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Change and the profession

It is commonly said that change is the law of life. From the point of view of the legal profession this could be turned around to read, the life of the law is change. Certainly at the present time lawyers in New Zealand, as well as elsewhere are having to cope with or prepare for changes that are unprecedented.

The proposed Bill of Rights is going to have profound legal effects over areas of the law that few people yet realise. Anyone who imagines that it will only be cosmetic, an updating as it were of s 5(j) of the Acts Interpretation Act, is probably in for a shock. Not least of course politicians themselves. This issue of the *New Zealand Law Journal* contains three articles that look from very different perspectives at aspects of this question.

But it is not just change in the content of the substantive law that needs to be thought about. Change within the profession is equally dramatic. The whole understanding of what the profession is, what its social role is, how it operates, whether it is efficient, what its economic base is, and what are its professional ethics and standards, are all matters that are currently undergoing a transformation. Because most of these questions are approached as separate and distinct, the extent of the revolution is generally overlooked.

The changing attitudes are not restricted to New Zealand. The Master of the Rolls, Sir John Donaldson gave the opening address to the Law Society's National Conference at Bournemonth last year. The address dealt with the topic of change and reform and has been published in full in *The Law Society's Gazette* for 31 October 1984. In the course of his address the Master of the Rolls set out to slaughter a number of sacred cows in such areas of the law and its practice as advertising by solicitors, inter-professional partnerships and fee-sharing, a systematic review of the administration of civil justice, aspects of legal aid in both theory and practice, legal expenses insurance, contingency fees, arbitration and finally procedural reforms. Whether the slaughter of sacred cows is as wholesale as this list might suggest is open to argument. But certainly the address is worth reading in full and thinking about.

In the opening part of his address Sir John Donaldson has something to say about the current situation of the legal profession in the public mind. This is a particularly important question for the New Zealand profession at the present time and it is worth considering therefore just what he has to say.

He begins by acknowledging that there is a good deal of critical public interest in the legal profession at the present time. He says that if the media were to be believed then the profession had come to be regarded as monopolistic, negligent, narrow-minded and avaricious, if not downright dishonest. He first makes the necessary qualification that this media concern with the legal profession should not be seen out of perspective because as he says, the media from time to time gets bees in its collective bonnet. He lists a series of other particular targets such as doctors, dentists and even Alsatian dogs. As he points out times change and the spotlight moves on and so in due course he thought it would be with the profession of the law.

Sir John Donaldson rightly points out that when there is public criticism however it should be attended to in a realistic way in order to benefit the profession in seeing ways in which it might improve.

Over the last few years the New Zealand Law Society has been very conscious of the fact that it has been looked at critically by the public and many steps have been taken to deal with this. In some ways the public relations exercises that have been undertaken have not been as successful as some people would like. On the other hand it must be borne in mind that what is having to be

explained is something that is, and ought to be, quite different to the slick simplicities of a power seeking political party.

Sir John Donaldson after commenting on the fact that lawyers by the nature of their training and professional activity should be able to be articulate and explain themselves remarks that they do not seem to do this very effectively. He first looks at some of the weaknesses of the profession and then at the strengths. He makes a nice point about lawyers when he says that those who expect automatically to be loved should forget it. He points out that the phrase "beloved physician" might not look out of place on a tombstone but the words " beloved lawyer" would look distinctly odd.

The reason he points out is of course the well-known one that a patient goes to a doctor because he has suffered a misfortune in the way of illness for which he can blame nobody, but this is not the position when a client consults his lawyer. If he does not have an opponent to blame for the situation in which he finds himself then he will be tempted at least to blame his lawyer for his unhappy situation. Again unlike doctors, or architects for that matter, lawyers are seen as people who charge substantial fees for work that does not have a physical effect. In some ways it is a pity that lawyers cannot write prescriptions and send people out of their offices feeling happier even if their problems remain unsolved.

The important points however that are made by the Master the Rolls relate to the strengths of the legal profession and the need to explain the social purpose that lawyers serve. He says:

> If I had to sum up the social purpose of the legal profession in a single sentence, I should say that they stand in the same relation to society – the body politic – as do doctors to their patients – the body individual.

He sets out three essential social purposes of lawyers. The first is to assist the public in doing what they want to do, that is to comply with the law that applies to them. The second social purpose can be described as helping people to make sensible choices within the area of free choice that the law leaves to them, and by sensible he means choices that will reduce or eliminate the chances of disputes arising thereafter while at the same time achieving the object that the client has particularly in mind. The third social purpose he describes as the settlement of disputes which should be resolved as quickly and as economically as possible and with a minimum of personal conflict between the parties.

Conveying the importance of these social functions performed by lawyers to the general public is not an easy task. Selling the role of the law is necessarily different from selling cakes of soap or any other sort of cake for that matter. It cannot be done on a one-off basis but can only be the result of careful and continuous explanation over a period of time.

Sir John Donaldson is concerned about how this question of the social purpose of the legal profession is to be explained and understood by the general public. He sums up his point about it in this way:

> Now let us be clear and let the public be clear as to the manner in which we approach this task. It is not as mere technicians. It is as members of a learned profession. And what difference, the public will ask, does that make? We all know the answer, but for far too long we have failed to give it. One of the essential differences between the technician and the professional can be summed up in one old fashioned word – "dedication". The doctor has it and the public knows it. So too has the lawyer. The public should know that too.

As has been mentioned above one of the topics that Sir John Donaldson looks at critically is the question of advertising by a profession, and the legal profession in particular. The Australian experience especially in Victoria, appears to point to an all-or-nothing approach. Sir John however takes a more cautious view by considering what is the principle that lies behind the traditional prohibition, and what end do the critics seek. He expresses his view in the following words:

> Advertising is not necessarily incompatible with the maintenance of professional standards, but it very easily can be. The public has a need to know who is and who is not a qualified solicitor and where he carries on his profession. It has a need to know what expense will be involved in using his professional services. It has a need to know in what branches of law he is experienced. Disseminating this information – informational advertising – is clearly unobjectionable.
>
> But in the field of commerce, advertising is not only or even mainly informational – it is promotional. . . . Promotional advertising – touting – is wholly inconsistent with the standards of any true profession. And professional standards stand or fall together. . . .
>
> Accordingly, as Master of the Rolls with a statutory duty to consider any proposal to modify the Practise Rules, I welcomed the formulation of the amendment with its reference to the purpose of the change which is expressed by the words "in the interests of *informing* the public of the service provided by particular solicitors and the profession as a whole". Not, be it noted, "in the interests of promoting the practice of particular solicitors".

Such a statement hardly amounts to the slaughter of a sacred cow. To continue the medical analogy it is more in the nature of an operation for curative purposes. It does illustrate however the need to think in terms of principles to understand the nature of the reasons for traditional attitudes and practices, so that reforms undertaken relate to the reality of the situation and the needs to be met. Eventually there has to be practical decision in matters of this kind, but it should be one that is taken in the light of what is meant by professional standards, ethics, integrity and, in Sir John Donaldson's word, dedication.

This will sometimes be misunderstood, and this fact causes problems of its own. The New Zealand Law Society like the Law Society in England has a task of explanation and information on behalf of the profession as a whole. It is not an easy task to perform. In endeavouring to do it the officers and staff of the New Zealand Law Society deserve the understanding and the support of all members of the legal profession.

P J Downey

Case and Comment

Contracts — Mistake

The case of *Ozolins v Conlon* (CA 16/83, 31.5.84) has been noted elsewhere. With respect, it is somewhat surprising that it seems to have caused so little concern. Without forgetting for one moment the human factor in the case, it is suggested that the Contractual Mistakes Act 1977 was misinterpreted. (Other issues were raised in the case, but only the issue of mistake will be considered here. The case was remitted back to the High Court on the question of what relief should be given to Mrs Ozolins).

An elderly widow, Mrs Ozolins, entered into an agreement to sell her land. Although she intended to retain part of it, the agreement related to all of it. Mr Conlon, the purchaser, intended to buy all of it.

In short, the majority of the Court of Appeal decided that there was an operative mistake within the terms of ss 6(1)(a)(iii) and 6(1)(b) of the Contractual Mistakes Act 1977. Sections 6(1)(a) and (b) of the Act read as follows:

> (1) A Court may in the course of any proceedings or on application made for the purpose grant relief under section 7 of this Act to any party to a contract —
> (a) If in entering into that contract:
> (i) That party was influenced in his decision to enter into the contract by a mistake that was material to him, and the existence of the mistake was known to the other party or one or more of the other parties to the contract . . . ; or
> (ii) All the parties to the contract were influenced in their respective decisions to enter into the contract by the same mistake; or
> (iii) That party and at least one other party . . . were each influenced in their respective decisions to enter into the contract by a different mistake about the same matter of fact or of law; and
> (b) The mistake or mistakes, as the case may be, resulted at the time of the contract:
> (i) In a substantially unequal exchange of values; or
> (ii) In the conferment of a benefit, or in the imposition or inclusion of an obligation, which was, in all the circumstances, a benefit or obligation substantially disproportionate to the consideration therefor.

It was considered that both parties were acting under the influence of a mistake — Mrs Ozolins believed that she was only obliged to sell part of her land and Mr Conlon believed that Mrs Ozolins intended to sell all of her land. Thus, both parties were, in the view of the majority, "influenced in their respective decisions to enter into the contract by a different mistake about the same matter of fact or of law". Further, it was considered that the mistake or mistakes resulted in a substantially unequal exchange of values. On the facts of the case, the majority then considered that Mrs Ozolins was entitled to relief under s 7 of the Act.

It is respectfully submitted that the majority decision significantly undermines the law of contract and opens the way for any party who enters into a contract under the influence of a mistake (whether known to the other party or not) to obtain relief. It is submitted that this was not the intention behind the passing of the Act and this is evidenced in the report on the law of mistake prepared by the Contracts and Commercial Law Reform Committee (see for example p 17 of the report and see also Sutton, *Reform of Law of Mistake in Contract* (1976) 7 NZULR 40, 49). It would appear from that report that the primary motivation for the passing of the Act was not to widen the ambit of the types of mistake that would be operative, but to enable the Courts to exercise a wide range of remedies in appropriate circumstances when an operative mistake had been made and certain criteria were met.

In this respect, it is submitted that the minority judgment of Somers J correctly reflected both the position that existed before the passing of the Act and the way in which the Act should be interpreted. As Somers J pointed out, the type of mistake made in the present case did not fall within any of the traditionally accepted categories of mistake (ie common, mutual and unilateral). Only one party was mistaken and this mistake was unknown to the other party. As it seems likely that the types of operative mistake outlined in s 6(1)(a) of the Act were intended to parallel (and not expand) the traditionally accepted categories of mistake, it is submitted that the majority of the Court of Appeal erred in holding that there had been an operative mistake.

It is further submitted that if the majority of the Court of Appeal were correct, there would be no need for the category of mistake stipulated in s 6(1)(a)(i) of the Act (and indeed, possibly s 6(1)(a)(ii)). This is because so long as one party to a contract is mistaken, the other party will also be deemed to have been mistaken and it will be immaterial whether that other party knew of the first party's mistake.

Hot on the heels of the *Ozolins'* case was *Engineering Plastics Limited v J Mercer & Sons Limited* (High Court Auckland, A580/83, 10.9.84).

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Chief District Court Judge — Judge P J Trapski

The Minister of Justice announced on 10 December that the new Chief District Court Judge to replace Chief Judge D J Sullivan would be Judge P J Trapski. As is well known Judge Trapski is presently Principal Family Court Judge, a position he has held since the office was established in 1981. He will assume his new office in April 1985 after the retirement of Chief Judge D J Sullivan.

Judge Trapski was born in Otorohanga some 49 years ago. He was educated at St Patrick's College, Silverstream, and graduated LLB from Victoria University of Wellington in 1958. He was admitted to the Bar in 1959. He began his legal career, while a student, as a law clerk in Wellingtion with the firm of Martin & Hurley. After completing his legal studies he joined the New Zealand Army serving as a legal staff officer in Malaysia. He subsequently practised at Mt Maunganui. He was in practice there until his appointment as a Stipendiary Magistrate in 1972.

Judge Trapski served as a Magistrate first in Wellington, and then from 1974 in Rotorua. He was a member of the Magistrates' Executive and was one of those who prepared and presented the submissions of the Magistrates to the Royal Commission on the Courts, and the consequent submission on salaries for District Court Judges to the Higher Salaries Commission.

As suggested in the submission of the Magistrates' Executive, the Royal Commission recommended the setting up of a new system of Family Courts. The success of the new Family Court system in practice is widely acknowledged as owing much to the leadership and guidance of Principal Judge Trapski during its formative, and therefore most testing period.

While in practice in Mt Maunganui Judge Trapski took an active part in the affairs of the community and in the commercial world. He was for a time Deputy-Chairman of R A Owens Holdings Limited. He served on the Tauranga Hospital Board and was involved in both the Junior Chamber of Commerce and the Chamber of Commerce.

He was on the executive of New Zealand Jaycee in 1970 as General Legal Counsel. He has been active in church affairs. His professional activities included being a member of the Tauranga Legal Aid Committee and at one time he was the President of the South Auckland Law Practitioners Association. His forms of recreation are listed as swimming, skiing, golf, and that inescapable aspect of New Zealand suburban life, gardening. □

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In that case, the plaintiff vendor offered to sell various types of rings or seals to the defendant. In a telex which conveyed the offer by the plaintiff to sell these rings, there was the reference "245.70/C". It was accepted by the Court that in the trade, this would customarily have been understood to mean that the price was $245.70 per hundred rings. However, the defendant was unaware of this and asumed that there had been a typing error.

While Tompkins J acknowledged that there would have been a binding contract at common law, he considered that, on the authority of *Ozolins v Conlon* (supra), there had been an operative mistake in terms of s 6(1)(a)(iii) and s 6(1)(b) of the Contractual Mistakes Act 1977 and that this was an appropriate case for relief. The Judge made the following statement:

> Each party had a mistaken belief about their intentions concerning the price. That mistaken belief influenced their respective decisions to enter into the contract. The plaintiff mistakenly thought the defendant was intending to agree to buy the 4000 rings for $644.96 per hundred, plus the tooling charge. The defendant mistakenly thought that the plaintiff was intending to agree to sell the 4000 rings for $644.96, plus the tooling charge. Those mistaken beliefs were different, but they were about the same matter of fact, namely the price each thought was payable under the contract.

With respect, the comments that were made (supra) with respect to the *Ozolins'* case are even more appropriate with respect to this case. Here, it was the vendor who made the offer, and as has been seen, the offer was unambiguous. With respect, it could not be said by any stretch of the imagination that the vendor was acting under the influence of a mistake. Only the defendant was mistaken and this mistake was unknown to the plaintiff.

The effect of these two cases is that so long as one party to a contract is mistaken, irrespective of whether that mistake is known to the other party, there will be prima facie, an operative mistake in terms of s 6(1)(a) of the Contractual Mistakes Act 1977. Whether that mistake will be truly operative will depend upon whether it meets the criteria otherwise specified in that section. If it does, relief in terms of s 7 will be possible. This position, if correct, clearly constitutes a radical departure from the common law position. It might be argued, particularly by advocates of law being decided according to the length of the Chancellor's foot, that had this been the intention behind the passing of the Act, this might not be a bad thing. However, it is not at all apparent that this was the intention or that it should be.

S Dukeson

FAMILY COURTS NOW — AN INTERVIEW WITH JUDGE TRAPSKI

The new Family Court system commenced in October 1981. The first Principal Family Court Judge was His Honour Judge Trapski. At the time of his appointment Judge Trapski gave an interview on the proposed new system. This was published at [1981] NZLJ 383. The following interview given in January 1985 takes a retrospective look at the Family Court system as it has developed.

Judge Trapski, it is less than four years ago that you were appointed as Principal Family Court Judge. This was an entirely new position. I wonder now, looking back on it, whether you would feel that you have achieved what was in your mind when you first took up the position?

The most important thing that has been achieved is that we now have, in New Zealand, a true Family Court. That achievement has involved tremendous effort by everybody who has had to become involved in that Court. My primary praise is for the profession and the Judges; then for all of the behavioural scientists who have, in one way or another, so willingly and optimistically provided support services to enable the Court to function as a Family Court. For me, the way that the profession has responded to almost reverse or tip upside down their traditional roles, practices and procedures, has been an eye-opener, a tremendous pleasure to see and a real joy to participate in.

Has the situation in the Courtroom, the actual atmosphere, changed as a result, in part at least, of the attitude of the profession?

Yes quite definitely. There is still a long way to go in that regard but there is no question about it; the profession has accepted the role of taking a back seat to allow their clients to talk, particularly in the mediation conference. At the start I think we were all concerned, even worried whether that would ever be possible. Not only was it possible, it has become a reality with the goodwill and trust of a far-sighted profession.

Are members of the profession explaining in an adequate way to their clients before they actually come into the Courtroom what the new system involves and how it will work with them?

Many are particularly good at that. You can sense when people have been adequately prepared; others are totally unprepared; you can sense that also. Some have quite clearly been told that informality is the keynote; that nothing is recorded; that everything said is privileged and is not able to be used in later proceedings. These messages get through and people open up. For others you can see that you have to do that exercise yourself and the lack of knowledge of what it is all about often impedes progress. They often still look to the Judge to provide a decision, whereas that is just not the object of mediation.

How many Judges are there who have the Family Court warrant?

Twenty-four now.

And as far as the Judges themselves are concerned, are they finding it rewarding work?

It certainly seems so. The interesting thing is that few of them want to change. Originally it was intended that there would be a fairly free exchange of warrants that Judges would move into the Family Court for a few years and then perhaps move out. This was for two reasons; first, it was thought that they would need a refresher or a time for a breather, and secondly they could go on to deal with a totally different type of work, commercial, criminal, jury work — then perhaps after a few years they could come back to the Family Court. In fact this has not happened. I would still like it to happen; I thought it would have happened before now. The fact that it has not is interesting.

When you were interviewed for the Law Journal *at the time that the new system was being introduced, you made the comment that you expected that Family Court Judges would spend 25 percent of their time in the general jurisdiction of the District Courts. Has it worked out like that?*

Yes, and it has proved to be an excellent thing. I would not resile from that one little bit. It is the envy of people in similar jurisdictions throughout the world. The Australians in particular, would love to get that little bit of relief, that change of diet occasionally, but they are not able to because of their Constitution. Their Family Court is a Federal Court.

There have been some tragedies in Australia in the Family Court field presumably from some feeling of bitterness or injustice. What sort of feedback do you get as to the reaction of the parties who have been through the system here?

Judges are probably the last people to get any feedback unless it's adverse. However, the Counselling Co-ordinators do get feedback. Generally speaking that seems to indicate that people are by and large satisfied with the system. At least it is a vast improvement. The other measure is the volume of complaints to the Minister. I am told that previously the then Minister was receiving up to 12 complaints a week. They are now a relative rarity — treated seriously but nevertheless a relative rarity. I take that as a measure of public confidence in the system. People have been able to have had their say, and that is important.

Do you think it is important that people have been able to say their piece in an informal manner?

Personally, I think this is the whole secret of the "success" of the New Zealand Family Court System. The ability a person has to say exactly what he or she wants to say, in his or her own words, to a Judge; that is really what people basically want in any Courtroom situation, but more particularly in this highly emotive environment of family disputes. They want to tell the Judge their own side of the story, and to be able to do so in their own words, in their own time, without being interrupted, and without fear of it being pulled to bits so that each and every word is analysed, questioned and queried. They want to get to the nub of the problem – they do not want to get into an argument over semantics.

Does the mediation system help to reconcile even embittered parties to the situation they are in?

Yes; the mediation conference is one of the best weapons to help overcome bitterness, provided that time out is taken; that it is utilised in conjunction with individual counselling and that people are allowed to go on uninterrupted. Where the mediation conference is used to introduce individual counselling during the adjournment people can have their out-pouring. Before then they are not ready to make important legal decisions about their lives; their emotional conflict is blighting their judgment and they have "tunnel-vision". That can be explained or talked out in the mediation conference. The merits of counselling (without necessarily using that word) can be discussed so that they can get rid of their bitterness before they get to decisions on the important legal issues. They come back, maybe six or seven months later, to work out for themselves what they originally came in for.

In your earlier interview you commented that the substantive law you thought would remain virtually unchanged, but that the main differences would be in procedure and attitude. Would you think there has been a change or not?

There have been very few changes in the substantive law. The main change has, in fact been in procedures and attitudes. Dissolution is on different grounds: maintenance provisions have changed but the most dramatic changes have been in procedures and attitudes.

In the previous interview you made the comment that counsel appointed to represent the interest of the child was advocate, investigator, mediator and you added one other function that you said was very important, that of protector. How well have counsel been performing these various functions?

Tremendously; I say that without the fear of contradiction. I know there are critics of individual counsel for children or their individual performances, but that is only to be expected; but by and large the way that the profession has responded to the responsibility of this task has been tremendous. They have attended seminars, they have expanded their reading, they have gone out of their way to work in times which have not been restricted to normal office hours. The response has been, as I say, tremendous. Their response in that role has also reflected on the way they act for other clients. It has provided the opportunity to open up issues that they may not have thought of before.

The new system would appear to involve to some extent a team approach including support people such as counsellors and various others. I was wondering if you could indicate how they seem to have reacted to the new system?

That has been a bit patchy. In some geographical areas the response has been fantastic; in other areas mediocre, and in other areas there has been no response at all, but it's all probably a matter of time.

Would this be the fault of counsel at all?

No, I do not think so. There have been a number of problems which have created this situation. In Auckland for instance there have been major difficulties in using counsellors from National Marriage Guidance Council effectively. The reasons for this are largely historical and geographical.

I am now involved in trying to even out these responses. I have arranged for the Director of the Conciliation Court of the County of Los Angeles, Mr Hugh McIsaac, to come to New Zealand during February. He will conduct a series of seminars on counselling skills right through the country, with the idea of evening out standards and raising them so that counselling is "family" orientated. He will be dealing in the main with counsellors, social workers and therapists. He will have the opportunity of meeting lawyers through Family Courts Association meetings in most centres, but basically as a psychologist and social worker he is there to look after the counselling and conciliation side to improve the quality of counselling and conciliation throughout the whole country.

There was some concern that with the new system, counsel would be squeezed out to some extent. In practice, what has been the role of the practitioner?

I would not like to think that practitioners feel they have been squeezed out of the Family Court generally. Yes, they no longer have the major role in the area of divorce, but in other fields, property, custody, maintenance, they are still in there; their role in these fields is very important. They have to be able to advise and assist their clients, but in a very specialised field now and with specialised knowledge. I do not think it is a field which you can pick up and pick down. Specialisation has arrived and the Family Court is one of the places where specialisation is important.

I have seen quite clearly a total field of expertise emerging for practitioners in this field. They have worked at it and by hard work they have developed a reputation for themselves. Particularly in the major cities many practitioners are specialising in this work, some of them solely, others as a major part of their work. It seems that they are not only existing or surviving, but doing very well in terms of a financial return and in terms of job satisfaction. Practitioners are now willing to take on this type of work: in the "old days" they dodged it or took it on as their duty to the community. Now it appears they are taking on this work enthusiastically because they like doing it, they are interested in it, and they are good at it. That it tremendous.

What proportion of the cases that come before the Family Court would be brought by the parties themselves without any legal assistance?

In dissolution probably the majority of cases now, but in other cases it is almost negligible. We shall always have the litigant appearing in person; they are still there, but I do not notice any increase at all. They are under tremendous disadvantages because of the expertise the profession has acquired.

To some considerable extent the Family Court now deals with matters that used to be dealt with in the High Court and there are some areas where there is an overlap. Would you comment on the jurisdictional relationship between the two Courts and how that works out in practise?

The main area involved is in division of property. I do not think there is any question the Family Court is getting the bulk of this work and I think doing it well. There have been some difficulties over appeals in custody cases where the procedure is appeal by way of rehearing. I personally strongly disagree with this as a matter of principle, and as a matter of practice. By and large I suppose it has worked out, but there have been some anomalous decisions from the High Court. I do not want to appear to be patronising or condescending in saying that. I do not know that the High Court Judges enjoy doing this type of work, especially now when they are progressively losing touch with it.

The area where I think there should be perhaps greater co-operation and concurrent jurisdiction is in the field of wardship. The Family Court has no wardship jurisdiction. I think it should have that jurisdiction. There are times when the facility to make wardship orders would be very useful indeed, even necessary. Instead, proceedings have to be commenced in the High Court. I think that is wrong.

To sum up the last few years, what would be your own assessment of (a) the success of the system and (b) the likelihood of any changes being needed in the immediate future?

There is an organisation in North America called the Association of Family and Conciliation Courts. It is having its Annual Conference in Vancouver in May of this year. It has organised a post-conference educational tour of New Zealand. The brochure for that conference says ". . . examine first-hand one of the world's foremost Family Court systems". That is an assessment by people who, six or seven years ago New Zealanders were consulting about what a Family Court system is all about.

And as far as the system is working at the moment then do you see any need for any major changes or alterations?

I do not see any need for major changes, rather some small tidying up of procedures. I think we can expand the field of the mediation conference; probably to take in property to a greater extent. It should be expanded to cover grandparents and maybe step-parents. These people are vital in questions of custody and access. If you leave them out of the mediation process, they will sabotage it. They should be involved.

So far as counselling is concerned it should be available freely to parents of children, grandparents and step-parents – it should not be restricted to husband and wife. There are a number of other minor matters also but by and large the system works.

Your final word in the previous interview was to ask all who came before the Family Court, parties, lawyers and specialists to look upon themselves as part of a team. Has that happened?

The word "team" was not my word; it comes from the Report of the Royal Commission on the Courts. I adopted it and promoted it. I believe the concept has caught on. I believe that people are excited about working in a team. They find it satisfying. They find safety in being able to place demarcation lines where their expertise starts and where it finishes, and someone else takes over. That is what team work is all about. We learn from other members of the team. I hope the concept of team work has been successful.

How would you sum up your own feeling about the experience that you have had as Principal Family Court Judge?

It has been personally, very demanding, but exciting. Really I feel quite proud of the way things have worked out, thanks to the co-operation of so many people. □

Jessup Moot travel donation

A donation of $300 has been made on behalf of the *New Zealand Law Journal* to assist the New Zealand team of Terry Sheat and Paul Foley to travel to New York to take part in the Jessup Moot. This annual competition is widely recognised as the most pretigious international moot. It is organised by the American Society of International Law and the Association of Student International Law Societies.

Terry Sheat and Paul Foley were the winners of the New Zealand Law Society Trophy in the inter-university moot finals in September 1984. An appeal has been made by the New Zealand Law Students Association Inc to the legal profession to help the New Zealand team attend the moot which is to take place in April 1985. Donations can be sent to the Association care of the Law Faculty at Victoria University of Wellington.

It is hoped that the two New Zealand participants will provide an article for the *New Zealand Law Journal* on their experience at the moot and their incidential activities of legal interest. □

Book note

In the January issue of the *New Zealand Law Journal,* [1985] NZLJ 36, there was a short review by A A T Ellis QC of the book *A Guide to Environmental Law in New Zealand.* The book should have been referred to as being published by Brooker and Friend Ltd for the Commission for the Environment. Any enquiries for the book should be directed to Brooker and Friend Ltd, as the Commission for the Environment does not carry stock of the publication and will not be acting as a selling agent. □

A company receiver's obligations

Recovery of the best price reasonably obtainable

By M J Ross, Department of Accountancy, University of Auckland

No longer can a receiver appointed by a debenture holder ignore the plight of unsecured creditors and sell mortgaged assets for a price merely sufficient to repay the debenture holder.

The 1980 Amendment to the Companies Act 1955 inserted s 345B into the Act and imposed on receivers a statutory obligation to recover the best price reasonably obtainable when selling assets of the company. This statutory duty has been of some practical concern to receivers. Section 345B holds a receiver personally liable to the company for selling at an undervalue.

There have been no reported cases to date on the application of s 345B. A guide to the likely interpretation of the section is provided by case law concerning allegations by a debtor that a secured creditor has realised assets at an undervalue. O'Donovan, in *Company Receivers and Managers,* (1981) at p 105, states that a receiver's duty in realising assets charged for the benefit of debenture holders is analagous to the duty which equity imposes on a mortgagee.

While each case turns on its facts, precedent indicates that in order to discharge the duty to realise the best price reasonably obtainable a receiver must:

1 ensure a forced sale is fully advertised so as to attract the best offers; and,

2 use the specialised skills of land agents and brokers, where necessary, in order to sell specialised assets to best advantage. A receiver is not absolved from liability merely by instructing agents to act.

1 Obligation to fully advertise

The perils of failing to properly advertise a forced sale have been illustrated in cases before the Privy Council and the English Court of Appeal.

In *Cuckmere Brick Co Ltd v Mutual Finance Ltd* [1971] Ch 949 the English Court of Appeal was critical of the content of advertisements for a mortgagee sale of land. The advertisements appeared in both the national and local press and posters were prepared and distributed to developers. The advertisements described the land in question as having planning consent for the erection of 33 detached houses. The advertisements did not disclose that the property in fact had planning permission for the construction of 100 flats. The site sold for £44,000 which left a balance outstanding under the mortgage of £14,200. The debtor company was sued for the balance outstanding.

There was expert evidence that the site would have sold for a higher figure if details of planning permission for flats had been advertised. The debtor company was given credit for the true market value of the property at the time of the sale. Further evidence was required to establish the true market value.

There was similar criticism of a poorly advertised auction in a further English Court of Appeal decision, *Standard Chartered Bank v Walker* [1982] 3 All ER 938. The case centred on personal guarantees given by Mr and Mrs Walker in support of the bank's loan to their company. The company purchased used metal presses and moulding machines which were resold to buyers around the world. The bank called in its loan, appointed a receiver, and the company's inventory was sold by auction.

The stock realised some £43,000 at auction. There was only £150 available to meet the claims of preferential creditors after paying the expenses of realisation. There was nothing available for the bank owed some £88,000 under its floating charge debenture. The bank sued the guarantors for £75,000, being the amount guaranteed by Mr and Mrs Walker. In their defence, the guarantors alleged the receiver had sold at an undervalue. The auctioneers had estimated that the inventory might sell for £90,000.

The Court of Appeal ruled that the duty to recover the best price reasonably obtainable was owed not only to the debtor company but also to guarantors of the company's indebtedness.

There was evidence that the auction was hastily organised and poorly advertised. There was an attendance of 70 at the auction, mainly local people, and there was only one buyer from overseas even though the market for the debtor company's machines was worldwide. It appears that not all customers of the debtor were advised of the forced sale.

The Bank was held liable for the receiver's actions as the bank had instructed the receiver to hurry the sale and finalise matters "as quickly as possible". The guarantors were given leave to defend the bank's claim under the guarantee because the forced sale was at an undervalue.

The Privy Council, in *Tse Kwong Lam v Wong Chit Sen* [1983] 3 All ER 54, ruled that a creditor had failed to take reasonable steps to get the best price in a mortgagee sale because of a failure to properly advertise the auction.

The property in question was a 15-storey building in Hong Kong. Public notice was given in three newspapers. The advertisement gave notice of the bare fact of the auction coupled with a minimum description of the property. Potential bidders were given just 15 days in which to make detailed enquiries and organise finance. There were 30 to 40 present at the auction. The one bid was at the reserve price and came from a family company of which the creditor was a member. There was a shortfall on

realisation of about $HK400,000.

The Privy Council per Lord Templeman at page 61, said the advertised details about the auction were so sparse that it confirmed the impression than the auctioneers were not instructed to do more than put the property under the hammer. The creditor was obliged to instruct real estate agents to place full details before the investing public.

The Privy Council ruled that there were grounds to set the sale aside as being at an undervalue, but the sale was not overturned because of an eleven-year delay by the debtor in bringing the case before the Courts in Hong Kong. Damages were awarded for the difference between the auction price and the best price reasonably obtainable when the auction was held in 1966. Further evidence was required to establish market values as at that date.

New Zealand cases

Recent cases in the New Zealand High Court illustrate the view that a creditor incurs liability for a failure to properly advertise a forced sale. In *Ansell v NZI Finance Ltd* (unreported, High Court, Wellington, A434/83, 14 May 1984), NZI Finance had leased Data General computer hardware to a company called A A Ansell & Co Ltd. Rentals totalling some $202,000 were payable under the three-year lease. The company went into receivership and since the receiver did not wish to continue the lease it was left to NZI to dispose of the computer equipment.

The equipment was sold by NZI after two months for $25,000. NZI sued the directors of Ansell to recover its loss on realisation. The directors had guaranteed the company's performance of the lease and had given mortgages over their respective homes as collateral security. The directors alleged that NZI had failed to get a reasonable price on resale.

Quilliam J ruled that NZI could reasonably have been expected to obtain a net price of at least $50,000 for the repossessed equipment. Since NZI had obtained only $25,000 on resale the guarantors were excused paying $25,000 of the loss on realisation.

His Honour criticised NZI for what he described as its "extremely casual" approach to advertising. NZI had placed advertisements in three major newspapers calling for tenders. The advertisement was repeated later in two of the papers. One advertisement appeared by mistake in the situations vacant column of one paper. A final advertisement was placed in a Wellington newspaper. The advertisement appeared in the paper's computer column but the computer equipment was misdescribed as "Data Journal Equipment" instead of "Data General Equipment".

Quilliam J was critical of the sparse advertising and lack of detail in newspaper advertising. There was evidence from computer brokers that a better response could be obtained if the hardware components were offered for sale separately, and if advertisements were placed in specialist publications as well as the daily press. Advertisements could also have been placed in Australian publications. There was evidence that Australian buyers would be interested despite the need to pay freight charges. This evidence led His Honour to rule that NZI had failed to take reasonable steps to get the best price on resale.

The terms of an advertisement calling for tenders on a forced sale was at issue in *Seafearer Fishing Co Ltd v Broadlands Finance Ltd* (unreported, High Court, Timaru A35/77, 17 August 1984). The security in question was a mortgage over a fishing vessel securing a $25,000 loan by Broadlands Finance. Broadlands seized the vessel following a failure to pay interest and insurance premiums.

The vessel was sold by tender. Advertisements were placed in all daily newspapers in New Zealand which had fishing ports within their area of circulation. The advertisement gave seven days within which tenders were to be submitted. Roper J was moved to say that a tendering period of one week was "quite inadequate" especially since the tender documents were in Christchurch and the vessel in Timaru. The sale was described as proceeding with almost indecent haste.

Broadlands accepted an offer of $45,000. There was evidence of a higher tender being submitted prior to Boardland's acceptance of the $45,000 offer. His Honour ruled that Broadlands was remiss in not making enquiries of the higher offer. The $45,000 offer accepted was held to be $8,800 below the market value of the vessel and the debtor company was awarded $8,800 damages.

2 Method of sale

A receiver may consider selling mortgaged assets by tender, auction or private treaty. The overriding requirement in s 345B is that the receiver obtain the best price reasonably obtainable.

There is dicta from the Privy Council, in *Tse Kwong Lam v Wong Chit Sen* [1983] 3 All ER 54, at p 59, that there is no obligation to postpone the sale in the hope of later obtaining a better price, or to break up the assets and sell in a piecemeal manner if this can only be carried out over a substantial period or at some risk of loss.

Sale by public auction is appropriate if there is an established and well known market in the assets being sold such that sale by auction is a reasonably reliable method of establishing the market price. The High Court indicated in *Ansell v NZI Finance Ltd* that such a method of sale was suitable for used cars since there was a regular market for these assets. Similarly, the Privy Council indicated in *Tse Kwong Lam* that sale by public auction was appropriate for a forced sale of second-hand furniture.

For substantial capital assets, be they land and building or specialised equipment, it is appropriate that a receiver obtain specialised advice about the method of sale. In *Tse Kwong Lam* the creditor should have consulted real estate agents for advice on the best method of realising the 15-storey building and for advice on the reserve price. In *Ansell* the creditor was criticised for failing to obtain advice from anyone in the computer industry or from any computer broker before selling specialised computer equipment.

If a receiver does rely on a specialist for advice on the method of conducting a forced sale, the receiver is still liable to the debtor for any negligence by the specialist. In *Tomlin v Luce* (1889) 41 ChD 573 auctioneers were instructed by a creditor to proceed with a mortgagee sale. Advertisements publicising the sale incorrectly stated that roads on the property being sold were kerbed. The purchasers claimed they were entitled to avoid the contract because of the misrepresentation. Their claim was compromised with an allowance of £895 being given to the purchaser for the misrepresentation. The first mortgagee was ordered to

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Implementing open government: A progress report

By Hon G Palmer, Deputy Prime Minister and Attorney-General of New Zealand.

For the second year running the Hon G Palmer, as he has now become, was invited to address the Annual General Meeting of the New Zealand Section of the International Commission of Jurists. In this paper given at Wellington on 6 December 1984 the Attorney-General develops and considers from his new perspective of executive responsibility some of the themes of his earlier paper, published at [1984] NZLJ 31. He explains what the new government has already done and what it hopes to achieve, more particularly in the area of parliamentary reform and the enactment of a Bill of Rights. He sees the two as interrelated and as involving a radical change in administrative, legislative and judicial responsibilities and attitudes.

Just over a year ago I was scheduled to deliver a speech to this group. In the event it was delivered in my absence by two of your members. Such are the exigencies of parliamentary life. I must confess that that absence almost recurred tonight. The debate on the Estimates of Expenditure started today. It is particularly gratifying to speak to you in person, at last. May I record my thanks to those who read a long speech last year.

I am going to take the opportunity to recapitulate the themes of that address prepared 12 crowded months ago. I offered a recipe to change New Zealand's system of government: adopt a Bill of Rights and reform Parliament. Now I am in the position of cooking the dish itself. I do not intend to serve it up without offering people the opportunity to sample the flavours.

Progress Report

This is a progress report – the first of a series – on our Open Government policy. The most critical components of that policy are the reform of Parliament and a Bill of Rights.

But there is of course more to it than that. Reform of Parliament and the protection of individual freedoms also involve such varied issues as the electoral system, an adequate law reform structure, access to the Courts, and an examination of the role of the Executive Government itself.

I am sure you are all conscious of the ironies involved in a member of the Executive undertaking this work. The Executive is the most dangerous branch of our Government. And I am a rather senior member of it. I invite you to reflect on the undoubted fact that in New Zealand changes to the system will not take place unless they are supported by the Executive.

Power Sharing

We do have a Government committed to constitutional change. Difficulties which have arisen in recent years need no rehersal from me. They are of recent memory.

New Zealand is too small to be able to rely on a body of detached, disinterested and authoritative public opinion as exists, for example, in the United Kingdom. Indeed if any group represents such an opinion in New Zealand it should be the International Commission of Jurists. If we suffer weaknesses on account of our size it also produces strengths. The small size of New Zealand means at least that it is feasible to attempt an open exchange of information.

The Government is willing to share power. People are willing to participate in that sharing. There must be dialogue on how this devolution of power should proceed. We must keep people informed as to progress on these matters, and receive suggestions for further developments. We must establish a set of guiding principles for politicians, administrators, and the judicial system. The Open Government policy is proceeding on all three fronts. Let me address them in turn.

Electoral law

At risk of stating a truism, democratic government turns on elections. Our electoral law and system have not been reconsidered in terms of basic principle for many years. A considered, dispassionate, and detailed look at it is required.

We plan to do this by means of a Royal Commission. Work to set this up is well advanced – the drafting of terms of reference is complete. Assembling its personnel is proceeding to a close. The Commission will be asked to consider what changes to our electoral system are necessary or desirable. The present system of voting, the method for determining electoral boundaries, the number of representatives, the life of Parliament, and the use of referenda are all matters which the Royal Commission will examine. It will also deal with question of election expenses and who bears the cost of political campaigning.

A proper review of our electoral law is very significant in any long-term reform of New Zealand's system of government. No politician can afford not to be interested in it. But in some senses, for a politician, the electoral law is only the theoretical background to his or her more immediate environment: Parliament. And it is parliamentary reform that is the key to improving the quality of democracy in this country.

Parliamentary procedure

We proposed in the Open Government policy a wide-ranging package of reforms to parliamentary procedure, the select committee structure, and the way the administrative machinery of Parliament works. More than any other, it is these aspects that will

improve the accountability of Government and the effectiveness of Members of the House of Representatives.

A review and revision of the Standing Orders of the House was urgently needed when we came into office. We took immediate steps to set up a select committee of the House to accomplish this task. It will also review the whole topic of parliamentary privilege when it has completed the Standing Orders.

Some of the essential reforms are complex, involving a complete restructuring of the select committee system itself. The House of Commons attempted this same exercise some years ago. It is a multifaceted problem.

If we are to avoid mere tinkering with the existing structure and procedures of select committees, we have to acquire a different conceptual standpoint rather than relying on the way things have always been done in the past. We should extend the ambit of select committees' powers to examine and investigate any matter that falls within their areas of responsibility.

How will the Government react to this intensified scrutiny? How will MPs cope with the inevitably increased workload? Will the resource base sustain the pressures placed on it? Will there be enough MPs, and enough time in the Parliamentary schedule, to give the committees scope to carry out their new duties effectively?

These questions are all being addressed. They involve both a philosophical commitment to a new order and a detailed examination of the way the House of Representatives works.

One of the questions that the Royal Commission on the Electoral Law will make recommendations on is whether we need more people in the House. Increasing the membership will mean changing entrenched provisions in the Electoral Act. We cannot do this without a clear expression of public preference. But having more MPs will be one way to assist the development of an effective committee structure.

Another way is to refine the business of running the House itself. This we are already doing. We regularly advise the public of the projected dates for sittings of the House. There is, in my veiw, no need to shroud the timing of the Parliamentary session in mystery. Nor do we subscribe to the charade of "filling up time" in the House if the business of government or of select committees may be more effectively accomplished by adjourning its proceedings. We have had two such adjournments in this first session of the Forty-first Parliament. Next year we will be in a position to establish a regular schedule of meeting times.

Except when demonstrably urgent business has had to be accomplished, the House has not sat after midnight. This year's Budget is a case in point. Some Budget legislation must be passed "on the night". Commonsense and equity requires that the imposition of fiscal duties as well as measures of wider economic significance occur immediately.

Perhaps our rather cumbersome procedures for dealing with these exigencies should be reviewed. For the limited purposes of Budgetary measures it may be possible to devise more streamlined methods, such as are used in the United Kingdom. But at any rate the public was able to catch some of the dreary atmosphere of an all-night sitting because the full proceedings were broadcast.

Parliament is now broadcast all the time it sits. As Leader of the House I have determined that whenever the House sits outside the hours prescribed for broadcasting, the broadcasting of proceeding shall continue until the House rises. The Standing Orders should be altered to give permanent effect to this dramatic change of practice. This change was made immediately the new Parliament opened. Even in the interim it has meant a very different atmosphere in the House.

We have done a certain amount behind the scenes of Parliament too. Two measures in particular have a significant effect on the public. Under the previous administration it was decided to make the Press Gallery "cost-effective" – if such a term is appropriate. A rent was to be imposed on office space the journalists occupied, and charges made for phones and other facilities. This is not acceptable to anyone concerned with improving public understanding of Parliament, and the accountability of politicians to their electorate. We immediately rescinded this decision. The Press Gallery continues to work at the heart of the legislature, without threat of eviction from its nominal landlord.

Public accessibility to politicians is to be improved in another way also. I have announced recently that each MP will be provided with paid secretarial assistance in his or her electorate. Office space will be partially paid for by the Legislative Department, which will also provide phones and other equipment. The electorate secretary will assist with constituency work, arrange appointments, help with research and answer enquiries.

Administration of Parliament

This second example demonstrates the role played by the Minister in Charge of the Legislative Department in making decisions which vitally affect how MPs carry out their work. We think that the administration of Parliament should not be controlled by the Executive branch of government. Accordingly, we have done a great deal of work towards the abolition of the Legislative Department.

A Parliamentary Commission is to be set up. This will be headed by Mr Speaker and will give him more power and responsibility in the running of Parliament. The exercise will be particularly fascinating as special procedures will have to be provided to settle the appropriation of money for the running of Parliament. These changes are not merely superficial. Indeed much of their strength and effectiveness derives from a sense of continuity and re-examination of first principles.

Radical and orthodox

I have said elsewhere that the pragmatist politician is all too prone to dismiss questions of theory. And tonight I have already claimed our reforms are radical. And so they are. But they are also strongly orthodox. We are realistic about the need to control the powers of the Executive through the democratic process. Already we have set in train an examination of the power to make regulations. The Statutes Revision Committee was given extensive terms of reference to enable it to give full and proper consideration to the way in which Executive powers may be limited and parliamentary scrutiny improved.

Its report is awaited with great interest by the Government. We are prepared to act with considerable boldness in putting into effect such

recommendations as it may make that will limit this formidable source of power.

Politicians will have their difficulties adjusting to the different behaviour that is now called for. Administrators, too, have had to alter their approach. Some of this relates to the "first principles" point that I made earlier.

Our transition to power was far from the orderly, measured process that had characterised past changes of administration. The laws and rules governing the succession of government were severely tested. Serious weaknesses in New Zealand's arrangements for the handover of power after the defeat of a government at an election were exposed. The whole business raised matters of both philosophical and practical significance for us all.

Its significance for Open Government is this. It is clearly necessary to locate, collate and put in one readily accessible place the scattered pieces of our constutional law that are to be found in statute. A committee of officials from all the government departments involved has been set up to do this. This will have benefits that go beyond the particular point of a dignified exit for the defeated administration.

We should achieve a comprehensive reorganisation of what is a patchwork of constitutional legislation. And we may be able to diminish some of the mystique that attends the somewhat fluid situation when a government is being formed. The proper administration of government ought not to be mysterious. It should be accessible and comprehensible to those who are affected by it although not involved in it.

Ministerial veto

The Official Information Act marks a major breakthrough for advancing these attitudes. But the Act is too timid. We undertook to revise it.

The Department of Justice has done a great deal of work putting the policy initiatives of this Government into effect. Shortly I will be bringing to Cabinet specific proposals for reform that will form the basis of an amending Act. They follow our election policy closely. Of prime importance is the attempt to eliminate the power of Ministerial veto over the release of information.

And only just second to this is our intention to limit and refine the exemptions which at present restrict the sort of information that may be released. The range of exceptions to the principle of disclosure will be narrowed. Secrecy provisions in other legislation not dealt with by the Official Information Act will be eliminated or amended.

Part of the exercise will be to look very carefully at the grounds for refusal to release information, and make such a decision subject to review by the Courts. This does not derogate from the important and sensitive role the Ombusman plays in this area. But in the new atmosphere of Open Government the Courts will be expected to play their part in guiding politicians and administrators, doing what they have always done – interpreting and applying the law.

They will be called on to perform new tasks, however. They will also be confronted with a great deal of new law.

Law Reform Commission

Already Cabinet has set aside $600,000 pa to fund the new Law Reform Commission which will replace the present part-time committee system. Cabinet has also decided to appoint a Commissioner-designate who will take on much of the necessary work of consulting with interested groups and making recommendations as to the form the legislation should take. As soon as the Act is through the House, he or she will be appointed as Commissioner.

This procedure is somewhat unusual. But it has a number of advantages. Consultation and opportunities for participation are to be the hallmark of the new Commission. We have no intention of developing a law reform structure and imposing it on everyone without fully traversing the environment in which it is to operate. Making the appointment this way also means that a great deal of the necessary background will be filled in by the time the Commission is actually established.

Delays in producing effective work will thus be diminished. And the workload will be considerable. Systematising statute law so that it is easier to locate, monitoring legislation and periodically reviewing it will be continuing tasks.

Attitudes as well as systems will have to change. The law of statutory interpretation will be revised as will the language in which laws are written. Both simplicity of language, and the clear expression of the intentions of Parliament in passing a law, have profound implications for Open Government.

New policies

Access to the law has improved in another way also. In a major Budget exercise, 17 new policies which will greatly improve the functioning of the justice system were approved. Some of them have already been put in place. All sorts of community groups have benefited from increased funding. The duty solicitor scheme has been extended. Very shortly I hope to announce increased funding for legal aid. Others, such as the Courts building programme, which benefits by an additional $3 million annually, are more long-term.

Open justice means open Courts. There are problems in achieving this in a time of economic restraint. But the judicial system has been starved of resources, with detrimental effect on the achievement of quick and effective justice. I am determined to remedy this neglect. I am especially determined to do so since, as I said before, the Courts, will be called upon to perform new tasks in a new way. I am not proposing a judicial revolution. Nevertheless a revolution is on its way.

Bill of Rights

At the beginning of this speech I referred to the necessity of establishing a set of guiding principles for politicians, administrators, and the judicial system. I have referred to each of these sectors in turn. It seems to me that the efforts of each group, their ability to adapt and respond to public perceptions of Open Government, will find a focus in the passage of a Bill of Rights for this country.

In a sense a Bill of Rights goes far wider than the concept of Open Government. It will impose restraints on even the most open of governments, the most flexible of administrators. It will limit the present ability of legislators to enact any law they please.

The implementation of policies of Open Government will inevitably alter our views of the appropriate functions of politicians, administrators, and the judiciary. As our expectations shift, so may our conceptual framework.

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Bill of Rights: Redistribution of power

By B V Harris, Senior Lecturer in Law, University of Otago

In this article Mr Harris looks at the legal meaning and the practical reality of the classic political concept of the separation of powers and at the likely effects on the relationship between the three branches of government of the enactment of a Bill of Rights.

The new Labour Government is committed to major constitutional reforms. The introduction of an entrenched Bill of Rights is the most significant innovation being contemplated. The aim of the reforms is the "redistribution of power between the executive, legislative and judicial branches of our Government" as stated by Geoffrey Palmer at [1984] NZLJ 180.

The suggestion of a redistribution of power invites a consideration of the structure and functioning of the present New Zealand government system in the light of the doctrine of the separation of powers and the theory of checks and balances. What effect will the incorporation of an entrenched Bill of Rights have upon this analysis?

Separation of powers and checks and balances

Both the institutions and functions of government in New Zealand fall loosely into three categories; legislative, executive and judicial. To perhaps oversimplify, "legislative" means law-making, "executive" means policy-making and administration of the system of government as manifest in the law, and "judicial" means resolution of disputes as to law and fact between individuals (including corporate bodies) or between individuals and the government. It is difficult to define the expressions "legislative", "executive" and "judicial" so as to allow definitive classification of the many different governmental functions. The distinction between executive functions, and judicial functions has, for example, been subject to much debate.[1] In reality many of the institutions within the government system perform a mixture of legislative, executive and judicial functions.

Political philosophers have developed a doctrine called the "separation of powers". The most famous proponent of the doctrine, although not its original author, was the French philosopher Montesquieu.[2] He recognised the three different functions of government and advocated that there should be three institutions of government, one corresponding with each of the three functions. It is uncertain whether Montesquieu thought that each of the institutions should perform only its allotted function and not trespass in any respect upon the powers exercised by the other two branches, or whether he thought the mixing of functions to a small degree was tolerable.[3]

The reasoning behind the doctrine of the separation of powers is the belief that human nature is such that if more than one function of government is vested in an institution or person the processes and principles of government will be abused. In the words of John Locke one of Montesquieu's predecessors in *Second Treatise* XII, para 143:

> . . . it may be too great a temptation to human frailty apt to grasp at Power, for the same Persons who have the power of Making Laws, to have also in their hands the power to execute them, whereby they may exempt themselves from Obedience to the Laws they make, and Suit the Law, both in its making and execution, to their own private advantage. . . .

In Montesquieu's own words:

> When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.
>
> Again, there is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executor power, the judge might behave with violence and oppression.
>
> There would be an end of every thing, were the same man, or the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals.

Another theory which has tended to become blended with the doctrine of the separation of powers is that of

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A Bill of Rights is not merely an academic exercise. It is an imperative protection for fundamental freedoms. It is a restraint on the abuse of power. It is an authoritative statement of our society's values in the realm of human rights. It provides a judicial remedy for those who suffer under a law or conduct which breaches individual rights. Because it is all of these things, it encapsulates the concerns that the Open Government policy is offering, in a limited way, to remedy or at least mitigate.

Open Government is subversive. It undercuts a number of cherished beliefs about the ability of those in power to wield that power. It will greatly alter the complexion of the institutions of state. But the Bill of Rights is the skull beneath the skin. □

checks and balances. The idea underlying the theory of checks and balances is that one organ of government should be able to prevent abuse of governmental process by another. For example, if the executive purports to assume a law-making role which has not been authorised by the legislature, then the Judiciary will intervene to prevent the unauthorised law-making from continuing as illustrated in *Fitzgerald v Muldoon* [1976] 2 NZLR 615. The theory requires power to be allocated in such a way that the potential for abuse is minimised.

The theory of checks and balances is not always consistent with the "pure" doctrine of the separation of powers. The inconsistency arises because in order to provide an effective check and balance two organs of government may have to share the same function. For example, in the United States where the theory of checks and balances is manifest in the Federal Constitution, one could say that the legislative function is shared between the legislative and executive branches, that is between Congress and the President. Congress can pass legislation, but the President has a limited power of veto. Article I, s 7 of the Constitution of the United States provides that every Bill which passes the House of Representatives and Senate must be sent to the President, who may approve the legislation or return it to Congress. After such a Bill is returned by the President it shall become law, irrespective of the President's wishes, if it is approved by two-thirds of each house.

Conversely, the legislature can obstruct some executive action. For example, by the provisions of Article II s 2 of the Constitution, the President may only make treaties if his action is supported by two-thirds of the members of the Senate present. The executive and the legislature are jointly performing an executive function. If one accepts the expression of the doctrine as tolerating a degree of sharing of functions, little inconsistency arises between the doctrine of the separation of powers and the theory of checks and balances.

The application of the theories to the structure and functioning of the present New Zealand Government System

The legislature, the executive, and the Judiciary are easily recognised as distinct and different institutions in the New Zealand constitution. The legislature is the General Assembly: s 32 of the New Zealand Constitution Act 1852. The executive is the cabinet functioning through the Governor-General, the Executive Council, individual ministers or the civil service: SR 1983/225. The Judiciary is the formal Court system ranging from the small claims tribunals to the Judicial Committee of the Privy Council: SR 1973/181. This classification is an institutional classification rather than a functional classification. As in most western constitutions, the functions of the different branches are mixed.

A simple model may be put forward to illustrate how the three institutions and functions work together to form the system of New Zealand Government. The executive, that is Cabinet with the assistance of the civil service, research and put before Parliament a proposal for tax legislation. The Bill is debated by Parliament and passed. After the recording of the Governor-General's assent it is enacted. It is difficult to decide whether the researching and putting of the Bill before Parliament by the executive branch is in fact an executive function or a legislative function. However, the debate and enactment of the Bill by Parliament is without doubt a legislative function, as is the granting of assent by the Governor-General.

The Inland Revenue Department, a part of the executive, is required by the statute to administer the new tax law. The administration of the statute requires the interpretation and application of the law – essentially an executive function, but arguably with a judicial element. The mechanical collection of the tax money and the credit of that money to government funds would obviously be an executive function.

When a dispute arises as to whether a particular individual is obliged to pay tax under the law the services of the Taxation Review Authority, a tribunal performing a judicial function, and the Judiciary may be invoked. The judicial bodies are charged with the responsibility of authoritatively deciding the law's application or lack of application to particular fact situations.

Each of the major institutions in the present New Zealand Government System requires consideration in the light of the doctrine of the separation of powers and the theory of checks and balances.

(a) The legislature

The legislature includes amongst its personnel people who are also important members of the executive branch of government. The Governor-General is part of the General Assembly in terms of s 32 of the New Zealand Constitution Act 1852, but at the same time, as the Queen's representative, he is the formal head of the executive branch. Similarly, the Ministers who are Members of the Executive Council and Cabinet are required by s 9 of the Civil List Act 1979 to be members of Parliament. So in contravention of the doctrine of the separation of powers the same persons are members of both the legislative and executive branches of government.

It could be argued that in some situations the potential exists for power to be abused because the same people dominate the New Zealand legislature and executive. For example, if the executive desires more authority than is provided by existing statute the Cabinet can use its command of the majority of votes in Parliament to ensure that the required authority is enacted promptly as in the case of the Whangarei Refinery Expansion Project Disputes Act 1984. However, the Ministers' membership of Parliament and their collective membership of Cabinet, together with party discipline, does allow needed initiatives for legislation to move smoothly from the executive, through Parliament into legislation. Close co-operation betwen the executive and legislative branches is essential to the functioning of modern government. Strict observance of a pure theory of the separation of powers would not allow the legislature to be sufficiently responsive to the needs of government. The executive has a detailed appreciation of the legislation required in a sophisticated modern society. It would be impossible for Parliament to develop a similar appreciation without close ties with the executive.

The Ministers' membership of Parliament is also the basis of responsible government. It facilitates the collective responsibility of Cabinet to Parliament and the individual responsibility of Ministers. Parliament is therefore able to be a

form for the criticism of the policy and actions of executive government.

The inconsistency with the doctrine of the separation of powers allows Parliament to be a check on the abuse of power by the executive, yet, that same inconsistency detracts from the effectiveness of the check. The executive's dominance of New Zealand's small Parliament, through the dual membership, and the stringency of party discipline, must be borne in mind when assessing the effectiveness of parliamentary scrutiny of executive action. For example, such dominance must detract from the penetration of review by parliamentary select committees such as the Public Expenditure Committee of government related spending, or the Statutes Revision Committee of delegated legislation.[4]

Parliament not only departs from the pure doctrine of the separation of powers by including members of the executive in its membership, but also by performing functions which arguably are not legislative. For example, the House of Representatives performs judicial functions when it decides whether parliamentary privilege has been breached and what the punishment for such breaches should be. Parliament's power under s 8 of the Judicature Act 1908 to remove a High Court Judge from office has never been used in New Zealand, but if the House were to exercise this statutory power, it would arguably be performing a judicial function. Once again such a departure from the pure doctrine of the separation of powers would facilitate the application of the theory of checks and balances in the sense that, in extreme circumstances, the parliamentary dismissal of a Judge could be a check on the abuse of power by the Judiciary.

Parliament has the legal power to impose checks on the executive and Judiciary in a more dramatic manner than that discussed already. The General Assembly can enact legislation at any time to override the wishes of the executive and the Judiciary. Both the executive and the Judiciary exercise their powers with the express or implied authority of Parliament. However, the political reality of executive domination of Parliament renders the use of legislation to check the abuse of executive power unlikely.

Neither is Parliament likely to need to use its law-making supremacy to check abuse of power by the Judiciary. Such abuse is unknown in our Court system. However, Parliament may use its law-making supremacy to change the law from what the Court has held it to be when deciding a case.[5]

The traditional understanding of the continuing substantive supremacy of Parliament does not allow the other institutions of government to check abuse of power by the legislature. The General Assembly is free to enact any law whatsoever in the confidence that it will be upheld by the Courts. The Courts' responsibility is to uphold the law as enacted by Parliament, not to question it.

Notwithstanding this traditional understanding, the New Zealand Court of Appeal led by Cooke J has suggested as obiter dicta in a series of recent decisions that if Parliament were to enact legislation purporting to take away certain common law rights, that legislation would not be upheld by the Courts.[6] For example, Parliament may not be able to take away the rights of citizens to resort to the ordinary Courts of law for the determination of their rights.[7]

The idea that the Courts may measure parliamentary enactments against substantive principles selected by the Courts themselves remains only a judicial suggestion at this stage. The substantive principles so far suggested by Cooke J and his judicial colleagues are likely to be widely supported. However, the suggestion that this power to disregard the intention of the legislature resides with the executive appointed Judiciary in advance of the adoption of an entrenched Bill of Rights is a little startling for those of us brought up on the law-making supremacy of the democratically elected Parliament. If the Courts were to refuse to allow Parliament's enactments to override certain common law rights the Judiciary would without doubt be acting as a check on what it thought to be the abuse of power by the legislature.

In theory the executive has the potential to impose a check on the legislature through the power of the Governor-General in terms of s 44 of the New Zealand Constitution Act 1852, to summon, prorogue and dissolve the General Assembly. Parliament cannot make laws until it has been summoned and cannot make laws after it has been dissolved. In reality the check is of little significance because the Governor-General is obliged by convention to act on the advice of his Ministers and those same Ministers dominate the legislative programme of Parliament.

The major checks on the abuse of power by the legislature are the force of public opinion and the triennial general election. In theory the Official Information Act 1982 should facilitate better public scrutiny of the exercise of power by the legislature and the executive.

The Governor-General's assent is a prerequisite to the enactment of legislation. This is because he is a component part of the General Assembly. The requirement that he assent to or refuse his assent to proposed legislation is also specifically provided for in s 56 of the New Zealand Constitution Act 1852. New Zealand Governors-General have always strictly complied with the convention of following ministerial advice and have never refused assent to legislation. The last monarch in the United Kingdom to refuse assent to legislation was Queen Anne in 1707. However, in a system of government devoid of many of the traditional constitutional safeguards (for example a written constitution and a second legislative chamber), such a potential restraint on the use of legislative power should not be ignored.

(b) The executive

The executive develops policy and administers the law through the civil service. The doctrine of the separation of powers sits as uncomfortably with the executive in New Zealand as it does with the legislature. The executive is not only dominated by the Ministers who are members of another branch of government, the legislature, but also the executive's functions extend beyond those which may be classified as executive.

For example, the executive has an important law-making role through the promulgation of statutory regulations. However, practical reasons exist to justify this delegation of law-making power to the executive by Parliament. First, it would be impossible for Parliament to find appropriate time to deliberate upon the volume of statutory regulations modern society requires. Secondly, regulations are usually concerned with matters of detail, not matters of

principle. The executive is better suited than the legislature to this task of making specific mechanical rules for the implementation of the broader rules contained in statutes.

The executive also performs a legislative function when it initiates legislation and guides legislation through Parliament. The permanent civil service has a great influence on the content of the bulk of legislation because it is this body which often recognises the need for, proposes, and drafts the legislative proposals put before Parliament. It would be impossible for Parliament to perform its law-making functions without assistance from the executive.

The executive may also be called upon to perform judicial functions. For example, when the Governor-General exercises the prerogative power to pardon he is performing a judicial function upon the advice of his Ministers.[8]

Constitutionally, the Attorney-General is an interesting member of the executive because he is called upon to perform legislative functions as a Member of Parliament, and executive and judicial functions as a member of the executive. When performing the more judicial aspects of the office of Attorney-General, such as exercising a power to stay criminal proceedings under s 774 of the Summary Proceedings Act 1957, or participating in a relator action,[9] he is expected to act as a law officer administering the law in the interests of his government. A supporter of the pure doctrine of the separation of powers would not accept that one person could perform, without abuse of process, more than one of the traditional functions of government in this way.

In theory (that is ignoring the reality of executive domination of Parliament) the exercise of power by the executive is checked by Parliament and the Judiciary. The executive can only do that which it is authorised to do either by statute or the common law. Parliament can therefore circumscribe the power available to the executive. Also the conventions of collective and individual ministerial responsibility facilitate the executive's accountability to Parliament. As already discussed, Parliament as a whole or through select commitees can scrutinise the exercise of executive authority and take appropriate action through legislation or otherwise to remedy abuse of power.

Since the executive is limited to exercising only the powers conferred upon it by statute and the common law the Judiciary can check unauthorised executive action.

As well as refusing to enforce unauthorised governmental decisions, the Courts have a jurisdiction to issue the public law remedies provided by the common law or under the Judicature Amendment Act 1972 (as amended) for unlawful governmental action. For example, in *Fitzgerald v Muldoon* the High Court declared that the Prime Minister had purported to exercise power which he did not have, either from the common law or from statute. He did not have legal authority to suspend by public statement the operation of an existing act of Parliament. Not only did he not have authority to do what he did but the actions were in defiance of a statutory prohibition, namely s 1 of the Bill of Rights (1688). The Judiciary enforced Parliament's circumscription of the powers of the executive.

Executive action is now also subject to checks from statutory bodies such as the Ombudsmen and the Human Rights Commission which are outside the classification of the traditional institutions of government.

(c) The judiciary

Of the three major institutions of government in New Zealand, both the doctrine of the separation of powers and the theory of checks and balances sit most comfortably with the Judiciary. The personnel of the Judiciary (with the exception of those who are members of the Privy Council) do not have membership of any other branch of government. The independence of the Judiciary is one of the unquestioned principles of the New Zealand Constitution.

The Judiciary is often called upon to resolve disputes between the executive branch of government and private legal persons so appearances of justice being done could not be maintained if the Judiciary were not independent from the executive. Further, the Judiciary's function is to apply the law as enacted by Parliament and as established by the Courts themselves in the development of the common law. If the Judiciary did not have a strict independence from the executive the proper performance of this function would be inhibited by a temptation to give effect to the wishes of the executive rather than objectively applying the law. The existence of such a temptation is the rationale for the doctrine of the separation of powers.

The functions of the Judiciary are primarily judicial, however it may be suggested that the Judiciary also performs a law-making function in two slightly different ways. First, the Judiciary is arguably law-making when in the name of statutory interpretation it is sometimes called upon to bridge the gap between the wording of a statute and a particular fact situation.[10] Secondly, the Courts are arguably law-making when developing the common law. The substantive aspects of modern administrative law are, for example, almost entirely Judge-made.[11]

When considered from the point of view of the theory of checks and balances the Judiciary can be seen as potentially subject to checks from the executive and legislative branches. For example, the executive has the potential to impose a check upon the Judiciary through its power of appointment.[12] However, in New Zealand there is a very strong convention that such appointments are not influenced by political considerations. As already mentioned the legislature could impose a check upon the Judiciary through its power to dismiss a Judge. This power would only be employed in extreme circumstances.

As has already been indicated there is doubt as to whether the nature of the law-making supremacy of the New Zealand Parliament will allow the Judiciary to impose any check upon the abuse of power by the legislature. There is no doubt, however, that the Judiciary may impose a check upon the abuse of power by the executive branch of government.

The adoption of an entrenched Bill of Rights

The adoption of an entrenched Bill of Rights will change dramatically the distribution of power in the New Zealand structure of government. Parliament acting by a majority of one will no longer have supreme law-making powers; the Judiciary will be able to declare legislation invalid if it is found to contravene the guarantees of the Bill of Rights.

From the point of view of political reality the innovation will mean that the executive's capacity to transform

promptly its wishes into legislation will be circumscribed. Executive domination of Parliament will be unlikely to ensure sufficient support to satisfy the procedural entrenchment of the Bill of Rights. Therefore any change to the basic laws contained in the Bill of Rights will require the executive to enlist support beyond the governing party. This will, of course, be consistent with the object of the entrenchment of any law: that is change should only take place after careful deliberation and upon evidence of wide support within Parliament and society.

Not only will the Judiciary be able to declare invalid ordinary legislation which is inconsistent with the Bill of Rights, but also executive action which is contrary to the Bill of Rights will be declared invalid. The Judiciary already has the capacity to find unauthorised executive action to be invalid, but the Bill of Rights will expand the range of substantive principles against which executive action may be measured.

The redistribution of power brought about by the adoption of an entrenched Bill of Rights can be analysed in terms of the doctrine of the separation of powers and the theory of checks and balances. The ideal of the separation of powers will be furthered by the denial of complete law-making power to the executive. The executive's domination of the House of Representatives is unlikely to guarantee the degree of support that will be required to satisfy any entrenchment procedure which may protect the Bill of Rights from impetuous change.

From the point of view of the theory of checks and balances the entrenched Bill of Rights will enable the Judiciary to act as a check on the abuse of law-making power by the executive through Parliament, and as a better check on the abuse of executive power by the executive through its officers.

The relative decrease in the power of the executive and the corresponding increase in the power of the Judiciary may tempt the executive to redress the balance when making appointments to the Judiciary. It must be hoped that the effectiveness of the attempted redistribution of power will not be undermined by the executive's succumbing to this temptation. The convention of non-political appointments to the Judiciary should be assiduously maintained in order to ensure the actual and apparent independence of the Judiciary. □

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1 See eg Sir Ivor Jennings, *The Law and the Constitution* (5 ed 1959) 280-304 (Appendix I).

2 See eg John Locke, *Second Treatise* (1690) XII. See also M J C Vile, *Constitutionalism and the Separation of Powers* (1967) 76. Montesquieu, *The Spirit of Laws* (1748) Book XI, ch VI. See Vile, at 76 to 97 for a thorough analysis of Montesquieu's understanding of the doctrine of the separation of powers. It is interesting to note that Montesquieu did not use the words "doctrine" or "separation of powers" at all.

3 See Vile, supra fn 2 at 85-86.

4 See *Standing Orders of the House of Representatives* (1979) Nos 334, 377 and 378. For criticism of the effectiveness of parliamentary scrutiny of executive action see Palmer, [1984] NZLJ 178-179.

5 See eg War Damage Act 1965 (UK) which reversed the decision of the House of Lords in Burmah Oil Co v Lord Advocate [1965] AC 75. Cf Clutha Development (Clyde Dam) Empowering Act 1982 which effectively reversed the decision of the Planning Tribunal in *Annan v National Water and Soil Conservation Authority and Minister of Energy (No 2)* (1982) 8 NZTPA 369.

6 *L v M* [1979] 2 NZLR 519 at 527 per Cooke J; *Brader v Ministry of Transport* [1981] 1 NZLR 73 at 78 per Cooke J; *New Zealand Drivers' Association v New Zealand Road Carriers* [1982] 1 NZLR 374 at 390 per Cooke, McMullin, and Ongley JJ; *Fraser v State Services Commission* [1984] 1 NZLR 116 at 121 per Cooke J; *Taylor v The New Zealand Poultry Board* unreported, Court of Appeal, 18 April 1984, CA 124/83 per Cooke J. And see Caldwell, *Judicial Sovereignty* [1984] NZLJ 357.

7 *New Zealand Drivers' Association v New Zealand Road Carriers* [1982] 1 NZLR 374 at 390 per Cooke, McMullin, and Ongley JJ. Compare with the judicial attitude to privative or ouster clauses in United Kingdom and New Zealand legislation: *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147; *O'Reilly v Mackman* [1983] 2 AC 237; *Bulk Gas Users Group v Attorney-General* [1983] NZLR 129.

8 See clause XI of the Letters Patent Constituting the Office of Governor-General 1983 (SR 1983/225).

9 An example of a relator action is *Attorney-General ex rel Benfield v Wellington City Council* [1979] 2 NZLR 385.

10 See Lord Denning, *The Closing Chapter* (1983) 93-114, and see Callen *Law Making and Judges* [1984] NZLJ 163.

11 The Judges' Rules could be cited as a more overt example of judicial "law-making". The rules are not technically part of the law, however they are followed very closely. See *R v Convery* [1968] NZLR 426.

12 See eg ss 4 and 57 of the Judicature Act 1908 (as amended).

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compensate the second mortgagee for the £895 lost through the auctioneer's negligence.

The principle is that whatever is done by the receiver's agent must be taken to be done by the receiver personally. Provided competent agents are selected, a receiver is not liable for their errors in matters of judgment or detail provided such errors do not seriously affect the success of the sale or the price realised.

3 Conclusion

The cases indcate that merely putting assets to tender or to auction does not by itself discharge a receiver's obligation to obtain the best price reasonably obtainable.

The advertisement of sale must fully detail the attributes of the asset being sold and should be placed in both general and specialist publications to reach the widest circle of possible buyers. Advertisements should be placed with a view to the posible market – regional, national, Australasian or international.

If there is a recognised market for second-hand stock, a receiver can usefully sell in that market. Specialist advice should be sought for the sale of capital assets.

When assets are sold by tender or at auction then sufficient time must be allowed to enable intending purchasers to inspect the asset and arrange finance before submitting bids.

If trading stock is being realised then customers and suppliers dealing in these items should be contacted.

These steps involve the receiver in time and expense. Ultimately these expenses are borne by the debtor but they are necessary to ensure that the receiver carries out the statutory obligation under s 345B to realise the best price reasonably obtainable. □

Presidential retrospective

"I never promised you a rose garden"

By Bruce Slane, retiring President, New Zealand Law Society

For three years of major changes in the legal profession, including the passing of the Law Practitioners Act 1982, Bruce Slane of Auckland has been President of the New Zealand Law Society. As his term is ending he was asked to provide an overview of his experiences of those three years and what he had learnt of the strengths and the problems of the profession in this period. The original intention was to interview Mr Slane but for various reasons this was impractical. He was accordingly written to at length and topics were suggested that he might like to discuss. The resulting somewhat discursive nature of the article is therefore to be attributed to Mr Slane dealing with the topics suggested plus some others that occurred to him. The article should therefore be read not so much as a formal report on stewardship as a conversational look at the variety of issues that had to be dealt with and the changes of attitude that resulted from his experience as President.

Opening note

"In my part of the country they reckon you're a liberal."

That was my first discussion about the Presidency with a district law society president, but it wasn't in my first year fortunately. The voice was just a little accusing and I could see what part of the problem was.

Coming from Auckland. As far as the rest of the country is concerned, Auckland is a problem and coming from Auckland an even bigger one. I decided early on that I was not prepared to deny my Auckland heritage and on the other hand I was going to make it clear that I was by no means blind to the rest of the country, or the handmaiden of the Auckland Law Society.

As it happens, my relations with the Auckland Law Society have been much more distant than with several others. I have sat with their Council once and had dinner with them once in three years.

The other part of the problem was that I was into PR, law reform, improving the profession's relations with outside groups which involves listening to (and sometimes taking aboard) views you might not want to hear. I said I was not a "liberal" in the pejorative sense it's often used but rather a person who believed passionately in the law, civil liberties, the role of the independent Judiciary and an independent profession and that we should keep ourselves modern and up to date without sacrificing principle.

View of NZ Law Society

However, I had a different view of the New Zealand Law Society when I took office. I had been four years a Council member and then a Vice-President, including two years on the Executive Committee, so I thought I knew a good deal about it, and so I did.

But I suppose everybody else except the President and the Secretary-General and his staff, have an on and off relationship with the New Zealand Law Society. Generally living some distance away you think about things from time to time and you go to meetings and discuss them and come away again. The "swan in and swan out" exercise had resulted in some district presidents constantly reaffirming prejudices against the New Zealand Law Society because they had not got to grips with it and made little effort to convey the decisions of the Council and the Executive adequately to their members. There were others who were intensely and vitally interested, but in one or other aspect of the activities.

I also saw the mood as fairly conservative. The days of reform seemed to have gone. The profession had had enough, the Courts had been changed by the Royal Commission, the disciplinary procedures by the Law Practitioners Bill and the Government was neglecting legal aid, duty solicitors and community law services. It seemed a period for consolidation, administrative changes and some long distance planning. I was totally wrong.

Frankly, earlier I had not thought that the New Zealand Law Society was very important. When I was on the District Council in Auckland, I believed that most of the things that mattered could be dealt with at district level.

At the time I took office I expected that the job would largely be administrative with a certain amount of time-wasting social and ceremonial activity and some improvements that could be brought about in public relations and communications and relations with district law societies. I made a list of things that I thought I ought to be able to achieve, found it three months later, read it again nine months later and have now lost it. I do not think that mattered.

The Office of President

The most amazing thing was to discover how important other people thought the President of the New Zealand Law Society was. He is not actually very important at all unless he wants to make the job count. It is an office that can be gracefully occupied by those who can detach themselves from the day to day affairs of state, the worries about the future of the profession and the significant changes that are going on in our society. But I found if you were constitutionally incapable of this insulation, as I was, that it was actually a very involved, exciting and interesting task, but certainly not one in which you feel any degree of power. More a feeling of being battered about the head – which explains the friendly (or bemused) look at airports.

I suppose power comes really from

knowledge, diligence and effort. In other words, if you have studied to know more about any of the topics that are being discussed than most people have had time to accumulate, then you have got a better chance of having your knowledge taken notice of. But your opinions are always subject to virulent attack. (See Dugdale 1982, 1983, 1984.)

This intensity of involvement is dangerous, so I have always tended to consult widely as those who have had telephone calls from me will know. I was also aware that many people regarded the New Zealand Law Society as an expensive irrelevance. Consultation heads the responsibility outwards.

Major issues

It was quite clear however, after I took office, that there were going to be a number of major issues facing us. The Law Practitioners Bill slithered through Parliament but Parliamentary and other information reaching me indicated that we could not expect to sit on the scale fee system indefinitely, but if we were to lose it, we might lose it in a dramatic way by a huge proportion of the profession's work being heisted off us on the basis that this was the only way of breaking the lawyers' "monopoly". Basically the scale was unpopular with the public. Governments saw it as retail price maintenance.

I made a personal decision that the profession should not be told what to do but should be made to face up to issues. I believed that busy lawyers were inclined to put these matters out of their minds with the demands of practice, the increasingly difficult economics and the increasing pace of professional life. I believed that if any decisions were going to stick, they had to have broad grass roots support and that the reasons for the need to face these decisions had to be introduced over a fairly long period. I believed that if I raced ahead in my mind and others with me examined something and came to a conclusion that was four stages ahead of current thinking in the profession, we would be resented and dismissed as unrealistic or simply soft appeasers. So what we did was to get a broad range of people working on the issues. People who I knew were deeply conservative, as well as those who were progressive and energetic – not that some conservatives aren't energetic.

The result was that when the study went in, lawyer after lawyer came to his or her own conclusions and if you take the scale as an example, what happened was that the profession was challenged to find a different solution from that proposed by the committees and working parties. The same situation later developed with advertising. There were not many satisfactory alternatives. I knew that, but I knew that there would be differences of opinion and as far as I was concerned my determination was to make the profession face the issues. I had to make the Law Society Council which, given the choice, preferred to defer difficult decisions to debate, and decide. Individuals and ordinary practitioners had the uncomfortable experience of looking at the options and having to come to their own conclusions.

I was not into thrusting any particular view upon them, although I did not hestitate to mention at the time when the final decisions were being taken, what I thought was the best solution. We were not perfect at it, we managed to mess up the scale fee by settling for a guide, which was really going to be an unsatisfactory compromise. It went when the political implications were appreciated. It would have been unconvincing anyway.

Although we are not free from the threat of the Housing Corporation turning itself into a conveyancing corporation, the fact remains, as the Minister of Housing would readily admit, it is a lot more difficult to introduce such a scheme when the legal profession has reformed itself and allows its members to compete on price and advertise that they do that sort of work.

Public relations

I believe that the profession cannot isolate itself from what is happening in the world today. We cannot simply by assertion, thumping the table and constant repetition of the old cliches, secure our place in the firmanent. We have to persuade, we have to explain and we have to make ourselves clear – not by writing obfuscating pompous letters as unfortunately some of us are prone to do. Clear speech, plain speaking, good use of English, are still skills that each of us needs to develop daily.

Public relations is a two-way street. It involves explaining an organisation to its public and it also requires a feedback to the organisation of the attitudes of its public. If we were to put it into commercial terms (and I am not just talking about the profession which practices privately, but to all of us) the fact is that we need to know and understand our market.

Whether we are a Government or corporate lawyer, a law teacher, an employee or a self-employed private practitioner, the fact is that we need to know those whom we claim to serve. We need to know their needs, we need to know how they are best served. We need to consider methods of delivering those services, and structures for providing them, that are not necessarily based on what has gone before.

Law practices

We tend to look at incorporation of legal practices for instance, in one way, namely in relation to limited liability, superannuation, structural continuity, etc. What we should be looking at is whether the incorporation of law practices might provide a better structure for providing, at one end of the market a highly efficient, if you like, assembly line service, a ready made suit, well supervised, properly provided at basic costs and at the other end, the bespoke tailoring department for those who cannot be fitted into a suit off the rack.

The spate of mergers is an indication that many have recognised what commerce is going to demand of the private profession in the way of instant service and highly specialised skills. What I believe has yet to follow is changing patterns of delivering conveyancing services in the domestic or cottage conveyancing field.

We are in an era of reform-driven Governments and we fool ourselves if we adopt an ostrich approach and stick our heads in the sands of time. Efficiency, even across international borders, is the keynote of current economic thinking. But we have to meet that situation and it is changing so rapidly. It may be only a passing fashion. But in passing it's unlikely to leave us immune.

There would be some weeks when I would do nothing at all but Law Society work and even then not succeed in reading what I would think is a satisfactory amount of material backgrounding what is happening overseas as well as understanding significant changes arising out of

Government, institutional and judicial decision making.

Future planning

The Law Society should have about twice the income it does at the moment with a highly developed research team which is feeding up to the practitioners the issues which they ought to face rather than the practitioners coming to committees to decide matters, half of which are the result of reactions to initiatives by others.

Frankly I think we went on the wrong tack in approaching this matter as a future planning one. When the world is changing so fast that it is sheer speculation to talk about the year 2000, it is even doubtful if we can predict what the situation will be three or four years from now. But that is the period and time span we should impress upon ourselves the need to examine. Then we can lift our eyes a little higher and a little further ahead. At the moment the Law Society is running very fast and only just keeping up.

Apathies

There are some apathies which worry me. The lack of foresight of many leaders in the profession in relation to the Law Foundation is one. I believe the Law Foundation will be a dynamic force of great importance to us. We need funding for research and we need that research to be practically oriented. And we need the Law Foundation to assist neighbourhood and community law services. We should stop the silly nonsense of a small minority who are somehow resentful of those services being provided another way. And some of those who do the work there should take the chip off their shoulders and remember that they can be crusaders without having to show that they are fighting infidels.

The Law Society President should not have to travel the country just so he can say that he has visited every district law society. What he should be interested in doing is talking to the people on the ground and not rushing it too much. I found it difficult to begin with because until I felt comfortable in the job I really was not in a position to talk confidently about the Law Society itself.

Positive approach

I do note one basic difficulty we have. Lawyers are largely negative beasts. I was at a session at the Canadian Bar Association on marketing of law firms and the lecturer said something like this.

> Lawyers are very well trained to criticise. They can find a hole in a document and they can find out what's wrong with anything. But if you're going to stay at my seminar today, I'd like you to put all that out of your mind because if you don't you won't get any benefit.

My advice to all who engage in Law Society office is not to lose their critical faculties but at the same time to adopt a positive approach to the issues. A problem-solving approach rather than finding weaknesses in every approach. I would also say do not go for law society work unless you are really prepared to do a lot of spare time reading. If you are not prepared to discuss issues, you are not much use at the Law Society Council because that is what the Council has got to deal with – the issues: professional indemnity insurance; codes for specialisation; the Privy Council; the Bill of Rights. Any lawyer can go along and pick holes in what has been done by the administration or the Executive Committee. What is more difficult is to make a positive and thoughtful contribution.

Political considerations

The negative approach I consider, is also one of our dangers in dealing with Governments. Given a proposal, our tendency is to pick holes in it. Our tendency is to defend the status quo rather than to go to the enormous effort needed to bring about change. But unless we do change that which is old and ought to be discarded, we will not succeed in retaining the best of what we have. The baby will be thrown out with the bath water and good laws will go because they were not reformed soon enough.

If common lawyers of years ago had not been complacent about the system of collection of accident compensation for people by means of a Supreme Court Judge and jury, we would never have had the Accident Compensation Corporation. Why on earth did we persist in a system that had juries fixing damages when they had had no experience of it and were not allowed to be told what the current tariffs were. And yet there were common lawyers who would defend that to their dying day. And where are they now? They are either doing something more useful or they have gone to Sydney.

Likewise, when politicians have a new idea in their heads, the obvious thing to do is not to start looking immediately at the holes in it (the idea – not the head), but to examine the objectives and find out how they could be best achieved. Adopting a positive approach helps to find solutions and not to prevent them. The more difficulties that are put in the way of moderate reform, the more likely is the radical solution. People want solutions for problems, not problems for solutions.

At times things have been exciting and demanding. The profession was under great critical pressure at the time of the Stewart Royal Commission. Although only a tiny proportion of the profession could be said to be in any way involved in the conclusions of that Commission, it threw up questions in relation to the profession as a whole which needed to be defended on television and elsewhere. There were many who doubted the ability of the law societies properly to deal with the disciplinary procedures.

Journalists keep popping up to write the story that the editor has suggested, namely the increasing number of lawyers who have been struck off. The statistics do not show that and they go away disappointed. But you have got to be prepared with that sort of information. (And you PR efforts that stop silly stories are never recognised. We still get lawyers saying we do nothing in the PR field and even a suggestion recently that we ought to consider using television because a lot of people watch it. It makes you wonder where some people have been during the last few years.) But those who think that "meeting out" solves a problem are simplistic.

It also has to anticipate change and be ready for it and to anticipate the issues. The timeliness of the Law Practitioners Act was shown by the Stewart Royal Commission report and the ability of the new structure to deal properly with those matters.

I have only one reservation and that is that in the case of smaller law societies I believe that they would not have the resources and abilities to deal with major enquiries and that some partnership between the New Zealand

Law Society (which at present foots the bills of the major investigations anyway) and the districts is probably going to be needed in the future.

Voluntary membership

At some stage again there will be an attack on the Law Society on the voluntary membership issue. You can be assured it will not be brought because of the freedom or rights of members but simply to weaken the profession or because it is politically convenient.

The former Prime Minister, Sir Robert Muldoon, who has an unerring eye for such matters, raised the monopoly and the compulsory membership of the Law Society directly when discussing interest rates. That was an interesting time since I was determined that the Society should not become either an arm of nor an Opposition to a Government. It was a conduit between members of the profession and the Government.

While it is legitimate for governments to indicate that if something does not happen they may have to legislate, a government by threat imposed with an iron whim is a serious danger for us. I believe that we should try and press for a convention that the Prime Minister should not be Minister of Finance. The latter portfolio carrying with it the power of Treasury to destroy everybody else and without itself being subjected to any great scrutiny, is one of the grave dangers of our present system. The Minister of Finance/Prime Minister has control of Cabinet and Cabinet has control of the Government.

Sir Robert Muldoon said that those draconian powers under the Economic Stabilisation Act and the powers that he had were no threat to freedom because of our three-yearly elections. If it used those powers unwisely it could be thrown out. It did and it was.

Judicial appointments

It may be thought glamorous to be able to be consulted about the appointment of Judges, but I found it a problem. I do not think the system in New Zealand is yet completely satisfactory. But the consultation has been improved and there is a willingness to accept that the New Zealand Law Society President should be consulted before a decision is taken or anybody is invited to take an appointment. The position has been confirmed in writing.

I see two issues for the new legal conglomerates. One will be conflict of interest, the other will be positive action programmes for women lawyers and ethnic minorities. I am hoping one of the firms will follow the overseas example by seconding a younger lawyer to a community law project.

Overseas contacts

I have personally benefited from the contacts with lawyers overseas. The advantage of getting out of your own country to consider its problems cannot be over-emphasised. But the opportunity to speak to the profession's leaders in other countries indeed gives a surprising perspective.

I have said before that wherever I went in New Zealand solicitors told me that the practice in their district was different from anywhere else and in particular different from Auckland. I found there were many more common elements of practice in all the parts of New Zealand than there were differences. Everybody wants to feel they are in a unique situation and to an extent they are. There are some delightful differences in practice. But there are remarkable similarities.

When we came to discuss some of the major issues I heard repeated voices that we are not the same as people overseas and therefore we should not look at overseas experience. My firm advice is that practice overseas is not all that different and they are encountering just the same sort of problems, just the same sort of issues and they are arising in just the same sort of ways. We do not have to reinvent the wheel on every issue. We can look and see what is happening, we can find out what others have said and done, we can learn research and improve our thinking by contact with lawyers from overseas.

In some matters we are ahead of the profession overseas. At least in acknowledgment of a problem, we were well ahead of Australia in discrimination against women lawyers. (We need to give this issue continuing impetus and promote awareness.)

The overseas conference circuit in some professions may be just an entertainment. But for the vast bulk of New Zealanders who go to the IBA, LAWASIA and the Australian Law Convention or venture into the ABA and CBA conferences, I can only say that it they put their minds to it, they will be pleased and they will be better for it.

The profession itself should insist on being well represented by its official representatives at those gatherings. What is gained from them is of enormous value in terms of perspective. It impresses on us just what are the important elements of our professionalism and just what there is that we must fight to maintain.

Asian region

On a regional basis, it is vital that we maintain out interest in LAWASIA and the Australian Law Societies and Bar Associations. I was privileged to go to China with the Chief Justice and I have been in a number of Asian centres and mixed with a wide range of practitioners at LAWASIA Council meetings.

We are part of this region. We need to take off our mono-cultural glasses and we will find out a number of things. We will find that race relations are not too bad at all in New Zealand compared with many countries; that the enmities between some races can be bridged by a friendly New Zealander who can get on with both of them; that we are not threatening to anybody and as long as we do not think we are better than others and do not patronise them and do not romanticise about it, we will be enriched by the contact and we will learn other ways of conducting legal work and other ways of doing business and what is more, we will make friends.

Closing note

And I suppose as a closing note the thing that I've enjoyed best has been the friendships. I have enjoyed the politicians, (and learned to respect many on both sides of the House, while learning how much politics play in decision making – quite different from our life) the public servants who are increasingly very impressive, the Judges, the foreign leaders, the country practitioner, the small society district president, the shared decision making of the Executive Committee, the debates of the Council, the work of the Law Society staff. I have been most fortunate.

Thanks □

Human Rights and the Supreme Court in Fiji:

Butadroka revisited

By Isikeli Mataitoga, Barrister and Solicitor of Wellington

Introduction

The sovereign democratic State of Fiji attained independence on 10 October 1970. With independence there came into existence the Fiji Constitution, which amongst other things contained a Bill of Rights. The provision of a Bill of Rights in the constitution is similar to many of the constitutions of other Commonwealth States[1] in the region which were former colonies of United Kingdom. The preamble to the Fiji Constitution states:

> The people of Fiji do affirm . . . their reverence for God and their unshakeable belief that all are entitled to fundamental human rights and freedoms based upon and secured by the rule of law and to that end desire that the following provisions shall take effect as the Constitution of Fiji.[2]

Chapter II, encompassing ss 3 to 18 of the Constitution contains the Bill of Rights provisions. Section 17(2) provides that the Supreme Court of Fiji shall have original jurisdiction to hear and determine any application made in pursuance of subs 1. Any person who alleges that any provision of Chapter II (ie Bill of Rights provision) was being contravened in relation to him, may apply to the Supreme Court for redress: s 17(1).

This article will express a viewpoint based on a recent judgment of the Supreme Court of Fiji by Kermode J in *R V Butadroka,* (unreported Fiji Supreme Court decision dated 9 August 1977, Mr Justice Kermode) and advocate what is believed to be the modern approach that Courts which have faced similar problems, have held to be the proper one to adopt.

The facts of *R v Butadroka* were: Mr Butadroka is an indigenous Fijian politician. As leader of the Fijian Nationalist Party, he and two other of the party faithful, were arrested and charged with unlawful assembly contrary to s 80 of the Penal Code 1967 (Fiji). The alleged unlawful assembly took place at a meeting held in the Civic auditorium in Suva, which was restricted to Fijians.[3] At this meeting Mr Butadroka made a statement for which he was later charged with inciting racial antagonisms contrary to s 17 of the Public Order Ordinance 1972. At the trial before Mr Justice Kermode in the Supreme Court, the defendants did not call any witnesses. Through their counsel they argued that sections of the Public Order Ordinance 1969 violated ss 3, 12 and 13 of the Fiji Constitution and therefore no offence had been committed. Mr Butadroka was found guilty on two of the charges laid against him and was sentenced to six months imprisonment. The third charge was withdrawn.

Ms Helen Aikman in an article *Public Order and the Bill of Rights in Fiji: R v Butadroka* (1981) 11 VUWLR 169, thoroughly analysed the judgment in the *Butadroka* case. This present article asseses an alternative approach that is open and will suggest the establishment of a Human Rights Commission as being necessary. It will also briefly advance some arguments on the role of the Supreme Court as the protector of the individual rights and freedoms of the people of Fiji. It will be argued that this role is not only based on the clear and unambiguous words of the Constitution, but also in the oath of allegiance a Justice of the Supreme Court must take before he can perform any of the functions and duties of that high office.

A constitutional dilemma

Unlike New Zealand,[4] Fiji has no Human Rights Commission, charged with the responsibility of safeguarding the individual rights and freedoms of its citizens and providing a forum where individuals who have been discriminated against or who claim that certain of their rights have been violated, can go to and obtain redress for their grievance. New Zealand has no written Constitution with a Bill of Rights[5] such as Fiji has. In Fiji, the responsibility of hearing and determining any grievance on human rights is vested in the Supreme Court in terms of the Constitutional provisions.

This means that the Supreme Court of Fiji is in a way the Human Rights Commission as well as a Court of law. Because of these two roles, which in certain circumstances demand different approaches, the Supreme Court is and will continually be faced with a dilemma. Because of these competing demands, the Supreme Court cannot reasonably be expected to serve "two masters" adequately. The current arrangement will encourage lukewarm and at times poor determination of cases involving claims of human rights violations.

The role played by the Supreme Court in interpreting the human rights provisions of the Constitution is vital in upholding the faith of the people of Fiji in the Constitution. They said so in the preamble of the Constitution. This places the Justices of the Supreme Court in an unparalled position of being the protector of the human rights and freedoms of the Fiji citizenry.

A Justice of the Supreme Court shall not enter upon the duties of his office until he has taken and subscribed the oath of office: s 92. The oath of office in the First Schedule to the Constitution states:

> . . . I will well and truly serve our Sovereign Lady Queen Elizabeth II, her heirs and successors in the

> office of Judge of the Supreme Court and I will do right to all manner of people after the laws and usages of Fiji.

A Justice therefore must uphold the Constitution first and foremost as the supreme law of Fiji. Any law that is inconsistent with the Constitution is void to the extent of that inconsistency (s 2). The Bill of Rights in the Fiji Constitution are not absolute (s 3). The limits of individual rights and freedoms is where it begins to prejudice the rights and freedoms of others or the public interest.

The rights conferred by the Constitution must be balanced against the provisions of the Acts of Parliament which have as their basic tenet, the protection of the public interest. The judicial dilemma arises in that a Judge, while being required to uphold the human rights part of the Constitution, can only do so if it does not violate certain public interest provisions in other statutes such as the Public Order Ordinance. The Judge is expected to be the Human Rights Commissioner and at the same time, a judicial officer. This places a near impossible responsibility on the Justices of the Supreme Court.

Section 3 of the Constitution provides in general terms that every person in Fiji is entitled to the fundamental rights and freedoms of the individual, that is to say, the right whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest. The section is in general terms but nevertheless substantive in its effect in so far as it relates to the interpretation of the specific provisions of Chapter II.

Section 3 of the Fiji Constitution was one of the three provisions argued by counsel for Butadroka to be violated by certain sections of the Public Order Ordinance 1969. There were no discussion about the general effect of s 3 of the Constitution in the Supreme Court decision. It was not particularly relevant given the facts of the case. However, in a decision dated 25 October 1984, the Privy Council in *The Societe United Docks and Desmarais Brothers Ltd & Ors v The Government of Mauritius,* (unreported decision No 29 of 1983 and 34 of 1982, delivered by Lord Templeman on 25 October 1984) held that s 3 of the Mauritius Constitution, which is identical to s 3 of the Fiji Constitution, confers substantive rights on the individual and that it is not preambultory or introductory in effect. The specific provisions in Chapter II of the Mauritius and the Fiji Constitution are to be interpreted in the light of the provisions of s 3. In other words s 3 confers the right in general terms and the specific provisions, such as ss 12 and 13 in the *Butadroka* case set forth the circumstances in which the right in question may be set aside. This determination of the Privy Council, it is considered, will require a change in the approach of the Supreme Court of Fiji in its future determination of human rights issues, to that adopted by Kermode J in the *Butadroka* case.

Court's role to be vigilant

It is submitted that the Fiji Constitution require of the Supreme Court an active role, rather than a passive one, for the protection of individual rights and freedoms. Section 17(2) of the Constitution states:

> The Supreme Court shall have original jurisdiction (a) to *hear* and *determine* any application. . . .

In other words the Supreme Court is required to do two things. First it shall *hear* any application made to it under s 17(1) and secondly it shall *determine* the application. According to the normal rule of construction these words are to be given their ordinary meaning, unless there are policy reasons that require a more technical or more general interpretation to achieve the intention of Parliament. In this context, the word "hear" means that the Supreme Court must give due time and consideration to arguments advanced by the parties to a s 17 application.

The word "determine" in the context of s 17(1) of the Constitution should be given a purposive meaning, rather than the ordinary meaning of the word. Ordinarily the word "determine" means to decide. That is to hear the arguments and reach a definite decision that resolves the issue before it. This meaning, it is submitted, does not achieve the purpose which the framer's of the Constitution and indeed the individual citizen of Fiji, expected of the Supreme Court. The preamble includes these words of affirmation and belief of the people of Fiji:

> [We] the people of Fiji do affirm [our] unshakeable belief that all are entitled to fundamental human rights and freedoms. . . .

Clearly these words of affirmation cannot be evaded by the Supreme Court on the basis of some technical or semantic ground. It is submitted that if the word "determine" means nothing more than to "decide", the purpose of the Constitution in this regard will in most cases be defeated because the Court will be too passive in its approach to be of much use in fulfilling its clear role of protecting the rights of the individual.

The Shorter Oxford Dictionary defines the word "determine" in this way: "To decide from reasoning, investigation . . . etc". It is submitted that this definition would be the proper one for the Supreme Court to adopt when it is confronted with cases involving claims of violation of human rights. It clearly indicates an active role. It will not be a determination if all that the Supreme Court is doing is balancing the competing arguments and deciding the issue before it. There is a requirement to decide only after careful reasoning and investigation. This was the approach adopted by the Privy Council in *Thornhill v Attorney-General of Trinidad and Tobago* [1981] AC 61.

This requirement imports the idea that the Supreme Court may in certain cases require each party to provide more evidence and other information, than the parties have supplied to the Court to justify their claim. The Court may test each parties arguments to establish if they are reasonably supported.

The Supreme Court, admittedly has a difficult task when it adopts a critical approach to legislation which purports to limit the rights and freedoms of the inidividual. The Judges have the task of deciding what is reasonably justifiable in a democratic society. In the Indian case of *Madras v Rowe* [1952] SCR 597, 607, the Court dealt with the problem in these terms:

> In evaluating such elusive factors and forming their own conception of what is reasonable in all the circumstances of a given case, it is inevitable that the social philosophy and the scale of values of the Judges participating in the decision should play an important

part, and the limit to their interference with the legislature's judgment can only be dictated by their sense of responsibility and self-restraint and the sobering reflection that the Constitution is meant not only for people of their own way of thinking but for all, and that the majority of the elected representatives of the people have, in authorising the imposition of the restrictions, considered them to be reasonable.

It will be evident from the above case, that the Court is required to do much more than perform a balancing act. It is required to consider the public policy reasoning behind the legislation and weigh the clear requirement of the constitution. Ms Helen Aikman in her article (supra), has suggested that the Supreme Court may be obliged to consider evidence not normally admissible in ordinary cases concerning subordinate legislation to the constitution. This is a view which this writer supports.

In essence the Supreme Court is required to hear and determine all application made to it regarding the violation of fundamental human rights and freedoms. The restrictions that necessarily exist to those rights and freedoms are to be closely tested when they take form in subordinate legislation. The Courts need to be vigilant and not easily lapse into legal and technical ritualism. As recently stated by the Privy Council in *Attorney-General of The Gambia v Momodon Jobe* [1984] 3 WLR 174 per Lord Diplock at p 183:

> A Constitution, and in particular that part of it which protects and entrenches fundamental rights and freedoms to which all persons in the state are to be entitled, is to be given a generous and purpose construction.

This is the approach which it is submitted is the proper to adopt with regard to the interpretation of the Fiji Constitution.

No room for tabulated legalism: The Fisher principle

The Privy Council in its opinion given by Lord Wilberforce, dealing with the interpretation of the Human Rights provision of the Bermudan Constitution, in *Minister of Home Affairs v Fisher* [1979] 3 All ER 21 (PC), said that it:

> . . . calls for a generous interpretation avoiding what has been called the austerity of tabulated legalism, suitable to give to individuals the full measure of the fundamental rights and freedoms referred to:

And later at p 26, having rejected the concept of tabulated legalism, and referring to the second of the two approaches open to the Court to follow in interpreting human rights provisions in Constitutions similar to that of Fiji, the Privy Council said:

> The second would be more radical: it would be to treat a constitutional instrument such as this as sui generis, calling for principles of interpretation of its own, suitable to its character as already described, without necessary acceptance of all the presumptions that are relevant to legislation of private law.

Lord Wilberforce then said that:

> . . . their Lordships prefer the second. This is in no way to say that there are no rules of law which should apply to the interpretation of a constitution. A constitution is a legal instrument giving rise, amongst other things, to individual rights capable of enforcement in a Court of law. Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to that language. It is quite consistent with this, and with the recognition that rules of interpretation may apply, to take as a point of departure for the process of interpretation a recognition of the character and origin of the instrument, and to be guided by the principle of giving full recognition and effect to those fundamental rights and freedoms with a statement of which the Constitution commences. . . .

From the principle enunciated by the Privy Council above it is clear that the Supreme Court of Fiji will have to evolve its own approach.[6] It is not good enought to rely on out-of-date English decisions as Kermode J did in *R v Butadroka*. A Judge who is faced with the same situation as arose in the *Butadroka* case must take recognition of the character and origin of the Constitution. This requires a clear understanding, on the part of the Judge, of the aspirations of the Constitutional provisions and an unshakeable belief in the preservation of fundamental human rights. It follows that any limitation to those rights will have to be compelling and clearly, not doubtfully, based on public interest, before it can be accepted. Anything less would be a clear violation of the human rights provision in the Constitution and indeed amounts to a derelection of duty on the part of the Supreme Court.

The principle to guide the Supreme Court is that which gives full recognition and effect to those fundamental rights and freedoms, as the preamble to the Constitution so clearly states. The Court clearly must not be overawed by the political background, merely conscious of it. In countries like Fiji, the Court must be careful that seemingly legitimate and proper prosecutions brought by government agencies, are not guises using due process of law to solve a "problem" that is manifestly political. Hypothetically this sort of manipulation may exist for example where Mr X a politician makes racially discriminatory statements. Those statements are unacceptable and embarrassing to the Government. Mr X is prosecuted under the Public Order Ordinance, for inciting racial violence or similar generic charges.

The Supreme Court must be satisfied that the statements were more likely than not, to lead to racial violence. A mere apprehension on the part of the police is not enough. A public statement of belief by another politician in the local press that statements by Mr X are likely to incite racial violence is not enough. The Court must *"determine"*, in accordance with the interpretation set out above, that given the social and political circumstances existing at the time the statement made by Mr X was more likely than not to cause racial disharmony.

This point can be illustrated by reference to the *Butadroka* case. One of the charges laid against the defendant was unlawful assembly in breach of s 8 of the Public Order Ordinance. The Court's role in seeing the Constitution that is upheld necessitates an inquiry by the Court each time a s 17(1)[7] application comes before it. As s 8 of the ordinance is one which restricts the right of

assembly, the Court must be in a position to ensure that this fundamental right is not unjustly curtailed. Kermode J's handling of the issue suggests that he more or less accepted the prosecution's case without inquiring whether there were any grounds upon which the rights given to Mr Butadroka by the Constitution may be limited. The approach adopted by Kermode J was at variance with that later taken by the Privy Council in *Attorney-General of St Christopher, Nevis and Anguilla v Reynolds* [1980] AC 673, and that had been taken many years earlier by Turner J in *Reade v Smith* [1959] NZLR 996. It is important to note, that the Privy Council case dealt with legislation which purported to confer an unfettered discretion on some civil servants to issue permits for street meetings etc. This legislation was held to be unconstitutional.

When the Court's approach in the *Butadroka* case is compared to a recent decision of the Supreme Court of Western Samoa in *Saipaia Olomalu v Attorney-General of Western Samoa,*[8] it is possible to perceive in the Western Samoan case a readiness on the part of the Court to take an "activist approach", in favour of fundamental rights. Even although this particular decision was overturned on appeal, it is nevertheless refreshing to know that Courts in the South Pacific will be ready and willing to decide in favour of the preservation of fundamental rights and freedoms when called on to do so in appropriate circumstances.

A human rights commission?

The establishment of a Human Rights Commission may be the best option available to resolve the dilemmas created by leaving the protection of individual rights and freedoms, to the Supreme Court. The individual who has a s 17 complaint makes it in the first instance to the Human Rights Commission. The Commission then investigates the complaint and if there is merit, it should be empowered to rectify it. This power of the Commission will be subject to the usual review procedure in the Supreme Court.

The Commission could also act on the direction of the Supreme Court to investigate the circumstances surrounding a case that is before the Court. The advantage of this is that the Supreme Court would then have access to the experience and specialised knowledge of a body specifically charged with the responsibility for protecting human rights. It could if required assist the Court on matters the latter may need more information on regarding a case. It is submitted that this suggestion does not in any way affect the role of the Supreme Court with regard to the human rights protection as currently enshrined in the Constitution. If anything it will assist the Court and thereby enhance that role.

The two tier approach herein advocated will provide for a thorough consideration of human rights issues. It will also provide an opportunity to appoint more than one person to the membership of the Commission. This will lead to a broadening of the background, experience and knowledge, that is brought to the consideration of human rights issues. This can only be an advantage for the preservation of human rights, particularly in a multi-racial society where a particular racial group's cultural perception of human rights may be different in emphasis to the others.

The reality of the current situation and indeed the position in the future if there is no change made, is that vacancies for Justices of the Supreme Court would, more likely than not, be

Fiji Times

The Court of Appeal of Fiji 1984

The President and Chief Justice of Fiji Sir Timoci Tuivaga,
Sir Barry O'Regan, Sir Graham Speight, Mr Justice Mishra and Mr Justice Barker

filled by expatriate European Judges, whose experience and knowledge of the law is valuable and much needed in Fiji; but they lack the multi-cultural appreciation that is, it is submitted, so urgently required in the position of someone deciding human rights issues in Fiji. After all human rights do not exist in a vacuum; they are personal rights and they take their meaning and significance from the place of the individual in his particular environment.

The establishment of a Human Rights Commission, even if it is part of the Ombudsman Office[9] to begin with, would be a welcome change. The important thing is to have another forum, before the Supreme Court, where human rights issues could be considered more carefully, than would be the case in the atmosphere of a Court case, where the immediate concern of the parties is to win.

Conclusion

In Fiji the Constitution sets the limits to governmental power primarily by the fundamental rights provisions and also by the declaration in s 2 that the Constitution shall be the supreme law of Fiji, and that any law which is inconsistent with it to the extent of the inconsistency shall be void. The responsibility for the protection of human rights in Fiji rests in the Supreme Court.

In practice this may not achieve the purpose which the framers and indeed the people of Fiji believed the Supreme Court is capable of doing. The reason for this suggested incapacity is not to be found in the fact that Justices of the Supreme Court are not and do not have the legal experience, but rather it lies in the fact that the requirement placed upon them by virtue of the recent case law referred to above, requiring the Courts to consider the customs and usages of the people, creates a dilemma that is not easy to resolve in strict legal terms.

As has been pointed out above, the dilemma arises because of the two different roles a Judge is required to perform. On the one hand, a Judge is ordinarily deciding cases on the basis of evidence adduced before him and that approach is quite acceptable in the ordinary cases that come before the Courts. However, when a case giving rise to human rights issue is before the Court, a Judge needs to be more active in his approach. It is submitted that a mere passive acceptance or rejecton of one party's submission is not a function synonymous with the role of protecting the human rights of the individual.

A Human Rights Commission is suggested as an appropriate "middle-step" between the individual and the Supreme Court. By creating this intermediate structure, more time, experience, and specialised knowledge will be brought to bear on the issues affecting human rights and freedoms. This will allow for proper consideration of the issues that do come up. The present position is that someone who has a human rights complaint will have to apply to the Supreme Court for a hearing. A Courtroom environment is not the best environment for resolving these issues.

As countries in the South Pacific "develop", governments will require more power to bring about that development. Because a government shares the same environment with its citizens, an increase in government power will necessarily mean diminution in the rights of the individual in society. Fiji, to this extent, provides an interesting case study. □

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1 For example: Nauru, Western Samoa, Vanuatu, Tuvalu and the Solomon Islands. See generally the article: *"Human Rights in the hands of Judges: The Experience in the Pacific Islands Nations"* by N K F O'Neill *(1983) 2 LAWASIA No 2 (NS) 194.*

2 Fiji Independence Order 1970.

3 In this context the word "Fijian" refers to a person whose father or any of his male progenitors in the male line is or was the child of parents both of whom are or were indigenous inhabitants of Fiji. S 134 of the Consititution provides a wider definition.

4 The Human Rights Commission was set up by the New Zealand Government in 1980 as a result of the passing of the Human Rights Commission Act 1977.

5 The adoption of a Bill of Rights legislation is currently being proposed by the Labour Government.

6 See Lord Diplock's Statement in *Thornhill v A G of Trinidad and Tobago* [1981] AC 61, on the proper approach for Courts to follow when dealing with a Constitution containing a Bill of Rights, at p 70.

7 This provision provides the individual the right to apply to the Supreme Court for redress if any of the rights and freedoms guaranteed under the Constitution has been violated.

8 See Neroni Slade: "A Constitution in Practice" [1984] NZLJ 181, for some comments on this case.

9 See Sir Guy Powles: "Ombudsmen and Human Rights Commissions" [1978] 21 ICJ Review 31.

Social "hypocrisy"

We have given up the socially useful and constructive pretence that we all behave better than we normally behave, or believe more hopeful or creative things than we really do believe, and have sunk into that stupor of "realism" so encouraged by TV pundits, socially relevant novelists and the like. The implication seems to be that we have gained in honesty at the expense of social stability: but . . . I would question it. What [is called] "hypocrisy" seems to me a mixture of common sense and normal idealism: it was an aspect of the belief, almost equally part of the Hebrew, Greek and Christian traditions, that we must continue to honour and celebrate our highest ideals and principles, even though we may personally fall short of them. As long as man realises that his ideals *are* high, and that they make for dignity, and promote happiness, and are worthy of service, then his own failures are beside the point. The important thing is that he should honestly repent his failings and fight against them, and not pretend to be better than he is. To behave in this manner is not hypocrisy but wisdom. It is worth remembering that the Christian doctrines of original sin and salvation by grace are specifically concerned with this issue, and that to all traditional cultures of any stature the truth would seem clear. The great majority of men have never made their flawed behaviour the measure of the universe or indeed the measure of themselves.

A E Dyson
Critical Quarterly (1970)

A Misleading Case —

(with apologies to and admiration for A P Herbert)

By A A K Grant, formerly Central Regional Manager of the National Bank of New Zealand, and until recently Teaching Fellow in Banking at Massey University.

Haddock v Lange, Douglas, Hercus and others (in the High Court)

Mr Justice Tarakihi today delivered judgment in a case taking us back over a thousand years. His decision was as follows.

This case was brought by Mr Albert Haddock, long known for his contributions to the English Courts, but now for some time a citizen of New Zealand. It concerns one of the Laws of Ine, who ruled England from the year 689 till 726. It reads:

> Be stale
> Gif he thonne stalie on getwitnesse ealles his hiredes, gesellen hie xxx schillings to write ond gongen hie ealle on theowot.

As a working knowledge of Anglo-Saxon is not now as common as it should be, I give the translation:

> About stealing
> If he steals in the presence of his party (lit household) they shall pay 30 shillings as a penalty and shall all be cast into slavery.

Haddock (who appeared for himself) points out that in terms of s 2 of the English Laws Act 1908 this country has adopted as laws of New Zealand all English laws existing as at 14 January 1840 unless specifically repealed. Junior counsel for the defendants was Mr A K Grant, whom we welcome back after his recent involvement with one of the lesser forms of communication. He argued very ably that the law "Be stale" was repealed by the anti-slavery laws of the nineteenth century. Unfortunately, he was unable to point to any statute which did in fact, repeal a Law of Ine. I accept the submission of Mr Haddock that prison sentence is an appropriate modern equivalent.

In evidence, Haddock pointed out that prior to the recent election he had, by prudent and careful living, managed to put by a modest competence for his advancing years. This, in spite of strenuous efforts to the contrary by the Commissioners of Inland Revenue and later the New Zealand Inland Revenue Department. He was also in receipt of national superannuation and considered it an essential part of his income, particularly as he is no longer able to carry out maintenance, such as painting, on his house and property. He likened tradesmen to the Commissioners of Inland Revenue in the rapacity with which they endeavour to separate him from his money.

He attended election meetings and asked each of the three named defendants if they would alter the basis of national superannuation if elected and said that in each case he received a denial. The defence did not put forward evidence to the contrary and I accept the point as established.

He produced as an exhibit a copy of the Budget Part 1 (B.6) which on pp 14, 15 and elsewhere sets out a special tax on other income of national superannuitants where that income exceeds $5,200. The document also makes it clear that the special tax can equal and exactly equal the whole of the national superannuation payment.

Haddock laid emphasis on the fact that the proposed special tax on superannuitants commences at an income just over half of the figure described by the defendants elsewhere in the Budget as "low income" and becomes fully effective at almost exactly that same "low income". As the same income can justify government payments to one group and special taxes on superannuitants as another group, Haddock drew the inference that the defendants regarded people over 60 as of no further use. Counsel for the defendants presented no evidence on the matter and I must therefore accept Mr Haddock's submission on this point.

The Solicitor-General submitted that there is no case to answer because the money taken away comes from a different pocket from that holding the money promised. No doubt that submission was made on the specific instructions of defendants. Haddock drew attention to the exact equality of the money sums involved and submitted that the whole thing amount to theft by a trick.

I am satisfied that this is a case where *res ipsa loquitur* applies and find the defendants in breach of the Law of Ine "Be stale".

This raises the matter of sentence. Both sides presented a wealth of evidence of the present day equivalent of 30 shillings in the seventh century. The range was so great that I am forced to take a middle course. I find that the present equivalent is $6,776 which just happens to be the amount of national superannuation no longer available to the plaintiff. Each defendant shall be fined that amount and the first payment received shall be paid to the plaintiff.

I come to the other part of the sentence. Evidence has been presented that all members of the party were present in the House of Representatives when the Budget was presented. Clearly the crime was committed in their presence. The defendants, being the three named defendants and all other members of the Parliamentary Labour Party shall serve 30 days in prison. I am aware that there are restrictions on the imprisonments of Members of Parliament while the house is in session, but that is a problem for others to solve.

There remains one sad duty. Mr Haddock is to be retained in custody pending psychiatric examination. Anyone who believes the pre-election promises of politicians must be of unsound mind. □

Aboriginal Australians and the World Court II —

The Advisory Jurisdiction of the World Court

By Douglas C Hodgson, Faculty of Law, Monash University, Australia

In an earlier article [1984] NZLJ 33 Mr Hodgson considered the implications of a challenge by Aboriginal Australians to the established legal principle that Australia was a settled colony. In this article, the author assesses the appropriateness of the advisory jurisdiction of the International Court of Justice as a means of mounting such a challenge in light of precedent and the particular nature of the issues and participants involved.

Pursuant to art 65(1) of the Statute of the International Court of Justice, the Court "may give an advisory opinion on any legal question at the request of whatever body may be authorised by or in accordance with the Charter of the United Nations to make such a request". Both the General Assembly and the Security Council as well as other organs of the United Nations and specialised agencies are or have been authorised pursuant to art 96 of the Charter to make such a request. In advisory matters, there are technically no "parties" and no binding "decision" as in contentious proceedings.[1] States are not competent to request advisory opinions, with their participation being confined to supplying relevant information and materials.[2] Individuals are also not authorised to request opinions and indeed have no locus standi at all in terms of the Court's Statute with respect to participating in advisory proceedings.

Aboriginal Australians, therefore, would be constrained to solicit the assistance of the United Nations General Assembly in requesting an advisory opinion. Such an attempt would not be without precedent. During the period 1922-1924, the Six Nations Iroquois Confederacy attempted to petition the League of Nations concerning certain grievances against the Canadian Government. An attempt to seek an advisory opinion from the Permanent Court of International Justice to determine whether the Iroquois were a State and entitled to petition the League was effectively forestalled, however, by diplomatic intervention.

Assuming the willing participation of the General Assembly in the venture (which, in itself, may pose difficulties for Aboriginal Australians), the Court is nevertheless not required in terms of art 65(1) of its Statute to respond to the Assembly's request for an advisory opinion. The power conferred by that provision on the Court to give an advisory opinion is discretionary in the sense that even if the Court considers itself to have jurisdiction, considerations of "propriety" may compel it to refuse to give the opinion.

However, considerations of propriety and discretion arise for the Court only if it has previously satisfied itself that it has jurisdiction, and if the question is not a legal one, the Court has no discretion in the matter and must, accordingly, decline to respond to the opinion requested (see the Advisory Opinion on *Certain Expenses of the United Nations*, 1962 ICJ REP 155). In relation to matters of discretion, the combined jurisprudence of the Permanent Court of International Justice and the International Court of Justice identifies two general principles that are intended to guide the Court in the exercise of its discretion under art 65(1).[3]

The first principle is that the Court, being a Court of Justice, cannot depart from the essential rules guiding its activity as a Court, even in giving Advisory Opinions (*Status of Eastern Carelia*) PCIJ, Series B, No 5, p 29). Therefore, the Court may decline to give an Advisory Opinion if to do so would be inconsistent with its judicial role. The second principle is that in view of the Court's status as a principal organ of the United Nations, it is under a duty to co-operate with other organs, with the corollaries that a request for an Advisory Opinion should not in principle be refused (see the Advisory Opinion on the *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (First Phase)*, 1950 ICJ REP 71-72), and only "compelling reasons" should lead the Court to refuse to give the requested opinion (see the Advisory Opinion on *Judgments of the Administrative Tribunal of the ILO upon*

complaints made against the UNESCO 1956 ICJ REP 86).

Political questions

Would the World Court be competent in terms of art 65(1) of its Statute to reply to a General Assembly request for an Advisory Opinion based upon the question whether the Australian continent was *terra nullius* at the time of colonisation? Pursuant to both art 96 of the UN Charter and art 65(1) of its Statute, the Court is only competent to reply to a "legal question". The implied determination of the legal character of the question by the requesting body is not binding on the Court for it alone must finally decide the "legal" nature of the question on which its own jurisdiction depends. If the request does not contain such a question, the Court lacks jurisdiction to consider it (see *Certain Expenses*, supra), and discretionary considerations do not arise.

Would the Court consider itself to lack jurisdiction to answer the foregoing question in view of the political motives behind the request and the potential political fallout attendant upon the delivery of the Opinion? Clearly, the Court would not be competent to deal with an essentially "political" question in view of the express language of the relevant provisions and the Court's status as a judicial (as opposed to a political) body. In terms of a politically motivated request for an Advisory Opinion, the consistent practice of the Court has been that if it considers that the question put to it comes within the normal scope of its judicial function, it will not concern itself with the possible motives for the request, political or otherwise (Advisory Opinion on *Conditions of Admission of a State to Membership in the United Nations*, 1948 ICJ REP 61; see also *Certain Expenses*, (supra) 155-156). Therefore, the matter will not be ruled out of jurisdiction solely by reason that political motive actuated the bringing of the request before the Court.

Although the issue of political motives and implications then becomes one of discretion or propriety, the Court will likely make every attempt to continue to ignore both the political motivation of the request and possible political consequences of the opinion if its past history is any useful indication.[4] There would therefore seem to be little point in objecting to a General Assembly-sponsored request for an Advisory Opinion concerning the aboriginal claims on the basis of their political context. Indeed, it could well be argued that an Advisory Opinion abstracted from the political context and based merely on strict legal reasoning is unlikely to serve any useful purpose.[5]

Political motivations and implications aside, it would appear from the *Western Sahara* Advisory Opinion (p 18) that the actual question whether a territory was *terra nullius* at the time of its colonisation would be deemed by the Court to constitute a legal question.

Factual questions

Could an objection be raised on the ground that, notwithstanding the legal nature of the question, the "factual" element of the case is predominant or the central legal finding must be preceded by findings on controverted facts? In *Western Sahara*, the Court acknowledged (p 19) that in order to answer the question whether the subject territory at the time of colonisation by Spain was *terra nullius*, it would of necessity be required to determine certain facts, but that a mixed question of law and fact is none the less a legal question within the meaning of art 96(1) of the UN Charter and art 65(1) of its Statute. The Court had earlier stated in its Advisory Opinion concerning the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* that:

> Normally, to enable a Court to pronounce on legal questions, it must also be acquainted with, take into account and, if necessary, make findings as to the relevant factual issues (1971 ICJ REP 27).

The ascertainment of the facts indeed forms part of the judicial function and both the Permanent Court of International Justice and the International Court of Justice in the course of advisory proceedings:

> regularly made relatively simple findings of fact, established on the basis of the documentation submitted to the Court.[6]

However, although the PCIJ acknowledged early on in the *Eastern Carelia* case (PCIJ, Ser B No 5) its own capacity to engage in a limited factual enquiry, it also recognised (p 28) that:

> it is certainly expedient that the facts upon which the opinion of the Court is desired should not be in controversy, and it should not be left to the Court itself to ascertain what they are.

Applying these considerations to the instant case, since the term "legal question" does not exclude factual questions, the Court would be competent to respond to the legal question whether the Australian continent was *terra nullius* at the time of colonisation and, in so doing, to make certain factual enquiries. Nevertheless, where, as here, disagreement over basic facts in the documentation submitted to the Court and wide-ranging factual investigations may be anticipated, the Court may be more inclined to refuse to respond to the request in the exercise of its discretion on the ground of the inappropriateness of its advisory jurisdiction as a method for establishing the facts in this type of situation.

The plea of domestic jurisdicition

Apart from the legal, political and factual elements inherent in the question as framed above, could the Australian Government challenge the Court's competence to entertain the request on the basis of an alleged breach of United Nations Charter art 2(7) which essentially provides that the United Nations is not authorised to intervene in matters which are essentially within the domestic jurisdiction of any State. The Permanent Court of International Justice first had occasion to consider matters of domestic jurisdiction in its 1923 Advisory Opinion on the *Nationality Decrees in Tunis and Morocco* PCIJ, Series B, No 4. The

Permanent Court held the phrase "solely within the domestic jurisdiction" contained in art 15(8) of the League Covenant (the precursor of Charter art 2(7)) to comprise:

> certain matters which, though they may very closely concern the interests of more than one State, are not, in principle, regulated by international law (p 24).

In the *Peace Treaties* Opinion, the present Court had to consider objections to its competence on the basis of the alleged applicability of art 2(7) of the Charter. In reply to an argument that a matter may be essentially within the domestic jurisdiction of a State even though it is governed by a treaty, the Court stated (pp 70-71):

> The interpretation of the terms of a treaty . . . could not be considered as a question essentially within the domestic jurisdiction of a State. It is a question of international law which, by its very nature, lies within the competence of the Court.

Such an approach was consistent with that of the Permanent Court which had consistently rejected the idea that the interpretation and application of a treaty is a matter of domestic jurisdiction.[7] In effect, then, the "reserved domain" of a sovereign State in relation to matters of domestic jurisdiction encompasses those activities which are left unregulated by international conventions, custom and general principles of International Law and, by corollary, remain within the exclusive jurisdiction of that State.

In light of these principles, would a General Assembly request for an Advisory Opinion couched in the language previously discussed contravene art 2(7)? Unlike the situation in *Western Sahara* involving competing interests of various States, the "dispute" here would be of an intra-Australian nature between the Australian Government on the one hand and Aboriginal Australians and their representatives on the other. Therefore, the dispute or question would somehow have to be significantly connected with International Law for art 2(7) to be inapplicable.

In relation to the issues of recognition of the pre-colonial aboriginal land ownership system and protection of property rights derived thereunder, it is significant to note that Australia has not yet ratified (and is not likely to) the one international convention which would appear to come the closest to identifying and dealing with these issues. Covention (No 107) of the International Labour Organisation concerning the protection and integration of indigenous and other tribal and semi-tribal populations in independent countries (328 UNTS 247) entered into force on 2 June 1959. The more noteworthy of its provisions include art 7 which provides that in defining the rights of indigenous populations, regard shall be had to their customary laws, and art 11 which states that:

> The right of ownership, collective or individual, of the members of the populations concerned over the lands which these populations traditionally occupy shall be recognised.

Although Australia has ratified the more recent International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights, the only provisions thereof which appear to address themselves in any manner to the instant issues are arts 1 and 47 of the former instrument, and arts 1 and 25 of the latter pertaining to the right of peoples to self-determination and to enjoy and utilise fully and freely their natural wealth and resources. However, doubts have been expressed in relation to whether indigenous populations are "peoples" in the context of the International Covenants on Human Rights. In the event, it would appear that the question of whether the Australian continent was *terra nullius* at the time of colonisation may have to be answered by the Court on the basis of general principles of International Law.

The nettle that the Court would have to ultimately grasp is the fact that the question relates to a matter which exclusively concerns specific relations between a sovereign State and its indigenous inhabitants. It is perhaps significant to note in the present context that the Permanent Court in the *Serbian Loans* case (A 20/21, 5, 18) was not deterred from assuming jurisdiction over a controversy which:

> [was] exclusively concerned with relations between the borrowing State and private persons, that is to say, relations which are, in themselves, within the domain of municipal law.

However, even if the Court rejected an attack by the Australian Government upon its competence based upon art 2(7), it is submitted that the "municipal relations" aspect of the dispute might well be relied on by the Court to (at the very least) add further support to a discretionary refusal to render an Opinion based on some other ground.

The issue of consent

In the event that Australia voted against the General Assembly resolution requesting the Advisory Opinion by reason of an alleged contravention of art 2(7) or otherwise, could Australia's lack of consent form the basis of an objection to the Court responding to such request? Neither for the Permanent Court nor the present Court did absence of consent on the part of a State having a relevant legal interest constitute an absolute bar to the rendering of an Advisory Opinion.[9]

As appears from the *Peace Treaties* Advisory Opinion, the absence of an interested State's consent to the exercise of the Court's advisory jurisdiction does not concern the competence of the Court but rather the judicial propriety of its exercise. The Court stated (p 71):

> The consent of States, parties to a dispute, is the basis of the Court's jurisdiction in contentious cases. The situation is different in regard to advisory proceedings even where the Request for an Opinion relates to a legal question actually pending between States. The Court's reply is only of an advisory character: as such, it has no binding force. It follows that no State, whether a Member of the United Nations or not, can prevent the giving of an Advisory Opinion which the United Nations considers to be

> desirable in order to obtain enlightenment as to the course of action it should take.

When will the Court, in the exercise of its discretion under art 65(1) of its Statute, decline to respond to a request in the situation where a State directly concerned has not consented? In the *Eastern Carelia* case, the non-participation of Russia, a State directly concerned in the dispute, was indirectly responsible for the Permanent Court's refusal to give the Advisory Opinion as requested by the League Council. Although it was the actual lack of "materials sufficient to enable it to arrive at any judicial conclusion upon the question of fact" which was considered by the Permanent Court to prevent it from giving an Opinion for reasons of propriety, the inadequacy of the evidence was directly attributable to the refusal of one of the two States to take part in the proceedings.

Thus, although the lack of Australia's consent to the advisory proceedings would not in itself prevent the Court from responding, it is arguable that its non-participation in the proceedings might lead the Court to refuse to give the Opinion for reasons of judicial propriety where, as here, the "factual" element of the question would be predominant and the historical evidence and other materials controverted.

Inequality of the participants

Even assuming the willing participation of the Australian Government in the advisory proceedings, would the Court in the exercise of its discretion decline to respond to the request because of some perceived inequality of the parties? Although art 66(2) of the Court's Statute and its Rules contemplate participation by States and international organisations in the form of written submissions or oral proceedings, the individual is not mentioned in the Statute as having any locus standi whatsoever in advisory proceedings. Where, therefore, the interests of individuals and non-governmental associations are being adjudicated by means of the advisory procedure, the problem of equality between the interested participants arises.

The Permanent Court exhibited considerable flexibility in the types of entities from which it received written materials (and even on occasion oral arguments) in the course of advisory proceedings: labour unions, political parties (*Danzig Legislative Decrees* case (A/B 65, 41)) and minority groups.[10] However, the present Court has been far more restrictive and has in general permitted only States and intergovernmental organisations to address it.[11] Thus, in the Advisory Opinion on *Effect of Awards made by the United Nations Administrative Tribunal* 1954 ICJ REP 47, the Federation of International Civil Servants' Associations and a firm of New York lawyers who had appeared before the Administrative Tribunal in the same matter were refused an opportunity to submit written statements and participate in oral argument in view of the limitations set forth in art 66(2) of the Court's Statute.

Shortly thereafter in the Advisory Opinion on *Judgments of the Administrative Tribunal of the International Labour Organisation* 1956 ICJ REP 91, the Court intimated that it would not comply with a request when not all participants in the dispute are entitled to appear before it (for example, individuals, corporations and non-governmental organisations) unless arrangements could be made for them to present their submissions on a basis of substantial parity with those parties entitled to appear. In the event, the Court dispensed with oral proceedings and received a written statement made by counsel for the staff members involved which had been forwarded by the UNESCO.

Whether or not, then, the Court would agree in the instant case to comply with the request would depend in part on its ability to adopt appropriate procedures designed to overcome the inequalities inherent in the status of the two major participants – the Australian Government and Australian Aboriginal groups and organisations.

Usefulness of the opinion

The Court would also have to satisfy itself that the giving of the requested Opinion would not be devoid of object or purpose in the sense that the question put to it is relevant and has a practical and contemporary effect. In the *Western Sahara* Advisory Opinion, Spain argued that the questions put to the Court were academic and irrelevant and, as such, should not be considered. After having declared that the relevance and practical interest of the questions posed raise discretionary rather than jurisdictional concerns, the Court found to its satisfaction (p 20) that:

> the opinion [on the legal status of the territory at the time of Spanish colonisation] is sought for a practical and contemporary purpose, namely, in order that the General Assembly should be in a better position to decide . . . on the policy to be followed for the decolonisation of Western Sahara.

Indeed, on previous occasions, the Court had examined the object of the General Assembly in requesting the Advisory Opinion in question. Thus, in the *Peace Treaties* Opinion, the Court, being satisfied (p 72) that:

> the sole object of [the request] is to enlighten the General Assembly as to the opportunities which the procedure contained in the Peace Treaties may afford for putting an end to a situation which has been presented to it,

found no reason for not replying. Similarly, in the Advisory Opinion on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, the Court was satisfied that "The object of this request for an Opinion is to guide the United Nations in respect of its own action" (1951 ICJ REP 19).

In the present context, what "practical and contemporary purpose" from the General Assembly's point of view could be served by the Court's determination of the question whether the Australian continent was *terra nullius* and therefore susceptible to effective occupation at a particular date? It is on this aspect that *Western Sahara* can be distinguished in several material respects.

To begin with, the questions posed for the Court in 1975 directly concerned to a greater or lesser extent the interests of Spain, Morocco and the Islamic Republic of Mauritania, with Zaire and

Algeria also participating in oral proceedings before the Court. Here, no States apart from Australia would have an immediate interest in the determination of the question and it is difficult to imagine any other States desiring or willing to intervene in the proceedings.

Apart from this exclusively Australian flavour, however, any genuine interest that the General Assembly might be said to have in the determination of the "Australian" question wanes in comparison with the much more substantial and sustained interest and involvement exhibited by the General Assembly in the decolonisation of Western Sahara. Here, on the most generous view, existing principles of self-determination would be involved only in an indirect sense, with the emerging applicable legal principles still "*sub judice*" within the context of the proceedings of the Working Group on Indigenous Populations and the Human Rights Sub-Commission on Prevention of Discrimination and Protection of Minorities. In view of these considerations, the Court might well be inclined on the ground of relative lack of usefulness or relevance to refuse to respond to the request.

Conclusion

It will have become apparent from the foregoing analysis that the World Court would have to strain in order to respond to a General Assembly request for an Advisory Opinion on whether the Australian continent was *terra nullius* at the time of the British colonisation. For the Court to set to one side the procedural, discretionary and jurisdictional roadblocks in order to comply with the request would be to ignore its judicial function. Although the question would be susceptible to a determination based upon International Law, nevertheless its setting and context render it inapplicable to adjudication by an international tribunal.

The trends established by the advisory jurisprudence of the two Courts bear this out. Of the 27 Advisory Opinions rendered by the Permanent Court, six related to disputes between a State and some other entity such as a protected minority group or political party.[12] Advisory Opinions have been sought from the present Court primarily to resolve administrative difficulties and internal problems facing the United Nations Organisation which has involved in many cases the interpretation of Charter provisions.[13] As such, the Court's advisory jurisdiction in the United Nations era has virtually ceased being used as a means of settling disputes among States and other entities.[14]

Even on the generous assumption of ultimate success on the merits, an Advisory Opinion is neither inherently binding on the participants nor res judicata of the controverted issues. Aboriginal Australians might therefore wish to more profitably channel their efforts to secure justice in the direction of other United Nations agencies such as the Human Rights Commission's Sub-Commission on Prevention of Discrimination and Protection of Minorities and the Working Group on Indigenous Populations. □

1 However, although an advisory opinion is "a far 'weaker' statement of the law than a judgment, in strictly legal terms, its moral and political effectiveness is another matter. . .": D W Bowett, *The Law of International Institutions* (3 ed, 1975) 248-249).
2 Rosenne, *The World Court: What It Is and How It Works* (3 ed, 1973) 80.
3 Rosenne, *The Law and Practice of the International Court* 2 (1965) 709.
4 Pomerance, *The Advisory Function of the International Court in the League and the UN Eras* (1973) 302-303.
5 Bowett, op cit 250.
6 Rosenne, *The Law and Practice of the International Court*, 2: 701. However, the learned author proceeded to point out that the Court was never really faced with the problem of establishing disputed facts in the course of rendering an Advisory Opinion (ibid).
7 See Waldock, *The Plea of Domestic Jurisdiction Before International Legal Tribunals* (1954) XXXI BYBIL 96, 138.
8 Australia has been a member of the International Labour Organisation at all relevant times.
9 Pomerance, op cit 295.
10 Hudson, *The Permanent Court of International Justice 1920-42* (1943) 422-423.
11 Szasz, *Enhancing the Advisory Competence of the World Court* in L Gross (ed), *The Future of the International Court of Justice* 2 (1976) 499, 507.
12 Szasz, op cit 503.
13 See Pomerance, op cit 51-52; Bowett; op cit 251-252, and the cases cited therein.
14 Szasz, op cit 503.

BOOKS

Matrimonial Property, (2 ed)

By R L Fisher, LLM, Wellington, Butterworths of New Zealand Ltd, 1984. xciv + 726, including appendices and index. Price $75.00 ISBN 0409 60039 3

Reviewed by Professor P R H Webb, Auckland University

The aims and contents of the work

As those who were familiar with the learned author's first edition, published in 1977, would have foreseen the second edition has revealed beyond all reasonable doubt, indeed beyond all probable possible doubt whatever, that his present contribution to the subject of matrimonial property has been clearly greater (or, if one prefers, has clearly been greater) than that of any other writer in the field.

According to his preface, Mr Fisher has attempted to treat matrimonial property as a comprehensive topic instead of simply an analysis of the 1976 Act itself. This, he (very rightly, in the reviewer's opinion) says, seemed justified by the encroachment of matrimonal property law into land law, personal property, gifts, conveyancing, revenue, estate planning, torts, trusts, contract, conflicts, crime, creditors and commerce as well as the more familiar property disputes on marital breakdown. As he also notes, property rights in the context of de facto marriage have also grown in importance and therefore warranted inclusion along with the associated topic of informal trusts. The growing size of the book, 648 pages of text (as opposed to 150 in the first edition) has meant that the related topics of maintenance and property rights after death, could receive only limited mention by Mr Fisher.

The work is divided, like Gaul, into three parts. Part I deals with "Property Rights without invoking the statutory Matrimonial Property Regime", and consists of nine chapters: on the nature of matrimonial property; engagements and de facto marriage; gifts; trusts, agreements; variation of agreements and trusts on dissolution of marriage; the Joint Family Homes Act; revenue and estate planning, and Protecting the non-owner spouse. When it is considered that these occupy 286 pages of text, it will be appreciated that none of these topics has been treated lightly.

The approach, (in all Parts) is always meticulously accurate and scholarly throughout. One may pick for special mention the paras (1.23 to 1.37) on the limitations to the 1976 Act as a code, the treatment of the conflict of laws aspects of the Act (1.50 to 1.56) and the whole chapter on Trusts (ch 4), for which all readers should be especially grateful in the absence of a really up-to-date and extensive New Zealand text on this branch of the law. Those who are faced with the none too easy problems of drafting a s 21 agreement — or of attacking such an agreement, indeed — should find their paths smoothed not only by ch 5, but also by the six excellent Contractual Precedents very thoughtfully provided by the author in Appendix D. If anyone needs reminding of s 182 of the Family Proceedings Act 1980 and the power to vary maintenance agreements and settlements upon dissolution of marriage, he or she will be consderably assisted by ch 6. The revenue expert, the comercial lawyer and creditors remedies practitioner will be much assisted by chs 8 and 9, as, needless to add, will the family lawyer.

Part II of the book contains chs 10 to 16 inclusive, and is entitled "Meaning and Value of Property". After dealing with jurisdiction, the meaning of property, ownership of property and valuation, ch 10 is devoted — with particular skill — to specific forms of property and the problems attendant thereon; thus goodwill, business and professional practices, farms, partnerships with third parties and between spouses, companies and superannuation are all covered with a high degree of insight. Chapter 11 may be termed one of the "inner core" chapters. It treats of the Classification of Property, beginning with the significance thereof, the rationale behind it and the time at which classification attaches.

The remainder of the chapter is concerned with individual classifications and copes exhaustively (but certainly not exhaustingly) with the matrimonial home, and family chattels (s 8(a)); co-ownership (s 8(b)); acquisitions in contemplation of marriage (s 8(d)); acquisitions after marriage (s 8(e)); acquisitions from pre-marriage assets for common use and benefit (s 8(ee)); income, gains, proceeds and increases from matrimonial property (s 8(f)); life policies (s 8(g)); insurance policies (s 8(h)); superannuation rights (s 8(i)); agreed matrimonial property (s 8(j)); residual separate property (s 9(1)); acquisitions and proceeds therefrom (s 9(2)) and, with considerable acuity, increases, income and gains from separate property (s 9(3)); property acquired while not living together (s 9(4)); property acquired after Court order (s 9(5)); separate property used to augment matrimonial property (s 9(6)) and the problems arising out of s 10(1) and (2) concerning gifts from third parties and inter-spousal gifts. The clarity of

treatment is excellent; the criticisms are, where called for, acute. No trick is missed. The author proves himself to be a past-master at wringing every possible point out of his chosen authorities.

Chapter 12 is another "inner-core" chapter in that it fully deals with ascertaining the matrimonial home or the equivalent thereof (ss 2, 11 and 12); ascertaining the family chattels; (ss 2(1) and 11(1)(b)) and dividing what the learned author calls "the domestic property" under ss 11 and 12. He then proceeds to deal neatly with the exceptions to equal sharing, viz, the short marriage under s 13 and extraordinary circumstances under s 14. The chapter ends with the problems surrounding s 16 when there are two homes available at the marriage date.

The next "inner core" chapter is the thirteenth, devoted to what many have come to dub the "balance matrimonial property" or "section 15 property" and to the division thereof. It deals also with the factors affecting contributions and contains a most valuable analysis of the permissible forms of contributions under s 18(1) and concludes with a highly perceptive section on quantifying and comparing contributions. There is an especially penetrating analysis of the situations where there has been inequality in the introduction of capital and inequality of effort: see pp 441-452. The last of the "inner core" chapters, ch 14, is concerned with the meaning of separate property, substantive rights with respect to it, jurisdiction with respect to it and a consideration of s 17 (sustained on diminished separate property).

Chapter 15 expertly and nicely goes into the interstices of that bugbear section, s 20, concerned with Debts. Even after Mr Fisher's patient, detailed and clever exegesis, however, one still feels with those who wish that the section had been better drafted. The last chapter in Part II is entitled "Changes in Assets and Liabilities after Separation". In the main, this contains a particularly acute account of the general principles that are applicable, and of the effect of post-separation changes in value or indebtedness, and how the Court exercises its discretion under s 2(2) – a matter which might alone form the basis of an extensive Master's thesis. Assets acquired after separation are dealt with here, thus again calling for discussion of s 9(4). Post-separation debts are also discussed, and the chapter ends with an account of the somewhat tricky questions that arise when there has been a disappearance of an asset or debt after the parties' separation.

Part III bears the title "Invoking the Statutory Matrimonial Property Regime", and consists of chs 17 and 18. Chapter 17 is entitled "Jurisdiction, Orders and Implementation" and covers a wealth of material; the scheme of orders; the jurisdiction to make global division orders and a consideration of s 25(1) and (2) limitation (s 24); the various orders the Courts can make to implement division and the principles on which they choose the form of division; jurisdiction over an asset in isolation under s 25(3); occupation and tenancy orders under ss 27 and 28; orders for children's benefit under s 26; the modification under s 32 of existing maintenance orders and agreements; interim, successive, supplementary and variation orders and the effect and enforcement of orders.

Chapter 18 bears the title of "Proceedings Under the Act" and is concerned with matters such as selecting the parties, choosing between the Family Court and High Court as the forum in which to have the proceedings heard and the transfer of proceedings; initiating the proceedings (including valuable assistance on the adequacy of evidence, the onus of proof and the admissibility of evidence). Interlocutory measures, the hearing itself, costs and appeals wind up the chapter.

There are five Appendices: Appendix A contains the (amended) text of the Matrimonial Property Act 1976; Appendix B contains that of Part II of the Domestic Actions Act 1975 and Appendix C that of the Estate and Gift Duties Amendment Act 1983 – a wisely chosen set of ready reference pages that will save an untold number of journeys to search the pages of the statute books. Appendix D, as already mentioned, contains some contractual precedents. The last, Appendix E, is devoted to some Court Form Precedents which will be a godsend to pleaders.

In short, if the reader cannot find what he wants in order to solve the problem confronting him, be he practitioner, academic or law student, then the reviewer can only say that it is either extremely bad luck or that the problem must be one in ten thousand. Mr Fisher has got it all, and more.

The sources

In his preface, the learned author very modestly says he "attempted to assimilate the flood of judicial decisions on matrimonial property since the first edition was published in 1977". One look at the size of the table of cases (pp xliii to lxxvi) bears out the fact that there has, in very truth, been a deluge. One could well believe there was indeed no misprint at all when the printer makes Mr Fisher go on to say "Over the intervening seven years there have been approximately 70 decisions of relevance in the Court of Appeal, 800 in the High Court and untold numbers in the District Court".

These are appalling statistics by any standard, especially when one reflects that not every matrimonial property dispute necessarily leads to litigation, and one can only, rather sadly, ask oneself whether it is the law that is astray or the people who find themselves in the position of needing to litigate in such numbers. Undaunted, however, Mr Fisher has with enviable expertise, culled the pages of the five volumes of the *Matrimonial Property Cases,* the *NZLR, Butterworths Current Law,* the *NZLJ*, the *NZFLR, Recent Law* and the *Family Law Service,* to name but some of the sources. When he says he has "tried to provide a framework of general principle which will not date too quickly", the reviewer would reply that he has succeeded, and admirably, too.

The format of the book

As indicated above, the work is divided into chapters in the conventional manner. Each chapter is divided into lettered sub-headings. Sometimes there are well chosen sub-sub-headings serving logically to break up the text. The whole text, is, however, arranged so that there are numbered paragraphs frequently needed to be subdivided into paragraphs in the usual sense of the term. At the end of each numbered paragraph the footnotes appear. Thus the arrangement is closely akin to that of *Halsbury's Laws of England* and does not resemble that of an orthodox student's or practitioner's text book presenting the law in

narrative form with the facts of relevant cases, their *ratio decidendi* and the author's commentary in the text. The general principles and the author's explanations and criticisms appear, as a rule, in the text and the facts, the *rationes decidendi* and relevant obiter dicta appear in the footnotes.

Some might have preferred, as a matter of taste, another approach, for instance that of Rule, Comment and Illustrations as adopted in Dicey & Morris's *Conflict of Laws* (10 ed, 1980). On the other hand, if Mr Fisher was to put across with any degree of economy the wealth of material with which he was faced, it is very hard to see what possible alternative he had. The main thing is that it is all there to his cut-off date of 1 May 1984.

The student studying family law for his first degree will probably elect to assimilate his knowledge from shorter sources than Mr Fisher's new work, though, if he or she has to write an opinion on a matrimonial property topic, it would be foolhardy not to consult this major reference work. For Honours or Master's theses, the book is as much compulsory reading as it is for the practitioner faced with a real-life problem in the office. It need hardly be said that no family law teacher's library will be complete without a copy of this work.

Comments

The style of writing, and the presentation of the law in a logical order, are impeccable. There is a nice sense of English and New Zealand legal history. Misprints are few. One wonders how far jurisdictional difficulties can be waived in a conflict of laws situation when foreign immovables are concerned: cf eg, *The Mary Moxham* (1876) 1 PD 107; *Duke v Andler* [1932] 4 DLR 529. It would be interesting to know how a case should be run in New Zealand where the parties are subject to a foreign matrimonial property regime as in *De Nicols v Curlier* [1900] AC 21 (HL) and *De Nicols v Curlier* (No 2) [1900] 2 Ch 410. Might it be helpful in a later edition to have a small discussion on what is a "question" for the purposes of the Act?

Mr Fisher's gift of prophecy is enviable: thus, in the course of the very fine section on contracting out, he says it is not permissible to contract out in respect of the Court's powers to make orders as to occupation of the matrimonial home under s 27. He has been borne out by *Pawson* [1984] *NZ Recent Law* 270, a decision of Judge B D Inglis, QC, which overtook the author in the press. One wonders whether an inter-spousal partnership that comes to grief along with the marriage should be wound up under the Partnership Act or the 1976 Act, and if *Hargreaves* [1926] p 42 and *Burnett* [1936] p 1 would further the discussion on settlements falling outside s 182 of the Family Proceedings Act 1980. (In the same context, *Moffat* (1984) 2 NZFLR 395 (CA) and *Totty* [1984] *NZ Recent Law* 58 must have appeared too late to be considered.)

One cannot but be impressed with what one might call the sound "practical" hints that are given eg we are warned in para 5.68 not to include in a written s 21 agreement a term that the parties have informally agreed between themselves as to division of chattels; para 7.2 gives a list of the comparative advantages of Joint Family Home Settlements; in the context of gift duty, we are usefully instructed how to avoid possible difficulties arising out of s 75A(2) and (3) of the Estate and Gift Duties Act 1968 in para 8.15; in para 8.44, we are given a timely reminder of the effect of family trusts and companies on matrimonial ownership; in paras 10.18-10.20 there is some excellent advice on valuing farms, which one feels, might well have prevented *Johnston v Johnston* (1984) 3 NZFLR 65 being litigated had they been available to counsel. Moreover also, the jurisprudence experts should be delighted with the learned author's analysis of "justice" (paras 12.40 and 12.41) in the context of s 14 of the Act, and the evidence expert will applaud para 18.27 on the onus of proof.

Like the rest of family law, matrimonial property law is a "growth industry" as may be seen from the number of cases that, apart from the few already mentioned, have overtaken Mr Fisher either in the press or after publication. To name but some, there are *Brown* (1984) 2 NZFLR 417 (CA) (position where matrimonial home is partly owned by a third party); *Guiney* (1984) 2 NZFLR 475 (a useful case on the valuation of goodwill in a consulting engineering partnership); *Allen* (1984) 2 NZFLR 405 (CA) and *Callaghan* (1984) 2 NZFLR 410 (both concerned with superannuation); *Jackson* (1984) 2 NZFLR 374 (CA) (intermingling).

It was a particular pity that *Wheeler* (1984) 2 NZFLR 385 could not be included on the oft-met sale-or-occupation order controversy, for it seems to be the first case to be reported which illustrates the position after the insertion of the new s 28A of the 1976 Act. Equally impossible to deal with was the valuable guidance as to s 47 of the Act given by Eichelbaum J in *General Finance Acceptance Ltd v Cooper* (1984) 3 NZFLR 108 and the interesting approach to accident compensation received after separation in respect of a pre-separation accident in *Storer v Storer* (1984) 3 NZFLR 88, and, one wonders, would the learned author have had any bones to pick with *Cross v Cross* (1984) 2 NZFLR 433 (CA) and *Walsh v Walsh* 1984) 3 NZFLR 23 (CA)? No doubt these will find their place in the next edition, which, it is fervently trusted, will appear in less than 70 — that is to say, seven — years time. Their absence from the present edition is due just to the luck of the game as any textwriter knows to his cost.

The author does not profess to cite every possible case, and it is possible to think of a few cases that do not detract from the work because of their absence, eg *Beams v Api* [1982] *NZ Recent Law* 20; *Fergusson v King* [1983] *NZ Recent Law* 338, or, indeed *Jensen v O'Carroll* [1981] 1 NZFLR 84, all on s 2(2) of the Act; *Veninga* (1983) 2 NZFLR 79 and *Rafferty* (1983) 2 NZFLR 193, both on short marriages — but might not *Reade* (1982) 1 NZFLR 445 on the same topic have had brief mention? And, perhaps, *Derrick* (1983) FLN 163 (2d), on trial separations and s 9(4)? And might not *Tierney v Tierney* [1983] *NZ Recent Law* 335 neatly illustrate the difficulties where a family trust owns all the property which would otherwise be classifiable as matrimonial property?

Au fond, however, every line of Mr Fisher's work is worth the proverbial subsidy (and, indeed, must have cost him a sudsidy in time to write). Both he, and the publishers, have executed a first class piece of work. If this reviewer had prizes at his command to award for excellence of content and get-up he would, without hesitation, award them to Mr Fisher and Butterworths of New Zealand, and feel privileged to do so. □

Books

Accident Compensation in New Zealand

By A P Blair LLM, published by Butterworths. 2nd ed ISBN 0-409-70160-2
Price $29.75

Reviewed by J A L Oliver, Chief Solicitor, Accident Compensation Corporation

In September 1978, the First Edition of this work was published, filling a need for a basic legal text on accident compensation law. Since then, both the Accident Compensation Act and the organisation administering it have undergone substantial legislative and administrative change and it is appropriate that the Second Edition of this work has now been produced recording these changes.

In the preface to the First Edition the author commented that lack of knowledge of the law and practice of accident compensation was widespread, both among the professions as well as among laymen. He hoped that his book would assist. The First Edition was of great assistance and the Second Edition follows in its footsteps.

As the author observes, the essential phraseology of the Accident Compensation Act 1982 is similar to the 1972 Act and thus the precedent value of decisions under the 1972 Act remains. This is important because most sections of the Act have been subject to scrutiny by the Accident Compensation Appeal Authority and many are the subject of decisions of Higher Courts. This book contains liberal references to decided case-law and practical illustrations of the legislation in operation.

Fundamental to the concept of accident compensation is the question of personal injury by accident. If personal injury by accident is suffered then benefits under the Act flow from this. It is thus natural that almost half of the book should be devoted to personal injury by accident in its various forms. Separate chapters are devoted to mental consequences of an accident, heart attacks and strokes, medical misadventure and disease injuries. This latter chapter singles out individual diseases and details the way in which they are dealt with under the Act.

Separate chapters are also devoted to criminal injuries and self-inflicted injuries and suicide.

In comparison, the various types of compensation available are dealt with in only three chapters, two of which are devoted to dependency (fatal accidents) and earnings-related compensation. All other types of compensation are dealt with in one relatively short chapter.

Practitioners may be surprised at the relatively short treatment given to lump sum compensation under sections 78 and 79 of the 1982 Act (previously sections 119 and 120), when one considers that 40% of reviews and appeals concern these assessments. However, the text covers the essential details succinctly and it may well be that the text reflects their proper rather than assumed importance.

The chapters on Corporation procedures and review and appeal procedures are extremely valuable and will, I hope, dispel a number of misconceptions.

Accident Compensation is still a relatively new concept in spite of the fact that it has been in full operation for over ten years. It is indeed pleasing to see a practical text on accident compensation law produced, particularly when it has been written by a person who has had a very real hand in the development of the law. I commend the book to all practitioners who wish to get involved in dealing with compensation claims and claimants. □

Books received from overseas

(Books listed may be reviewed later)

Supreme Court Practice 1985 (UK), Associated Book Publishers, £140.

Breach of Contract by J W Carter, (1984) The Law Book Co, Sydney, $A56.

Corporate Law in Canada by Bruce Welling (1984) Butterworths, Toronto.

Understanding Companying Law by P Lipton and A Herzberg, (1984) The Law Book Co, Sydney, $A28.50.

The Law of Damages by S M Waddams, (1983) Canada Law Book Ltd, Toronto.

Injunctions and Specific Performance (1983) Canada Law Book Ltd, Toronto.

Equitable Remedies by I C F Spry, 3 ed (1984) The Law Book Co, Sydney, $A60.

Criminal Procedure in New Zealand by W C Hodge, 2 ed (1984) The Law Book Co, Sydney, $A17.50.

The Yearbook of World Affairs 1984 Stevens and Sons, London, £20.

International Dispute Settlement by J G Merrills, Sweet & Maxwell, London, £6.95.

Cases on Trusts by H A J Ford and I J Hardingham, (1984) The Law Book Co, Sydney.

Cases on the Criminal Code (Aus) by E J Edwards and R W Harding, 3 ed (1984) The Law Book Co, Sydney, $A45.

Solar Energy and the Law by Adrian J Bradbrook, (1984) The Law Book Co, Sydney, $A45.

Australian Family Property Law by I J Hardingham and M A Neave, (1984) The Law Book Co, Sydney.

Transportation Economics by Norman C Bonsor, (1984) Butterworth and Co (Canada), Toronto.

The Standard Land Contract in Queensland by W D Duncan and H A Weld, 2 ed (1984) The Law Book Co, Sydney, $A25.

Freedom of Information by Peter Boyne, (1984) The Law Book Co, Sydney, $A29.50.

The Pocket Oxford Dictionary 7 ed (1984) Oxford University Press, $NZ14.95.

The Law of Intellectual Property by S Ricketson, (1984) The Law Book Co, Sydney, $A69.50.

A Manual of Australian Constitutional Law by P H Lane, (1984) The Law Book Co, Sydney, $A39.50.

Law and Modern Society by P S Atiyah, (1983) Oxford University Press, $NZ13.50.