their actions. The corollary to this is the treatment ethic, that deviant behaviour can be remodelled to conform to a "socially acceptable norm".

In the "best interests of the child" we have directed juveniles away from the established criminal judicial institutions to an institution that insists on a less exacting requirement of "due process of law".

In delivering the judgment of the Court of Appeal in *R v C* (supra) the President of the Court described the Children and Young Persons Act 1974 "as far more than a consolidation of the provisions of the Child Welfare Act 1925 and its numerous amendments. Naturally it embodies many of the aims of the previous legislation, but overall its purpose was to make a completely fresh approach to the problems relating to the welfare of children and young persons".

In respect of children accused of murder or manslaughter the premises of the principal Act are now cast aside – children who commit such offences are now fully accountable to the law.

Curiously however the legislators have then resiled from this stance by permitting the convicted child to serve his sentence in a children's institution rather than a prison.

Our new attitude to murder and manslaughter may perhaps be rationalised in the child's favour on the basis that we view the offences of murder and manslaughter as crimes of such magnitude that the accused must be accorded the protection of due process of law. Only two substantial elements differentiate the Children and Young Persons Court from our traditional Court institutions: the current absence of what American jurists call "due process of law" and the secrecy of the proceedings. Due process of law and public trials are precisely the two elements accorded by the amendment to children accused of murder or manslaughter. The result for a convicted child is precisely the same as before the amendment, he is placed in a Department of Social Welfare institution.

It is not that the writer deprecates the amendment because it accords to a child accused of murder or manslaughter the protection of due

process of law and public trials, but rather he questions whether the amendment is necessary, particularly in view of the fact that there is nothing in the Children and Young Persons Act 1974 which precludes "due process of law" from the proceedings of the Children and Young Persons Court.

In the writer's view the absence of due process of law gives juveniles the "worst of both worlds" *(a)*, and even more so with "in camera" proceedings, for secrecy protects the institutions and its officials from public scrutiny and may place the juveniles entirely at the mercy of these officials.

In the writer's view "due process of law" is a cornerstone to our liberty and it should operate equally for the protection of juveniles as it does for adults.

In delivering the opinion of the United States Supreme Court in *In re Gault* 387 US 1 (1967), Mr Justice Fortas remarked that "due process of law is the primary and indispensable foundation of individual freedom. It is the basic and essential term in the social compact which defines the rights of the individual and delimits the powers which the state may exercise. As Mr Justice Frankfurter has said 'the history of American freedom is, in no small measure the history of procedure'. But in addition the procedural rules which have been fashioned from the generality of due procedure are our best instruments for the distillation and the valuation of essential facts from the conflicting welter of data, that life and our adversary methods present. It is these instruments of due process which enhance the possibility that truth will emerge from the confrontation and conflicting data. Procedures is to law what scientific method is to science" (p 20). In the writer's view due process of law is necessary in the Children and Young Persons Court to check any tendency the officials of that institution may have to become overbearingly paternalistic towards juveniles.

In its historical background the cause of the Childrens Courts arose because the same range of sentences at what writers on the subject now classify as the "disposition stage" *(b)* was applied equally to juveniles as adults. What the writer would suggest is the point at which different considerations should apply to juveniles as against adults is more correctly placed at the disposition stage, not at the earlier determination of guilt stage. Historically the perceived need for new type of institutions did not arise out of the trial procedure. What happened was that the legislators in both the United States and New Zealand, in their zeal to reform "tossed the baby out with the bathwater" as it were *(c)*.

Finally, it is suggested that "the features of the juvenile system, which its proponents have asserted are of unique benefit to juveniles, will not be impaired by constitutional domestication. For example the commendable principles relating to the processing and treatment of juveniles separately from adults are in no way involved or affected by the procedural issue under discussion" *In re Gault* (supra), p 22.

In the writer's view therefore the amendment was unnecessary because juveniles could and should be afforded the protection of due process of law in the Children and Young Persons Court. On the other hand it may well have been useful for it raises precisely that issue; juveniles and due process of law.

(a) See *In re Gault* 387 US 1 (1967)

(b) See *Pursuing Justice for the Child* (Margaret K Rosenheim ed).

(c) For an interesting discussion on juvenile deviance and the appropriateness of State intervention see *Pursuing Justice for the Child*, supra.

Softening the crunch – "In considering the witnesses in this case (for maintenance), I have been impressed by their frankness and by their obvious friendliness notwithstanding the strains of separation. I doubt if that element would have been there had it not been for the backstop provided by the State through Social Welfare Benefits. Lest it be thought that there is something wrong with Social Welfare Benefits and de facto relationships, might I ask those in authority to consider whether perhaps the lives of people are not the happier because of the existence of that backstop. Anything that removes the bitterness of matrimonial turmoil must benefit the nation I would have thought." – Chilwell J.

Clash! – You all know of the anecdote, attributed to F E Smith, who, when a young man was chided by the Judge in these words "Young man, have you heard of the saying of Bacon, the great Bacon, that youth and discretion are ill-wedded companions?" to be immediately rebuffed by the reply, "I think so, My Lord, was it the same Bacon, the great Bacon, who said that a much-talking judge was like an ill-tuned cymbal?" Mr Henry Litton QC addressing the Hong Kong Bar Association.

Finite terms . . . – A notice on a road in Vermont reads: "30 days hath April, June, September and November. Also anyone driving over 45 mph" (from *Obiter Dicta*).