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REASONS FOR DECISIONS

As early as 1932 the Donoughmore Committee (Cmd 4060, 1932) was concerned with the need for reasoned decisions. The Committee saw the requirement as part of the obligations imposed by the principles of natural justice. At p 100 of their Report the Committee stated its conclusions in these words:

> ". . . Any party affected by a decision should be informed of the reasons on which the decision is based; indeed it is generally desirable that the fullest amount of information compatible with public interest should be given . . . .
>
> "Such a decision should be in the form of a reasoned document available to the parties affected. The document should state the conclusions as to the facts and as to any points of law which have emerged."

It was not until 1958, when the Tribunals and Inquiries Act was passed in terms of the recommendations of the Franks Committee (Cmnd 218, 1957), that a large number of tribunals became obliged to give reasons. In New Zealand, many statutes require that reasons be given. An example is contained in the Social Security Act 1964, s 12P which provides:

> "**Notice of decision** – On the determination of any appeal, the Secretary shall send to the Commission and to the appellant a memorandum of the Authority's decision and the reasons for the decision, and the Commission shall forthwith take all necessary steps to carry into effect the decision of the Authority".

It is significant that the next two sections, ss 12Q and 12R, provide respectively for appeals on questions of law to the Administrative Division from the Social Security Appeal Authority and for appeals from decisions taken by the Division to the Court of Appeal. The relationship between these three provisions is obvious. Only if there is compliance with s 12P will the right of appeal be as effective as was intended.

A decision which does not give reasons is unlikely to persuade those affected that they have been given a fair hearing. Moreover, as has been suggested, a decision without reasons or with inadequate reasons denies the person aggrieved the right to seek review or to exercise fully any right of appeal which has been provided. The person aggrieved is equally disadvantaged if the decision is as inscrutable as the face of a sphinx (Lord Sumner in *The King v Nat Bell Liquors Ltd* [1922] 2 AC 128, 159) or if it speaks with the ambiguous voice of the oracle (Lord Tucker in *Baldwin and Francis Ltd v Patents Appeal Tribunal* [1959] AC 663, 687). In either form, there is room for complaint and the parties will be unable to exploit fully review based on error of law apparent on the face of the record or any appeal right, whether it be confined to errors of law or extended to include facts and merits. A decision without reasons or with inadequate reasons obviously deprives the person aggrieved of the opportunity to have the decision reviewed or overturned. If a tribunal has misdirected itself in law as the result of failing to construe the legislation correctly or if it takes irrelevant considerations into account or if it makes any of the other jurisdictional errors recognised by the House of Lords in *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147, these errors will be more easily identified if a fully reasoned decision has been given.

Though there have been suggestions, especially by Lord Denning MR, that a tribunal which fails to give reasons for its decisions or which has given inadequate reasons may be compelled to complete

the record (and thereby disclose error), examples of the exercise of this power are not easy to find. The decision of the House of Lords in *Padfield v Minister of Agriculture Fisheries and Food* [1968] AC 997 can probably be used to support the propositions that if the record (which presumably includes letters communicating the decision) shows that the decision-maker has completely misunderstood his powers, or that he has used his powers to achieve a purpose different from that embodied in the legislation, or that he has communicated his decision to the addressee in a fashion which is incomprehensible, the decision is liable to be invalidated. The applicant for review in *Simonsen v Social Security Appeal Authority and Social Security Commission* (judgment 11 September 1978) must have wondered whether he could bring himself within the *Padfield* decision.

The decision of the Appeal Authority took this form:

> "Having considered the notice of appeal, and the report of the Commission, and upon hearing Mr Williams for the appellant and Mr Hofman for the Commission, the Authority finds:
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> "(1) That not part of the sum received by the appellant by way of damages could be considered as income for the purposes of the Act.
>
> "(2) Notwithstanding the various letters which passed between the solicitors for the appellant and the Department and also the interviews had with officers of the Department, the Authority is of the opinion that the provisions of s 71 (1) (b) of the Act are applicable and that thereby there was created on the amount of moneys paid by way of settlement for damages, a charge in favour of the Commission.
>
> "(3) That out of the total damages received by the appellant, payments were made to various hospital boards and other creditors.
>
> "(4) That having regard to all the facts available to the Authority the amount claimed by the Commission is not unreasonable.
>
> "(5) The appeal is therefore dismissed."

The applicant claimed that the decision, and especially paragraph 4, did not comply with the Social Security Act 1964, s 12P. Though White J agreed "that the decision of the Appeal Authority could have been expressed more fully to make it clear that the Appeal Authority agreed with the reasons stated by the Commission", the deficiency did not invalidate the decision which sufficiently communicated to the applicant the decision that none of the grounds relied on by him showed that the claim for a total refund was unreasonable.

Having seen more than 50 recent decisions of the Appeal Authority, the writer has some sympathy for the applicant. The decisions follow a very similar pattern and few exceed 150 words. They may fail to persuade the claimant that the special or personal aspects of his claim have been examined. Decisions as cryptic as those of the Appeal Authority may be criticised on the additional ground that they cannot serve as precedents in later cases, one of the advantages in having reasoned decisions. The appellant in *Simonson* could and did claim that the decision of the Appeal Authority failed to meet the requirement that proper and adequate reasons intelligible to a lay person should be provided. One does not expect the whole process of reasoning to be included in the decision but the decision should convince the parties that the arguments presented have been carefully weighed before the decision was reached. Obviously it is a matter of judgment, and in this case White J decided in favour of the Appeal Authority, whether the statement of reasons discharges the statutory obligation. In view of the critical remarks of the Judge already cited, it is to be hoped that the form of the decisions of the Appeal Authority will be modified and that they will in future be more informative. Writing a reasoned decision is good discipline for the decision-maker; as well-reasoned decision is more likely to convince the parties that their day in Court was not wasted.

JF Northey

Imposing Sentence – I wish to state that disapproval is shown by this Court of a style of sentencing in which a Magistrate gives no reasons, or next to none, when imposing a sentence of the gravity of a term in gaol. In the hierarchy of necessary but unpleasant duties that of imposing a gaol sentence is most prominent, and reasonable brevity is commendable and, at times, even merciful. Not so of a sentence passed which is coldly silent as to the reasons. Ours is a system of justice which is public, undergoing continual scrutiny. It is a system which allows for errors and provides for the mechanism of appeal. These two vital elements cannot work properly and effectively if the reasons of a Magistrate at the time the sentence is passed are locked in his mind. A prisoner upon whom such sentence is passed in common justice has the right to ask why. Jeffries J.

CONSTITUTIONAL

THE ATTORNEY-GENERAL AND THE STAYING OF PROCEEDINGS

By Dr F M BROOKFIELD, *Associate Professor of Law in the University of Auckland.*

The decision of the Attorney-General to exercise his power under s 77A of the Summary Proceedings Act 1957, to stay the prosecutions for wilful trespass still remaining against about 170 Bastion Point protesters, has drawn both criticism and support. The latter has come, for example, from the editor of this journal ([1978] NZLJ 321), whose defence supplements the Attorney-General's own persuasive and careful statement to the press (17 August 1978) of the reasons for his action.

Much has been made by the critics of the unfairness to some 50 protesters whose cases had already been dealt with and of whom all but a few had been convicted and discharged. It is argued on the other side, however, that because no penalties were inflicted the unfairness was too slight to weigh against the public interest in the termination of a long parade of proceedings that would have occupied the courts several months if it had been allowed to continue. The editor goes so far as to call them "purposeless" proceedings purposeless, it seems, in the sense that the prosecution's point had been adequately made in the cases that had been dealt with. The protesters had "equally offended in a manner that touched society so slightly that no penalty need be imposed . . . . If [the Attorney-General] is to be condemned for staying such pointless prosecutions as these, then when may be enter a stay?"

The answer to that question is that he may enter a stay with undoubted propriety in that limited class of cases on account of which, in 1967, the then Attorney-General sought and obtained the power from Parliament. The power was needed, that officer explained to the House of Representatives, to enable the government to undertake to United Kingdom authorities that a fugitive offender surrendered to New Zealand for trial would be prosecuted only for the alleged offence that was the basis for his surrender *(a)*.

However, Parliament, in enacting s 77A in the wide terms sought, conferred a power to stay summary proceedings not limited to that class of cases, with no indication of the principles to govern its exercise. Recently, in a general paper on the role of the Attorney-General *(b)*, the present writer briefly discussed the power and the previous controversial instance of its use in 1976 to stay the private prosecutions brought under the Superannuation Act 1974 ("the Superannuation Act prosecutions"). The present short article relies on that discussion but seeks to examine the power further and also to consider this latest exercise of it.

Probably many are inclined to see the power simply as an extension of and in effect no different from that to stay proceedings on indictment, a common law prerogative power which the Attorney-General exercised on the Crown's behalf and which in New Zealand he exercises now as a statutory power under s 378 of the Crimes Act 1961. The common law power, since it pertained to the prerogative, was generally unreviewable. As to the statutory replacement the position may in effect be virtually the same; but, as suggested in the paper referred to above and now to be argued further, it is otherwise in respect of the statutory extension under s 77A *(c)*.

Here helpful reference may be made to *R v Kent, ex parte McIntosh* (1970) 17 FLR 65 *(d)*

(a) Section 77A was added by the Summary Proceedings Amendment Act 1967, s 2. For the circumstances and parliamentary references, see F M Brookfield "The Attorney-General" [1978] NZLJ 334, 337–338 (paper given at the 1978 New Zealand Law Conference). The text of the section is : "The Attorney-General may, at any time after an information has been laid against any person under this Part of this Act and before that person has been convicted or otherwise dealt with, direct that an entry be made in the Criminal Record Book that the proceedings are stayed by his direction, and on that entry being made the proceedings shall be stayed accordingly".

(b) Note (a) ante. See that paper for fuller references for a number of matters discussed or touched on in the present article.

(c) For the previous discussion see Brookfield, loc cit, 338–339. It will be apparent from that and from what follows below that the power under s 77A, in affecting the respective rights of prosecutor and defendant, is within the definition of "statutory power of decision" in the Judicature Amendment Act 1972, s 3: so that in a proper case (declaration also being an available remedy) application for review could be made under s 4 of that Act to test the validity of the decision.

(d) The writer is indebted to Dr J A Seymour of the Australian Institute of Criminology for this case, discussed by the latter in a chapter (on the role of

where, in the Supreme Court of the Australian Capital Territory, Fox J had to consider the Attorney-General's statutory power to file an information prosecuting an indictable offence without a committal for trial *(e)*, a power replacing a similar but not identical one under the prerogative. Fox J emphasised that, now that the power was statutory, the usual rules applied "for determining its scope, and . . . the extent to which it is subject to the supervisory jurisdiction of the Court" (at 79). The learned judge said also (at 79–80) that "the courts should regard as important the fact that the power is vested in a high officer of State, the Attorney-General, and that they should take account of the history of the prerogative power". But it was inappropriate, he held, "to apply directly what has been said in relation to [the latter] power", pointing out that, among other things, the statutory power in extending to felonies went beyond the prerogative, which covered misdemeanors only.

Fox J was prepared to assume for the purposes of the case before him that the statutory power was unlimited, in that it could generally be used in any type of case "and on any grounds which the Attorney-General may think proper. Its exercise is reviewable, but on the assumption made, only in the relatively limited situations (such as where the power has been exercised capriciously or for an unlawful purpose) in which the Court has supervisory jurisdiction over the exercise of statutory powers" (at 89).

This reasoning applies a fortiori to the power under s 77A, which must in this respect be contrasted with the power to stay proceedings on indictment under s 378 of the Crimes Act 1961. The latter accurately corresponds to the prerogative power to enter a nolle prosequi and is therefore unlikely to be reviewable, except perhaps in the most extreme circumstances. That under s 77A, on the other hand, may be used to take away common law rights of private prosecution that were outside the reach of the prerogative. Further, it may be used so as to defeat the proper expectations of a defendant also, that the case brought against him will be dealt with according to law and that, if the case fails, he may be awarded costs.

In conferring a power to interfere with common law rights s 77A is similar to those statutory provisions which prohibit prosecutions without the Attorney-General's consent. B M Dickens has cogently argued that that officer's exercise of his powers to refuse consent is reviewable, in part because of the interference with common law rights *(f)*. Tentatively adopting Dickens' reasoning, so far as it is applicable, the writer has suggested that the exercise of the Attorney-General's power under s 77A may be reviewable also *(g)*.

Dickens' opinion is based not only on the ground of such interference and of ouster of the normal jurisdiction of the courts but also on the doctrine of *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997 that a Minister cannot exercise a statutory discretionary power "to thwart or run counter to the policy and objects of the Act [conferring the discretion] . . . ." (per Lord Reid at 1030). This latter ground is not available to support a case for the reviewability of a stay under s 77A. But it may perhaps be legitimately adapted on the basis of Parliament's likely intention: the wide power under that section must not be exercised to thwart or run counter to the policy and objects of the statute under which the prosecutions in question are brought. For that surely would be an unlawful purpose. (The power could not have been used, for example, systematically to stay prosecutions such as could be brought under the Industrial Relations Act 1973 before its 1978 amendment).

At all events, Fox J's judgment, which was not cited either in Dickens' article or in the writer's general paper referred to above, reinforces the case propounded in the former and adopted, tentatively in regard to s 77A, in the latter *(h)*.

No doubt the power under s 77A may (like that considered by Fox J) be exercisable on any

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Australian Attorneys-General in proceedings on indictment) of a forthcoming book.

(e) The New Zealand equivalent is the Attorney-General's power under the Crimes Act 1961, s 345 (3) (with the Judge's consent) to present an indictment against any person without committal. As to the prerogative power, see J L J Edwards, *The Law Officers of the Crown* (1964), 262 et seq.

(f) "The Attorney-General's Consent to Prosecutions" (1972) 35 MLR 347, 352.

(g) Brookfield, loc cit, 339.

(h) So also, indirectly and although in the context of the immigration legislation, do the recent expressions of reluctance on the part of the Court of Appeal to regard ministerial discretionary powers under statute as completely unfettered and exercisable, even unfairly, and for whatever purpose without any review by the courts: *Movick v Attorney-General* (1978: as yet unreported), noted [1978] NZLJ 271 (JFN) and [1978] NZ Recent Law 254).

Kent's case may be compared with *R v Medcalf ex parte Conacher* [1978] WAR 53 where the Western Australian Full Court, in proceedings for certiorari, refused to review the Attorney-General's exercise of a statutory discretion in declining to certify that a particular association was suitable for incorporation as a religious or charitable body. But a main ground for the judgments is that the decision of the Attorney did not affect legal rights.

ground the Law Officer thinks proper but, it is submitted, not capriciously, grossly unreasonably *(i)* or for an unlawful purpose. Though exercisable by a high officer of State it lacks the historical identity or association with a prerogative power to render it (as the power under s 378 of the Crimes Act may well be) virtually unreviewable.

An effect of all this is to re-inforce criticisms previously brought against the stay of the Superannuation Act prosecutions. Clearly the purpose of that stay was to give effect to the Prime Minister's action in purporting to suspend the 1974 Superannuation Scheme, an action declared illegal in *Fitzgerald v Muldoon* [1976] 2 NZLR 615 *(j)*. It is now suggested that that stay, however well-intended, was not merely of doubtful propriety – questionable for (among other reasons) the political advantage that may have indirectly accrued to the government from it – but was by reason of its purpose actually unlawful. The general conclusion submitted, as a surely acceptable corollary to *Fitzgerald v Muldoon*, is that an Attorney-General cannot lawfully use s 77A as a means of anticipating changes in the criminal law that Parliament has still to enact.

The stay of the Bastion Point prosecutions is not in the same dire case. The purpose was not unlawful and the Attorney certainly did not exercise his discretion capriciously or grossly unreasonably. The somewhat uncertain element of unfairness could properly be weighed against other considerations in an assessment which the Attorney-General and not a court was intended to make. Certainly grounds for judicial review appear by no means clear, especially in the light of the persuasive if not compelling reasons set out by the Attorney in his statement of 17 August. There remains the question of political accountability. But, as in this respect with the stay of the Superannuation Act prosecutions, it is obvious that the House of Representatives would not disapprove his reasons and censure him for what was done.

Judicial review being unavailable and effective Parliamentary censure virtually impossible in fact, it is important that grounds for criticising the Bastion Point stays should be stated fully. That we shall attempt below, after first quoting the essential parts of the Attorney-General's press statement of 17 August:

> "The Attorney-General said that in reaching his decision he had been guided by two broad factors. First, the interests of justice: he considered the Supreme Court judgment [in the *Hawke* case] had made the legal position clear. The land was Crown land and the defendants had no right to be upon it. The law had been upheld by the Police action in arresting and removing those on it without authority. Some 50 of them had been prosecuted and dealt with by the Court which had seen fit, after entering convictions, to impose no penalty.
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> "While he recognised that about one in four of those arrested had been convicted of trespass under the Trespass Act he considered that, in view of the nature of the particular trespass, in the minds of the defendants and the Court's decision not to impose any penalty, stopping the remaining prosecutions was not unjust. Had penalties been imposed the situation would have been very different. In the Attorney-General's view the interests of justice have been met by the prosecutions that have so far been carried through to completion. Justice is not served by proceeding to carry through to a hearing the remaining 170 and more prosecutions.
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> "Secondly, said the Attorney-General, he had considered the public interest. In his view it was clear that this would not be served by continuing. It was not possible for the Court to hear more than about three or four cases a day, and at the present rate of progress it would be about April next year before the cases were completed. In view of the nature of the prosecutions and the results to be anticipated by what had gone before, the sensible course to follow was to stop now".

Comment is offered under the two heads of the above.

(i) The interests of justice

The Attorney-General's belief that the judgment of Speight J in *Attorney-General v Hawke and Rameka* (1978: not yet reported) had disposed of all relevant legal issues was, as it happens, incorrect. Some issues either not dealt with in that judgment or dealt with only by assumption have been examined by the writer elsewhere in this journal *(k)* and shown to afford by inference a possible legal defence to the protesters who were prosecuted, though one which, it is believed, no defendant had yet pleaded in the cases disposed of before the stay.

However, the point here made, with all respect, is that the Attorney-General was not entitled to

(i) In the sense that no reasonable Attorney-General could have exercised it on the ground in question. Cf *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223, 230, 234.

(j) Noted [1976] NZLJ 547 (FMB).

(k) F M Brookfield "Protest and Possession at Bastion Point" [1978] NZLJ 383.

assume as he apparently did that none of the remaining defendants had a substantial defence to plead. It is understood that in fact one of those whose case would have been heard on 17 August but for the announcement of the stay, had prepared a substantial defence. Clearly such a defendant loses a likely entitlement to costs if the prosecution is stayed under s 77A. It is unjust that he should do so.

The Attorney-General is on somewhat firmer ground in arguing that there was no unfairness, in the circumstances, to those who had been convicted. But he goes too far in minimising it. There is likely to have been *some* unfairness, surely, for one can scarcely assume that in the circumstances all the convicted welcome their convictions. It would have been possible to do justice by securing convictions (if no defence were available) against a limited number of the protesters by the Commissioner of Crown Lands prosecuting only those "ringleaders" who were in occupation of the land as distinct from merely being present on it, under s 176 of the Land Act 1948. (The removal of the other protesters could have been effected under common law powers or under the powers conferred on the Commissioner by s 24 of the Land Act. No doubt removal by arrest was easier but the Crown presumably had the resources (what landowner has greater?) to accomplish the simple removal of all the protesters without arrests and prosecutions. Of course, stopping them from returning would then have been harder but surely it could have been done).

At all events the course taken, and then abandoned by the Attorney-General's stay, was to invoke s 3 of the Trespass Act. The some 50 convictions obtained before the stay must now be regarded as obtained entirely at random and justifiable apparently (see the last two sentences of the second paragraph quoted from the Attorney-General's statement) because the convicted are somehow seen as representative of the protesters as a whole. Surely a novel idea which, if sound, could have been used initially to justify any random selection of the persons to be prosecuted.

(ii) The public interest

Whatever the unfairness to the convicted defendants, it was, in the view of some, outweighed by the desirability of ending the long procession of proceedings. However, since the Crown had deliberately chosen the advantages of proceeding under the Trespass Act, ought not the Attorney-General to have left the Crown to pursue that course whatever the accompanying disadvantages? – specially since the latter were predictable at the time the decision to use the Trespass Act was taken. Not only must it have been known that many of the protesters were unlikely to co-operate in the speedy disposal of their cases but the possibility that, in the circumstances, no or merely nominal penalties would be imposed and no costs awarded, must have been apparent. At any rate that was a chance the prosecution took.

All of this may not mean that the Attorney-General's decision was necessarily wrong. It does suggest, however, that, since the predictable consequences that in fact ensued were regarded as so intolerable in the public interest, the original decisions to prosecute under the Trespass Act were wrong. If so, that is a matter upon which the Attorney-General, acting drastically to intervene in the normal processes of the criminal law, might properly have commented.

But of course (except perhaps if the blunder had been so clear as to be beyond argument) it would be somewhat visionary to expect him to do so; just as, in a wider and more serious context, it is visionary to rely confidently on the Crown through the Attorney-General protecting the citizen from unconstitutional or illegal action for which the Crown or a Crown agency is responsible *(l)*. Here one comes to the strongest (as it were, the bastion) point of the argument: the invidiousness of the Attorney-General's position – invidious for general reasons particularly applicable to the present case.

It seems clear that the Crown's decision to invoke the Trespass Act to clear the protesters from its land was taken as a matter of government policy and rests upon the collective responsibility of the cabinet *(m)*. In accordance with the New Zealand practice, the Attorney-General is a member of that body and shares in responsibility for its decisions. In the present case things evidently turned out badly so that the prosecutions became an embarrassment to the administration of justice and, surely it may be argued, a political embarrassment to the government. The Attorney-General terminated the prosecutions, deciding, as he must, independently of his ministerial colleagues and on his bona fide assessment of the public interest. But the fact is that, as with his exercise of the same power in staying the Superannuation Act prosecutions, the public interest was found to coincide with what is arguably the political advantage of the government – with which as a

(l) Adapting the sceptical remark of Gibbs J in *State of Victoria v Commonwealth* (1975) 134 CLR 338, 383. See *Access to the Courts – 1 Standing: Public Interest Suits* (1978: Law Reform Commission of Australia) 13 and cf note (q) post.

(m) See eg the respective statements of the Prime Minister and the Minister of Lands quoted in the New Zealand Herald, 23 May 1978.

member of the cabinet he is personally as closely identified as any other Minister.

The invidiousness of an Attorney-General's position is lessened if, as in England and the Australian Commonwealth, though a member of the Administration he is outside the cabinet. If he were so in New Zealand, his two interventions under s 77A would have been more acceptable. However, as the circumstances of *Gouriet v Union of Post Office Workers* [1977] 3 All ER 70 show, much of the difficulty would still remain *(n)* unless his office were to become entirely separate from politics as is that of the New Zealand Solicitor-General.

To revert to the present case, the problem remains of the convicted defendants. If the unfairness to them is slight, there is still no reason why it should continue since something can be done to remove it. The Attorney-General has rightly said he has no power (by virtue of his office) to annul the convictions. But simply as a Minister of the Crown he may advise the Governor-General to exercise the prerogative power of pardon, in accordance with Paragraph 8 of the Letters Patent of 1917 *(o)* and Paragraph 7 of the Royal Instructions of the same year *(p)*. Any other Minister or the Executive Council as a whole could of course offer that advice. Behind any such advice there would normally (though no rule of law requires it) be a decision of the cabinet. One hopes that the novel notion that the convictions are somehow representative and for that reason defensible – as suggested in the Attorney-General's statement – was not used to rationalise any reluctance of the cabinet to "climb down" by deciding that pardons be advised in these cases. A critic should however be constructive. What follows attempts to suggest in summary the state of the present law, how it could usefully be reformed and, also, how it can be made to work fairly as it stands.

(1) *Reviewability.* The Attorney-General's exercise of his power under s 77A to stay summary proceedings is, it is suggested, reviewable by the Courts; so that it cannot be exercised capriciously, grossly unreasonably or for an unlawful purpose. In the nature of things it is a private prosecutor who, claiming that the power has been exercised unlawfully against him, is likely to attempt to test this proposition; though no doubt a defendant might do so in rare circumstances. Both would have standing.

(2) *The costs of the parties.* Even where the power is exercised properly injustice may still be done in the matter of costs. Ideally, the private prosecutor whose proceedings are stayed and also his defendant should have costs against the Attorney-General in a proper case; but no doubt a suitable amendment to the Costs in Criminal Cases Act 1967 is unlikely to be obtained to enable that. In any event, a proper case is likely to be one where the exercise itself can be reviewed as suggested in (1) above.

However, the defendant's expectation of costs in public prosecutions that are stayed is another matter and should, it is suggested, be provided for either by amendment to s 5 of the Costs in Criminal Cases Act 1967 or by the adoption of the following practice in police or (central or local) government prosecutions: the Attorney-General should announce his intention of exercising the power to stay and request the prosecutor to anticipate the stay by asking leave to withdraw the prosecutions or by offering no evidence. The defendant would then not be deprived of costs that could properly be awarded under s 5.

(3) *Should the English position be adopted?* The procedure last suggested approximates as nearly as possible to that used in England where there is no equivalent to s 77A but the Director of Public Prosecutions may under s 2 (3) of the Prosecution of Offences Act 1908 take over any summary proceedings and then end them in the manner indicated above. Any such action would, of course, not itself be reviewable by any court but magisterial disapproval of it could be registered and justice done in respect of the defendant's costs.

There may be good reason for giving the Attorney-General for New Zealand a similar power in lieu of that under s 77A. If, that is, a general power to stop summary proceedings is necessary in this country at all.

(4) *Many defendants: the problem of the already convicted.* Where this problem arises, as in the Bastion Point cases, the Executive Council should as a rule advise the granting of pardons to those convicted before the stopping (by whatever means) of the remaining prosecutions.

(5) *The giving of reasons.* The Attorney-General's practice of giving reasons for a stay of proceedings is to be welcomed. (It may, of course, be a condition of the valid exercise of his power that he do so).

(6) *The political involvement.* The wider question of the Attorney-General's position, as a political officer and member of the cabinet, remains, independent of the problem of s 77A though given added urgency by it. Certainly the removal of the Attorney-Generalship from politics altogether, so that both Law Officers would be non-political, would be a radical reform not to be made without

(n) See eg Brookfield [1978] NZLJ at 339–340, 342. It will be recalled that the English Attorney-General's refusal of his fiat incurred much criticism. See further note (q) post.

(o) 1919 *New Zealand Gazette* 1213.

(p) Ibid, 1214.

careful consideration and which might not solve all the difficulties anyway *(q)*. But the easily made change of excluding the Attorney-General from the cabinet, so that he ceases to be so closely involved in government policies and decisions, would be a clear if modest benefit to his office and the administration of justice, generally as well as in relation to his power under s 77A.

(q) It might not solve adequately the problem of the refusal of fiat to relator proceedings, for which the likely solution will be a statutory relaxation of the rules as to standing. See now *Standing in Administrative Law*, 11th Report of the Public and Administrative Law Reform Committee (1978), and the discussion in Brookfield, [1978] NZLJ at 339-341. As to the early period (1866–1876) of an independent and non-political Attorney-Generalship, see ibid, 335.

HISTORY

THOMAS MORE AS A PUBLIC FIGURE

This lecture delivered by the Right Hon SIR PETER RAWLINSON QC *during the Thomas More Congress in Angers, last year, appropriately marks the 500th Anniversary of the death of Sir Thomas More.*

When the Duke of Norfolk, Lord Treasurer of England, visited Chelsea Parish Church he saw his colleague the Lord High Chancellor of England singing at Mass in the parish choir.

> "God's body", he exclaimed, "God's body, my Lord Chancellor ... A parish clerk! A parish clerk!"

The words express, probably, the genuine bewilderment, as well as reproach, felt by a pragmatical down to earth self-seeking fellow Minister at the humility and simplicity of the greatest man ever to bear the Great Seal of England.

Some four years later the same nobleman, sitting upon the Commission to try his former colleague in Westminster Hall, (and probably equally bewildered by Thomas More's refusal to obey the King's demand to accept the King's new title of Supreme Head, and by his defence) commented: "We now plainly see that ye are maliciously bent".

What is plain to us to see is that Norfolk did not "see" and did not understand, as he had never understood, the man who was once his colleague. To the very end the colleagues, even friends, of Thomas More still failed to understand that for Thomas More there existed a loyalty superior to that which he and they owed to Caesar.

One week ago this morning, I passed that Church where the Lord Chancellor sang as that "parish clerk", which so offended the Duke. One week ago this evening, I passed on my way from the Debating Chamber in the House of Commons through the great Hall of Westminster (built some eight hundred years ago) and I stopped at the plaque which marks where Thomas More stood over 440 years ago when he faced his judges, and doubtless smiled sadly at Norfolk's comments.

Above my head was the great roof with its hammer beams, timber hewn from the New Forest where William Rufus died from the mysterious assassin's arrow. Before me, rose the great west window on either side, the stone walls rising to the wooden roof. Because it was night, and empty, and silent, and only partly lit, around me I could feel the spirits of many remarkable Englishmen, including a King, who had passed through that place to their deaths. For at night that Hall is a sinister place.

But my thoughts were only for that day of July 1 1535, when the two Courts of Chancery and King's Bench were flung into one and a Lord Chancellor was tried, a precedent for the trial of that King one hundred years later. I thought of how the one Court formed on that day perhaps covered the spot where the prisoner, Thomas More in happier times as Lord Chancellor on his way to his Court of Chancery knelt to receive the blessing of his father, a Judge of the King's Bench.

Above all I seemed to hear what passed that day in that Court 400 years ago, and seemed to hear the voice of Richard Rich and the cross-examination by the prisoner – a cross-examination so deadly to the honour of that most vile of Solicitors-General. I seemed to hear those great words, spoken by More in rebuttal of the indictment:

> "For as much, my Lord, this indictment is grounded upon an Act of Parliament directly repugnant to the laws of God and His Holy Church, the supreme government of which, or any part thereof, may no temporal prince presume by any law to take upon him, as rightly belonging to the See of Rome, a spiritual pre-eminence by the mouth of Our Saviour himself, PERSONALLY present upon the

earth, only to Saint Peter and his Successors, bishops of the same See by special prerogative granted. It is therefore in law amongst Christian men insufficient to charge any Christian Man".

Then, later, the uneasy, but shrewd, reply of Lord Fitzjames the Lord Chief Justice to Lord Chancellor Audley:

"I must confess that if the Act of Parliament be not unlawful, then is not the Indictment in my conscience insufficient".

Finally those last words, words which even those venal Commissioners appointed to try him can surely never have forgotten – those Commissioners whose names sound like the roll of English chivalry called by Henry V upon the eve of Agincourt – only *they* were a roll of honour and not, as here, a roll of infamy:

Lord Chancellor Audley;
The Dukes of Norfolk and Suffolk;
The Earls of Huntingdonshire, of Cumberland, of Wiltshire;
Lords Montague, Rochford and Windsor;
The 2 Chief Justices;
The Judges;
and Thomas Cromwell.

These were the Commissioners who two weeks earlier had condemned John Fisher, and among whom were numbered the father, uncle and brother of Anne Boleyn whose Coronation the prisoner had so demonstratively ignored.

And those final words, which they heard from More, will surely forever haunt the stones and beams of Westminster Hall:

"So I verily trust and shall therefore right heartily pray, that tho' your Lordships have here in earth been Judges to my condemnation, we may yet hereafter in heaven merrily all meet together to our lasting salvation".

As I stood there in that mysterious place amid the dark shadows cast by the twentieth century lights in that dramatic hall, through which twentieth century Ministers and MPs daily pass, I could imagine the bent, bearded frail figure, moving slowly and courteously out to the river, the Tower, and to martyrdom. Perhaps that worldly Duke of Norfolk, when he lay some twelve years later a prisoner in the Tower (doubtless praying for, and being granted, unworthily, the death of the King) he remembered the "Parish Clerk" Lord Chancellor, and understood what Thomas More sought to teach to all public men then and thereafter, – that a power exists superior to the State they serve.

Those words I have repeated this morning are well known to all of you. But they can never be repeated too often. They epitomise the public man of whose public life I speak today. For Thomas More is the especial Saint, not only of all Englishmen and of all lawyers, but of all public men whose lives take them into the service of the State. But you must forgive a particle of chauvinistic pride, when I emphasise that he was, in essence, the most English of men who ever played a major part in the public affairs of our Nation.

What then does he teach us, his disciples and his followers? To some, public service is a desire and a need – a fulfilment, the only fulfilment of restless ambition and spirit. It is, however, a worthy and honourable pursuit, that of the leadership of the community in which a man lives. To others, public service is a duty, a hard duty that everyone, in any society, must for some part of their lives perform if they are to justify the reason for their lives.

Certainly in the 16th century, and for long thereafter, public service brought with it the chances of truly glittering prizes; position, title, wealth, land. But with the prizes went the attendant risks of abrupt turns in the wheel of fortune. In place of banqueting hall and musicians' gallery, came very swiftly the stench of imprisonment in the Tower, the scaffold, or worse – Tyburn tree.

Nowadays the circumstances of public life are obviously very different in form and degree, at least in what remains of free Christendom and the Great Republic across the Atlantic. Yet even in those societies the shifts of fortune can still today be abrupt. Even the greatest in position can, in so short a time, find themselves wandering along a Californian beach, dishonoured and despised, close servants or ministers, in prison – although, apparently, awaiting a rich reward in royalties, and books, and fees for cosy chats on television! Such are the "mores" of today.

In totalitarian countries, the consequences of fall more closely resemble the 16th century.

Whatever the rewards of public life, the dangers and hardships remain, even today, even in the Western World. How easy, then, the role of author or even of a literary or political or religious controversialist, snug in his library or in his study. Not for him personal, physical confrontation. Not for him, nowadays, even the contest of the modern hustings. Rarely will he receive abuse from fellow commentators, and certainly no physical insult. For that is ever the more comfortable, more safe role, – the role enjoyed by the observer, or the armchair critic throughout the ages. Not for him discomfort, not for him danger. Not for him exposure to all the direct temptations of power, that most insidious of weapons in all the devil's armoury. Some controversialists have power, but it is power without responsibility – "the prerogative of the harlot throughout the ages". But to some, who sit or dispute or criticize in the comfort of home or office and never venture into

the lists, there perhaps sometimes may come the memory of the parable of the man who buried his talents in the ground; and they may reflect and wonder if their reluctance has come from cowardice, or timidity, or idleness. They are the men who, in every age, turn their backs upon the burdens of public duty and shrink from the rigours of effort and responsibility in public service. As Edmund Burke said: "All that is necessary for the triumph of evil is that good men do nothing".

What in modern times is true was much more true in the 16th century, when the temptation to shrink from the real terrors and dangers of public service was far greater. How easy, how attractive, to settle for the life of historian, of academic, safe, surrounded by friends and family, discussing and disputing and composing, comforted, of course, by great devotion to religion; but hiding from the gales of the revolutionary 16th century world; feeling, even expressing, sorrow at the new styles; but ultimately accepting the New Order; and so surviving amid the joys of family and bodily comfort and ease!

Or, alternatively, how easy to settle for the mere practitioner of the law, applying, learning, following professional standards with high integrity, and justly applying the statute and the law made by King, Council and Parliament, be it what it may. Although certainly a degree or two more "public" than the study and the library, yet more tranquil than the terrors and fierceness of the public political forum.

For, in every age, there is a wide distinction between engaging in rational argument, in sensible debate, oral or written, between observers or philosophers of equal intellectual integrity, affording opportunity for the application of learning and scholarship, dealing in controversy conducted in conditions of gentlemanly differences; and participation in the field where men's very lives are the stakes, amid public affairs, ever shifting and changing, managing the others, persuading, cajoling them to follow causes to which few are inclined, but from which (it is believed) many will advantage.

The practise of politics, the Art of the possible, is ultimately the most real of all human activities in every age and in every time. And in any age, the most difficult. According to a distinguished modern journalist:

> "Politics is not a prize-giving or a garden fete. It is the attempt to reconcile the all too discordant appetites, wills, interests and aspirations of men – whether men in mass or individual men in the closets of power – in no more than the hope that any decision will at least be in the direction of the people's good".

To illustrate what that means, even in modern, respectable times, a modern English Prime Minister, in a speech to the members of the Royal Academy 40 years ago, jocularly remarked in comparing the artist with the statesman in the twentieth century:

> "Your instruments by which you work are dumb pencils or paints. Ours are neither dumb, nor inert. I often think we rather resemble Alice in Wonderland who tried to play croquet with a flamingo instead of a mallet".

For in great issues of State, again throughout the ages, men who seek to serve the public must always be conscious that the task to which they have set their hands will always be the most dangerous. But if men like More had in his time played the academic, the pamphleteer, alone, what hope can there ever be for the Good and for the Just?

One, therefore, of the reasons why Thomas More will always remain the exemplar for all Englishmen who seek public service, is that he forbore his natural inclination and subdued his personal taste to study, to teach, to reflect, to pass his time in agreeable intellectual and spiritual pursuits; and, instead, he chose the heroic path and went out into the storms of the world.

But if he forbore much that his natural inclination led him to, one thing he never ever forbore; and that was to pray. Just because he knew that he must resist the temptation to settle for a life of quiet reflection and give his talents to public work, so he also knew how much that life needed the strength afforded only through prayer, – so the singing in the parish choir!

This is one important facet of this remarkable human being that makes him still so relevant, still so immensely relevant, to modern man. For he teaches us all the lesson that, especially in times of great trouble, of present or threatening revolution, no man should flinch from duty to serve.

Before, then, we even contemplate what he taught those who followed him in the public life of England, it is worth studying the mundane and worldly (in best sense) example that his life affords, of how he bore himself in the world and in the transaction of public business in Council, in embassy, in office.

He certainly taught public men the importance of style and poise, of how to walk with kings and not lose the common touch. He taught the need for good humour even in moments of extreme seriousness, and with that good humour ease of address, after which many an Englishman subsequently has sought, thus in a sense founding a tradition. He taught the importance of facility in debate, upon which the English tradition (with that of law) again has so greatly turned, perhaps over much, so that skill in debate is too great a significance!

Also, he taught the need for the acceptance

of the authority of the State, although we shall come to the limits which his death taught must be imposed upon the authority of any state. So, in this fashion, a gentleman although not noble, he moved among the grandees of the time, among the natural counsellors of a dictator-king, with the ease of a man sure in himself and in the standards he set himself.

How distant it all is to us, and yet how close! The education in manners, affairs, and debate; University, the Inns of Court, Parliament, the Privy Council ... The issues, stakes, and dangers may be dissimilar and were far graver, and yet they mysteriously seem the same. Witness the threat of Christendom:

– the division of Christendom
– the new thinking, which would, by apparently liberating men, enslave them.

Is it all so very different from what we in our time have faced and must yet face?

Then, apart from style and manner, the acceptance of the responsibility to exercise power, although power by its nature has to be exercised by some, in itself its possession spells danger even for the righteous. For it enjoys the most terrible and facile influence to corrupt, and not only in its evil demonstrations. A public man must accept the obligation to wield power. But the power to help or favour, to befriend or assist, even to promote what is thought to be good and excellent, can also corrupt. Once exercised, its possession can so easily become enjoyable: its absence would be painful, like withdrawal symptoms during Lent! And with its constant application, so easily marches Pride.

So the Parish Clerk Lord Chancellor tried to teach his contemporaries (with singular lack of success with his ducal critic) of the essential triviality of what the World calls greatness. But that did not mean that Thomas More did not recognise the necessity of men exercising power over others. He showed that the proper use of power required the greatest personal self-discipline. For Thomas More knew the value to men of ceremony. He knew that Caesar was entitled to his eagles, and to his standards, and to his brass trumpets. He recognized that the State, and the officers of the State, must work amid the trappings of greatness, – that men need to see that the authority under which they live has the outward representation of power, so that the more readily they can recognise and acknowledge not only what is owed to authority, but also what authority owes to them. Thus the King his Crown and Sceptre: the Lord Chancellor his Seal and Chain, and the priest his vestments. How foolish it is to deny men these manifestations. How rash of State, or nowadays, alas, Church to refuse man the colour, the music, and the mystery. The "ceremony that surrounds the King": the ceremony that surrounds the Mass. So Thomas More, as he moved ever higher in the hierarchy of the society in which he lived and worked, accepted this duty, acknowledged this need. And yet, so as ever to be reminded of the triviality of this worldly necessity, he, for himself, wore next to his skin, mentor to any chance of pride, disguised beneath his finery, the blood-stained shirt of hair beneath the velvet robe and golden chain. To any Catholic who, centuries later, vastly more humbly, intensely less wisely, greatly less honourably, without his grace, his courage, his saintliness, treads some of the paths which he trod, he is ever present.

He is the apt example for every public man. But particularly for the Englishman who four hundred years later follows in the professions he practised, because the institutions (what Isaiah Berlin called "the plinths of civilisation") in England which nourished him, or which he served, remain very much the same. So, as you join your Inn of Court, the face of the Reader is his; as you plead your first case, in Courts of King's Bench or Chancery, the face of the Judge is his; as you take your seat in the House of Commons, the face of the Speaker is his; as you swear your oath on joining the Privy Council (an oath now amended for Catholics so that offensive reference to foreign prelates is eliminated) your voice is the voice of him.

He is the example non-pareil, the man who demonstrated with his life and his death that no Parliament, no law, no sovereign, no office, no wealth, no position, no title, subverts the prime loyalty to principle, to faith, and to God.

In England, the practise of the law has ever been the honourable pursuit of men whose intellectual and temperamental bent leads them towards public service. Long before the sixteenth century the English put greater store than other parts of Europe upon the pre-eminence of law.

In the eighteenth century, Francois Marie Arouet (better known as Voltaire) remarked that:

> "To be free implies being subject to law alone. The English love their law in the same way as a father loves his children because they created it themselves, or are at least under the impression they created it".

The law, which the English loved because they believed they had created it, had not developed very greatly by the sixteenth century as it did thereafter. But the common law existed. It was a significant and vital influence governing the lives of Tudor Englishmen. Save the law of Treason which, as we shall see, was arbitrarily applied by King and his Council.

We can thank heaven that old Sir John More, and the natural physical inclination of Thomas, led him away from the contemplative life of the re-

ligious, and he became the lawyer and not the priest. Thomas More's early skill in debate, his charm (so attractive to the King), his command of language, must have made him into a remarkable advocate.

When he became a Judge, as the Lord Chancellor is a Judge, he brought to the law that wider Christian compassion that led him into the use, and thus the development, of the new Chancery injunctions, the use of Equity, which means the application of what the Judge feels is right and just over the forms and precedents, often over-rigid, of the Common Law. Thus his use of injunction to bring judgments into his personal jurisdiction, over-riding the jurisdiction of the judges whose objections and claims to apply the law he had to assuage with charm at dinner.

The just Judge knew, before the phrase was coined, that "justice delayed is justice denied". So he dealt with the accumulations of work, built up by the preoccupations of the Cardinal of York, Thomas Wolsey, preoccupations with affairs of State to the detriment of humbler people's disputes and troubles. Thomas More became "the righteous Judge, and true friend to the poor".

In his short Chancellorship, over which hung the threat of the King's Great Matter and the conflict with the Church, it is this emphasis upon the professional as opposed to the political aspects which prevailed. It was as though the Lord Chancellor (who had received the King's promise to be allowed to abstain from close involvement in what had then become the prime, central issue facing the King's Government or Council, in which the Lord Chancellor was the first counsellor) thrust himself into this part of his duties conscious of the conflict, by then much larger than a man's hand, which threatened the realm, and upon which he knew he would eventually have to make his stand.

Lord Chancellor More did not sign the letter of 1530 urging the Pope to declare the marriage of Henry and Catherine void. The Lord Chancellor did introduce to Parliament the King's Great Matter in 1531, but in words and form which could have left the Parliamentarians in little doubt where stood the first subject in the realm.

When the resignation and withdrawal from public service followed in the next year (after the consent of the clergy to the articles before Canterbury depriving it of the power to enact constitutions without the King's consent) there can have been little doubt in his mind of what shortly he would have to face. I cannot believe that when he wrote to Erasmus in June 1532 of his hope to enjoy being freed of public business so that he might have some time to devote to God and himself, he felt he would have much time. If the "field" had not yet "been won", he knew that

Thus as the short respite commenced, and the interrogations were imposed upon him, there remained for him as the lawyer and the public man two tasks:

First: at any trial to demonstrate any distortion of law and justice, and to reveal to those then alive who had ears to hear and opportunity to learn, the tyrannical application of the law of Treason by King and Council as a political exercise by the State of the weapon of judicial murder.

Second: when the inevitable result had been, however unlawfully, perpetrated to give his testament, and to demonstrate and reveal the real threat to Christendom posed by the King, and the destruction of the admittedly frail, but still subsisting, unity of Christendom under the papacy, – and Thomas More would do this despite the unworthiness of the men who so recently wore the Triple Crown.

Thus, then, he set out to accomplish his final public tasks. First, to show the unlawfulness and distortion of the process under which he was to be condemned. To do this he employed, as he was indeed entitled to do, and as he was indeed well fitted to do, his skills and learning as a lawyer. For he wished to show to the England of his day and the England of tomorrow, what manner of men, what lack of legal principle, what use of tyranny, were being employed against him and others, and against the nation itself.

So, his silence upon the oaths, claiming, justly, that in accordance with the Common Law "he that holdeth his peace seemeth to consent". If his judges denied that in the course of any lawful trial, then the law was being aborted. Just as he knew that no defence would be accepted of any claim that no act by him had been "malicious" (as he correctly advised John Fisher), so he knew that, to condemn him, his judges would be, and must be seen to be, distorting the Common Law of England. Tyranny must not be permitted to disguise itself in law.

So Thomas More, the common lawyer, son of a Judge, Bencher of Lincoln's Inn, one time Lord Chancellor, was determined to strip away the pretence of "justice" as applied to those arraigned for treason, because they could not accept the Supremacy.

Law, that of man as well as that of God, was (as it is today) the fabric of all civilized society. Therefore strip the trial of all law, and the naked face of royal policy could be seen for what it was.

Thus, he dealt with the first three counts of the indictment. Those he must have anticipated. They concerned his "silence" and his correspondence in the Tower with his friend, John Fisher, this last so trivial that it was easily swept aside. Fisher was less experienced in the affairs of the world than More, as befitted a bishop compared to a Lord Chancellor. So Fisher's conversation

with Chapuys, so bluntly avoided by More: yet Fisher was a man of uncompromising courage whose strength must have sustained More as did More's Fisher.

Then, in the trial, More was confronted with the testimony of Richard Rich, the Solicitor-General.

When I was Attorney-General of England (having some years previously served in the administration of Mr Harold Macmillan as Solicitor-General: the Attorney-General is the senior of the two law officers of the Crown), I caused to be sought out a collection either of portraits, prints, or photographs of all the Attornies and Solicitors-General of England since the first record of the offices in the early fourteenth century. When collected, these portraits were hung upon and lined the corridors of the chambers in the Royal Courts of Justice used by the two law officers of the Crown. So when, over some four years, I passed to and fro, I passed between the pictures of my predecessors. Among them were those of Sir Mathew Hales, Attorney-General, the Counsel who prosecuted Thomas More, and of Richard Rich who perjured himself and betrayed Thomas More. The face of Rich matched his conduct, and I can say nothing worse about him.

Yet when Rich gave his evidence in support of the fourth and last count, and so "undid" all that Thomas More had done to rebut the first count, More knew that in the context of this so-called trial all was lost, for technically here was evidence of More's repudiation of the Supremacy. In furtherance of the purpose which he had set himself, namely to reveal the illegality, there only remained the opportunity to demonstrate how false was this alleged testimony and how unworthy it was of credence.

So there followed the cross-examination of Richard Rich, an angry, effective, biting cross-examination of a witness whose testimony Southwell and Palmer refused to corroborate, and which effectively destroyed the credibility of the witness. What then was left of this so-called indictment in this so-called trial? Only the discredited testimony of a sole witness which no doubt, if it were a Court, no Court would ever have accepted. And the final consequence for the Crown (if this had been a valid trial) was great. For the Crown had taken a great risk. It had placed into issue its own credibility, because it had risked producing the testimony of one of its own law officers. If he were discredited, the Crown was discredited. There was, of course, no risk of rejection. The Commission would see to that. There was only risk of discredit, and that was what happened.

Thus Thomas More, lawyer, executed the first of his final purposes. To what end? Little in his lifetime because of the strength of the tyranny: much for posterity.

His second purpose was to show what truly was the King's purpose, and where it must lead, and to give his own testament. For one moment it appeared that no opportunity would be given as Lord Chancellor Audley moved to give judgment. Again the lawyer intervened:

> "My Lord, when I was toward the law (what a wonderful description of More's great career!) the manner in such case was to ask the prisoner before judgment why judgment should not be given against him".

The gentle, but magisterial rebuke, again calling the so-called Judges to some form of legal order.

Finally, the great speech expressing the principle of the limits set by divine law, so that when the State trespasses beyond those limits, a Christian must put God, conscience, and Church first.

Thus he delimited in modern terms, for all times, the duties of the subject or citizen. Thus he demonstrated one King's tyrannical purpose. Thus he showed to all men of his time, and of all time thereafter, the duty a man owes to God, be the temptation of power, position, wealth, family, ease, never so great.

When that frail figure (which I saw in my imagination last Thursday in Westminster Hall) had spoken those last graceful words of forgiveness upon his judges, saluting them with the hope that they would meet merrily in heaven, and turned and left Westminster Hall, he left behind words and a spirit to guide and uplift all who follow in any age in the service of Crown or State.

Sometimes, somehow, in matters less immense than those which he had to face, every public man may have to face a similar choice. Then he will have to make his own decision when interest conflicts with principle. The consequences to history and to his own life (certainly in the West if not the East) will be less great than the consequences to Thomas More. The alternative may or may not be the scaffold, or its modern equivalent, and it may or may not be the Tower, or its modern equivalent. He may, or may not have been a First Minister with a name honoured throughout the civilised world. But the decision he faces will be in principle, though not in degree, the same. It may present the alternative between advancement, security, wealth, safety: and demotion, worldly disgrace, poverty, ridicule. It will present the choice between the world and the spirit.

Thomas More was the first in modern times to show the way. He taught us that the State is not all. He taught all men, and public men especially, that be the cost never so dear, that be the consequences to position, ease, wealth, worldly honour, even family, never so great, a man must choose the spirit. Each man, to be a man, must be God's good servant first, and always.

CRIMINAL LAW

ASPECTS OF INTOXICATION AND SELF-DEFENCE IN CRIME

A NOTE TO VIRO v THE QUEEN

By Dr G F ORCHARD, *Senior Lecturer in Law, University of Canterbury.*

The recent decision of the High Court of Australia in *Viro v The Queen (a)* is a landmark in Australian law in that the High Court unanimously held that since the abolition of appeals from it to the Privy Council it is no longer bound by any decision of the Privy Council, whether such decision was given before or after the abolition of the right of appeal in 1975. There was general *(b)* acceptance by members of the High Court that they will continue to regard opinions of the Privy Council as highly persuasive, but as a final court of appeal the High Court could not be absolutely bound by the decisions of any other court, or by its own previous decisions. Thus, when in *Viro* the High Court was confronted by inconsistent decisions of its own and the Privy Council it was free to choose which should be followed, or it could reject both. The position of State Supreme Courts faced by conflicting decisions of the High Court and Privy Council is not quite so clear. At present, litigants in the State Supreme Courts may appeal to either the High Court or (in non-federal matters) the Privy Council, so the State Courts are subject to two ultimate appellate tribunals, the decisions of both of which bind the State Courts but neither of which is bound by or subservient to the other. A majority of the High Court in *Viro* favoured a general rule that the State Courts should follow the High Court in preference to the Privy Council, although this might encourage the losing side to opt for the Privy Council as the appellate tribunal. This curious breakdown in the doctrine of precedent based on a fixed hierarchy of courts might only be resolved when all Australian appeals to the Privy Council are abolished.

The discussion of the doctrine of precedent in *Viro* is of considerable theoretical interest, but the High Court also had to consider aspects of the law relating to intoxication and self-defence as defences to criminal charges. These issues are of more direct relevance in New Zealand, and it is with these that the remainder of this note is concerned.

1. Intoxication

In *Viro* D had killed V by stabbing him. At the time D was under the influence of voluntarily injected heroin and at his trial it was suggested that he had not intended to harm V, although it was also suggested that D had used the knife in self-defence. D was convicted of murder, but although the trial judge adequately directed the jury that such a verdict required that D had acted with intent to kill or cause grievous bodily harm (which suffices for murder in NSW), he did not instruct them that the fact that D was under the influence of heroin might be relevant to that issue. This aspect of the case was dealt with by Gibbs J *(c)* who concluded that as there was evidence that the heroin might have affected D's mental processes this was a material non-direction requiring a new trial. The two conclusions of law necessary for this ruling are not really controversial: the criminal responsibility of a person who has voluntarily consumed a drug is governed by the same rules as apply to one who has voluntarily consumed alcohol *(d)*, and evidence of such intoxication may be relevant to the question whether D in fact formed the "specific intent" required for murder even though the evidence does not suggest that D was *incapable* of forming that intent *(e)*. This accords with the decision of the New Zealand Court of Appeal in *Kamipeli (f)* and other English and Australian decisions where the Courts have rejected a contrary view which might be extracted from *DPP v Beard (g)*.

In *Viro* it was not suggested that the effect of the heroin had been so extreme that D had acted "involuntarily" or without consciousness of what he was doing, and so the High Court did not have to decide whether it should follow the deci-

(a) (1978) 18 ALR 257; discussed in 52 ALJ 345.

(b) Murphy J is an apparent exception.

(c) Stephen, Jacobs, Murphy and Aickin JJ concurring; Barwick CJ and Mason J expressed no opinion on this issue.

(d) (1978) 18 ALR 257, 273, following *Lipman* [1970] 1 QB 152 and *DPP v Majewski* [1977] AC 443.

(e) Ibid, 273-276.

(f) [1975] 2 NZLR 610.

(g) [1920] AC 479; see Orchard, "Drunkenness as a 'Defence' to Crime" (1977) 1 Crim LJ 59.

sion of the House of Lords in *Majewski (h)* that even in such a case as that voluntary intoxication can provide no defence if the crime in question requires a mere "basic intent" (for example, the crime of manslaughter). Gibbs J, however, referred to *Majewski* a number of times, with no apparent reservations, and also commented:

> "It has never been suggested in the present case that the actions of the applicant were involuntary. In the light of the decision of the House of Lords in *DPP v Majewski* it could not successfully have been contended that the applicant would have been exonerated from criminal responsibility if the drugs which he had voluntarily taken had deprived him of the ability to exercise self-control or to realize the possible consequences of what he was doing" *(i)*.

This statement seems to be deliberately circumspect for the references to lack of self-control and foresight are taken from the speech of Lord Elwyn-Jones LC in *Majewski*, but the Lord Chancellor's additional reference to cases where D is unable "even to be conscious that he was doing [the act]" is omitted. Nevertheless, the general tenor of Gibbs J's remarks suggests that *Majewski* will be followed in Australia, and this view has since been adopted by the Court of Criminal Appeal of South Australia in *R v Fahey (j)*. There it was held that the offence of unlawful wounding is one of "basic intent" only, with the result that, pursuant to *Majewski*, voluntary intoxication could provide no defence even though the effect of the intoxication was that D did not know what she was doing and so was in fact unable to form any intention. In *Fahey*, however, some limit to this rule was suggested. Thus, Hogarth ACJ said that in all cases where a crime of "basic intent" was charged D's intoxication was to be disregarded if it was proved to have been voluntary but D was to be convicted only if, on the assumption that he was sober and in full possession of his faculties, the intent required for the offence was to be inferred from his conduct. Also, White J said that in all cases (including those involving voluntary intoxication) D's act must be "deliberate or non-accidental", but because the intoxication can provide no defence it seems this means it suffices if D's conduct *appears* to be voluntary and deliberate if voluntary intoxication is the only reason for concluding that this might not in fact be the case. This qualification to the *Majewski* rule seems to be sensible and is of some importance. It means that although the intoxication will not excuse any crime of "basic intent" yet the alleged "recklessness" of which D is guilty in becoming intoxicated will not automatically supply the mens rea required for the crime: the question of fact remains whether, upon the assumption that D was sane, conscious and sober, any required intention, knowledge, or foresight is to be inferred from D's conduct *(k)*.

The question whether *Majewski* will be applied in New Zealand remains open *(l)* and here the position is complicated by dicta rejecting such a rule in *Kamipeli (m)*. But the inherent authority of the House of Lords, the approach of the High Court of Australia in *Viro*, and the decision in *Fahey*, are factors making it probable that *Majewski* will be accepted here notwithstanding what was said in *Kamipeli*.

2. Excessive force in self-defence

The really difficult issue in *Viro* concerned the common law relating to self-defence and culpable homicide. D had conspired with two others to rob V of some $1200 which V had intended to use to purchase heroin from D. Pursuant to this plan D had attacked V with a jack handle and V had retaliated with a knife; D claimed that in the ensuing struggle he had dropped his weapon but had then picked up another knife and with this had killed V. On these unpromising facts the defence of self-defence was raised and was left to the jury by the trial Judge in strikingly simple terms: D was entitled to be acquitted if in killing V he had been acting in self-defence against an attack by V who had then become the "aggressor" rather than the defender, and it sufficed if there was a reasonable doubt that this was so. The jury having rejected this defence and convicted D of murder, the substantive issue for the High Court was whether the judge had misdirected the jury in failing to direct them that, even if D had had the requisite intent to kill or cause grievous bodily harm, the appropriate verdict would be manslaughter and not murder if the defence of self-defence failed only because D, although seeking to defend himself, used too much force. In *Viro* the common law governed this question and in *Howe (n)* the High Court of Australia had held that at common law manslaughter was the appropriate verdict in such a case, but in *Palmer (o)* the Privy Council had considered *Howe* but had declined to follow it: their lordships took the view that if for any reason the complete defence of self-defence

(h) [1977] AC 443.

(i) (1978) 18 ALR 257, 272.

(j) Unreported, CA 24 of 1978, 18 July 1978.

(k) A like rule applies when the insanity defence is relied upon but D fails to discharge the burden of proof: *Roulston* [1976] 2 NZLR 644, 649 CA.

(l) *Roulston* [1976] 2 NZLR 644, 653-654 CA.

(m) [1975] 2 NZLR 610 CA.

(n) (1958) 100 CLR 448.

(o) [1971] AC 814 PC, on appeal from Jamaica; reaffirmed in *Edwards* [1973] AC 648, 658, PC on appeal from Hong Kong.

failed then the fact that D had been seeking to defend himself was irrelevant and if he killed V with the requisite intention, and had no other defence such as provocation, his crime was murder and not manslaughter.

In *Viro* the High Court, by a majority, concluded that in Australia *Howe* should be followed in preference to *Palmer*. The conclusions of the majority were expressed by Mason J *(p)*: if D causes V's death by an act done in the reasonable belief that he was threatened with death or grievous bodily harm from an unlawful attack, the crime is manslaughter only and not murder if D honestly believed that the force he used was reasonably proportionate to the threatened danger but the complete defence of self-defence fails because (but only because) that force was in fact more than was "reasonably proportionate" to the apprehended danger. Mason J left open the question whether the principle also applies when D reasonably apprehends harm not amounting to death or grievous bodily harm *(q)*, and nor did he discuss the applicability of such a principle to cases where D acts to prevent crime or the escape of a criminal *(r)*.

This principle was favoured because the moral culpability of a person who honestly (albeit unreasonably) believes he is doing no more than is "necessary" for self-defence is less than that "ordinarily associated with murder", and the idea that the difference between what D actually believed and what a reasonable person in D's situation would believe is "illusory" or "academic" was rejected *(s)*. Against this, Barwick CJ and Gibbs J preferred *Palmer* to *Howe*, the main objections to the principle in *Howe* being that it is imprecise, confusing and impractical, it invites compromise verdicts of manslaughter (when, perhaps, complete acquittal would be more proper), and there is very little scope for its operation if it is confined to cases where death or grievous bodily harm is reasonably feared *(t)*. More radical views were expressed by Jacobs and Murphy JJ who would have rejected both *Howe* and *Palmer* in favour of a broader conception of self-defence from which "objective" limitations would be almost entirely absent. These views will be returned to below.

(p) (1978) 18 ALR 257, 302-303; Stephen and Aickin JJ concurred: 292-293, 329, and in the interests of certainty Gibbs J concurred, 288, although in principle he preferred *Palmer*; and Jacobs and Murphy JJ, 312, 323, also accepted the majority view although disputing the principle.

(q) The Courts in Victoria have so restricted the principle in self-defence cases: *Enright* [1961] VR 663, *Tikos (No 2)* [1963] VR 306; but in *Howe* (1958) 100 CLR 448, 460 Dixon CJ contemplated a wider rule.

(r) Cf *McKay* [1957] VR 560.

(s) (1978) 18 ALR 257, 297 per Mason J.

3. New Zealand law: excessive force

The objections to the rule adopted by the majority in *Viro* have force, but in any event it seems clear that it does not represent the law in New Zealand.

Howe does not appear to have been considered by the New Zealand Court of Appeal, although in *Benning (u)* it was, perhaps, effectively rejected in that the Court approved directions to the effect that a deliberate killing was murder (and not manslaughter) if D used more force than was "reasonable in the circumstances"; and the Court rejected an argument that the jury should have been specifically directed that it was manslaughter only if D used too much force "but without any intent to kill", the trial judge having elsewhere adequately directed on the need for one of the intentions defined in s 167 of the Crimes Act 1961. The "manslaughter rule" in *Howe* and *Viro* does not depend on the absence of such an intention, but even if *Benning* does not conclude the matter there are other reasons why the rule will not be applied in New Zealand.

The New Zealand Courts will doubtless regard themselves as being bound by the decisions of the Privy Council in *Palmer (v)* and *Edwards (w)* where *Howe* was rejected, for although neither case was an appeal from New Zealand it is apparent that their lordships were expounding a general principle of common law which should be followed here unless there is something in the local law to exclude it *(x)*. So far from there being anything in New Zealand law excluding *Palmer* it has been suggested that the applicability of *Howe* is excluded by s 62 of the Crimes Act 1961, which provides that D is criminally responsible for any excessive force "according to the nature and quality of the act that constitutes the excess" *(y)* Howard *(z)* suggests that such a provision does not really conclude the issue, for it does not specify the "degree of unlawfulness" of a resulting killing, so there is still room for the application of the supposed common law that it is manslaughter only. But the Courts of Tasmania and Queensland have rejected *Howe* in interpreting Code provisions which, while not identical, are similar to the relevant provisions in the New Zealand Act *(aa)*. It

(t) Ibid, 286-287 per Gibbs J.

(u) Unreported CA 171/77, 1 March 1978.

(v) [1971] AC 814.

(w) [1973] AC 648.

(x) Cf the discussion of PC decisions from other jurisdictions in *Viro* (1978) 18 ALR 257, 281 per Gibbs J 295 per Mason J, 306 per Jacobs J, 326 per Aickin J.

(y) Adams, *Criminal Law and Practice in New Zealand* (2nd ed) para 1229.

(z) Howard, *Criminal Law* 3rd ed), 93-94.

(aa) *Masnec* [1962] Tas SR 254; *Johnson* [1964] QD StR 1.

now seems clear that this is the correct conclusion in Code jurisdictions for in *Viro* it was said that the *Howe* principle is based on an interpretation of the "malice aforethought" required for murder at common law *(ab)*, and, of course, that requirement has been abandoned in the Codes in favour of a more precise definition of the intention and foresight which may suffice to make a killing murder. If *Howe* is based on the common law requirement of "malice aforethought" it seems clear that it could not be applied here *(ac)*, and it also confirms that a similar rule will not apply to reduce non-fatal wounding offences *(ad)*.

4. New Zealand law: self-defence

Howe and *Viro* are concerned with a relatively narrow question about the borderline between murder and manslaughter, but the judgments in *Viro* also involve more general discussions of the law of self-defence, and these may yet be of some significance in New Zealand. A consideration of this requires a more general review of the present law of self-defence in this country.

When the Criminal Code Commissioners wrote the part of their Report of 1879 which dealt with the use of force in self-defence, the defence of property and the prevention of crime, they suggested that one broad common law principle could be extracted from the cases.

> "We take one great principle of the common law to be, that though it sanctions the defence of man's person, liberty and property against illegal violence, and permits the use of force to prevent crimes, to preserve the public peace, and to bring offenders to justice, yet all this is subject to the restriction that the force used is necessary; that is, that the mischief sought to be prevented could not be prevented by less violent means; and that the mischief done by, or which might reasonably be anticipated from the force used, is not disproportioned to the injury or mischief which it is intended to prevent" *(ae)*.

This suggests that whenever the common law recognised that D might be justified in using force against another it provided one general rule which required two quite abstract tests to be satisfied: that the force used was necessary in that the harm threatened could not be prevented by less violent means, and that the harm likely to result from D's force was reasonably proportionate to the harm D intended to prevent. But in the proposes Code appended to their report the Commissioners did not content themselves with providing such a general defence, but instead draughted numerous more detailed provisions defining the defences available in various different circumstances (the rules varying according to whether D was defending himself or another, or movable or immovable property, or whether crime was being prevented or riot suppressed, and so forth). These various provisions were intended to represent the particular rules applied at common law in the different situations.

The Commissioners' decision to define in some detail a series of defences of varying content, rather than to suggest one or two more general provisions defining permissible force, has had a lasting influence in New Zealand: the Crimes Act 1961 has more than 20 distinct provisions defining the force which may be used to arrest people (ss 39 and 40), to prevent dangerous offences, breaches of the peace and riots (ss 41-47), to defend oneself and persons "under protection" (ss 48-51), to defend property in various circumstances (ss 52-58), and to exercise disciplinary powers (ss 59 and 60); and surgical operations are specifically dealt with (s 61). Perhaps the most obvious result is that this is a rather complex part of the law in which some fine distinctions are drawn. Let it be accepted that it is unlikely that all these provisions could be satisfactorily reduced to one general statutory provision, yet it is surely the case that significant simplification is possible and desirable.

The need for simplification has been found to be most pressing in the context of self-defence, and here a consideration of the problems presented by the present law requires that the relevant sections of the Crimes Act be set out:

> **"48. Self-defence against unprovoked assault** – (1) Every one unlawfully assaulted, not having provoked the assault, is justified in repelling force by force, if the force he uses –
>
> "(a) Is not meant to cause death or grievous bodily harm; and
>
> "(b) Is no more than is necessary for the purpose of self defence.
>
> "(2) Everyone unlawfull assaulted, not having provoked the assault, is justified in repelling force by force although in so doing he causes death or grievous bodily harm, if –
>
> "(a) He causes it under reasonable apprehension of death or grievous bodily harm from the violence with which the assault was originally made or with which the assailant pursues his purpose; and
>
> "(b) He believes, on reasonable ground,

(ab) (1978) 18 ALR 257, 301-302, per Mason J; cf *Johnson* ibid.

(ac) Cf Edwards (1964) Univ of Western Aust L Review 457, 464.

(ad) *Falla* [1964] VR 78; Howard, op cit, 137-138.

(ae) Report, p 11; and see Appendix B to the Report.

that he cannot otherwise preserve himself from death or grievous bodily harm.

"**49. Self-defence against provoked assault** – Everyone who has assaulted another without justification or has provoked an assault from that other, may nevertheless justify force used after the assault if –

"(a) He used the force under reasonable apprehension of death or grievous bodily harm from the violence of the party first assaulted or provoked and in the belief, on reasonable grounds, that it was necessary for his own preservation from death or grievous bodily harm; and

"(b) He did not begin the assault with intent to kill or do grievous bodily harm and did not endeavour, at any time before the necessity of preserving himself arose, to kill or do grievous bodily harm; and

"(c) Before the force was used, he declined further conflict and quitted or retreated from it as far as was practicable.

"**50. Provocation defined** – Provocation within the meaning of sections 48 and 49 of this Act may be by blows, words or gestures."

No doubt the most striking feature of these provisions is that if D has provoked an assault from V, or has assaulted him, the defence can succeed only if the stringent provisions in section 49 are met, although in other cases the rather less demanding provisions in section 48 apply. The complexity of the present rules is hardly less obvious however, and in *Kerr (af)* the Court of Appeal concluded its judgment by urging that these sections be replaced by some simpler legislation. The Court said that this question had concerned the Judges for some considerable time and went so far as to suggest that the present rules are so excessively complex that "many juries must find the varying tests and distinctions . . . quite incomprehensible".

The two sections are relatively complicated even when read in isolation, but the difficulties for Judges and juries are seriously increased when the evidence is such that D may or may not have started or provoked the conflict, so that both sections have to be considered. There may then be so many similar but different tests for the jury that any confidence in the decision-making process would seem misplaced. In *Sampson (ag)* the trial Judge made a brave attempt to avoid some of these problems by obtaining a preliminary determination from the jury on the questions whether D had been threatened and, if so, whether he had provoked V, and he then directed them on the rest of the case in a manner appropriate to their answers on these issues. The Court of Appeal knew of no precedent for this "unusual procedure" and said that even if it were ever permissible it will be generally undesirable and likely to cause more difficulties than it is designed to avoid. Nevertheless one must feel sympathy for any tribunal which has to cope with both ss 48 and 49, and it seems absurd to expect that a jury will be able to do so. And even if s 49 is not in issue, considerable confusion may arise if both s 48 (1) and 48 (2) have to be considered.

A number of difficult or obscure issues are also raised by the text of these sections. The jury must treat an assault by V as unprovoked unless satisfied beyond reasonable doubt that it was provoked by D, *(ah)* but what does "provoked" mean? Provocation may be "by blows, words, or gestures" (s 50), and some assaults are deemed to be with or without provocation (eg, ss 52 (2), 56 (2) and 53), but in other cases it may be doubted whether D can be said to have "provoked" an assault unless his conduct was in some way wrongful and an assault reasonably foreseeable, or perhaps even intended. The Court of Appeal has held that if D has been guilty of "provocation" the mere fact that the assault which follows is more violent than was to be expected does not mean it is not a "provoked assault" within ss 48 and 49, but in any case the jury has to decide whether "the provocation led to the actual assault . . . or whether it should be attributed to something else such as pre-existing hostility or a desire for revenge" *(ai)*. In the latter case the more benign provisions of s 48 apply. The nature of the assault by V is relevant to the question whether it was really caused by D's "provocation", and D is to be given the benefit of any reasonable doubt, but this issue of causation does seem a difficult one, well capable of causing profound confusion.

Assuming the issue whether an assault has been provoked or not is disposed of, ss 48 and 49 prevent other problems of interpretation. In *Kerr (aj)* the Court of Appeal solved one riddle by declaring that s 48 (1) can apply even when death or grievous bodily harm has resulted from D's act, provided the requirements of s 48 (1) (a) and (b) are complied with, but other problems remain. Thus, in every case the terms of s 48 make the defence conditional upon D having been "unlawfully assaulted" (and s 49 presumes an "assault"). At

(af) [1976] 1 NZLR 335, 343-344.
(ag) Unreported, CA 61/72, 25 July 1972.
(ah) *Sampson*, ibid.
(ai) ibid.
(aj) [1976] 1 NZLR 335, 343.

common law it suffices that D reasonably believes (albeit mistakenly) that there is a threat of unlawful force justifying defence *(ak)*, but it is quite uncertain whether this sensible principle can apply in New Zealand: it may be that the common law rule relating to mistake provides a justification which is not "altered by or inconsistent with" a statutory provision (and is therefore preserved by s 20), but conversely it may be argued that these detailed statutory provisions must have been intended to entirely replace the common law in this area, a view which gains some support from the fact that some provisions within these sections are draughted to expressly cover reasonably mistake (s 48 (2) (a) and (b), and s 49 (a)). Equivalent doubts arise in respect of a case where V's assault was in fact "provoked" by D, but D was reasonably ignorant of that fact.

It is apparent from *Seni (al)* that the terms of these sections are such that the defence of reasonable mistake cannot be superimposed on *all* the provisions of ss 48 and 49. In that case, in relation to s 48, the trial Judge had simply directed that the defence failed if D had used more force than was reasonably necessary to defend himself. The Court of Appeal held that this was correct of s 48 (1), but there had been misdirection because s 48 (2) could apply even if this test was not met, if D reasonably *believed* he could not otherwise defend himself: "The first test [s 48 (1) (b)] is objective and the second [section 48 (b)] (subject to the requirement of reasonable grounds) is subjective." This entirely understandable decision does nothing to allay doubts as to whether reasonable mistake as to the threat of unlawful force can justify self-defence in New Zealand.

Quite apart from difficulties in interpretation, it is also thought by some that the provisions in section 49 are too absolute and restrictive of the right of self-defence when D has first assaulted V, or has provoked V's assault. It is regrettable that s 49 may apply (rather than s 48) even though V's reaction is out of all proportion to the provocation, and the rules that D may not use any force at all to defend himself until he reasonably apprehends death or grievous bodily harm, and has retreated as far as practicable, are surely too absolute *(am)*.

Finally, in addition to the problems presented by the text of ss 48 and 49, there are other noteworthy peculiarities which emerge from a consideration of related provisions in this part of the Code. Thus, s 51 provides for a relatively simple defence when D uses force to defend "anyone under his protection" from an assault, the conditions being that the force used must not exceed that which is "necessary" to prevent the assault, and D must not intend harm which is disproportionate to the assault he intends to prevent. Here the draughtsman has been content with general requirements of "necessity" and "proportion", there being no special rules concerning cases where serious injury is intended or caused, or where the person "under protection" has provoked the assault. The meaning of persons "under protection" of D is quite obscure *(an)*, and in contrast it now seems that the common law does not distinguish between such people and mere "strangers" in allowing D to use "reasonable" force to defend others *(ao)*. But where serious injury is threatened to another the Code does not confine the defence to cases of assaults on persons "under protection". Here the operative section is s 41 which, in comparison with ss 48 and 49, is so strikingly simple that it should be set out in full:

> "Everyone is justified in using such force as may be reasonably necessary in order to prevent the commission of suicide, or the commission of an offence which would be likely to cause immediate and serious injury to the person or property of any one, or in order to prevent any act being done which he believes, on reasonable grounds, would, if committed, amount to suicide or any such offence."

In this section the amount of permissible force is succinctly and generally described – that which is "reasonably necessary" – and, although the possibility of mistake as to what is necessary is not covered, the fact that it suffices that D act "in order to" avert the threat, and the reference to reasonable belief in such threat, allows account to be taken of other mistakes on D's part. Section 41 authorises D to defend anyone else's person or property, but it cannot (it seems) authorise D to defend *himself* from "immediate and serious injury" for it is apparent that the more particular and complex provisions in ss 48 and 49 are designed to provide an exhaustive account of the law of self-defence (subject to the doubts already mentioned about mistake).

The relative simplicity of s 41 is instructive and attractive, although that is not to say that it is necessarily an ideal provision: mistake as to what is "reasonably necessary" should be expressly

(ak) *Chisam* (1963) 47 Cr App R 130, 133-134; *Devlin v Armstrong* [1971] NILR 13, 33-34; *Rose* (1884) 15 Cox CC 540, 541; where V is a constable acting in the execution of his duty it seems that "injury" must be apprehended: *Fennell* [1971] 1 QB 428 CA.

(al) Unreported, CA 117-76, 8 February 1977; the CA repeated its criticism of the complexity of the present law.

(am) Cf Adams, op cit, 544-546.

(an) Adams, op cit 553, 554.

(ao) *Duffy* [1976] 1 QB 63, 67-68.

dealt with and because there is no general requirement of proportion the section may allow too much force when D is seeking only to protect property or prevent suicide.

5. Possible reforms

The complexity of the existing New Zealand law of self-defence is such that reform in the near future is essential, and the modern common law rule is of such apparent simplicity that it is probably the most natural source of inspiration for such reform. However, although there is general agreement that the common law has now abandoned the detailed rules which were once applied, in favour of a rather general test, there is a certain amount of doubt as to precisely how the common law should now be stated.

In *Kerr (ap)* the Court of Appeal felt able to summarise the position in one short sentence: "With the passage of time the common law has contented itself with the simple test whether the force which was used in self-defence was both reasonably necessary and no more than was reasonably necessary." This, however, is somewhat elliptical and a consideration of the Privy Council's advice in *Palmer (aq)* (from which the Court of Appeal quoted at some length–, and the views of a majority of the Judges in *Viro (ar)* suggests that there are probably three requirements which must be met if D's force is to be justified on the ground of self-defence:

(i) That D acted with intent to defend himself (or, semble, another) against an unlawful attack which was made by V, or which D believed, on reasonable grounds, was about to be made by V, and

(ii) That the force used by D was reasonably necessary, and no more than was reasonably necessary, to prevent or stop V's attack, or D believed, on reasonable grounds, that this was so; and

(iii) That the force which D used was reasonably proportionate to the danger which he was seeking to avert *(as)*.

In some statements of the law, requirements (ii) and (iii) are not distinguished, it apparently being assumed that for force to be "reasonably necessary" the proportion rule must be satisfied, or vice versa. It seems better to treat these as two distinct requirements for there may be cases where it is not possible for D to ensure that some relatively trivial harm is averted unless he resorts to considerable violence (and so much force could be said to be "necessary"), but it is generally thought that this is not permitted by the common law *(at)*.

The rule stated above requires that D's force be (or be reasonably believed to be) "reasonably necessary", and that it be "reasonably proportionate" to the harm threatened. While both these requirements appear to be generally accepted it is also commonly emphasised that the standard of "reasonableness" is not to be applied to penalise force of a kind which might be expected from an ordinary person faced with the circumstances D was faced with. "Detached reflection cannot be demanded in the presence of an uplifted knife" *(au)*, "jewellers' scales" are not to be used to measure "reasonable force" *(av)*, D "cannot weigh to a nicety the exact measure of his necessary defensive action" and if he did no more than he honestly thought was necessary "that would be most potent evidence that only reasonable defensive action had been taken" *(aw)*. Moreover, although D's force must have been "reasonably necessary" for his defence, it is also commonly said that the law does not now insist on any general "duty to retreat" before force is used. Rather, it is said, any failure on D's part to retreat or take some other avoiding action not involving the use of force, is merely a factor to be taken into account in deciding whether, in all the circumstances, D's force was "necessary" and "reasonable" *(ax)*.

The rather general approach suggested by modern common law authority has been critically examined by Ashworth *(ay)*. He argues that the law's principal objects in this area should be to minimise violence and maximise the protection of human life (including that of an attacker), and to provide principles which will promote consistency of decision. Pursuant to these reasonable objects he suggests that although it is unrealistic for the law to seek to provide detailed rules for various types of case, yet general principles should be applied by the Judges and he suggests a number of such principles calculated to minimise the occasions on which force which is not truly necessary

(ap) [1976] 1 NZLR 335, 343.

(aq) [1971] AC 814, 831.

(ar) (1978) 18 ALR 257, 278-280 per Gibbs J, 292-293 per Stephen J, 297, 302-303 per Mason J, 327-328 per Aickin J.

(as) All this seems implicit in *Palmer*, supra, except that the PC does not expressly relate the defence to D's "reasonable beliefs"; cf the criticism of Aickin J in *Viro*, supra, at 330.

(at) Report of the Criminal Code Commission 1879, Appendix B, p 44; Ashworth [1975] CLJ 282, 296; *McKay* [1957] VR 560, 572-573.

(au) *Brown v US* 256 US 335, 343 (1921) per Holmes J.

(av) Smith and Hogan, Criminal Law (3rd ed), 260, citing *Reed v Waite* (1972) *The Times*, 10 February.

(aw) *Palmer* [1971] AC 814, 832, which is also true in New Zealand: *Kerr*, supra, 342.

(ax) *McInnes* [1971] 3 All ER 295, 300; cf *Palmer* [1971] AC 814, 831.

(ay) Ashworth, "Self Defence and the Right to Life" [1975] CLJ 282.

and reasonable would be protected. For example, D must take any "reasonably possible" or "practicable" steps open to him to avoid the use of force *(az)*; the benevolent view of "reasonableness" should be confined to the innocent victim of a sudden attack and the requirements of the defence should be strictly construed against he whose own fault contributed to the conflict *(ba)*, and against he who was unlawfully armed.

No doubt principles of the restrictive kind suggested by Ashworth may be justified in theory, but it is doubtful whether they would be desirable in practice. There would seem to be a real risk that this approach could lead to the kind of complexity which characterises the existing Code provisions, and in cases where D has been at "fault" the suggested principles could well require an unrealistically high degree of self restraint. Moreover, if the statutory defence was defined in general terms of "reasonable necessity" or the like it may be doubted whether the Judges could properly impose more precise criteria (as legal requirements) in instructing juries.

A notable feature of the rule which has earlier been suggested as representing the common law is that it contains two "objective" limitations: D's force must be "reasonably proportionate" to the apprehended danger and it must not be more than was (or was reasonably believed to be) necessary for self-defence. But in *Viro* various qualifications to these requirements were suggested. The most novel and extreme view was propounded by Murphy J who favoured abandoning all "objective" limitations so that the defence would succeed if D in fact acted for the purpose of defending himself against an unlawful attack (or there was a reasonable doubt that this was the case). On this view such matters as proportionality and necessity would be of no more than evidential significance and Murphy J even thought it unrealistic to insist on a "belief" that the force was necessary, for in many cases "the self defender acts instinctively" *(bb)*. Bold and novel though Murphy J's views appear to be they seem to represent the approach of the trial Judge in Viro. The opinion expressed by Jacobs J is similar and only slightly less in advance of orthodoxy. He thought it should be enough for the defence to succeed that D acted for the purpose of defending himself and in the belief that his acts were necessary to defend himself; however the defence would fail if in the circumstances that belief was not one which a rational person could hold (although the jury should be told of this qualification only if such a view was open on the facts of the case) *(bc)*. Jacobs J's conclusion was inspired by the view that "objective" fault is not generally sufficient in modern criminal law *(bd)*. His judgment is of considerable general interest in that he suggests a reconciliation of authorities which would require "reasonable" grounds before a mistake can excuse and those which would give the presence or absence of such grounds no more than evidential significance. Jacobs J suggests that it would be wrong to insist that the mistake be one which a reasonable person *would* hold, for that would be to punish negligence, but he argues that a mistaken belief which could not have been held by a rational person should not itself excuse, because it would be an "insane" belief and "the requirements for a defence of insanity cannot be avoided by pleading an irrational belief" *(be)*.

These are perhaps the clearest departures from the orthodox "objective" requirements in *Viro*, although a similar trend is evident elsewhere. Thus Barwick C J thought that the most important question was whether D intended to do no more than defend himself, and he regarded "proportionality" as only an evidential factor relevant to the question whether D reasonably believed his conduct was "necessary" for his defence *(bf)*. Moreover, in requiring that D must "reasonably believe" he was threatened with serious unlawful attack, Mason J added that this meant "not what a reasonable man would have believed, but what the accused himself might reasonably believe in all the circumstances in which he found himself" *(bg)*. Add to this the orthodox view that an "honest and instinctive" belief that D's force is no more than is necessary is "most potent evidence" that D took no more than "reasonable defensive action" *(bh)* and it is apparent that seemingly "objective" tests may be significantly qualified, if not effectively abandoned altogether.

6. Conclusion

The existing New Zealand law of self-defence must be reformed to provide a simpler scheme than exists at present. No doubt any new rule will require that D act with intent to defend himself against unlawful attack, but the diversity of views expressed in *Viro* suggests that there is room for

(az) Citing *Julien* [1969] 2 All ER 856.

(ba) He questions *Held* [1972] Crim LR 435 where the Court refused to recognise a duty to avoid going to a place where one knows one may be attacked.

(bb) (1978) 18 ALR 257, 320-322.

(bc) Ibid, 312.

(bd) Cf *Woolnough* [1977] 2 NZLR 508, 518 which suggests the possibility of "unreasonable" mistake as to excusing factors collateral to the actus reus being a defence.

(be) (1978) 18 ALR 257, 310.

(bf) Ibid, 264-266.

(bg) Ibid, 303.

(bh) *Palmer* [1971] AC 814, 832 PC.

debate on other matters, in particular whether there should be a requirement of proportionality, or belief, or reasonable belief, in proportionality, and whether any required belief in the necessity of the action should have to be based on reasonable grounds. The views of Jacobs J on the significance of a requirement of "reasonableness" in the context of true crime are clearly important but are perhaps best considered as part of a more general review of the principles of criminal liability.

THE ROLE OF PRESSURE GROUPS IN THE LEGISLATIVE PROCESS

Mr Noel S Woods CBE retired as Secretary of Labour in 1970 and is now Visiting Fellow in Industrial Relations at Victoria University. He holds an MA degree, Diploma in Education and Diploma in Social Sciences. In 1935 he was awarded a Fellowship of the Rockefeller Foundation for his work in industrial relations. He worked in the National Service Department as Divisional Officer in charge of industrial manpower and the Labour Department as Chief Research Officer, Registrar of Industrial Unions, Assistant Secretary and then Secretary of Labour. Mr Woods was a member of the International Labour Organisation's original committee on equal pay. He has written and lectured widely on industrial relations. Other interests include care of the aged, the role of women in society, development conferences, church committees, the Royal Society and the Economic Society.

In the industrial relations area

The organisation of workers into pressure groups (trade unions) has historically been a main generating force behind the regulation and improvement of wages and other conditions of employment. The historic role of trade unions has been to use the corporate strength of pressure-group organisation in the pursuit of four main objectives, chiefly through collective bargaining and legislation. These four objectives are:

To protect the individual worker from victimisation, intimidation and exploitation;

To continually improve the terms and conditions of his or her employment;

To conserve the standards already gained;

To ensure that workers share the increments of technological and social advance.

To a steadily increasing extent each of these objectives has had to be sought through political as well as industrial sources. The extent to which this is so varies greatly from time to time and from country to country. In New Zealand, for example, there was a time when the quality of a worker's housing would have depended almost entirely on what was in his pay packet; today, while this is still an important determinant, the quality of his housing also depends upon government policies and enactments regarding such matters as state rental housing, home-purchase finance, and family benefits which can be capitalised.

There are some important differences between countries such as the United States where the trade unions continue to rely upon their corporate strength as the main safeguard of trade union objectives, and countries such as New Zealand where trade unions have tended by political action, to shift this safeguarding task more substantially on to the shoulders of the state. Again, an example may clarify the point. The American worker's wage rate normally continues to rest on an agreement between employer and trade union or work group which those parties will enforce as between themselves; the New Zealand workers' wage rate more usually rests on a collective agreement or award which is enforceable by the state as an extension of the Industrial Relations Act.

From country to country the amount of legislation in the industrial relations area (which may broadly be described as the area covering

wages and conditions of employment, safety and health at work, freedom from discrimination; the availability of employment, training for employment, holidays, sick leave, unemployment and various other matters arising out of the fact of employment) varies widely, but most of it can be traced to the original initiatives of those pressure groups of workers called trade unions. They cannot claim the whole initiative (Eg, some initiatives came from paternalistic employers like Cadbury and Wedgwood) and sometimes the initiative has worked indirectly – as when a Government ratifies a Convention of the International Labour Organisation not so much from the direct pressure of its own trade unions as from the pressure of a growing concensus of governments in favour of a set of standards stemming originally from those trade unions who applied the pressure to secure the passage of the Convention.

Thus we see how initiatives coming largely from the trade unions as pressure groups have steadily transmuted into a growing body of social legislation, some of it reaching well beyond what we have described as the industrial relations area.

There is a law of physics – at least, there was when I was at school and I haven't heard that it has since been abolished – which postulates that every action generates an equal and opposite reaction. We also find this law here and there in industrial relations. When one group begins to generate pressure another group often forms to oppose it by creating an opposite pressure. If a southerly gale comes up while a northerly is still rampaging you are – well, of course, you're in Wellington – but you are more generally caught in a highly turbulent situation in which it becomes difficult to remain on course. As conflicting pressures rise we find ourselves driven by them to extreme positions.

This was something of the situation regarding industrial relations at the time of the 1975 general election. The conflict between pro-union and anti-union pressures became intense and the political proponents of the pressure groups moved towards extreme positions and committed themselves to extreme measures – heavy penalties, no penalties; discipline the unions, free the unions. Clearly the party that wins from an extreme position is then faced with the fact that it is committed to similar over-reaction in its legislative programme. Thus there are generated swings in legislative activity instead of evolutionary change and these in turn produce instability and create further pressures. (I have discussed in other papers elsewhere the point that the objectives could have been better met by more moderate legislation if the atmosphere had been less charged with extreme commitment).

Employers have also formed themselves into pressure groups through various organisations such as employers' associations, trade associations, and industrial unions of employers. In the industrial relations area these organisations (and more particularly the industrial unions) have been far from impressive in either withstanding the trade union pressures or generating legislative activity. One reason suggested for the apparent trailing of employer pressure groups is the possibility that they possess less solidarity than trade unions because they are weakened by internal competitiveness and by an element of apathetic or non-supportive employers. Some trade unions may, however, be in much the same position. In those cases where employer groups appear to possess a higher degree of solidarity, there seems to be no clear evidence that they are more effective as pressure groups within industrial relations. (They may, of course, have powerful pressure in other areas).

A more likely explanation of the traditional reluctance of employer organisations to take strong initiatives in the industrial relations area may be that, in the first instance, most initiatives appear to employers as added costs and therefore as things to be avoided or approached with caution. An employer group, aware that a wage-increase and other improvements in conditions of work within certain limits have become unavoidable, has customarily tended to wait for the trade union to take the initiative with a log of claims far beyond these limits, and then to play defensively on the terms of reference set by the workers. In fact, for employers to take the initiative and set the terms of reference had become such a rare phenomenon that when, after the amending legislation of 1973, employer groups began to do so, their action was regarded by trade unions as so contrary to established custom as to be improper.

Historically this negativeness of employers in the industrial relations area has been a general rule. The initiating pressure for the 8-hour day, the 40-hour week, paid holidays, equal pay, redundancy payments, and so on, has come from the trade unions. They have been the pace-setters

with the employers and employer organisations playing the negative part of trying to slow down the pace and reduce the cost. Cost, of course, has to be weighed against benefit. What has looked like cost at first sight has often turned out to be profit on closer acquaintance.

The fact of the matter is that as a general rule (but there are exceptions) the pressure of employer groups on government, which is usually in the direction of maintaining the status quo, has been less effective than the pressure of worker groups which has been in a socially forward-moving direction. The result has been accumulating legislative change in the worker's favour, but slowed down by contra-pressures more usually generated by concern over costs.

While the pressures generated by employer and worker organisations respectively are usually opposing ones there have nevertheless been occasions when the two parties have supported each other to exert a combined pressure on government (as in 1961 over union membership, 1968 over general wage orders, and on various other occasions).

Pressures once set in motion may become self-accelerating for reasons quite distinct from those which activated the pressure group in the first instance. We may take as an example, the pressure in 1977 from trade unions to have the wage restraint legislation abolished and allow for a free – and obviously upward – movement of wages. In September 1977 our television screens advised us that for a 12-month period consumer prices had risen 14.8 percent and wages had risen 15 percent, from which we were no doubt invited to deduce that workers were doing well enough and unions should damp down their pressure.

If we look carefully at these percentages we realise three things: first, the worker like other purchasers of consumer goods was paying 14.8 percent more for the same quantum of goods; second, the employer was paying out 15 percent more for the same quantum of labour and naturally endeavouring to recover this additional cost through prices; and third, that the increase in the worker's take-home pay was *not* 15 percent, but was 15 percent less income tax which for a skilled manual worker could be as much as or even more than one third of the increment. (For a rise in taxable income in 1976-77 from $5,000 to $6,000 the rise in income tax was approximately $350, ie 35 percent of the increment). The worker was in fact taking home an increment of around 10 percent to cope with an increase in the family cost of living of 14 percent. The pressure for more in the pay packet was in fact accelerating and not being held steady, but the cause of the continuing spiral in both prices and wages in this situation arose out of taxation policy and not out of trade union or employer policies. It has to be recognised that in some situations government itself can be generating pressures which become channelled back on to government through the parties concerned. A flag on a flag-pole in the heart of Wellington always flies from the south when the wind is from the north – a wall turns the wind back upon itself, but does not generate it.

Sufficient has now been said by way of argument and example, to indicate how effectively the legislative process in the industrial relations area is influenced by pressure groups. Several other points of some general validity emerge. Historically it has been the trade unions who have exerted the greater and the more successful pressure; but not always wisely directed pressure. The pressure has been unwise, for instance, when directed towards securing legislation which looked superficially attractive but in the long run worked out to the disadvantage of the trade unions. It has similarly been unwise when it has brought into being contrapressures of sufficient intensity to produce political over-reaction and punitive and restricting legislation. Historically the politicians have tended to over-react to any considerable intensification of pressures in the industrial relations area, thus creating an unstable pendulum effect which may have little relationship to maturing industrial relations philosophies. Clearly also, some of the pressures ascribed by government to the pressure groups are pressures generated by government itself and blown back into the face of government after impact on the groups affected.

Where pressure groups have major impacts on the legislative process, as they clearly do in industrial relations, it becomes doubly important that the groups concerned are well-structured, well-resourced, and well-informed. It also becomes important that the legislators be so well-informed on the basic principles, practices and philosophies in the industrial relations area that they do not over react when pressures intensify and are able to diagnose the causes of the rise in pressures with clarity and accuracy. Furthermore, the lesson has to be learnt that to deliberately stir up pressure groups is as counter-productive as to deliberately stir up a wasp's nest. If pressure is inconveniently high, there is no remedy in further increasing it.