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WHO WILL ARBITRATE NOW?

Whatever may be the merits of the Remuneration Bill nothing could be better calculated to destroy confidence in Industrial Arbitration than the manner and timing of its introduction. The General Wage Orders Act 1977 was introduced after full consultation with interested parties. It marked the beginning of a return to free wage bargaining and was accompanied by changes to the Arbitration Court designed to restore confidence in arbitration. Indeed, its very success would hang on the confidence of the protaganists in the system. What confidence can anyone have when less than two years later, and immediately before the hearing of a General Wage Order application, and after a minimum of belated consultation, legislation is introduced to replace the General Wage Orders Act and effectively pull the rug out from under those acting in reliance on it.

Even post-primary teachers, who are not renowned for their militancy, are asking at stopwork meetings what confidence they can now place in the arbitration system.

Much was made in the second reading debate of the Remuneration Bill of the provisions of cl 6 which provides a guarantee, so it was said, of the decisions of various wage fixing Courts and Tribunals. Before a decision is guaranteed though it must be made. The legislation containing the so-called guarantee would prevent the hearing of an application that had already been made. This cl 6 can be changed when expedient too. Without confidence in the guarantor it is no use speaking of guarantees.

The Remuneration Bill provides for a system of wage adjustment by regulations operating alongside the arbitration process and downgrades direct negotiation by protecting only *determinations* of the arbitral Tribunals and Courts. Whatever the merits may be - why control by regulation? There are different philosophies towards wage control. These philosophies should be debated. They were debated in parliament during the passage of the General Wage Orders Act 1977. The point of balance, and a delicate point of balance at that, could be found in the subtlety of the language used to define the matters to be taken into account by the Arbitration Court when determining a general wage order application. Parliament should debate differences in philosophy and policy. Interested bodies should have an opportunity to participate and comment. It is appropriate that the balance be reflected in legislation. And close consideration having attended its passage, no less consideration should be given to any change.

To a government the advantage of a regulation is that none of this is necessary. When taken beyond their purpose, which should be machinery only, they are the ideal instrument of a despot.

If wage adjustments are needed outside the arbitration system why can they not be made by Act of Parliament? After all an Act of Parliament is being accorded urgency to repeal an Act and give power to make a regulation giving 4.5 percent general wage order in early September. It all goes to show that this type of adjustment, which is deserving of debate, could be made by Act of Parliament and does not justify the grant of wide regulation-making powers.

It has been said that the Economic Stabilisation Act 1948 empowers all that the Remuneration Bill does. That is correct. The best that can be said of the Economic Stabilisation Act is that it is one of the heavier avian corpses hanging about the neck of open government. The Remuneration Act will be another.

Tony Black

INTERNATIONAL LAW

THE LEGAL SYSTEM OF TONGA

By ROGER CONNARD, *LL M, Visiting lecturer, 'Atenisi University, Nuku'alofa; formerly, Senior Lecturer in Law, University of Auckland**

The Kingdom of Tonga is one of New Zealand's nearest neighbours. Contact between the two countries is considerable: immigration into New Zealand by Tongans; trade between the two countries; New Zealand aid to Tonga; remittances from Tongans working in New Zealand; and tourist visits to Tonga by New Zealanders. This brief survey sets out the salient features of the Tongan legal system.

The Constitution

The Tongan Constitution was established in 1875 and is believed to be the third oldest written constitution in the world. It was introduced by the then king, George Tupou I; by it, he sought to maintain Tonga's independence in the face of increasing colonial expansion by Western powers, and also to ensure the country's future stability *(a)*.

In many ways, the Constitution is a rather curious mixture of feudalism, Tongan tradition and nineteenth-century English and American concepts of fundamental freedoms. The extent of the role played by the King's Prime Minister, the Rev Shirley Baker, in its introduction as been the subject of much debate *(b)*.

Declaration of Rights

The first Part of the Constitution sets out a number of fundamental rights: a declaration of freedom; the prohibition of slavery; equality under the law; freedom of religion and speech; and various provisions relating to fair trial (by jury), no double jeopardy, habeas corpus, etc. There is also the famous cl 6 whereby "the Sabbath Day shall be kept holy in Tonga . . .".

Form of Government

By cl 31 of the Constitution, "the form of Government for this Kingdom is a Constitutional Government under His Majesty King Taufa'ahau Tupou IV his heirs and successors". Three divisions of the Government are listed and these will be discussed in turn.

(1) *The King, Privy Council and Cabinet.* The Constitution sets out the rules for succession to the throne. As will appear shortly, the King's powers are very wide; directly or indirectly, all legal power resides in him. However, it should be noted that by cl 17 "the King shall govern on behalf of all his people and not so as to enrich or benefit any one man or any one family or any one class but without partiality for the good of all the people of his Kingdom". The importance of status in Tongan society requires a restricted interpretation to be given to this clause, as is implicit in the Constitution itself.

The Cabinet is appointed by the King. It consists of the Prime Minister (also the Minister for Foreign Affairs), the Minister of Lands, the Minister of Police and such other Ministers as the King may appoint. The Privy Council consists of the Cabinet, the Governors of Ha'apai and Vava'u (the central and northern island groups of Tonga) and, again, such other Ministers as the King sees fit to appoint.

(2) *The Legislative Assembly.* Law-making power lies with the Legislative Assembly, except that, under the Government Act, s7, the King in Privy Council has limited powers to make ordinances while the Assembly is not in session. It consists of the privy Council, seven nobles; representatives (elected by the Kingdom's 33 nobles) and seven people's representatives (elected by all Tongans, except the nobles, over the age of 21 years). It must meet at least once every year, and elections are held every three years, though the King has power to order its earlier dissolution.

Statutes are enacted in broadly similar manner to those of the English or New Zealand Parliament. After three successful readings, Bills are submitted for the King's Assent and then become law. Should the King withhold his Assent from any Bill, it cannot be introduced again until the following session. Periodically, Laws Consolidation Acts have been passed, appointing a Law Revision Commissioner to prepare an updated set of all the Statutes and

* I am indebted to Kelemani Taufaeteau LLB for his friendly assistance, though the views here stated are, of course, my own.

(a) See Latukefu, *The Tongan Constitution*, 1975, Tonga Traditions Committee, Nuku'alofa, p.43.

(b) See Rutherford, *Shirley Baker and the King of Tonga*, 1971, Oxford University Press.

Regulations currently in force. The Commissioner has wide powers to rearrange statutes and sections of statutes in more convenient form, to simplify or bring into conformity the wording of statutes, and to make other formal changes of a like nature. The revision, after approval by the King, becomes the sole source of all Statutes and Regulations then in force. The most recent Revision, in 1967, was carried out by Sir Campbell Wylie QC and is published in three volumes, the first two containing 141 numbered statutes (including the Constitution) and the third setting out the Regulations.

The Legislative Assembly has power to make amendments to the Constitution provided that they do not affect "the law of liberty, the succession to the Throne and the titles and hereditary estates of the nobles" (cl 79). The procedure is as for a normal Bill, except that the Privy Council also must unanimously approve the amendment.

(3) *The Judiciary.* The Judiciary is headed by a Chief Justice, (currently Mr Justice Henry H Hill), appointed by the King with the consent of the Privy Council. The Court structure is basically the same as in New Zealand. The several Magistrates' Courts try lesser criminal and civil cases, with a right of appeal by either party to the Supreme Court. They also conduct the preliminary inquiries for indictable offences. Trials on indictment take place in the Supreme Court before the Chief Justice and a jury of seven. An unusual feature of Tongan law is that there is no appeal against conviction on indictment, although the King in Privy Council may grant a pardon, or, it seems, reduction of sentence. Major civil cases are tried in the Supreme Court, with a right of appeal to the Privy Council (Sir Trevor Henry has recently sat as a member of the Privy Council in its performance of this duty). There is also a Land Court, the Chief Justice also sitting as the Judge of this Court, from which an appeal lies to the Privy Council.

A Court of Appeal Act was passed in 1966, but the necessary Commencement Order has never been made. Unfortunately, the 1967 Revision of the Statues included this Act, in the belief that the Order was about to be made; exceptionally, therefore, resort must be made to the 1948 Revision for the present state of the law relating to appeals.

The Land

The final Part of the Constitution deals with the Land, though most of the details are to be found in the Land Act. In a short article of this nature, it is impossible to give more than a very bare outline of this important topic *(c)*. The essential features are that all land belongs to the King, by whom (or whose predecessors) hereditary estates have been granted to the 33 nobles and a few others. The sale of land is prohibited, but leases may be granted (where the lessee is a foreigner the consent of the Cabinet is necessary). All Tongan males over the age of 16 years are legally entitled to a acre town allotment and a bush allotment of not more than 8 acres at a small rent fixed by the Government. On the death of an allotment holder, the land passes to his widow and then to his eldest son. In practice, and for a variety of reasons, there is an increasing number of Tongans without the allotments to which they are legally entitled.

The Substantive Law

Of course, it is only possible here to give a brief idea of this topic. The Criminal Offences Act is in essence similar to the Crimes Act 1961 (NZ). There is also a codification, of 165 sections, of the law of evidence, based apparently upon the Indian Code.

In the area of civil law, from a legal standpoint the most important piece of legislation is the Civil Law Act, whereby (s 4) "the common law of England, the rules of equity and the statutes of general application in force in England" in 1966 are to be applied by Tongan Courts so far as they are not in conflict with Tongan legislation and so far as local circumstances permit. Contract and tort law are therefore substantially the same as in New Zealand, although note should be made of the Contracts Act, whereby contracts involving credit in excess of $500, made between foreigners and Tongan subjects, require writing and registration to be enforceable. Other Tongan statutes include a Companies, Probate and Administration, Divorce, Magistrates, Courts, Shipping, Carriage of Goods by Sea, Carriage by Air, Prices of Goods and Services, and Marine Insurance Act, all in broadly the same form as their English or New Zealand counterparts, though usually a good deal less complex.

The Legal Profession

There are no professionally qualified lawyers in private practice in Tonga (there are two in the Crown Law Office). There are, however, a number of local lawyers, entitled to practise

(c) For further reading, see Crocombe (ed), *Land Tenue in the Pacific*, 1971, Oxford University press, Ch.6 (reprinted with per- mission by the University of the South Pacific, 1977); see also *land and Migration*, papers presented at a Seminar sponsored by the Tonga Council of Churches, September 1975.

by virtue of registration under the Supreme Court Act, s16. The roll is maintained by the Chief Justice. Courses of instruction in law are currently being provided, with a view ultimately to introducing an examination system, although much work remains to be done. Occasionally, Tongan lawyers residing overseas are briefed to appear in the Supreme Court or before the Privy Council.

Proceedings in the Magistrate's Courts are normally entirely in Tongan. In the Supreme Court, Tongan and English are always both used. Three small volumes of law reports have been published, although these are long since out of print.

*Conclusion*As has been seen, the Tongan legal system is one in which a New Zealand lawyer can feel at home. Local features are comparatively few, although it would be a pity not to mention the delightful s 12 (1) of the Town Regulations Act, which provides:

> "Any person travelling to a distant place upon a Government road if he be thirsty may peel and drink coconuts growing by the roadside in any main road but it shall not be lawful for him to carry away any nuts but only to relieve his thirst nor may he take nuts from any plantation".

However, it would be wrong to assume that similarity in the form of the law means also similarity in popular attitudes to it. That is not to say that the law as described is a facade, or that it fails to operate in the manner described. It most certainly does. It is just that one is left a little uncomfortable about the seeming irrelevance of many of its provisions in the context of traditional Tongan values and popular attitudes.

It is perhaps the Constitution itself that presents the greatest enigma. Some of the statutory provisions do not appear to tally with the wording of the Constitution, and in most of the cases to come before the Courts constitutional points could doubtless be raised, though this rarely occurs. In the 1929 Revision of the statutes, several amendments of substance were made to the Constitution in an attempt to bring it into line with existing statutory provisions, a striking example of the tail wagging the dog *(d)*. The emphasis placed by the Constitution on "freedom" in a country which is constitutionally not a democracy, doubtless poses problems to many observers accustomed to equating the two concepts.

Historically, the Constitution is of immense importance. It marked the culmination of a series of steps by King George Tupou I to introduce the concept of the rule of law into Tonga in the nineteenth century. Its present practical importance may well lie more in what it stands for, and in what it is popularly believed to mean, rather than in what, legally construed, it actually says.

(d) See Latukefu, op. cit., p.80.

COMMERCIAL LAW

THE IBM MONOPOLY CASE

By GRANT HAMMOND *(Mr Hammond is a partner in the Hamilton Firm of Tompkins Wake & Co. He is presently on leave in the United States where he is teaching at the University of Illinois).*

A recent brief note in the *New York Times* relating to an IBM stockholders meeting which approved a four for one stock split probably did not catch public attention even in the US *(a)*. Perhaps it should have, for it also recorded a bitter attack by the chairman of IBM - Frank Cary - against the US Justice Department with respect to that department's now longstanding anti trust suit against the company."Day by day, it's becoming the lawsuit of the century - the 21st century", the chairman is reported to have said *(b)*.

New Zealand lawyers are not accustomed to paying much, if any, attention to US litigation, except, perhaps, when a notably lurid case temporarily reaches the daily newspapers or generalist journals. Doubtless this is due in part to a feeling that American authorities are unlikely to have much "practical" relevance, but it may also be attributable in some measure to the paucity of American legal materials in New Zealand law libraries, and the fact that most New Zealand lawyers have no formal training in researching such material as is available. This is in turn translates into a feel-

(a) *New York Times*, Tuesday, 1 May 1979.

(b) Id. The company earned $3 billion on sales of $21 billion in the last financial year. it introduced 450 new products. It spent $1 billion on research.

ing of discomfort in using any American material. This is regretable; many contem- porary legal issues in New Zealand have been litigated before US appellate tribunals. The particular resolution of the dispute by a US court may not be appropriate for New Zealand conditions, but it does not follow that that Court's reasoning is without relevance - substantial insights into the real parameters of, and possible solutions to, legal issues can be obtained by noting US developments in much the same manner as developments elsewhere in the Commonwealth are taken into consideration.

The IBM monopoly case is one American suit which merits at least passing familiarity, particularly by commercial lawyers, for whatever the eventual outcome of it may be, it seems inevitably destined to be a landmark corporate case in the common law jurisdictions. It is, arguably, the largest and most complex commercial suit ever raised. It raises acute questions of anti trust law and policy, particularly in relation to monopoly policy; some of which are not without relevance to the New Zealand Commerce Act. These issues are raised at a time when, coincidentally, there is a growing body of anti trust scholarship which suggests that the anti trust laws may have been used in ways in which have actually harmed economic efficiency and consumer welfare. In another sense the case tests the effectiveness of government or judicial regulation of the market- at a time when economists have been suggesting that for every $1 that the US Government spends on regulatory activity, it costs private enterprise $20, and that regulatory activity costs the US taxpayer $500 per head per annum. All of this coincides too with a notable counter-attack by some very able young economists of the so-called "Chicago" school (which traditionally has favoured free market theory) on regulatory activity. They have suggested, and there is increasing evidence for their view point, that it may be anticipatory reaction to regulation which is the real cause of inflation - and without question at least a sustaining factor.

These kind of issues aside the case raises questions of the relationship of law to technology, and on the adjectival level, a host of extraordinarily difficult problems of an evidential and remedial character. All of these problems will doubtless persuade some critics of the so-called "imperial judiciary" that the case marks a need for a retrenchment of the type of legal-socio-economic cases presented to US Courts in the anti trust sphere. Yet others will argue that only the Courts, for all the difficulties, are really equipped to resolve the issues. What then is the case all about?

The only legislative provision it is necessary to recall is s2 of the Sherman Act of 1890. This provides that every person "who shall monopolise, or attempt to monopolise, or combine or conspire with any other person or persons, to monopolise any part or parts" of interstate trade commits a felony. The consequences of conviction are severe - the criminal penalty of up to $1 million might not deter IBM - but the civil penalty of treble damages is formidable, particularly when it is appreciated that suit can be brought by agrieved private parties, as well as the Federal Trade Commission and the Justice department.

IBM may have been too successful, in commercial terms. As recognition of that success it reaped, from the late 1960s, huge profits mixed with a barrage of suits by smaller victims, all claiming that they were the walking wounded, and in some cases, the representatives of corpses, of monopoly action. As *Fortune* magazine put it, in 1973 - "Like Gulliver amongst the Lilliputians IBM is beset by a swarm of vengeful competitors trying to break it down or break it up by anti trust decree" *(c)*. Massive though some of those suits were, they were light-weights compared to the January 1969 Justice department suit which constituted one of the last actions of the outgoing Johnson administration.

This suit charged that IBM had monopolised the immensely important general systems computer market. The complaint asserted, for instance, that in 1967 IBM's share of the total revenue from the sale or lease of general purpose digital computers in the US was around 74 percent - well above the rule of thumb formula for monopoly evolved in earlier US Supreme Court decisions (60 percent). In 1972, as a matter of interest, a *New York Times* economic assessment had put the relevant market in these terms - IBM, 67 percent; Honeywell, 9 percent; Univac, 9 percent; Burroughs, 5.7 percent; Control Data 4.5 percent; NCR, 2.3 percent; others, 2.5 percent.

Under the existing US law, the Government will have to establish both the existence of monopoly power, and the abuse of that power, although the second requirement is not as onerous as might at first be thought to be the case. The Supreme Court has on a number of occassions remarked that, given the existence of monopoly power, it is much easier and may be legitimate to infer abuse of that power.

(c) Beman, "IBM's Travails In Lilliput" *Fortune*, Nov.., 1973, pp.148, 149.

Prima facie therefore, the Government had a fairly significant market structure argument going for it at the time it filed suit. Yet even then, it must have been a difficult policy decision for the Justice Department to actually file suit - should anti trust pounce on an early leader in a young and technologically dynamic industry, particularly while the smoke of the developmental battle makes projection of the ultimate winner doubtful?

Predictably, IBM in its pre-trial brief argued, first, that growth and technological change make monopolisation highly unlikely, and second, that (in essence) it was merely being competitive and that its very success attested the building of a "better mousetrap"- a classic economic goal. So there it was a classic clash of otherwise unimpeachable goals. To add to IBM's problems, any number of previous US decisions of some appellate authority - Supreme Court and Second Circuit Court of Appeals in particular - had made it plain that giant corporations would be held to higher standards than the small firm manoeuvres permissible by a small firm would not be permissible if practised by the monopolist. Yet the competitive ethic supposedly enshrined in the legislation and market theory was a clarion call for dominance and superior performance. The "youthful monopolist", as economists term the phenomena, falls between two stools - and the private treble-damages suit encourages interested third parties to give an activating shove.

The battle then commenced in earnest and has been conducted with some intensity ever since. At one stage discovery was running at the rate of ten truckloads of paper per day; there were whole warehouses full of documents relating to the suit. The legal juggernaut which a major US anti trust suit represents was rolling. IBM earns a staggering $8 million each day. It was unlikely to settle quickly on that count alone. At times the government has seemed to lack confidence in its own case - yet it cannot back down without conceding a major defeat for the department in the corporate sector. The situation is exacerbated for the government by continuing public concern over the level of corporate profits, which amongst industry leaders are at an historical high point. A defeat in the corporate sector would be a matter of real political concern, particularly with a presidential election next year and Edward Kennedy's campaigns qua big business.

At one stage a settlement was considered and quite extensive discussions were held in 1974 and 1975, but no agreement resulted. IBM was apparently willing to consider a very large divestiture - but not one that would reduce its share of the market at issue in the trial. The Justice Department, for its part, was interested not so much in the size of that particular divestiture as the future structure of the general purpose computer systems market.

The dilemma of this case highlights, in my view, many of the fallacies and limitations in present legal thinking on the monopoly question. The focus at present in both the Commonwealth and the US (bearing in mind the comment already made, that the structural and the abuse of power tests tend to yield the same result in practice, and are to a large extent intertwined - the US test merely, on this view, articulates the fear implicit in the English and NZ legislation) is on the legality of the particular company's actions. The law simply asserts the populist belief that there is no such thing as a "good" monopolist. Performance is said to be irrelevant - what matters is the market share and whether it was gained by lawful means. This view has support from the highest tribunals in a number of jurisdictions (it seems reasonably clear that some countries have adopted the ideas of particularly US anti trust law and endeavoured to apply them without really understanding the arguments on which US Courts have proceeded; EEC and Japanese law in particular have suffered from this syndrome). The justification for this simplistic philosophy is that you have to catch the perpetrators of the projected crime before they inflict irretrievable harm on a defenceless market, and ultimately, consumers. A more rational explanation for this stance would be to use the arguments of the specialists in industrial performance, who usually argue from a structure-conduct-performance theory. This holds, in its simplest terms, that if you can ascertain how many firms there are in the market and if you know their market shares, then you know how they will determine their prices and output and hence how the industry will perform. This theory at least has some intellectual plausibility, and it is in part at least on this theory that the US anti trust division is literally obsessed about mergers, regardless of their effect on competition. The problem is that the theory does not fit the facts of economic life. It does not appear at all clear that one should conclude that allegedly (or even proven) monopolists necessarily perform better than industries with fragmented or dispersed market shares. It may accordingly be that the oft supposed and rather simplistic link between structure and performance is too in-

effective, or even downright misleading, as a policy basis for monopoly policy. What really matters, and what should have been the policy base, is the real performance of a company - the prices it charges, the output it produces, its contribution to new technology and general economic efficiency.

When the problem of the IBM case is approached in this manner, a quite different answer may suggest itself. On the facts the performance of the computer industry has been nothing less than brilliant -IBM has steadily reduced prices, its production has grown staggeringly, and it has been highly innovative. Are those the characteristics of a monopolist? My main complaint with IBM would be, from the economic standpoint, that it did accumulate vast cash reserves - these could have been used for reinvestment - but that would be a very unusual anti trust violation, if indeed it is a violation at all.

What about the effect of IBM on other firms in the market? General Electric and RCA got out of this field in the late 1960s. They said, although the government apparently does not accept this, that their departure had nothing to do with IBM. Telex and Memorex were handed a terrible drubbing in the peripheral equipment developments and disputes of the early seventies. Those disputes are instructive. Modern computers carry out processing - the computation or performance of logical functions - in the central processing unit (CPU's). The CPU interacts with various peripheral equipment -input/output and storage devices to produce results. Generally peripherals are tailored for the specific electronic specifications of a CPU, but with the use of an interface device interchangeability is then permitted. These peripherals are commercially very valuable -they account for between 50-75 percent of the price of an electronic data processing system in the US. In the mid-1960s IBM introduced the 360 system - a major break through in computer technology. This system made possible "plug compatible" peripherals - that is, another firm could from that time make peripherals which could operate with IBM CPU's. There were only two or three of these firms in 1966 - by the mid 1970's the number grew to well over 100. Telex was one of these early plug compatible competitors. it started to make and market disc drives, printers and storage units. IBM took counter-measures and Telex then sued, claiming monopoly, attempt to monopolise, tying and restraint of trade. IBM filed the standard counter-claim alleging unfair competition, misappropriation of trade secrets and copyright infringement. IBM, after a trial loss, emerged successful before the Federal Court of Appeal for the 10th Circuit - the company was categorised by that Court "as no more than engaging in the type of competition prevalent throughout the industry." Eventually that suit fizzed before it got to the Supreme Court - Telex abandoned its suit in exchange for IBM's agreement to waive collection of the $18.5 million award for Telex's theft of IBM's trade secrets. Telex backed down, it said, because of a threat of shareholders suits for not settling, some doubt about is ability to pay $18.5 million damages if it lost the appeal, (significantly) the Justice Department refused to support Telex with an amicus brief, and apparently Telex was put under pressure by its principal lender to settle. That litigation therefore hardly affords evidence of predatory behaviour on IBM's part. More recently, Amdahl and Itel have seemingly enjoyed a tacit licence to produce products remarkably similar to IBM's without (as far as I am aware) any overt retaliation. Is it the government suit which is holding IBM off - or is this further evidence of benign indifference to apparently inferior competitors?

The Government case will not be resolved for years - even an initial merit trial is said to still be five years away. It seems unlikely that the US Supreme Court would dodge the issues by refusing certiorari - the appeal would plainly be a monumental one to mount. Even assuming liability, there would then be some hideously difficult questions of relief to be resolved. Ironically, whilst the legal juggernaut lumbers on - the present government threat is to reopen discovery - IBM's point that this is a rapid change industry is being borne out. The market is changing of its own accord; it seems clear enough that the integration of computer technology and communications technology will be the next major marketing development - which may bring the two giants, AT & T and IBM into collision or co-operation as the case may be.

So what are the lessons from the IBM case? First, it seems that it can be plausibly suggested that the sort of legal theories on which anti-monopoly policy have proceeded, are hopelessly outmoded. Structural arguments and per se rules are unsound as a matter of economics, quite apart from some perhaps justifiable unease over their blind character. What would be more sensible would be increased use of criteria of economic performance - factors such as average increases and output, distribution of profits and the like. It is nothing short of

extraordinary that in a country with an economy like New Zealand's the monopolies provisions of the Commerce Act should have been enacted in the form in which they were (d). The essentially structural theory built into the New Zealand Act is based on a model designed to control the multi-firm large scale industry (although I would contend that it does not achieve that result in anything other than a haphazard manner). The New Zealand situation is much closer to one of some (mostly?) oligopolistic industries, some natural monopolies, and some forced monopolies (my term - forced in the sense that the economy is too small to support several firms in some specific industries). Per se rules perhaps have a place in limited categories of case, where the harm is unarguable and easily verifiable - price fixing is probably still the best example. Otherwise they should be confined to the nineteenth century waste-paper bin.

The problem with a more closely reasoned approach is that it can create severe institutional tension. Departments of Justice worldwide traditionally prefer simple, some would say simplistic, rules to administer. The reasons are not hard to locate - inadequate departmental funding, lack of sufficient, or sometimes any, specialised expertise, a desire to be seen to be producing quick results in those cases which become publicly notorious, a desire to have formulas which are concrete and "appliable", whatever their intrinsic merits, and perhaps subtley a desire to have lawyers and accountants be the policemen of the policy. If 60 percent market share is known to be the standard for monopoly, counsel have no alternative but to advise their clients accordingly; the result in all but a few cases will be compliance. The US Justice department has in various ways let it be known that it regards 60 percent as "the" standard, and major corporations have adhered pretty closely to it. It is no secret for example that General Motors would be horrified if American Motors had to cease car manufacturing - GM to everybody's embarrassment would then be above the magical percentage.

Pressure for so-called simplification of the anti trust laws is continuing - President Carter's National Commission on the Anti-Trust Laws has had suggestions that the burden of proof on the Department be lessened - even to going so far as to require that when companies reach a certain size they be broken up no matter what, and no matter how honest their activities might have been. This appalling suggestion, which was put forward in all seriousness, appears to be an attempt to institutionalise unofficial departmental standards. Leaving aside potential constitutional challenges which would undoubtedly be mounted, this suggestion is a dramatic illustration of structural theory carried to extremes. It also shows how departmental policy, unless rigorously scrutinised from time to time, can ossify into the formal standards of to-morrow.

If ease of application correctly categorises departmental aspirations for this area of the law, the large firm on the other hand wants to be in a position to argue the real merits, of course as it seems them to be - typically it will want to argue that monopoly was forced upon it, or that its behaviour whilst garnering a pretty fair share of the market is not in fact anti-competitive. These arguments are often, perhaps even routinely, presented by high powered and expensive counsel and economic experts - to the eternal frustration of the department and the Judges - who have had to go back to school on economic and accounting theory. Yet it is clear that the tide in the US is flowing, at least as far as the Courts are concerned, away from the structural approach.

The second broad lesson of IBM is that it is futile to attempt to sue anti trust or anti-monopoly type laws in the pursuit of varied and, often, contradictory goals. it is surely axiomatic that, for instance, the pursuit of economic efficiency must routinely conflict with a goal like the decentralisation of social control. To lump together "economic efficiency, consumer welfare, and dispersion of social, economic, and political power" (as President Carter's Commission does) is simply to create utter conceptual confusion. Yet that is precisely the sort of confusion expressed in some of the major provisions of the Commerce Act. I refer in particular to ss 2A, 21 and 80. The point

(d) There is not a great deal of published material on the Commerce Act. The practitioner would find a set of collected papers by the Legal Research Foundation, Auckland University, a useful addition to his library - "The Commerce Act 1975", Occasional paper Number Twelve of the Foundation. See also O'Keefe, *The Commerce Act 1975*, 2nd ed. (Butterworths) for an annotated version of the statute. Of those other works which might be readily available to New Zealand practitioners, A.D. Neale's, *The Anti Trust Laws of The United States*, (2nd ed. Cambridge) is now, unfortunately, out of date in some respects but still forms excellent introductory reading. It is somewhat weak on economic analysis. If you should choose to look to any available US law review literature, the accepted experts are Richard Posner at Chicago (very strong on economic analysis), Areeda and Turner at Harvard, Tom Morgan at Illinois. The latest Hornbook, and an excellent antidote to too much economics is Sullivan, *Anti Trust* (West).

is more than merely academic - how can anti-monopoly policy be an effective instrument of long term economic policy if the very legislation under which the tool itself arises is ambivalent? There is a place in jurisprudence for the creative ambiguity - a situation where the legislature can legitimately take the attitude that it cannot foresee every contingency likely to arise in practice, or where the Courts traditionally have special expertise - adjectival provisions for instance - but when the legislature fudges the issue on matters of long term economic policy that is quite another matter.

INDUSTRIAL LAW

UNJUSTIFIED DISMISSAL AND UNION MEMBERSHIP

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The grievance procedure in s 117 of the Industrial Relations Act 1973 is available only to a worker covered by the relevant award or collective agreement. It was so held by the Court of Appeal in *Auckland Freezing Works and Abattoir Employees I U W v Te Kuiti Borough* [1977] 1 NZLR 211 on a case stated by the since defunct Industrial Court. The standard grievance procedure as contained in subs (4) of s 117, or any other provision serving the same purpose as approved by the Arbitration Court, operates as a clause in the appropriate industrial instrument, and proceedings under it may be commenced by the worker only through his union. It will be recalled that in the Te Kuiti slaughtermen's case although the dismissed workers belonged to a representative union, as their service contract was not subject to an award or collective agreement, they could not rely on any grievance clause *(a)*.

Contrariwise, in a recent case before the Arbitration Court the worker claiming personal grievance was covered by an award, but despite the unqualified preference clause never joined a union. In *Muir v Southland Farmers Co-operative Assn Ltd* (unrep, AC 27/79, 26.3.1979) the Court had to decide whether lack of union membership constituted a sufficient cause to deprive a worker from relief when asserting unjustified dismissal. Subsection (3A) of s117 inserted by the 1976 Amendment Act provides that any worker who is unable to have his grievance dealt with "because of a failure on the part of the worker's union or the employer or any other person to act . . . in accordance with the procedure applicable under the provision . . in the award or collective agreement, that worker may, with the leave of the Arbitration Court . . . refer it to that Court for settlement . . ." Mr Muir, a farm machinery salesman after his dismissal, notwithstanding his lack of membership turned to the Otago and Southland Shop Assistants Industrial Union of Workers for assistance. The Court commented:

> "The Court was not in the least surprised that the union, when asked to do so, declined to do anything for him. From the union's point of view, why should it?"

Following the rebuff by the union Mr Muir applied for leave to the Court under subs (3A) on the basis that the union has refused and therefore failed to act. The employer objected to the granting of leave saying that the union was not the worker's union as he did not belong to it.

Examining the purpose of subs (3A) the Court referred to instances prior to the amendment when by reason of failure on the part of an employer or a union the grievance procedure had not been followed, and stated that this was the mischief the legislature intended to remedy so that "a worker need not be deprived of his right to have his grievance aired". Adoption of a large and liberal construction to the effect that, provided a worker is bound by an appropriate award, he could obtain leave under the subsection, however "imports some strain to the words" "[the worker's] union", or "his union". The expression plainly "means the union to which the worker belongs". It may be extended to include two further meanings: (1) a union prepared to represent a worker covered by the instrument regardless of actual membership, and (2) the union to which the worker under an unqualified preference clause should belong.

These extended interpretations in the light of the general scheme of the Industrial Relations Act 1973 were rejected. One may add, very correctly. The statute, as the Court explained, is based and dependent upon the existence of industrial unions, not only on arbitral matters, in disputes of interest, but also in disputes of rights involving individual workers.

(a) See [1977] NZLJ 348.

As a close example where a worker may exercise his claim only through a party to the award, that is his union, the Court referred to recovery of wages under s158, adding that in such a case an Inspector of Awards can act also. With due respect to the Court it should be pointed out that this concurrent power vested in an Inspector constitutes a significant difference between ss117 and 158. The remedy provided by s158 is open to every worker covered by an industrial instrument, even though for any reason he is not a union member. The only criterion is that his "position is subject to an award or collective agreement." No such alternative representation has been provided for by the legislation regarding grievance proceedings. The conclusion of the Court in respect of union membership for the above reasons appears to be logical and correct. The Court stated:

> "[W]e are of the opinion that actual membership of the appropriate union is a prerequisite before a worker can, as an individual, invoke the provisions of subs (3A)."

As "the matter is of considerable moment to individual workers", it was added that, "if the parties so desire", a case will be stated to the Court of Appeal. A decision of the Court of Appeal laying down the principle in an authorative form for sure guidance on the interpretation of the subsection would be welcome.

Muir's case, as the Arbitration Court recognised, raises serious implications for workers who are not union members. An employee may not be required to join a union if he is above the salary bar as in *NZ Insurance Guild Union of Workers v The Insurance Council of NZ* (1976) Ind Ct 173 *(b)*. Secondly, if a union loses the unqualified preference clause in the relevant industrial instrument pursuant to the ballot procedure contained in ss101A-101D, some members may resign not being aware of the possible consequences of severing ties with their former union. Furthermore, on grounds of conscience certain employees may obtain a certificate of exemption through the machinery in ss105-112 of the Act, while others coming under s112A and Schedule 1A are exempt by virtue of their qualifications. In any case an unqualified preference provision, as it is defined in s98, applies only to adult workers, which in turn means persons over the age of 18 years. Although the age of majority is 20 years as provided by s4(1) of the Age of majority Act 1970, the Factories Act 1946 defines "youth" as a male person over 16 but under 18 years of age. The Arbitration Court referred to workers under 18 years who are not bound by an unqualified preference clause. Subsections (8) and (9) of s82 of the Industrial Relations Act 1973 on the other hand clearly provides that an award "shall . . . bind every worker who is at any time while it is in force employed by any employer on whom the agreement is binding". Thus, the instrument in general binds even junior workers, but it must be accepted that s98 specially exempts them in respect of an unqualified preference clause.

The obvious answer is that all workers who for various reasons are not obliged to join a union retain *the right*, as distinct from *the obligation*, to become union members. Consequently, it may validly be argued that any adverse effect flowing from non-membership, is their own voluntary choice. When they made their election they were, or ought to have been, aware both of the advantages and disadvantages. It should not, nevertheless, be forgotten, that many employees act on impulse, without proper advice. They see only the immediate results, free from the payment of union dues, but do not consider potential future implications. In the present anti-union climate they are inclined to put aside honest advice given by union officials as mere propaganda.

Be it as it may, the position of employees, who are not members of a union, in view of the Arbitration Court's opinion expressed in Muir's case, appears to be that they cannot resort to grievance proceedings. A non-unionist worker, notwithstanding that an award or collective agreement covers his employment, cannot refer to the union which is a party to the instrument as "his union", and has no ground to invoke the special procedure provided by subs (3A). Expressed bluntly the purpose of the amendment is not to bypass the union and the settlement process by a grievance committee, but to provide direct access to the Arbitration Court in a case where "the worker's union", or the employer or any other person, has failed to act.

The most important feature of the grievance procedure, as the model clause in s117(4) makes clear, is the provision for direct informal discussions between the worker and his immediate supervisor, or where this seems inappropriate, between a representative of his union and the employer or his representative. As a final step the matter should be referred to grievance committee consisting of equal numbers of union and employer nominees with or without a chairman. Only in cases where the

(b) See ibid.

grievance is not settled should it be referred to the Arbitration Court. Thus, participation of the union is one of the cornerstones in the working of the grievance machinery. Unlike in recovery of wages claims an Inspector of Award could not be a proper substitute for the role the union is called upon to fulfil during the difference stages of the settlement process. Even though a grievance clause on the lines of subs (4) of s117, or something similar, were inserted in an individual service contract, as it was suggested in the *NZ Insurance Guild* case, the procedure could not be put into motion without union involvement. The contract of employment of a person whose job is not covered by an industrial instrument and who does not belong to any union may contain an arbitration clause for settling disputes, including dismissal, but it will not be a grievance provision under the Industrial Relations Act.

Consequently an employee, unless he satisfies both the requirements of coverage by an industrial instrument and of union membership, must fall back on a common law action. He will not be able to claim unjustifiable, merely wrongful, dismissal. Apart from exceptional circumstances where a declaration or injunction may be granted, his main remedy will be damages. As old established authorities, such as *Addis v Gramophone Co Ltd* [1909] AC 488, HL and *Baker v Denkara Ashanti Mining Corporation Ltd* (1903) 20 TLR 37, reinforced by the recent New Zealand decision *Bertram v Bechtel Pacific Corporation Ltd* (unrep. A6/78 SC), laid down the principle, damages cannot be more than the amount the employee would have earned during the period of notice. Moreover, as Barker J emphasised in Bertram's case, "an employee is not entitled to damages for the injury . . . to his existing reputation and . . . [his] feelings, his distress, social discredit or loss of reputation or for the extra difficulty in finding other employment which was caused by the circumstances of his dismissal". In contrast, under the Industrial Relations Act 1973, either in grievance or in victimisation proceedings, there is a wide discretion to grant, besides reimbursement of lost wages, compensation which would include grounds not allowed by common law *(c)*.

It seems obvious that in this respect industrial legislation has left the old rules of wrongful dismissal far behind. There can be no doubt that a dismissed worker, if he is able to prove unjustified dismissal, may obtain more favourable remedies from the Arbitration Court than he would get in an ordinary Court action. Disregarding reinstatement, a statutorily recognised form of specific performance, the scope of monetary recompense in the nature of damages is more realistically fitted to the actual wrong suffered. Being in the fold of a union under the umbrella of an industrial instrument certainly provides better protection.

Accepting the fact that some workers do not want to be union members, perhaps not always realising the adverse consequences of their situation, there are others who beyond their own fault cannot take advantage of the grievance process for various reasons. Though they belong to a union, as voluntary members, they are not covered by an industrial instrument. Furthermore, many employees, mainly in executive and managerial positions, have no organisation in the nature of a union, and regardless whether they would wish to or not, do not come under industrial legislation. For such persons, as Barker J remarked in *Bertram's* case (supra) "summary and unfair dismissal can work injustice and there may be a case for reform of the law".

The present writer has already expressed the view several times *(d)* and does it now again at the peril of being labelled repetitious, that the role of the Arbitration Court should be widened giving it exclusive jurisdiction in all termination of employment cases. The discretion under subs (3A) of s117 could be used in granting direct access to the Court where the employee claiming unjustified dismissal had no possibility of joining an industrial union and his employment was not subject to an award or collective agreement. These two preconditions need not necessarily be present together, they may be alternatives. By applying the discretion sparingly the essential criterion of union participation in grievance settlement will be preserved. Alternatively, the Supreme Court and Magistrates' Courts should be given statutory power to grant, instead of common law damages, the remedies allowed by s117(7) of the Industrial Relations Act 1973. There is no valid and compelling reason for perpetuating a dichotomy of available remedies. The continuation of this bifurcation further widens the gap and will inevitably create the impression that the common law "work[s] injustice".

(c) See [1979] NZLJ 13

(d) *Introduction to the Law of Employment* (Butterworths, 1975) ch 24; [1978] 8 NZULR 188; [1979] NZLJ 13.

HISTORY

THE TREATMENT OF MAORI PRISONERS TAKEN IN THE NEW ZEALAND WARS

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Members of Amnesty International argue persuasively that the Geneva Convention, the international protocol signed in 1864 for the protection of surrendered soldiers and those who tend the sick and wounded in times of war, nowadays gives little overall protection to prisoners-of-war *(a)*. Even so, before the convention was signed the plight of prisoners-of-war taken in European and North American conflicts was sometimes perilous indeed. Although prisoners were fairly well treated in the Napoleonic Wars the Confederate prison camps of the American Civil War are an instance of barbarous neglect and vicious dehumanising. In the Civil War case, the ethnic and cultural similarities of the belligerents increased the bestiality of captor to captive.

In the nineteenth century wars fought between the so-called "civilised" nations, before the Geneva Convention, there were *some* rough and ready rules for the treatment of prisoners. Open torture, execution and public exhibition of prisoners were avoided, although as much to prevent retaliation as from fine Christian principles. However, when European or Anglo-American armies met *native* foes, a popular Social Darwinist belief that non-European foes did not share the finner feelings of "civilised" men often led to excesses of brutality against prisoners-of-war. *(b)* From the "native" side Red Indian scalpings, North African tortures and Maori cannibalism seemed to reinforce the validity of this Social Darwinist hypothesis. Primitive native conventions that enslaved prisoners of war, disfigured them, or even cooked them for supper brought fierce retaliatory measures from regular soldiers, often recruited from the cesspits of Europe. A rough and ready "soldiers' justice", partly retaliatory and partly racist, led to excesses against Indian prisoners after the mutiny of 1857. Christopher Hibbert records of one Captain William Wallace:

> Although his own family had escaped, he considered it his duty to take up by the cartload those whom he suspected of being rebels, to tie them to a convenient tree and leave them hanging" *(c)*.

More sadistic officers fired their Indian prisoners from cannons.

But what of New Zealand? In the "flagpole war" of 1845, throughout the contest with the Ngati Toa and Ngatiu Raukawa, and during the land Wars of the 1960s, Maori prisoners were taken by the Red Coats. Were these prisoners treated humanely, or with bestiality? Were they given the status of "prisoners-of-war", recognised as captured soldiers from a foreign nation, or were they regarded as rebels against the crown, captured in arms against their lawful ruler?

Hone Heke's war of 1845 and Governor Grey's pacification of Ngati Toa and Ngati Raukawa around Port Nicholson in 1846 resulted in over one dozen Maori prisoners being taken, in or after the battles. The captured Maori belligerents were from tribes that *had* signed the Treaty of Waitangi and had, from Grey's point of view, accepted the Queen's sovereignty. Thus, the captured Maori were not "prisoners-of-war", in the sense that they were foreign nationals captured in battle, but were as much armed "rebels" as were the American patriots captured in arms against George III.

Grey had declared Martial Law in the battle areas, and with the precedent of the coercive acts of the American War of Independence and Imperial acts of 1798 and 1833 to serve him he

(a) The Geneva Convention signed in 1864 was the first of four conventions designed to mitigate the horror of war. The representatives of sixteen European countries signed the 1864 convention, an agreement essentially concerned with the amelioration of the condition of the wounded.

(b) Darwin's theory was applied to racial conflict by several "Social Darwinists". Josiah Strong, who published his key work, *Our Country* in 1885 stressed the superiority of Anglo-Saxon civilization. formalised well held views of the inferiority of "native" culture.

(c) C. Hibbert, *The Great Mutiny, India, 1857*,(London, 1978), p 124.

ordered a court-martial to be convened to try the "rebels" *(d)*. John Tattersal notes that "no one was appointed to represent the prisoners" *(e)*. His criticism should be tempered by the fact that at British field court-martials of the mid-nineteenth century the Court acted as an interrogator and that no prosecuting or defending officers were appointed. Of those charged Te Rangihatea, an old and dying man, was judged insane, given life imprisonment, and allowed to die within two months in Wellington Hospital. The Court was less generous with his brother, Te Whareaitu, who was found guilty of open rebellion and was hanged two days after sentence.

The trappings of military justice were in evidence at Port Nicholson. The court-martial was properly convened, a field officer presided, as was required, and findings were corroborated by a senior officer. However, those convicted had been taken prisoner in May, but the Court did not convene until September, and this delay is not only curious but important in judging the legality of the trial by this military Court. A court-martial is supposed to order justice speedily and summarily, during a declaration of martial law. Once the emergency has ended, and the civil Courts can resume their jurisdiction, it is improper that justice should remain in the hands of other than the Queen's Judges. In this case the trouble had ended four months before the court-martial sat. This point was not lost on Major E Last, the District Commander, who offered his eight remaining prisoners to the Wellington magistrate, Mathew Richmond, for trial.Richmond pedantically refused jurisdiction on the grounds that the declaration of martial law had abrogated his authority. His dereliction of judicial duty forced Grey to convene another court-martial, under Lieut-Col W A McCleverty. A boy prisoner was released into his family's jurisdiction and the remaining seven were charged with being taken in rebellion, and with aiding and abetting the rebel Te Rangihat ea. John Tattersal notes:

> "The probable illegality of any conviction based on these proceedings arose from the fact that the acts with which the prisoners were charged did not in fact constitute any offence, either civil or military, at all and that they were no more than the acts of soldiers at war" *(f)*.

This is a poor defence. In 1846, as today, there was a clear distinction in law between the militant actions of subjects and citizens against lawful authority and the military acts of the soldiers of a foreign power. Te Rangihaeta's men, by treaty and the act of secession, were subjects of Queen Victoria, and their armed reaction was correctly charged as treason.

The seven prisoners tried were sentenced to transportation for life. Two of the now convicted felons did not leave New Zealand. Matene Tikiahi and Tope were retained in New Zealand, for the governor believed their evidence could be useful against the leaders of the rebellion. The five remaining prisoners were sent to Maria island, north east of Hobart, where one of their number Hohepa Te Umuroa died from tuberculosis six months after his arrival. After a prolonged series of protests from the Van Diemen's Land authorities and from the church missionary society - protests that complained that Maori warriors should not be classed as common felons - the four remaining Maori were returned to New Zealand in April 1848, on the order of Earl Grey, the Secretary of State for the Colonies.

The Maori prisoners taken in the Land Wars of the 1860s posed many more problems than had those arrested in the 1840s. In the first place, there were far more of them. At the battle of Rangiriri in November 1863 the imperial forces took 183 prisoners, who were marched north to Otahuhu, where an angry crowd attempted to attack them, and from where they were shipped to Auckland. At Rangiaohia north - 20 were captured - including Henry Wheeler, a half-caste - the battle of Orakau the British collected a further five prisoners, and after the battle of Gate Pa where 13 were captured, their grand total reached over 220. A second problem posed was the status of the prisoners who, if they were Waikato and Ngati Maniapoto, were not signatories to the Treaty of Waitangi and had some claim to be treated as foreign nationals. A third problem relates to Grey's inconsistency and his use of the prisoner question as another arrow in his contest for power with the colonial parliament. Grey will not escape unscathed from our analysis.B J Dalton's argument is sound when he judges that:

> "No humane concern prevented Grey in July 1863 from personally ordering the capture and close confinement of a group of men, women and children, many of them

(d) The 1833 act is of particular interest: "The Act for the more effectual suppression of local disturbances and dangerous associations in Ireland". 3 and 4, William IV, 1853.

(e) J. Tattersal, *Maoris on Maria Island: Punishment by Exile* (Napier 1973), p6.

(f) Ibid., p8

aged or ill . . . and none of whom was guilty of an indictable offence. Grey sent no report of this affair. The detention of a second group of prisoners on a hulk at Wellington in 1865 and their subsequent escape were not reported, nor yet the exile in 1866 of 200 prisoners to the Chatham Islands without trial of any kind. A humane regard for prisoners that is as selective as was Grey's, cannot but be suspect" *(g)*.

The problems have been suggested and the villain identified. Now attention must be given to the development of the conflict over prisoners' status.

The victors in the field were generous toward their captives. General Cameron, soon after the battle of Rangiriri Pah sent a despatch to Governor Grey in which he applauded the conduct of the Kingite defenders at Rangiriri. The General stated:

> "I hope the prisoners will be treated generously, for everyone must admire the gallant manner in which they defended their position to the last" *(h)*.

These prisoners were transported to Auckland, marched through jeering crowds who were restrained by the escort from tearing the Kingites limb from limb, and then placed on coal hulk, HMS *Marion*, at anchor 1300 yards from Government House. The *Marion* was a vessel of 450 tons with a total space that gave prisoners less than 48 cubic feet per man, accommodation regarded by the colonial government as quite adequate as a prison hulk, but condemned by W Alex MacKinnon, the surgeon of the 57th regiment and sanitary officer to the British army in New Zealand. Dr MacKinnon visited the *Marion* on 24 May 1864 in the company of a colleague and reported to the governor that the prisoners had only the deck to lie on, there was a "want of light and air", the prisoners' blankets were dirty, and the prisoners were generally depressed *(i)*. The prison doctor, S Sam, in his half-yearly report of 17 June 1864, notes that seven prisoners had died in the previous six months, of chronic dysentery *(j)*. Dr Sam had previously warned the government, in January 1864, that "the number of prisoners now on board the hulk should not be augmented as it would tend to have an injurious effect upon the state of their health" *(k)*.

Unfortunately the welfare of the prisoners on the hulk became more and more related to a battle over their status and to the question of whether they were prisoners of the governor or of the colonial parliament. Frederick Whitaker, one of the several colonial secretaries during the contest, made the parliamentary point of view crystal clear in June 1864, when he wrote to Grey:

> "It is a well-recognised constitutional doctrine, that in suppressing a rebellion or civil tumult, Her Majesty's troops act only in aid of the civil power, Whether arrested by military force, by a police constable, or simply surrendered at pleasure, rebels in arms are offenders against the law of the country liable to be punished by it, and their disposal as fitting a subject for the control of the Responsible Advisers of the Chief Executive officer as any other which concerns the "peace, order and good government of the country'" *(l)*.

However, Whitaker's predecessors had not all been as straightforward in their appraisal. William Fox, in April 1864, expressed a desire to see *all* Maori prisoners taken in battle placed on trial, but he wanted the army, not the civil authority, to soil its hands with this process. Wrote Fox to Grey:

> "The trial of so many prisoners by the ordinary Courts, for high treason, would, however desirable on many grounds, be almost impracticable, and at all events open to great objection on account of the delay and technicalities which attend such trial. The most convenient mode of trial will be under the Suppression of Rebellion Act, and a good court may be constituted, partly by the officers of Her Majesty's regular forces, as required by the Act, and partly by gentlemen holding militia commissions who have not been actually engaged in war but who hold high social positions in the colony" *(m)*

The colonial administrators believed that the "hand who pays the piper calls the tune". They were defraying the expense of the imprisonment of the Kingites on the hulk and they objected to the governor's interference. The hindered officers sent by Grey to inspect the hulk and in despatch after despatch rejected his authority over the prisoners. However, the

(g) B J Dalton, *War and Politics in new Zealand, 1855-1870* (Sydney, 1967), p 205.

(h) Despatch, Cameron to Grey,

(i) 24 November 1863, National Archives, CD 63/121. British Parliamentary papers, 14 (Colonies: New Zealand) 1865-1868 Report 4 June 1864.

(j) Ibid, Report, 17 June 1864.

(k) Memo for Thomas Russell, 15 January 1864. National Archives CD 64/154.

(l) British Parliamentary papers, op cit, Whitaker to Grey, 2 June 1864.

(m) Ibid., Fox to Grey, 5 April 1864.

colonial premiers held the prisoners on the hulk without warrant and without court sentence. If the prisoners were "rebels" they should have been either tried by court-martial or sent for trial to the civil Court. The attorney-general issued no writ to bring them to trial and no evidence exists to suggest that the several colonial secretaries who inherited the problem were prepared to call Grey's bluff by issuing warrants, or writs of *habeas corpus*.

Governor Grey's position is even less consistent. To the Secretary of State for the Colonies Grey argued that the colony's elected ministers were advising a course of action against native prisoners likely to rebound against Britain's interests and reputation. Grey insisted on the enactment of a "Suppression of Rebellion Act" in 1863; an Act designed to deal with any "combination for the subversion of the authority of Her Majesty and her Majesty's government", an act that justifies in its preamble as being necessary because the ordinary course of the law was inadequate to suppress the New Zealand rebelion.

Under this act summary justice by court-martial "at the earliest possible period" was given legislative authority. However, Grey, when advised on 5 April 1864 by his ministry to try the prisoners on the *Marion* under this act, refused *(n)*. In a despatch to Edward Cardwell, the Secretary of State for the Colonies, Grey even suggested that the Act was framed by a "local legislature", when he himself, on the basis of Imperial Acts of 1798 and 1833, had designed this New Zealand Act.

The governor's inconsistency is further shown in his attitude to individual prisoners. He stated that he wished to secure the release of Te Oriori, who had succoured the dying Captain Mercer at Rangiriri, yet he did not use his gubernatorial power of clemency to pardon that Kingite prisoner *(o)*. Again, the governor affected concern for the welfare of the prisoners on the hulk *Marion* but although the hulk was moored only 1300 yards from Government House he never once visited the prisoners during their time of incarceration. His excuse to Cardwell for this failure to closely investigate the charges he had laid was, "I could not bring myself to go on board and look upon their misery". In and same despatch he argued that "Some of the prisoners were innocent men," *(p)*. Given *that* judgment he failed in his duty as governor in not releasing these "innocent men".

(n) Ibid.
(o) Ibid., Grey to Cardwell, 29 September 1864.
(p) Ibid.

Grey seems to have "played-up" the prisoner conflict carefully, intent upon suggesting to the Colonial Office that he was indispensable, forbearing, despite colonial vindictiveness, and that the governor needed to be given a free hand in the settlement of the New Zealand War problems. It hardly seems far to portray Grey as one who consistently believed the prisoners on the hulk were prisoners-of-war rather than rebels. General Cameron was more likely to have been inclined to that view. Grey himself, in November 1863, argued that:

> "He has always felt . . . it was *not* advisable that the Native prisoners should first be treated as prisoners-of-war, then confined for the length on board a hulk, and during the continuance of the war have their rights as British subjects practically ignored" *(q)*.

But he did nothing to assure the prisoners, or the crown, of speedy justice.

For Grey the prisoners were pawns in a contest for power. He wished to secure his reputation by upstaging the colonial politicians. Finally, the Secretary of State for the Colonies gave him the reinforcement he had carefully plotted to obtain. In a despatch of 27 June 1864 Cardwell opined:

> "It is for the governor personally as representative of the imperial government, to decide upon the fate of persons who are taken prisoners in the course of these military operations" *(r)*.

Grey squeezed the last drop of profit from his contest with the colonial parliament and then in August 1864 he released the prisoners on parole to his private domain, Kawau Island. The governor justified this change of placement on the arguments that the prisoners should not be wintered over on the hulk (although the colonial government had made arrangements for them to be incarcerated ashore), and that the hulk was unhygienic. However, Grey was now compromised bythe holding of prisoners without trial, prisoners that Cardwell had decreed to be very much under his authority. Besides, reports from the Waikato made it plain that many rebels would not surrender for fear of arrest and imprisonment. As early as May 1864 Grey reported that:

> "The governor thinks that the statement of Pumipi, . . . confirms the fact that the people with Rewi were afraid to give up their guns lest they should be imprisoned afterwards, as was the case with the prisoners taken at Rangiriri" *(s)*.

(q) Ibid., Despatch: Grey, 5 November 1863.
(r) Ibid., Cardwell to Grey, 27 June 1864.
(s) Ibid, Despatch: Grey, 25 May 1864

At Kawau Island the prisoners were left to their own devices. They were guarded by only four soldiers and they were allowed contact with mainland maori. On 11 September 1864 the prisoners quitted the island. From this time Grey consistently referred to them as prisoners-of-war. Cardwell on 27 June 1864 had left it to Grey to decide whether the prisoners "shall be kept under such constraint as may be legally applied to them as prisoners-of-war, or whether they should be handed over the to civil authority to be dealt with as criminal" *(t)*. The colonial parliamentarians had responded by noting that murderers were present among the prisoners-of-war and that these murderers must be tried in the civil Court. With or without Grey's direct connivance, but certainly with an opportunity provided by Grey, the prisoners escaped. No serious attempts were made to recapture the escapees, although several parties were despatched to discover their whereabouts. Several messages were sent by the prisoners to Grey, informing him of their devotion and their insistence on remaining free, and most of the prisoners made their way south to join their people in the King Country. However, the settlers of Auckland saw in their escape another example of Grey's perfidy, and a ballad was composed to ridicule their bete noire, the governor:

In that battered hulk that's anchored off the Waitemata shore,
The Maoris used to while the time away.
They tucked the British beef in, and of biscuits had galore,
And lived like fighting cocks each blessed day;
They had presents of tobacco; all they lacked was liberty,
And they pitched into the grub like anything,
After living months at our expense at last they have got free,
And this is the song the rebels now will sing.

Chorus: Kakino Georgy Grey,
You have let us get away,
And you'll never, never see us any more,
Much obliged to you we are,
And you'll find us in a pa,
Rifle-pitted on the Taranaki shore.

On the very best we fed, we had lots of beef and bread,
In confinement very few of us did sulk;
But some of us did die from the plentiful supply
And gormandising there on board the hulk.
If sickness we did sham, the worthy Doctor Sam
Attended us and made us all serene,
And every Sabbath day a parson came to pray,
And warn us all how naughty we had been.

Kakino Georgy, &c.

No work we had to do; no employment to pursue
We loafed and smoked from breakfast until tea,
And the time we would employ in chaffing you, old boy,
And planning what we'd do when we got free.
We were a useless lot, but the 'elephant'you'd got
To starve or work us you were too humane,
If the worst comes to the worst we'll do what we did at first,
And surrender to be fattened up again.

Kakino Georgy, &c.

In this luxurious gaol keeping us got very stale;
With your captives you did not know what to do;
And you watched us with great grief polish 'levenpenny beef'
That was the price they stuck it into you.
And then, dear Georgy Grey, you took us all away
To the Kawau for a pleasant change of scene;
And to make us cultivators, and grow our own potatoes;
But colour of the Maori eye ain't green.

Kakino Georgy, &c.

All the guard on us down there were four persons, I declare-
The doctor and a sleepy volunteer,
An interpreter named White, and a parson, so 'twas right
We'd no difficulty, that was very clear.
So we didn't dig and plant, but as we'd such a slant,
The opportunity we didn't lose;
And wasn't it a game when the *friendly* natives came,
And assisted us to cut in their canoes.

Kakino Georgy Grey, &c (u)

Recrimation followed recrimination in the wake of the escape. When W. Fox, the Colonial Secretary, asked "What would be the status of the prisoners should they be recaptured?", Grey responded, quite safely, that if they were recaptured he would not stand in the way of "a legal trial" *(v)*. In his reply, Grey suggested that he had never placed any obstacle in the way of a legal trial and Fox countered, the same day,

with a respectful reminder that when the governor had been advised on 7 April 1864 to send the prisoners for trial under the Suppression of Rebellion Act, he had declined to take the advice of his ministers *(w)*. Grey was not silenced even by such a clear indication of his inconsistency, but argued in reply that the words "legal trial" were the operative words of his statement, and that a trial by court-martial, four and one-half months after capture was improper. He retorted, with amazing disregard for his previous position that the governor could not, under such circumstances, think that the ordinary Courts of law were wholly inadequate for the effective punishment of these people *(x)*. Fox was not allowed the last say, for Grey placed a high value on self-justification, but despite Grey's continued spate of explanations, Fox made a telling criticism when he pointed out that:

> "If ministers did commit so grave an offence as to advise His Excellency to subject the prisoners to a trial not authorised by law, it appears to them remarkable that His Excellency, who is ordinarilynot averse to pointing out their failings, real or supposed, should for six months have passed over one of great importance, and waited patiently for the chance of an opportunity be afforded by the Colonial Secretary for explanation" *(y)*.

Grey appears to have done himself little damage at the Colonial Office by his handling of the constitutional conflict occasioned by the holding and escape of the Kingite prisoners. The Secretary of State for the Colonies, Edward Cardwell, informed Grey on 26 December 1864 that he believed that:

> "The history of the prisoners affords a striking proof of the evils which result in the conduct of the war from disputed authority - and of the absolute necessity for placing in one responsible hand the power of dealing with questions arising out of the conduct of military operations" *(z)*.

Cardwell's support for Grey, and his advice favouring the placement of power "in one responsible hand", led to increasingly arbitrary and extra-legal orders by Grey over the disposal of maori prisoners. In 1866 Governor George Grey ordered 180 East Coast Maori to be exiled in the Chatham islands, amongst their number was Te Kooti Rikirangi. Had the Secretary of State for the Colonies checked Grey rather than encouraged him, the Hau Hau atrocities might not have occured.

In the long term, most of the Kingite elders captured during the land wars suffered no lasting injury. There was no "drum head" court-martial with attendant hangings, or firing squads. Dr Sam and his medical officers cured many of their captors of debilitating diseases. The ballad-mongers were correct in their charge that the prisoners on the *Marion* were better fed and clothed than they had been prior to their capture. However, the maori "old people" of the Waikato still tell of mounted pakeha soldiers trotting away from the battlefields with Kingite warriors roped in line by nooses around their necks, and made to run in order to remain alive. Pakeha reports, of course, tell nothing of this - nor would they, for Cameron, unlike his Indian mutiny veteran successor, Major-General Sir Trevor Chute, would not have tolerated this behaviour.

As for justice, the British government kept a careful watch on the battle between Grey and his advisers for the control of the Maori prisoners. Within Britain, a powerful evangelical lobby demanded that the "intelligent Maori", who had accepted the gospel so readily, should not be victimised for resisting land-grabbers. Cameron and many of his officers agreed. British secretaries of state for the colonies had no wish to antagonise powerful lobbies and were relieved when Grey finally acted with some determination and clarified that the Kingite prisoners were prisoners-of-war.

The governor's final judgment, the escape from Kawau Island, and Grey's successful refusal to pursue his prisoners, must have greatly relieved another British Cabinet Minister, the Foreign Secretary who would have hardly cared for the embarrassment of the trial and hanging of over two hundred Maori "rebels" in the year of the signing of the Geneva Convention.

(t) Ibid., Cardwell to Grey, 27 December 1864.

(u) L. R. Thatcher, "The Escaped prisoners", R. Bailey and H. Roth (eds), *Shanties by the Way*, (Wellington, 1967), p 37.

(v) Ibid., Fox to Grey, 18 October 1864, Grey to Fox, 19 October 1864.

(w) Ibid., Fox to Grey, 19 October 1864, [entered as 20 October, the date of receipt in the index].

(x) ibid., Memorandum of His Excellency, explaining his reasons for declining to sanction the trial of the prisoners, 20 October 1864.

(y) Ibid., Memorandum of Minutes in reply to His Excellency's Memorandum of 20 October, W. Fox, 24 October 1864.

(z) Ibid., Cardwell to Grey, 27 June 1864.

HUMAN RIGHTS

"Poison in the System"

DECLARATION OF GENEVA

I solemnly pledge myself to consecrate my life to the service of humanity;

I will give to my teachers the respect and gratitude which is their due;

I will practice my profession with conscience and dignity;

The health of my patient will be my first consideration;

I will respect the secrets which are confided in me;

I will maintain by all the means in my power, the honor and the noble traditions of the medical profession;

My colleagues will be my brothers;

I will not permit considerations of religion, nationality, race, party politics or social standing to intervene between my duty and my patient;

I will maintain the utmost respect for human life from the time of conception; even under threat, I will not use my medical knowledge contrary to the laws of humanity;

I make these promises solemnly, freely and upon my honor.

Is the Declaration of Geneva a relevant guide for doctors in today's society? Mr J D Dalgety* *in a paper presented at the 5th World Congress on Medical Law at Gent examines this question.*

On 14 July 1933 *(a)* Germany passed the "Law for the Prevention of Progeny with Hereditary Diseases". Abortion and sterilisation were permitted for these purposes. The law was not mandatory. Doctors began performing both.

In a decree signed by Hitler *(b)*, dated 1 September 1939, the authority of doctors was expanded to grant a merciful death to mental patients who were considered incurable. "Charitable non-profitmaking foundations" were established to facilitate the implementation of the decree. Dr Walter Schmidt became a participant in the programme. In giving evidence at his trial following the end of the war he testified *(c)*.

> "The legal gentlemen in Berlin told us that this task was a legitimate matter, that it was a law of Hitler's, a decree having full legal force. The question as to whether Hitler was empowered to issue such decrees was likewise discussed by lawyers and answered in the affirmative."

By 1940 the programme was working well. In a sworn statement a nurse, P Kneissler, said this in respect of the practice of medicine at Grafeneck Castle *(d)*.

> "The patients we moved were not necessarily severe cases. They were mentally ill, true enough, but often in very good physical condition. Each transport consisted of about seventy patients, and we had such transports almost daily.
>
> "When patients had arrived at Grafeneck they were assigned to the barracks there, where Dr Schumann and Dr Baumhardt gave them a cursory examination on the basis of the questionnaires. It was up to these two physicians to say the final word on whether a patient was to be gassed or not. In individual cases the patients were exempted from gassing. In most cases the patients were killed within twenty-four hours of arriving at Grafeneck. I was in Grafeneck for almost a year and know of only a few cases in which the patients were not gassed."

The same nurse worked at an institution at Hadamar - there the patients were not gassed but were killed with veronal, luminal, and morphine-scopolamine.

With young children the method was different. In a sworn statement L Lehner said this about Dr Pfannmuller's work at the Eglfing-Haar Institution *(e)*.

> "In about fifteen to twenty cribs lay the same number of children, aged one to five . . . . "
>
> "We kill (or he may have said "we do the thing") not by poison injection, or such

* Mr Dalgety is a barrister and solicitor in practice in Wellington. He has been actively involved for five years, as a member of the pro-life lobby, in resisting the adoption of the abortion/euthanasia philosophy in New Zealand.

methods - that would be merely furnishing new propaganda material to the foreign press and to certain gentlemen in Switzerland". (He probably meant the Red Cross) "No our method is much more natural and simple, as you see." With these words he drew one of the children from its crib, aided by a nurse evidently on regular duty in the ward. He showed around the child like a dead rabbit and with a knowing expression and a cynical grin said words to this effect: "This one, for example, may take another two or three days." I can never forget the sight of this fat, grinning man, a whimpering bundle of skin and bones in his fleshy hands, surrounded by other starving children. The murderer explained further that food was not withdrawn from the children all at once but by gradual reduction of the rations."

News of the programme reached the people. A Lutheran Pastor Paul Braune made protest to several Ministers *(f)*. He was threatened with imprisonment "for interfering in secret matters". The Catholic Bishop of Wurttenberg, wrote on 19 July 1940 to the Minister of the Interior complaining that insane, feeble-minded and epileptic patients were being transferred from hospitals to Grafeneck Castle. Relatives were informed of the transfer and shortly after they would receive a notice of the patient's death and an intimation that the ashes would follow. He wrote to the Minister of Justice and asked for an appointment. His letter concluded "There can be no stopping once one starts down the slope" *(g)*.Further protests came from Catholic Bishops. Cardinal Bertram wrote on behalf of the German Conference of Bishops. In respect of the sanctity of life Bertram said:"If this principle is once set aside, even with limited exceptions, on the grounds of an occasional need, then, as experience teaches us, other exceptions will be made by individuals for their own purposes."

News of these developments reached Pope Pius XII *(h)*. On 6 December 1940 a decree of the Congregation of the Holy Office was issued and published in *Osservatore Romano* in the following terms:

> *Q* "Whether it is licit, by the order of the public authority, to kill directly those who, although guilty of no crime worthy of death, nevertheless, because of psychic defects or physical defects can no longer be of use to the nation and are thought rather to be an impediment to it and to be an obstacle to its vigor and strength. *A* No, since this is contrary to both the natural and the divine positive law."

It is a matter of record that the protests then and thereafter in Germany achieved nothing. The programmes increased; they were extended to embrace Jews, gypsies, Poles, Russians, wounded Germans and many others *(i)*. Experiments of a cruel and revolting nature were carried out on an extensive basis. They produced not a single cure nor one important medical discovery *(j)*.

Within the space of 12 years, doctors in Germany moved from the killing of the unborn and the sterilisation of the mentally ill (many of whom were subsequently killed pursuant to the euthanasia decree) to wholesale killing. Was there any dissent from the medical profession? A commentator wrote in *Doctors of Infamy (k)*.

> "It is too much to say, perhaps, that one single courageous individual, one single worthy representative of German medicine could, with less careful consideration for his physical comfort, have saved the honour of the entire profession. Yet I am convinced that such an individual could have done something to mitigate the horrors which are related in this book; Had the profession taken a strong stand against the mass killing of sick Germans before the war, it is conceivable that the entire idea and technique of death factories for genocide would not have materialised. From all the evidence available, it is necessary to conclude that, far from opposing the Nazi state militantly, part of the German medical profession cooperated consciously and even willingly, while the remainder acquiesced in silence".

In 1947, the WMA sought "an apology" from the German profession in the following terms (part only of the WMA statement is reproduced) *(l)*.

> "We express our regret that no protest was made by the organised medical profession in Germany against the base uses to which it knew that medical knowledge was being applied, and we now place on record our condemnation and abhorrance of the crimes committed by members of our profession in Germany and Eastern Europe since 1933."

The German profession ultimately expressed regret (18 October 1947) but in some what less fulsome terms. A dark chapter in the history of medicine had ended.

The British Medical Association was founded in 1832. Within the Commonwealth it

was the mother of medical associations, as Westminster was the mother of Parliaments.

After the war, the BMA took a leading role in the establishment of the World Medical Association.

In June 1947, the BMA council prepared a statement entitled "War Crimes and medicine", which its representatives submitted to the WMA. Because of its importance, I have appended it to my paper. Two excerpts are relied on:

> "*The profession must be vigilant* to observe and to combat developments which might again ensnare its members and debase the high purpose of its ideals."
>
> "Appendix II Principles for Inclusion in a Charter of Medicine. Ethics . . . the spirit of the Hippocratic oath cannot change and can be reaffirmed by the profession. It enjoins . . . *The duty of curing, the greatest crime being co-operation in the destruction of life by murder, suicide, and abortion*"
>
> Note: the italics are mine.

In Geneva, in September 1948, the WMA approved the modern restatement of the Hippocratic oath to be known as "The Declaration of Geneva".

The "first commandment" of that code reads:

> "I will maintain the utmost respect for human life, from the time of conception; even under threat, I will not use my medical knowledge contrary to the laws of humanity."

There is no doubt from the evidence that this statement meant, and was intended to mean, that abortion and euthanasia are crimes against the laws of humanity, in which the doctor should not cooperate no matter what pressure is exerted.

That was 31 years ago.

In 1967, the United Kingdom passed the Abortion Act 1967. Abortion on request became a reality within a few years. Hundreds of thousands of unborn children have been killed for the convenience of their mothers, by British doctors.

In 1970, the WMA, with the adoption of the Declaration of Oslo, abandoned its principles in respect of unborn children, because of the "diversity of attitudes towards the life of the unborn child" *(m)*. In future, abortion was to be a matter for the "individual conviction and conscience" of each doctor *(n)*.

In 1977, the British Medical Journal carried a paper by Dr R B Zachary, Professor of Paediatric Surgery in Sheffield in respect of the medical care being afforded some spina bifida babies in some United Kingdom hospitals. He reported *(o)*.". . . these babies are receiving 60 mg kg body weight of chloral hydrate, not once but four times a day. This is eight times the sedative dose of Chloral hydrate recommended in the most recent volume of Nelson's Paediatrics and four times the hypnotic dose, and it is being administered four times every day. No wonder these babies are sleepy and demand no food, and with this regimen most of them will die within a few weeks, many within the first week.

"In another centre only one out of 24 patients was operated on - all the others died. When asked, "Did they fall or were they pushed" -into death - the reply was, "They were pushed of course." At another meeting I attended a paediatrician was asked by a medical student what was his method of management, and the reply was, "We don't feed them."

"One final point. It has often been said by those who oppose abortion that the disregard for the life of a child within the uterus would spill over into postnatal life. This suggestion has been "pooh-poohed," yet in spina bifida there is a clear example of this. The equanimity with which the life of a 17-week-gestation spina bifida infant is terminated after the finding of a high level of x-fetoprotein in the amniotic fluid has, I think, spilled over to a similar disregard for the life of the child with spina bifida after birth.

"Much of my surgical life over the past 30 years has been devoted to improving the quality of life of those who have been born with spina bifida. The attitude of mind that would eliminate all the severly handicapped reminds me of the poster issued by Christian Aid some years ago, which said "Ignore the hungry and they will go away" - to their graves. If we eliminate all the severely affected children with spina bifida there will be no more problem; but why stop at spina bifida, why not all the severely affected spastics, all those with muscular dystrophy, and all those with Down's syndrome? Why stop at the neonatal period? Our aim should be that life with spina bifida is the best possible life for that person in the family and in the community."

Amniocentesis has been advocated in the United Kingdom by two doctors as a routine measure for all pregnant women to permit abortion to be carried out in respect of abnor-

mal children. *(p)* Is someone in England looking after the Down's syndrome babies or are they now being pushed?

In 1977, the United Kingdom funded a 75,000 pound research project to deal with problems which arise from Britain's aging population. The terms of reference embraced euthanasia. It was reported that Mr Roland Moyle (Minister of State, Department of Health and Social Security) wrote to the Human Rights Society on 8 August 1977, that he found the idea of euthanasia "stimulating", although the Department was not "advocating" it *(q)*.

Recently, the BMA published a section of a new draft code of ethics which was causing it difficulty in the British Medical Journal *(r)*. The areas included abortion, severely malformed infants and euthanasia. With the greatest respect, this was predictable - once you abandon your principles, you are forced to adopt skilful drafting and oblique phrases to cover up their lack. These examples taken from the BMJ article speak for themselves:

Abortion

"Because risk of injury to the health of a woman is statistically smaller if the pregnancy is terminated in the early months than if it is allowed to go to term, some people argue that abortion is justified if the woman requests it. But she needs a doctor to do it and the Act contains a "conscientious objection" clause by which the doctor can refuse to participate in treatment, though he has a duty to allow his patient access to alternative medical advice, if she wants it.

"In my opinion, the observation on risk of injury is incorrect. I rely on a BMJ paper entitled 'Effects of Legal Termination in respect of pregnancy' *(s)*. It is also significant that in 1964, Planned Parenthood and World Population said "An Abortion kills the life of a baby after it has begun. it is dangerous to your life and health. It may make you sterile so that when you want a child you cannot have it" *(t)*.

Severely Malformed Infants

"The doctor must find a just and humane solution for the infant and the family, to which consultation with hospital collegues, the general practitioner, nurses, and social workers may contribute."

Euthanasia

"Doctors vary in their approach to passive euthanasia but the profession condemns legalised active voluntary euthanasia.

"And when 'legalised active voluntary euthanasia' presents itself, and some doctors want to practise it, will the outcome be more skilful drafting and oblique phrases?"

On 21 April 1971, the United States Supreme Court delivered its decision in the case of the *United States v Vuitch*. Professor H L Hirsh delivered a paper on the aftermath of the Court's decision at our Conference in Gent in August 1973. The decision related to the District of Columbia - Washington DC which I understand has a population of some three million. A statute declaring abortion illegal unless undertaken to preserve the mother's life or serious risk to her health was in question. Two thousand, five hundred abortions had been performed in Washington DC in the five years preceding the decision. The decision determined that the performance of abortion was a matter for the exercise of the physician's personal judgement. Professor Hirsh revealed that almost 19,000 abortions were carried out in the remainder of 1971, and approximately 30,000 in 1972. He interviewed 31 obstetricians:

"Physicians who perform abortions now do so openly and notoriously whereas prior to the Supreme Court decision rarely was the procedure listed as such on the operation schedule. There is no longer any stigma even as compared to the most liberal attitudes towards abortion prior to the Supreme Court decision in the *Vuitch* case. Only the four Catholic physicians in the group studied were irrevocably opposed to abortions. Although the other 27 physicians had performed an occasional therapeutic abortion prior to the Vuitch decision, since the Supreme Court decision all of them were now performing 100 to 600 abortions per year."

California became the first US State to pass "right to die" legislation in the form of the Natural Death Act 1976. During 1977, "60 bills were introduced in 42 States, with seven becoming law *(u)*. Minors are covered by some legislation. New Mexico's "Right to Die Act" was passed into law in 1977. In its law, maintenance medical treatment ie treatment designed solely to sustain the life processes (apparently wide enough to cover any medical treatment), *shall not be utilised*, if a spouse or parent or guardian executes a document on behalf of the minor to this effect and a District Court certifys the document, provided that two doctors certify that the minor is suffering from a terminal illness.

Two doctors had to certify at Grafeneck Castle.

Two doctors had to certify the legal justification (serious danger to a woman's life or health) at New Zealand's sole abortion clinic (it has since closed). A Royal Commission found that their rejection rate was 4.6 percent in the year ended May 1975 and 2 percent in the following year. The Commission concluded that the clinic had a virtual abortion on request service *(v)*. And will it stop with the killing of the unborn, handicapped babies and terminally ill patients? Of course it won't. Reverend Paul Marx OSB Ph.D. of Collegeville Minnesota has documented *(w)* the utterances of a number of doctors in influential positions in the United Kingdom and the United States who have advocated euthanasia of newborn babies with disabilities, the senile, the seriously ill and the elderly.

We must never forget that only a small minority of german doctors were found to be evil, and so it is today. You should not accommodate the small number by changing the profession's fundamental rules. If they do not agree to practice by the rules, you deregister them. Otherwise, the philosophy of the minority dominates the rest of the profession.

The developments I have referred to have all taken place in the last 12 years.

In New Zealand during the last five years, there has been a savage onslaught on the unborn, by some doctors, with the great majority of doctors acquiescing in silence. In 1977, 5,800 unborn children were killed - most of them in one abortion clinic. Legislation was passed that year giving greater protection to the unborn. The New Zealand Medical Association did not support it. During 1978, the number of abortions fell to 2,600. However, many women travel to Australia to have abortions - the laws in the States of Victoria and New South Wales give no protection to the unborn.

In New Zealand, the Society for the Protection of the Unborn Child commissioned a survey from McNairs, a marketing research firm of good repute *(x)*. The survey took place in the last weeks of April 1979. The survey embraced a number of questions related to social issues. A representative nation-wide sample of 2,032 persons over the age of 15 were interviewed. One question from that survey is reproduced:

Do you feel that Doctors should maintain the utmost respect for human life from the time of conception? Yes: 78%; No: 14%; Don't know: 7%; Total Sample: 100%.

Medicine and law are disciplines. They should demand high standards from their members. Their ethical codes demand such standards.

The developments I have recorded here are factual. They are representative of a world-wide phenomenon. They could not have taken place without the support and/or acquiescence of the medical and legal professions, including Judges.

> The conclusion is unmistakable. The medical profession is ensnared again and well advanced down the slope. The professions (lawyers and Judges must share the blame), have failed the peoples of the world as badly during the last 12 years as the German medical profession failed its people during 1933 to 1945.
>
> It is time that the National medical Associations who were a party to the Declaration of Geneva, took stock. If the basic standards which motivated them to condemn the German profession for "the crimes committed against humanity since 1933" and restate the Hippocratic oath, have no meaning today, they should say so. It would also be fair of the WMA to give the medical profession of Germany a retrospective clean bill of health since 1933. Because, in truth, the German profession could claim to be the pioneers of the recent developments.
>
> One of the declared objects of the WMA is the maintenance of the honour of the medical profession. Honour, I suggest, has long since gone. Should hypocrisy be added to the indictment?
>
> The alternative is to reaffirm the Declaration of Geneva without exceptions, and then implement it. It would be difficult. To admit to error is never easy. There would be soul searching. But it is all there in the Declaration of Geneva. It is as relevant today as when some nameless British doctors first drafted it 30 odd years ago. it is the essence of medicine: to cure and never to kill.
>
> Solzhenitsyn summed it up thus *(y)*. "And the simple step of a simple, courageous man is not to take part in the lie, not to support deceit."

The message of the past is clear. We all know we can learn from it. The question is do we want to?

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ADDENDUM

War Crimes and Medicine

[This is the text of a statement by the Council of the British Medical Association for submission to the World Medical Association in June 1947.]

The evidence given in the trials of medical war criminals has shocked the medical profession of the world. These trials have shown that the doctors who were guilty of these crimes against humanity lacked both the moral and professional conscience that is to be expected of members of his honourable profession. They departed from the traditional medical ethic which maintains the value and sanctity of every individual human being.

Crimes committed by doctors have been classified by the War Crimes Commission as follows:

(1) Experiments without consent on human subjects authorised by high authorities on the pretext of scientific research in the interests of the war.
(2) Experiments without consent conducted by medical officials in concentration camps on their own initiative in order to gain experience.
(3) Deliberate selection and killing of prisoners in camps by medical neglect or by lethal injections.
(4) Deliberate killing of infirm or feeble-minded patients and of children in hospitals and asylums.

From the above it is clear that doctors carried out their inhuman experiments both for the furtherance of the war effort and for research in disease. In the course of the experiments and in the application of their findings, they deliberately killed persons politically undesirable to the regime in power. They misused their medical knowledge and prostituted scientific research. They ignored the sanctity and importance of human life, exploiting human beings both as individuals and in the mass. They betrayed the trust society had placed in them as a profession.

The doctors who took part in these deeds did not become criminals in a moment. Their amoral methods were the result of training and conditioning to regard science as an instrument in the hands of the State to be applied in any way desired by its rulers. It is to be assumed that initially they did not realise that the ideas of those who held political power would lead to the denial of the fundamental values on which medicine is based.

Whatever the causes such crimes must never be allowed to recur. Research in Medicine as well as its practice must never be separated from eternal moral values. Doctors must be quick to point out to their fellow members of society the likely consequences of policies that degrade or deny fundamental human rights. The profession must be vigilant to observe and to combat developments which

might again ensnare its members and debase the high purpose of its ideals. The medical crimes committed in the late war have shown only too convincingly how medical knowledge and progress, unless governed by humanitarian motives, may become the instruments of wanton destruction in the pursuit of war.

The influence of Medicine throughout a nation is often underestimated. Individually the doctor is more than the exponent of medical opinion and the technical expert. He is the confidant, the friend and the trusted adviser, and wields an influence far beyond the immediate realm of physical needs. Collectively the medical profession can cultivate throughout the world the growth of international amity.

The following procedure by the World Medical Association is accordingly recommended:QL

(1) The publication of a resolution endorsing judicial action by which members of the medical profession who shared in war crimes are punished.
(2) The drafting of a World Charter of medicine. This might take the form of a modern affirmation of the aims and ethics of medicine in the spirit of the Hippocratic oath, which should be published and applied in medical education and medical practice.

In medical education, the traditional aims and ethics of medicine should pervade the curriculum. An undertaking to abide by these principles as expressed in a Charter of medicine should be part of the medical graduation ceremony.

In medical practice, the adoption of this Charter by the World Medical Association and its constituent bodies, and publicity through the world medical press, would do much to prevent a recurrence of such crimes and to ensure that Medicine remains a constructive and beneficent influence in society as a whole.

APPENDIX I

Summary of medical crimes, abstracted from reports of Nuremberg Trials, 1945-46

An abstract of the available evidence indicates that the so-called experiments include:

(a) The effect of vacuum and pressure chambers.
(b) Sterilisation - chemical, operative, and radiological, with controls by artificial insemination.
(c) Blood transfusion.
(d) Cold water immersion, with periodic blood tests and difference methods of resuscitation.
(e) Liver puncture.
(f) Deliberate septic infection.
(g) Excision of parts of the body.
(h) Experimental operative surgery - non-indicated operations - for instructional purposes.
(i) Exposure to gas and chemicals for varying periods and results checked by autopsy.
(j) Methods of "mercy killing", gas, benzene injections, cremation of semi-moribund individuals before death, etc.

APPENDIX II

Principles for inclusion in a Charter of Medicine

AIMS. The traditional aim of Medicine has been the succour of the bodily needs of the individual irrespective of class or race or creed, the cure of disease, the relief of suffering, and the prolongation of human life. In later years the prevention of disease has been added to the traditional aim. All these have been accomplished by the scientific method coupled with the spirit of charity and service.

The achievement of the highest possible level of health for all people is an aim of the World Medical Association.

ETHICS. Although there have been many changes in Medicine, the spirit of the Hippocratic oath cannot change and can be reaffirmed by the profession. It enjoins.

APPENDIX III

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