The New Zealand
LAW JOURNAL

4 September 1979 No 16

GOVERNMENT AND THE CONSTITUTION

Over the last two or three years a number of constitutional matters have attracted attention, comment and criticism — criticism directed in the main not at the substance of the decision, but at the way in which it was made. More attention was given to the way the Labour Government Superannuation Scheme was dismantled and at the way the NAC-Air NZ merger was effected than to whether these changes were desirable. More criticism was levelled at the speed at which regulations and statutes have been passed than at the substance of the enactments. As much criticism was directed to the lack, or inadequacy of the Select Committee hearings on the Security Intelligence Service and Town Planning legislation as to the content of the Bills.

In addition there has been a measure of healthy protest at what many saw to be a use of the Attorney-General's power to stay prosecutions for political ends (the Ford Motor Company case), at the appointment of a former (albeit respected) politician to the office of Governor General, and to penal legislation having retrospective effect (as in the Transport Amendment Act (No 3) 1978).

What is done is a matter of policy. The manner in which it is done is a matter of style and attitude. There are signs of change. Increasingly the more recent members are expressing dissatisfaction and a most significant indicator is the dropping, as the result of caucus pressure, of the Budget proposal that power be introduced to enable the reduction of income tax rates by regulation. In addition the Minister of Justice has committed himself to a course of less legislation.

Unfortunately, and probably unavoidably, ranks close whenever there is criticism of the style of government. Thus in the debate on the Remuneration Bill, while the Opposition attacked the method of implementing the new General Wage Order (by regulation rather than arbitration) the Government members tended to defend their position, not on the merits, but on the basis that the Labour Party had done just the same when it was in power. So there is still some way to go.

There is some indication that the Auditor-General is also taking a much stronger line. Those who heard the Auditor-General give evidence in 1976 in the case of *Fitzgerald v Muldoon* may have felt that the attitude of the Auditor-General's office towards retrospective validation of unauthorised payments was slack compared with the practice in, say, England. Since then, however, the annual reports of the Auditor-General have been increasingly critical of governmental expenditure and management and of the extent to which certain quangos (quasi-autonomous national government organisations) such as, for example, Air New Zealand, are not subject to audit by his Department.

There is a suggestion of a move in the right direction; and there is nothing like maintaining a certain minimum level of indignation to ensure that this movement maintains its momentum.

Geoffrey Palmer's book "Unbridled Power?" does this. It serves as a reference to, and a reminder of events that should not be forgotten by those who seek change. It records and reminds for example that:

(a) in the last week of sittings in 1978, Parliament, over three days, sat for 45.5 hours and passed 30 Acts of Parliament as well as passing numerous Bills through Committee

and second reading stages;

(b) the Town and Country Planning Act 1978 was rushed through with inadequate consideration both at the Select Committee stage and in the House;

(c) attempts have been made to suspend laws without the consent of Parliament;

(d) given an adverse Court decision the Minister of Social Welfare tagged an amendment by supplementary order paper onto a Bill already before the House and effected a change in Legislation two days after the decision without adequate opportunity being given to the House to debate the measure let alone comment being made on the desirability of the Minister controlling the exercise of the statutory discretions vested in the Social Security Commission and Social Security Appeal Authority by written directions.

And there are many others. However, to refer to "Unbridled Power?" only as a reminder of things we would rather had not happened is to do it a considerable injustice. So much has happened in recent years bearing on some aspect of our constitution (such as it is) that there has hardly been time to draw breath, sit down and review the position overall. This book does just that. In a punchy and readable style that neither speares nor overdoes detail, the author describes how we are governed (not to say overgoverned). He does this so clearly that from time to time one has the feeling of sitting on the shoulders of a potential decision as it passes through the system. In the preface the author gives his opinion that "in New Zealand the time has arrived for a review of the rules about how we are governed. The press for change is in the direction of finding ways to protect people from Government." For those interested in that protection "Unbridled Power?" will prove a valuable (if low-priced) acquisition.

It is though, sad to relate that in the comparatively short time between writing (December 1978) and publication (July 1979) events have continued to occur that would justify a place in the rogue's gallery section of future editions. There has been anything but a move away from Government by regulation. The proposed "fiscal regulator" has already been mentioned. Its demise was a healthy sign. It should not have been proposed at all. The Remuneration Act 1979 with its power to make General Wage Orders by regulation points to a continuation of the trend to manage the economy by regulation. However, the blackest mark should go to the regulations introducing the carless day scheme. The scheme goes beyond economics to our very lifestyle. If this country's response to the oil crisis is not sufficiently important to warrant debate in Parliament then what is?

Tony Black

TAXATION

OBJECTIONS TO ASSESSMENTS AND OTHER DECISIONS OF THE COMMISSIONER

By DR A P MOLLOY, *Barrister-at-Law*

Although we might rarely stop to think about it, the taxation of the citizen is bound up inextricably with his rights of freedom of assembly, action, discussion, and religious profession. The nexus is the constitutional principle described as the "rule of law".

This rule expresses a notion derived from the mediaeval view that law governs, or ought to govern, whatever happens in the world *(9)*. Its significance in the modern New Zealand context is that, while Parliament is supreme, and may enact laws, the Courts are independent; the Courts alone are able to declare the effect of the law; the Courts will apply the law without favour as between citizens and officials; and the Courts will act to prevent arbitrary interference, unauthorised by the law, with the freedom and property of the citizen.

The rule of law has a double effect in the taxation context.

One effect is to ensure that the moneys raised, and paid into the Public Account, are applied only to lawful purposes. Purposes, that is, authorised either by a *permanent statute*, such as the Civil List Act 1950 or the Public Finance Act 1977, s 87 (relating to repayment of the National Debt); or by the *annual* Appropriation Act, by which Parliament specifies

(a) Cf Holdsworth *History of English Law* Volume 2 (1923) 121-122, 196; and Volume 10 (1938) 647-650.

the sums to be provided for objects not covered by a permanent statute.

Control over the issue of tax moneys from the Public Account is in the hands of the Controller and Auditor-General. When the Treasury needs money for public purposes it must make out a requisition to him, under Public Finance Act 1977 s 60, which authorises payment of the specified sum. Before he makes the payment, or grants credit, for that sum, s 60(5) requires the Auditor-General to satisfy himself that the Treasury requisition is properly grounded in statutory authority.

If any such requisition to him lacks the necessary statutory authority, say because no Appropriation Act had been passed for that year; because the requisition purported to be under, but went beyond the terms of, a specific Act; or because the Governor-General had not signed a warrant under s 59, the Controller and Auditor-General could not lawfully give the counter-signature to the requisition necessary to enable the money to be drawn. If he tried to do so he could be restrained by the Courts.

The other effect of the rule of law in the tax context arises because, outside of a statute providing for enforced exactions, the only principles that might oblige any man to share his income or property with his fellows, either directly or through contributions to the Government, are principles of religion or philosophy. *There is no such principle known to the common law.*

Whenever any person is assessed for income tax the question therefore is: "Is the assessment justified according to the terms of the statute law of New Zealand?". In other words, is the assessment justified by, first, a specific provision of the Income Tax Act 1976, and, secondly, by an Annual Taxing Act having been duly passed and being in force in relation to the year in question? [Without such an Act, which is made for a particular income year only, there are no "rates" fixed which, for the purposes of Income Tax Act 1976, s 39 could be the basis for assessment].

Where a taxing statute is one, the revenue-raising objectives of which are matched or overshadowed by such social purposes as the redistribution of wealth, eg the Estate and Gift Duties Act 1968 *(b)* or the curbing of speculation, eg the Property Speculation Tax Act 1973 *(c)* the question whether its terms apply may be coloured by a consideration of those social objectives.

But where the Act is one in respect of which revenue-raising is the paramount consideration, as with the Income Tax Act 1976, the sole question is as to the exact amount of revenue, if any, which may be exacted, in given circumstances, according to its *precise terms.*

Because there is no common law counterpart or ancestor of the statutory duty to pay income tax, there is absolutely no room for any notion whatsoever of an underlying obligation of reasonableness, fairness, or public duty. The citizen in a given situation is either in the net or out of it. And if he is out of it, then he cannot lawfully be taxed as if he were in it: upon some such basis that it is inequitable that he should escape, where, say others in closely similar, but not completely identical, circumstances, have not been able to.

Conversely, if he is in the net cast by the very words used by Parliament, the citizen cannot lawfully be allowed by the Commissioner to escape the tax on some such notion that it is not fair that he should have had to pay. Equality before law is a two-way concept.

Income tax is a matter of "in" or "out": and questions of fairness and equity are not to be decided as between the Commissioner and the taxpayer. They are for Parliament itself, alone, to resolve.

Because it's a matter of "in" or "out", no one can be criticised *fairly* who does a sidestep, and, if he can, conducts his affairs in such a way as to attract no, or only a minimum, income tax liability. This principle was very clearly put by Romer LJ, in the English Court of Appeal, in a case that had nothing whatever to do with taxation, it was on charges given by a company:

> "If a man so conducts his affairs that he places himself outside the operation of an Act of Parliament, he cannot be said to be either evading it or defeating it. He has done nothing that is unlawful, and he has done nothing that calls for adverse comment from the Court." (*Re George Inglefield Limited* [1933] Ch 1, 26 (CA)).

Occasional canting judicial homiletics to the contrary notwithstanding, there is absolutely nothing so special or sacred about the Income Tax Act 1976 as to put it beyond the scope of this principle. There is no duty to do anything that will attract tax or more tax; and there is nothing illegal or immoral in doing something that does not attract tax in preference to doing something else that might attract it.

(b) Cf *John Danks & Son Pty Ltd v Collector of Imposts* [1944] VLR 172, 175 per Macfarlan J.

(c) Cf *Ken Wilson's Enterprises Ltd v CIR* [1975] 2 NZLR 177, 180 lines 14-32 per Quilliam J.

These prefatory remarks are worth making, because one frequently sees instances of taxpayers being put into, or further into, difficult situations, by professional advisors adopting a neglectful, or even a carefree, stance towards the strict letter of the law while they make initial, well-intentioned, attempts to "sort things out with the Inspector on a practical basis". Then, when things did not get sorted out after all, the case in Court has been hamstrung, occasionally fatally, by the notice of objection not having taken vital points, or by the contentions in the Case Stated having been inadequately formulated: so that the Court is deprived of the jurisdiction to listen to points vital to the taxpayer's success.

Because there is no duty on the client to pay any but the exact amount of tax specifically provided for, anyone giving him advice on his objection to an assessment for a greater amount has a clear duty to advise him of every possible point that is, or arguably may be, open to him to be used in support of his case.

If the adviser is to discharge his professional duty properly, a number of extraneous considerations and pressures must be utterly ruled out.

Not the least of these is the very friendly, and perfectly understandable, wish to maintain a good relationship between the adviser's firm, on the one hand, and the department, on the other. No doubt, that sort of relationship rebounds to the credit of the firm's tax clients *generally*. But when an objection is being prepared, the foundation is being laid for a potential case for one client only: and his interests, and his alone, are all that count in that respect.

So, if there are points to be taken, they *must* be taken. It may be negligence if they are not, and, if the failure to take them ends up by costing the client tax, any negligence will become actionable.

It is the obvious arguments that are so easily overlooked in objections; or even thrown away by incautious admissions in correspondence.

For example, under ss 126, 127, and 128, certain prima facie capital, development expenditure of agricultural and marine farmers is tax deductible, subject to claw-back under s 129 in the event of "sale" of the property within a defined period. A strong, but easily-overlooked, argument, in the common situation of a reconstruction involving the separate incorporation of what previously was only a division of the company which owns the property: is that a transaction by which the parent purports to "sell" the property to the new subsidiary for, say, 200,000 $1 ordinary shares, may be no "sale" at all, but an exchange. And this, notwithstanding the use of "sale" terminology.

This leads to another reason why prefatory remarks on the rule of law are useful. They serve to emphasise a fundamental all too easily overlooked: that income tax is a creature of a statute law which, for its proper appreciation, requires a sound and detailed knowledge of numerous other legal disciplines, such as statutory interpretation, equity, property law, partnership and company law, administrative law, and the law of evidence; and it requires also an ability, when dealing with the Revenue, to look ahead to the possible consequences for any eventual case in Court of anything said, written, or, even, omitted, in dealings with the Revenue.

In short, income tax involves basic constitutional law principles; draws together a number of legal disciplines; and therefore should be a matter of far greater concern on the part of the legal profession than it is.

By unprofessionally evading their responsibilities, many lawyers unfairly place a burden on their clients' accountants which the accountants are simply not equipped to bear.

Seeking financial advice from a lawyer, and seeking advice on tax law from an accountant, is akin to seeking medical advice from a pharmacist or a nursing sister. In any of these cases the advice so sought, if given, sometimes may be right, so far as it goes. However, that these are instances of practices that are quite clearly undesirable, in any but the most insignificant of cases, and who is to adjudge insignificance, is self evident.

Lawyers should recognize that, where commercial imagination, or the proper principles of accounting, play any part in a given scheme or dispute, the accountant's advice must be sought. But where it is a matter of legal principle, a solicitor conceivably could be liable in negligence to his client if he just left it all up to the accountant; and the accountant could be liable if he was foolish enough to accept the situation; give advice which no reasonable and capable tax lawyer, not accountant *(d)*, would have given; and the client is fixed with a tax liability as a result.

A case that brings home the importance of always realising the possibility of the legal situation in respect of income tax is *Morgan v Beck & Pope* (1974) 1 NZTC 61225, in which Quilliam J found a firm of solicitors liable to pay damages to their client in the amount of

(d) Cf *Greaves & Co (Contractors) Ltd v Baynham Meile & Partners* [1975] 1 WLR 1095 (CA).

the roughly $14,000 that their actions, which the learned Judge held to have been negligent, had cost their client in income tax.

The importance of the objection itself is obvious: particularly in view of s 33(1) of the Income Tax Act 1976, read with s 36 of the Inland Revenue Department Act 1974, the combined effect of which is to confine the objector to the grounds stated in his notice of objection.

But the objection letter usually goes in only after a certain amount of other correspondence, and that other correspondence often is no less vital. It can represent the opening advocacy in any Case Stated which results from a disallowance of the objection: in that it may be annexed to the Case Stated; and, therefore, could be the first contact the Court has with the case.

This golden opportunity ought not be allowed to pass by without advantage being taken of it. If the witnesses are properly briefed, and their evidence cross-checked and verified, and if all the relevant documents have been carefully sifted and weighed, a comprehensive letter setting out the whole situation from beginning to end; raising, meeting head-on, and explaining away, any suspicious elements in, or shortcomings of, the objector's case: may cause the assessment to be withdrawn.

But even if it does not, it assists immeasurably the trial of any Case Stated in which fact and intention play significant roles. It means that counsel's opening address, instead of breaking new ground for the Court, is able to reinforce what it has read already in the attachments to the Case Stated. it gives counsel the opportunity of drawing comment on what the Court at that stage considers to be the strengths and weaknesses of the case: so enabling late steps to be taken, if necessary, to bolster any possible unforeseen shortcomings that those comments might indicate.

When the evidence finally is led, the presence of such a letter as an exhibit to the Case stated, or an answer, may mean that the Court is now going through the taxpayer's story for the third time [the annexed letters; the opening address; and now the evidence], without the Commissioner having had a chance to put anything up yet. Provided the evidence has been well marshalled, and the witnesses come up to brief, the objector's case effectively can be won on the facts before the Commissioner's case is even opened.

But there is another side to this coin. it is that the pre-objection correspondence can put dynamite under the client's case. For example, in a "purpose or intention of acquisition of land" case under s 67(4)(a), the credibility of the objector in the eyes of the Court is the fulcrum of the whole proceeding.

In many such cases, before acquiring the land he has now sold at a profit, the objector has made a declaration as to his purpose of acquisition: in order to obtain from the Court, pursuant to the terms of the Land Settlement Promotion and Land Acquisition Act 1952, consent to his making the purchase.

Unless any statements he made for that purpose are checked carefully, from the Court's records if necessary, before the first letter of explanation is written: there is a royal chance of setting up a conflict between the subsequent story and that earlier solemn declaration. Any Crown counsel worth his salt will exploit this mercilessly, so as to suggest that, for this objector, an oath is just an occasion on which to ally blasphemy with perjury. The Crown will have an excellent opportunity to destroy the credibility of the objector; and to destroy, with it, his chance of discharging the onus of proof which rests on him.

Turning to the objections "code" in Part III, ss 30-36, of the Income Tax Act 1976: the first point to note is that the objection, in which the relevant grounds are mentioned, is required by s 30(1) to be lodged "within such time as is specified in that behalf in the notice of assessment". And the usual notice of assessment has a note on its back to the effect that the objection must be lodged within a month from the date appearing on the face of the objection. What often happens is that a notice of assessment arrives stapled to a document describing itself as an income tax statement of account: which is a document embodying a note to the effect that, if it arrives in company with an assessment notice, the statement of account is not to be treated as a notice of assessment.

If the worst happens, and more than a month elapses from the date of the statement of account, the Commissioner still is likely to accept an objection filed reasonably soon afterwards. But if he will not, then check the notice of assessment itself. It is often not dated: the date on the statement of account having been deemed sufficient by the department in issuing the two documents in tandem. And if it is not dated, it is strongly arguable that no time has been specified in the notice of assessment, and that an objection may validly be lodged at *any* time, without limit, thereafter.

The next parts of the Objections code are ss 31 and 33: to the effect that, if an objection is not wholly allowed, the objector is entitled to have the Commissioner state a case for the opi-

nion of the Taxation Review Authority or of the Supreme Court.

Two important points in relation to this brace of provisions. First, another question of time limits. Unlike s 30, the objections provision, neither of the Case Stated-request-provisions gives the Commissioner any power to accept a request *after* two months from disallowance of the objection. It has been held *(e)* that under this sort of provision the Commissioner has no power to waive the time limit, and that *(f)* not even an unconditional appearance by the Commissioner in Court can confer validity on a request made out of time.

The second vital point about the Case Stated request is that it is a statutory right vested in the objector, and the Commissioner cannot lawfully delay in complying: on some such basis as that a similar case is being brought before the Court by another taxpayer, and the Commissioner is going to take no action in the meantime until the result of that case is known.

The taxpayer is entitled to *insist* that the Commissioner state a case regardless of any considerations like that, and a Court will issue a Writ of Mandamus, or make an order in the nature of mandamus on an application for review, if the Commissioner does not comply. It is up to the Court or the Authority, not the Commissioner, to decide, once the case is before it, whether the matter should be adjourned pending the outcome of the other proceeding. These propositions are clear in principle, and are supported by *Re Hissinck, Ex p Deputy FCT* (1969) 1 ATR 636, 639 lines 5-14 per Gibbs J, and *Re Norper Investments Pty Ltd* (1977) 7 ATR 488, 492 lines 13-25 per Needham J (NSW Supreme Court).

There are at least two reasons why the objector should insist on his right to have a case stated forthwith, notwithstanding any reluctance on the Commissioner's part:

1 Unless the case is stated immediately, and a fixture applied for, the Court's current delays are such that, if the "test case" of the point in the objector's case; or if, although it is not appealed, the taxpayer thinks it is wrong, and would like to take the issue on to a higher court in his own case: the taxpayer may be delayed by some years in discovering where he stands, or in recovering any tax he may have paid.2 Because the Commissioner will not divulge the name of the objector in the "other case"; and because it may be highly advantageous to both objectors to join forces: insistence of having a Case Stated and set down for hearing could force the Commissioner to apply for an adjournment if the other case has yet to be heard, and might compel him to disclose the identity of that "other case" as part of his argument in support.

The next important provision in the objections code in Part III of the Income Tax Act 1976 is s 34, providing that the Commissioner's right to recover tax is not suspended by the objection or the case stated. usually he will agree to a postponement if there is a bona fide dispute, but if he does not agree, he is entitled to begin recovery proceedings; winding up proceedings; or insolvency proceedings.

But, as Dr Seuss says, it is "important to know" that, once the Commissioner *does* issue any of these proceedings, he puts himself in the hands of the Court: which is master of its own procedures and has not been fettered by anything in the Income Tax Act 1976. Because of this it has power to adjourn the proceedings, pending the outcome of the Case Stated: cf *Clifford v CIR* (1965) 9 AITR 610 (CA).

The Court will not treat s 34 as making irrelevant the possibility of an objection being successful. Rather, it interprets it merely as preventing the objection *of itself* detracting from the Commissioner's right to be paid.

If the taxpayer can show that he or it is *certain* to succeed on the hearing of his objection, the Court will grant a stay of all attempts at recovery by the Commissioner: cf *Deputy C of T (WA) v Australian Machinery and Investment Co Pty Ltd* (1945) 3 AITR 236 (FC).

But it is not necessary to establish *certainty* of success on a pending Case Stated in order to stay recovery proceedings. The Court is unlikely to decline a stay so long as it can be shown that the dispute is bona fide, and is based on substantial grounds: cf *Fortuna Holdings Pty Ltd v Deputy FCT* (1976) 6 ATR 620 (McGarvie J: Supreme Court of Victoria), and *Re Norper Investments Pty Ltd* (1977) 7 ATR 488 (Needham J: Supreme Court of NSW).

The overriding consideration is that of justice: which requires, on the one hand, that the Commissioner's recovery chances are not nullified by the stay; and, on the other hand, that the taxpayer is not ruined by having to pay a bill when there is a substantial chance that, after he *has* been ruined, or his business has been destroyed, it will be discovered that he was not lawfully assessed with the tax in the first place.The final relevant provision in Part III of the Income Tax Act 1976 is s 36, by which various decisions, such as [under clause (e)] the

(e) Cf *FCT v S Hoffnung & Co Ltd* (1928) 42 CLR 39, 54 per Isaacs J (as he was then) (FC).

(f) Cf *Chadwick v CSD* (1977) 7 ATR 394 (CA: NSW).

decision of the Commissioner whether to approve a fund as a "sick, accident, or death benefit fund" [for the purposes of s 61(41): excempting from tax certain income of such a fund], are declared not to be the subject of any right of objection under Part III.

Apart altogether from s 36, there are a number of instances where no dispute procedure is provided by the Act. Just one example arises where a company sends some of its staff, with their families, overseas to work for it for what are expected to be lengthy periods well in excess of one year. In a case on these facts that is coming before the Supreme Court soon, the Commissioner has required the company to treat these staff as resident in New Zealand on the expressed grounds that they are being paid from here and not taxed overseas; and has required it to deduct PAYE from their pay. The company contends those grounds to be irrelevant to the issue of residence, and is concerned that the deduction of tax is going to result in the staff walking off the site and joining up with overseas employers offering twice the money.

In these, and similar, cases the only approach is by way of a motion for review under the Judicature Amendment Act 1972. This procedure allows the Supreme Court to set aside decisions and to grant declarations, injunctions, and mandamus, and make orders in the nature of these "extraordinary" remedies. It also empowers the Court to make interim orders: such as the one the Court has made already in the case I have just mentioned, that, pending the final outcome, the Commissioner ought to refrain from treating the overseas staff as New Zealand residents, and ought therefore to refrain from requiring the Company to deduct PAYE from their salaries or to account to the Commissioner for it.

So much for a quick trip around Part III: an area replete with traps and overdue for reform.

In any other sphere of the civil law, a party who realises that his present pleadings will not enable him to argue his case properly can amend them: on terms as to the granting of an adjournment, or costs, if necessary to protect the other side. In the tax field any other rule places the need for certainty as to the quantum of the Revenue take too far ahead of the demands of justice for the citizen.

And the technicalities act to the detriment of the Revenue, and therefore taxpayers as a whole, as well. For example, the Commissioner will be prevented from arguing in support of his assessment that, although the Case Stated shows it was made under one section, it could be justified under another.

The spin-off from this is, first, to create precedents which it may be dangerous to rely on, and therefore to undermine the vital certainty of the law; and secondly, to put the taxpayer in double jeopardy, so to speak, in that the Commissioner could turn around and, having lost under his original section, issue new assessments under the alternative provision, and put the taxpayer through the trauma, expense, delay, and uncertainty of a new trial. Good news for the Bar, but bad for everyone else; and wrong in principle.

The time may have come for tax objections to be fought on grounds that are unrestricted by the bases of either the assessment or the objection. Once the dispute has been joined, the Commissioner should have to file, not a Case Stated, but a statement of claim setting out all the bases on which he claims an assessment in respect of the particular fund could be justified. And the objector then should have to file a statement of defence in the ordinary way of any civil action.

Because the ways of conducting business are technical, it is appropriate that the substantive laws *imposing tax* also are technical. But it is wrong that the procedural rules *governing tax disputes* should be, as they are at present, sources of injustice: for the individual, on some occasions; and for the Revenue, which is really to say the community, on others.

Correction — The Judicial Variation of the Private Trust Part II

By M F L Flannery.

The words in the last paragraph on page 306 were inadvertently attributed to Somers J. They were part of the text of the article. The quotation from *Lilley v Public Trustee* was:

"The history of the legislation now under consideration has however followed a very special course. It is for that reason that we are of opinion — in the words of Lord Simon of Glaisdale in *Farrell v Alexander* [1977] AC 59, 91 — that the intention of Parliament to endorse the previous New Zealand decisions has been so clearly demonstrated that the Court is pre-empted from an independent examination of the validity of those earlier interpretations. Even if the decisions on the Family Protection Act are put to one side and regard is had solely to the course of the legislation affecting testamentary promises the only tenable conclusion is that Parliament intended the words 'final distribution', as they appear in the present enactment, to have a narrower meaning than that contended by the appellant. The Legislature, in its positive enactments and repeals, has itself defind the meaning to be attributed to those words."

LAW REFORM

LAW REFORM: A MINISTERIAL VIEW

The HON J K McLAY *Attorney-General and Minister of Justice in a recent address to Victoria University of Wellington Law Faculty Club outlined his views on law reform.*

I regard law reform - the process of modernising and updating our laws -as being an essential ingredient of good moderate and stable government. In many respects, we have always had law reform. Ever since the first legal rules were laid down they have been constantly developed and adjusted to new facts, new ways of life and new ways of looking at life. However, in the past 150 years, that process of development, adjustment, and change, has been accelerated and the term "Law Reform" has come to describe a situation where the inherent tendency of the courts to develop the law on a gradual basis is hastened by increased legislative activity.

Parliament is often accused of passing too many laws and sometimes (although not last year when we passed fewer laws than in any year since 1973, and certainly not this year when we have one of the lightest legislative programmes in recent memory) that has sometimes been a valid criticism. However, many of those who would criticise forget that much of the law that we pass involves the repeal of old laws and the reform, improvement, and modernisation of the legal rules that govern our society. It is for that reason that despite the light legislative programme this year I hope to introduce a number of measures that will ensure that our laws are consistent with modern views and attitudes.

However I firmly believe that we must recognise that the law cannot remedy all social ills. In fact the law is very often an unsuitable instrument for improving our way of life. In a free and diverse society the law should, in my opionion, emphasise individual responsibility. We must get away from the philosophy that the best way of dealing with an evil is necessarily to pass a law about it. Such an approach quite often debases respect for the law generally. Thus, I can tell you not only as Minister of Justice but also as Chairman of the Cabinet Legislation Committee, that this year's legislation proposals have all been looked at with a healthy scepticism. In short, although the reform the law necessarily involves legislative change; it equally involves a recognition that good law reform may well mean less, rather than more, legislation.

Recently I convened, for the first time in three years, a meeting of the Law Reform Council (the body responsible for co-ordinating law reform in New Zealand). It is my intention that this body should meet more regularly in the future. One of the matters that I put before the Council for discussion was the question of the structure of our law reform bodies. It is perhaps not widely appreciated that New Zealand was one of the first countries in the world to have a formal law reform system. The first Law Revision Committee was established in New Zealand in 1937 with six members. Over the next 25 years the Committee grew in size until it became an unwieldy body of more than 16 members. It was replaced in 1965 by the Law Revision Commission, a body of 12 members under the chairmanship of the Minister of Justice and with a number of standing committees (by 1975 there were five in all).

Like its predecessor the Commission proved to be a large, unwieldy and ineffective body, and it was replaced in 1975 with a two-tiered system comprising the five Law Reform Committees acting under a Law Reform Council, again chaired by the Minister of Justice who has the overall responsibility for law reform. Other members are the Solicitor-General, the Chief Parliamentary Counsel (or law draftsman) the Secretary for Justice and the chairmen of the five separate Law Reform Committees. As I have indicated, in the past this body has met infrequently and has adopted essentially an advisory role. It is my hope that, for the future, the Council will meet more regularly and adopt a more positive role. Specifically I have asked the Council to undertake the overall responsibility for co-ordinating a programme for the review of all laws, whether statutes or regulations - passed more than 50 years ago. This will in iteself be a major exercise but, in my opinion, is an essential part of any process to modernise and update our laws.

In addition, and quite separate from that review of old laws, we are starting this year with a new method of printing statutes. By

1981 the number of volumes of statutes will be reduced by at least 13; by 1983 the reduction will be 39 volumes (approximately half the total number that you at present find in a complete library). When completed the new method of reprinting statutes will mean that all statutes will have been reprinted in the previous 10 years - and this cycle will be maintained on a continuous basis.

If nothing else these two exercises might do something to answer the arguments of those (including some academics who should know better) who measure Parliament's statutory output by placing a ruler alongside the volumes of statutes!

Recently it has become fashionable to criticise New Zealand's law reform structure and to use that criticism as a springboard for advocating changes - particularly the establishment of a "fashionable" full-time Law Reform Commission. Much of this criticism has, however, ignored the fact that the Law Reform Committees themselves - the working element of the law reform system in New Zealand - have over the years been very successful in an admittedly unspectacular but systematic way, in producing proposals for changes in the law

Many of the arguments for a full-time Law Reform Commission in New Zealand are based on comparisons with overseas experience. In fact the establishment of a full-time Commission has become almost a status symbol for even the poorest countries.I must confess that I get the impression that many of the advocates of a full-time body are much more impressed with the form than with the substance of such bodies overseas - particularly those that have an element of glamour about them such as that in Australia. There is no doubt that some overseas full-time Law Reform Commissions have had impressive results - but in many cases that is simply because of the previous state of that particular country's law. A great deal was done mainly because there was a great deal to be done. The law in those countries was in a far less satisfactory state than that which it has now reached in New Zealand after many years of systematic (if unspectacular) law reform.

Most of the arguments for a full-time Law Reform Commission have been based not so much on the lack of output - or the quality of output - of the Law Reform Committee but rather on the rate of "legislative success" enjoyed by the Committee's reports. However what this highlights is the difficulty that any Minister of Justice must encounter in getting "Parliamentary time" for the implementation of law reform proposals. At the same time as the Minister is pressing for a place in the legislative programme for individual proposals advanced by Law Reform Committees, the public and Parliament itself are raising a cry against too much legislation being passed.

For that reason I am very pleased that within the context of this year's very light legislative programme I will be introducing Bills to give effect to eight Law Reform Committee reports as well as a number of recommendations made by the Macarthur Committee on company law and by special working parties on unit titles and negotiable instruments. On top of that I propose a number of additional law reform measures that do not result from the reports of any particular committee and also hope to be able to introduce legislation to give effect to some of the recommendations of the Royal Commission on the Courts.

Despite what I would regard as being tangible progress there are those that still believe that we do need some full time co-ordination of law reform activities in New Zealand. For instance Professor D.L. Mathieson of Victoria University has argued that the present part-time Commission should be headed by one or two full-time Commissioners (probably as chairman and deputy chairman). He suggested that the Commissioner should be of the status of a Supreme Court Judge with "a breadth of legal experience; a sense of vocation for law reform; the ability to delegate and to act as the leader of numerous law reform teams; tact, persuasiveness, an aptitude for public relations and the ability to establish a close working relationship with the Minister. I should probably add to that breathtaking list of attributes a facility to "float like a butterfly and sting like a bee".

My great fear is that such a Commissioner would inevitably become a high powered "administrator and paper pusher" and I sincerely doubt that a person with such qualities (and enjoying the status of a Supreme Court Judge) would be prepared to undertake such a potentially mundane and soul-destroying task - particularly when the alternatives of successful practice at the Bar or even a judicial post must be available.

It is my belief that most of the proposals for a more complex (and potentially full-time) law reform structure ignore several very practical problems.

First, the resources needed for such an extensive undertaking are apparently beyond the resources of many states - such as California -

which are far larger and wealthier than New Zealand.

Secondly, most of these proposals ignore the fact that it is the capacity of the legislature to implement law reform recommendations - rather than the output of committees - which largely dictates the progress made with law reform.

Thirdly, giving the responsibility for law reform to an autonomous body carries with it the risk that we might lose the very necessary close contact that at present exists between the law reformers on the one hand and the political and administrative system on the other. A partnership that at present works very well and will be enhanced, I believe, by more regular meetings of the Law Reform Council. Fourthly, there would be very great difficulty in attracting suitable people to such a full-time task. Fifthly, there is a danger that full-time Commissioners would become too preoccupied with their activities to the exclusion of reality (such as has sometimes been suggested of the English Law Reform Commission).

I think, however, that the final answer was given some years ago by the executive secretary of the Californian Law Reform Commission who said that, although those part-time members of his Commission who were in private practice found the demands of law reform work extremely heavy, even his state (one of the wealthiest in the USA) could not afford (nor could it obtain the services of) persons of the same quality on a full-time basis. Practising lawyers with broad experience and acknowledged judgment are an essential part of the law reform agency. "The Commission is not engaged in an ivory tower activity" he said.

My mind is certainly not closed on the question of a full-time Commission or Commissioners. I certainly believe that our system of law reform must be allowed to develop and adapt to changing circumstances and for that reason I have arranged for the matter to be one of regular discussion at future Law Reform Council meetings. However like my predecessors, both Labour and National, I remain at this stage unconvinced of the need for a fundamental change in our law reform structure.

There are, however, many respects in which we can achieve immediate change. For instance I hold firmly to the view that law reform is not the prerogative of lawyers alone and for that reson, following discussion with the Law Reform Council, I am going to make arrangements to appoint suitable lay persons to assist Law Reform Committees in their work.

One of the real gaps in our present law reform structure is the lack of adequate research facilities; this year my department has been able to make a modest but nonetheless significant increase in the number of trained and qualified staff allocated to this work.

The need for wider participation in the process of law reform has already given rise to the use of working papers (especially where the Committee is examining a controversial question or an area of the law affecting a wide public). After receiving comments on this working paper a final report is prepared. The Committees often feel that their working papers and reports are not getting enough publicity. Sometimes this is because the reports tend to be very technical or because the news media tend to give superficial treatment to less controversial issues. As a result of this the public are often unaware of the process of law reform and the progress that is being made. Again I hope to devise suitable measures to promote public discussion on the Committees' reports.

And there are many other areas in which I believe we can move to improve the process of law reform without, at this stage, undertaking a fundamental change in the structure of the Committees and the Council. For instance it is already the practice of most Committees to annex a draft Bill to their report. Experience both in New Zealand and overseas has shown that a law reform report which includes a draft Bill is much more likely to be implemented - and in a much shorter period of time. Parliamentary Counsel (law draftsmen) are now attached to all of the Law Reform Committees and I hope that, for the future, all Committee reports that require legislative change should have a draft Bill attached.

I mentioned that some of the law reform measures that I intend to introduce to Parliament this year will not result from the work of a Law Reform Committee or similar body. This highlights the role that is played by the Law Reform Division of the Department of Justice which comprises qualified lawyers whose responsibility it is to assist with proposals for law reform whether from the Committees or from other sources.

All of these provide a valuable input to the law reform system. However what must never be lost sight of is the fact that, ultimately, it is not Law Reform Committees or Law Reform Councils or the Law Reform Division of the Department of Justice that achieves the actual change. It is legislators - and only legislators - that have access to the legislative machinery that actually makes that change.

It is becoming increasingly difficult to get time in Parliament for the introduction of law reform Bills. Not only is there a natural and justifiable feeling against over-legislation it is also a fact that more work tends to go into each Bill than was previously the case. Most law reform measures are referred to Select Committees and the consideration and hearing of numerous submissions can often mean that some months elapse before a Bill is reported back to the House. All-in-all the process of law reform is a delicate balancing act - the need to achieve the modernisation, codification, and clarification of the law on the one hand; without resulting in over-legislation on the other.

Those two conflicting propositions heighten the dilemma of the law reformer; a dilemma that is perhaps best summed up in two passages written over 150 years ago.

In the first Henry Brougham, speaking in the House of Commons, said: *"It was the boast of Augustus . . . that he found Rome of brick, and left it of marble; a praise not unworthy a great prince . . . but how much nobler will be the sovereign's boast, when he shall have it to say, that he found law dear, and left it cheap; found it a sealed book - left it a living letter; found it the patrimony of the rich - left it the inheritance of the poor; found it the two-edged sword of craft and oppression - left the staff of honesty and the shield of innocence."*

And, lest those words ring a little too eloquently in the law reformer's ears let him also be reminded of what Lord Eldon (Lord Chancellor from 1801 to 1827) said of the potential law reformer, "that he should come publicly with a halter around his neck and adventure a hanging if he failed in his undertaking".

CRIMINAL

BLASPHEMY AND MENS REA

By Dr GF Orchard, *Senior Lecturer in Law, University of Canterbury.*

The prosecution in Lemon [1979] 1 All ER 898 HL, [1978] 3 All ER 175 CA arose from the publication of a poem and illustration in an issue of *Gay News* , a newspaper for homosexuals which was also sold in the public. The object of the poem was probably to promote amongst homosexuals a conviction that Christianity does not reject them, but the author chose means which most would realise would offend many people. The poem (entitled "The Love that Dares to Speak its Name") described acts of sodomy and fellatio by a Roman centurion with the body of Christ immediately after His death and ascribed to Him during his lifetime homosexual practices with the Apostles and other men. The drawing showed the centurion embracing the naked body of Christ. The Crown reacted by producing its own grizzly specimen from the prosecution closet: the editor and publishers were charged with blasphemous libel, this apparently being the first such prosecution in England (or, coincidentally, New Zealand) since 1922. The particulars of the offence alleged publication of "a blasphemous libel concerning the Christain religion namely an obscene poem and illustration vilifying Christ in His life and in His crucifixion", and the jury convicted the accused by a majority verdict of ten to two. These convictions were affirmed by the Court of Appeal, and by the House of Lords by three to two majority.

Plainly this crime is very far from being the most important in the modern calendar, but there are aspects of the decision in *Lemon* which have some general importance in the criminal law. By the time the case got to the Lords the area of dispute was confined to the extent to which mens rea is essential for the offence, it being thought that the finding of the jury that there had in fact been a blasphemous libel was not seriously open to challenge. Nevertheless, a determination of the actus reus necessarily preceded a conclusion as to what mental element might be required.

The Actus Reus

The Judges appear to be unanimous on this. At one time it was thought that any denial of the truth of Christianty was criminal, the theory being that "Christianity is parcel of the laws of England; and therefore to reproach the Christain religion is to speak in subversion of the law" (*Taylor* (1676) I Vent. 293, per Holt CJ). This idea was much qualified in nineteenth century trials (in particular, in *Hetherington* (1841) 4 St Tr NS 563, *Bradlaugh* (1883) 15 Cox 217, and *Ramsay and Foote* (1883) 15 Cox 231) and was finally repudiated by the House of Lords in *Bowman v Secular Society* [1917] AC 406. The result arrived at by the common law is that the mere denial of the existence of God, the truth of Christianity or the Scriptures, or

moderate or temperate criticism of christianity, is no offence. But blasphemous libel is committed if words are published, in writing or orally, which amount to an offensive treatment of Christianity, God, Christ, or any other subject sacred in the religion. The test is whether the words are calculated to "outrage and insult" or "shock and outrage", the feelings of Christians, or "ordinary Christians", although before this test can be met there must be a lack of "moderation" in what is published: an element of offence, ridicule, contempt, scurrility or vilification. On the other hand, the words need not be obscene in the ordinary sense of that word, they need not constitute an attack on Christian beliefs or doctrines, and they need not be liable to provoke a breach of the peace. It was assumed that the offence is confined to the offensive treatment of Christianity, although Lord Scarman thought there is a case for legislation extending it to protect the religious feelings of non-Christians.

In New Zealand, s 123(1) of the Crimes Act 1961 provides that every one commits a crime who "publishes any blasphemous libel".Probably this does not extend to spoken blasphemy (which may, however, be "profane" language contrary to s 48 of the Police Offences Act 1927: *Armstrong v Moon* (1894) 13 NZLR 517), but in other respects it appears the common law is applicable. "Blasphemous libel" is not defined (the Criminal Code Commissioners deemed definition to be "inexpedient": Report, 21-22), except that s 123(3) provides that it is not committed by anyone who "in good faith and in decent language" expresses or argues for "any opinion whatever on any religious subject". In *Glover* [1922] GLR 185 Hosking J explained that here "decency" is used "in the sense of propriety and what is becoming", and that the publication must "pass the bounds of propriety and reach the region of contemptuousness and insult": putting aside the views of those with "intensely religious feelings", the language must be "calculated to shock and insult the feelings of the community towards matters that are religious and sacred". This seems to be indistinguishable from the test now applied at common law.

In 1922 Kenny expressed the view that the actus reus of the crime "can now be defined with precision" ("The Evolution of the Law of Blasphemy" (1922) 1 Camb LJ 127, 140) but this is impossible to accept in view of the inherently uncertain concepts used in delimit its boundaries ("vilification", "scurrility", "shock", "outrage" and so forth). Moreover, in New Zealand, where there is no established church, it might be argued that blasphemy could include offence to the religious feelings of non-Christians (Adams, *Criminal Law and Practice in NZ* (2nd ed), para 923), but it is submitted that in the absence of legislation this would be an improper extension of the crime, whatever justification it might have in logic or public policy.

Mens Rea

Section 123 says nothing about the mental element, so it may be presumed the common law applies. In *Lemon* it was accepted that the offender must intentionally, or knowingly, publish material which in the opinion of the jury was blasphemous in that the jury found it was likely to outrage Christians. What was disputed was whether the prosecution had to go further and prove that D intended that people be shocked or outraged, or at least knew that this was likely. Lords Diplock and Edmund-Davies concluded that such an intention or awareness is essential, but the majority (Viscount Dilhorne, Lord Russell and Lord Scarman) agreed with the Court of Appeal in holding that there is no such requirement. No such intention was required in *Glover* [1922] GLR 185.

In essence, the majority reasoned that originally such mens rea was clearly not required, the nineteenth century cases were at best ambiguous on the point, and as a matter of policy the Courts should not now require it for it might threaten the effectiveness of the law which has as its object the prevention of outrage to religious feelings and the avoidance of civil disturbance which might result therefrom. The minority thought the nineteenth century cases supported the need for such as intention, and that to reject it was inconsistent with the increased recognition of the need for subjective mens rea for truly criminal offences. Any lack of emphasis on this requirement before 1898 could be explained by reference to the accused's inability to give evidence of his actual state of mind, which meant that the intention to shock would be necessarily inferred, or presumed, if that was the tendency of the material.

There is little doubt that it is only in exceptional cases that the minority view would significantly increase the chances of acquittal, but the division of opinion in Lemon may have implications beyond the actual decision. The views of the Court of Appeal and the majority in the Lords have been criticised as doing violence to both authority and principle (Buxton [1978] Crim LR 673; Smith [1979] Crim LR

311). The authorities were probably inconclusive, although in the nineteenth century trials it was plainly stated that a "wilful intent to insult" was required (eg *Bradlaugh* (1883) 15 Cox 217; *Ramsay and Foote* (1883) 15 Cox 231). The majority view, that this merely referred to "the intention revealed by the publication" - its objective tendency, seems a strained interpretation which many will regard as unjustifiable when the object is to minimise the fault required for this crime.

The question of principle is more important. Before considering the main issue, two subsidiary matters may be mentioned. First, Lord Scarman thought it would be intolerable to allow D to escape punishment by pleading "the excellence of his motives": [1979] 1 All ER 898 HL, 927. This misrepresents the issue. In *Lemon* D's motive was apparently to encourage homosexuals to feel they are not excluded from the embrace of Christianity, but the minority do not suggest this could provide a defence. On their view (and on any orthodox theory of mens rea) D would have the required mental element if he realised it was likely that Christians would be outraged, no matter how worthy his motive or purpose in knowingly risking such outrage.

Second, in the minority view D had to intend to outrage Christians or be aware that such outrage was likely to result from his conduct. Lord Edmund-Davies described the latter state of awardness as "recklessness" (920), but Lord Diplock made a point of asserting that it is "settled law that both states of mind constitute 'intention' in the sense in which that expression is used in the definition of a crime whether at common law *or in a statute*" (905, italics added). Any doubts on this, he said, "were finally laid to rest" by *Hyam* [1975] AC 55. This meaning of "intention" is far from being "settled law", and *Hyam* (which was about the mens rea of murder at common law) does no such thing (see Buzzard [1978] Crim LR 5, and the following reply by Professor Smith, 14). The point is of little importance at common law or when statute is silent as to mens rea, for then either state of mind will usually suffice for mens rea whether both be called "intention" or one "intention" and the other "recklessness". But it is important when statute defines an offence as doing something "with intent" and then, it is submitted, mere foresight of likelihood will not suffice unless there is very good reason for a significant departure from the ordinary meaning of the word "intention". Thus, in *Solicitor-General v Radio Avon Ltd* [1978] 1 NZLR 225 CA, 236-237 the Court of Appeal had no doubt that a person who acted with "irresponsible indifference" to a result he "must have known" could ensue, did not have "an actual intention" to bring it about. It may be added that Lord Diplock also described the mens rea he would require as a "specific intention" (903). This seems to be unhelpful. "Specific intention" is a concept which is used to artificially restrict the defence of lack of mens rea arising from voluntary intoxication. There was confusion as to its meaning in *DPP v Majewski* [1977] AC 443 HL but the end result was probably that a "specific intention" is required only when the prosecution must prove something more than mere awareness that the actus reus is likely to result from one's conduct. The mens rea favoured by Lord Diplock in *Lemon* does not require anything more than such awareness.

The main issue is whether the decision that it is unnecessary for D to foresee outrage in others is contrary to principle. The argument against the decision is clearly put by Professor Smith. The actus reus of an offence is the legal definition of the evil the law seeks to prevent and the general principle is that in serious crime a person is responsible only if he knew that the evil in question would or might follow from his conduct. In blasphemy an essential element of the actus reus is that the material published have the tendency to outrage others. If D is unaware of this but is nevertheless held guilty there is a departure from general principle and strict liability is imposed in that mens rea is not required as to all the elements of the actus reus: [1979] Crim LR 311; and see Smith and Hogan, *Criminal Law* (4th ed), 38, 79.

The force of this must be conceded - it is the principle applied by Lords Diplock and Edmund-Davies, even though it did not "make sense" to Lord Russell. Nevertheless it is respectfully suggested that it is based on a rather over-tidy view of mens rea or, perhaps, the actus reus of this crime. As a general rule the mens rea principle requires that D advert to the facts required for the actus reus (and, sometimes, that he understands a principle of the civil law essential to the actus reus). There are, however, different kinds of "fact" (see, eg Glanville Williams [1976] Crim LR 472, 532). In blasphemy, the actus reus requires material that is "likely to outrage ordinary Christians" and this is a question of "fact" in that the jury must decide the issue and, no doubt, should acquit if left in reasonable doubt on it. But it is doubtful whether it is a question of fact in any other sense.

When the issue before a Court is whether material is "obscene", that is a question of

"fact" for the jury who must determine whether there is any reasonable doubt about it, but evidence is not admissible on the question even when the test is whether the material "tends to deprave and corrupt" normal people: eg *DPP v Jordan* [1976] AC 699 HL, 717, 726; cf *Police v News Media Ownership Ltd* [1975] 1 NZLR 610 CA, 616-617 per McCarthy P. Similarly, there is little doubt that evidence is not allowed on the question whether alleged blasphemy is liable to outrage Christians (cf *Lemon* [1979] 1 All ER 898, 921 per Lord Russell; the appellants did not pursue a complaint that "expert theological evidence" was excluded at trial, but it does not appear what this would have been aimed at: [1978] 3 All ER 175 CA, 178). Moreover, although the test is so stated as to require a prediction of human reaction, and thus appears to require a true inference from primary facts, yet the class of person is vague ("Christians" or "ordinary Christians") and the nature of their reaction is described in emotive and imprecise terms - various combinations of "outrage", "shock", "insult", "resentment" and "offence" are used. In truth, the test requires the jury to form, without the aid of evidence, an opinion in the nature of a value judgment, and when the actus reus of an offence includes such an element it is submitted that there is no general principle that guilt is dependant on D's prediction coinciding with the opinion subsequently formed by the jury or Court. It is submitted that the function of the "calculated to outrage Christians" test is to provide the jury with a standard (albeit an extremely vague one) to be applied in determining whether published material achieves a sufficiently high degree of offensiveness. It is really only a slightly more precise way of saying that the material must be "highly offensive". Such a value judgment does not involve finding any "fact" to which D must have adverted if a conviction is to be consistent with general principles relating to mens rea, and in such a case principle does not require more than advertance to the content of the material which is found to be sufficiently offensive. Also, as a matter of terminology it seems wrong to stigmatise this as an example of "strict liability", for if a jury finds beyond reasonable doubt that people would be outraged by material D knowingly published any contrary prediction on D's part can presumably be regarded as unreasonable and negligent.

It is therefore suggested that the decision in *Lemon* is not wrong in principle, although a different result could have been reached on the authorities. It may be added that there was some authority at common law for holding a publisher vicariously liable if an employee knowingly published a blasphemous libel. In England this liability was removed by s 7 of Lord Campbell's Libel Act 1843. It is thought that the Crimes Act will not be interpreted as preserving vicarious liability in this crime.

Comparable Cases

It would be going too far to suggest that guilt will never depend on D realising that his conduct will or might offend some community value but such cases will be exceptional. Thus, it is possible to identify other truly criminal offences where the mens rea is limited in the same way as in *Lemon*.

For example, contempt of Court by scandalising the Court. In *Solicitor-General v Radio Avon Ltd* [1978] 1 NZLR 225 CA, 232 it was held that D was guilty of such a contempt if he knowingly published words which were objectively calculated to bring a Judge into contempt or lower his authority, and it was no defence that D neither intended nor foresaw this result.

Offences involving indecent publications have already been mentioned, and here the same principle will apply. Section 22 of the Indecent Publications Act 1963 creates a number of offences committed by one who deals with material "knowing or having reasonable cause to believe" that the material "is indecent". Whether material is indecent is determined by the Court or, in the case of a book or sound recording, the Tribunal, and this determination involves a somewhat sophisticated assessment of the material. The matters specified in s 11 of the Act must be considered in determining whether the material "offends current community standards", and so is indecent in the ordinary sense of the word, or (in the case of sex, horror, crime, cruelty or violence) whether the subject matter is depicted "in a manner that is injurious to the public good". Whether material is really "indecent" thus depends on whether it is found to be indecent by the Court or Tribunal: *Police v News Media Ownership Ltd* [1975] 1 NZLR 610 CA, 626, per Richmond J. D cannot "know" of this finding before it is made, and nor is it sensible to talk in terms of a "reasonable belief" as to non-existent determination. In enacting s 22 Parliament can hardly have contemplated knowledge or cause to believe based on D's personal assessment of the nature of the material in the light of the amorphous provisions of the Act. The conclusion is that s 22 merely requires that D know or have reasonable cause to believe what the content of the material is, this being content which

the Court or Tribunal concludes is indecent. Similarly, in *Ewart* (1905) 25 NZLR 709 CA, 738 Edwards J was careful to describe the defence as honest ignorance of "the contents" of the newspaper, and in *Sarcoff v Holford, ex parte Holford* [1973] Qd R 25 CCA it was held that mens rea is not negatived when D knows of the contents of a book but believes, contrary to the view of the Magistrate, that it is not "obscene" or contrary to community standards. One may doubt whether Hanger CJ was right in describing this as "error of law", but even if it is accepted as a belief as to a "fact" it is nevertheless not such a belief as negative mens rea, for otherwise D's own standards of decency would govern his guilt whereas it is clear that what matters is the community standard as perceived by the judge, jury or Tribunal. Likewise, the ignorance contemplated by s 124(4) of the Crimes Act 1961 will be ignorance of the content of the model, object, show or performance, not the "community standard or decency" (Adams, para 934).

The position appears to be different in the case of sedition. In *Lemon* Lord Edmund-Davies found support in modern common law authority suggesting that the crime of seditious libel required an actual intention to cause public disorder and the like (918), although Viscount Dilhorne did not accept that this was beyond doubt (911). In New Zealand, in contrast to blasphemy, sedition is effectively defined in some detail by the specification of various forms of "seditious intention" in s 81 of the Crimes Act. Pursuant to s 83 it is a crime to publish "any statement that expresses any seditious intention" but although a statement with a seditious tendency may be sufficient evidence of such an intention (*Wallace-Johnson v R* [1940] AC 231 PC), it seems that s 83 is to be interpreted as requiring an actual seditious intention on the part of D, such as an intention to procure disorder or bring the administration of justice into contempt: *Solicitor-General v Radio Avon Ltd* [1978] 1 NZLR 225 CA, 236-237. Thus, the mental element in sedition is significantly greater than in blasphemy, notwithstanding the common origins of these extremely vague offences; but most forms of "seditious intention" seem to be rather more precise than the concept of blasphemy and in New Zealand the difference results from the quite different ways in which the statute defines the offences. In the case of criminal defamation it is hardly likely that a belief that words do not expose another to "hatred, contempt, or ridicule" would be a lawful excuse within s 211 or s 216, in which case the mental element of this last form of "libel" will be closer to blasphemy and obscenity then sedition.

Conclusion

It is well-known that Parliament is much readier to create new offences than to get rid of old ones, but blasphemous libel seems to be clear candidate for abolition. The content of the crime is excessively uncertain and its restriction to the abuse of Christian feelings is indefensible. Professor Smith, however, points out that it would be wrong to extend it to protect all religious feelings for it may be a very good thing that some religious notions should be ridiculed and vilified; for example, the idea that adulterers should be stoned to death or the hands of thieves amputated: [1979] Crim LR 311, 313-314. Of course, the fact that any prosecution requires leave of the Attorney-General (or the Solicitor-General) is a presumably sufficient safeguard against silly prosecutions, so that satirists may continue with their ridicule in reasonable safety. But the fact that a bad law will rarely be enforced, if ever, is no justification for its continued existence, particularly where, as here, it seems quite unnecessary. In so far as it is thought necessary for the criminal law to punish injury to feelings, this is more than adequately provided for by other offences relating to indecent publications and acts, offensive behaviour and language. The original justification for the offence was supposedly the preservation of public order, but it is now clear that no threat of disorder is required in fact. Statutory controls and public opinion are quite sufficient to ensure that the mass media and mainstream newspapers will avoid criminal blasphemy, which really only leaves books, student newspapers and minority publications as likely candidates for prosecution. The publicity and antagonism which would almost inevitably ensure from any such prosecution would probably mean it would do more harm than good, even from the viewpoint of outraged Christians.

Inevitable inferences *Carson:* Are ye a teetotaller?

Witness: No, I'm not.

Carson: Are ye a modtherate drinker?

No answer.

Carson: Should I be roite if I called ye a heavy drinker?

Witness: That's my business.

Carson: Have ye any *other* business?

"Carson" (H. Montgomery Hyde, quoted in *Obiter Dicta*).

ADMINISTRATIVE LAW

EXECUTIVE AND JUDICIARY IN CONFLICT: PARK v MINISTER OF EDUCATION.*

By DR. R. OPENSHAW *of the Education Department at Massey University, Palmerston North.*

The relationship between executive and judicial authority has always been an important one in a parliamentary democracy such as New Zealand, involving, as it does, the rights and status not only of individuals, but also of interest groups and institutions. During times of social or political tension, this relationship can become crucial, with the decisions made by Courts having far reaching consequences. While this has happened but rarely in New Zealand, there have been times when a legal judgment has become something of a "cause celebre" for later generations. This was particularly true of the *Park* case, in 1922 which, whilst ostensibly concerned solely with the Minister of Education's right to cancel a single teacher's certificate, in fact raised issues basic to the exercise of authority and freedom in this country. Before examining the actual decision, it is therefore necessary to consider the social and political background behind the subsequent legal battle.

By the early 1920s, New Zealand's bitter Great War experience had helped to bring about some decisive changes in public attitudes which were to have an important influence on the *Park* case. Most New Zealanders now regarded the role of the primary school in citizenship training as being vital to the nation's future well-being, with the teachers consequently having ". . . reposed in them a confidence and trust peculiarly important and, indeed, sacred . . ." *(a)*. Long years of tension and sacrifice had nourished a climate of opinion which condoned the continued persecution of non-conformists and dissenters *(b)*. In addition, the birth of Soviet Russia and the worldwide resurgence of socialist agitation provided new enemies for a public already conditioned to the mass expressions of hatred and anger *(c)*.

At first, schools were affected chiefly through a heightened interest in patriotic programmes for children, but increasingly attention focused on loyalty as the defining characteristic of patriotism *(d)*. Teachers were to prove particularly vulnerable as the Government, prompted by growing public concern, acted decisively to ensure loyalty in the schools through regulation and legislation. In May 1921, weekly flag saluting was made compulsory in all New Zealand schools *(e)*. Then, in June a young student teacher named Hedwig Weitzel was convicted in the Wellington Magistrates Court for distributing subversive literature *(f)*. This incident received considerable publicity, and was one of the major factors behind the Government's introduction of loyalty oaths for teachers that same October *(g)*. It was also to play its part in kindling the *Park* controversy.

One further factor should be considered, namely the attitude of the Minister of Education, C J Parr. Parr's enthusiasm for school patriotism, and his willingness to intervene personally in order to seek out possible disloyal individuals in the teaching service was clearly illustrated on a number of occasions *(h)*. The

* [1922] NZLR 1208.

(a) C J Parr, *New Zealand Parliamentary Debates*, Vol. 191, 1921, p 34.

(b) For the effect of this on E C Wolter, a naturalised German citizen, see C H Baber. "The Twenties: New Zealand's Xenophobic Years" [1976] *New Zealand Law Journal* pp 95-96.

(c) D Mitchell, *1919: Red Mirage*, London: Jonathan Cape, 1970 and R K Murray, *Red Scare: A Study in National Hysteria*, New York: McGraw Hill, 1964, examine how the fear of Bolshevik inspired subversion produced both hostility and repression overseas during this same period.

(d) See especially, R. Openshaw "Patriotism and the New Zealand Primary School: The Decisive Years of the Twenties",D. Phil. dissertation, University of Waikato, 1978.

(e) See *New Zealand Herald* (Auckland) 27 May 1921.

(f) NZH, 20th August 2 September, 10 September.

(g) This legislation obliged all New Zealand teachers from March 1922, to subscribe to an oath of allegiance to the Queen as a condition of employment in schools. It met with considerable opposition from teachers, but the requirements still exists today in only slightly modified form.

(h) Particularly the *Weitzel* case (see Openshaw, pp. 114-119), Parr, of course, was not the only senior Government member to intervene in matters of loyalty and patriotism, Massey himself, for instance, used his influence on behalf of the Navy League, and its right of entry into schools (see Openshaw, pp 75-76).

Minister's stance together with prevailing attitudes towards patriotism and loyalty in the community greatly increased the likelihood of conflict where a teacher was suspected of lacking these qualities, and it is in this context that the *Park* case must be viewed.

On 15 September 1921, Jean Gladys Park, a young teacher at the Carterton District High School near Masterton, angered by Parr's handling of the Weitzle incident, wrote an indignant letter to *National Education*. Park was especially critical of the Minister's decision to deprive Weitzel of her teacher's certificate and to subsequently force two inquiries into the behaviour of students:

> "It is said that political control of the teaching profession from the university down made the people of Germany as 'putty' in the hands of her 'War Lords'. It is just this principle that I see in the reported activities of the Minister."

Park's letter appeared in the 1 October issue of *National Education*, providing the editorial comment that in this case, the Minister's actions had been " . . . in the general interest of the country" *(i)*. Unfortunately for Park, her letter attracted considerably more attention than the perfunctory comment of the editor of *National Education*. The Carterton District High School Committee was incensed at what it interpreted as a blatant attack on Parr. Accusing Park of insubordination and gross misconduct as a teacher, the school committee demanded that the Wellington Education Board set up a full inquiry into the matter *(j)*. With some sections of the Carterton community backed by the local press already alleging that Park was guilty of disloyalty as well as misconduct, the board lost little time in setting up a special committee to consider the charges against her. The committee duly reported back to the board, and while it admonished Park to be more discreet in the future, it cleared her both of the school committee's charges and of the more serious allegations of disloyalty *(k)*.

The board did not accept the findings of its committee without disagreement. In what proved to be a stormy session, three members of the board, including the future Minister of Education, R A Wright *(l)* claimed that the committee had been too lenient and demanded that it re-examine Park more closely. Their views ran counter to those of the other six members present, and a bitter debate followed in which Wright clashed with the chairman of the board, Thomas Forsyth. In answer to Wright's charge that Park had advised her class to read the *Maoriland Worker*, Forsyth retorted that it had been merely a joking remark. Addressing the three dissenting members, he warned them that "political capital was being made and he for one was not going to allow the Board to be made a 'stalking horse'" *(m)*.

The meeting upheld the committee's decision by six votes to three, a result which prompted the editor of the *Maoriland Worker* to jubilantly exclaim, " . . . the three Jingoists were smacked to the boundary, and peace descended upon the proceedings" *(n)*. In reality, peace was far away. Parr had been observing the Wellington Education Board's inquiry with considerable interest, and upon learning of its decision he determined on decisive action. His first step was to appoint A D Thomson, an ex-Stipendary Magistrate and Public Service commissioner, to hold a public inquiry into the charges the school committee had originally laid against Park and to report its findings to him. To reporters he claimed, "Only this course can give satisfaction and allay the suspicions caused by the extraordinary actions of the Board" *(o)*. Parr then threatened Park with cancellation of her teacher's certificate if she failed to attend the new inquiry.

As with others before, Parr had chosen to act unilaterally but he was soon to become aware that far wider issues than the guilt or innocence of a single teacher had been raised. The editor of the *Manawatu Daily Times* complained that, "The action of the Minister is an attack upon the Education Act and the Education Boards throughout the Dominion, and is without parallel in the history of public administration" *(p)*. For the second time in just over a month, the Wellington Education Board met with its members in an angry mood. On this occasion there was unanimous support for their committee's decision to take no further action against Park. It was decided to advise Park to attend Parr's proposed inquiry but to avoid any mention of its actual legality. Forsyth was insistent that the board's inquiry committee should attend any new inquiry. ". . . even if unwelcome" *(q)*. The editor of *National Education*

(i) *National Education* 1921, p 337.

(j) *Manawatu Daily Times* (Palmerston North) 15 December 1921, An offence.

(k) Ibid.

(l) Minister of Education in the Reform Administration from May 1926 until December 1928.

(m) NZH, 15 December 1921: *Maoriland Worker* (Wellington) 21 December 1921.

(n) MW, 21 December 1921.

(o) MDT, 27 December 1921.

(p) Ibid.

(q) MDT, 26 January 1921.

who had been critical of Park's original letter, strongly criticised Parr's action and went even further than the board in questioning the legality of the Minister's intention to cancel a teacher's certificate ". . . in the arbitrary manner he had theatened to do with Miss Park if she didn't face a second inquiry" *(r)*.

Park however, had no intention of facing another inquiry. In February 1922, she filed an injunction with the Wellington Supreme Court to restrain the Minister from cancelling or suspending her certificate. The stage was now set for an important legal battle. Both Park and Parr were ably represented, the former by M. Myers, later Chief Justice Sir Michael Myers, and the latter by W C MacGregor KC, the Solicitor-General who was assisted by Sir John Findlay KC, one of the Dominion's leading barristers *(s)*.

Much of the subsequent debate concerned the intention of certain clauses in the 1914 Education Act, and the consequent applicability of the regulations by which the Minister sought to remove Park's teacher's certificate. Like the majority of her colleagues, Park held her certificate under s 161(e) of the 1914 Act, which gave the Minister of Education the right to issue certificates of competency to teachers *(t)*. Parr now claimed that this same section by inclusion of the words ". . . to make regulations for any purposes which he (the Governor General) thinks necessary in order to serve the due administration of this Act", empowered him to suspend or cancel a certificate on the grounds of gross misbehaviour or immoral conduct, as expressly provided for in cl 58 of regulations gazetted in 1912:

> "The Minister of Education shall have power to cancel any certificate or licence to teach if the holder of the certificate or licence shall at any time be proved guilty of immoral conduct or gross misbehaviour within the meaning of the Education Act, 1908. He shall also have power for sufficient cause shown to suspend any certificate or licence to teach for such a period as he thinks fit." *(u)*

In defence, Myers claimed that while this clause gave the Minister the power to cancel or suspend certificates, there was no actual power of cancellation vested in the 1914 Act itself.

In answer to Mr Justice Salmond's inquiry if it was necessary for the Act to expressly state powers of cancellation, Myers pointed out that the presence of such powers in the Minister's hand was undesirable, because it adversely effected the security of tenure of teachers. Furthermore, even if the Minister actually had such powers, they could only be used if a teacher either had not appealed, or else had lost an appeal, as provided for under the 1914 Act *(v)*. Lastly, Myers indicated that any subsequent action by the Minister to remove Park's certificate constituted a breach of her rights, and was sufficient to constitute an action for damages *(w)*.

On Parr's behalf, MacGregor protested that Myer's view of s161 was too narrow, and that the power of withdrawal was implied, even if not actually stated. The words "proved guilty" in reg 58 really mean "proved guilty by the Minister". He further argued that the incorporation of the phrase ". . . shall have the force of law" in both the 1908 Act (s 72(e)) and the 1915 Act (s 161(2)) endowed educational regulations such as 58 with the force of the statute itself, and thus could not be set aside by the Supreme Court *(x)*.

Findlay reinforced his collegues last point by suggesting that the Minister's powers could not, in fact, be controlled by the Court. The regulation in question conferred on the Minister, an executive power rather than a judicial one. Similarly, Parr's proposed second inquiry was not a judicial matter at all, but an administrative matter *(y)*.

Such far-reaching questions ensured considerable interest from both the Institute and the education boards, who awaited the Court's verdict with some trepidation. On 23 June after hearing the final submissions, Mr Justice Salmond gave his judgment. From the outset, he fully recognised that the issues raised affected both the security of tenure possessed by teachers, and the autonomous authority of education boards. The central problem, he believed, was whether the words ". . . to make regulations for any purposes which he thinks necessary in order to secure the due administration of this Act", were sufficient to authorise reg 58, and this in turn depended on whether any resulting Ministerial power to cancel cer-

(r) *National Education*, 1922, p 36.

(s) *National Education*, 1977, p 51.

(t) Education Act, 1914 5 Geo V *New Zealand Statutes*, p 233.

(u) *New Zealand Gazette* 1912, Vol. 1, p. 771. While the regulations were allowed under the 1908, and 1914 Acts, neither Act actually defined the meaning of "immoral conduct or gross misbehaviour".

(v) Section 147-155, pp.229-231.

(w) *Park v Minister of Education* [1922] NZLR 1208, 1210-1211.

(x) Ibid., p. 1211.

(y) Ibid.

tificates was consistent with both the clauses in the Act relating to the status of certificated teachers (s71(i)) and to the powers of education boards to appoint, promote or dismiss teachers (s 83). Salmond considered that it was not consistent and that reg 58 was consequently ultra vires and void.

First, the alleged powers of the Minister to suspend Park's certificate were inconsistent with s71 (i) which recognised only two classes of teachers, certificated and uncertificated. Second, the possession of a certificate conferred on teachers a status similar to that bestowed on graduates of a university, thus the granting authority could not revoke them. Third, Salmond pointed out that public school teachers were not servants of the Crown, but of the education boards. A Minister who cancelled certificates, would be jeopardising the rights of the boards to appoint, promote or dismiss teachers, and also the rights of teachers to appeal against any decision, because the Act provided only for an appeal against a decision, of an employing body. (ss49 and 153) Fourth, Salmond dismissed the defence's claim that reg 58 had the force of law and was therefore beyond the jurisdiction of the Court, because any legal force the regulation possessed, was subject to it being consistent with the intention of the Act, and in the case, it was not. Lastly, he indicated that Parr's threats to remove Park's certificate, if carried out, could indeed be the subject of a future action by her, for damages *(z)*. On these grounds, the Court granted the injunction. Park had won. Parr accepted defeat with ill-grace, complaining that according to the Court's verdict, even if a teacher was to subsequently ". . . become a forger, seditionist or even a murderer, the certificate of fitness that the Minister had given him is to stand for life and cannot be withdrawn" *(aa)*

The editor of the *New Zealand Herald* was quick to criticise Parr's remarks, pointing out that the Minister, in ". . . discussing the judgment of the Court concerning the case of Miss Park, appears to have fallen a prey to unwarranted fears" *(ab)*. Other papers were not so kind. The Wellington *Evening Post*, the *Auckland Star* and the *Christchurch Sun* were among those papers whose editors bitterly attacked Parr's handling of the *Park* case, the last mentioned claiming that "Mr Parr is a patriot to the verge of fanaticism" *(ac)*.

National Education, however, had the last word on a controversy which had been provoked by a single letter in its correspondence column nearly a year previously:

> "What was the result? A frantic outburst of hysterical small-town fanaticism in Carterton - a village heresy hunt - inaugurated by two or three individuals who ought to be thoroughly ashamed of themselves, alarms and excursions in high places, and a Board inquiry.What a spectacle for the Twentieth Century! *(ad)*

Park continued teaching, and was to make an important contribution to the development of wider concepts of education during the 1930s, and as a member of the Institute's executive, was to help secure the abolition of proficiency in 1936 *(ae)*.

The decision of the Supreme Court itself, however, was to have wider, national implications. The security of tenure of public school teachers had been confirmed, and the teacher's certificate safe-guarded from arbitrary cancellation. These were important gains, and the Institute was, much later, to pay written tribute to the significance of the *Park* case *(af)*. Equally, the autonomy of the education boards was reinforced by the Court's decision, the fears of their Parliamentary supporters at least temporarily eased, and further legal support provided for the use of education boards in the future.

Perhaps of even greater importance, was the Court's conclusion that there were legal limitations to Ministerial power. This conclusion was reached at a time when public attitudes were strongly hostile towards any suspicion of unpatriotic or disloyal behaviour, and, moreoever, reached in spite of a very determined Minister of Education who did not hesitate to utilise this intense community feeling to demolish opposition. Lastly, the Court's decision to grant Park's injunction attracted considerable publicity and thus served as a rallying point for the small but rapidly growing number of New Zealanders who believed that the Government and the Education Department had gone too far in its support of school patriotism.

(z) Ibid., pp. 1212-1219.
(aa) NZH, 3 July 1921.
(ab) ibid.
(ac) *National Education*, 1922, pp. 242-243.
(ad) ibid., p. 245.

(ae) see *National Education*, 1977, correspondence section, p.157.

(af) "Miss Park is Dead", *National Education*, 1977, p.51. Of course its value might become ever more apparent in our own times, if the current economic recession prompts a closer examination of the tenure system.

CONSTITUTIONAL LAW

THE CONSTITUTION OF ZIMBABWE RHODESIA

BY KAYE TURNER, *a graduate of the University of Auckland, BA, LLB. She was an editor (with Pauline Vaver of the Faculty of Law, University of Auckland) of* Women and the Law in New Zealand *(Hicks Smith/Sweet and Maxwell, Wellington, 1975). She has worked as Assistant Secretary of the Auckland District Law Society, 1975-76, and since then has lived in London, studying the comparative constitutional law of African Commonwealth countries, and working as a consultant. She is a legal correspondent for the Gemini News Service, a news agency circulating mainly to third world countries, particularly Commonwealth members.*

At midnight, as 31 May 1979 ended and 1 June 1979 began, the new constitution of Zimbabwe Rhodesia came into effect. It is the foundation document of this new state created out of the old Southern Rhodesia, the latest in a line of startling constitutional manifestations, from the unilateral declaration of independence in 1965, through seven fierce years of civil war, still unended, to the internal settlement agreement of March 1978. Its status is entangled in its past, in the fact that it is the fruit of an accommodatory arrangement between the illegal regime resulting from the UDI, and some of the nationalist leaders who had opposed the regime both before and after the UDI.

But whatever its legitimacy, it is clear that the constitution is operational and that it has become a central factor in the debate presently taking place in some countries as to whether or not the "majority rule" government which operates under it should be afforded international recognition.

For that reason it is important that the provisions of this lengthy, rather complex constitution should be widely known and understood, so that informed conclusions may be reached about the enforced nature of any government which operates under it.

The Constitution provides for a two-tier parliament, made up of a Senate (an upper house) and a House of Assembly (a lower house) *(a)*. Section 18(2) establishes that there will be 30 Senators: 10 black Senators elected by an electoral college made up of the black members of the House of Assembly; 10 white Senators elected by an electoral college comprising the white members of the House of Assembly; and ten Chiefs, five elected by an electoral college made up of the Council of Chiefs in Mashonaland, and five elected by an analogous body in Matabeleland. In addition, two Senators may be appointed by the President so that they may serve on the Senate Legal Committee. The qualifications to hold these appointments are set out in s 34(4), and are such that both are likely to be made, and will almost certainly be filled by whites.

The House of Assembly has 100 members: 72 black members elected by voters on the common electoral roll (ie elected by the blacks); 20 white members elected by voters on the white voters' roll; and eight white members elected by an electoral college made up of the 92 elected members of the House of Assembly. This electoral college chooses from a list of 16 candidates nominated by the 20 white members of the House in office immediately before the dissolution of Parliament *(b)*.

The legislative authority of Zimbabwe Rhodesia is vested, under s 15, in the Legislature, consisting of the Parliament and the President. The President is Head of State and Commander-in-Chief of the Defence Forces *(c)*. He is elected by a simple majority of the Senate and the House of Assembly meeting together as an electoral college *(d)*. His term of office is six years and a President is limited to two terms of office *(e)*. While the executive authority of Zimbabwe Rhodesia is vested in the President under s 65, he must act on the advice of the Executive Council *(f)*, and so his role is that of a titular figurehead.

The black members thus have clear ma-

(a) Constitution of Zimbabwe Rhodesia, 1979; s 16.

(b) The various provisions relating to the composition of the House of Assembly are set out in s 22(2).

(c) S 6.

(d) Various provisions relating to the office and election of the President are set out in s 9.

(e) S 10(1).

(f) S 70(1). "To advise the President in the government of Zimbabwe Rhodesia there shall be an Executive Council consisting of the Prime Minister and such other persons, being Ministers, as the President, on the advice of the Prime Minister, may from time to time appoint".

jorities in both the Senate and the House of Assembly, although these majorities do not reflect the proportionate numerical strength of Africans in the general population. (Twenty-eight percent of the seats in the House of Assembly are held by whites, who constitute less than four percent of the population of the country). Because the President is elected by a simple majority of Parliament, he will almost certainly be black, as, indeed, proved to be the case. But to what extent is the black numerical majority in the legislature empowered to exercise the functions of government under the Constitution? To what extent does real power to govern now lie in the hands of the black majority?

First, the ability of the Legislature to change the Constitution itself must be considered. The Constitution contains a large number of specially-entrenched provisions, very many more than is usual, which can only be changed by the affirmative votes of 78 members of the House of Assembly - more than three-quarters of its membership *(g)*. This means that a least six white members, as well as all the black members, would have to vote for any amendment. This effectively gives the white minority a veto power over any and every proposed amendment to the specially-entrenched constitutional provisions. (Any amendment must also, under s 157(2) (a), also receive the affirmative votes of not less than two-thirds of the total membership of the Senate. Section 157(3) sets out a procedure for the eventual supremacy of the will of the House of Assembly in cases where the Senate fails to pass a Constitutional Bill).

No fewer than 123 of the 170 articles of the Constitution are specially-entrenched, as set out in the Second Schedule. They include provisions relating to the composition of the Legislature, the procedure of Parliament, the Executive Council, the declaration of public emergencies, the Judicature and the Judicial Service Commission, and every aspect of the Public Service.

Among the posts which are given special constitutional protection are those of the Judges of the High Court, the Chairman and members of the Public Services Board, and the commissioned ranks in the Defence and Police Forces. In addition, various "transitional provisions" preserve the present incumbents of such posts in power.

The constitution also establishes qualifications for the various key posts, and assigns them special entrenchment. Appointees as Judges of the High Court must have been a Judge of a superior court "in a country in which the common law is Roman-Dutch and English is the official language" *or* have been qualified for not less than 10 years to practice as an advocate either in Zimbabwe Rhodesia or in a country where the common law is Roman-Dutch and the official language is English *(h)*. This effectively limits the choice to a few countries in Southern Africa and excludes, for example, almost all Commonwealth countries as possible sources of Judges. Those countries which fulfill the criteria are Lesotho, Botswana, Swaziland, Sri Lanka and, notably, South Africa.

The members of the Judicial Service Commission, whose main task is to make binding recommendations to the President for appointments to the High Court *(i)*, comprise the Chief Justice, the Chairman of the Public Service Commission, and one other member (appointed by the President acting on the advice of the Chief Justice) who has *either* been a Judge of the High Court *or* qualified to practice as a lawyer in Zimbabwe Rhodeasia for at least 10 years *or* has stood for election to either House of Parliament or to a local authority *(j)*.

The Attorney-General, who controls prosecutions in the independent exercise of his discretion, is appointed by the president on the (binding) recommendation of the Judicial Service Commission *(k)*. He must be both qualified for appointment as a Judge of the High Court *and* have served in the Attorney-General's department for at least 10 years *(l)*.

Members of the Public Service Commission, which regulates and controls the general organisation of the Public Service and the Prison Service *(m)*, are chosen "for their ability and experience in administration or their professional qualifications" *(n)*. The majority must also be people who have held designated senior posts in the public service for at least five years *(o)*.

The Commissioner of Police is appointed by the President on the (binding) recommendation of the Judicial Service Commission and must have held no lesser rank than Assistant Commissioner of Police for at least five years

(g) S 157(2) (b) (i).
(h) S 80(1).
(i) S 82(1).
(j) S 88(1) and (2).
(k) S 95(1).
(l) S 95(2) (a) and (b).
(m) S 93(1) (a).
(n) S 92(2).
(o) S 92(2) (a). The posts designated are Secretary, Deputy Secretary or Under Secretary in a Ministry in the Public Service, or a post in the Public Service of a grade equivalent to or higher than that of Under Secretary.

(p). The Commissioner advises the President on all appointments to and above the rank of Inspector *(q)*.

The Police Service Commission is chaired by the Chairman of the Public Service Commission and at least half of the Commission's other members must have held the rank of Assistant Commissioner of Police or above for not less than five years *(r)*.

The Commanders of the Army, the Air Force and any other branch of the Defence Forces must have held the rank of Colonel or Group Captain or above for at least five years in the existing defence forces *(s)*. Each is appointed by the President on the recommendation of a Board *(t)* made up of two of the Commanders, including the retiring Commander as Chairman and a Secretary of a Ministry in the Public Service *(u)*.

The Defence Forces Service Commission, which has overall responsibility for the day-to-day administration of the defence forces, *(v)*, consists of the Chairman of the Public Service Commission *(w)*, two members who have held the rank of Colonel or Group Captain or above for not less than five years *(x)*, and two other members chosen for "their ability and experience in administration and their suitability otherwise" *(y)*.

The Ombudsman, whose office is established under s 144 of the Constitution, requires no special qualifications and is appointed by the President on the advice of the Judicial Service Commission *(z)*.

An appointee to the Senate Legal Committee, whose chief function is to scrutinise proposed legislation to ensure that is does not contravene the Declaration of Rights set out in the Constitution *(aa)*, must be either a retired Judge of the High Court or have been qualified for not less than 10 years to practice as an advocate or attorney in Zimbabwe Rhodesia or have been a Magistrate in Zimbabwe Rhodesia for at least 10 years *(ab)*.

The Comptroller and Auditor-General is appointed by the Public Service Commission and must have held a designated high office in the Public Service for at least five years *(ac)*.

The principal diplomatic representatives of Zimbabwe Rhodesia abroad are appointed by the President acting on the advice of the Prime Minister, after the Prime Minister has consulted with the Public Service or other appropriate Commission *(ad)*.

Appointments to each of these important posts and controlling bodies are thus made subject to qualifying conditions and/or to the recommendations of committees that are inaccessible to blacks, and will remain so for many years to come. The higher levels of the Judiciary, the defence forces, and the Public Service, remain preserves of white domination for at least the next decade, regardless of the black majority in the Legislature.

Even more striking is the limitation on black control of the Cabinet under the Constitution. Provisions relating to this are set out in Part II of the Third Schedule to the Constitution which is entitled "Transitional Provisions and Savings". The relevant section, s 9, is entitled "Interim National Government", and it is worth setting this provision out in full because it is such an important feature of the early years of "majority rule":

"Notwithstanding any of the provisions of this Constitution, during the period prior to the dissolution of the first Parliament or the period of five years, whichever is longer, the following provisions shall apply - "(a) there shall be not less than fifteen Ministers all of whom shall be members of the Executive Council; "(b) each party which is represented in the House of Assembly by five or more members thereof shall be entitled to be represented in the Executive Council in terms of subparagraph (c); "(c) a party referred to in subparagraph (b) shall be represented by such number of Ministers as bears the same proportion to the total member-

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(p) S 98(2).

(q) S 99(1) (a).

(r) S 100(1) and (2). The function of the Police Service Commission are set out in s 101 and include: The consideration of grievances by members of the Police Force; the consideration of any proposal that a person who has been a member of the Police Force for more than two years should be removed from office or reduced in rank and the confirmation of such a proposal "if deemed fit"; and the making of recommendations to the Commissioner of Police about the recruitment policy, promotion policy, entrance examinations, and advancement and grading of posts, in the Police Force.

(s) S 103(1) and (2).

(t) S 103(2).

(u) S 103(6).

(v) Ss 106(c) and 107.

(w) S 105(1) (a).

(x) S 105(2) (a).

(y) S 105(2).

(z) S 144(2).

(aa) S 59(1).

(ab) S 34(4).

(ac) S 96(2) and (3). The offices so designated are: Secretary, Deputy Secretary or Under Secretary in a Ministry in the Public Service; or a post in the Public Service of a grade equivalent to or higher than that of Under Secretary.

(ad) S 97.

(ae) Ss 103(3) and s 98(3), respectively.

ship of the Executive Council as the number of members of that party who are members of the House of Assembly bears to the total number of members of all the parties referred to in subparagraph (b) who are members of the House of Assembly; "(d) in recommending to the President the persons to be appointed as Ministers in terms of subparagraph (c), the Prime Minister shall act on the advice of the leader of the party concerned; "(e) the Prime Minister shall not recommend the removal from office of a Minister appointed in terms of subparagraph (d) unless the leader of the party concerned has advised him so to recommend; "(f) before recommending to the President the functions to be allocated to the various Ministers, the Prime Minister shall consult with the leaders of all the parties referred to in subparagraph (b); "(g) if the Prime Minister wishes to recommend the appointment of Deputy Ministers the provisions of subparagraphs (b) to (f) shall, mutatis mutandis, apply."

Thus, for at least the first five years, the number of Cabinet portfolios is to be divided among the political parties in proportion to the number of seats they hold in the House of Assembly. This means that the whites, less than four percent of the population, will hold over one-quarter of the Cabinet posts. The black Opposition parties are represented in the Cabinet - although at the time of writing they have all refused to take up their seats. It is impossible for the Prime Minister emerging from the black majority party to assume effective control of the running of the country - apart from those he selects from his own party, he does not even have the power to choose those people who will become Ministers. That task is specifically reserved to the individual party leaders, as is the power of dismissal of their respective Ministerial members. It is in this way that Ian Smith appears in the Cabinet, despite Bishop Muzorewa's 1977 assertion that no government with Ian Smith in it could be a majority rule government.

In the crucial fields of the police, and of defence and security, all effective power is in the hands of the Force Commanders and the Police Commissioner, who are not answerable to their Ministers. The Prime Minister or such other Minister as he may authorise may give directions to them, but only those which are "general directions of policy with respect to the (maintenance of law and order) (defence of Zimbabwe Rhodesia)." *(ae)* Specifically, each of the Force Commanders and the Police Commissioner is "not . . . in the exercise of his responsibilities and powers . . . subject to the direction or control of any person or authority." *(af)* If they disregard a general direction, only the Defence Forces Service Commission or the Judicial Service Commission has the power to dismiss them, and then only if it "deems fit" *(ag)*. The reality of the situation is that both the office-holders and the membership of the Judicial Service Commission will be white - so these vital areas of authority are preserved in white hands and excluded from majority control.

The Constitution does provide - after 10 years at the earliest - for a review of the composition of Parliament by a special commission *(ah)*. The chairman of this commission is to be the Chief Justice, and there would in addition be two white and two black members. Because of the entrenched constitutional qualifications already outlined above, even after a decade of "majority rule" the Chief Justice would almost certainly be white. Thus, even after 10 years, the whites would have the power to preserve their special position in Parliament - and as the document provides for no further review, to do so indefinitely.

There are many other aspects of the constitution which also severely limit the ability of a black government to rule effectively. Selected existing legislation is not only preserved, but given special protection. Certain provisions of racially-discriminatory statutes in key areas of health, education and local government are entrenched *(ai)* and can be altered only if the white members agree.

A substantial programme of land reform is clearly a serious priority for any government in a country which remains substantially rural and where the white four percent of the population presently owns half the disposable land. Under the Constitution the Legislature and the Executive have no power to acquire land compulsorily except under a law which: - requires the High Court to determine whether the aquisition is necessary in the public interest *(aj)*; - requires the High Court to refuse any application to compulsorily acquire land unless "it is satisfied that, having regard to its area and suitability for those purposes, the piece of land in question has not been substantially put to use for (agricultural) purposes for a continuous period of at least five years prior to the date of

(af) Ss 103(4) and s 98(4).
(ag) S 111.
(ah) S 159.
(ai) S 160(1).
(aj) S 124(1) (c).

application"; periods of non-use because of "any public disorder" are to be disregarded *(ak)*; and - requires the High Court, should it approve the acquisition, to fix as adequate compensation an amount which would not be "less than the highest amount which the land . . . would have realised if sold on the open market by a willing seller to a willing buyer at any time during the period of five years immediately prior to the date of acquisition." *(al)*. The owner of land acquired in this fashion, if ordinarily resident or if a citizen, has the absolute right to remit such compensation anywhere abroad, free from any deduction except ordinary bank transfer charges *(am)*.

The Constitution ostensibly outlaws all discrimination. Chapter VII, the Declaration of Rights, contains a provision to protect people against discrimination, s 131. This outlaws discriminatory provisions in any written law, as well as the performance of executive or administrative acts in a discriminatory manner. Such laws or acts are defined as discriminatory if "by or as an inevitable consequence of that provision or that act . . . persons of a particular description by race, tribe, place of origin or colour are prejudiced by:
"(a) being subjected to a condition, restriction or disability to which persons of another such description are not made subject; or "(b) the according to persons of another such description of a privilege or advantage which is not accorded to persons of the first-mentioned description; and the imposition of that condition, restriction or disability or the according of that privilege or advantage is wholly or mainly attributable to the description by race, tribe, place of origin, political opinions, colour or creed of the persons concerned."

Perversely, the provisions of s 131 almost certainly would have the effect of preventing any new laws designed to redress almost a century of discrimination against the African majority, and to positively promote their welfare and opportunities. The (white-controlled) Courts would in all probability rule that any such law was unconstitutional because it discriminated against whites. As the Constitution specifically preserves many provisions of the law which discriminate in favour of whites, this aspect of the Constitution would make it extremely difficult, perhaps impossible, for the "majority rule" government to bring about any real changes in the pattern of distribution of services, wealth, jobs and economic power in Rhodesia, unless they received the positive support of the whites, whose privileged position it would be that was under attack.

This is also the crucial factor in assessing the validity of the appellation "majority rule" in relation to the Government of Zimbabwe Rhodesia now headed by Bishop Abel Muzorewa. If "majority rule" is merely a very limited question of numbers, then the present Constitutional arrangement meets any requirement that black faces should outnumber white faces in the legislative body. But if "majority rule" means something more than that, if it also embodies the concept of effective rule by the majority group, then the new Constitution of Zimbabwe Rhodesia is not the document which allows for that possibility. Rather the reverse. And in view of the Constitution under which the recent elections were held, it is not surprising that the international community has taken the view that those elections are unacceptable.

(ak) S 124(2).
(al) S 124(3).
(am) S 124(6).

PERSECUTION OF DEPORTEES

The New Zealand section of the International Commission of Jurists recently sought information from the Secretary-General of the International Commission of Jurists in Geneva concerning countries that may "persecute" those who are deported from New Zealand. The Secretary-General replied as follows:

> "We are sometimes asked to express an opinion whether a person would be likely to be subject to persecution if he were deported to a particular country. We find it very difficult to answer these questions in the abstract. However, if we are supplied with some details of the case explaining why the person concerned thinks he is on risk to be persecuted on political grounds, we might be prepared to express an opinion as to whether the fear seems to be well founded."

Case details should be forwarded to the International Commission of Jurists, P.O. Box 120, Geneva, Switzerland.