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Legal Aid in Asia

An international Conference for invited participants from 12 Asian and South Pacific countries was held in Taipei at the end of September. The full proceedings of the 18 papers presented, and the contributions from the commentators and the discussion by the participants will be published in due course by the Chinese Association for Human Rights, 100 Hengyang Road, Taipei, Taiwan.

The participants from outside Taiwan, were from Indonesia, India, Thailand, New Zealand, Phillipines, Fiji, Sri Lanka, United States, Singapore, Australia and Japan. For one who had visited the Chinese mainland in an official capacity back in the era of the Cultural Revolution when Chairman Mao was still at the helm it was an interesting comparative experience to visit Taiwan.

It was particularly interesting being there at the time the agreement between London and Beijing over Hong Kong was announced. Two law societies in Taiwan have been members of the Law Association for Asia and the Western Pacific (LAWASIA) since that organisation was formed, and there are negotiations currently going on regarding the acceptance for membership of the China Law Society of Beijing. The President of LAWASIA, Mr Raul Goco was at Taipei having just been to Beijing. Two other Councillors of LAWASIA were also at the Conference. LAWASIA is of course a non-political organisation, and the members are not governments nor representatives of governments. The Chinese situation that exists between the mainland and Taiwan is however a most complex and contenious problem involving political and international issues that inevitably affect non-governmental organisations to some extent.

The arrangements for the Conference were of the standard type in that the papers were circulated beforehand, the speakers spoke to them rather than read them, they were then commented on and finally were the subject of a general discussion. There were occasionally marked differences of view on points of jurisprudence and over practical measures that would be effective.

The Conference was opened by Grand Justice Herbert H P Ma. There is a Supreme Court in Taiwan which is the final Court of Appeal and one of the Justices of that Court, a woman, Ren-shu Renee Chang was one of the local participants. There is however a separate Constitutional Court. It is the members of that Court who each have the exalted title of Grand Justice and it is the Court of which Grand Justice Herbert H P Ma is a member. The Conference was closed by Dr Shi Chi-yang the Minister of Justice, who incidentally is a graduate of Heidelberg, the University of *The Student Prince* fame.

Most of the local participants were graduates of prestigious United States law schools such as Harvard or Yale, but there was one at least who did his doctorate at Sydney. The proceedings were in English which may have restricted the number of local participants. With only one mild exception from one of the local participants the Conference was free of propaganda about the China-Taipei-Beijing political issue.

The American experience was explained by Benjamin Lerner of Philadelphia where he heads the office incorporated of the Defender Association of that city. He is also President of the National Legal Aid and Defender Association. He outlined the history of legal aid in the United States, more particularly over the past 20 years. The changing fortunes of those involved in the system of legal aid has clearly been affected by the policies and attitudes of the President of the time. Mr Lerner himself believes that a full-time employed staff system is the best model with supplementary assistance on a largely voluntary basis from the private Bar. According to Mr Lerner the American Bar Association tends to agree with this point of view. In the criminal field he strongly advocates the public defender system.

Mr Lerner summed up his views in terms that have some relevance for the New Zealand situation. He said:

> For over 200 years, the United States has embraced the concept of equal justice under law for all of its citizens. Hopefully, we will never retreat from this concept. However, the debate as to the most appropriate means for achieving equal justice, particularly for the poor, has never been resolved.
>
> There are those who measure our nation's system of legal services against what is available to citizens of most other countries and who conclude that we should be extremely proud of what we have achieved. On the other hand, there are those who measure our achievements against the promise we make to ourselves in our Constitution and our Independence Day speeches. They conclude that we have a long way to go before we can claim to live up to even the most basic of our professed ideals.

Another paper of particular interest was that given by Dr Tzu-wen Lee of the Ministry of Justice. Dr Lee is a graduate of Sydney University. His paper discussed the prospects for regional co-operation on legal aid among Asian and Pacific nations. Among other things he referred to the difference between Asian and Western attitudes and approaches to dispute settlement and the social implications of litigation itself.

> Confucius would argue that litigation eventually leads to disaster or misfortune. A Western lawyer would say, to paraphrase Brutus in *Julius Caesar,* that "it is not that I love social harmony less, but that I love justice and truth more". The choice here is one between two values that are both legitimate.

Such a choice has become a rather difficult one because it has now become a matter of wisdom. The challenge facing jurists and practitioners alike is how to give legal aid to the poor without creating a litigious community.

The value of a Conference such as this is manifold. Two obvious ones are that it was held, and that the proceedings will be published. The fact that it was held at all emphasises the importance and significance of the issue of legal aid in Asia. This can be seen as a result of a growing awareness throughout the region of the importance of legal systems, legal issues, legal rights and the rule of law generally. The question of the relationship of law to custom in traditional societies was one that came up for discussion during the Conference, but was not able to be adequately developed. Secondly, the fact that the proceedings will be published means that a further contribution will have been made to the literature on the subject from specifically Asian and Pacific viewpoints. The proceedings will no doubt be available for future study and consideration in the law libraries of Universities and other institutions. This is the way in which a body of knowledge is built up, and ideas and opinions are disseminated.

No single conference on any subject is likely to be definitive, but this one in Taipei raised and considered and discussed issues about legal aid in Asia that are going to be of continuing interest and concern in the region in the years ahead. New Zealand practice and experience was of considerable interest to many participants. It was a small matter of pride that in his closing address the Minister of Justice referred to and briefly quoted from the paper about the New Zealand system — even though the particular extract was more in the way of a warning that foreign experience needed to be adopted and adapted with caution, rather than simple praise of New Zealand.

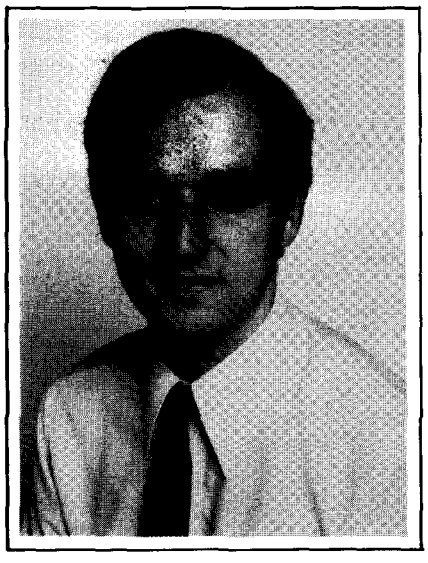
It is proposed in this and the next issue of the *New Zealand Law Journal* to present slightly edited versions of three of the papers given including the opening address. The choice is somewhat arbitrary and the papers are presented as ones of general interest. They cover a wide variety of issues and are not of immediate practical value in the New Zealand situation, with the exception perhaps of that by Professor Ochiai on the Japanese experience of prisoner rehabilitation and the use of voluntary agencies.

New Zealanders need to appreciate more and more the reality of the legal systems and concepts and practices of the countries of Asia. Japan is now our biggest trading partner, and the Asia-Pacific region is of increasing importance for us. A greater awareness of Asia is necessary on the part of lawyers as well as members of the business community. We need to know more about legal systems and legal thinking in Asia and the Pacific. Equally importantly we need to contribute, and be seen to be willing to contribute sympathetically towards the understanding and resolution of broad legal issues and problems as they are developing and coming to attention, This is not a simple nor a quickly disposed of task. But this is where our future lies to an ever-growing extent. The point was well stated by the then Minister of Foreign Affairs, Hon Brian Talboys in his Waitangi Day address in 1979 when he said:

> Until recently Pakeha New Zealanders looked outward to Europe for their cultural ties, just as New Zealand looked to Europe, that is mainly Britain for trade and many other mutually beneficial relationships. . . . But now both Maori and Pakeha are moving into a period in which they are basing their thought and action on the realities of their situation. And the major reality — though not the only one — is that we all live in the South Pacific, on the edge of Asia. For much of New Zealand's history many Pakehas lived and acted not as if they lived in the South Pacific but as if they still lived on an island off the coast of Western Europe. They saw the outside world through other people's eyes. . . . But change has been underway for years now. The Pakeha is coming to terms with geography, with the Pacific and with Asia. . . .

P J Downey

Butterworths' Travel Award 1984



Each year Butterworths makes a cash award to a legal student to assist him or her in travel costs related to further study. The award is made on the recommendation of University staff.

This year the award was made to Stephen Beaglehole who had been a student at Victoria University of Wellington. Mr Beaglehole was born in the United Kingdom and grew up there, in Singapore, Australia and New Zealand. He graduated from Victoria University in 1982 with the degree of LLB(Hons). He worked in the Wellington office of the firm of Bell Gully Buddle Weir as it now is. He qualified as a Barrister and Solicitor early in 1984.

Mr Beaglehole is at present continuing his studies at Gonville and Caius College, Cambridge. He is specialising in Commercial and International Law. Before his eventual return to New Zealand he hopes to be able to get some practical experience working more particularly in these two areas. His non-legal interests are art, history and music. □

Checkpoints and random stopping under the Transport Act 1962

By Philip Joseph, Lecturer in Law, University of Canterbury

A Introduction

The publicity accorded the 1983 Christmas drink-drive campaign was scarcely surprising. Strategically set up Ministry of Transport checkpoints for random stopping of motorists is not one's routine experience of the liberal democracy. For most though, the statistical correlation between road accidents and alcohol vindicated any inconvenience to the motoring public. These checkpoints were to suppress a *specific* offence most prevalent during the festive season, were for a limited period only, were confined to evening hours, and entailed only "provisional" restraints[1] of short duration.

However Montesquieu said that every man invested with power is liable to abuse it, and to carry his authority as far as it will go.[2] If such cynicism is a just reflection on public life then surely it is a question of time before we see state-sanctioned checkpoints and random stopping for every facet of law enforcement. Montesquieu's homily may indeed prove true for no sooner had the Christmas campaign ended than a Ministry of Transport spokesman acclaimed the true potential of checkpoints advocating they be employed as a routine law enforcement technique. He envisaged a joint operation to this end, the police in partnership with the Ministry of Transport.[3]

Blunty, is this not a plea for indiscriminate law enforcement by ambush? Undoubtedly the paramount question facing modern society is what we mean by the fredom of the individual, and what measures must be accepted in order to preserve that freedom. The penultimate question might now be whether we must prepare ourselves for a new phase of law enforcement by interrogation at the hands of specially co-ordinated police and Ministry of Transport flying-squads. This paper addresses two questions: are the police and Ministry of Transport empowered under existing law to conduct checkpoints as a general law enforcement technique and, secondly, is there sufficient constitutional warrant for imposing arbitrary restraints on the motoring public under legal sanction? The answers to these questions will determine whether, contrary to extending checkpoints, we should not curb the powers of our law enforcement agencies to perform their routine functions.

The general power to stop vehicles under the Transport Act 1962 reads:

> 66 *On demand by constable or traffic officer, user of vehicle to stop and give name and address* — (1) The user of a vehicle shall stop at the request or signal of a constable or traffic officer in uniform or of a traffic officer who is wearing a cap, hat, or helmet which identifies him as a traffic officer, and on demand give him his name and address and state whether or not he is the owner of the vehicle, and, if he is not the owner of the vehicle, shall also give the name and address of the owner.
>
> (2) Any person commits an offence who fails to comply with any provision of subsection (1) of this section, and may be arrested by any constable without warrant.

B The statutory power

In the Transport Amendment Bill (No 4) 1983, the Minister failed to obtain express powers for the Christmas checkpoints for detection of excess blood-alcohol levels. The Select Committee believed that those powers already existed, and that express powers would have been superfluous, in view of the High Court decisions in *Felton v Auckland City* (unreported, Auckland 18/11/77, Chilwell J) and, more recently, *Hohaia (Police) v Roper* (unreported, Wellington 23/2/83, M 534/82, Quilliam J) and *Maxwell v Police.*[4] Following the Committee's deliberations, the Court of Appeal reversed on appeal Quilliam J's decision in *Roper* (unreported, 16/12/83, CA 105/83). At first sight the Court of Appeal decision might seem significant for halting the parade of cases intent on giving to s 66 its widest possible interpretation. On reflection, however, it does little to ally fears of unwarranted police powers arising as a result of s 66.

Consider first the High Court decisions.

(i) The High Court decisions

Felton is memorable for the terse comments of Chilwell J deploring earlier ministerial statements that random breath testing was not condoned and that the legislation could not be used for that purpose (see [1978] NZLJ 57). Chilwell J preferred his own interpretation and found that pursuant to s 66 of the Transport Act 1962 a uniformed constable or traffic officer has power to stop any vehicle irrespective of cause to suspect an offence.

> His Honour concluded, hence it follows from the decision, that the police and traffic officers have the statutory right to conduct random breath testing. That exists as a matter of law.

Legal counsel for the Ministry of Transport has cautioned that these remarks in *Felton* were strictly obiter since there was cause to suspect an offence against the Transport Act 1962 (the defendant's vehicle failed to yield the right of way to the traffic officer's vehicle) (see [1983] NZLJ 315). That caution was also expressed with regard to *Roper* (the defendant's vehicle observed on the incorrect side of the road and seen

to be weaving erratically). Be that as it may, what bearing does the question of cause have on the exericise of the s 66 power? In *Maxwell* O'Regan J said that the only two matters for decision were whether a request to stop was made and whether it could be inferred that the appellant knew such request had been made. The same view is manifest in *Roper*. Although there clearly did exist reason to stop the vehicle in this case, Quilliam J attributed the question of cause no greater prominence than O'Regan J. In both decisions their Honours emphasised the wording of s 66 which is silent as to any condition precedent for the exercise of the power.

Does the obligation to stop arise only where the command is issued for the purpose of ascertaining the particulars specified in s 66(1)? According to the High Court decisions it would seem not. In *Roper* Quilliam J observed:

> There is, I think, a danger of reading the obligation to stop created by s 66(1) as an obligation to stop solely for the purpose of compliance with a request for name, address and other particulars. I am unable to see that it is to be limited in this way. . . . I can see nothing in the Act to say that a constable [or traffic officer] may stop a driver for one purpose only.

Quilliam J held that the obligation imposed by s 66 is to stop and to remain stopped, not simply for such time as it may take to give one's name and address and other particulars, but for such period as may be reasonable to enable the constable or traffic officer to carry out his law enforcement duties. It was on the basis of this finding as to the duration of the obligation to remain stopped that the Court of Appeal reversed the High Court decision. However it will be seen that the difference between the decisions is semantic only provided the constable or traffic officer, once having stopping a motorist pursuant to s 66, points to further available powers the exercise of which requires the motorist to remain stopped.

Must the proper use of s 66 be for the enforcement of the Transport Act 1962 (or Regulations thereunder)? Or does it confer wider powers facilitating the discharge of the general law enforcement functions of the police? Quilliam J in *Roper* did not venture beyond the constable's power to stop the respondent for reasons relating to the use and roadworthiness of the respondent's vehicle. O'Regan J in *Maxwell* was more expansive. His Honour seemed to dismiss *Roper* as being singularly unexceptional for involving only the exercise of specific powers conferred by s 68B: "It was not concerned with the exercise of other powers of police constables conferred by other statutes or at common law." That the section can be used to facilitate the exercise of "other powers", His Honour constrasted s 68B with s 66.

Section 68B is devoted to the definition of express powers and authorities of constables and traffic officers "to enforce the provisions of this Act" (specifying, for example, power to "(b) inspect, test, and examine the brakes or any other part of any vehicle on any road or any equipment thereof"). Section 66, His Honour said, is concerned with obligations imposed by law on users of motor vehicles. His Honour then resolved that s 66 embodied "inferential as opposed to express powers" to issue the command to stop. With respect there is no such creation known to law as an "inferential power"; whilst one *infers* from statutory language the grant of a power, powers are not created by inference, they are created by implication. Consequently s 66 should be treated like any other implied power admitting of exactly the same limitations as an ordinary express power. Nonetheless, upon the finding of "inferential powers", His Honour held that the words of s 66:

> give no warrant whatsoever for construing it or any part of it in a way to impose any prerequisites (other than those as to means of identification prescribed) to or limitations upon the exercise of those powers.

From these decisions s 66 can be invoked to facilitate not simply enforcement of the Transport Act 1962 but also the exercise of any law enforcement power the police might possess. The obligation to stop and to remain stopped arises indeed for whatever reason the command might be given.

Consider now the Court of Appeal decision in *Roper*.

(ii) The Court of Appeal decision

The question in the case stated to the High Court in *Roper* was:

> When a Police Constable has completed his action under s 66 of the Transport Act 1962 does s 68B(2) of the Act give a Constable power to require the driver of a vehicle to which the subsection applies to remain where he or she is, along with the vehicle, until a Traffic Officer can be brought to the scene to issue the written notice required by the subsection?

The constables had seen the appellant driving in an erratic manner, had stopped her and requested her name and address and other relevant particulars. She complied but was then instructed to remain stopped to allow the constables to inspect the roadworthiness of the vehicle. A constable subsequently informed her that the vehicle had three bald tyres and she should remain where she was until Ministry of Transport assistance was obtained "to write the vehicle off the road". Reference was to s 68B(2) of the Transport Act 1962 which provides:

> (2) Any . . . constable or traffic officer, if he believes on reasonable grounds that any vehicle does not comply with the provisions of any regulations for the time being in force under this Act, may, by notice in writing given to the driver or owner of the vehicle, direct that the vehicle be not used on any road and that notice shall continue in force until the vehicle has been made to comply with the provisions of any such regulations as aforesaid.

The appellant expressed concern that she wanted to get her children home but was told again to remain where she was until a traffic officer could be found to issue the s 68B(2) notice. She refused and drove off. The constables followed her to her home where she was arrested for failure to stop pursuant to s 66.

Quilliam J held that s 66 imported an obligation to remain stopped for such period as might be reasonable to enable the constable or traffic officer to properly perform his duties under the Act. His Honour cited in support s 68B(1). It was noted that nowhere in s 68B(1) is there any provision authorising a constable or traffic officer to stop a driver for purposes of exercising any of the general or specific powers the section confers. In Quilliam J's opinion Parliament could not have intended those powers to be exercised only at a time when the driver either happened to be stationary or had stopped voluntarily:

> Plainly, for the purpose of "enforcing the provisions of this Act" [within the meaning of s 68B], the constable or traffic officer may exercise the power given by s 66(1) to stop the driver and, moreover, he may do so "at any time".

The Court of Appeal disagreed. This was an attempt to telescope powers each of which was conferred independently of the other. Section 66 is a "self-contained provision", said Richardson J for the Court, which cannot be enlarged by importing into it the powers under s 68B. Rather the definition of the duration of the obligation to remain stopped under s 66(1) rests on the association in subs (1) of the two obligations it creates, namely, ". . . an obligation to stop at the request or signal of a constable or traffic officer; and an obligation to furnish specified information on request". Therefore, said Richardson J:

> [I]t is necessarily implicit in the subsection that the user of the vehicle must remain stopped for the time reasonably needed to provide the information which may be sought. . . . [But] [o]nce the driver has stopped and has supplied the information . . . that obligation to stop (and remain stopped) has been exhausted and there is no authority *under that section* for the constable or traffic officer to make any further demands on the driver at that time (Emphasis added)

That the constables in detaining the appellant were not claiming to have acted under s 68B(2), but rather had purported to act throughout under the authority of s 66, demonstrates the limited effect of the Court of Appeal decision. Had the constables themselves chosen to invoke s 68B(2) and issue the notice under that section, they would in every respect have been acting lawfully in detaining the appellant. Richardson J's dictum above is confined to an absence of authority *under s 66*. In contrast His Honour did not hold that it would be improper for a constable or traffic officer to invoke s 66 — even in an admittedly perfunctory way — simply as a device to activate other powers. Indeed His Honour stated that the powers conferred under s 68B will be available regardless of how the vehicle came to be stationary.

The decision therefore only outlaws detention per se under s 66 beyond the period it takes to obtain a driver's particulars. Obviously the protection this promises is more formal than real since in every instance the duration of the restraint can be freely extended by resort to, in particular, s 68B. As the Court of Appeal observed:

> It is also necessarily implicit in s 68B that the constable or traffic officer may require that the vehicle remain stationary to allow a reasonable time for the exercise of those specific powers by the constable or traffic officer — and that an attempt to prevent the constable or traffic officer from discharging his statutory responsibilities may give rise to a charge under the Summary Proceedings Act 1981 or other criminal statutes.

A typical scenario following completion of the formalities under s 66 might include inspection to ensure a current driver's licence and vehicle warrant of fitness, followed by a meticulous examination of the tyres, lights, brakes or "any other part of any vehicle on any road or any equipment thereof" (s 68B(1)(b)). Consequently *Roper* poses no particular problem for the constable or traffic officer disposed towards fishing for possible evidence of crime: no matter how long a conscientious examination might take, he need fear no recrimination through lack of cause to suspect an offence. If the zealous constable or traffic officer, once invoking s 66, can point to more general law enforcement powers, so much the greater the potential to prolong the restraint.

C Constitutional implications

Is s 66 defensible according to the constitutional orthodoxy that has shaped the common law and our perception of liberty? In *Roper* Richardson J referred to *Blundell v Attorney-General* ([1968] NZLR 341), a decision noted for the Court of Appeal's attempt to isolate the essentials of liberty and the rule of law in the Westminster democracy. The standards to which this Court had regard in admonishing the police for their actions raise the question whether freedom from arbitrary restraint in New Zealand is not a two-sided coin, one for when in transit and subject to the Transport Act 1962, and one for when not in transit and not so subject.

(i) The common law standards

In *Rice v Connolly* ([1966] 2 QB 414) Lord Parker CJ freely admitted there was no exhaustive definition of the powers and obligations of the police, but added they at least include keeping the peace, preventing crime, protecting property, and detecting crime and bringing offenders to justice. Much routine police work revolves around the last of these, investigating and detecting crime and bringing offenders to trial. The social utility of this work is undoubted.

Yet the common law the early settlers transported to this country preferred personal liberty to any general police power to detain for questioning: never at common law have Courts tolerated detention not amounting to lawful arrest.[5] Nor have they recognised any power to require suspects or witnesses to accompany them to a police station, compel attendance at an identity parade, or to insist on a person giving his name and address or any other particular or information.[6] In giving decision the Court of Appeal in *Blundell* exalted the need to resist any attempt to undermine this positive withholding of police power.

Consider the facts. B was restrained for some period by constables whilst inquiries were

made whether a warrant had been issued for his arrest. He finally went or was taken – their Honours did not determine which – to the police station in a patrol car, but was allowed to go thence without being formally taken into custody. No warrant for B's arrest had in fact been issued during this period. The Court of Appeal held that the police could not legally justify the restraint, even if in terms of duration and purpose it was "provisional" only for so long as it took to inquire as to the warrant. McCarthy J, said

> [T]he police, have no power to detain except in the process of making an arrest, no power to hold for interrogation, no power to hold whilst inquiries are being made. I reject the Solicitor-General's submission that there can be some form of custodial restraint falling short of arrest and which is not exercised in pursuance of a decision to arrest. I know of no satisfactory authority for that submission. No statute authorises it, and no case holds it directly (p 359).

McCarthy J reiterated the complete absence of any common law or statutory power to take and hold for questioning or whilst inquiries are being made (see p 357). With respect His Honour might have been reminded of s 66 of the Transport Act 1962 which provides an obvious example of a power to stop and detain in the absence of arrest. Another is s 18(3) of the Misuse of Drugs Act 1975 which confers a power to "detain and search for the purpose of search" any person suspected of committing an offence against the Act (albeit, unlike s 66, cause to suspect an offence against the Act is a prerequisite to the exercise of the power). So McCarthy J was not altogether correct in asserting that "[t]he British people have always turned their backs on the grant of such powers to Police" (p 357).

Turner J was circumspect in more closely confining his pronouncements to the facts, but was not less adamant than McCarthy J in holding that detention pending inquiries, indeed for any purpose, could not be justified under New Zealand law. For this reason Turner J held it to be immaterial that the constables may have been acting reasonably in the circumstances in imposing the restraint:

> I [have not] been able to find any English decision, nor has the learned Solicitor-General [been] able to produce one, where in England the reasonableness of the acts of the constable in restraining a plaintiff, short of formal arrest, has been available as a defence to an action for false imprisonment in respect of such acts; the reported decisions seem exclusively to turn on justification for formal arrest, . . . (p 352).

Blundell and the common law authorities assure us that our personal liberty, while not guaranteed as elsewhere by positive grant, is adequately secured by the absence of any power in the police to detain or otherwise impede us in the pursuit of our lawful activities. The common law has never paid heed to the vagaries of the situation in which the liberty is claimed: whether the individual is on foot, as in *Blundell*, or, as in *R v Spencer* ((1863) 3 F & F 857) and *Hatton v Treeby* ([1897] 2 QB 452), using some mode of conveyance. For example, in *Spencer* a constable intercepted a cart carrying S (and others) to search for unlawfully taken game. Despite evidence against S of "habitual poaching", the constable was held to have exceeded his authority requiring the indictment for assaulting the constable in the execution of his duty to be dismissed.

Again in *Hatton v Treeby* (followed in *Elder v Evans* [1951] NZLR 801, per Hay J) the constable was held to have acted unlawfully. The constable observed the appellant riding a bicycle at night without a light, a petty offence not justifying arrest. The constable called upon him to stop in order to ascertain his name and address. On the appellant's failing to so so the constable caught hold of the handlebar of the bicycle whereby the appellant was thrown to the ground. It was found as a fact that the constable did not know the name and address of the appellant, that he could not have ascertained these particulars other than by stopping him, and in achieving this he used no more force than was necessary. Despite these findings the constable was convicted of assault, having no power to stop or to detain the cyclist.

The above is the common law. There is no more elementary statement about the Westminister democracy than this acclaimed withholding of police power: the right to personal liberty *is* and *ought to be* assumed save in so far as an arrest warrant has been duly issued or there is good reason to believe a crime justifying summary arrest has been committed. Apart from any civil action for damges against the police, this means that a person detained but not arrested is entitled, as against the police, to use such force as may be necessary to resist the restraint.

(ii) Quaere the statutory reversal

The obligation under s 66 is to stop and, pursuant to further powers then available, to remain stopped. No question of arrest arises, it is simply a power to detain once a person enters his or another's vehicle. But if their Honours in *Blundell* and the many Judges who preceded them were bound to resist an inherent power to detain, where is the warrant for a statutory power? Does it reside in the capactity of the unfit driver or vehicle to inflict death or personal injury? Perhaps this might warrant a special departure from the orthodox rule that would vindicate checkpoint programmes to deter the drunken driver. But if the preservation of life (and possibly property) be the justification for s 66, the power it implies must thenceforth be confined to road safety and enforcement of the Transport Act 1962: not, as O'Regan J and the Court of Appeal liberally accepted, to be invoked in aid of any statutory or common law power the police might possess.

Does the rationale of s 66 extend beyond road safety to the due enforcement of the Transport Act 1962 generally? Clearly it does. The Transport Act 1962 creates a multitude of offences, some of which are punishable only on summary conviction, some either on summary conviction or by way of infringement notice served upon the driver, and some by way of infringement notice only. Consider the ordinary speeding offence. To serve a speeding-infringement notice

the constable or traffic officer must stop the driver; s 66 provides the requisite power. If it is decided to proceed by way of summons, the prosecutor must know the name to insert in the summons and the address at which it can be served. Even assuming the power to stop the vehicle, the problem is obtaining that information.

The common law principle upheld in New Zealand[7] is that neither a constable nor a traffic officer has power to demand the name and address of a person on the ground that he has committed an offence or is under a civil liability. Professor Glanville Williams has pointed out that the position is slightly different when there is a power to arrest upon reasonable suspicion of crime. A constable or traffic officer will in effect acquire a power to demand name and address, for if no answer is given, or if the answer is unsatisfactory, this will help to furnish the constable or officer with reasonable ground for arresting.[8] But comparatively few offences under the Transport Act 1962 justify a power of summary arrest, which means that for the majority of offences under the Act s 66 is an essential machinery provision.

However even to delimit s 66 properly to matters arising under the Transport Act 1962 need not remedy this objection, that the power to stop vehicles can legally be invoked to enter upon fishing expeditions to gather evidence on the basis of some vague suspicion that a driver (or his passangers) may have committed an unspecified criminal offence. The Court of Appeal in *Blundell* took the strongest exception to the Solicitor-General's proposition that the police should always have power to detain on suspicion whilst evidence justifying arrest is gathered. Turner J, for example, said it will never be sufficient for a constable to say:

> I may be going to arrest you; I do not yet know; but I will restrain you in the meantime while inquiries are being made.[9]

The problem is that to confine s 66 to matters arising under the Transport Act 1962 will not, of itself, deter the zealous constable saying he stopped a vehicle to see whether it was in a safe and roadworthy condition, when *in fact* he stopped it because he knew of the driver's past convictions for receiving stolen property hoping that he might at that time have been carrying stolen property.

The zealous constable might be sufficiently deterred should good cause to suspect a breach of the Act be required to invoke s 66. One questions why this should be dispensed with as the usual limitation on powers in penal statutes affecting a citizen's liberty. Experience on the roads does not indicate that Ministry of Transport efficiency in policing the Transport Act 1962 would be impaired by prefacing s 66 with this condition — law enforcement officers are generally too rational or too busy to intervene in the absence of cause.

Checkpoint campaigns and random stopping would no longer be legal; but if special powers for detection of excess breath/blood alcohol levels were thought to merit an exception Parliament might reconsider the Minister's proposal in the Transport Amendment Bill (No 4) 1983. Special powers might also be granted to authorise checkpoints or roadblocks in emergency situations, for example, in aid of legitimate civil defence measures or where the public interest is genuinely threatened by subversive or criminal activity. The objection remedied is that no longer would fishing expeditions in the hope of purloining evidence of some indeterminate offence be legally permissible.

One problem would still remain. Even unlawfully obtained evidence of crime is technically admissible, and the rarely-invoked civil action for damages against the police may not tell sufficiently on the police officer intent on obtaining a conviction. The problem is compounded by the decision in *R v Sang* ([1980] AC 402) in which the House of Lords would not be persuaded that a trial Judge has a residual discretion to strike out evidence of crime unfairly or improperly obtained. So perhaps it is a salutory thought that whatever limitation were imposed on s 66 we would still need to trust benignly in our police force, and vainly hope that not even the individual officer will forget that it can never be his duty to breach the law.

D Conclusion

This paper is concerned to show that s 66 is a vehicle for the exercise of powers that are neither necessary nor, in the interests of the individual, desirable. Their mere existence invites their use, as the call for extended checkpoints demonstrates. Let it be clearly understood, there can be no higher public-interest justification for the type of checkpoint operation currently being conducted in the northern coal-mining districts of England. Whatever one believes of the miners' cause, the indiscriminate denial of free passage to deal with union pickets illustrates the slippery slope once the principle of provisional arbitrary restraint is accepted for any purpose. In New Zealand, rather than extend the limits of the law, they should be confined at least in accordance with the above proposals. If we are to have extraordinary police powers by dint of the Transport Act 1962, let the onus of proof presently be on those advocating the public need. □

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1 The adjective is borrowed from *Blundell v Attorney-General* [1968] NZLR 341 (CA) where one of the defences on behalf of the police was that the holding of the plaintiff was in duration "provisional only"; discussed infra.

2 *L'Esprit des Lois*, Ch XI, pp 3-6.

3 *The Week*, Television One, 3 January 1984. A transcript of the interview could not be obtained owing to lack of usual television facilities over the New Year period. However it can be confirmed that the spokesman referred to the high incidence of suspected stolen vehicles and stolen property observed in vehicles during routine Ministry of Transport work.

4 Unreported, Masterton 29/6/83, M3/83, O'Regan J. For a case comment on *Roper* and *Maxwell*, see D L Bates [1983] NZLJ 231. The writer identified some of the legal and constitutional complexities involved, but did not discuss these.

5 See, eg *Rice v Connolly* [1966] 2 QB 414; *Kenlin v Gardiner* [1967] 2 QB 510. Contrast *Donnelly v Jackman* [1970] 1 WLR 562.

6 See Glanville Williams *Demanding Name and Address* (1950) 66 LQR 465; S A de Smith, *Constitutional and Administrative Law* (3 ed, 1977), at pp 443-52, but particularly p 444.

7 See, eg *Elder v Evans* [1951] NZLR 801.

8 Supra n 6, p 467, citing *Hatton v Treeby* as a case where the constable should have arrested the rider upon reasonable suspicion of having stolen the bicycle.

9 P 354. For the basic constitutional objection to "hav[ing] a look" pursuant to a search warrant obtained under pretext; see *McFarlane v Sharp* [1972] NZLR 838 (CA), p 844 per Turner P.

It's All Quite Legal

By George Luke

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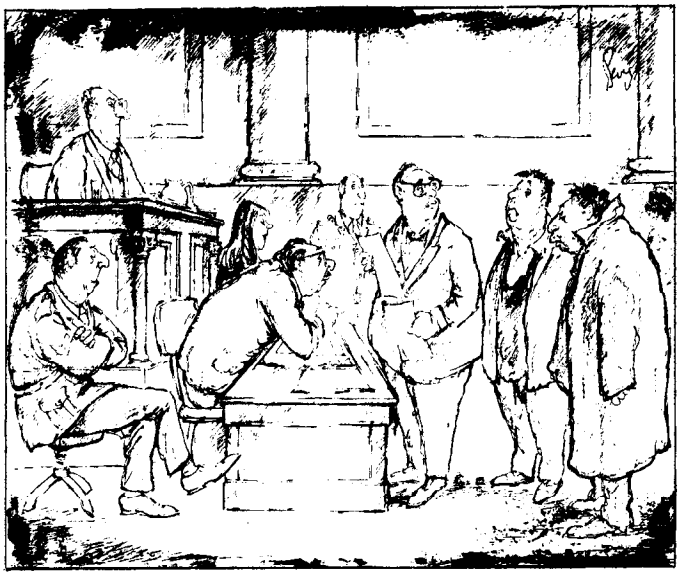
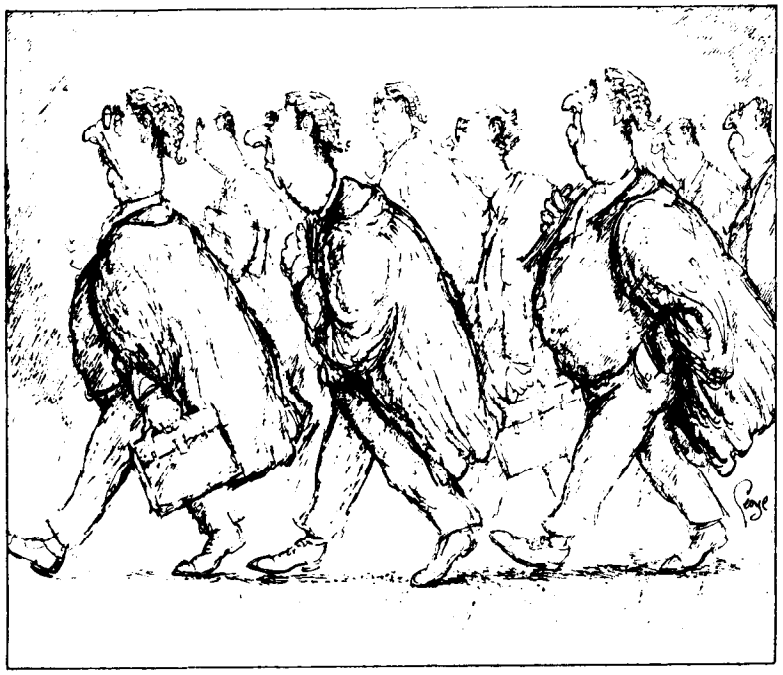
The court of law is a place where segments of life are selected and produced in dramatic form. Players assume roles with expertise — personalities change before your eyes — dialogue and speeches flow with a balanced rhetoric and all the scripts are artistically constructed. The performances are always original and the material has been filched for centuries by hack scribblers and playwrights of genius. It is in essence a theatre.



'Before the Beak'
(Auditioning)



In the corridors about the court one is fascinated by the flow of legal life. There is so much going on. Some actors hurry to the stage with great purpose — others check their scripts, test their voices for that right amount of dignity and suddenly assume court-room faces. The nervous newcomers to the theatre strive to remember their lines — all are eager to play their roles well.

Obituary

Professor Robert Quentin Quentin-Baxter

By Christopher Beeby, Assistant Secretary, Ministry of Foreign Affairs

With the sudden and untimely death in September of this year of Professor R Q Quentin-Baxter, New Zealand has lost an eminent public lawyer and a fine man. No other New Zealander has made such a valuable contribution to the development of international law. His work in the fields of constitutional law and human rights was also of exceptional value. He gave of himself unsparingly and with great concern for his students as a university teacher. He was widely respected in New Zealand, in the South Pacific and at the United Nations.

All those who worked with Quentin-Baxter, whether at home or abroad, had the highest regard for his scholarship, for his formidable grasp of complex legal issues, for his wise judgment and for his insistence that the solution to individual problems must have regard to broad principle. He was committed to excellence in everything he did. His colleagues and his friends also knew him as a man whose life was formed, at every point, by a deep sense of integrity, by warmth and by humour.

All these qualities distinguished a highly successful and varied career.

Quentin-Baxter graduated in law and philosophy from Canterbury College and was awarded, in 1947, the New Zealand Universities Senior Scholarship in Law for ex-Servicemen. For the next two years he was assistant in Tokyo to Mr Justice Northcroft, the New Zealand member of the Military Tribunal for the Trial of Far Eastern War Criminals. He then joined the diplomatic staff of the then Department of External Affairs and influenced heavily the formative years of that recently established Government agency. From 1949 to 1968 he served in Wellington, Ottawa, New York and Tokyo. From 1964 to 1968 he was an Assistant Secretary in the Department with special responsibility for Legal, Consular and South Pacific Affairs.

During this period Quentin-Baxter made his mark as a New Zealand representative at international conferences. He attended some six sessions of the United Nations General Assembly, the 1949 Geneva Conference on the Protection of War Victims, the 1958 and 1960 Geneva Conferences on the Law of the Sea, the 1958 and 1966 Commonwealth Law Ministers Conference, annual sessions of the United Nations Commission on Human Rights (to which he was appointed New Zealand Government representative in 1966) and meetings of the South Pacific Commission (of which he was the Chairman in 1967).

At these and other meetings Quentin-Baxter became widely known for his diplomatic, negotiating and drafting skills.

In 1968 he was appointed Professor of Jurisprudence and Constitutional Law at Victoria University of Wellington and resigned from the Department towards the end of that year to take up the chair. A busy round of academic duties did not prevent him from enlarging greatly the contribution he had already made as a practitioner of international and constitutional law.

Having completed his term on the United Nations Human Rights Commission, of which he was the Chairman in 1969, Quentin-Baxter was elected in 1971 for a five-year term to the International Law Commission – the United Nations agency on which members serve in their personal capacities, having the principal responsibility for the codification of progressive development of international law. He was subsequently re-elected to the Commission for two further terms and remained a member at the time of his death. He also continued to attend regularly the Sixth (Legal) Committee of the United Nations General Assembly.

In 1973 and 1974 Quentin-Baxter led the New Zealand team to the International Court of Justice to present the case against France in respect of its atmospheric testing of nuclear weapons in the South Pacific. In 1974 and 1977 he led the New Zealand delegation to the diplomatic conference called to update the law for the protection of victims of armed conflict.

In less formal ways Quentin-Baxter remained an invaluable source of advice and assistance to what had become the Ministry of Foreign Affairs. He was President of the New Zealand Institute of International Affairs.

As senior member of the International Law Commission Quentin-Baxter played a large and constructive role in all aspects of that body's work. For the past several years he had made a major contribution as the Commission's Special Rapporteur on one of the most demanding topics on its agenda, that of international liability for injurious consequences arising out of acts not prohibited by international law. Anyone who would like to learn more of the process by which an international lawyer with great skills comes to grips with a complex subject calling for both innovation and the widest possible knowledge of existing international law and state practice could do no better than study Quentin-Baxter's five written reports and the record of his oral comments to the Commission on this specialist topic. They constitute

Christmas Message to the Profession

From the Attorney-General

I do appreciate the invitation from the editor of the *Law Journal* to address a Christmas message to the legal profession.

As Minister of Justice I have been concerned this year to secure adequate funds to make improvements in the system of justice. Many of these improvements were long overdue. The condition of Court buildings in Auckland, Wellington and Christchurch have been of particular concern. In the Budget round it was possible to secure an extra $11 million for vote Justice. The increase was financed principally by an increase in various fees and charges levied by the Department. The cost of providing many of the services performed by the Department lags behind what it costs to provide them. A greater effort has to be made to recover the costs if improvements are to be financed. This is because there can be no increase in the deficit.

Much of the money from the increases, which are being levied from 1 January 1985, will go on Court buildings. Improvements in Offenders Legal Aid will take another large portion. Among the other changes for which provision has been made are:

- increases in jurors fees and witnesses expenses;
- adjustment in the levels of civil legal aid;
- increase in fees for the duty solicitor scheme;
- grants to community law offices;
- recognition of Court workers;
- establishment of a Law Reform Commission; and
- extension of the duty solicitor scheme to Children and Young Persons Court.

Next year will be challenging for the Profession. The move to introduce a Bill of Rights will demand the participation of all sections of our society. The Profession should be at the forefront of debate as its members are most likely to have considered the concepts and be familiar with the issues involved.

The concept of a Bill of Rights is a vague and mystifying matter for the majority of New Zealanders. It would be unfortunate if the Bill were least understood by those it is designed most to help.

In order for the Bill to achieve its purpose, open discussion is important — but what is more important is that those discussions and considerations be understood by the public.

It is undeniable that legal history abounds with injustices which have sprung from misunderstandings caused by the complexities of the law and its language. This Bill of Rights must not fall prey to that same misunderstanding.

The Profession will have an important role to play in applying its collective skills of analysis and advocacy to the provisions of the Bill of Rights. But this must not get in the way of a direct appreciation and understanding of the new law on the part of individuals.

The establishment of a permanent Law Reform Commission — also on the programme for the forthcoming year — offers the considerable opportunity for the revision of laws that are out of step with modern life and letters. It will not deal only with "lawyers' law" but with legal matters of more general impact. It will place law reform in New Zealand on a new and more viable footing.

This holiday period offers us all an opportunity to reflect on the role of law in our society and what changes should be made. I hope that these reflections prove fruitful and that lawyers face the New Year refreshed.

Geoffrey Palmer
Attorney-General

a lasting contribution to the codification and development of international law.

That kind of assessment of the value of Quentin-Baxter's work as an international lawyer is very widely shared. The impact he had on legal work in the United Nations and the respect in which he was held by lawyers representing widely differing legal systems and political philosophies was reflected in the tributes paid to him in the Sixth Committee following his death. His colleagues there, who included the President and several other Judges of the International Court of Justice, referred to his great intellectual strength and honesty, his kindness, his humour and his achievement in handling his specialist topic on the Commission's agenda.

Had he lived Quentin-Baxter could have expected, were it not for his modesty, to have achieved the honour of election to the International Court of Justice.

Quentin-Baxter's work closer to home as a practising constitutional lawyer should also be remembered. As constitutional adviser to Niue from 1971 to 1975 and, with his wife Alison (who shared in all his work), to the Marshall Islands from 1977 to 1980 he played a critical role in the development of democratic self-government in those countries. His work in developing the constitutional relationship between New Zealand and the Cook Islands was hardly less significant.

More recently, Quentin-Baxter had turned his mind to the question of a Bill of Rights for New Zealand. He had begun to explore, in a way that only he could, in public statement and private discussion, the relationship between a measure of this kind and the legally binding international commitments relating to human rights already entered into by New Zealand.

As a public lawyer, diplomat, scholar and teacher of the highest quality, Professor Quentin-Baxter will be greatly missed. □

The Treaty of Waitangi — its legal status

By E J Haughey, MA, LLM

The Treaty of Waitangi is a short document which for its size has generated much argument. In the following brief article E J Haughey, a former Crown Counsel and a sometime Judge of the Maori Land Court looks at its legal status. The article was originally written in the form of a letter to the Editor of The Listener, *was rejected as too long for a letter and not suitable as a small feature article. For some earlier articles on the Treaty see Molloy [1971] NZLJ 194, O'Keefe [1983] NZLJ 136 and Williams [1983] 214.*

The Treaty of Waitangi has always been the subject of extensive controversy. On the one hand it has been claimed that this compact amounted in the eyes of International Law to a valid and legally binding treaty, whereby the Maori people "ceded" their sovereignty over New Zealand to the British Crown in return for the assumption by the Crown of certain specified obligations. On the other hand the treaty has been denounced as a fraud and a mere sham. In my submission neither of these extreme points of view can be sustained.

It is true that pursuant to the first article of the treaty the Maori signatories to it purported to "cede" to the Crown all the "rights and powers of sovereignty" exercised or possessed by them "over their respective territories as the sole sovereigns thereof". It is reasonably clear, however, when the relevant authorities are examined, that the Maori Chiefs in question were not judically competent to do this; and that the title to British sovereignty over the country rests on some other basis. In any event in constutional practice New Zealand was always classified as a "settled", not a "ceded", colony.

In *Wi Parata v The Bishop of Wellington* (1877) 3 JR (NS) SC 72, the Chief Justice, Sir James Prendergast, in delivering the judgment of himself and Richmond J, stated quite categorically:

> So far as [the Treaty of Waitangi] purported to cede the sovereignty . . . it must be regarded as a simple nullity. No body politic existed capable of making cession of sovereignty.

See also, Dr N A Foden, *The Constitutional Development of New Zealand in the First Decade, 1839-1849*, and *New Zealand Legal History, 1642-1842* (an abridgement of his unpublished doctoral thesis entitled "Genesis of New Zealand's Legal History)"; Professor James Rutherford (a former Professor of History at Auckland University), *The Treaty of Waitangi and The Acquisition of British Sovereignty in New Zealand, 1840;* Robson & others, *New Zealand, The Development of Its Laws and Constitution*, 2 ed 1967, pp 3-5; Sir Kenneth Roberts-Wray, GCMG, QC (who was for many years the Legal Adviser to the Commonwealth Relations and the Colonial Offices), *Commonwealth and Colonial Law* (published in 1966); and A P Molloy, "The Non-Treaty of Waitangi", [1971] NZLJ 194.

In his monumental treatise in Commonwealth Law, Roberts-Wray summed up the position as follows:

> [The] original status [of New Zealand] was obscure. That the Treaty of Waitangi should be regarded as the root of title by cession has been strongly contested and in any case did not affect the South Island. The facts appear to point to *acquisition by settlement, perfected by annexation* (emphasis added). *op cit* pp 888-889.

The Treaty of Waitangi was, however, no fraud or sham. The second article thereof (which is clearly severable from the first) was specifically designed to protect the proprietary interests of the Maoris in their lands and other national resources. By this article the Crown confirmed and guaranteed to the Chiefs and Tribes of New Zealand and to the respective families and individuals thereof the full, exclusive, and undisturbed possession of their lands and estates, forests, fisheries and other properties which they might collectively or individually possess, so long as it was their wish and desire to retain the same in their possession. The article, however, then went on to provide that the Chiefs yielded to the Crown the exclusive right of pre-emption over such lands as the proprietors thereof might be disposed to alienate at such prices as might be agreed upon between them and the persons appointed by the Crown to treat with them in that behalf.

Although the Treaty of Waitangi has itself never been incorporated in the ordinary law of New Zealand the provisions of this crucial second article thereof have in fact been legally implemented by the great mass of legislation which has from time to time been enacted by Parliament in respect of Maori land — a matter which has been adverted to by the Courts on a number of occasions.

In particular, in his judgment in the Rotorua Lakes case *(Tamihana Korokai v Solicitor-General* (1913) 32 NZLR 321, 355 Chapman J pointed out:

> From the earliest period of our history the rights of the Natives have been conserved by numerous legislative enactments. . . . The various statutory recognitions of the Treaty of Waitangi mean no more, but they certainly mean no less, than these recognitions of native rights.
>
> The due recognition of this right or title by some means was imposed on the Colony as a *solemn duty* (emphasis added). That duty the legislature of New Zealand has endeavoured to perform by means of a long series of enactments culminating in the Native Land Act 1909 [now the Maori Affairs Act 1953].

By the third and final article of the Treaty of Waitangi the "Royal protection" of the Crown was extended to the Maori people and they were granted "all the rights and privileges of British subjects". They have accordingly long enjoyed full citizenship in the new nation, which was soon to replace the primitive tribal communities of the past, and have been able to participate in all the economic and other advantages and benefits which the advent of European settlement brought to the country. □

The Speluncian exploration of New Zealand

By N J Jamieson, Otago University

Fuller is famous for his *Case of the Speluncian Explorers* in [1949] 62 Harvard LR 616. The facts of the case are quite simple. Some explorers get stuck down a cave where they turn cannibal for as long as it takes to rescue them.

Fuller's facts are not so different from those in the celebrated case of *R v Dudley & Stevens* (1884) 14 QBD 273, where two shipwrecked mariners survived by killing and eating a cabin boy. Eventually the mariners were rescued – if only to stand trial and be hanged for murder.

Until faced with the same crisis, none of us can be quite sure of not turning cannibal. The cases – one hypothetical and the other actual – search out untried areas of our own lives. Experience of human nature teaches us that it is far safer to go boating or potholing with someone who is openly unsure of what he would pinch to eat or eat at a pinch than one who loudly professes to keep within a disciplined diet. As a matter of psychoanalytic jurisprudence those who can be vociferously indignant, when safely on shore or above ground, of any suggestion that their appetites could degenerate under stress, merely evidence a lack of imagination. It is just that lack of imagination which incapacitates such people from seeing beyond the present, and therefore brings about their depravity under stress.

Deciding differences

Fuller poses the problem of cannibalism in the cave as an issue for jurisprudence at large. It is therefore important to consider the juristic relevance of several other matters. In the first place the five explorers are all members of a society. They thus share common aims, acknowledge common courtesies, and recognise the same conventions. In the second place, they know something of what it is to be able to recognise and decide differences among themselves. It is this ability to decide differences, rather than merely adhering to a common purpose, that marks out a civilised from an uncivilised society. The extent to which it is developed to promote and allow for differences within the context of a common purpose indicates the level of civilisation – static or dynamic. And of course civilisations, like individuals turned cannibal, degenerate in times of war, misgovernment and other social stress, back down the ladder of human evolution.

Whether the speluncian explorers know much of how to make rules is a moot point in the morality of law. They can cast dice, and so use change to determine issues. And they can bind the unwilling to meet death in the interests of the willing – man's ultimate sanction in the mechanism of administering human affairs. But whether they do indeed possess an underground legal system seems to depend not only on their attempt at making rules, but on the relationship of their attempt underground to what is going on above.

The speluncian explorers can communicate with the outside world. Radio is no real delay. But the outside world cannot obtain their immediate release, nor enable their survival. Those above ground are not only physically remote but intellectually standoffish. They decline to advise the explorers on the medical, legal, or ethico-religious consequences of the explorers' proposal to kill and eat one of their own number to enable the others' survival. This refusal is important, for it signifies that those above ground recognise the autonomy of those underground. Can those above ground go back on the recognition, afforded by their failure to exercise initiative to decide this issue, once the explorers are rescued?

It was Whetmore's scheme to revert to cannibalism in the cave. Whetmore had status within the speluncian society, for he too, as we all are within some sort of society, was trapped. On this account, there are those who would see it just and fitting that it was Whetmore who was killed and eaten to provide the necessary sustenance for his fellow explorers.

That crude conclusion is unfortunately complicated by the fact that before dice were cast to determine whom should be sacrificed Whetmore resiled from his own proposition. Nevertheless, he had no objections to the fairness of someone casting the dice on his behalf. The throw went against him. He was then put to death and eaten by his companions in accordance with what some legal philosophy glibly calls "the rules of the game". In the same way that Rozanof makes his priest ask of a caller "Funeral or wedding – which will it be", how can we truly decide whether Whetmore's death was martyrdom or suicide?

Legal morality

The morality of law, as it affects the *Case of the Speluncian Explorers* fortunately promises to provoke unending discussion. Should Whetmore's fellow explorers be convicted for the crime of murder? Should executive clemency be extended to reprieve each of the convicted defendants from the death sentence?[1] Perhaps we can see the outcome to such questions more clearly when we consider the *Case of the Human Sacrifice* in the *State v Williams* (Spring Term 2383)?[2]

The *Case of the Human Sacrifice* was decided not in New Zealand (nor in *Newgarth* as was Fuller's *Speluncian Case*) but in the *New* States, thus again emphasising the inability of new nations to get away from old problems. Reading from the report of the Supreme Court in the

New States case ". . . James Williams, the head priest and 'Prophet on earth' of the New Whole Earth Church (New Mexico Division) killed Sarah Reinhart and Roger Reinhart by severing the blood vessels of their throats with a ritual steel blade." This was done on May 1, 2381, which makes this, like Fuller's case, another hypothesis in jurisprudence.

Of course, issues of life and death, whether they be murder, abortion, euthanasia, or suicide, go on constituting the crises of controversy in jurisprudence. This is particularly so with Fuller's *Case of the Speluncian Explorers* whose action is explicitly underground, beneath the surface (or so it appears) of reality, in a cave.

The notion of the underground is one that has been very fully explored by Dostoevski, but it is more to Plato that we are indebted for the philosophy of the cave. The cave, no doubt symbolising the world-womb, and the shadows of reality projected by the fire of life on its far wall, go on providing a vital metaphor by which to explain our learning experience.

Rather than follow Fuller's footsteps by searching for truth and justice along the well-blazed trail of abstract jurisprudence, however, this paper takes a detour into New Zealand's legal history. It is true that the way of life established by our legal system in God's Own Country may appear quite mundane, and what has happened in the past may be brushed aside today as being merely legal history, but what we have to say about the beginnings of our legal system can be understood only in the context of the morality of law conveyed by the *Case of the Speluncian Explorers*. It is only in this context of abstract jurisprudence that our Treaty of Waitangi can be seen to require the fullest possible recognition in constitutional law. The alternative is to keep alive in practice a dark and evil underground running counter to what we profess on the surface to be our faith in New Zealand's legal heritage.

New Zealand background

Emigration to New Zealand round the Cape in 1840 took three months of hazardous sea voyage. That was bad enough, so perhaps Maori historians will overlook pakeha condescension at not making the full comparison with the Great Voyages. A hundred or so years later the voyage still took the best part of six weeks. That was more than long enough for a young mother harassed by the real risk of her toddler falling overboard.

These were some of the continuing physical problems. Even in 1952, for example, the Shaw Saville emigrant ship *Tamaroa* could still run very low on food en voyage to New Zealand. Just as significant, however, no less for the history of ideas as the practical consequence of whether the emigrant would remain in New Zealand, were the mental attitudes. No one can understand, unless outward bound forever from Hawaiki, Britain, or Apia, what it means to sever oneself permanently from one's homeland. The generation of original Hawaikians is gone. Those who came from Britain in emigrant ships are quickly passing. An airfare from Apia can be the victim of a resurrected racial discrimination. Nevertheless, it was what came to New Zealand by way of ideas in the head and the initiative to put them into physical action that goes furthest to explain New Zealand's legal heritage.

One can see this clearly only by comparison. The writer still has relatives in Britian who regard space travel as more feasible for themselves than trying to hang onto the underside of a flat earth in the antipodes. This mental attitude of "hanging on", whether brought from Hawaiki, Britain, or Apia could work very well in giving a good grip on something new, but it could also prove disastrous if all it meant was having one's hands full in refusing to give up what one was carrying.

Physical problems and mental shortcomings manifested themselves most clearly in the nineteenth century crisis of communication. Physical exploration had exceeded the possibilities of physical communication. Our air and space travel today is made possible by reason only of overcoming this crisis in communication. But in the nineteenth century it is the existence of this crises which explains most of Britain's imperial and almost all of New Zealand's early legal history.

Twentieth century technology eroded the obvious need for effort in effecting communication. Whetmore's radio is now as much a hindrance as a help. We are disabled from understanding our own history, no less than we are incapacitated from coping with our own contemporaneousness. The result of today's technolgy is to fill our lives with as many chitchats of constitutional history, this or that view of Waitangi, as we have commentaries, this or that view of ministerial responsibility, in contemporary affairs. The result of what passes for universal education, is that the real issues, those which ought to be determined as matters of principle, can be avoided by those who are devious enough to use the trees to hide the wood. One has only to keep talking, or keep writing, to disguise the dearth of ideas in our own age. None dare stop lest everything we are misguided enough to hold dear to us collapse. This is as true of any writer who feels as much a captive of his own times in needing to point this out as it is for anyone else. One can only hope to demonstrate to some new age the dearth of ideas in one's own age by perfecting the disguise. Only then will this age be obvious for what it is, and so be superseded by what ought to be.

The nineteenth century, in which the foundations of New Zealand's legal history were laid, was, unlike ours which preoccupies itself with material things, one which was devoted to ideas. Intellectual conflict, as for example between darwinism and creationism, was intense. Idealism ran rampant in a way which we can never understand once having confused progress with materialism.

The nineteenth century devotion to ideas paradoxically owes a great deal to difficulties of communication. In the context of New Zealand's legal history, which was intensely idealistic, this was partly because it took a ship's crew three months to convey one idea to the other side of the world, and not less than three more months to get a response to it. Communication within the so-called civilised world was only relatively better — not as nearly instantaneous as ours where the odd "hmm" or "eh" is taken to constitute a breakdown in communication. Thus in our own times when the Japanese replied "mokusatsu" to the Potsdam ultimatum, the Allies went ahead, and, ignoring what was probably a request for time to allow further consideration, dropped the atomic bombs on Hiroshima and Nagasaki.[3]

The nineteenth century, unlike our own, was fortunately privileged to have more time for thought. Button-pushing had not yet assumed the

status of a fine art, and space invaders had not elevated the conditioned response of Pavlov's dogs to the status of scholarship. Nevertheless, the paradox was that nineteenth century thoughtfulness was as much disguised as it was engendered by difficulties in communication. It is this disguise that, because of our own shortcomings, we fail to see through.

In the nineteenth century, the antipodes were regarded in the European crisis of communication variously as a womb or a tomb. The missionaries regarded New Zealand as the womb of a new world. Isolation from degenerate Europe would enable the evolution of a Christian Utopia. The result is possibly Erewhon. Other Europeans regarded the other side of the world as a refuse midden. We were to afford relief both to Britain's overflowing prisons, and those dispossessed by her agrarian and industrial revolutions. Out of the first hardly humanitarian concern grew the penal colony of New South Wales, which was later to be given dominion over New Zealand. Parremata Barracks near Sydney was not only the seat of New Zealand's first government, but the intended tomb for many antipodean founding fathers outlawed from the old country to be buried alive in Australia and New Zealand.

Emigration

The second concern, being for poor but honest folk, gave rise to the New Zealand Company and similar enterprises encouraging honest to goodness emigration. The driving force behind these emigrants can be seen to be their cynicism for the old world. Where that cynicism, being of a worldly nature, predominated over idealism, it was rarely enough to make Australians or New Zealanders out of them. Once their fortunes were made, give or take a few intervening generations, it was back to the old country to swank it over the stick-in-the-muds.

The third concern which brought settlers to Australia and New Zealand from all walks of life, whether as convicts of conscience, wee-free worshippers, or those who must simply cross the line or explore a cave simply because it's there, held the most formative influence in Australasian legal history. Their was the idealism to send down new roots born of their experience of, and dissatisfaction with the old. Interestingly enough, it was with these idealists that the old country found most fault. Britain bitterly opposed them. That the old country clearly saw most challenge to its own authority in the idealism of this group of early settlers is borne out by the legal history of the way in which Britain invoked the Treaty of Waitangi to end the attempts of the Kororareka Association and the Port Nicholson settlers to secure law and order.

We will see that only if we are open-minded enough to evaluate our legal history of these affairs against the touchstone of Fuller's speluncian exploration. And we must remember that the three categories of settlers coming to New Zealand, for the first part ex-convicts and runaway sailors, secondly, poor but honest folks who sought a better world in which to bring up their children, and thirdly, poets, prophets and philosophers, are not mutually exclusive, one of another. There is now and again for example the odd poet who marries and even manages to bring up children just as there are honest men convicted. This complexity of early New Zealand society meant that institutions, as different as those of Church and State ought to be according to their definition, more often agreed as disagreed over the problems of New Zealand's early legal history. It is perhaps a moot point whether it was their agreement or disagreement that caused our early settlers to overlook having any sort of established church here in New Zealand.

In either event, whether seen as a womb or a tomb, New Zealand in 1840 corresponded to Plato's cave. Such was the crisis of communication that the reality of western civilisation could only be reflected in a grotesquely distorted way by the shadows of convict settlements and missionary zeal on the antipodean back wall.

There are those who will oppose this underground view of reality. They would have us look directly into the flames of legal history, seeing there in the flickering furnace which consumes the past, a truer account of events than the shadows of the present indirectly portrayed through jurisprudence on the back wall. This relates to one's view of fancy. This, as earlier mentioned, is often the only safeguard by which facts retain their status as facts, and man, in being pre-eminently the thinking animal, retains his intellectuality by appreciating biological survival only as a means to an end, and not that which would justify cannibalism were survival an end in itself.

As to the importance of fancy, therefore, in the evolution of those ideas that equate with the evolution of man, it is said[4] that the Greeks to whom we are indebted for western civilisation were in turn indebted to the very extravagance of oriental fancy to free themselves from the limitations of what they could see with their own eyes. How fanciful it is to compare New Zealand's legal history with Plato's cave and our early settlement with speluncian exploration needs to be assessed by considering the hard facts of New Zealand's legal history. The comparison will open our eyes to a new reality lying underground in the roots of our legal system.

Legal history

As to what are the hard facts of New Zealand's legal history must allowably express a great deal of inconsistency. This is one of the first and most important points that needs be made. It is all very well to acknowledge the crisis of communication in New Zealand's early legal history, but we hardly practise what we preach if we expect human intentions as they were then expressed and world events as they then happened to be consistent. Even today we have, like Whetmore's friends turned cannibal, radio communication with the old country, but the European Economic Community and the Commonwealth are still as much worlds apart as the spelunican explorers and their would-be rescuers.

Commonwealth relations today make little headway against membership of the European Economic Community, so what should we expect of communications between Britain and New Zealand in 1840 except a situation much more at odds. To make a coherent legal history of the expansion of the common law to New Zealand in the mid-nineteenth century without taking account of the communication gap of nearly three months is a psychological rationalisation that bodes ill for historical accuracy. And if we would avoid the intellectual cannibalism of being made to eat our own words we ought to show some imagination in looking beyond the present when we are caught by the

hard facts of inconsistent history that would otherwise entomb us underground.

On this account there ought to be no real surprise that while Britain was by Act of Parliament formally disclaiming all claims to sovereignty in New Zealand, the settlement of New Zealand by English, Welsh, Scots, and Irish was practically in full swing. To disclaim sovereignty is to renounce Cook's earlier exploration and in turn to contradict Hobson's later proclamation of dominion over the South Island on the grounds of discovery. For Britain to grant dominion over New Zealand to a penal colony such as New South Wales is hard enough in the abstract without running counter to the so-called Grand Experiment whereby Busby was appointed as a diplomatic representative between Britain and New Zealand as independent sovereign states. And of course the paradoxes inherent in the Treaty of Waitangi, like those in Magna Carta, require a full and separate treatise.

Nevertheless these are all still fanciful comparisons, mere metaphors by which to indicate that the same problems of survival, physical isolation, indecision, and failure of communication beset both Fuller's *Spelunican Explorers* and the settlement of New Zealand. If this were all, then we might allow the point of comparison merely as a party-piece, but there is much more than this of New Zealand's legal history that is seriously at stake.

This can be seen by reflecting once again on the outcome of the *Spelunican Case*. When the rescue of the explorers was finally effected we find that human society above ground was not prepared to countenance cannibalism even underground. This conclusion was reached, and sentence of death for murder on the speluncian explorers passed, notwithstanding that the cannibalism underground had been (apparently) authorised underground in accordance with (the attempt of the explorers to make) rules. The underground attempt to make rules would not be accorded the authority of law above ground. It was no matter that the rules below ground were the only means whereby the trapped explorers could meet their biological need for survival. It was also irrelevant that those above-ground were impotent to rescue or relieve those below-ground. In neither case could necessity be argued in defence.

It is on this score that we are forced to recognise the early exploration of New Zealand as spelunican. The recognition is due on two counts. Because each count refers to a vastly different state of juristic affairs we have a twofold confirmation of this most important phase in New Zealand's legal history.

In the first place Britain opposed the vigilante movement of the Kororareka Association by which a group of settlers in the Bay of Islands drew up their own rules in an attempt to administer what they saw as necessary by way of law and order. At least one person was tarred and feathered — his death being ascribed, doubtless euphamistically, to drowning. Britain, although renouncing territorial sovereignty over New Zealand, would not allow this sort of initiative to be exercised in establishing an underground legal system. All species of lynch-law were distinctly un-British.

In the second place, Britain still opposed the vastly different attempt of the Port Nicholson settlers to negotiate both among themselves, and with the Maoris as an independent people, some semblance of constutitonal rules with which to govern themselves. This came to a head in the case of *Pearson v Baker*, a fairly full account of which is given, as of the British response to attempts at self-government by the Kororareka Association, in Foden's *Legal History*.

There is no doubt, therefore, that the early exploration of New Zealand was speluncian, and was so regarded and dealt with accordingly by the British authorities. Neither the members of the Kororareka Association or the Port Nicholson enclave had any alternative but to devise rules of their own for the maintenance of law and order. Busby's Grand Experiment, backed at least in principle but not with finance[5] by the British Government could never be called a sham. It was too naively idealistic and therefore ingenuously genuine for that; but it never brought about in practice anything like the legal system it aspired to promote in theory. And so, like the speluncian explorers, the early settlers of New Zealand saw themselves as having no alternative but to make their own rules.

We shall content ourselves in passing to note that the counter-thrust of the British Government in arguing that no British subject could validly exercise the initiative taken either by the Kororareka Association or the Port Nicholson settlers does not hold water. In the final analysis this argument is reducible to a concept of personal, as opposed to territorial law. The barely medieval notion of a person carrying his own legal system about with him had long been rendered obsolete by the evolution of the common law. Nevertheless, this outmoded notion still persists today in trying to account for the expansion of the common law to Australia and New Zealand. It is unfortunately based on a misunderstanding of Blackstone's doctrines.[6]

Treaty of Waitangi

The consequences of the early spelunican exploration of New Zealand by no means finish in 1840. It is true that Waitangi brings about the ignominious end of the Kororareka Association, just as for vastly different reasons it provokes the virtuous indignation of the Port Nicholson settlers and the end of their attempted constitution. The shadows of both these bands of speluncian explorers nevertheless still flicker through the reality of legal history on the continuing back wall of Plato's cave. This is so, because it is the speluncian exploration of New Zealand more than any other understanding of our legal history, that enlightens the present legal status of that most hard-done-by yet well-intentioned of legal documents, the Treaty of Waitangi.

This is the very point at which New Zealand's legal history ceases to be speluncian. On 6 February 1840 the British Crown took responsibility for the dilemma of Government in New Zealand. It will be recalled that in Fuller's hypothesis, those representing law and order above ground in the *Spelunican Case* refused to take responsibility for the administration of law and order below ground. When the speluncian explorers asked the above-ground authorities for help in their juristic, legal, and ethico-religious problems, the pundits stood clear.

Now it is true that for almost forty years our legal history of British non-involvement in New Zealand explicitly followed that spelunican parallel. But with the Treaty of Waitangi that period of legal history came to an

end. On 6 February 1840 the British Government took a stand in relation to New Zealand which the Crown in right of New Zealand can never renounce without revolution.

The status of our Treaty is one of fundamental law. It derives this status from the stance taken by the British in responding with the Treaty to the attempts at self-government by the early settlers in the absence of any viable alternative. Having made that Treaty and followed it up with proclamations of sovereignty the Crown is bound by it in a way very different from the above-ground authorities (whose silence was quite equivocal) in the *Case of the Speluncian Explorers*.

One of the most fertile of contrasts between Fuller's hypothetical case and our own legal history to explain the status of our Treaty in fundamental law occurs in this area of communication theory. Fuller's hypothetical case carried with it the technological advantage of Whetmore's two-way radio. Yet this is the very case in which an irretrievable breakdown in communication takes place. Those above ground simply refuse to answer or express their views on the pressing questions asked of them by those below the ground. On the other hand, by the Treaty of Waitangi the British gave what in the context of the Kororareka and the Port Nicholson Constitution is a clear and unequivocal answer. The paradox laid bare by the comparison lies in the fact that where avenues of communication are easy few people bother, but where communication is difficult most people exert themselves. A great deal of our present perplexity over the Treaty of Waitangi results from our underestimating the difficulty of its nineteenth century communication.

The status of the Treaty of Waitangi, whether or not we would wish to see it re-affirmed or incorporated into municipal law, can never be repudiated, dismissed, belittled or ignored except at the cost of undermining the foundations of our legal system. The Treaty is neatly embedded as a result of our speluncian experience in New Zealand's fundamental law. Whatever difficulties we may have in interpreting its text do not alter its function as the keystone to our legal system.

Antipodean legal history in New Zealand first grew underground. That has immense significance in determining the autochthony – that is to say, where the real roots lie – of the New Zealand's legal system. By the way in which the Treaty of Waitangi was executed as a direct response to the speluncian exploration of the Kororareka Association and the Port Nicholson settlers, the Crown has no alternative but to exercise its full and continuing responsibility under the Treaty in accordance with Fuller's morality of law. The Crown is bound in every possible way to honour the agreement. Why is it allowable, therefore, that a new generation of lawyers should grow up in New Zealand who have never studied jurisprudence – unless it be to make law subservient to politics?

Unlike Fuller's parable, what went on in New Zealand did so as a fact of legal history. It took place here on a grand scale. Indeed it is perhaps the grandeur of the scale on which it took place that makes us overlook it. But most of the juristic issues which Fuller identifies with his hypothetical case really happened in New Zealand. Plato's cave, and the shadows cast on its back wall, are irretrievably built into New Zealand's heritage of law for as long as we continue to search for justice. □

1 D'Amato, *The Speluncian Explorers — Further Proceedings* [1980] Standford LR p 466.
2 Pepper, *The Case of the Human Sacrifice* [1981] 23 Arizona LR 897.
3 Kazuo Kawai, *Mokusatsu, Japan's Response to the Potsdam Declaration* [1950] Pacific Historical Review, p 409.
4 M L West, *Early Greek Philosophy and the Orient* (Oxford, 1971) p 242.
5 Busby died both a bankrupt and a disillusioned man. The indebtedness of jurisprudence to Busby in New Zealand – a fit subject, says Foden, for a Maine or Bentham – has barely been touched on, far less repaid.
6 See *English Law but British Justice* [1980] 4 Otago LR 488.

Recent admissions

Barristers and Solicitors

Allen, J R	Wellington	15 March 1984	Hacking, R A	Auckland	2 November 1984
Bartlett, J J	Auckland	2 November 1984	Jeffries, M A	Auckland	2 November 1984
Bassett, I C	Auckland	2 November 1984	Langstone, C R	Auckland	2 November 1984
Burrowes, P	Auckland	2 November 1984	Leman, P J L	Auckland	2 November 1984
Casey, M M	Auckland	2 November 1984	Meech, B P	Auckland	2 November 1984
Chisholm, D J	Auckland	2 November 1984	Morris, L M	Auckland	2 November 1984
Clancy, R J	Auckland	2 November 1984	Ogles, K G	Auckland	2 November 1984
Clark, J S M	Auckland	11 July 1984	Oldham, P J	Wellington	9 August 1984
Commissaris, A T	Auckland	2 November 1984	Partridge, R J C	Auckland	2 November 1984
Cook, P A	Auckland	2 November 1984	Pasley, M P	Auckland	2 November 1984
Connor, D M	Auckland	2 November 1984	Perry, D N	Whangarei	12 October 1984
Corrick, S C	Auckland	2 November 1984	Presland, G B	Auckland	2 November 1984
Coyne, M J	Auckland	16 August 1984	Robertson, W K	Wellington	17 July 1984
Currie, D E J	Christchurch	8 November 1984	Slark, L	Auckland	7 August 1984
Dawson, G F	Auckland	2 November 1984	Smith, C A	Auckland	2 November 1984
Eustace, T H	Auckland	2 November 1984	Smith, S K	Auckland	2 November 1984
Farrelly, N W	Auckland	2 November 1984	Stanton, G L	Whangarei	7 September 1984
Goldsmith, F R	Auckland	31 May 1984	Tapsell, M A	Auckland	2 November 1984
Gordon, J C	Auckland	2 November 1984	Westwood, M E	Auckland	2 November 1984

Queen's evidence in New Zealand:

The case of R v McDonald

By C B Cato, Barrister of Auckland

> I believe that any right thinking person will recoil from the prospect of a man being put on trial on evidence coming from accomplices who, on their own admission, were not mere accomplices or secondary parties to the offence charged but were so implicated that in law, should their evidence be believed, they have to be regarded as equally guilty with the accused of the offence charged.
>
> Pritchard J in *R v McDonald.*[1]

The case of *R v McDonald* [1980] 2 NZLR 102 (CA); [1983] NZLR 252 (PC) has raised some important issues of principle and practice in relation to Queen's Evidence, in New Zealand. Queen's Evidence has received little academic consideration possibly because it would appear that undertakings of future immunity from prosecution have only been "sparingly given".[2] Yet, the subject is of considerable importance in the practice of criminal law and with the advent of the modern supergrass, in Britain the subject has merited greater attention.

In New Zealand, *R v McDonald* has sharpened our focus on the topic. For reasons, however, which will be advanced shortly, it is difficult not to view the admission of Queen's Evidence in that case with other than disquiet. The case is exceptional because the Queen's Evidence came from accomplices who were not merely secondary parties or accessories after the fact, but were in fact liable to prosecution as principals. In the final part of this article, some suggestions for possible legislative reform are advanced.

The facts of R v McDonald

McDonald was indicted for the murder of an unfortunate young woman, who had been shot, in all probability by accident or in mistake for somebody else, outside a nightclub. The shot came from the direction of a park across the road. With McDonald on the fateful night were two men, O'Connor and Speck.

The Crown's case against McDonald as to his involvement in the shooting rested almost entirely on the evidence of O'Connor and Speck, who were offered an immunity against future prosecution by the Solicitor-General in exchange for their evidence. Moreover, initially when interviewed at different times by the Police in connection with the shooting, O'Connor and Speck were offered, with the approval of a senior police officer, immunity from prosecution so long as they told the truth and were not the trigger man. On different occasions, they made statements to the Police which contained these offers of immunity.

The Solicitor-General subsequently signed undertakings against future prosecution which were dated the same day as O'Connor gave his evidence at depositions and the day before Speck gave his evidence. The conditions for immunity were that O'Connor and Speck give evidence in proceedings against McDonald on a charge of murder and did not take the privilege against self incrimination. So long as they complied, O'Connor and Speck were protected from prosecution as principals, as parties to conspiracy to murder, or as accessories after the fact.

The undertakings, however, were not shown to either man prior to their giving evidence at the preliminary hearing. Their Lordships, when dismissing McDonald's appeal against his conviction for murder, did say that this omission "was to be regretted". The judgment of the Board further records that Speck was not shown his undertaking until the voir dire held to challenge the admissibility of the evidence prior to trial and O'Connor was not shown his until after the voir dire. Both men gave evidence on the voir dire prior to the trial Judge, Pritchard J, ruling that the evidence was admissible.

The evidence of O'Connor and Speck implicated McDonald as the man who fired the trigger. McDonald for his part gave evidence denying this. He, however, admitted handling the rifle in question, but maintained that he had remained in a car and had not taken any part in the shooting. He denied any knowledge that a shooting would take place. There was some evidence that the telescopic sight fitted to the rifle was more consistent with a person having Speck's eyesight rather than McDonald's.[3]

The trial Judge, having admitted the evidence of O'Connor and Speck, directed the jury on the dangers of relying on their testimony, they being accomplices. In particular, he pointed out the possibility that when they came to give their evidence at trial they may still have been labouring under the effect of the inducement offered to them by the Police. The jury returned a verdict of guilty against McDonald of murder only "as a participant with others". As Lord Diplock noted in his judgment, "this must have meant that they did not accept beyond a reasonable doubt the evidence of either Speck or O'Connor that McDonald was the trigger man".

McDonald appealed to the Court of Appeal against his conviction for murder for which he received a mandatory life sentence. The grounds which are relevant here are first, whether the Attorney-General

or the Solicitor-General had the power to give an undertaking against future prosecution and secondly, whether the trial Judge's discretion had been exercised wrongly in favour of the Crown.

Before, however, proceeding to a discussion of these issues and related matters, it is necessary to consider something of the history of Queen's Evidence.

Queen's evidence prior to McDonald

The concept of an accomplice giving evidence for the Crown in the expectation of receiving a favour from the Crown is not new. It has its roots in antiquity. Prior to the advent of the modern police force the prospect of a pardon was a major incentive for the successful prosecution of many crimes. Thus an accomplice who gave evidence in relation to crimes under certain statutes, or pursuant to Royal Proclamation, would have a right to a pardon against future prosecution so long as he fulfilled the conditions under which the pardon was offered.[4]

The earliest form, however, of the modern concept of Queen's Evidence was the procedure of approvement.[5] An approver was an accomplice who, having been indicted of a crime, offered his evidence to the Crown against others in exchange for a pardon. To approve, however, was a dangerous business since if the witness resiled from any previous statement to authorities in the slightest degree, if it was considered he had not told the truth, or if his partners in crime were not convicted, the approver himself was executed. By the time of the famous case of *R v Rudd* 98 ER 114 (1775); 1 Cowp 331, in 1774, however, this procedure had fallen into disuse and had been replaced by a procedure, less fraught with conditions. Lord Mansfield, who was the Judge of first instance in *R v Rudd*, reviewing the history of pardons up until that time, concluded the ancient procedure of approvement was one of "great inconvenience".

In practice, the new procedure described by Lord Mansfield in *Rudd* as an "equitable practice" and further considered on appeal by eleven Judges of Gaol Delivery, was that a witness desiring to turn Queen's Evidence and already in custody, would, in exchange for the prospect of a pardon, agree to give evidence against his partners in crime. The witness, however, unlike an approver or one who had given evidence under Statute[6] or Proclamation, had no right to a pardon. He lived under the mere expectation that should he be subsequently indicted for the crime a pardon would be forthcoming. He could not, therefore, plead the expectation in defence of a future indictment.

All that he could do would be to ask for an adjournment or bail to enable a petition to the Crown to be presented. It was the responsibility of the trial Judge to decide whether to grant bail or an adjournment for the purpose of a petition being brought. If he decided that the witness had not given evidence truthfully, bail or an adjournment would be declined. It was the granting of bail or the adjournment of proceedings which was an indication to the Crown that the petition should be dealt with favourably. This was the procedure which would appear to have survived until the development of the *nolle prosequi* procedure, whereby an Attorney-General had the power to stay proceedings brought against a witness who had given evidence for the crown.[7]

Finally, in regard to *Rudd* it is important to observe that Lord Mansfield declined bail to Mrs Rudd to enable her to present a petition on the grounds that she had not given evidence truthfully at the trial against her partners in crime. This decision was upheld by the eleven Judges of Gaol Delivery. Mrs Rudd was tried but acquitted. This was of little comfort, however, to the persons against whom she had given evidence, since they were executed.

Little attention had been directed until comparatively recently, in England or in New Zealand, to the legality of the modern development of an undertaking against future prosecution. In *R v McDonald*, the Court of Appeal however, without citing any precedents, simply observed that, "the practice of giving immunity in this way has long been accepted in England and has been adopted from time to time in New Zealand". Although the legality of this procedure was not judicially questioned in England until 1975 in the case of *R v Turner*, (1975) 61 Cr App R 67, it would appear that in Scots law the concept of a guarantee against future prosecution was recognised at least by the time of the famous case involving Burke and Hare, at the turn of this century. Unlike the pardon in English law, however, an undertaking given to a *socius criminis* enabled him to plead the undertaking in defence of any further indictment.[8]

It is appropriate here to refer to the notorious case of Burke and Hare which is perhaps Scotland's most celebrated criminal case. Like McDonald, it involved an undertaking against future immunity given to principal parties, Mr and Mrs Hare, for their evidence against Burke of murder. In this regard, the crime was of the most callous kind. Burke and Hare had graduated from grave robbing to murder for profit, the bodies being destined for an Edinburgh surgeon, Dr Knox, who was not however indicated or prosecuted for his part in any crime.

The Lord Advocate, however, decided that Burke was the more infamous, although history would suggest that Hare was equally if not more culpable. Certainly, he was a very willing partner in these nefarious activities. However, Hare and his wife were given an immunity against future prosecution in exchange for their evidence against Burke, who was ultimately convicted and executed. Subsequently, to the protestations of the Edinburgh populace, Hare and his wife were released after the Lord Advocate honoured his undertaking and stayed a private prosecution brought by the relations of one of the witnesses against Hare. They left Edinburgh for unknown parts and disappeared.

Before leaving this case, however, it is of relevance to consider the strong admonition given by one of the trial Judges, Lord Meadowbank, before Hare gave his evidence against Burke. This passage is taken from the Notable British Trial Series:

> Lord Meadowbank – Now, we observe that you are at present a prisoner in the Tolbooth of Edinburgh; and from what we know, the Court understands that you must have had some concern in the transaction now under

> investigation. It is therefore my duty to inform you, that whatever share you might have had in that transaction, if you now speak the truth, you can never afterwards be questioned in a Court of Justice; but you are required, by the solemn oath you have now taken to speak the truth, the whole truth, and nothing but the truth; and if you deviate from the truth, or prevaricate in the slightest degree, you may be quite assured that it will not pass without detection; and that the inevitable result will be, the most condign punishment that can be inflicted. You will now answer the questions that are to be put to you.

The importance of this passage is that it forcefully illustrates how it was not lost on these Scots Judges that it was vital in the interests of justice not only that Hare give evidence but that his account be truthful so that any conviction obtained could be regarded as safe.[9]

Before proceeding to consider *McDonald*, it is important to consider the leading English case of *R v Turner* (1975) 61 Cr App R 67. Like *Burke's* case, this is a case of considerable interest. Bertie Smalls, a London criminal, having been approached by the Police for questioning in relation to robberies in London offered to disclose what he knew in exchange for what he termed, "a guarantee". Smalls said to the Police, "You give me outers and bail now and I'll give you everything on those jobs you told me about." The request by Smalls aptly illustrates the force of the words of Lord Abinger CB many years ago; in *R v Farler* (1837) 8 CP 106, 108:

> the danger is that when a man is fixed, and knows that his own guilt is detected, he purchases impunity by falsely accusing others.

The Police did not give Smalls any immediate assurance but subsequently in the form of a letter of undertaking, the Director of Public Prosecutions undertook not to adduce any evidence against Smalls in any criminal charge, other than murder, which he might disclose in conversations with the Police. It was agreed that Smalls would make a statement and that subsequently he would be indicted. If the statement was not considered to have evidential value, then it would remain secret. If, however, it did and Smalls was of "genuine and substantial assistance", and "was prepared to give evidence for the Crown", then no evidence would be led by the Crown in regard to the charges proffered against him.

Smalls subsequently made a statement as a result of which 26 people were arrested. The Crown honoured the undertaking by leading no evidence against Smalls and after initiating a prosecution, the charges against him were dismissed. At a series of trials, it was Smalls' evidence which led to the conviction of a number of persons for robbery with lengthy sentences of imprisonment.

It was argued in the Court of Appeal by analogy with *R v Pipe* (1967) 51 Cr App R 17 that Small's testimony was inadmissible. *Pipe* had emphasised that a co-accused could not give evidence for the Crown until proceedings had been concluded against him.[10] Lawton LJ, who delivered the judgment of the Court of Criminal Appeal on the admissibility of Smalls' testimony, considered that to accede to this argument would be to create an important change in the law relating to Queen's Evidence. In a carefully considered judgment, Lawton LJ, having referred to Lord Mansfield's judgment in *Rudd*, said that for centuries the law had, not without some distaste, admitted the evidence of accomplices of this kind.[11] It followed that in his opinion the *Pipe* principle should not be so extended.

However, Lawton LJ was not unmindful of the dangers posed by the admission of this kind of evidence. In his opinion, there was a discretion in the Court to exclude the evidence if he saw fit. Thus his ruling stands against any proposition that an offer of future immunity per se was sufficient to preclude a Court from ever excluding Queen's Evidence obtained in this way. Lawton LJ observed at p 79:

> If the inducement is very powerful, the Judge may decide to exercise his discretion, but when doing so he must take into consideration all factors, including those affecting the public. It is in the interests of the public that criminals should be brought to justice; and the more serious the crime the greater is the need for justice to be done. Employing Queen's Evidence to accomplish this end is distasteful and has been distasteful for at least 300 years to Judges, lawyers, and members of the public.

It was vital in the opinion of Lawton LJ to consider Smalls' position at the time he gave his evidence. What weighed heavily with the Judge in favour of admissibility was that at the time when Smalls came to give his evidence, proceedings had been effectively concluded against him. Lawton LJ said:[12]

> All the charges which had been preferred against him had already been terminated in his favour. By means of the absurd conspiracy charge, the prosecution had tried to give him immunity from prosecution for any offences he had disclosed in his favour.

It is important to further emphasise here also that Lawton LJ was extremely critical of the fact that there was no requirement in the letter of undertaking that Small's disclosures be truthful. Of the undertaking, it was said:

> It was ineptly worded. Condition 6 could have caused both the Director's professional staff and police officers grave embarrassment had it been decided to prosecute Smalls. Although it was implicit in the letter that the statements to be made by Smalls should be truthful, it was most unfortunate that there was no express reference in the letter for the need for Smalls to tell the truth.

In an article, "Immunity from Prosecution", [1983] Camb LJ 299, 317, fn 87, Mr A T H Smith criticises as a positive inducement for Smalls "to varnish the truth so as to be seen to be keeping his part of the bargain", that part of the letter of undertaking which read, "should Smalls refuse to give or refrain from giving evidence to the best of his ability . . . this statement should have no effect". A similar criticism can be directed at the

undertaking given to O'Connor and Speck which made no mention of the undertaking of future immunity being conditional upon true and frank disclosure. Yet we have seen from our discussion of the ancient procedure of approvement, the equitable claim for a pardon and the warning given by Lord Meadowbank to Hare, that future immunity was dependent upon the truth being told.

The legal issues in R v McDonald

(a) *The admissibility in principle of the evidence*

It was argued for McDonald that the Attorney-General, or the Solicitor-General in his capacity as a law officer, had no authority in New Zealand to give an undertaking of this kind. McDonald contended that the Solicitor-General's powers were derived exclusively from Statute and that s 378 Crimes Act 1961 only gave him authority to order a stay of proceedings after an indictment had been presented. The Court of Appeal, however, in reasoning approved by the Privy Council did not accept that the powers of the Attorney-General and the Solicitor-General were so limited. The Court considered that the undertakings were similar to the undertaking given to accomplices who gave evidence for the Crown that they would, subject to certain conditions, receive a pardon.

The Court referred to Lord Mansfield in *Rudd* and adopted the reasoning of Lawton LJ in *R v Turner*. The Court did not accept that the fact that the Attorney-General's powers were contained in Statute rather than as part of the prerogative as in England, was material. Nor did it matter to the Court that such an undertaking was as "matter of law" not "strictly binding on the Crown", for it was "quite unthinkable that such an undertaking would not be honoured. . . ."

It is difficult, with respect, to refute this reasoning. The alterntive would be to require the Attorney-General to indict prior to trial and then stay the prosecution in every case where Queen's Evidence was involved. This, of course, occurred in *Turner's* case; but it did mean that the conspiracy charge in the indictment was aptly described by the Court of Criminal Appeal as an "absurd" thing. The conspiracy charge read,

> that on divers days between the first day of January 1969 and 24 December 1972 (Smalls) conspired with other persons to rob other persons.

Further, if an undertaking provides that truthful evidence is a condition of immunity and it is emphasised to the witness that a full and frank disclosure is required, this form of undertaking is a better guarantee of reliability, for example, than the equitable right to a pardon where the witness had no more than a mere expectation of a future pardon and would not unnaturally be tempted to give evidence advancing the interests of the prosecution.

A properly worded undertaking of future immunity is therefore a positive incentive for the witness to tell the truth because so long as he tells the truth he knows his safety is assured. Such a condition eliminates any temptation that he might otherwise have to curry favour with the prosecution. Therefore, if immunity is conditional upon truth, there is much force in the observations of Richmond P, in the Court of Appeal, that:

> . . . in reality the importance of such an undertaking in relation to the evidence given by an accomplice lies in the practical effect which it will have both in prosecuting that accomplice and in bringing about a state of mind on his part wherein as far as possible he is removed from the fear of consequences of giving evidence incriminating himself and knows that he has nothing to gain by giving false evidence.

However, this was unfortunately not the case in *McDonald*. The undertakings did not carry a reservation as to the truth. The only conditions were that O'Connor and Speck give evidence at the trial and did not take the privilege against self incrimination. As has already been mentioned, one writer, Mr A T H Smith in his article "Immunity from Prosecution", observes that undertakings of this kind are an inducement to witnesses to "varnish the truth so as to be seen to be keeping to [their] part of the bargain". Further, in this case the Solicitor-General's decision to grant immunity had been pre-empted by the Police. More will be said about this shortly. Suffice it to say here, that the Police's inducement constituted a positive incentive for O'Connor and Speck to lie and to implicate McDonald as "the trigger man".

It is, therefore, submitted that, although in principle there can be no objection to Queen's Evidence being given conditional on an undertaking of future immunity from prosecution; where, as in *McDonald*, there is not an express reservation of truth, a far stronger argument for advancing the *Pipe* rationale to justify the exclusion of the evidence, exists.

Further, where as here, the Attorney-General's discretion has been pre-empted by a very improper inducement by the Police, an even stronger case for exclusion exists. It is to be noted that Lawton LJ in *R v Turner* said that undertakings of immunity should never be given by the Police. It is submitted that if a safe compromise between the public interest in the conviction of criminals and the right of any citizen to a fair trial is to be achieved, a minimum condition for admissibility must be that the undertaking contains an express requirement that immunity is conditional upon a full and frank disclosure. The Crown has an obligation, not only to protect society from criminals, but where it chooses to strike bargains with them it must do all in its power to ensure that those bargains minimise as far as possibile any prospect of injustice and do not serve to advance it.

(b) *The improper exercise of discretion*

Pritchard J, the trial Judge, accepted that he enjoyed a discretion to exclude the evidence of O'Connor and Speck. This was a point the Crown did not dispute in either the Court of Appeal or before the Privy Council. Pritchard J observed that:

> It would be most irregular and improper to permit either of these men to give evidence against the accused if at the time when their evidence is given it can be said that they can derive a

substantial advantage to themselves in doing so.

Pritchard J, however, having referred to the approach of Lawton LJ in *R v Turner*, chose to admit the evidence on the basis that when O'Connor and Speck gave their evidence any prospect of their gaining an advantage had been eliminated by their receipt of undertakings of future immunity from the Solicitor-General. In a passage appropriate to set out in full, Pritchard J said:

> The issue, as I see it, is whether or not there is at the present time any improper inducement remaining for these two witnesses to falsely implicate a third person: As was said by the English Court of Appeal in *Turner's* case:
>
> > It is necessary however to consider Smalls' position at the time when he gave his evidence.
>
> There may indeed have been a powerful inducement to a witness to give the Police information about his partners in crime, but if the inducement no longer operates because in one way or another all the charges which could possibly be brought against him have been disposed of or terminated, then the earlier inducement is spent and is irrelevant. *In virtually the same circumstances as we have here*, Lord Justice Lawton said in the *Turner* case:
>
> > These facts . . . would have justified the Judge in refusing to exercise his discretion to exclude Smalls' evidence had he been asked to do so which he was not.
>
> I have reached the conclusion that there was no impropriety in the means by which these two men were persuaded that they should give evidence, that there is now no prospect of either of them deriving any advantage from so doing, and no reason now why they should seek to ingratiate themselves with the Court. [Emphasis the writer's.]

Although it is difficult to successfully challenge the exercise of a trial Judge's discretion on appeal, nevertheless it is respectfully submitted that, contrary to the view of the Court of Appeal and the Judicial Committee, this was a case which merited intervention. Indeed, it is further submitted that it is difficult to conceive of a case more deserving of intervention. The case bore little resemblance to *R v Turner* and the trial Judge erred materially when he stated in the passage above, that it did.

In *R v Turner*, the Police did not give an improper inducement or pre-empt the decision of the Director of Public Prosecutions to offer immunity. As we have seen, not only in *McDonald* was there an improper inducement by the Police, but there was a positive incentive for O'Connor and Speck to deceive, and thereby curry favour with the prosecution from the outset of arrest. It is unlikely, if not inconceivable that, having made statements to the Police and further, having given evidence at depositions, O'Connor and Speck would resile from their earlier testimony on receipt, at trial, of the undertakings from the Solicitor-General.

It was a point of some concern to their Lordships, in their short judgment dismissing McDonald's appeal, that O'Connor and Speck were "vague" in their understanding of the immunities. Further, it was of concern to their Lordships also that the undertakings had not been shown to either of them or acknowledged prior to depositions.

Decision making

Granting immunity from prosecution was perhaps the hardest decision to make the Solicitor-General, Mr Daniel Neazor QC told the Rotary Club of Wellington South yesterday.

Mr Neazor said decisions to give immunity could only effectively be given by either himself or the Attorney-General, Mr Palmer.

The police could not decide as they were unable to stop private prosecutions, and immunity was not within a Judge's province until a particular case appeared in Court.

> It is perhaps the hardest of all decisions to make because it involves balancing public interest in letting go free a person who has admittedly committed crimes to make possible the conviction of another or others.

Mr Neazor recalled that only a couple of weeks ago he had given a promise of immunity to a young woman. She could have been charged as a party to robbery, but immunity was given so that she could be available to give evidence against two men charged with the murder of a taxi driver.

The reason for the promise was that a person who had been involved in a crime could refuse to give evidence which could incriminate him or her. If the promise was given, that fear of personal incrimination was removed, he said.

> We never give protection against perjury, so a person who has immunity in respect of a particular offence, and lies, could be tried for that.

In granting immunity, which he described as "an unlovely business at best", Mr Neazor said the following matters were considered:

- the seriousness of the charge;
- how serious was the part played by the person wanted as a witness;
- whether the case could be proved without any promise to any criminal;
- could the case against the witness be proved without an admission, and;
- whether the proposed witness was supported by other evidence, because a judgment that the accomplice was telling the truth was involved.

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In the opinion of the Board, this should be the "routine practice" where Queen's Evidence is to be obtained in this way. The observations of the Board are particularly appropriate because the undertaking was not shown to O'Connor, it will be recalled, until after he had given his evidence on the voir dire at which the objection to admissibility was made.

Further, and perhaps even more fundamentally, *R v Turner* and *R v McDonald* are distinguishable in that what influenced Lawton LJ in *R v Turner* was that by the time he had come to give his evidence, proceedings against Smalls had been commenced and terminated. The Court was at pains to emphasise that there was little if any prospect of advantage to Smalls apart from a possible fear of loss of protection. Unlike Pritchard J in *McDonald*, Lawton LJ did not consider that the letter of undertaking given by the Director of Public Prosecutions was, in itself, sufficient to eliminate any prospect of false evidence being given. Indeed, the only common factor in these cases was the fact that the undertakings did not expressly make immunity conditional upon full and frank disclosure.

It is, therefore, with respect, regrettable that the Court of Appeal and the Judicial Committee should have declined to intervene, in this case. It is also regrettable that the Board should emphasise that they would be indisposed to interfere because the Court of Appeal had upheld the trial Judge's exercise of his discretion. Given the modern tendency to assume much of criminal practice within the discretion of a trial Judge, it is submitted that it is important that appeal Courts be prepared to scrutinise with care an exercise of discretion. *Ibrahim v The King*[13] with respect to Lord Diplock countenanced the jurisdiction of the Privy Council not only to intervene where a point of exceptional public importance was involved, which in any case existed in *R v McDonald*, but also to intervene where, for any substantial reason justice had been denied. In this case, the propriety or otherwise of the exercise of discretion meant the difference between freedom or life imprisonment for McDonald. The criticism by Lord Diplock of the Crown's delay in showing O'Connor and Speck the undertakings suggested that their Lordships had some real concern with the procedure that had been adopted in this case. This concern was vitally relevant to the issue of the admissibility of the evidence, rather than its weight.

Considerations for legislative action

The issue of Queen's Evidence and its future role in the administration of criminal justice is of such fundamental importance that statutory recognition should be given to the practice of granting future immunity from prosecution. A witness should have, not only the expectation of safety from future prosecution, but a right to plead the undertaking in bar of trial provided that the conditions upon which the immunity has been given have been met.

It is acknowledged that the Court of Appeal considered it[14] "unthinkable" that an Attorney-General would not so honour an undertaking and hopefully this will prove to be correct in future; but it would appear prudent for the legal standing of such an undertaking to be put beyond doubt. Further, this could only better enhance the value of the undertaking in the eyes of a witness.

Since the turn of the century, the United States has enacted statutes relating to immunity,[15] formerly having to rely on the procedure of pardon.[16] It is not suggested here, however, that we would be wise to adopt the approach contained in the most recent federal immunity statute passed in 1970: 18 USC Para 6002 (1970). This statute severely restricts immunity and precludes the State merely from relying on any evidence derived from the witness. It is not a guarantee against future prosecution if there is other independent evdience available.[17]

Postscript

A private prosecution brought by convicted murderer Brian Ronald McDonald against two witnesses at his trial was withdrawn today after McDonald was beaten up in Paremoremo Prison.

Counsel for McDonald, Mr Barry Hart, told a preliminary hearing in the Auckland District Court that McDonald was savagely attacked last Wednesday. His hand and two teeth were broken and he received concussion and facial lacerations.

McDonald had charged that the two witnesses, Bruce Graham Speck and Gary Keith O'Connor, had conspired to defeat the course of justice, given false evidence at a High Court murder trial hearing and given evidence in the District Court with intent to wifully obstruct, prevent and pervert the course of justice between 1 July 1979, and 6 May 1980.

McDonald was sentenced to life imprisonment in 1980 after being convicted of the murder of Margaret Bell outside Mainstreet Cabaret in Queen Street in July 1979.

Mr Hart told Judge J H Hall he wished to withdraw the information against O'Connor and Speck as McDonald was unable to be in Court because of his injuries, and as threats had been made to his family linked with the prosecution.

Mr Hart added that a draft submission for pardon had been prepared and was due to be lodged with the Governor-General.

Counsel for Speck and O'Connor, Mr Kevin Ryan and Mr Kevin McDonald, asked Judge Hall that the informations be withdrawn so they could not be laid again.

Judge Hall ruled that the informations be withdrawn but said there was no bar to similar informations being brought at a later date.

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If legislation is to be introduced, then it should be required that any undertaking given expressly provides that immunity is conditional upon the witness giving a true and frank account. Further, it should be a requirement that the document be given to the witness at the earliest opportunity but not later than prior to the commencement of the preliminary hearing. In this regard, the witness should have to acknowledge in writing not only that he has read the document but that it has been explained to him and that he fully understands the basis upon which his future safety depends. It should be incumbent upon the trial Judge to satisfy himself that there has been compliance with these conditions.

Another protection to better ensure the truth of testimony is that the Crown be obliged to provide the defence with any written statements that the witness has given to the authorities either prior to or subsequent to any undertaking. In this way, the witness can be more effectively challenged about any discrepancy in his testimony.[18] For similar reasons, the Crown should be obliged to provide the defence with relevant details of the witness's antecedents including information about other offences in which the witness may have an involvement.

If these protections are embodied in legislation, then the reliability of Queen's Evidence will be better enhanced, and the ends of justice will be furthered also. The present law and practice is uncertain and unsatisfactory. Indeed, in conclusion, it is appropriate to leave the last word to Cardozo J, who, in *Doyle v Hofstader*, 257 NY 244; 177 NE 489 (1928), said.

> Whether the good to be attained by procuring the testimony of criminals is greater or less than the evil to be wrought by exempting them forever from prosecution for their crimes is a question of high policy as to which the law-making department of the government is entitled to be heard. □

1 High Court, Auckland Registry T281/79, unreported. For a New Zealand authority on immunity given to an accessory after the fact; see *R v Weightman* [1978] 1 NZLR 79.

2 See Lawton LJ in *R v Turner* (1975) 61 Cr App R 67, 80. One extremely valuable recent article is A T H Smith, "Immunity from Prosecution", [1983] Camb LJ 299. Also on the jurisdiction of the Attorney-General to stay proceedings in New Zealand; see *Brookfield* (1978) NZLJ 467.

3 The Court of Appeal considered "This evidence in the nature of a two-edge sword because of the strong possibility that Miss Bell was shot for the cashier". [1980] 2 NZLR 102 at 109.

4 A history of the development of Queen's Evidence appears in Radzinowicz, *A History of English Criminal Law*, Vol 2, pp 40-56; and Chitty, *A Practical Treatise on the Criminal Law*, Vol 2 pp 762-775.

5 This is discussed by Hale CJ, *The History of the Pleas of the Crown*, Vol 2, pp 225-240.

6 Such as under the Statutes of William and Anne, discussed by Lord Mansfield in *R v Rudd*, ibid, p 1116.

7 See Smith, loc cit, p 303; also "Nolle Prosequi" [1958] Crim LR 573.

8 See the discussion by Roughhead, "Burke and Hare", Notable British Trials, Butterworths & Co, 1921 pp 67-77.

9 The writer is greatly indebted to Dr Owen Dudley Edwards of the University of Edinburgh and author of an historical account of the lives of Burke and Hare for drawing his attention to the importance of that case and the place of the socious criminis in Scots law. A common distaste for "grassing burking Hares" is acknowledged.

10 For New Zealand practice, see *R v Currie* [1969] NZLR 199.

11 His Honour referred to the passage in Hale, "Pleas of the Crown", Vol 2, p 226 "The Truth is that more mischief hath come to good men, by the kinds of approvements by false accusations of desperate villains than benefit to the public by the discovery and convicting of real offenders". For a defence of immunity in American Criminal Jurisprudence see Bauer, "Reflections on the Role of Statutory Immunity in the Criminal Justice System", (1976) 67 J of Crim Law and Criminology 143.

12 Idem. Note, in a Corrigenda to the Report, the Editors of the Criminal Appeal Reports state that they were informed that the Prosecution "had no such object in mind and that it was drafted by junior counsel in conformity with the committal charge, when he was told that no evidence would be offered against Smalls, for reasons which could not then be disclosed".

13 [1914] AC 599, 615. "There must be something, which in the particular case, deprives the accused of the substance of a fair trial and the protection of the law or which in general tends to divert the due and orderly administration of the law into a new course, which may be drawn into an evil precedent in the future."

14 [1980] 2 NZLR 102 at 105. In fact, the Attorney-General stayed private prosecutions brought by McDonald against Speck and O'Connor for murder. At the time of writing this article private prosecutions for perjury against O'Connor and Speck are proceeding. Note also, there is some uncertainty about the legality of non-statutory immunities in the United States. See "Non-Statutory Immunities" (1974) 65 J of Crim Law and Criminology 334.

15 See Wigmore, McNaughton Revision, Vol 8, paras 2280-2284.

16 See *US v Ford*, 99 US 594-606, "The Whiskey Cases". "The fact that an accomplice has testified fully and fairly in accordance with contract with district attorney, who has promised immunity from prosecution is not a bar, but he is entitled equitably to a pardon." Note, the Federal Courts may have abandoned this doctrine, *King v US*, 203 F 2d 525 (8 Cir 1953).

17 There has been considerable constitutional debate in the United States over the legality of this kind of immunity. Its legality was upheld in *Kastigar v US*, 406 US 441 (1972) cf *Counselman v Hitchcock*, 142 US 547 (1892). Further for discussion, see Symposium: "The Granting of Witness Immunity", (1976) 67 J of Crim Law and Criminology 129-180.

18 This is the law in New Zealand in relation to identification; See Crimes Amendment Act 1982, s 344C(2)(a).

Privy Council appeals

With the proposed abolition of the Privy Council as our final Appeal Court the whole appeal system in New Zealand must undergo restructuring. The abolition is a proposal to which I am devotedly opposed, for I think it is a further retrograde step in isolating ourselves from the mainstream of the western world.

It also seems to me illogical to seek to abolish that right of appeal when our own Prime Minister has himself accepted membership of the Privy Council and such valuable contributions have so recently been made to the Judicial Committee by Sir Clifford Richmond, Sir Owen Woodhouse and Sir Robin Cooke.

Those actions appear to me to strengthen in every way the function of the Privy Council in our appeal system. We should be grateful to those four men for the example they have set.

Jeffries J
Wellington District Law Society Dinner 26.10.84

Legal aid and beyond

By Herbert Han-Pao Ma, Grand Justice, Judicial Yuan, Republic of China

This article is the keynote speech given by Grand Justice Ma in opening the Asian and Pacific Conference in Legal Aid held in Taipei on 24-27 September 1984 which is discussed in the editorial at [1984] NZLJ 381. The Grand Justice considers the distinction between the concepts of legal aid and legal services. This issue was discussed at length on different occasions during the Conference. There were marked differences of view, but the majority of those who spoke seemed to favour the idea of legal services being a more appropriate concept for the furtherance of social justice.

If the aim of law is to further justice, we are reminded that law does not enforce itself. Many kinds of people are needed to man and operate the machinery of justice in order to achieve this lofty end. Among others, Judges and lawyers are indispensable requisites of a free society under the rule of law in the generally accepted modern Western sense of the expression.

The average controversy is likely to have two sides, each believed in, in good faith, by honest men. At a trial in a Court there is the Judge who is to render the judgment. But in order for the Judge to decide such controversies satisfactorily, the case of each party must be presented thoroughly and skillfully. The litigant cannot do this adequately for himself. It can only be done by specialists well-trained in the norms of decision and experienced in the authoritative technique of applying them, especially in the busy and complicated world of today. In other words, each party to a law suit needs to be represented by a lawyer.

Now, lawyers are professionals and must charge a fee for their services in order to make a living. Such fees have always been more than many people can pay. Hence, those who cannot afford to employ a lawyer are felt by society and the legal profession to be entitled to professional assistance, free or at a nominal cost, for the sake of justice. "Legal Aid" is the term used more generally to refer to such thought and practice in the English-speaking world. Because the denial of the opportunity to retain a lawyer is due to the party's financial condition, Legal Aid has become inseparable from the poor or poverty.

Adversary procedure

The well-known nature of the observation so far, makes it seem trite. But it forms a convenient ground from which some more thoughts on the theme of this Conference may be thrown out. First, I would like to mention that the common law is based on an adversary procedure in which professional representation of litigants at all stages is presumed. Therefore, the right to counsel or representation should be, and actually is, more highly valued in common law countries than in the civil law countries, in which an inquisitorial procedure is adopted and the Judge supposedly plays an active role in protecting the interests of the parties. Consequently, we do find common law countries more experienced in practising and systematising Legal Aid on the basis of one theory or the other.

However, the result is both encouraging and baffling. For instance, from the experience of the United States, we have learned that in the beginning Legal Aid, which generally includes assistance to the poor in both civil and criminal cases, was charitable in nature and private in support and in control. By the 1960s, it was taken to mean a variety of government-supported methods, ranging from support to the established legal aid societies in their ordinary work on to government aid to the reform of established but unjust institutions and to methods of aiding the poor to lift themselves out of poverty. The name "Legal Services" was then preferred in order to emphasise that legal assistance to the poor is not a charitable gift but a legal obligation of the state and a personal right of the poor.

In recent years, there has been felt the need of extending Legal Services into the middle class interests when for instance the credit problems of the poor reached the local banks or the loan sharks. On the other hand, the idea of "Legal Services" has further developed to include public interest issues, such as environmental and consumer protection, on the grounds that underrepresented interests are entitled to be heard before legally constituted decision-making bodies.

By this stage, the nature of the legal needs of the poor and the methods to deal with them seem to have become increasingly controversial; and government support as well as professional response has turned vacillating, seriously affecting the ongoing work.

Who are the poor?

The oversimplified description of these developments in the United States only serves to illustrate the kinds of problems that have arisen in a country keen on practising Legal Aid. What shall be the legal needs of the poor? How shall such needs be met? Last but not least, who are the poor? These and other problems are likely to occur in other countries promoting legal assistance, given the necessary economic, social and political conditions. A little elaboration on these problems in general is perhaps in order.

Legal Aid traditionally emphasised the poor's access to and representation in Court. It may also just involve a professional

consultation, or assistance in negotiation or the preparation of documents. These are, after all, ordinary and basic legal needs of the poor in everyday life, and should first be attended to in any country advocating equal justice.

Legal Aid or Services

In this sense, the term "Legal Aid" is still being accepted and generally used. However, it has recently been argued that Legal Aid in this sense stemmed from the assumption that the law was just – that for the poor the problem lay not in the nature of the law but in obtaining access to the law. This argument in fact expresses dissatisfaction with the existing legal system and suggests law reform by exposing the problems of the poor and uncovering their new needs.

To differentiate from the limited meaning and scope of the traditional "Legal Aid" term, the broader name "Legal Services" has been proposed and given increasing blessing by scholars and organisations. Indeed, "Services" is not "Aid" or vice versa, and one may justifiably take sides on different grounds.

Such terminological distinctions also warrant the attention of those Asian and Pacific countries whose languages are not of Western origins. These countries may have names in their own language for their institutions of providing legal needs to the poor. But inasmuch as these countries' modern legal systems are almost invariably patterned after Western democracies, the names they give for their Legal Aid programmes are likely to be a translation of some aspect or aspects of their Western archetypes, and any significant change in the foreign origins may have impact on the national scene.

One may of course ask the often put question "What's in a name?" Well, to a Chinese, there is a lot. Confucius taught "the rectification of names" as a prerequisite for any sensible talk. What is more, it is a highly desired virtue that the name and reality conform to each other. In this sense, the "name" problem concerning "Legal Aid" has so much to do with the nature and scope of the subject itself, that you cannot seriously discuss one without the other.

It is interesting to mention in this connection that this Conference, in choosing its name, encountered precisely this kind of difficulty. Those of you who know both English and Chinese will note that in the English title of the Conference, "Legal Aid" is used; but in Chinese, the title, literally translated into English, would be "Legal Services". There was quite a bit of discussion about this terminological problem. Legal Aid is a tradition and has its charms, as every tradition has. The Chinese counterpart of the English expression "Legal Services" has increasingly been used by organisations, because more and more legal needs of the poor are attended to. As a result, a tentative compromise was reached. Perhaps this Conference would and could throw some light on this "name" question as it really goes deep into the very nature of the theme of the Conference.

General remedies

It has been well said that justice requires general remedies for general ills. If a segment of the population is frequently in need of legal assistance, such assistance can only be adequately provided in an organised way by organised groups, be they societies, departments of social agencies, public bureaus, bar associations, law school clinics, or a combination of some of them.

Undoubtedly, effective Legal Aid or Legal Services to the poor will help to enhance respect for law, and hence the cause of the rule of law. However, it is pertinent to ask whether such programmes would encounter difficulties of a cultural nature. Traditional distaste for litigation and lawyers in countries of a Confucian background may pose a formidable challenge to the willing utilisation of professional assistance.

Finally, one more thing may be worth serious consideration. Would promotion and expansion of Legal Aid or Legal Services in a systematised way lead to overlitigiousness in the society? It is something that Western democracies have been concerned about for some time. They even suggest possible ways of avoiding legal difficulties, and more efficient methods of resolving conflicts. It would be interesting to know how countries with traditions of settling disputes by non-legal means respond to this development.

To answer all these and other questions would take us beyond Legal Aid in the traditional sense. The combined experience and concerted opinions of many countries in this region will be of great help. □

Plus ça change. . . .

Those Budget Blues

(reprinted from [1971] NZLJ 23)

We're approaching the time of the Budget
The time when I always lay in
A store of such taxable products
As whisky, tobacco and gin.

But the first great effect of the Budget
Is my finding the solace I sought
In a very much greater consumption
Of the stuff I so thoughtfully bought.

. . . plus ça même chose

The same old crisis

(Reprinted from [1971] NZLJ 169)

The present economic crisis in New Zealand is revealing the weakness and indeed the dangerous instability of many of our institutions, of which the most important is that of Parliamentary government itself. We have, in effect, no constitution, and there is little or no security for what we may still believe to be our fundamental rights. The years of high living and very plain thinking must be paid for now by some period of plain living and high thinking, coupled with vigorous and well planned action, if we are to survive as a prosperous and well ordered nation. It is submitted with confidence that constitutional history and law should now be drawn upon to strengthen the crumbling foundations of our liberties. We must hasten to make good the years which the locust has eaten. . . .

A C Brassington

Expiry Notice!

In memory of the High Court of New Zealand found to be ailing in part 1 [1984] 1 NZLR and silently passing away in parts 2 and 3 [1984] 1 NZLR.

In lieu of flowers please send donations to the New Zealand Council of Law Reporting.

Inserted by a Barrister who looks forward to relating to his grandchildren how "in the old days" there was a High Court of New Zealand, whose cases were, occasionally, reported.

Offenders' rehabilitation in Japan

By Kiyotaka Ochiai, Professor of Law, Rissho University, Japan

In this article Professor Ochiai describes the way in which aid is provided in Japan to help in the rehabilitation of prisoners. The most distinctive feature would appear to be the reliance that is placed on voluntary organisations. It seems extraordinary by our standards that there are only 876 full-time probation officers in Japan with a population in excess of 120 million. The explanation is that there are some 47,000 volunteer probation officers. Then there are the voluntary organisations, one of which has approximately 220,000 members. It is interesting to compare the Japanese system with the description of Throughcare dealt with in the article on that topic at [1982] NZLJ 124 by Michael Stace. Professor Ochiai's article was originally a paper presented to the Asian and Pacific Conference on Legal Aid held in Taipei on 24-27 September 1984 referred to in the editorial appearing at [1984] NZLJ 381. Professor Ochiai writes and speaks English very well, and no attempt has been made to alter the very occasional idiosyncratic expression.

After World War II, the new Japanese Constitution was enacted in 1946. It established a democratic government and confirmed the principles of the rule of law. Constitutional safeguards for fundamental human rights were strengthened.

Accordingly, the offenders' rehabilitation system has also made steady and remarkable progress. While rehabilitation service for offenders has existed in one form or another for centuries in Japan, it was not until the early years of the 1950s that all elements of offenders' rehabilitation system were implemented together as an integrated service of a single public organisation.

Rehabilitation aid

In order to protect the society and to keep and maintain its rule of law, the responsibility of the government should not end when it has committed offenders to prison. Its further responsibility should be to ensure immediate and appropriate rehabilitation aid to them with a view of preventing them from repeating any crime and becoming law-abiding good members of the society after their release. The achievement of the rehabilitative goal will eventually bring about benefits to the whole members of the society and contribute to the establishment of the law.

Statistically, a year following their release is of crucial importance for rehabilitation. With this in view, the Japanese law clearly declares that the responsibility for the aftercare of discharged offenders as well as the administration of probation and parole rests with the State.

The basic statutes related to the rehabilitation of offenders are as follows: (1) The Offenders Rehabilitation Law of 1949, consisting of three chapters and 52 articles, provides for matters concerning probation and parole supervision; (2) The Law for Probationary Supervision of Persons under Suspension of Execution of Sentence of 1954, comprising 13 articles, provides probationary supervision to be sentenced by the Criminal Court; (3) The Law for Aftercare of Discharged Offenders of 1950, consisting of 19 articles, contains the provisions concerning aftercare and rehabilitation aid hostels; (4) The Volunteer Probation Officer Law of 1950, comprising 14 articles, provides the volunteer probation officer system; and (5) The Amnesty Law of 1947, consisting of 15 articles, defines the kinds and effects of a variety of pardons, that is general amnesty, special amnesty, commutation of sentence, remission of execution and the restoration of rights.

The rehabilitation services for offenders may be classified into the following two categories; (a) probation and parole supervision and (b) aftercare.

Parole supervision

Probation and parole supervision is a major counterpart of treatment within institutions and, unlike aftercare, it contains an element of State authority. It is conducted by the probation office. Persons placed under such supervision consist of the following categories— (1) Juvenile probationer: a juvenile who has been placed on probation by the Family Court; (2) Adult probationer: an offender who has been placed on probation by the Criminal Court upon the pronouncement of suspended sentence of imprisonment or fine; (3) Training school parolee: a juvenile offender who has conditionally released from the training school by the decision of the parole board; (4) Prison parolee: an offender who has been released from prison on parole by the parole board; and (5) Guidance home parolee: a woman who has been conditionally released by the parole board from the women guidance home, a non-punitive correctional institution for ex-prostitutes. The total of the persons who were under the probation or parole supervision of these five kinds was 87,408 as of 30 November 1982.

Aftercare

Unlike probation or parole, aftercare is not a substitute for institutional treatment, but is provided upon the voluntary application to the probation office on the part of

discharged offenders who are in difficulties after their release from prison or detention house. The eligibility for aftercare is limited to the maximum period of six months from date of release from confinement. Means of aid by the probation office include provision of meals, clothing, medical care, recreation, travel fare, lodging accommodation, and referral to the public employment or welfare agency. A total of persons applied to the probation office for aftercare was 9,329 in 1979.

In Japan, correction services are divided distinctly between two departments of the Ministry of Justice: Institutional correction belongs to the Correction Bureau while rehabilitation services belong to the Rehabilitation Bureau and the agencies under its jurisdiction. As such agencies, there are: (1) the National Offenders Rehabilitation Commission; (2) the Regional Parole Board; and (3) the Probation Office.

The National Offenders Rehabilitation Commission is a central board attached to the Ministry of Justice. It consists of five members who are appointed by the Minister of Justice with the approval of the Diet. Its major functions are: (a) to make recommendation to the Minister of Justice with respect to pardons for specific individuals, which the cabinet has power to grant; and (b) to render judgment upon the complaint regarding a decision of the regional parole board.

The Regional Parole Boards are placed at eight cities where the High Courts are located. The board is responsible for: (a) decision of release on parole; (b) revocation of parole; (c) decision to terminate treatment; and (d) extension of parole period. Its decision has to be made collectively by the panel of three board members.

Probation and rehabilitation

The Probation Offices are the agencies which are basis of the rehabilitation service. They are located at the 50 cities – one each prefecture and four in Hokkaido – where the District Courts are located. Their main duties are: (a) supervision of probationers and parolees of all age levels; (b) adjustment of inmate's family relationship and other social conditions prior to release from correctional institutions; (c) aftercare of offenders who has been discharged from prison or detention houses without supervision; (d) investigation and application for pardons; and (e) promotion of crime prevention activities in the community.

As rehabilitation agents working for these offices, there are: (1) the Government Probation Officers; (2) the Volunteer Probation Officers; and (3) the Rehabilitation Aid Association (or Hostel).

The Probation Officers are regularly paid full-time government officials employed on the basis of merit system and assigned to the probation offices. They are 876 in total. In general, they are mainly engaged in supervision and aftercare of offenders. They are required to have adequate knowledge of psychology, education, sociology or psychiatry and expertise relating to rehabilitation of offenders. They are primarily responsible for a case to which they have been assigned by the chief of the probation office. The survey in 1967 and 1980 disclosed that one probation officer was supervising on average 273 and 132 offenders respectively. Therefore it is difficult for him to handle all the process of casework. Usualy he carries out his duties with assistance of volunteer probation officers.

Volunteers

This Volunteer Probation Officers' system is the unique characteristic of Japanese rehabilitation of offenders. It forms the mainstay of rehabilitation services in practice. Accordingly it may seem strange to those who are acquainted with jurisdictions where probation and parole systems have existed for a long time as totally professionalised services. One of the reasons is the shortage of government fund. But even greater reason to maintain volunteers obviously lies in the fact that the trust of the authorities in the potential of volunteer workers is so overwhelming.

They are appointed by the Minister of Justice from among ordinary citizens who have the following qualifications: (a) confidence and popularity of the community with respect to his personality and conduct; (b) enthusiasm and time for such work; (c) financial stability; and (d) good health and activity. The term of office is two years with possible reappointment.

They work at the front of the rehabilitation services with the spirit of humanism and social service. They are not paid any salary or allowance for their service. What the government pays is only whole or part of the expenses needed for their performance of duties, such as travel

Community participation: Community responsibility

The criminal justice system is for each of us, part of our citizenship and not just a weapon against offenders. The good will of the community is fostered by contact with offenders during the course of their sentences. Community service placements, periodic detention projects and inmate work such as the carving of the pou for the Michael Fowler Centre in Wellington encourage positive links. It is the community which can make or break offenders in terms of their changing, adapting and facing their responsibilities.

The community needs to be involved in, and aware of the role of the probation service. It can provide skills and resources to assist the learning process of offenders. The involvement of the community will also ensure confidence in the work of the probation service. And in the whole notion of dealing with the majority of offenders in the community.

Community participation is vital to help effect social changes necessary to prevent offending. For example, poor housing, inequality and uninformed attitudes. In this way, the community at large accepts responsibility for its offenders. Offenders are helped to move towards the wider community and the community is helped to move towards offenders.

Hon G Palmer
Address to Probation Officers Conference 2.11.84

fare. There are about 47,000 volunteer probation officers among whom women accounted for 19% in 1980.

Hostel Accommodation

The Rehabilitation Aid Hostels are residential facilities run by non-governmental bodies under the authorisation of the Minister of Justice. They give accommodations and guidance mainly to those probationers and parolees as well as discharged offenders who have been referred to them from the probation office. The State subsidises the expense for such care. The state subsidy in 1979 was about 90 million yen on average per hostel which accounted for 55% of its whole income. At present there are 105 rehabilitation aid hostels in the country. And the number of persons cared for at the hostels on 31 March 1982 amounted to 1,404.

In addition to the public rehabilitation agencies as mentioned above, there are a number of private organisations, as follows: (1) The Volunteer Probation Officers Association which serves as an important channel of communication among members and with the probation agency as well and provides training programs and engages in interpreting ideas and policies regarding prevention of crime and rehabilitation to the public in the respective community. (2) The Rehabilitation Service Promotion Association which assists volunteer probation officers and rehabilitation aid hostels by means of providing with subsidy, training text books, lectures and various forms of facilities. (3) The Big Brothers and Sisters Association which is an organisation of youths engaged in befriending delinquent youngsters and forestalling delinquency. (4) The Women's Association for Rehabilitation Aid whose membership approximates 220,000 mothers and housewives.

These private volunteer organisations have also engaged in crime preventive day-to-day activities through distribution of pamphlets and leaflets, public lectures, round-table discussions, film show or counselling in close collaboration with government. The crystalisation of such efforts is a nation-wide Crime Prevention Campaign, "the Movement for Brighter Society" under the auspices of the Ministry of Justice in July each year. □

Books

The Insanity Plea. By William J Winslade and Judith Wilson Ross. Published by Charles Scribner & Sons 226 pp US$15.95.

Madness and the Criminal Law. By Norval Morris. Published by University of Chicago Press 235 pp US$20.0.

Reviewed by Mary Tedeschi.

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In New Zealand the defence of insanity in accordance with the McNaughten rules of 1843, is embalmed in s 23, Crimes Act 1908. The rules themselves have been the subject of much criticism on the ground of their rigidity and failure to reflect whatever happened to be the current psychological theories at the time a particular criticism was made. The basis of the defence is of course related to the doctrine of mens rea. Any suggestion that insanity should not be a defence will come as a surprise to most lawyers. But this has now been seriously proposed in the United States. This review of two books advancing that argument first appeared in the American quarterly magazine THE PUBLIC INTEREST of which the reviewer is Assistant Editor. The magazine is published from 10 East 53rd Street, New York, NY 10022, USA.

This review article should be read in conjunction with the lecture "Madness and Guilt" by Professor Julius Stone in the Auckland Law School Centenary Lectures, *which is to some extent an analysis and critique of Norval Morris' book reviewed herein.*

For the Greeks, madness was an affliction visited on those unlucky enough to have angered the gods. The genius of this explanation lies in its association of madness with divinity – an association inferred, perhaps, from the inescapable mysteriousness that surrounds both. Modern culture has stripped this mystery of its mythological roots and given it a peculiar twist: God is no longer allowed to create madmen, but He is surely intimate with some psychiatrists. Fifteen years ago, in *The Triumph of the Therapeutic*, Philip Rieff described the increasingly priestly function of psychiatry in American culture. Writing of the ascendency of psychological over religious mores, he observed that "if the therapeutic [man] is to win out, then surely the psychotherapist will be his secular spiritual guide". It is a remark that goes to the heart of contemporary debate about the insanity plea. Revered in the courtroom and reviled by critics, psychiatrists are inextricably mired in the controversy that surrounds the plea. The relation of their profession to the criminal law is one of two issues that shape the contemporary debate.

The Insanity Plea

The other issue, of course, involves the criminal responsibility of the insane. The insanity plea – that modern response to an ancient question – is best understood in light of previous attempts to address the phenomenon of madness within the criminal law.

The Romans inherited from the Greeks the belief that madness signalled divine intervention, and Roman law deferred cautiously to those afflicted. While madmen could not themselves be punished as criminals, they were given lifetime guardians who were held legally responsible for any of their criminal actions. This compromise between protecting the citizenry on the one hand and accommodating divine design on the other at the very least ensured that someone was accountable for the illegal activities of the insane.

It was left to medieval theology to provide a theory of criminal justice that held the insane themselves to be

criminally liable. Christian thinkers followed Augustine in believing that madness was a punishment inflicted by God for past sins, a belief which bore an obvious resemblance to the earlier Greek idea. But the Christian conception of sin revolutionised that idea. For while madness was not freely chosen, sin was; thus, the insane could be punished for those acts that preceded, and resulted in, their insanity – even if those acts were not in themselves illegal. In the Christian view, men were criminally liable for the very madness that subsequently deprived them of their freedom to choose.

Of course the Christian association of madness, sin, and criminal guilt made good legal sense only in a state that accepted the Church's theological principles. English law broke with this tradition in maintaining that crimes could be committed – and punishments justly assessed – even though the criminal did not possess his full powers of reason. For all their differences, the Roman, medieval, and early English views of madness and criminal guilt shared a crucial assumption: Someone – whether God, a guardian, or the agent himself – was responsible for the acts of the insane. Moreover, such acts should not and would not go unpunished.

In the *McNaughton* case of 1843, English law abrogated these traditional assumptions, and in so doing, it created the rule on which the modern insanity plea is based. McNaughton was acquitted of murder on the grounds that, by virtue of a mental defect, he did not know that what he was doing was wrong. Widely hailed for its progressive understanding of criminal guilt, the *McNaughton* ruling was made possible only through the combination of two powerful forces in modern English history: the urge for humanitarian reform, and the new-found optimism in science – in this case, the nascent science of psychology. Like psychology itself, the *McNaughton* rule has come a long way since its arrival in America. Now, to the general dismay of the psychological and legal professions, the American public insists on a harder look at *McNaughton's* natural heir, the special defence of insanity. These books, which dismantle the defence from distinctly different perspectives, are indispensable responses to that demand.

Mental health professionals

William J Winslade is an attorney and a psychiatrist, and co-author Judith Wilson Ross, a lecturer in psychiatry – facts that lend special weight to their arguments in *The Insanity Plea.* Nominally organised around six recent cases involving the defence, the book is a rigorous and disturbing account of the influence exerted by mental health professionals in a criminal trial. There is Robert Torsney, the New York City policeman who killed an unarmed black 15-year-old in front of several witnesses, all of whom agreed that the attack was unprovoked; although he had no history of mental illness, Torsney was acquitted by an all-white jury after a well-known psychiatrist speculated that he had suffered a brief and rarely-documented "psychomoter seizure". There is James Grigson, aptly dubbed the "killer shrink", who in nearly 60 capital cases has urged the death penalty for criminals he calls "sociopathic." In all but two of these, Texas juries sentenced the defendant to death – this, despite the fact that "sociopath" was a category dropped from that psychiatric bible, the *Diagnostic and Statistical Manual*, 15 years ago.

And there is, of course, the case of John Hinckley Jr acquitted last year for the attempted assassination of President Reagan and the shooting of three other men. It is for this case that Winslade and Ross reserve their sharpest and most instructive attack on the plea. The defence contended that Hinckley's insanity was manifest both in his bizarre attachment to Jodie Foster, whose love he hoped to win through this "historical deed", and in his unreasoned desire to emulate Travis Bickle, anti-hero of the movie *Taxi Driver*. Winslade and Ross point out that Hinckley's motives – historical fame and recognition from the girl he loved – have been regarded throughout Western history as legitimate and even laudatory. They also observe that nothing could be more *abnormal* than insisting that only a madman is unduly influenced by a movie or any other form of fiction. To the *Taxi Driver* defence they pose a telling question: Would anyone dismiss as insane a young girl who, inspired by a movie about Mother Teresa's life, emulated that woman, and eventually received a Nobel prize for charitable works? Upon concluding the obvious, the authors expose the ultimate inconsistency in the Hinckley defence: "It cannot be that good choices are our responsibility and bad choices are not. But the Hinckley defence argued that the good John Hinckley might have done was to his credit, while the evil belonged to something or someone else." Indeed, there is no better summation of the logic behind the *McNaughton* ruling itself.

Putting aside the concoctions of Hinckley's lawyers and psychiatrists, the manifest injustice of the verdict was in no small part a function of the legal standards that the judge and jury faced. Most states place the burden of proof for an acquittal on the *defence*; it must prove beyond a reasonable doubt that the defendant

> Lady Wootton, in her *Science and Social Pathology* expressed the view that the criminal law is rather inexorably moving from the model of individual's choice of wrong from right, leading to his liability (some even think his "right") to be punished in a definite manner towards, on the other, the model attributing conduct to mental disorder or abnormality, leading to the prescription of rather indeterminate therapeutic treatment. "Once we allow any movement away from a rigid intellectual test of responsibility on *M'Naghten* lines, our feet are set upon a slippery slope which offers no real resting place short of the total abandonment of the whole concept of responsibility."
>
> The most cogent part of Barbara Wootton's argument is that once the *M'Naghten* test is left behind in favour of mental disorder, the only evidence available to test whether there should be criminal responsibility for certain behaviour is whether the defendant exhibited it. In Glanville Williams's words, in his standard *Criminal Law*, "an approach in terms of self-control creates the possibility of finding diminished responsibility in every charge of crime".
>
> – **Julius Stone**
> *Madness and Guilt*

was insane, according to criteria which vary from state to state. In a federal trial like Hinckley's, however, the burden of proof is reversed; here the prosecution must prove – again beyond a reasonable doubt – the defendant's very sanity. As Winslade and Ross remark, if sanity depends to any degree on what transpires in a man's mind – and everyone assumes it does – this burden of proof is impossible to shoulder. Thus, peculiar as it seems, the Hinckley judge and jury were unjustly castigated for their verdict. For unless they could know exactly what John Hinckley thought in the months it took him to prepare his attack, his "sanity" could never be asserted without doubt. Nor, for that matter, could the sanity of anyone else.

Their analysis of the Hinckley case is a good example of what makes Winslade and Ross valuable contributors to the renewed debate about the insanity defence. To be sure, their exposure of the corrupt logic in the Hinckley and other rulings is itself a public service. More important – and here the authors' understanding of psychiatry is crucial – they are singularly adept in questioning whether psychiatrists belong in the courtroom at all. Of particular note is their analysis of the problem inherent in assuming that psychiatrists possess expert knowledge. Since *McNaughton*, the criminal law has assumed, however implicity, that psychiatry resembles empirical science. But as Ross and Winslade point out, no reasonable understanding of "expertise" – and certainly not the understanding on which a Court accepts expert testimony – can include the variety of diagnoses and conclusions reached by psychiatrists. Psychiatry as a science can only suffer by comparison with other forms of forensic expertise. If ten ballistics experts offer distinct interpretaions of a gunshot wound, each requiring a different jargon, any sensible juror will conclude that, whatever the scientific status of ballistics, it is useless for the purposes of a criminal trial. Of course, ballistics is not like that, but psychiatry is. Psychiatrists routinely contradict one another's diagnoses and conclusions – often in language that no layman could hope to understand. This fact speaks volumes about the state of their profession, but it does not clarify matters for the juror at all.

Worse, far from being taken for a confused witness whose testimony is useless, the psychiatrist is taken for an "expert" – whose merest speculation is given extraordinary weight. A juror sympathetically disposed toward the defendant can placate his conscience – whatever the facts of the case – by appealing to the psychiatric testimony most in line with his inclinations. After all, if an "expert" on the human psyche explains that the defendant, in a moment of classic schizophrenic delusion, killed a man who he thought was a rooster, by what right and with what arsenal of jargon is the juror to contradict him?

The Insanity Plea is a persuasive scorecard of past and potential abuses abetted by this anomaly of the criminal law. At the very least, one concludes from it that the plea requires a fundamental overhaul – if not the outright abolition urged by the authors. But the most compelling case for abolition would require a more detached analysis, one relying less on discrete abuses and more on the complicated philosophical concerns in which the defence took root. In *Madness and the Criminal Law*, Norval Morris gives the insanity plea and its stepchild, the plea of unfitness to stand trial, exactly the detached theoretical treatment they deserve.

Principle and practice

Morris's book is a jurisprudential examination of attempts to intermingle the mental health and criminal law powers of the state. It is, for all its erudition, a very odd book. From the introductory acknowledgment to the National Rifle Association ("without whose

> The American Psychiatric Association's Statement on the Insanity Defense, adopted in December 1982, in the wake of controversies stirred by the *Hinckley* verdict, marks a watershed at least in the wide consensus among psychiatrists as to the need to limit both the ambitions and burdens of psychiatrists in the area. The need for these limits on the role of psychiatrists is asserted both as to the issues involved in determining criminal responsibility, and as to custodial disposition, after a verdict of "not guilty by reason of insanity".
>
> As to their trial role, the report is emphatic that psychiatrists ought not to testify on the "ultimate" issue of the trial, for example as to "sanity or insanity", or "responsibility", or other conclusory formulas such as ability to distinguish "right from wrong". On such issues psychiatrists are (the Association thinks) making a "leap in logic" from medical to legal conclusions. Determining whether a defendant is legally insane is a matter for legal fact-finders, not for experts. The questions for the experts should only be the medical elements of mental state, motivation and diagnosis "in clinical and common sense terms". In so far as these limits have been in controversy . . . the APA Report of 1983 impliedly asks that these limits be legislatively set.
>
> That Report, also, declares that psychiatrists are better able to say whether the defendant knew the wrongfulness of his act than they are to say whether he was able to control his own behaviour. It offered two strong reasons: first that the line between "irresistible impulse" and "impulse not resisted" was shadowy; and second, that since more psychiatrists are determinists, their evidence on volition is likely to confuse the jury . . .
>
> Psychiatrists' self-restraint is also extended by the 1983 Report to their role after acquittal on grounds of insanity. They are concerned to check the tendency for "quasi-criminal" insanity acquittees of dangerous crimes to be assimilated to persons merely civilly committed because of severe illness or potential for future violence. They draw from this the inference, first, that the insanity acquittee should not be entitled to automatic release at any point where he cannot "be repetitively adjudicated" as "dangerous" in accordance with the appropriate standard of proof. This was the more important, second, because modern psycho-pharmaceutical advances deceptively relieve symptoms, without warrant of cure. In any case, third, release decision should not rest with psychiatrists, but with a wider group analogous to parole boards. . . .
>
> — Julian Stone
> *Madness and Guilt*

intervention this book would not have been written") to the concluding chapter, which challenges Aristotle and all other champions of the principle that identical crimes must be punished equally, Morris makes his case with verve and refreshing irony. "You would be surprised," he writes near the end, "how much more sensible prisoners are about matters of punishment than are my colleagues at the University of Chicago Law School". Those prisoners should enjoy this book. For all its idiosyncracies, *Madness and the Criminal Law* may well be the answer to the insanity defence that its critics have long awaited.

Morris brings his formidable skills to bear on a number of intricate problems: the relationship between moral and criminal guilt; the limits of trying and sentencing the insane; the relevance of insanity to sentencing; criminal liability for involuntary conduct; and the justice, in criminal law, of anisomy, or treating like cases as unlike. "Some blunt hacking away is necessary", he explains, because "libraries are stuffed with discussions of the trees; the forest has been neglected". Morris's own best contribution to that literature is his attack on traditional justifications for the modern progeny of the *McNaughton* rule. At the heart of these justifications lies a claim as emotionally compelling as it is exasperating in its vagueness. Most generally, it demands that mercy be exercised by refusing to punish those who did not know what they were doing, or did not realise that what they were doing was wrong. How is it just, proponents of the insanity plea ask, to punish a man for acts whose meaning he does not understand?

Morris has three responses. The first involves the unexpected consequences of attempting to enforce this particular desire for clemency. He asserts that no reasonable understanding of "mercy" would sanction the indeterminate detention of the accused that is made possible by a plea of insanity or of unfitness to stand trial. If anything, it is *more* merciful to sentence a criminal for a specific period of time than to quarantine him indefinitely. Here Morris has a stock of horror stories to rival Winslade and Ross. Theon Jackson, a deaf-mute with no previous record of commitment or arrest, was declared unfit to stand trial after allegedly stealing $9. So certain was the Department of Mental Health in Indiana that it was unjust to try Jackson – who presumably did not understand the charges against him – that he was detained for three and a half years before the Supreme Court held that his detention was unconstitutional. Various legislative experiments have followed this ruling, but none has effectively addressed the problem of "unrestorable unfitness". And in fact no experiment can – for if "mercy" requires that a defendant comprehend the moral, social, and criminal issues involved in his trial, it follows that one who possesses no such capacity can be held in custody for the rest of his life.

> Not only is it unlikely that the Anglo-American common law is on the way to discarding the notion of criminal responsibility. We seem rather in the presence of the renewal of serious proposals to have the doctrine of *mens rea* replace the special defence as the means of testing for legal insanity, as essential to prevent undesired assimilation of penal and mental health systems.
>
> Professor Morris advocates that the special defence be replaced by referring the insanity issue either to the mens rea requirement, or to the newer doctrines of diminished responsibility. As regards mens rea he thinks this would be but a return to early tradition, a tradition which in 1982 only Montana and Idaho actually followed. If nineteenth century excrescences on determinism and hoped-for therapies are put aside, mental illness may be seen as negating the mental element required by mens rea. Moreover, even a degree of insanity insufficient to support acquittal could and should (he thinks) be relevant to sentence.
>
> – **Julius Stone**
> *Madness and Guilt*

Morris's second response to the demand for mercy is similarly rooted in the problems of policy. Here, he points to the ironic consequences of the insanity plea itself: Those least likely to use the plea successfully are precisely those it was invented to protect. No recent instance of criminal violence is as familiar as the Manson slayings of 1969. And surely no understanding of "madness" could exclude the behaviour and ostensible mental states of Charles Manson and his cult before, during, and after their spree. Yet each was found guilty of murder – and sent to prison rather than the asylum.

It is a commonplace fact: After a crime as grisly and inexplicable as Manson's, the principles of the insanity defence are abruptly abandoned. No juror wants to allow a group of psychiatrists the opportunity to release a man like Manson. And so the insanity plea is corrupted in practice: Just as it cannot protect those for whom it was intended, so is it most likely to succeed for the defendant who always, except for his particular crime, seemed sane.

This discrepancy between the principles that underlie the defence and their neglect or manipulation in practice is the target of Morris's third arrow. Proponents of the defence assume that, in ascertaining a defendant's mental state, we can distinguish fairly beteween mad and bad, sick and wicked. Morris denies that we are so equipped: "We fail in this classificatory effort and are doomed to failure no matter how hard we try since the distinction surpasses our moral and intellectual capacities." "Mercy", in the sense intended by proponents of the plea, is the prerogative of God, not man; for only God – or some entity closer to omniscience than our psychiatrists and jurors – can distinguish between mercy and leniency.

Punishment of the sick?

In arguing that the insanity and unfitness pleas be abolished, Morris is far from urging wholesale punishment of the sick. Rather, he suggests that mental illness assume the status of other adversities relevant to punishment, such as the defendant's prior record or familial history of violence or impoverishment. For Morris, the special defence of insanity is no more legitimate than a defence of having grown up in a black ghetto. Both can be harsh extenuating circumstances relevant to sentencing, but neither justifies acquittal. In sum, "the English and American Judges went wrong in the nineteenth century", and the first step in addressing the unjust consequences of the *McNaughton* rule is abolition of the special defence of insanity.

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