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Superior orders

The Greenpeace tragedy will be dealt with in the Courts in the normal way and it is not the intention of this editorial to deal at all with the issues in that case. Whatever may be the rights and wrongs of that episode as finally determined the event itself and the many rumours that it generated do give rise to thoughts about an important legal question involving the position of the executive Government in our constitutional system, and the defence or excuse of "superior orders." In the day-to-day workings of our political system it sometimes gets overlooked that the executive, or the Government as it is more commonly called, is not an independent superior power. It is part of a constitutional system in which Parliament and the Courts are just as significant.

These bodies are interdependent. Judges for instance are appointed by the executive through the Crown as represented by the Governor-General; and are removable, again by the Governor-General, on the passing by Parliament of an appropriate resolution. Parliament considers legislation that is proposed to it by the executive; and the Acts that it passes are then subject to judicial application in the light of the principles of the law relating to statutory interpretation. The executive itself of course holds office and continues to hold office only so long as it has the confidence of a majority of the Members of Parliament. As recently as 1984 there was an illustration of this when the defection of one supporter of the executive, on what was considered to be a crucial policy issue relating to nuclear warships, was the reason given for the need to hold an election.

The legal principles about the position of the Executive in the common law tradition and the defence of "superior orders" had a very interesting – and in its own peculiar way entertaining – illustration in Australia in the case of *A v Hayden and Others (No 2)* (1984) 56 ALR 82. It is worth recalling some of the comments made by the Judges of the High Court of Australia in that case.

Mason J in the opening paragraph of his judgment described the background and the legal oddity of the issue of the disclosure of names:

> There is an air of unreality about this stated case. It has the appearance of a law school moot based on an episode taken from the adventures of Maxwell Smart. It features the Commonwealth in a new and somewhat unattractive role; recruiting officers to the service of ASIS, its counter-espionage organisation, on the footing that their names will be kept secret for reasons of national and personal security, instructing them through superior officers to participate in a bizarre training exercise carried out at the Melbourne Sheraton Hotel which involved risks of disturbing the peace and of the commission of criminal offences, yet arguing that it is entitled to disclose their names to the Chief Commissioner of Police for Victoria so that he may conduct investigations with a view to enforcing the criminal law against them, the Commonwealth itself being immune from enforcement of the law, notwithstanding that through senior officers it initiated the training exercise.

It will be recalled that what had happened was a team of secret service trainees were required, as an exercise, to attempt the rescue of a hostage from the Sheraton Hotel in Melbourne. The exercise had been approved in principle right up to Ministerial level. The team was supplied with firearms and blank ammunition. A sledge hammer was also obtained, again with the approval of a superior officer. The sledge hammer was in due course used to break open the door of a room on the tenth floor of the hotel, and during the performance that followed a group of men wearing masks appeared on the ground floor of the hotel carrying firearms which included two sub-machine guns. The hotel had not apparently been forewarned, for the sake of realism.

The issue before the High Court was whether the men involved were entitled to retain their anonymity even though the Commonwealth Government was prepared to disclose their identities to the police in the State of Victoria. The people involved failed in respect of all three objections they raised to the Commonwealth Government disclosing their names. These were that the matter involved national security; that they were acting under "superior orders"; and that there was a contract between them as individuals and the Commonwealth Government that their anonymity would be preserved at all times.

As to the first argument the Court took the view that it was neither for the individual men involved nor for the Court to decide on the matter of national security when the executive itself was prepared to disclose the names. As far as the contractual point was concerned the Court held that it would not lend its aid to the enforcement of a contractual term which had the tendency to affect the administration of the criminal law adversely, and that its enforcement in any event would be contrary to public policy. In many ways however it was the arguments relating to the executive power of Government and the consequential claim to immunity by agents of the Government in terms of "superior orders" that led to the most interesting observations.

On this point it is worth setting out a number of comments from various judgments that were delivered in the High Court bearing in mind of course that Australia unlike New Zealand has a written constitution and that the reference to "the Commonwealth" are references to the executive Government of Australia as distinct from the Governments in the separate States. Gibbs CJ, p 84 stated:

> The fact that this foolish exercise was carried out under the authority of the Commonwealth would, in itself, provide no reason in law why the Commonwealth should not disclose the identities of the plaintiffs to the Chief Commissioner [of Police of the State of Victoria]. It is fundamental to our legal system that the executive has no power to authorise a breach of the law and that it is no excuse for an offender to say that he acted under the orders of a superior officer.

Mason J after the introductory paragraph quoted above went on at page 92 to refer to the alleged promise of anonymity in these terms:

> It is possible that the promise was given, and the arrangements for the training exercise made, in the belief that executive orders would provide sufficient legal authority or justification for what was done. It is very difficult to believe that this was the Commonwealth's view — Superior orders are not and never have been a defence in our law — though it is conceivable that the plaintiffs may have had some such belief. . . . For the future, the point needs to be made loudly and clearly, that if counter-espionage activities involve breaches of the law they are liable to attract the consequences that ordinarily flow from breaches of the law.

In his judgment Murphy J referred to an argument of counsel that he said astonished him. Perhaps counsel was led to make the statement he did by being pressed to the logical consequences of a more general argument by questioning from the Bench. Be that as it may the comments by Murphy J are very much to the point concerning the limitations that exist on the executive power, and the last sentence in the following quotation from p 101 of the judgment is particularly noteworthy.

> The executive power of the Commonwealth must be exercised in accordance with the Constitution and the laws of the Commonwealth. The Governor-General, the Federal Executive Council and every officer of the Commonwealth are bound to observe the laws of the land. If necessary, constitutional and other writs are available to restrain apprehended violations and to remedy past violations. I restate these elementary principles because astonishingly one of the plaintiffs asserted through counsel that it followed from the nature of the executive Government that it is not beyond the executive power, even in a situation other than war, to order one of its citizens to kill another person. Such a proposition is inconsistent with the rule of law. It is subversive of the Constitution and the laws. It is, in other countries, the justification for death squads. . . . In Australia it is no defence to the commission of a criminal act or omission that it was done in obedience to the orders of a superior or the Government. Military and civilians have a duty to obey lawful orders, and a duty to disobey unlawful orders.

In the judgment of Brennan J some historical background was considered and the ancient principles of constitutional law were specifically stated as being not obsolete. This judgment also makes it clear that the restraints on the power of the Monarchy and on Regal authority, apply equally to the executive Government. It is not simply that the Government can do anything that Parliament will let it by default; although most politicians seem to be unaware of this fact, and there is talk sometimes of the Courts "frustrating" the policy of the Government in applying the law that Parliament has enacted. At p 116 Brennan J expressed the historical situation as follows:

> The incapacity of the executive Government to dispense its servants from obedience to laws made by Parliament is the cornerstone of a parliamentary democracy. A prerogative to dispense from the laws was exercised by mediaeval kings, but it was a prerogative "replete with absurdity, and might be converted to the most dangerous purposes" (*Chitty: Prerogatives of the Crown* (1820), p 95). James II was the last King to exercise the prerogative dispensing power (see *Holdsworth: A History of English Law*, vol VI, pp 217-225), and the reaction to his doing so found expression in the Declaration of Right. It was there declared that "the pretended power of dispensing with laws, or the execution of laws, by regal authority, as it hath been assumed and exercised of late, is illegal". By the Bill of Rights the power to dispense from any statute was abolished (1 Will & Mar, Sess 2, c 2, s XII). Whatever vestige of the dispensing power then remained, it is no more. The principle, as expressed in the Act of Settlement, is that all officers and Ministers ought to serve the Crown according to the laws.
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> It is expressed more appropriately for the present case by Griffith CJ in *Clough v Leahy* (1904) 2 CLR 139 at 155-156: "If an act is unlawful — forbidden by law — a person who does it can claim no protection by saying that he acted under the authority of the Crown."
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> This is no obsolete rule; the principle is fundamental to our law, though it seems sometimes to be forgotten when executive Governments or their agencies are fettered or frustrated by laws which affect the fulfilment of their policies. Then it seems desirable to the Courts "that sometimes people be reminded of this and of the fate of James II, as Scrutton LJ reminded the London County Council" in *R v London County Council: Ex parte Entertainments Protection Association* [1931] 2 KB 215, 229 (per Windeyer J in *Cam and Sons Pty Ltd v Ramsay* (1960) 104 CLR 247, 272).

Then at p 117 Brennan J went on to deal with the argument concerning superior orders. He said:

> It may be that the ASIS officers who induced the beliefs stated and who issued the "exercise cards" regarded ASIS as a para-military force and encouraged the plaintiffs so to regard it. That may be a correct view. But if that view engenders the proposition that participation in an ASIS exercise exempts ASIS officers from obedience to the ordinary laws of the land, the proposition must meet with the same reply that Hale

CJ gave some 300 years ago to a captain of military who asserted exemption from the jurisdiction of the ordinary Courts: "Whatever you military men think, you shall find that you are under civil jurisdiction, and you but gnaw a file, you will break your teeth ere you shall prevail against it" (*The Case of Captain C* (1673) 1 Ventris 250, 251; 86 ER 167, 168).

The Commonwealth Parliament has made no law granting to ASIS officers exemption from any law; it is unnecessary to consider whether its constitutional powers could support such a law in times of peace. It is sufficient to say that none of the approvals given is capable of affecting any criminal responsibility which a particular plaintiff may have incurred in the exercise at the Sheraton Hotel. The exercise cards with which they were issued were no passport to immunity from the operation of the ordinary laws of Victoria.

The particular exercise was described in two of the judgments as foolish and bizarre. Fortunately in this part of the world it is only such relatively mundane and ludicrous episodes that normally have to be put up with. There is however always the problem of not noticing small and persistent changes of behaviour by officials or politicians that in each separate case can seem excusable or insignificant. "Trivial" is the word that politicians often use to justify them. It is such cases as this one in Australia that helpfully illustrate some basic and essential principles on which our constitutional system and therefore the vitality of our political processes are based. In New Zealand the case of *Fitzgerald v Muldoon* [1976] 2 NZLR 615 illustrated the same basic point that the executive arm of government, even at the highest level, remains subject to the law as interpreted and enforced by the Courts. If and when there is a new Bill of Rights in operation in New Zealand this principle will have renewed vigour over a broad area.

P J Downey

Books

Mental Health Law

Published by the Mental Health Foundation of New Zealand (1985), edited by John Dawson and Max Abbott.

Revieved by B R Boon, Wellington practitioner and District Inspector of Mental Health.

This publication is an account of the Legal Section of the Foundation's 1985 Conference on the Future of Mental Health Services in New Zealand. It includes a number of well researched papers dealing with the origins and history of our present legislation, and proposals for reform from the various perspectives of the Department of Health, the medical, nursing and legal professions, and the Judiciary.

The Mental Health Act 1969 has been undergoing a wide ranging review led by Director of Mental Health, Dr Basil James and his Working Party. A new Bill is expected to be introduced to Parliament in 1986.

This collection of papers is a valuable contribution to the current debate on the future direction of mental health services in this country, and the legal structure to support them. The papers deserve to reach a wide audience, not only of the professionals and others working in this field, but the wider community which is vitally affected by this little known branch of our law. What needs to be better understood is that our psychiatric hospitals and services deal very largely with voluntary patients and need to be seen by Government and the public generally as an integral and important part of our public health system.

The legal connection arises from the committal procedures whereby mentally disordered people may be compulsorily admitted to, detained and treated in psychiatric hospitals. The draconian effects of committal are graphically illustrated in Judge D Finnigan's paper, loss of liberty, loss of all control over one's financial affairs and property, and no control over treatment or future prospects.

Lawyers generally have tended to have little awareness of this aspect of the law. In this reviewer's experience, confirmed by one of the research papers, the legal profession has played a very limited role in the field, apart from our District Court Judges and District Inspectors who have an ongoing task in the committal procedure, and in subsequent investigation of complaints, and review of status. It is to be hoped that legal aid and assistance to patients subject to a committal application will be encouraged in the legislation brought down to replace the 1969 Act.

The role of District Inspectors and Visitors needs to be expanded.

The whole topic of compulsory detention and treatment is vitally important to the community, and in particular the medical and legal professions, and the Judiciary. There needs to be much greater public awareness of the need for sound mental, as well as physical, health. We all need to be more tolerant of the mentally ill, and to promote the best practical system to treat their illness sympathetically and effectively.

This very useful publication is commended to all practitioners concerned with this aspect of law. Like crime and road accidents, mental illness will not be prevented by legislation. But the legal profession can play its part in raising public awareness of the problems confronting the mentally ill, and in seeeking better ways to deal with them in our hospitals and in the community. □

Obituary

Lord Diplock

By Rt Hon Sir Robin Cooke, a Judge of the Court of Appeal of New Zealand

The death of Lord Diplock of Wansford (in Cambridgeshire) at the age of 77 after 24 years' service as an appellate Judge, 17 of them in the House of Lords and Privy Council, should be noticed in this *Journal*. While Privy Council appeals from New Zealand are not frequent enough for it to be said that he had a major direct impact on the evolution of New Zealand law, he gave the judgment or majority judgment of their Lordships in three leading New Zealand cases, notable in different ways for the controversy surrounding them. *Europa Oil v Commissioner of Inland Revenue* [1976] 1 NZLR 546 – the second *Europa* case; *Lesa v Attorney-General* [1982] 1 NZLR 165 – the Western Samoan New Zealand citizenship case; and *Re Erebus Royal Commission* [1983] NZLR 662. In two of those cases the result reached in the New Zealand Courts was reversed. In addition he had much indirect influence on our law as the result of the general tendency to follow English precedent, a tradition still fairly strong.

Kenneth Diplock had firm friends in this country, and a multitude of admirers. The first reaction to his passing is one of sadness that the struggle is over. For some years this courageous and determined man, frail and often pitiably short of breath, handicapped by eye problems also, diminutive of physical stature but by common consent an intellectual giant, his head of very distinctive almost equine shape, wrestled with ill health. He lived for the law and worked virtually to the end. Without his work, one imagines, it would have come sooner.

The son of a Croydon solicitor, he was educated there at one of the perhaps less well-known public schools, Whitgift, and at University College, Oxford. He read chemistry at Oxford, evidently not with any marked distinction but acquiring a reservoir of technical knowledge which he was to enjoy tapping in patent cases. See for instance his speech in *Beecham Group v Bristol Laboratories* [1978] RPC 521 for a summary "in layman's language" of the basic chemistry of semi-synthetic penicillins.

I first saw W J K Diplock KC when he argued for the Crown in the Court of Appeal a deportation case of no great importance, *R v Brixton Prison Governor* [1952] 1 KB 169. He was then, in his mid forties, at the height of his career as a banco advocate. What was most striking was the extreme slowness of delivery: slower even, it seemed, than T P Cleary. This contrasted with the general style at the English Bar, where at all levels argument usually moves much more briskly than in New Zealand. Possibly the slight deafness of the presiding Judge, Singleton LJ, had something to do with it. But it was obvious that here was a counsel of formidable power.

It must have been not long afterwards that I was fortunate enough to be invited to dine with him for the first time. He was always very good at taking an interest in Commonwealth lawyers, young and old. It was at the former United Universities Club in Suffolk Street, behind New Zealand House, and another guest was a pupil of Diplock's, R L McEwen, later Sir Robert McEwen Bt, editor of *Gatley*, and now himself deceased. I remember McEwen's wife explaining that they kept a pet snake and were naturally able to get the right food for it at Harrods. In later years Lord Diplock, who lived in Crown Office Row in the Temple, entertained rather at the Athenaeum, a club of grander status but lesser cuisine.

In his tribute to Lord Diplock in the House of Lords Lord Scarman described him as "a truly great appeal Judge: original, creative, and, of the old established legal shibboleths, devastatingly destructive". Although those who favour the current legal jargon would probably not describe him as an activist – a term of dubious import but often having a connotation of trendy – he was surely original and creative. Without much exaggeration it could be said of his appellate judgments on matters of law that he touched nothing that he did not transform. Largely this was because of his method. He would work out some basic principle and then carry it through to a series of conclusions with logic which sometimes seemed remorseless. This a priori, deductive approach was of course different from the a posteriori, inductive way in which common law mainly grows up, with many judicial minds and strands of thought contributing to a not wholly consistent and ever-changing pattern.

In his analytical approach the starting point was naturally crucial. Since he came to regard progress towards a comprehensive system of administrative law as "the greatest achievement of the English Courts in my judicial lifetime" (*Inland Revenue Commissioners v National Federation of Self-Employed* [1982] AC 617, 641) it is appropriate to recall again from that field a dramatic illustration of a radical change in the articulate major premise.

In *Anisminic v Foreign Compensation Commission* [1968] 2 QB 862 in the Court of Appeal he read a judgment which he began by describing (correctly) as "very long" and (disarmingly) as "very tedious", a judgment based on the umbrella theory of jurisdiction: broadly that the authority of an inferior tribunal

to decide whether a certain kind of situation exists always includes authority to decide conclusively some questions of law (subject only to any statutory appeal and possibly review for error on the face). After the reversal of that decision by the House of Lords, [1969] 2 AC 147, he wrote with equal cogency a speech denouncing the distinction between errors of law within and outside jurisdiction as esoteric and an unnecessary fetter which the English Courts had imposed on themselves: *O'Reilly v Mackman* [1983] 2 AC 237.

The rigour with which he sought to exclude any loophole of ambiguity makes some of his judgments less than easy reading. But they are enlivened rather than disfigured by occasionally recherche language – *synallagmatic, noumenon, dyslogistic* – and flashes of charm. As when on using again the first of those terms he said "The insertion of this qualifying adjective was widely thought to be a typical example of gratuitous philological exhibitionism" [1968] 1 All ER 108.

In dealing with social problems he was not conservative and could display realism and insight. In his superbly simple speeches in *Pettit v Pettit* [1970] AC 777 and *Gissing v Gissing* [1971] AC 886 he expounded regarding family assets a principle first of imputed common intention, then modified to objective reasonable inferences of intention, which although possibly a little outside the main stream of English law may yet help us to solve difficulties in the field of de facto relationships.

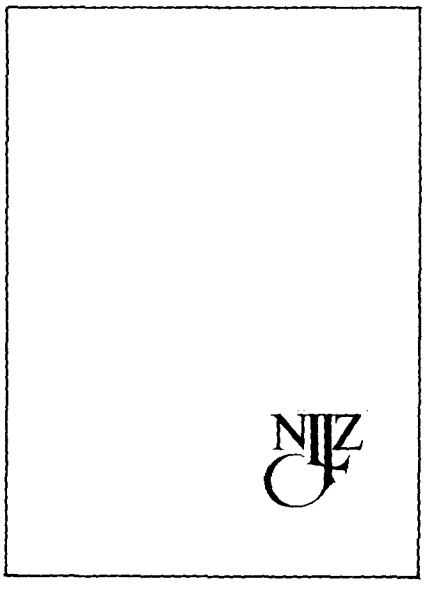
Severity of reasoning carries a risk of failure as well as success. In negligence law his judgment for the majority in *MLC v Evatt* [1971] AC 793 has everywhere commanded less judicial support than the dissenting opinion of Lords Reid and Morris. While fully conscious of the importance of the role of ultimate appellate Courts in criminal law, he must bear a main share of the responsibility for the effect on the reputation of the House of Lords in this field, of such decisions as *Sang* [1980] AC 402 (limiting the trial Judge's control over unfairness on the part of the prosecution); *Majewski* [1977] AC 442 (limiting the defence of intoxication); *Rose* [1982] AC 822 (limiting the grounds on which a new trial can be ordered in England); *Caldwell* [1982] AC 341 (expanding the concept of recklessness). He was an exponent of the purposive interpretation of statutes. His quite frequent references in later years to the Western Samoan case made some wonder whether his departure from that approach there tended to haunt him.

That handful of references cannot begin to do justice to the massive quantity or the special quality of his work. As to his modus operandi, from sitting quite often under his presidency one formed the impression that he was not usually much influenced by the arguments of counsel. He was no hunch Judge, in that he read the case carefully in advance and thought it through dispassionately; but if he changed his mind it was apt to be as a result of his own reflection. English counsel are perhaps more deferential than their Australasian counterparts, but it must have been trying to cope with some of his ex cathedra observations, especially as they could be difficult to hear exactly. On some days, though, he would mitigate this with ample benignity.

Presiding, he was a master of judicial dispatch, sometimes ruthless. In 1984 there was a petition for special leave to appeal in a Queensland criminal case where, years after the original trial and appeal, a fellow prisoner had recanted his evidence against the man convicted. The High Court of Australia had refused leave to go to the Privy Council, holding that the jurisdiction had been taken away, and the prisoner's advisers tried to circumvent this by seeking leave to appeal from the old Queensland decisions. The case was supposed to raise far-reaching issues as to Privy Council jurisdiction and Australian Courts. Various Commonwealth and State Governments were represented and the Chamber was crowded with counsel, solicitors and persons interested. Many of them were from Australia. Diplock disposed of the petition in some ten minutes, after passing to his colleagues a note manifesting the opinion that counsel in support had not got it on its legs. In the ratio of cost to hearing time, this case can have few rivals.

In private life he was until lately a rider to hounds; a recreation consonant with both his build and his love of the English way of life. He was the only Law Lord in recent years to do the *Times* crossword regularly. For quite different reasons his security was said to be threatened by the IRA, necessitating some precautions, but he treated these things as trivia. He was a committed churchgoer, a connoisseur of the elegant essays delivered under the name of sermons in the Temple Church. Such a question as why Salisbury Cathedral is often said to be the finest in England would evoke a detailed reply, traversing the features to note in early English architecture. His *Who's Who* entry discloses that he was once President of the National Association of Parish Councils.

With Lord Wilberforce and Lord Denning retired, Lord Reid and now Lord Diplock dead, and Lord Hailsham chiefly absorbed in politics and administration, it can be said that in the working English judiciary there has been as exodus of some post-war giants. Beyond the general comment that the rich resources of their Bench and Bar enable a continual supply of comparable figures, it would be inappropriate to write now about Judges at present in harness. What can be said with confidence is that Diplock's combination of qualities is inimitable and one cannot conceive that they will be found together ever again. In his own kind of language, to describe him as ordinary or uncomplicated would be antiphrasis indeed. □



Case and Comment

Damages for late payment

The decision of Casey J in *Broadbank Co Ltd v Mosgiel Ltd* (High Court, Dunedin, judgment 2 May 1983, A 56/82), which was discussed by the writer in "Case and Comment" [1983] NZLJ 322 has been the subject of a successful appeal by Broadbank. However, the appeal decision, although successful in the sense that Broadbank was entitled to recover damages, has not otherwise altered the effect of the High Court decision, since the appeal was fought and won on grounds which were not argued there.

Briefly, the case had arisen out of two credit facilities made available to Mosgiel, one by Broadbank alone and the other together with three other merchants banks. Broadbank's part of the finance was provided by means of bills of exchange drawn by Mosgiel of which it became acceptor. Mosgiel agreed to provide Broadbank with sufficient funds to meet its obligations as acceptor before the maturity dates of the various bills. Mosgiel went into receivership and did not honour that undertaking. Liability for the face value of the bills was accepted by the receiver, but it was not clear whether there was any liability for interest for the delay in payment and it was this question which was being litigated. The pleadings had asked for interest or damages, but the argument in the High Court had concentrated on Broadbank's entitlement to interest, a claim which it failed to establish.

The appeal was argued solely on the grounds that Broadbank should be awarded damages for Mosgiel's failure to pay in time. There was an obstacle to such an award, in the form of the generally accepted rule that damages are not usually recoverable for non-payment of money, but this case came within a well established exception: where there is a promise to pay on a fixed day with interest until then, interest can be allowed as damages if payment is not made on the due date. The Court was unanimous in its decision to allow the appeal and remitted the case to the High Court for an inquiry into the quantum of damages to be awarded. It emphasised that the award was not being made pursuant to a term being implied into the contract, but that it was purely damages for breach, which meant that the amount would not necessarily be based on the contractural rate on interest.

Johanna Vroegop

Occupation Orders Under Matrimonial Property Act 1976, ss 26, 27, 28A

Wheeler v Wheeler, High Court, Wellington; judgment 26 September 1984 (No M69/84); Savage J.

It appears not to be generally known that there was an appeal from the judgment of His Honour Judge B D Inglis, QC, in *Wheeler v Wheeler* (1984) 2 NZFLR 385, noted in [1984] NZLJ 362 by the present writer. The appeal was brought by the wife and came before Savage J early in September 1984. She had sought an order postponing the sale of the matrimonial home until the youngest child turned 16 years of age and permitting her to occupy it till then. Judge Inglis, QC, refused to postpone the sale (see (1984) 2 NZFLR, 393).

The parties were married in 1965. There was two children aged 11 and nine. The wife was aged 36, the respondent husband was 37 and they had separated in 1982. The wife was still in occupation of the home now in dispute and had the children with her. She was receiving the DPB. She was employed. The children were going to the local school where they were doing well. The husband was living with a woman and they had purchased a property. They had heavy and now pressing financial commitments in respect of it. The husband had access rights to the children, but difficulties in that context led him to seek an order that the custody of the children be granted to him with the wife having access rights. Judge Inglis QC, after some hesitation, left the wife with interim custody of the children, although he had been strongly critical of her and expressed concern about the children's emotional and mental health. He imposed conditions on the order, the most important of which was that the children were to receive treatment or therapy at the Child and Family Clinic in Wellington.

The home in question was a two-storey one with two double bedrooms, one of which was used as a rumpus room, two single bedrooms and two bathrooms. It had a double garage (or a garage and workshop) and the total area was over 2,000 sq ft. Its agreed value was now in the region of $82,500-$84,000 and the equity was in the region of $77,000-$79,000.

Savage J considered ss 26, 27 and 28A of the Matrimonial Property Act 1976 and made reference to *Doak v Turner* [1981] 1 NZLR 18 (CA), 23, which he noted, predated the enactment of s 28A. In his view, the effect of these sections in relation to applications made under s 27 was that, in terms of s 26(1), the Court must have regard to the interests of the children generally, and, in terms of s 28A(1), it must have particular regard to the need to provide a home for the children. "I note in passing", said his Honour, "that I think [counsel for the husband] was right when he submitted that this meant a home and not necessarily the existing matrimonial home. From a practical point of view it may well be the case, and I think that ordinarily it will be, that the duty of the Court in terms of s 28A(1)(a) to have particular regard to the specific need to provide a home for the children will necessarily be encompassed or included in the duty to have regard to the interests generally of the children, though it is conceivable, if somewhat

unlikely, that sometimes it will not."

Counsel for the wife put it that Judge Inglis's approach had been that the existing home was larger than the wife and children needed and so could be sold, with the result that the wife could use her share of the proceeds to buy a more modest home, and that, in effect, this ignored the spirit of s 28A. Savage J thought it clear, as submitted by counsel for the husband, that Judge Inglis had accepted that a home was needed for the children. Judge Inglis had also accepted, since the wife then had an order for custody, that it was she who had to be in a position to provide the home.

Savage J called attention in passing to the point that "the position is by no means so clear now; the [wife] has only an interim custody order and the whole question is to be reviewed next February [1985]".

Counsel for the wife submitted also that Judge Inglis was without evidence on the question of the cost and practicability of the wife's buying a substitute home. It was correct that there was no direct evidence on this, but Savage J thought the Court below was entitled to act without specific evidence. It had referred (see (1984) 2 NZFLR 391-393) to the parties' comtemporary equity in the property, the moneys that would be available to the wife from the proceeds and another source and her earning capacity. (She would, indeed, now have over $50,000 available). Savage J did not think the Court below could be said to have failed to have a proper regard to the matter of the need to provide a home. (See (1984) 2 NZFLR 392.)

It was further put by counsel for the wife that insufficient regard had been paid to the matter of the children's special psychological needs. It was also urged that the judgment giving the wife interim custody made it clear that their psychological needs required that they should remain in the present home. It was further submitted that Judge Inglis had been wrong in his interpretation of s 26(1) in that he had construed it as not requiring him to take into account the emotional wellbeing of the children and, in the result, had taken the approach of treating it as a discretionary consideration in terms of "other relevant circumstances" under s 28A(1) rather than as mandatory consideration under s 26(1).

Savage J accepted that Judge Inglis "took an unduly restrictive view of s 26(1)". Judge Inglis had said that the expression "interests of any minor or dependent children" in s 26(1) was often interpreted as if it authorised the Court to have regard to the general welfare in the widest sense of any such children but he was inclined to doubt whether such a broad view of "interests" could be justified in the context of a statute concerned primarily with property rights (see (1984) 2 NZFLR 388). He went on to develop the argument with reference to certain provisions of the Guardianship Act 1968 and the Children and Young Persons Act 1974 (see (1984) 2 NZFLR 388-389). Savage J did not share that view. The 1976 Act was primarily or principally concerned with property rights, but not wholly. Section 27 gave the Court power to grant one party a right to occupy the home, notwithstanding the property right the other might have in it, and the Court of Appeal in *Doak v Turner* (supra) had made it clear that there was no restriction on the considerations that might properly be taken into account by the Court in exercising its discretion under that section. "I have already held," said Savage J, "that the interests of the children as referred to in s 26(1) must be taken into account when the Court is considering an application under s 27 and in my view it follows that any factor which bears upon the interests of the children of the marriage, whatever its nature, must be considered by the Court if it is relevant to the question of whether an order should be made or not in the particular case. This view is reinforced by the judgments in *Goulding v Goulding* (1980) 3 MPV 72 and *Harper v Harper* (1978) 2 MPC 84, 86."

Though His Honour accepted the submission that the Court below had taken an unduly restrictive approach to s 26(1), he noted that it had taken the emotional wellbeing of the children into consideration. There had been no expert evidence on the matter before the lower Court, but there were references to it by the parties in their evidence and Judge Inglis had canvassed the issues from various standpoints in his judgment.

He had, in fact, expressly stated that, notstanding his view that s 26(1) did not require him to consider it, he had taken into account the question of the children's wellbeing when considering all the relevant factors (see (1984) 2 NZFLR 392-393). Savage J did not think it mattered whether he took it into account because he was required so to do by s 26 (1) or because he chose to do so as a relevant circumstance under s 28A(1): what was important was that he took it into account. Savage J did not think it was shown that, on the material before it, the lower Court had been wrong in its conclusion.

Even so, it still remained to be decided whether the new material contained in the subsequent custody and access judgment was such that the appeal ought to be allowed. Counsel for the wife submitted that, in the light of that judgment, it was clear that the children needed a period of stability and that it was not in their interests to be uprooted and that they needed to have the various pressures on them eased. The expert evidence given at the custody hearing was to the effect that the children would suffer harm if taken from the wife, but there did not appear to be any other area of danger to them referred to by the lower Court or, presumably, by the expert in his evidence. In those circumstances, Savage J did not accept that moving house would cause the children emotional harm. He accordingly dismissed the appeal so far as the refusal to postpone the sale was concerned.

There was also an appeal against the Family Court's order as to the payment of interest by the wife to the respondent on his share of the proceeds of sale of the home. Suffice it to say here that Savage J considered that the order should be varied to some extent. He made the point that, ordinarily and in general terms, a reasonable period ought to be allowed after separation for the parties to try to resolve property questions before interest should be allowed on their rspective shares in matrimonial property, though it was, of course, very much a matter for the Judge in the particular circumstances.

P R H Webb

The reconstituted office of Governor-General

By Professor F M Brookfield, Professor of Law, University of Auckland

Sir David Beattie is the first Judge to have held office, from November 1980 to November 1985, as Govenor-General of New Zealand. The ending this month of Sir David's term of office is an appropriate occasion to consider some major constitutional changes during that period. The statutory constitutional changes that occurred in 1983 with the passing of the Royal Powers Act, the Administrator's Powers Act, the Acts Interpretation Amendment, and the Civil List Amendment have gone largely unnoticed. Even more significant, in constitutional terms, were the substantial changes embodied in the Letters Patent Constituting the Office of Governor-General of New Zealand (SR 1983/225) which revoked and replaced the Letters Patent of 11 May 1917 and the Instructions under the Royal Manual and Signet, and certain other documents. In this article Professor Brookfield considers these and other changes of a constitutional nature. He describes the new situation in outline. He concludes by looking briefly at two outstanding matters being the reserve powers and the tenure of office.

THE RECONSTITUTED OFFICE OF GOVERNOR-GENERAL

Part I

Major constitutional change appropriate to the political independence of New Zealand has come slowly, step by step, over the last 40 years. The General Assembly has become a supreme legislature fully empowered through its adoption in 1947 of the Statute of Westminster 1931 and, in its power to amend the New Zealand Constitution Act 1852 ("the Constitution Act"), by the New Zealand Constitution Amendment Act 1947 (UK). For practical purposes at least the power of the United Kingdom Parliament to legislate for New Zealand has long ceased unless its exercise were requested under s 4 of the Statute of Westminster. The General Assembly's own law making power is clarified and perhaps enlarged by the substitution of a new s 53 in the Constitution Act by s 2 of the New Zealand Constitution Amendment Act 1973 (NZ). The same Amendment Act abolished the Royal power to disallow Bills assented to by the Governor-General by repealing s 58 of the Constitution Act. The Governor-General's own executive power was affected also: s 57 requiring him to conform to instructions from the Crown in the United Kingdom, in assenting to Bills, dissenting from them or reserving them for signification of the Queen's pleasure, was repealed. Consequentially s 59 was also repealed and s 56 in part amended.[1]

These now repealed provisions affecting the Governor-General had, of course, long been obsolete with the political evolution of the country from colony, to dominion, to independent realm. Obsolete also, in many respects, were the Letters Patent constituting the office of Governor-General, which were still those of 1917[2] until their recent replacement in 1983. The appointment of a new Governor-General makes this a suitable time to consider the new Letters Patent (SR 1983/225) and the latest changes which have been thereby made to an office which has necessarily changed much since the then Lieutenant-Governor, William Hobson, took it up as Governor of the Crown Colony of New Zealand on 3 May 1841.

It is necessary to refer here only to the main stages in the later evolution of the office of Governor. Under the Constitution Act the Governor became part of the General Assembly but continued to be also a prerogative officer under Letters Patent and the Commission appointing him. After the change in practice from merely representative government under the Act to responsible government in 1856, the Governor's active role in the administration of the Colony came to diminish by the latter part of the century, but he retained far from minor responsibilities to the Imperial Government. Dominion status proclaimed for New Zealand in September 1907 was accompanied by the issue of new Letters Patent reconstituting the office of Governor and the issue of new Royal Instructions which, consistently with the new status, omitted specific instructions as to the classes of Bills to be reserved for signification of the King's pleasure. Nevertheless the colonial element remained not inconsiderable. To give the Governor the greater gubernatorial glory that Dominion status and equality with the other Dominions were thought to require, the office was reconstituted as that of Governor-General by Letters Patent of 1917 ("the 1917 Letters") and fresh Royal Instructions ("the 1917 Instructions") were issued also. But in substance and apart from the change of name, the 1917 Letters and the 1917 Instructions were virtually the same respectively as those of 1907. So from 1907 to 1983

the content of the instruments creating the gubernatorial office and the standing instructions for the exercise of its powers remained virtually the same, and with a colonial element corresponding to that in the Constitution Act. Hight and Bamford could write in 1914:[3]

> New Zealand, as part of the British Dominions, is controlled by the Imperial authorities in all the ordinary spheres of Government, legislative, executive, and judicial.

They noted however that the degree of control in domestic matters was in fact slight. Nevertheless it was then at least still potentially great and the Governor-General was a means of its possible exercise; more so in imperial or external matters. But the Dominions' participation in the First World War and the Congress of Versailles brought about further constitutional evolution. The 1926 Imperial Conference defined the position of Great Britain to the Dominions as:[4]

> [A]utonomous Communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs, though united by a common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations.

Consistently with that equality the same Conference defined the position of the Governor-General in a Dominion as being "in all essential respects the same . . . in relation to the administration of public affairs in the Dominion as is held" by the King in the United Kingdom; and not that of a representative or agent of the United Kingdom Government.[5] The 1930 Imperial Conference recognised that the appointment of a Governor-General was solely a matter between the Monarch and the Dominion concerned and that the Ministers tendering advice as to the appointment were those of that Dominion.[6]

New Zealand accepted that position in so far as appointment to the office was concerned, so that apparently from 1930 the commissions of successive Governors-General have been countersigned by the New Zealand Prime Minister in place of a United Kingdom Secretary of State.[7] But otherwise New Zealand, slow to adopt the Statute of Westminster, has been slower still, so to speak, to bring the Governor-General's office up to date. Indeed, even in practicalities the reluctance showed: right up until 1941 the Governor-General remained the means of communication between the New Zealand Government and the United Kingdom Government and compliance with the requirement in s 58 of the Constitution Act that the Governor-General transmit to a Secretary of State a copy of every Bill assented to by him ceased only in 1947.[8] Fifteen years later in 1962, however, K J Scott could write:[9]

> The close ties that formerly bound the Governor to the United Kingdom Government have dispapeared without leaving any trace beyond a few anachronistic provisions in statutes and prerogative instruments.

The possibilities of control by the United Kingdom had indeed by then long ceased. Of the legal anachronisms that remained those that were statutory were largely removed by the New Zealand Constitution Amendment Act 1973, as we have seen. Now the anachronistic prerogative instruments have gone also, in the substitution of the 1983 Letters for the 1917 Letters and the 1917 Instructions. But statute has played a part in the process also, both a preliminary part and a supplementary or consequential one also.

First, the Seal of New Zealand Act 1977 made provision for a new Seal to replace both the Public Seal of the Dominion committed to the custody of the Governor-General by clause IV of the 1917 Letters and also the United Kingdom seals so far as these were necessary for validating or authenticating Royal acts of executive government in relation to New Zealand. These changes, though formal, were not unimportant.[10] Hitherto in accordance with cl I of the 1917 Letters the Commissions of successive Governors-General had been issued under the Monarch's Sign Manual and Signet. The use of the Signet became anomalous when the New Zealand Prime Minister took the place of the United Kingdom Secretary of State in the countersigning of the Commissions. Further, new Letters Patent reconstituting the office of Governor-General would also anomalously require authentication by a United Kingdom seal, in that case the Great Seal. The Seal of New Zealand Act 1977 brought these anomalies to an end by providing for one Seal for use alike by the Queen and by the Governor-General in statutory or prerogative acts of government, including those by the Queen in relation to the office of the Governor-General.

Part II

The new Letters Patent followed six years later, substantially as recommended at the conclusion of a most full and learned Report by Mrs Alison Quentin-Baxter as legal consultant to the Prime Minister's Department. The effects and significance of the 1983 Letters are briefly these:

Nature of the instrument

As with the constitution of the office of Governor or Governor-General on previous occasions, Letters Patent were chosen as a formal means of exercising the Royal Prerogative. But the Royal Title at the beginning of the 1983 Letters ("Queen of New Zealand and Her Other Realms and Territories" etc),[11] the use of the Seal of New Zealand and the counter signature by the Prime Minister combine to show for the first time that the office is constituted under the prerogative in right of New Zealand alone. In that sense the office has been "patriated" – brought home.[12]

Instruments revoked

These are not only the 1917 Letters and the 1917 Instructions but also the Dormant Commission of 1917[13] under which successive Chief Justices of New Zealand have held office as Administrator of the Government when the Governor or Governor-General has departed from the country.

Territorial scope (Cls I and XIX)

The Realm of New Zealand comprises New Zealand, the self-governing state of the Cook Islands, the self-governing state of Niue,

Tokelau and the Ross Dependency. Clause I contains saving provisions for the exercise of executive powers by "any other person . . . appointed to represent Us in any part of Our Realm of New Zealand". (Thus, the 1983 Letters are consistent with the exercise of executive power under the Cook Islands Constitution by the Queen's Representative in the Cook Islands).

The office constituted (cl I)
This is the office of Governor-General and Commander-in-Chief "in and over Our Realm of New Zealand".

Tenure (cl II)
Tenure is at the Queen's pleasure, as with the office in the past. The matter is discussed further below.

The powers and authorities delegated (cl III)
This clause authorises and empowers the Governor-General:

(a) To exercise on Our behalf the executive authority of Our Realm of New Zealand, either directly or through officers subordinate to Our Governor-General; and
(b) For greater certainty, but not so as to restrict the generality of the foregoing provisions of this clause, to do and execute in like manner all things that belong to the office of Governor-General including the powers and authorities hereinafter conferred by these Our Letters Patent.

There was no such general delegation of executive power in the 1917 Letters. Though there was scope for some degree of implied delegation the powers were largely limited to those specifically conferred. Some of these superfluously and confusingly overlapped with existing statutory powers. Thus cl VII conferred power to appoint Judges (but see s 4 of the Judicature Act 1908) and cl X conferred powers in relation to the legislature which, to a considerable extent, duplicated those in the Constitution Act and the Electoral legislation. Indeed it is doubtful whether, on the principle of *Attorney-General v De Keyser's Royal Hotel Ltd* [1920] AC 508, prerogative powers in respect of the New Zealand legislature exist at all. On the other hand, *Simpson v Attorney-General* [1955] NZLR 271 is authority for arguing that such powers do exist. The 1983 Letters, following Mrs Quentin-Baxter's recommendation, neatly avoid the problem in this and any other doubtful areas by simply conferring full executive power on the Governor-General. Where the prerogative has been superseded by statute the executive power of the Governor-General (and of the Queen by virtue of the Royal Powers Act 1983) will plainly be statutory, under the *De Keyser* principle. But the difficulty of that principle is that it operates uncertainly, particularly in such matters as the emergency prerogative. At all events, where the prerogative exists, the wide formula in cl III of the 1983 Letters is apt to delegate it. If, for example, whatever statutes or a written constitution might provide, the prerogative may be resorted to by the Crown to save the country from apprehended constitutional chaos (as in effect the Court of Appeal decided in *Simpson's* case and the Pakistan Supreme Court in *Special Reference No 1 of 1955*),[14] the Governor-General has that prerogative power by delegation.

The Executive Council (Cls VII, VIII, IX and X)
The Executive Council remains the prerogative body through which the Cabinet tenders collective advice to the Governor-General or to the Monarch herself. The rule as to the quorum (two Members apart from the Governor-General or the presiding Member) remains the same. But in other respects the legal constitution of the Council is much changed: to reflect rather than to modify the way in which it has long functioned. Clause V of the 1917 Instructions purported to leave the Governor-General free to act in opposition to the advice of the Council (though obliged to report "the matter to Us[15] without delay, with the reasons for his so acting"). But the general effect of s 4 of the Acts Interpretation Act 1924 was (and still is) to allow statutory powers conferred on the "Governor-General in Council" only to be exercised on advice.[16] In other matters constitutional convention had overlaid the discretion conferred by the Instructions so that it could be exercised only where the Monarch herself could properly have exercised the like discretion. Further, the constitutional relationship between the Monarch and her New Zealand Minister had (as recognised by the 1926 and 1930 Imperial Conferences) become a direct one from which the control of her Secretaries of State in the United Kingdom had disappeared. These constitutional realities are appropriately recognised in cl VIII of the 1983 Letters by limiting membership of the Executive Council to members of Parliament who are, "for the time being, Our responsible advisers".

Here, in one respect, cl VIII may require amendment. The requirement that at the time of appointment members of the Executive Council must be members of Parliament is of course consistent with s 9 of the Civil List Act 1979. But the over-rigid requirements of that section led to the constitutional crisis that immediately followed the election of July 1984.[17] Whether the difficulty will be solved in the future purely by statutory amendment or by both statute and a change to cl VIII remains to be seen.

Appointment of officers (cl X)
Clause X delegates to the Governor-General power to appoint, not only members of the Executive Council, Ministers of the Crown (normally of course the same persons as members of the Executive Council) and Commissioners, but also: (i) specified Officers of the Crown carrying out its prerogative functions in foreign affairs; and (ii) such other necessary Officers as may be lawfully appointed or constituted by the Crown. The main changes here, from the corresponding cl vII of the 1917 Letters are two: the specific inclusion in this way of necessary means to exercise the foreign affairs prerogative (which the 1917 Letters could not be construed to include); and secondly the omission of two classes of officer, Judges and Justices of the Peace, for whom statutory provision is made elsewhere.

The prerogative of mercy (cl XI)
This prerogative is fully delegated under cl XI. The substance of cl VII of the 1917 Instructions, by which the Governor-General was regulated in the taking of advice, especially in being required to take account of

Imperial interests, is of course not reproduced

The Administrator of the Government (cl XII)

Clause XII provides for this officer, who is empowered to act when the office of Governor-General is vacant or the holder of that office is for any reason "unable to perform all or any of [its] functions". In effect, the clause replaces both the unnecessarily complicated provisions in cls XI and XII (operating in different circumstances) for the office of Administrator of the Government and that of Deputy Governor-General, and also the Dormant Commission of 1917 for appointments to the former of those. The person appointed to the reconstituted office of Adminsitrator is the Chief Justice, and if the Chief Justice is unable to act there are alternative provisions for the President of the Court of Appeal or the Senior Judge of that Court, in that order of preference.

Ministers to keep Governor-General informed (cl XVI)

Clause XVI places a duty upon Ministers of the Crown to keep the Governor-General fully informed concerning their general conduct of the government and to furnish him or her information with respect to any particular matter. The substance of the clause has no precedent in the 1917 Letters.

Consequential statutory changes

The Administrator's Powers Act 1983 (replacing the Deputy Governor's Powers Act 1912), the Foreign Affairs and Overseas Service Act 1983 (replacing the Foreign Affairs Act 1943) and also the Acts Interpretation Amendment Act 1983, have made changes to the statutory law which are consequential upon or supplement the terms of the 1983 Letters.

The Queen, the Executive Council and the Privy Council

The colonial nature of the 1917 Letters necessarily had no provision for the Executive Council functioning in relation to the Queen. Further the Constitution Act had not contemplated that she would herself exercise statutory powers in relation to the General Assembly (except, of course, the provisions for reservation and disallowance which operated before their obsolescence and ultimate repeal by the New Zealand Constitution Amendment Act 1973). That the Queen could act fully as such in New Zealand: (i) not being excluded by statutory powers empowering the Governor-General; and (ii) having a similar relationship with the New Zealand Executive Council as with the United Kingdom Privy Council, was the effect of the Royal Powers Act 1953, now replaced by the Royal Powers Act 1983. The 1983 Letters, in providing in cl VII for an Executive Council "to advise Us and Our Governor-General" provides appropriately in this respect. One could say that the Executive Council has now been constituted as a kind of New Zealand Privy Council. But of course there is far from any exact equation with the United Kingdom Privy Council, for the Executive Council lacks any judicial function and its membership is limited to persons who are for the time being the Crown's responsible advisers. Contrast the membership of the Privy Council of the United Kingdom which is normally for life and is not so limited. The latter body retains a residual role in relation to New Zealand, not only in the surviving jurisdiction of the Judicial Committee but in the power of the Queen to make Orders in Council under the Judicial Committee Act 1944 and the Fugitive Offenders' Act 1881 (UK).[18] There is also the honorific membership of the Privy Council still accepted by the Prime Minister and occasionally by other principal Ministers of the Crown. To these things the 1983 Letters make no difference.

Part III

General: Outstanding questions (reserve powers and security of tenure)

The effect of the 1983 Letters (and of the preceding Seal of New Zealand Act 1977), supplemented by that of the 1983 statutes mentioned above, is both to remove the colonial element in the law relating to the office of Governor-General which has so long survived and also the degree of untidy overlap with statute law. Further, the Letters in effect recognise that the Executive Council may function as if it were the Queen's Privy Council in respect of New Zealand, in all matters of executive government.

So, over 50 years after the Imperial Conferences of 1926 and 1930 defined a constitutionally equal relationship between the United Kingdom and the respective Dominions, the New Zealand law relating to the Queen, the Governor-General and the Executive Council at last substantially accords with and gives effect to that equality. The Office of Governor-General has in a sense become patriated.[19] Apart from the possibility of minor amendment mentioned above, the Letters Patent should last as long as the country remains a monarchy. Two outstanding matters require some brief mention.

First the reserve powers remain unaffected by the 1983 Letters. Those legal powers, whether prerogative or statutory, which in certain circumstances the Monarch or the Governor-General may (subject to s 4 of the Acts Interpretation Act 1924) exercise at her or his discretion and not on ministerial advice, necessarily remain uncertain in scope. Opinions will continue to differ as to that scope, at least unless and until they become defined by statute or in a written constitution. These reserve powers are important, especially as a possible legal check in a constitutional order where, as at present, the power of a ministry with a secure parliamentary majority is largely without any such checks. The role as Governor-General of a person of mana, of strong and independent mind and sound judgment, who could both act in a constitutional emergency and also with good sense assist without interfering with the normal processes of government, is likely to grow rather than diminish. But opinions differ as to whether the Governor-General should pursue so comparatively active a role even in crisis and the matter cannot be reviewed further here.

Secondly, there is the matter of tenure of office. As with the 1917 Letters, there is provision in those of 1983 (cl II) that the Governor-General is to hold office at the Queen's pleasure. Since the Queen must by convention act on her Ministers' advice not only in the appointment of the Governor-General but on the revocation of his or her commission should they advise that, that Officer appears very vulnerable — liable to be

dismissed as a means of forestalling any exercise of the reserve powers which the Ministers would naturally wish to avoid. To take a well-known example, had Mr Whitlam in the 1975 Australian crisis anticipated his dismissal at the hands of Sir John Kerr by advising the Queen to dismiss Sir John, the Queen would have had to act as advised and the Whitlam Ministry would (it is assumed) have survived. But there are two comments to make. First, though the vulnerability exists, it is sometimes overstated. There is no way of ensuring that the Queen would act on such advice without any delay or consideration of the circumstances; and even if she did there is no reason to suppose that she could revoke the Governor-General's commission otherwise than in writing. Revocation would thus take time and longer than the Governor-General needs to dismiss the Prime Minister. But secondly, whether the Governor-General should have secure tenure and the means by which this might be achieved is clearly an important question. If the Governor-General is to perform the role adequately greater security appears desirable. On the other hand, it is not appropriate that tenure should be so secure as to invite a revolutionary removal from office in some serious constitutional crisis.

It is widely thought that the Crown cannot make the appointment more secure because of the principle that, in the absence of statute providing otherwise, Crown servants are generally dismissible at will. It has been held that contract cannot fetter that freedom to dismiss.[20] But, to adopt the view of Lord Goddard CJ in *Terrell v Secretary of State for the Colonies* [1953] 2 QB 482, 499, the Letters Patent could be amended to make tenure more secure; for the Governor-General holds office by appointment and not by contract. Secure tenure during good behaviour, for a fixed term, could be provided in this way; in which case the Governor-General could be removed during his or her term only for good cause established in a proceeding in the nature of *scire facias*. But a more appropriate means would be to provide for the secure term by statute, subject to the incumbent's removal from office on specified grounds (of misconduct, incapacity etc) by the Queen on an address by the House of Representatives. This has been suggested most recently by Dr G A Wood [21] who has suggested also that the mode of appointment should be similar: by the Queen on formal recommendaton by resolution of the House.

These suggestions would most appropriately be given effect to by amendment to the New Zealand Constitution Act 1952 under which the the Governor-General is already a component of the General Assembly with statutory functions in relation to it. The suggestions seem to have obvious merits in that they would strengthen the Governor-General's independence of party politics. But they would, of course, involve the supersession of the 1983 Letters Patent which have not been intended to do more than constitute the prerogative office of Governor-General in a form consistent with New Zealand's modern status as a separate realm of the Crown. □

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1. For recent accounts of the country's constitutional development, see Harris (1984) 5 Otago L Rev 565; and Brookfield (1984) 5 Otago L Rev 603. For earlier accounts see eg, Aikman and Robson in *New Zealand: the Development of its Laws and Constitution* (2 ed, 1967) ch 1 and Northey in *A G Davis Essays in Law* (1965) 149.
2. 1919 *New Zealand Gazette* 1213. For discussion of the office see Scott *The New Zealand Constitution* (1962) 72 et seq; Brookfield [1978] NZLJ 491 (where other references are given) and R Q Quentin-Baxter (1980) 10 VUWLR 289.
3. *The Constitutional History of New Zealand* (1914) 384.
4. Cmd 2768. See *Speeches and Documents on the British Dominions 1918-1931* (ed A B Keith) 161.
5. Ibid, 164.
6. Cmd 3717. See *Speeches and Documents* (fn 4 supra) 212, 221-222.
7. See Scott, (fn 2 supra), 73, as to the matter of advice. As to the change in the actual practice of countersignature, the evidence from the *New Zealand Gazette* is not clear until the publication of Sir Cyril Newall's commission which was countersigned by Peter Fraser (1914 *New Zealand Gazette* 350).
8. Scott, op cit, 87-88.
9. Ibid, 87.
10. For discussion see Brookfield [1978] NZLJ 491, 497.
11. See Royal Titles Act 1974, s 2.
12. G A Wood "New Zealand's Patriated Governor-General": paper delivered at New Zealand Political Studies Conference, at Auckland, 21 May 1985.
13. 1924 *New Zealand Gazette* 2841.
14. PLD 1955 FC 435. Reprinted in Jennings *Constitutional Problems in Pakistan* (1957) 259. See discussion of the case in Evatt *The King and His Dominion Governors* (1967 2 ed, Cowan) xix-xxii.
15. At least in 1917, this meant to a United Kingdom Secretary of State, not to the Monarch direct. The provision was, of course, colonial in nature.
16. The definition in s 4 appears to leave the Governor-General free *not* to exercise a power conferred on him in Council, when advised in Council to exercise it. See K J Keith "Canberra 11 November 1975: What Need New Zealand Remember?" (1976 AULSA Conference Paper (unpublished)).
17. See Brookfield [1984] NZLJ 298, and Harris [1984] NZLJ 302; and, for a different view, Keith (1985) 15 VUWLR 5, 8-9.
18. See Brookfield [1976] NZLJ 458.
19. See fn 12, supra.
20. For the general position (as to which there are some differing views) see eg Hogg *Liability of the Crown* (1917) ch 6; Wade *Administrative Law* (5 ed 1982) 61 et seq.
21. See fn 12, supra.

The lawyer's neighbour

The lawyer's notion of duty is not designed to tell the experts how to do their job; it's really just there to curb excessive enthusiasm. We use it to man the ramparts of common sense. And, by the way, when I talk about relationships giving rise to duties, I don't mean to restrict myself to familiar relationships like husband and wife, doctor and patient, seller and buyer. Oh, no! To the lawyer, every man owes a duty to his neighbour.

So – although he got rather a bad press for it – the lawyer who, in the *New Testament*, asked the master, "Who is my neighbour?" was actually asking the *right* question: and the somewhat casuistic answer he got didn't tell him anything that a sensible lawyer couldn't have worked out for himself. And if you thought I was mocking the lawyer for his concern with the grubby details of particular obligations, and some related inability in the lawyer to detect the grand design of the social fabric, then I've misled you. For, on the contrary, the duties that lawyers have hacked out of centuries of human misadventure are the very bedrock of civilisation as you know it.

Lord McCluskey
— on BBC Radio 3

Dissolution today: an update

By Richard Webb, Professor of Law, University of Auckland

In an earlier article in the *Journal* this year [1985] NZLJ 82, the writer attempted to clarify the then current state of the law relating to dissolution. The passing of the Family Proceedings Amendment Act (No 2), assented to on 11 June 1985 now renders it necessary to alert readers of that article to s 2 of that Act. It reads as follows:

> **2.** Grounds for dissolution of marriage — the principal Act is hereby amended by repealing section 39, and substituting the following section:
>
> **39.** (1) An application for an order dissolving a marriage may be made only on the ground that the marriage has broken down irreconcilably.
> (2) The ground for the order is established in law *if, and only if*, the Court is satisfied that the parties to the marriage are living apart, and have been living apart for the period of two years immediately preceding the filing of the application for an order dissolving the marriage; *and no proof of any other matter shall be required to establish the ground.*
> (3) A separation order or a separation agreement (whether made by deed or other writing or orally) in full force for the period of two years immediately preceding the filing of an application for an order dissolving a marriage may be adduced as evidence of living apart for the required period.
> (4) Where the ground for the making of the order is established under subsection (2) of this section, the Court shall, subject to section 45 of this Act, make an order dissolving the marriage.

How, then, does the newly-substituted s 39 affect the pre-existing state of affairs?

(a) The ground for dissolving a marriage continues to be that the marriage has broken down irreconcilably, since the old s 39(1) and the new s 39(1) proceed in the same terms.

(b) The proof of the living apart by tendering in evidence a separation agreement or separation order in full force for the two years immediately preceding the filing of the application continues to be possible: the old s 39(3) and the substituted version proceed in the same terms.

(c) Where the ground for the making of the order is established under subs (2) of s 39 (discussed below), the Court is bound, subject to s 45, to make an order dissolving the marriage: s 39(4). This new provision, like the old s 39(4), shows that, subject to s 45, the grant of an order is not discretionary. If the ground is made out, the Court must make the order.

(d) It is the italicised portion of s 39(2) that constitutes the kernel of the reform. It was clear from *Barker v Barker* [1983] NZ Recent Law 327; (1983) FLN (2 ed) and dealt with at [1985] NZLJ 83, that the Court considered that it must be established, under the old s 39(2), that the marriage had broken down irreconcilably *and* that, in addition, the parties must be shown to be living apart and to have been doing so for the requisite two-year period. *F v F* (1982) 1 NZFLR 449, though primarily concerned with living apart and resuming cohabitation, also took it for granted that the breakdown question was a justiciable issue. On the other hand, the *Marinkovich* case (1983) FLN 88 (2 ed), showed that this view was not shared by all members of the Family Court Judges: it was there held that s 39(2) should be interpreted as meaning that the living apart for two years per se established irreconcilable breakdown. This view was evidently followed by the first instance Judge in *Russell v Russell* (1984) 3 NZFLR 193, dealt with (on appeal) at [1985] NZLJ 85-86. This latter view was found unacceptable by Barker J in *Russell v Russell* (supra). He preferred the first approach. Parliament, it would seem, had meant the original s 39 to achieve the second approach, and consequently has now enacted the substituted s 39 to ensure its achievement for the future. Thus, where spouses are shown to be living apart and to have been doing so for the requisite two-year period, that is, in itself, now to be proof that the marriage has irreconcilably broken down. There is no need to prove the breakdown aspect at all. Or, as Barker J was constrained to do, examine closely the relationship between s 19(2) of the 1980 Act and the former s 39(2): see (1984) 3 NZFLR 196-197. The Court need not "go through the *Ash v Ash* exercise", as Barker J put it in *Russell v Russell* (1984) 3 NZFLR 197.

It is submitted that this is the totality of the change that has been brought about. "Instant" dissolution is thus no more possible now than it was before. The meaning of "living apart" has not been altered in any way and therefore continues to bear the same connotations as it did before the enactment of the Family Proceedings Act 1980 itself. *Russell v Russell* (1984) 3 NZFLR 195, approving *Marinkovich v Marinkovich* (supra) on this point. □

Mergers and takeovers (1): Towards a competition policy in New Zealand

By John Collinge, BLitt (Oxon), LLB (Auckland), Chairman of the Commerce Commission

This is the first of two parts of an article by the Chairman of the Commerce Commission. He discusses the policy of the Commission, in its theoretical and practical aspects, in assessing the competitive element when considering merger or takeover proposals. In this first article the author looks at competition as a policy, the question of markets, and the relevance of interlocking directorships.

Introduction

The Commerce Act 1975 (the Act) requires the Commission to assess certain mergers and takeovers having regard to the test of "public interest" outlined in s 80 of the Act. This paper endeavours to outline the philosophical and practical framework adopted by the Commission for assessing competition policy within the framework of this test in relation to merger and takeover proposals. In this respect, one broad objective of the Act is to monitor market structures to determine whether or not a competitive environment is likely to exist after the merger or takeover. Other policy objectives include the development of industry, the encouragement of exports, the achievement of economic efficiency and so on. Accordingly, the Commission must in determining the public interest in relation to merger or takeover proposals balance policies which often conflict, one against the other. Hence it is delegated substantial responsibility for applying economic policies in the specific situations in which it has jurisdiction. Bearing in mind this responsibility, the purpose of this paper is to canvass – in simple terms – the interpretation and techniques it has applied in relation to one of those policies only – that of encouraging competition when assessing mergers and takeovers. I need hardly say that the topic is timely given the fact that the policy is presently being debated in the context of the Commerce Bill recently introduced to Parliament.

The public interest

In many major western countries, mergers and takeovers are supervised in one way or another having regard to the public interest. They are also, of course, supervised from the point of view of the private interests of shareholders and of purchasers of securities, and these private interests are dealt with by the Courts and by the Securities Commission respectively. The role of the Commerce Commission is in relation to the public interest only. In this respect, s 80 of the Act sets out a list of criteria upon which the Commission must act. Anyone who reads this section will be immediately aware that the criteria are very far reaching. First, s 80(a) requires the Commission to have regard to restrictions of competition and also upon other effects, such as higher prices, deteriorating quality or service, often associated therewith. Secondly, s 80(b) contains a list which is a "hotchpotch" of seemingly unconnected concepts. Thus, it requires the Commission to have regard to policy matters such as efficiency, development of industry, better utilisation of resources – all proper economic objectives. It requires the Commission to look at "exports" – presumably because the encouragement of exports is considered important. It requires the Commission to have regard to the entry of new competitors into the market – presumably to address whether there is likely to be potential competition. It requires the Commission to have regard to the interests of consumers and purchasers without specifically mentioning the converse interests of sellers. It concludes by asking the Commission to have regard to "any other effects aiding the wellbeing of the people of New Zealand". Section 80(c) requires the Commission to have regard to the interests of employees in businesses directly affected by the proposal.

Analysis of s 80

Three main conclusions can probably be taken with reasonable certainty from the amalgam of interests and policies outlined in s 80. First, competition is referred to twice in s 80, albeit obliquely, and it therefore appears that the preservation of competition – both actual and potential – is one with which s 80 has specific concern. The second is that, because of the width of s 80, the policies and interests which can be taken into account by the Commission are "at large" subject to those being public and not private interests. Thirdly, no one policy clearly dominates so far as s 80 as a whole is concerned and that all policies, including the desirability of competition, must be considered and balanced. Indeed, "the wellbeing of the people of New Zealand" may well cover the

interests of all sections of the public and a wide range of policies other than those specifically mentioned in the Act. In practice, this means that the effects or likely effects of a merger or takeover proposal are weighed, to see how, as a matter of judgment, the interests of the public are affected overall. Having sketched this legislative background, which is the sole direct assistance to the Commission, it is now desirable to see whether any other assistance is available in relation to competition in particular.

Policy objectives

By way of introduction, there are a number of underlying choices of approach in controlling mergers or takeovers. One is that a competition policy alone could have been selected, eg where an absence of effective competition as a result of the proposal means the automatic refusal of the application. Alternatively, competition as a policy could be put "in the pot" with other policy objectives, eg the encouragement of exports, development of industries etc, and a balancing undertaken to determine the policy applicable. In this respect, some jurisdictions purport to give in different ways primacy to competition as a policy, eg by guidance, by the need to apply for clearances, by presumptions and so on. In the USA, competition stands alone in the legislation as a policy goal. That is not true of the United Kingdom, the EEC or Australia, all of which, in different ways, require that other policy objectives must be balanced with a pro-competition policy. Section 80 adopts this latter stance, and this may not be surprising in view of New Zealand's limited domestic markets and its pragmatic tradition. For clarity, I should also mention that whichever of these broad approaches is chosen, there will also be the "super" policies at the discretion of Parliament which have precedence, eg the anti-inflation policy in recent times; eg the wartime policy against profiteering; eg the curent immunity from competition laws of primacy producer boards; eg by direction of the Minister should he use his power to guide the Commission as to the economic policies of the Government from time to time. What then is the underlying approach of the Commerce Act? Is competition given primacy as a policy in any way? Can any further assistance be obtained from the remainder of the Act?

Competition a primary objective

As the Commission has interpreted its function, from the maze of policy objectives, pre-eminent in its consideration of mergers and takeovers is the object of encouraging competition, and it has been able to do this by relying upon the preamble and provisions of the Act other than s 80. Thus, in *Visionhire v Sanyo* (1984) 4 NZAR 288 it said:

> Section 80(a) refers back to the effects set out in s 21(1)(a) to (g) of the Act. Although no primacy is given to any one or more of these matters, the Commission is mindful of the preamble to the Act which provides that it is "An Act to promote the interests of consumers and the effective and efficient development of industry and commerce *through the encouragement of competition*" (emphasis supplied). Accordingly, the Commission considers that it is of fundamental importance to its determination that in its view the proposal does not in any significant way "prevent ... reduce or limit competition in the production ... supply ... sale, or purchase of any goods" (or services) in terms of subs 21(1)(e) and (f).

Obviously this interpretation, consciously and deliberately made, may depending upon your viewpoint be regarded either as an unwarranted legislative act of political intervention or as a worthy attempt to narrow the discretions of the Commission to more meaningful guidelines.

The meaning of restriction of competition

What is meant by "competition" when used in the phrases the "encouragement of competition" or to "prevent, reduce or limit competition" above? Commonly, the words "prevent, reduce or limit" can be collectively described as a "restriction" and this, in relation to competition, is commonly used in different ways. It can mean the restriction of the rivalry of a competitor as in a contract in restraint of trade, eg a contract between two firms containing a negative covenant. It can also mean the restriction of competition in a given market which, of course, may or may not occur from the mere restriction of a competitor. Of course, many mergers or takeovers have the first effect – the rivalry of a competitor may be limited by the transaction – but that is not to say that other competitors may not exist in the market affected by the merger or that competition will not exist in that market. Coming now to the question of assessing a restriction of competition in the relevant market affected by the merger, two main alternative tests are available. Does the proposal "substantially lessen competition" in the market or, alternatively, does it prevent "effective or workable competition"? The first involves the degree of reduction of competition caused by the proposal and does not address the question of the competition remaining in the market. The second is a test relating to the whole of the market affected by the proposal and whether, notwithstanding any reduction of competition caused by the merger, there is nevertheless a reasonable degree of competition remaining or possible. Many mergers may substantially lessen competition but there may nevertheless still be effective competition. Again, in *Visionhire v Sanyo* (1984) 4 NZAR 288, the Commission in deciding upon the test to be applied relied upon the general objectives of the Act:

> in the context of a merger or takeover proposal, the Commission understands this to mean that effective competition exists in the relevant market, notwithstanding that the merger or takeover proposal is implemented. . . . In carrying out its duties under the Act the Commission is directed by s 2A to be guided, inter alia, by "the need to secure *effective competition* in industry and commerce in New Zealand."

Similar interpretations of similar words have been adopted in jurisdictions with widely differing basic philosophies, namely Australia and the United Kingdom, so that the test of effective competition is widely used. In New Zealand, the express use of the words "effective competition" in s 2A makes the result even more likely.

The place of competition as a policy

If the encouragement of effective competition is simply one of a

number of competing policies being fostered, the important question is – where does it stand? As we have seen the Commission emphasised competition in *Visionhire v Sanyo*. Given that the encouragement of effective competition is a paramount policy, what exactly does that mean? It does not mean that it is above all others – that would raise impossibly difficult questions of degree, and would ignore the other policy objectives listed in s 80 of the Act. It means instead that in practice, as a first step, the Commission turns its mind primarily to the question of whether competition is "effective" or "workable". As indicated, the Commission considers whether the effect of the proposal, would be to prevent effective competition in all relevant markets. If not, then the Examiner would need to show other matters in s 80 of a detrimental kind which would justify intervention by the Commission. If so, then it is for the applicants to show that the proposal has other benefits of a type outlined in s 80 which would outweigh the absence of effective competition. Competition is thus a starting point and is a trigger in relation to the onus of proof. Although other policies are considered, competition nevertheless has the front seat and is central to the Commission's deliberations.

Effective competition

The Commission has also examined the meaning of "effective competition" more closely. Thus, also in *Visionhire v Sanyo* it said that:

> . . . broadly it envisages a market structure in which there is an absence of power in any relevant market to raise and/or decrease services to exclude entry by others to such market.

The Commission then obtained guidance as to the factors relevant to determining whether such a market structure exists from the Australian Trade Practices Tribunal in the *Queensland Co-operative Milling Association case* [1976] TPC 109 as follows:

> Competition is a process rather than a situation. Nevertheless, whether firms compete is very much a matter of the structure of the markets in which they operate. The elements of market structure which we would stress as needing to be scanned in any case are these:
> (1) The number of and size distribution of independent sellers, especially the degree of market concentration;
> (2) The height of barriers to entry, that is the ease with which new firms may enter and secure a viable market;
> (3) The extent to which the products of the industry are charcterised by extreme product differentiation and sales promotion;
> (4) The character of "vertical relationships" with customers and with suppliers and the extent of vertical integration; and
> (5) The nature of any formal, stable and fundamental arrangements between firms which restrict their ability to function as independent entities.

Many definitions of "effective competition" have been attempted by economists. In adopting this test, the Commission brought New Zealand very much in line with Australia – a result which may prove to be helpful as a common basis for assessing mergers and takeovers in the light of closer economic relations.

Issues arising

The recognition by the Commission of "effective competition" as a major policy of the Act has been widely recognised as, in itself, a watershed. *Visionhire v Sanyo* stated for the first time the test to be applied in assessing mergers or takeovers and selected one definition of many as the starting point. However, the definition itself in turn raises many questions. For example, how is a "market" defined? When can interlocked concerns be said to be "independent sellers"? What inferences can be drawn from market shares alone? How does one assess "barriers to entry"? Above all, how has the Commission applied these concepts in practice? Is there a framework or method which can assist in analysing complex situations where different types of relationships and different markets are affected? Are there guidelines available to assist business planning? What has the Commission learned after 15 months of operation which may be of use in the future? These and other issues will be dealt with in the following paragraphs.

Market structures paramount

"Effective or workable competition" is a concept which reflects a market, although not "perfect" in the economic sense, in which competition may reasonably exist. Thus, in relation to merger or takeover proposals, the Commission is concerned with the impact of a transaction (ie the proposal) upon the market structures existing at the time the proposal is made rather than with the behaviour or conduct of the participants after the event. The question is: Will the structure of the market reasonably allow "effective competition" after the merger? In other words, the Commission need not engage in the problematical crystal ball gazing task of predicting the future conduct or behaviour of the participants, but can direct its attention to present facts and to the effect or likely effect of the proposal upon the market structures which then exist. This approach is also supported by the provisions of the Amendment Act of 1983 which strengthens the monopolisation provisions to allow the Examiner to examine the *conduct* of a concern having a dominant position if he considers it to be contrary to the public interest. Many say that the most fruitful and meaningful contribution to a competition policy is in the area of ensuring, at the outset, market structures which provide the opportunity for competition. Indeed, you cannot force people to compete – you can only endeavour to provide the opportunity for competition by the relative absence of structural or artificial barriers.

Barriers to entry and contestability

Having said that we are concerned with market structures, I do not wish to be misinterpreted as indicating that effective competition is to be judged solely by factors such as the number of heads in the market and by relative market shares. In the *QCMA* case [1976] TPC 109 after the last mentioned quotation, the Australian Trade Practices Tribunal went on to say:

> Of all these elements of market structure, no doubt the most

> important is (2), the condition of entry. For it is the ease with which firms may enter which establishes the possibilities of market concentration over time; and it is the threat of the entry of a new firm or a new plant into a market which operates as the ultimate regulator of competitive conduct.

In recent times there has been a tendency to explain "the height of barriers to entry" in terms of the contestability of markets. For example, it has been said (after Baumol) that:

> the test applied is whether market conditions are such that there exist potential entrants who may enter the market if profits (inefficiency) are considered high and may leave otherwise than without incurring major entry and exit costs, (B Easton, Institute of Economic Research).

I do not wish to analyse the two approaches in detail but the net result of the contestability approach may in practice be little different from the barriers to entry approach except as a matter of perspective. The *QCMA* test starts from the viewpoint of exiting firms — the number and size distribution of independent sellers and proceeds to examine barriers to entry (which include exit costs). Contestability looks at the issue from the viewpoint of potential entrants and particularly at the costs of entry and exit. Both perspectives have — from incumbents and potential entrants alike — value in assessing the impact of a merger and takeover upon effective competition.

Contestability

In the same way in which no market is ever "perfect" in the economic sense, there is no such thing as a perfectly contestable market, ie where exit and entry is entirely costless or where barriers to entry are absent. Just as a judgment as to whether competition is "effective" or "workable", must be made, so must some assessment of whether the market is reasonably contestable. Contestability tries to judge the likely behaviour of a potential entrant in response to the barriers to entry. In this respect, it is no less judgmental than "effective" or "workable" competition. What is important in relation to contestability theory is that a monopolistic or oligopolistic market structure may be acceptable where barriers to entry are low or, expressed alternatively, where entry and exit is relatively costless or free. The emphasis in contestability theory is away from ensuring a number of independent sellers in the relevant market and whether there is a history of competition between them. It is upon whether, notwithstanding that there may be a monopoly or oligopoly in the relevant market, potential entrants could reasonably enter the market. Contestability theory has the important practical consequence that, in the absence of independent sellers in the market, there need be no concern if there is reasonably costless entry and exit for potential competitors.

Defining the relevant market

In order to be able to assess effective competition (or whether the market is reasonably contestible), it is necessary to define the markets which are relevant, ie the markets affected by the proposal. This is not always easy and the Commission has offered an analysis of factors relevant to such a determination in the *Tucker v Edmonds* case (1984) 4 NZAR 360:

> A market has been defined as a field of actual or potential transactions between buyers and sellers amongst whom there can be strong substitution, at least in the long run, if given a sufficient price incentive. In delineating the relevant market in any particular case, there is a value judgment which must be made which involves, for example, an assessment of pertinent market realities such as technology, distance, cost and price incentives; an assessment of the degree of substitutability of products; an appreciation of the fact that a market is dynamic and that potential competition is relevant; and an evaluation of industry viewpoints and public tastes and attitudes. Particularly important in this process is industry recognition (both by supplier and purchaser) and recognition by the consumer. Ultimately the judgment as to the appropriate market — and its delineation by function, product and area — is a question of fact which must be made on the basis of commercial common sense in the circumstances of each case — see, for example, the United Kingdom case of *Wire Rope* (1964) LR 5 RP 146, 204.

In *Tucker v Edmonds*, it was argued that the degree of concentration caused by the merger was miniscule in both the food additives and the baking products markets. Instead, the Commission examined a more specific market again, ie for baking powder and self-raising flour (ie raising agents), since many baking products involved a wide variety of mixes not having such function or purpose.

The product market

The definition of the relevant product market was in issue in *Air New Zealand v Mt Cook* (decision 130 (majority) and 130A (minority)) which concerned a merger or takeover proposal between an air carrier (on international, domestic and provincial routes) and a packaged tour operator which also had the plant, including air services, to use in packaged tours. The importance of which market was relevant was expressed as follows:

> In terms of air services, either the market to be addressed is domestic air services, in which case the merged concern would have a substantial monopoly and the proposal would make that more formidable or, alternatively, the market is tourist air services in which case there are two strong and willing participants and the proposal affects a change of shareholding in Mt Cook only, with the possibility that a de novo potential entrant is lost in the long term.

Thus, in *Air New Zealand v Mt Cook*, the question really resolved itself as to whether the tourist air services market was different from the broader domestic air services market, the result being very different according to which was chosen. Would people wanting air services consider travelling tourist air routes as an alternative? There was some overlapping, as some commuters used Mt Cook services between Auckland, Rotorua and Christchurch and some tourists used Air New Zealand domestic services to say Invercargill for the common destination of Queenstown. That is

a common characteristic of all markets. However, for the great majority of travellers, it seemed that the differing routes, purpose for which the airlines operated, the nature and speed of the aircraft, the scale of capital and backup services involved, the distinct customers, the differing consumer objectives etc, all pointed to the tourist air services market having different characteristics from the main trunk and provincial services offered by Air New Zealand. This conclusion, confirmed by the Chief Justice on appeal, and indeed made by the Commission a week earlier in *Goodman v Mt Cook*, was that tourist air services were not readily substitutable for those of main trunk/provincial routes. Importantly, the question of cross substitutability of one product for the other (ie the product market) is independent of the question to be decided. Otherwise, the result may be capricious and arbitrary if people choose the market to fit the desired conclusion rather than the conclusion which derives from an examination of the market.[1]

The geographic market

With Closer Economic Relations, for example, it is pertinent to ask whether, in defining the geographic area to be considered, the Commission will consider the Australasian market. Or will it confine itself to the New Zealand domestic market or say a provincial market within New Zealand? There is no simple answer to this and it will depend particularly upon the facts as to the extent to which there are transport or other barriers to entry to the area in question. It is perfectly possible, assuming minimum frontier barriers (eg tariff, licensing) and low transportation costs etc, for the Commission to take Australasia as a market. More usually, it tends to find itself dealing with the New Zealand domestic market considering carefully the ease of frontier entry and the competitiveness of imports which are not subject to NZ "dumping" rules. Thus, in *Wattie v Taylor Freezer* (decision no 127), the Commission found that factors such as costs, transport and quality of raw materials made it unlikely that Australian imports would compete with New Zealand ice cream. In appropriate circumstances, the Commission has also concerned itself with respectively the lower and upper halves of the North Island in relation to chicken meat because the technology and transport facilities were not yet readily available to make the North Island market one (*Wattie v Sandy Lodge* (decision no 131). In *Lion v Superliquorman* (1985) 5 NZAR 92 and *DB v Wilson Neill* (1984) 4 NZAR 468, the Commission looked at provincial regions in relation to the sale of liquor products at wholesale and retail because the industry appeared to treat such markets as separate and because consumers in Auckland could take little comfort from discounting of liquor products in say Hamilton. Any further fragmentation must be carefully considered but is certainly possible. There must be some limit to geographic fragmentation if the process is not to become over-complex and over particular. To date, it is the national geographic area which has had by far the most attention.

The function market

The Commission normally examines the functions of manufacturing, wholesaling, retailing or user markets. To date it has not examined more fragmented function markets. For example, the market for wholesale distribution of cement (ie the resale of cement by merchants to user and reseller) would be likely to be considered separately from the sale of cement by manufacturers to wholesalers. Should the market for primary distribution (ie from cement works to bulk storage depots) be likewise considered separately? This will depend particularly upon whether it would be unrealistic for primary distribution to be separated from manufacture. If the distribution process is interlinked with that of production or if there are few options for transport facilities other than those used by the cement companies or if customers look to buy bulk cement locally rather than ex factory, then the Commission may be reluctant to consider primary distribution as a separate market. However, there may well be industries in which the function of transport from ex works to selling depots for a particular product can be regarded as a separate market or trade.

Independent sellers

For the purpose of determining market shares of *independent sellers*, it is not realistic simply to confine such an assessment to inter-connected bodies corporate. In *Wattie v Taylor Freezer* (decision no 127) the Commission said:

> That would not make commercial common sense as clearly one company or group can control another in a *de facto* sense (ie without legal control) and, further, a group of persons who might otherwise be competitors (eg partners, joint venturers) can be a single commercial unit. Put in another way, when the Commission is considering the impact of a proposal upon effective competition in any market, it must have regard to the facts and circumstances of each case to see whether companies are, in fact, part of the same group.

In that case, the Wattie application to take over Taylor Freezer was to be by way of a joint venture which amalgamated the soft serve interests of Wattie ("Soft Serve") and Taylor Freezer ("Frosty Boy"). The Commission could not find, for practical reasons, this joint venture to be other than part of the Wattie group — the balance of the shares not already held would be unattractive to anyone but Wattie and there were rights of pre-emption available to existing shareholders. Further, the main companies in the ice cream products market were United Dairy ("New American") and Wattie ("Tip Top"). United Dairy was an equal joint venture between Goodman and the Dairy Board. Goodman and the Dairy Board also owned 48% of Wattie between them. The Commission concluded that, in these circumstances, there were a lack of independent sellers in the market. The Commission then found that the whole group would have, after the merger, approximate market shares of 92% (soft serve), 92% (hard ice cream), 97% (frozen novelties) and 98% (cones).

Proof of dependence

Accordingly, cross shareholdings are important in assessing whether sellers are "independent". Further, evidence of collusion or acting "in concert" would be relevant in

determining the question of "independence". Where cross shareholdings are not conclusive and there is no such evidence, the question of what linkage will suffice can become difficult and judgmental as is apparent from *Goodman v Mt Cook* (decision no 129). There, the Commission said:

> the same intentions or the same purposes are not sufficient for the two companies to be regarded as interlinked for this purpose. There must be a much more tangible link beteween the two so that they can no longer be regarded as independent.

In that case, Goodman would have had upon merger a 47% holding in Mt Cook which would clearly be sufficient, given the spread of shareholding, to give Goodman effective control of that company and certainly the dominant influence on its philosophy and strategy. However, Goodman had a much lower shareholding (ie 24.9%) in Newmans although, there too, the remaining shareholdings in that company were small and were widely spread with institutions predominating. Goodman was the major shareholder in each company by far. The Commission found:

> As the common link, Goodman is in the position to act as co-ordinator and catalyst for change in the two companies. Further, the action of Goodman in securing the rights of disposal of the remaining 27% of shares purchased from DB indicates that, at least, it is seeking a shareholder in Mt Cook with an intent common to its own. The action of Newmans [reluctantly we are informed] in expressing willingness to take 19.9% of such shares indicates that Goodman has found such a shareholder. In effect, the arrangement with DB is that Goodman is guaranteeing DB its price for the shares irrespective of the price at which Goodman can on-sell to another shareholder. Even if Newmans pays the full price, then one company procures a benefit, such as the procuration and/or reservation of shares in advance, for another (whether there be discussions in advance or that person is known in advance or not). That is at least evidence of co-operation which the Commission is entitled to take into account in assessing whether Newmans and Goodman can be regarded as one group for the purpose of assessing the public interest implications of this application. There is also, conversely, a past history of support for Goodman by Newmans in respect of Wattie which was outlined in *Dominion Industries v Wattie* (decision no 114A). Both parties have a common intention in relation to Mt Cook, there is "communication" through the common shareholding and there is evidence of co-operation in the sense we have outlined.

In the circumstances, the Commission considered Goodman/Newmans as one group and not as "independent" operators in the market.

Interlocking directorships

An assessment of the number and size distribution of "independent" sellers may also involve a consideration of interlocking directorships as well as cross shareholdings. Interlocking directorships may well cause the Commission to conclude that companies, apparently independent, are really one. In *Dominion Industries v Wattie* (decision no 114A) two contrasting situations were compared:

> We have already considered cross-directorships specifically before — in *Transfin Investments Limited v Grower Holdings Limited* (decision no 96) — where we decided that an interlocking directorship between Wattie and Grower Holdings Limited was not, particularly because of the different market segments in which the two companies operated, likely to have any significant effect upon competition or potential competition between the two companies. However, the sharing of one director in such circumstances is a very different case from that which exists as between Wattie and Goodman where half of each of the two boards is composed of the same members (one with a casting vote), where those companies directly compete in certain products and where they might reasonably be expected to be interested in extending their trading into each other's product markets. The possibility, in this case, for the interlocking directors to make decisions for both companies in relation to markets in which such companies compete is, unlike the facts of *Transfin v Growers*, both proximate and real.

Obviously, there are difficulties in finding two companies to be in fact structurally "independent" in circumstances where a majority of directors are common to each Board.

Interlocks generally

Speaking generally on interlocking directorships, New Zealand law has not taken a per se approach to banning interlocking directorships. In this respect, the legislature may well have had in mind the smallness of New Zealand as compared with say the United States. The New Zealand position, as enunciated by the Commission in *Transfin v Growers* (see *Transfin v Growers* (1984) 5 NZAR), appears to be that interlocking directorships are neither necessarily good nor bad and need not necessarily result in an adverse effect upon competition nor be contrary to the public interest. Further, there is no presumption in the Act that any such relationship is generally harmful. However, collusion in the market place between two companies, through interlocking directorships, may result in consequences under the collusive pricing provisions of the Act. In assessing a merger or takeover proposal, the Commission can hardly determine in advance that an offence might be committed. All it can do is to say that, from a structural viewpoint, the interlocks appear to contribute to the absence of independent sellers in the market and take that into account in assessing whether there was effective competition. Before the Commission would make an order prohibiting interlocking directorships as a condition of approving a proposal, there must be shown to be an absence of competition resulting therefrom or some potential for harm in terms of s 80 of the Act, (see *Transfin v Growers* (1985) 5 NZAR 20). □

The proposed Bill of Rights

By Paul East, Member of Parliament and National Party spokesman on Justice

This paper is based on the contribution made by Mr East as one of the politicians taking part in the Legal Education Foundation seminar on a possible Bill of Rights on 16 August 1985. It contains some useful historical background information on attitudes in the 1960s to a Bill of Rights. The article is published accordingly as background and as a contribution to the debate and discussion on the question of the need for a Bill of Rights in New Zealand at this time, and the possible provisions that such a Bill could contain. One interesting, or perhaps even entertaining sidelight is that so many of the parties now seem to have changed sides.

The most discouraging feature of the public debate on the proposed Bill of Rights is that the participants have been restricted to members of the legal profession and academics with an interest in constitutional issues.

The Government needs to have a true indication of public opinion on this important matter. To achieve this it will be necessary to have much wider and more vigorous discussion.

The first question the public will ask is – Why do we need a Bill of Rights? Many will claim we have enjoyed life in New Zealand quite happily without one. It can also be argued that we already have a Bill of Rights inherited from the United Kingdom.

The case of *Fitzgerald v Muldoon* [1976] 2 NZLR 615 put beyond doubt the authority in New Zealand of the Bill of Rights of 1688. That case also stressed the need to preserve the balance in our constitutional system between the Parliament, the Executive, and the Judiciary, and how essential it was that the actions of each in relation to the other remained inside proper boundaries. The Government has now suggested that the balance has changed and to redress the balance we need a Bill of Rights. The White Paper at p 30 states:

> Now, however, we face a State which has enormous powers over our lives, over the economy, over all of our day-to-day activities. The large, instrusive State which regulates the economy and provides extensive welfare services, which undertakes massive public works and provides education, which is heavily involved in health services and in subsidising or supporting a great range of private activity is a very different sort of State.

In any discussion on the Bill of Rights it is interesting to look at our recent history. In the late 1950s constitutional matters appear to have been much further to the forefront of the public mind. The Constitutional Society had brought public attention to focus on the fact that we had very little by way of constitutional safeguards in New Zealand – no Bill of Rights, no written constitution, and no second chamber.

In 1963, the National Government honoured an election commitment and answered the public pressure that had grown from the activities of the Constitutional Society by introducing a Bill of Rights into Parliament. Largely based on the Canadian Bill of Rights, it was not entrenched and did not have the same teeth as the present proposal.

A study of the introductory debate in Parliament, which can be found in *Hansard* 1963 vol 333 p 1181 will illustrate that not much has changed in 22 years.

The Minister of Justice (Mr Hanan) said that the balance between the citizen and the State had moved in the direction of the State. He claimed that the time had come to reassess the fundamental liberty of the individual, and if there was no Bill setting out rights in a concise form they were likely to be encroached without the public being aware. He also conceded that it could create uncertainty in the law and it was impossible to be precise about rights.

In the debate that followed Mr Mick Connelly asked if the Bill would allow euthanasia, and Mr Paddy Blanchfield asked if it would provide a right to obtain a loan from the State Advances Corporation.

Sir Eruera Tirikatene said the Bill should include the Treaty of Waitangi as it was the initiating factor in establishing the rights of the Maori people, and its spirit must be recognised constitutionally for all time.

Mr Arthur Faulkner asked if the Bill gave the individual the right to travel freely.

Norman Kirk focussed on an important issue when he asked if the Minister intended to review all existing statutes to ensure they conformed with the proposed Bill. A question that is relevant to the present proposal.

The Hon W A Fox took an interesting line when he said the Bill had been introduced to appease a vociferous minority who wanted a second chamber and a written constitution, and that it appeared the Government was not prepared to take responsibility for determining what are human freedoms but would leave it to the Courts

The Hon Mabel Howard thought the Bill should include the right to strike, and the Hon Mick Moohan the right to free legal advice.

Sir Stanley Whitehead asked if it would stop communists becoming Justices of the Peace, and the Hon Bob Tizard asked if it would bring interest rates down.

Although Mr Tizard did say it would increase uncertainty and a citizen would no longer be able to rely on a statute but would have to go to Court.

Mr Norman Douglas asked what many New Zealanders ask about the present proposal. "What is this risk the country has been running for so many years? What will it add to our way of life?"

In addition to the Minister of Justice Mr Hanan, there were only two speakers from the Government side. Both were back-benchers. They were Mr Scott and Mr Muldoon, both of whom spoke very briefly and raised the question whether a Bill of Rights would have had a restrictive effect on the earlier Labour Government's Supply Regulations Bill 1947. This had been a major election issue at that time,

but never became law. —Ed]

The Committee, to which the Bill was referred, reported back to Parliament with the unaminous recommendation that the Bill should not proceed.

The Leader of the Opposition, Arnold Nordmeyer, spoke for all the committee when he said that because the weight of evidence was so overwhelming the select committee had no alternative.

It is interesting to read those submissions in the 1965 *Journals of the House of Representatives.*

The New Zealand Law Society felt that listing rights could restrict some existing common law rights not contained in the Bill.

Professor Aikman, of Victoria University, said that there would be uncertainty and confusion, and decisions would owe a great deal to the subjective view of the Judges. Their social and political attitudes would play a significant legislative role, and this should not be so.

The New Zealand Maori Council even then was asking for the Treaty of Waitangi to be included in the Bill.

The Constitutional Society said the Bill would educate the ignorant about their rights but it acknowledged the danger of a Bill giving an illusory and disarming appearance of freedom, and recognised the risk that people may not be so vigilant.

Teachers from the Victoria University School of Political Studies questioned the narrowness of training and experience of Judges, and pointed out the danger that the Judiciary would become political. They said that in a democracy political decisions should be made by elected representatives, not by non-elected irremovable Judges.

Professor Campbell, Professor of Law and Deputy Vice-Chancellor of Victoria Unviersity, made a submission in which he stated that "Under the present law people may act as they wish unless the law restricts them. Their freedom of action is independent of the law. It is at all events not a right conferred by law. A Bill of Rights translates this freedom of action into a right conferred and defined by law."

What these submissions to the select committee demonstrate is that the arguments have not changed much in 20 years.

The public will want to know what the Bill will do; what it will safeguard that is not being protected now.

The public will ask whether Professor Griffiths of the London School of Economics is right when he says the law cannot be a substitute for politics, and that a Bill of Rights passes political decisions out of the hands of politicians into the hands of Judges. But the decisions are still political.

They will say politicians are side stepping issues like abortion and leaving it to the Courts.

They will say compulsory unionism should be outlawed in any Bill of Rights.

They will ask if the prison inmate and the insane should be able to vote, or indeed become a Member of Parliament.

Some will say the Bill should extend to social and economic rights. To them the right to food, shelter or health services are the most important rights, and they see this Bill as a white middle-class concept.

Others will wish protection from a State that can strip them of all the property they own or prevent them from leaving New Zealand with their assets.

The White Paper acknowledges a Bill of Rights will inevitably lead to the ending of the Privy Council as our final Court of Appeal. No Court on the other side of the World can have the knowledge and understanding of New Zealand values to interpret a Bill of Rights. Many New Zealanders are uncertain as to whether we are ready to take such a bold step.

It can be claimed with some justification that we are progressing well in protecting our rights without such a Bill. The last 25 years have seen developments in our Courts regarding judicial review, the establishment of the Ombudsman, the Human Rights Commission, the Race Relations Conciliator, the Official Information Act and the Information Authority, and the Treaty of Waitangi Tribunal.

Whatever one's views, a Bill of Rights proposes a major change in the political balance and we should not underestimate the risks:

- the judiciary would be politicised and in the long term Governments frustrated by the Courts involvement in politics would make political appointments to the Bench;
- the functions of the judiciary would change and some Judges may not want this new role;
- the respect for the integrity of the judiciary could be threatened by widespread public criticism as the Courts became increasingly involved in controversial issues; it will create uncertainty as there will be doubt on whether the Courts will uphold or strike down statutes passed by the Parliament;
- it is anti-democratic as Judges will set aside laws passed by elected politicians when they themselves are not elected and accountable to the people;
- laws are passed by what is supposed to be a House of Representatives — certainly the Parliament is more representative of New Zealand than the judiciary; and
- our Court of Appeal and High Court contain no women, no Maoris or Pacific Islanders, and only one Judge under 50 years of age.

At the very least we need to carefully examine our existing law to see what will be affected by such powerful legislation. At the moment we have no idea what existing laws will be affected by a Bill of Rights.

Recently Sir Robin Cooke, a distinguished member of our Court of Appeal, said we need a familiar constitution to build up national identity — something to grip the imagination. Sadly, this document has not shown much sign of that.

Public opinion seems indifferent to a Bill of Rights. It will be very difficult to inform the public on these matters so that a referendum has some meaning and substance.

Whatever the outcome we should recognise that a Bill of Rights will be very limited in the safeguards it can offer New Zealand.

As a distinguished United States Jurist, Mr Justice Jackson, said:

> I know of no modern instance in which any judiciary has saved a whole people from the great currents of intolerance, passion, and usurpation, and tyranny which have threatened liberty and free institutions. No Court can support a reactionary regime and no Court can innovate or implement a new one. □

The Bill of Rights: Reply to a criticism

By Professor Ken Keith, Victoria University of Wellington

The criticism of the proposed Bill of Rights by Mr Guy Chapman of Auckland published at [1985] NZLJ 226 under the title "A Bill of Wrongs", has drawn a reply from Professor Ken Keith. It needs to be made clear, at Professor Keith's express request, that although he was advisor to the Minister of Justice on the preparation of the White Paper and the draft Bill, the opinions he expresses in this article are his own, and should not be attributed to any other person except where this is stated. Mr Chapman was provided with a copy of the article in draft, and his response is published at the end of Professor Keith's article.

The Minister of Justice said in the introduction to the White Paper, *A Bill of Rights for New Zealand*, that the purpose of the draft Bill set out in it is to engender debate and provide a focus for the issues. The seminars held in May and November by the International Commission of Jurists and in August by the Legal Research Foundation are parts of that process. So too is Mr Guy Chapman's provocative paper in the July issue of the Journal. He opposes the enactment of the proposed Bill of Rights. He argues that:

1 the proposed Bill is not needed;
2 it would impose the "dead hand" of the present on future generations and parliaments;
3 it would insulate one section of the law from democratic change and leave ultimate sovereign power over it to Judges who are not democratically accountable;
4 instituting a higher law system is inherently undesirable; and
5 the proposed Bill would create unnecessary uncertainty.

I will argue that he has failed to establish any of these arguments.

It might first be said that all of the arguments, with the exception of the fourth, are very familiar. They were made, apparently with deadly effect, in 1964. They were made however at a different time and about a different proposal.

It is essential that the current debate give careful attention to the *actual* proposal as well as to the White Paper written in support of it. We must not assume that the proposed Bill is like other Bills. It is significantly different, for example, from the American Bill of Rights to which Mr Chapman gives considerable significance and from the Canadian Charter of Rights and Freedoms which he also discusses.

Is the Bill of Rights needed?

In answering this question, Mr Chapman quotes the White Paper in a most misleading way. Paragraphs 4.08 to 4.10 of the White Paper read as follows:

> 4.08 No Government and no Parliament we are likely to have in New Zealand in the foreseeable future are going to attempt to sweep away basic rights.
>
> 4.09 That is not the real point.
>
> 4.10 What is in point is the continual danger – the constant temptation for a zealous executive – of making small erosions of these rights. In some instances there may be a plausible argument based on expediency. But each small step makes the next small step easier and more seductive. For many years the needs, or alleged needs, of implementing a host of policies – or still worse of administrative convenience – have pressed against personal rights and freedoms.

(See also paras 4.11-4.12.) By reversing the order of paras 4.08 and 4.10, quoting (inaccurately) only part of para 4.10, and omitting para 4.09, Mr Chapman considers himself able to conclude that, according to the writers of the draft, the Bill of Rights is aimed at the unforseeable future. No other danger, he says, is identified. But it is clear from the paragraphs quoted above that the White Paper makes a quite different argument: there is a present danger; we have succumbed to it in the past; will the future be free or relatively free of it?

Contrary to Mr Chapman's assertion, it is not at all difficult to assemble examples of the kind of erosions that the White Paper refers to. I mention just a few by reference to some of the guarantees proposed in the draft Bill.

Search and entry powers

Article 19 provides for security against unreasonable search and seizure. The statute book contains a very large number of powers to enter and search premises for one reason or another. No doubt many can be justified. But that is not always so, and some of the powers are conferred in terms which are too broad and without proper safeguards. It is the case that such

The *New Zealand Law Journal* has devoted a considerable amount of space to the topic of the proposal for a Bill of Rights. Obviously if such a Bill became law its influence on all branches of the work of lawyers would be extensive. Lawyers also are the members of the community best able by their training and experience to have an understanding of the issues involved. For these reasons, and because the Attorney-General hoped there would be an informed debate on the subject, the *Journal* has given the topic such continuous attention. It is intended however, now that the Select Committee is to begin hearings, to leave the subject alone for some months, at least until the current round of discussions and submissions is concluded.

extravagant grants of power can be nullified or controlled by legislative amendment. That is indeed happening (see eg para 10.148 of the White Paper). Those responsible for the preparation of legislation can also respond to the relevant principles. That is the best way of dealing with such possible grants of power. As Mr Palmer says in the introduction to the White Paper, "in practical terms the Bill of Rights is an important set of messages to the machinery of Government itself. It points to the fact that certain sorts of laws should not be passed . . .". But sometimes legislation conferring such powers will be passed. Sometimes offending provisions will not be amended. In those cases the provisions can subsequently be controlled by the Courts enforcing the Bill of Rights in the way that has already been admirably demonstrated by the Supreme Court of Canada: see *Hunter v Southam Inc* (1984) 11 DLR (4) 641; see also paras 10.144-10.161 of the White Paper.

Reverse onus provisions

Article 17(1)(b) would provide that all persons charged with an offence have the right to be presumed innocent. There are many reverse onus provisions in the statute book. Once again, they can often be justified, especially on the basis that the relevant matter falls essentially within the knowledge of the defendant (see paras 10.114-10.121 of the White Paper). But that is not always so. Consider the very wide scope of s 299 of the Customs Act 1966. It provides that in any proceedings under that Act, every allegation made by the Crown relating to the identity or nature of any goods, or to their value, or to the country or time of their exportation, or to the fact or time of their importation, or to the place of manufacture, or to the payment of any duty, or to any act done or omitted with respect thereto by any person, shall be presumed to be true, unless the contrary is proved. A divided Court of Appeal may in 1979, to some extent, have drawn the teeth of the provision, but it is still extraordinarily wide (*Collector of Customs v Murray* [1979] 1 NZLR 76). On one view the majority judgments in the Court of Appeal are very hard to reconcile with the plain words of the provision. The judgments do help, however, indirectly to emphasise the interpretative role that a Court can play with the assistance of a Bill of Rights (see art 23 of the draft Bill). Even more, though, they underline the greater ability the Court would have had to do justice to that legislation with the clear authority of the Bill of Rights guarantee. What possible justification can there be, for instance, for reversing the onus in a prosecution for assaulting a Customs Officer, an offence punishable by five years imprisonment (s 238)?

Speech and assembly

Articles 7 and 9 would guarantee the right to freedom of expression and freedom of assembly. The picketing provisions in the Marsden Point legislation are closely based on the 1951 amendments to the Police Offences Act: Whangarei Refinery Expansion Project Disputes Act 1984, s 11 and Police Offences Amendment Act 1951, s 17. Essentially, those provisions appear to leave the creation of the criminal offence of picketing to the judgment of the Police Sergeant on the spot. It is the failure to comply with the Police direction that is the essence of the offence. The words do seem to be plain; there appears to be no power in the Court to review the Police direction and hold for instance that it is unreasonable and therefore of no effect. Such an unfettered power of direction probably cannot be reconciled with the guarantee of freedom of expression and assembly in the draft Bill. The Court, however, might well not get to that point of substance under the proposed Bill. Article 3 requires that any limits on the freedoms be "limits prescribed by law". The argument could be made strongly in respect of the picketing provisions that they do not *themselves* prescribe any such limits (eg White Paper para 10.28). The Court might well say that Parliament has yet to make a law of that type. In doing that it would be giving real significance to the first meaning which Dicey exactly 100 years ago gave to the rule of law: arbitrary power over personal liberty, he insisted, should not be conferred, *Introduction to the Study of the Law of the Constitution* (10 ed, 1959) 183.

Right to Court process

The Clyde High Dam legislation deprived the successful litigants of the fruits of their judgment. That retroactive action was seen by many as a serious breach of constitutional principle. That argument would have been able to take a legal form under draft art 21(3) of the proposed Bill, with its guarantee of a right of equal access to Court against the Crown.

Privative clauses

The Immigration Bill, as introduced in 1983, contained very strong privative clauses, clauses which many thought could not be justified. The select committee stage of the consideration of the Bill brought some slight improvements. It probably would not, however, have survived the provisions of art 21(2) of the draft Bill of Rights with its guaranteed judicial review of public actions. Once again that example, like the National Development Bill in 1979, can be used to help make the point that the principles found in the Bill are to be used as well at the legislative stage. It is much better, to repeat the point made about search and entry provisions, that the legislation be got right in the first place.

The rights of minorities

Articles 12 and 13 would prohibit certain types of discrimination and protect the rights of minorities. The White Paper does in fact list two specific examples of legislation which discriminated on racial grounds, para 10.20(a) and (b).

That, as indicated, is just a few examples of erosions of rights to be found in the statute book. Sir Owen Woodhouse provides others in his J C Beaglehole lecture, *Government under the Law* (1979). The argument about the need for a Bill of Rights, of course, goes beyond such specific examples. It relates as well, for instance, to the relative fragility in our constitutional and other non-legal controls to the same extent that we once did? Those controls are very important. They are essential. Judge Learned Hand is an important witness in support of that proposition (eg White Paper para 4.4). But are they enough? Part 4 of the White Paper discusses that question and addresses other reasons for adopting a proposed *additional* control of a Bill of Rights.

I agree with Mr Chapman that an absolutely critical control over the exercise of public power is the fixed parliamentary term. Obviously Governments are called to account by general elections in a most basic way. But that calling to account is of course far too blunt an instrument to control all exercises of power. If that were all that were needed, why would we have Courts and tribunals, lawyers, parliamentary petitions and other processes, the Ombudsmen, the Race Relations Conciliator, the Human Rights Commission and other agencies to control public power; and why too do we see as important the press and other less formal means of control over Government power? The simple truth is of course that while periodical general elections of our representatives and thereby of our Governments are essential in controlling public power, they are not sufficient. See further, for instance, paras 6.33-6.34 of the White Paper.

In the relevant part of his paper, Mr Chapman puts great emphasis on democratic trust: "the trust that an elected majority Government will behave with restraint". That argument leads very much into the second of his arguments. But before we leave this first one, we might note that we have had, for almost 30 years now, a clear recognition on our statute book and in the related practice of the political parties that certain basic provisions relating to democratic trust need special protection against the very parliamentary processes involving simple majority vote which he lauds. In this case the political parties and the Parliament have *not* seen those regular processes as sufficient. In essence those basic provisions cannot be changed except by agreement between the major political parties or with the support of the people.

Would the proposed Bill impose a dead hand and therefore be an inappropriate guide for the future?

On this occasion, Mr Chapman does not quote the relevant passages of the White Paper. Rather they are simply ignored. They should, however, be read: paras 3.14, 4.14-4.18, 6.14-6.17, and 7.21.

Before the essence of those passages is briefly mentioned, we should note Mr Chapman's use of the comparative material. That material, he thinks, demonstrates some of the dangers of the past controlling the present or the future. His first example is the second amendment to the United States Constitution. That amendment guarantees the right of the people to keep and bear arms. He says that that provision now makes little or no sense at all, and in practical terms its ineradicable presence in the Constitution lends to the control of crime in American society a dimension which simply does not exist in other societies in which the control of firearms by ordinary legislation has evolved with changing social circumstances.

This is not an occasion for an examination of the reasons for the inclusion of that provision or of its actual impact in the United States. It is perhaps enough to note on the interpretation of the provision that the Courts have consistently held that the right referred to is inextricably connected with the preservation of a militia; it has nothing at all to do with the formation of private armies and even less with individual possession of firearms; the arms in question must have some reasonable relationship with the preservation of a well regulated militia; and the provision probably restricts only the federal government and not the governments of the states – those which are the more likely to pass gun control laws. The provision appears to have no real impact at all on the law, as for instance the Ku Klux Klan recently discovered in attempting to apply it against Vietnamese immigrants, *Ku Klux Klan v Vietnamese Fishermen's Association* (1982) 543 F Supp 198. Generally see eg *USCA, Constitution Amendments 1 to 3,* Cumulative supplement (1983) 685-687 and *1985 Cumulative Annual Pocket Part* 120-121; and *Corwin's the Constitution and What it Means Today* (14 ed, 1978) 340-341. It may well be the case that the second amendment can be a powerful rhetorical device. The National Rifle Association certainly makes great use of it. But its legal effect, it would appear, has been negligible at most.

In the context of the New Zealand proposal, the more important point to make about the second amendment is that there is no provision in the draft Bill which is in the slightest like it. Whatever lessons are to be learned from the second amendment, they have not been neglected in the preparation of the New Zealand proposal. That is also true of the constitutional provisions that were in issue in the other cases to which Mr Chapman refers. These are cases, decided in the United States and Canada in the 1930s and earlier, in which important legislation, primarily of an economic and social kind, was struck down. Those cases turned either on the due process and equal protection amendments or on the federal distribution of powers. To repeat, none of those provisions have any reflection at all in the proposed New Zealand Bill. (Their exclusion, by the way, gives the lie to the statement Mr Chapman makes later in his paper that the authors of the New Zealand text have rushed "to embrace The [Canadian Charter] and sedulously copy all they can of it".) Once again those preparing the New Zealand draft have learned the lesson of those over-broad political interventions by the Courts and have turned away from the very general judicially enforced controls on legislative power.

There is no equivalent of those provisions in the draft Bill because of the emphasis which it places on process rather than on the product of the process. This emphasis is discussed at some length in passages of the White Paper referred to at the beginning of this section; see also my "A Bill of Rights for New Zealand? Judicial Review versus Democracy" in Legal Research Foundation, *A Bill of Rights for New Zealand* (1985) 47, and December 1985, 11 NZULR (forthcoming).

As the White Paper says, the Bill in large measure would promote the accountability of Government and the quality of democracy. For the most part, it would not control the substance of the law and of the policy which would continue to be elaborated in, and administered by, present and future parliaments and governments. Thus the Bill would reaffirm and strengthen fundamental *procedural* rights in the political and social spheres – rights such as the right to vote, the right to regular elections, freedom of speech, freedom of peaceful

assembly, and freedom of association (para 4.14). It is in that context, incidentally, that the comment is made that the rights just mentioned are "value free". They are value free, as explained there, in the sense that they do not attempt to freeze into a special constitutional status, particular substantive economic and social policies. It is quite wrong to say that democratic political development will be dead locked. In a broader sense the provisions of the Bill do of course attempt to give greater protection to some of the things we value most highly, but, to repeat, they are about process much more than the product of that process.

Mr Chapman asks whether we are wiser than the people who drafted the amendments to the United States Constitution when we come to make the selection of rights. No one, I think would make that claim. That fact is however that we are much better informed. We are able to take advantage of all that experience and of experience from elsewhere in the common law world and further afield as well. Thomas Jefferson did not have, even in his library at Monticello, the materials referred to in the selected bibliography to the White Paper, pp 119-123.

One lesson drawn from that experience is that the Courts are best and most appropriately involved in protecting and enhancing the processes for the exercise of power in the State. History and comparative analysis tell us in addition that there are substantive rights – for instance against torture, against the arbitrary taking of life, against invidious discrimination on certain established grounds – that can be properly put beyond the threat of shifting majorities and given greater protection in a constitutional system.

Would the Bill insulate one area of the law from democratic change and leave ultimate sovereign power over it to non-accountable Judges?

Mr Chapman says yes and says that that is inherently undesirable. The first point to make is that under the draft the powers of the Judges are not ultimate in the sense of final. The proposal does allow – as indeed all constitutional systems must – for amendment through the political process. The Judges' decision can be overriden by that process. This could be done, in terms of art 28, either by agreement between the major political parties or with the support of the people in a referendum. Moreover, constitutional history elsewhere – and not just in the United States – shows that Judges do take account of their perception of public attitudes in so far as the attitudes are relevant to the litigation. Article 3 of the draft indeed gives a clear pointer in this direction: limits on the rights guaranteed by the Bill might be accepted if they are reasonable and can be demonstrably justified in a free and *democratic* society. The Canadian Courts have already indicated that the practice of legislatures is relevant to that test, see eg Professor Peter Hogg, *Constitutional Law of Canada* (2 ed, 1985) 686-689 and White Paper, 10.34. Similarly, the Ontario Court of Appeal, in ruling on a reverse onus provision in narcotics legislation, has said that it will give great weight to Parliament's determination that the provision was necessary, *R v Oakes* (1983) 145 DLR (3 ed) 123 (on appeal to the Supreme Court of Canada). Experience shows as well that the assessment of public attitude can alter and with it the interpretation of the constitution; see eg the living tree metaphor used by the Privy Council in *Edwards v Attorney-General of Canada* [1930] AC 124, 136; quoted in the White Paper para 10.17. Mr Chapman welcomes such evolution and healthy development in the case of the common law. Is it not equally to be welcomed in the constitutional area? (Indeed some would see the need as greater if the political processes are clogged, eg *Baker v Carr* (1962) 369 US 186.)

The points just made relate to the *process* for decision under the Bill: the interaction between the Courts and political forces, either in an organised form or in a more general sense. The answer to Mr Chapman is also to be found in the *contents* of the draft. The answer is very much that given in the preceding section of this paper. It is that the powers to be exercised by the Courts under the proposal are very much powers to *enhance* democratic processes and not to stand in their way. A Court that strikes down legislation restricting speech or that requires administrators to follow fair procedures is not insulating a section of the law from democratic change. It might even enhance democratic accountability.

As already noted, the draft does go beyond process. It protects minorities for instance. (Minorities cannot always, history shows, look to majoritarian institutions to protect them.) It prohibits torture. And the freedoms of speech, association, and assembly obviously have substantive significance as well as a procedural one. But can the general validity of those freedoms really be in doubt? A final comment relates to the claim that the powers in issue are "inherently" undesirable. That is a very broad claim to make. The practice of many other constitution makers denies it as a general proposition.

Is a higher law system inherently undesirable?

Mr Chapman says that the proposed Bill would create for the first time in New Zealand a "higher law" standard by which other laws would fall to be judged. But we already have a higher law system. Thus regulations and by-laws are to be judged by reference to higher law. As Mr Chapman indicates elsewhere in his paper, we had a higher law system inherent in the lingering colonial status of our Parliament until 1947. According to some statements made in the Court of Appeal, legislation might even now be struck down by reference to higher principle (eg *Taylor v NZ Poultry Board* [1984] 1 NZLR 394, 398). And there are provisions in the Electoral Act and the Constitution Act which could also lead to that result. Further, many countries, such as those with federal systems, have a higher law. Sir Edward Coke who is referred to as supporting the existence of an undivided standard also thought that there was supreme law against which statutes could be measured, *Dr Bonham's case* (1610) 8 Co Rep 114a. It is surely not possible therefore to make a completely general claim of principle that all law is of the same standard or that it should be. If it were, how would we measure legislation against the common law? Surely a legal system does have to have principles of priority in that and other respects. Mr Chapman's fourth argument cannot be right in any general sense for a combination of practical, historical and theoretical reasons. His final reason for opposing the Bill is his strongest.

Does the generality of the Bill produce uncertainty of an intolerable kind?

This question is a fair one (even if it is not developed in the paper). It is of course acknowledged and discussed in the White Paper (para 6.18 – 6.21, and 10.2-10.4). It arises as well in the annotation to the particular draft articles. The discussion there leads into further questions. Just how certain is much of our law anyway? Consider the generality of the developing principles of the common law (to which Mr Chapman gives a great deal of support). Consider the rapid and often uncertain development of administrative law over the past 20 years – a development closely related to the subject matter of the proposed Bills. Should the Courts have refused to participate in that development to control public power, in the interests of certainty? Consider as well the increasing amount of legislation which confers broad discretions on the Courts. Consider too the legislative changes that might be made in the *existing* body of law by reference to the Bill. The federal authorities in Canada have undertaken a general study; see also the discussion paper issued by the Saskatchewan Minister of Justice on the compliance of Saskatchewan Laws with the Canadian Charter of Rights and Freedoms (September 1984).

There is no doubt that, as a practical and general matter, increased uncertainty in the law is not desirable. The question is first how much there will be. What is to be made of the argument presented in the White Paper that much of our law, a very high proportion of it, already conforms with the provisions of the Bill? What is to be made of the detail of the annotation to the specific provisions (including that on freedom of association to which Mr Chapman refers) relating the existing law to the proposals? And, as a second point, as against the uncertainty that may be introduced by the Bill, what weight is to be given to the advantages that flow in terms of controls against overweening public power?

These questions have to be considered and if possible answered. Some of the answers will lie in the detail of the draft. Thus it does deal expressly, for instance in the antidiscrimination and criminal justice provisions, with matters which in the United States were *not* resolved by the drafters of the constitutional amendments and which were accordingly left to the Courts – and to much controversy. Other answers to the questions posed may suggest possible changes to the draft, to introduce greater precision if that appears appropriate. Or changes to existing law might result. Or other matters might be left for the future. It is not enough merely to make assertions about the answers to the questions.

Can Parliament bind its successors?

Mr Chapman raises a number of other matters rather more briefly than those already discussed. The first relates to the possibility of Parliament effectively entrenching the Bill. Can it impose limits on future Parliaments? As he indicates, this is a matter which is not settled. He takes one view. The White Paper takes another (paras 7.1-7.24). It assembles authorities at least as weighty as his to suggest that the orthodoxy of some years ago has now changed. The White Paper places as well considerable emphasis on the *actual* process which will be followed in the adoption of such a document. There has to be, according to the argument in the paper, a general consensus both on the need for the Bill and its content. What we are concerned with here is not simply precise, legal logic. And convention, as well as law, has its part. The matter of principle on which Mr Chapman and the White Paper disagree has never had to be decided in exactly the form that is presented. The signs are that the Courts, if asked, would decide differently from the view expressed by Mr Chapman – so long at least as the Bill were adopted with clear public and political support.

The introduction of an alien doctrine of separation of powers?

Mr Chapman raises an interesting point about the reference to "the judicial branch of Government" in draft art 2. That provision is designed to make it clear that the Bill would control public (and only public) powers. It might well be that it could be more felicitously drafted. The reason for the reference to the Courts in the provision appears clearly from the commentary to it. In some circumstances the Courts are exercising state authority (for example when trying criminal cases), and their actions should accordingly be subject to measurement against any such Bill. It is difficult to see, however, that the provision does by itself, somehow or other, introduce or resurrect some doctrine of the separation of powers. It is concerned with a quite different matter. (And as to the assertion that we have no doctrine of separation of powers in our constitution, it is perhaps worth recalling the recent dicta of the Court of Appeal mentioned earlier and noticing that Lord Diplock speaking for the Privy Council and on a later occasion has a view different from Mr Chapman's; *Hinds v The Queen* [1977] AC 195, 212 and *Duport Steels Ltd v Sirs* [1980] 1 WLR 142, 157.)

The Treaty of Waitangi –an irrational proposal?

Again Mr Chapman's discussion of the difficult issues raised by the provisions relating to the Treaty of Waitangi is brief. The discussion is mainly by way of assertion. Several of the assertions require careful examination. Consider, to take just one, the proposition, which is given no independent support in the paper, that the Treaty "has never had legal effect". What is to be made of the following points?

First, the Treaty has plainly been seen as having *international* legal effect, for instance in the proclamation of British sovereignty over New Zealand made by Captain Hobson in May of 1840 and in a decision of an international tribunal deciding a land claim dispute between the United States and the United Kingdom.

Secondly, the Treaty is, of course, said to be the basis of a great deal of Maori land law; to take an early example see the Native Land Purchases Ordinance 1846.

Thirdly, a number of judgments do indicate that the Treaty does have legal force or significance of one sort or another. That is true even of the commonly condemned judgment of Chief Justice Prendergast in *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur (NS) 72. He did not think the Treaty was a Treaty. For him though it did affirm (or "merely affirm") the proprietary rights and obligations of the Maori "which, *jure gentium,* vested in and devolved upon the Crown under the circumstances of the case". That is, the Treaty for him had at least an evidentiary role.

Fourthly, the Waitangi Tribunal

(which will soon have wider jurisdiction) has broad reporting and recommendatory powers, involving the measuring of Government action against the principles of the Treaty. Its last three reports suggest that these are potent powers.

I do not develop these points here. I merely make them to indicate the importance, indeed the necessity, of careful specific examination of the proposals in the draft Bill. Thus just what is the present meaning of the Treaty? The Waitangi Tribunal can help with that. What are the present factual situations to which the draft proposals in the Bill might relate? How do those proposals relate to the law to be found in the Maori Affairs Act (or in the proposed Bill), and elsewhere in the legal system? How do they relate the argument increasingly made that there are certain common law rights reflected in the Treaty that might be directly pleaded in the Courts? How would the proposals affect the exercise of statutory powers (say under public works or planning legislation)?

The points just made about the Treaty of Waitangi can be made in a more general way. The discussion of the Bill, to repeat, must relate to the specific terms proposed. Those specific terms must be related to our present law. That is not to deny the importance of the general issues relating to the allocation of authority within our constitutional and political system. They too are critical. But those general issues cannot be considered apart from the specifics.

Conclusion

To conclude, the Bill is needed, it will strengthen and enhance democratic values and processes rather than stand inappropriately in their way, the judicial role is an appropriately defined one, and such uncertainty as the Bill causes will be tolerable because of the advantages it will bring in controlling public power. It is important, in addition, that the detail of the Bill and of its possible impact be carefully assessed — so far as it can be in advance. If we are to have a Bill, it should be as well prepared as possible, and our existing law tested against it, if only in a preliminary way.

Response by Mr Guy Chapman of Auckland

The author of the original article was invited to comment briefly on the above reply made to his article by Professor Keith

Professor Keith has set hares running in many directions, many of which tend away from the central issue, namely, the threat which the Bill poses to parliamentary democracy.

Several of these hares must, however, be stopped in their tracks.

1. "Small erosions"

Whether there have been "small erosions" of rights is a profitless question to which only a profitless answer can be, and has been, returned. Rather, the issue is whether major social choices should continue to be, finally, the affair of a democratic Parliament or, finally, adjudicated in the Courts. Is it not better that a succeeding Parliament, responding to public opinion, should repeal or alter legislation thought by some to be objectionable (although the cases cited are all controversial and would not be accepted by many as being at all objectionable) than that a Court should strike down such legislation without democratic sanction?

The choice of one generation or one Parliament might well not be the choice of the next generation or even that of the next Parliament. A mistake, should one occur, is easily remediable by a succeeding Parliament reflecting changed public perceptions and priorities. If the Courts are set up to overrule Parliament, as the Bill of Rights would have it, the process of democratic change will be trammelled. It comes down to this: should basic decisions be entrusted, as we have always entrusted them, to a responsible Government acting with a parliamentary majority or should such decisions be submitted to ultimate decision by the Courts. Surely our traditional way is the better way. *No fancied "small erosion" should lead us to throw over parliamentary sovereignty, our democratic safeguard.*

2. The suggestion that we ". . . already have a higher law system"

Professor Keith must be in jest when he asserts that the existence of *subordinate* legislation (regulations and bylaws) means that we already have a higher law system. A higher law system is one in which *parliamentary legislation* falls to be measured against an unalterable, or not easily alterable, prescription. Our constitution is mercifully free from any such higher law prescription and has remained so throughout its history.

3. The claim that the Bill is essentially concerned with "procedural rights" which are "value free"

The proposed Bill of Rights, far from being "value free", is a document value-laden from beginning to end. It is a document full of policy and replete with numerous substantive provisions. For example, it purports to "affirm" the "rights of the Maori people under the Treaty of Waitangi". If there are such "rights", they are undoubtedly substantive rights and not merely "procedural rights" claimed to be "value free". Likewise the right of an arrested person to ". . . consult and instruct a lawyer . . . and to be informed of that right". Again, this is a substantive right which embodies a particular policy and set of values. There is nothing "procedural" or "value free" about it.

The point to be made, however, is that whether or not certain "rights" are generally accepted and applauded today, a democratic Parliament, acting by ordinary parliamentary majority, should be able to alter and modify these "rights" in the future as circumstances change. This is how our parliamentary democracy has always worked and it has worked well. It permits a healthy evolution.

Contrast this with the proposed Bill of Rights which would freeze into unhealthy permanence a particular prescription of "rights", a prescription which is itself random and arbitrary and which reflects a selection of values chosen by a few at one moment in time. The choice, as much as the entire endeavour to elevate certain "rights" to higher-law democracy-proof status, presumes upon the future and ignores the success of our present system throughout our history.

It is fervently to be hoped that wise counsels will yet prevail and put an end to this imprudent and unnecessary scheme for which there is no warrant or general demand. □

The draft Bill of Rights: Meaningful safeguards or mere window-dressing?

By J A Smillie, Professor of Law, University of Otago

This paper formed the susbtance of the F W Guest Memorial Lecture delivered by Professor Smillie at the University of Otago on 10 October 1985. A longer version of this paper will appear in the 1986 issue of the Otago Law Review.

Introduction

In April 1985 the Government published a White Paper containing a draft Bill of Rights intended to guarantee to all New Zealanders certain fundamental human rights and freedoms.[1] Clearly, adoption of an entrenched Bill of Rights will mark an important change in the New Zealand Constitution. The proposed Bill will take the form of a superior body of law which binds Parliament and the Executive, and the Courts will be given the power to strike down legislation and other government action which violates the rights conferred in the Bill.

I do not propose to discuss the technical legal arguments as to whether and how such a law can be effectively entrenched, in the sense of being placed beyond the capacity of Parliament to amend by a simple majority vote. For present purposes I will assume that all obstacles to effective entrenchment can be overcome.

My intention is to offer some observations about the structure and form of the draft Bill, assess its likely effectiveness, and, in particular, attempt to identify the political philosophy which underlies the document and provides the key to its interpretation and application. Finally, I will offer an alternative approach to drafting a Bill of Rights for New Zealand.

Opposing views as to the role of the Courts

Most of the arguments for and against a constitutional Bill of Rights are well known and I do not propose to restate them. However I do want to outline the different attitudes towards the new role which the Courts would be required to perform in interpreting and applying a Bill of Rights.

Supporters of the Bill acknowledge that by giving the Courts power to review the constitutional validity of Acts of Parliament, the Bill will transfer ultimate political power from the elected representatives of the people to a small group of appointed Judges. However they insist that the Courts' new role would be neither as novel nor as far-reaching as many claim. They point out that the Courts already decide many controversial disputes between government and individual citizens in the exercise of their power to review the validity of delegated legislation and the actions of administrative tribunals and officials, and the Courts have developed principles to assist these determinations. They also claim that overseas experience shows that Courts in fact exercise wider constitutional powers to review the validity of legislation responsibly and with restraint.

However opponents of the Bill of Rights maintain that it will require Judges to make overtly political value judgments which, by virtue of their status, their background and training, and the limited nature of the forensic processess available to them, Judges are poorly equipped to make. Some believe that Judges, conscious of their limitations and of the undemocratic nature of their authority, and brought up in a tradition of absolute parliamentary sovereignty, will show overwhelming deference to the will of the majority as enacted by Parliament.

According to this view, a Bill of Rights will turn out to be no more than a declaration of high-sounding platitudes which creates a mere illusion of security for individual rights against the State. Conversely, it is argued that to the extent that Judges do attempt to give real meaning and substance to the freedoms guaranteed by a Bill of Rights, they will be drawn into heated political controversies and exposed to charges that they are giving effect to their own personal political preferences. Governments will be tempted to exert a more active role in the process of judicial appointments, and this will tend to erode the high reputation traditionally enjoyed by New Zealand Courts for independence, impartiality and fairness.

Viewed in the abstract, each of these contradictory arguments as to the effectiveness of a Bill of Rights and the suitability of the Courts to undertake the function of constitutional review, can claim some validity. In practical terms, their relative strength depends very much on the particular political philosophy upon which a Bill of Rights is founded, and intended to reflect and promote. The choice of a particular underlying philosophy will dictate the nature and specificity of the guaranteed rights, and also the relative strength of those guaranteed rights where they conflict with one another, or with interests which receive no express recognition in the Bill.

My intention is to discuss the nature and implications of the political philosophy which underlies the draft New Zealand Bill of

Rights. For this purpose, I will focus my attention on the broad assertions of rights and freedoms contained in Parts II, III and IV of the draft Bill. I will largely ignore the more limited "due process" guarantees in Part V of the Bill. The main object of these more specific provisions is to give entrenched constitutional status to *existing* safeguards against abuse of the criminal process.

The importance of Article 3

The rights conferred in Parts II, III and IV of the draft Bill are expressed in sweeping terms with few qualifications. For example, Article 7 asserts that:

> Everyone has the right to freedom of expression, including the freedom to seek, receive and impart information and opinion of any kind in any form.

Read literally, Article 7 would automatically invalidate a large number of existing laws which place restraints on freedom of expression in order to protect competing interests which receive no express recognition in the draft Bill. For example, the law of defamation limits free expression in order to protect the individual's interest in preserving his reputation; the Indecent Publications Act and certain provisions of the Summary Offences Act prohibt expression which threatens the community's interest in preserving standards of morality and decency; the Official Information Act restricts access to government information in order to protect a wide range of State and private interests; the crime of blasphemous libel protects the religious sensibilities of Christians, and the Consumer Information Act controls advertising to safeguard the economic interests of consumers. Read literally, Article 7 would invalidate all of these existing laws.

Similarly, the broad right to freedom of association contained in Article 10 would invalidate the laws prohibiting restrictive trade practices and conspiracy to inflict economic harm. Article 4, which gives constitutional status to the rights conferred on Maoris by the Treaty of Waitangi, would require Maori land to be exempt from the whole range of legal restraints upon land use.

However it is clear that these broad statements of rights are not intended to be read literally. Article 3, which adopts section 1 of the Canadian Charter of Rights and Freedom of 1982, provides that:

> The rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

This general limitation provision indicates that the guaranteed rights are not absolute: they are subject to such limits as can be justified by reference to the characteristics of a free and democratic society. But what are the essential characteristics of a "free and democratic society" and what limitations on guaranteed rights can be justified in terms of those characteristics?

A free and democratic society?

It is immediately apparent that there are several different conceptions of a "free and democratic society", each of which supports a different conception of fundamental human rights. So we must consider which particular conception of a free and democratic society is the preferred model to which the New Zealand legal system is intended to conform.

Since the whole purpose of an entrenched Bill of Rights is to impose *some* legal constraints upon implementation of the political will of the elected representatives of the majority, it is clear that the Draft Bill rejects a purely procedural majoritarian conception of democracy. Clearly it is the broader *ideals* of democracy that the draft Bill is intended to reflect and promote. This is confirmed by paragraph 1 of the preamble to the Bill, which declares that:

> New Zealand is a democratic society based on the rule of law and on principles of freedom, equality and the dignity and worth of the human person.

However, political philosophy reveals different ideal conceptions of democracy based on different notions of freedom, and different resolutions of the inherent conflict between freedom and equality.

The basic structure of the draft Bill reflects a view of New Zealand society which represents a rather uncertain compromise between the classical liberal and the socialist views of freedom and democracy; the kind of society which one writer[2] has described as "post-liberal" in character. Many of the formal or negative political and civil liberties which are fundamental according to classical liberal political theory — freedom of expression, assembly and association, and civil rights to life and physical integrity of the person — are guaranteed in strong and relatively unqualified terms. However the draft Bill also reflects the influence of socialist conceptions of freedom and democracy which emphasise substantive and material equality at the expense of the liberal ideal of equal negative freedom under formally universal laws.

The draft Bill does not guarantee the classical liberal rights to ownership and enjoyment of private property or freedom of contract, and the prohibition upon retrospective legislation is limited to criminal statutes. And while the draft Bill does not include any *general* right to the equal protection of the laws which would invite the Courts to review the substantive fairness of *any* legislative classification, it does reflect *some* concern with *substantive* as opposed to merely *formal* equality under the law by prohibiting legal discrimination on certain specified grounds, and by giving constitutional status to the special rights conferred on Maoris by the Treaty of Waitangi.

So we can conclude that *some* priority is to be given to the specifically guaranteed political, civil and equality rights, and the rights of Maoris. But precisely *what* priority should the Courts give to a specifically guaranteed right in the event of a conflict with other individual or community interests which enjoy no protected constitutional status? And how are conflicts between different specifically guaranteed rights to be resolved?

The "post-liberal" democratic society is capable of supporting a number of different conceptions of constitutional rights, each of which attributes a different philosohical justification, and a different weight or strength, to the guaranteed freedoms. So we must look to the

structure and content of the draft Bill read as a whole to ascertain which of these different conceptual justifications for fundamental constitutional rights is favoured by the authors of the draft Bill.

A utilitarian conception of constitutional rights

According to the principle of utility, a political decision is justified if it promises, on balance, to secure the greatest happiness of the greatest number or, in modern parlance, if its benefits in terms of overall public welfare exceed its costs. Of course Jeremy Bentham's theory of simple *act* utilitarianism would deny the very existence of individual rights to engage in conduct which at any time detracts from the aggregate welfare of the community.

However the more sophisticated theory of *rule* utilitarianism provides the basis for a weak notion of indivudial rights against the State. The rule utilitarian chooses as a general rule that which, viewed in terms of its long-term effect as well as its immediate consequences, will produce the greatest aggregate welfare in the majority of cases. Particular conduct is then judged by its conformity to that general rule. However the rule utilitarian would always leave the way open for this general rule to be amended, qualified or limited upon a showing that the new rule thereby produced will achieve a significant net increase in overall welfare.

A rule utilitarian would have no difficulty making sense of the New Zealand draft Bill. He would argue that the rights specifically guaranteed by the Bill are not intended to take automatic priority over other conflicting interests which receive no express recognition in the Bill. He would find support for this interpretation in Article 22 of the Bill which provides, under the heading "*Others rights and freedoms not affected*", that:

> An existing right or freedom shall not be held to be abrogated or restricted by reason only that the right or freedom is not guaranteed, or is guaranteed to a lesser extent, by this Bill of Rights.

This *general* recognition of unspecified rights and freedoms indicates that the authors of the Bill intend that a full range of *non*-specified interests which either presently or in the future receive some form of legal recognition should be given due weight by the Courts and balanced against the specifically guaranteed rights in order to determine, in accordance with Article 3, what particular limits upon the guaranteed freedoms are justified in a free and democratic society.

And by reference to what fundamental standard should this judicial balancing function be performed? The utilitarian would maintain that the standard of maximum aggregate welfare is the accepted background justification for policy-making in a modern democratic society, and the Bill, read as a whole, displays no intention to depart from it. The combined effect of Articles 3 and 22 is to transfer from Parliament to the Courts ultimate responsibility for making the utilitarian calculation as to where the balance of public welfare lies between unrestricted enjoyment of the guaranteed freedoms and any particular limitation on them.

By this view, the Bill of Rights would not limit the *kinds* of competing interest which may properly be balanced against the guaranteed freedoms. Article 3 would be seen merely as imposing certain *procedural* and *evidentiary* requirements which the Courts must observe in discharging their balancing function. Thus once the Court is satisfied that a particular law does *in fact* abridge one of the rights guaranteed by the Bill, Article 3 places the onus on the Government to justify the restraint which that law imposes.

In order to discharge this burden, the Government must prove that the limitation is "prescribed by law",[3] and is both "reasonable" and "*demonstrably* justified in a free and democratic society". Use of the strong term "demonstrably" indicates that it is not sufficient for the Government to show that the limitation imposed by the challenged law will produce a *marginally* greater aggregate welfare than will unrestricted enjoyment of the guaranteed freedom. In order to justify a limitation under Article 3 the Court must be persuaded that the overall public welfare will be *clearly* and *significantly* advanced by upholding the challenged law. But subject to these procedural and evidentiary requirements, the Courts' opinion as to the outcome of the utilitarian calculation should be decisive.

Clearly this utilitarian conception of the political philosophy underlying the draft Bill involves a weak view of the protected rights. The broad statements of guaranteed freedoms are seen as raising no more than a prima facie *presumption* that government interference with those freedoms will detract from the general public welfare. This presumption can be rebutted by a clear showing that any *particular* restraint upon a guaranteed right will, on balance, promote the overall welfare of the community to a significant degree.

The issue of balance

The official Commentary to the draft Bill of Rights provides many indications that its authors share this weak utilitarian conception of the guaranteed rights. The Commentary makes it clear that the authors of the Bill envisage the Courts balancing the specifically guaranteed rights against the whole range of non-specified competing interests when applying Article 3. For example, they say in para 8.10 (with emphasis added) that:

> In considering whether inconsistent legislation is justified in terms of Article 3, they [the Courts] will have to balance the rights contained in the Bill of Rights against *other* important social and other interests.

The later observation at para 10.24 (with emphasis added) that:

> In *some* cases the limit [on a guaranteed freedom] may indeed arise from *another* freedom included in the Bill

makes the point abundantly clear.

The Commentary to each of the particular guaranteed rights contains similar observations. To take just one example, the Commentary to Article 4, which confers constitutional status on the sweeping guarantees given to the Maori people by the Treaty of Waitangi, states at para 10.42 that the precise scope and application of those rights:

> must be considered in the light of

the whole ambience — social, economic and so on — at the time the question arises.

If this weak utilitarian view of constitutional rights is accepted, how should the Courts go about performing the balancing function required of them by Article 3? What is the appropriate form and level of judicial scrutiny of legislation which burdens guaranteed rights? A number of different approaches are open to the Courts.

First, the Courts could attempt to approach Article 3 cases in a completely objective and detached manner. This would require the Courts to identify and *attach such weight as is warranted by the evidence before them* to each of the various implications for the overall welfare of society associated with each possible resolution of the conflicting interests raised by the case. If, on balance, the Court is satisfied that the challenged limitation will produce a significant net increase in public welfare beyond that which would be achieved by unrestricted exercise of the guaranteed right, the limitation is justified and valid under Article 3. Some Canadian Courts have interpreted their equivalent of Article 3 as requiring such an approach,[4] and there are indications in the Commentary to the New Zealand draft Bill at paras 10.31 to 10.33 that its authors anticipate New Zealand Courts adopting a similar line.

Various consequences

Of course the most obvious drawback to this approach is the practical difficulty of accurately identifying and balancing all the various consequences, both long and short term, political, social, economic, cultural and otherwise, that will flow from any particular resolution of conflicting interests. For example, whether a limitation on freedom of association consisting of removal of a union's right to strike is justified by the economic benefit to society as a whole, requires a detailed understanding of the theory and application of "macro-economics".[5] In order to balance the total social costs and benefits produced by a legal prohibition on the sale of any particular category of pornographic expression, the Court would have to be familiar with a vast range of statistical, economic, psychological and sociological data and opinion.

But the evidentiary, procedural and time constraints to which the Courts are subject mean that there is little likelihood of a Judge being apprised of, far less conversant with, the full range of material relevant to such issues. The material available to a Judge is limited to that supplied by counsel, supplemented by the product of any independent research that he has the time and will to undertake. The Judge does not enjoy the assistance of a large investigatory staff, and he cannot call for a commission of inquiry into the matter and delay judgment until he has received the considered recommendations of a panel of experts.

No doubt counsel would gradually overcome their traditional reluctance to research social, economic and scientific data, and would present the Courts with voluminous "briefs" along the American model; Judges would tend to take an increasingly active role in researching relevant material; Article 27 allows the Attorney-General to appear as a party in any proceedings which raise a serious question as to a violation of the Bill of Rights, and further relaxation of standing requirements would allow representatives of special interest groups to place additional relevant material before the Courts.

Nevertheless, many judicial attempts at an objective balancing of social cost and benefits are likely to be based on incomplete information and understanding, and it is little wonder that some Canadian Judges have expressed doubts about the wisdom of such an approach.[6] In controversial cases, the outcomes will inevitably expose the Courts to charges of incompetence or insensitivity at best; and at worst, of giving effect to their own personal preferences under the guise of an objective pseudo-scientific calculation.

The Courts are therefore likely to avoid complete reliance on their own application of the utilitarian calculus to controversial social issues, and instead fall back upon *external* indications of where the balance of public welfare lies. A number of different techniques of this kind are available to them.

Contemporary social values

A Judge may take the view that the overall public interest is best served by giving legal effect to widely-shared contemporary values of society. Some Canadian Courts have adopted this approach by inquiring whether a challenged limitation on a guaranteed freedom would be accepted by "fair-minded people accustomed to the norms of a free and democratic society".[7] Some observations in the Commentary to the draft Bill at paras 3.11 and 8.12 seem to anticipate a similar approach by New Zealand Courts.

The obvious objection to this approach is its highly subjective nature. How is the Judge to ascertain the moral convictions of the "fair-mined person"? One member of the New Zealand Court of Appeal has lamented that in really difficult and controversial cases there is *no* community consensus on the issue — society is clearly divided and the Judge must choose between conflicting sets of values that are widely and strongly held.[8]

The abortion and censorship issues, both a which are delegated to the Courts for ultimate resolution by the draft Bill of Rights, are obvious examples of such cases. To critics of the outcomes of such controversial cases, judicial claims to be giving effect to dominant community values will be seen merely as a cover for the personal values and prejudices of the Judges themselves.

Furthermore, judicial assessment of the constitutional validity of legislation by reference to contemporary community values involves a fundamental contradiction. Judicial appeal to dominant community values makes some sense in the context of common law adjudication where Judges are addressing issues which Parliament has ignored, or addressed imperfectly or incompletely. However reliance upon community values to strike down clearly expressed legislative choices is much more difficult to accept.

While it may sometimes be true that the opinion of a majority of the elected representatives of the people do not truly reflect dominant community values, it is hard to believe that a small group of

appointed Judges is better qualified to make this assesment. While a comparative survey of analogous legislation in *other* "free and democratic" societies[9] may provide some more objective extrinsic criteria for assessment of contemporary democratic values, the basic criticism remains.

A passive deferential approach

Judicial awareness of the inherent difficulties associated with each of these approaches to constitutional review is likely to induce the Courts to show substantial deference to Parliament's assessment of what particular accommodation of competing interests best reflects community values and maximises overall public welfare. The Courts are likely to take a passive deferential approach to constitutional review by which they limit themselves to ensuring that a legislative limit on a guaranteed freedom has a legitimate State purpose (viz the primary motive is not merely to deny some minority group the right to exercise a guaranteed freedom); that there is some rational connection between that State purpose and the restraint imposed by the challenged law; and that the extent of the restraint is not totally disproportionate to achievement of the State aim.

Of course a passive deferential approach of this kind would render the Bill largely ineffective as a check upon legislative infringement of the fundamental rights it guarantees. Indeed, a recurring theme throughout the Commentary for example in paras 6.5, 6.17 and 10.180 is the authors' confident belief that the Courts will exercise their review powers with great restraint, so that almost all legislation which abridges rights guaranteed by the Bill will be upheld under Article 3 – see for example paras 6.21, 10.52, 10.72, 10.78, 10.80, 10.113, 10.134 and 10.166.

To the extent that the Bill stipulates basic values which the Courts should strive to protect, it will assist the Courts in interpreting *ambiguous* legislation and it will give constitutional force to the Courts' inherent powers to review *delegated* government action for compliance with legislative intention. But if this is the extent of the intended practical effect of the Bill of Rights, it can be achieved more easily (and more honestly) by a simple amendment to the Acts Interpretation Act 1924 without engaging the public in protracted debate and raising expectations which have no reasonable prospect of satisfaction.

Alternative approaches

Given the unsatisfactory consequences attendant upon practical application of these utilitarian approaches to the rights guaranteed by the Bill, what alternative approaches are open to the Courts? One possibility is a limited "process-oriented" approach to judicial review of the kind advocated by the American writer John Hart Ely in his recent book *Democracy and Distrust: A Theory of Judicial Review.*

Ely's "process-oriented" approach to judicial review

Ely's theory of constitutional interpretation is based on a particular conception of the ideal democratic society. He believes that the best policy outcomes are achieved by a system of pluralistic representative democracy in which policy decisions are the product of free interaction and competition between diverse minority interest groups which represent the full range of relevant viewpoints. The Courts are not competent to review the *substantive content* of legislation produced by this process. However the Courts do have a legitimate role to play in preserving the *integrity* of the process itself.

According to Ely, the Courts' role is to guard against an entrenched majority coalition abusing its control over the political process by systematically denying representation and recognition to minority interests, either through prejudice or oversight. So the Courts may properly treat legislative limits on *political* expression, assembly and association as inherently suspect because free exercise of these political rights is "critical to the functioning of an open and effective democratic process".[10]

Similarly, the Courts may review electoral apportionments to ensure that each citizen's vote carries approximately the same value. Judicial intervention of this kind is justified in order to "clear the channels of political change". Constitutional provisions conferring broad equality rights should be so construed as to invalidate legislation which is *intended* to harm the interests of "discrete and insular" minority groups "to whose needs and wishes elected officials have no apparent interest in attending" (p 151). While the *actual* purpose motivating the legislature will be difficult to ascertain, strict judicial scrutiny of legislation which has the *effect* of harming minority groups will serve to "flush out" illicit motives.

Ely's approach to judicial review does have some atttraction. His conception of democracy as majoritarianism tempered by open political debate and respect for minorities probably accords reasonably well with the New Zealand vision of the democratic ideal. And by directing the Courts' attention to the *processes* by which, and the *reasons* for which legislation is passed, his theory seem to offer the Courts a significant role in interpreting open-ended constitutional provisions, while at the same time providing some insulation against charges of undemocratic conduct and allowing the Courts to avoid ruling on the merits of the most controversial legislative policy choices.

Anti-discrimination provision

There are indications that the authors of the draft Bill contemplate New Zealand Courts adopting an approach of this kind. Perhaps the clearest indication is provided by Article 12, the anti-discrimination provision. The authors explain in para 10.82 (with emphasis added) that Article 12 omits any general right to the "equal protection of the law" because such a provision has enabled American Courts "to enter into many areas which would be seen in New Zealand as ones of *substantive policy*".

Ely's influence may also explain the authors' belief that affirmative action programmes which offer *preferred* treatment to minority groups will not infringe Article 12, so that there is no need to make express provision for such action.[11] Of course Ely at p 172, sees "nothing constitutionally suspicious about a majority's discriminating against itself". Other observations in the *White Paper* suggest that the intended object of the broad

Democratic and Civil Rights enumerated in Part III of the Bill is, in Ely's words, to "keep open the channels of political change".

But if the authors' intention was merely to provide constitutional protection to *political* expression, assembly and association, and to prohibit invidious discrimination *against* specified minority groups, it would have been very easy to say so in clear and express terms. And of course some of the guarantees included in the draft Bill necessarily require the Courts to judge the substantive merits of legislative policy. Obvious examples are provided by Article 14 which provides that "No one shall be deprived of life" except on grounds that are "consistent with the principles of fundamental justice", and Article 15(3) which provides that:

> Everyone deprived of liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

In any case, Ely claims too much for his theory of judicial review. When applying his approach (by inquiring, for example, whether particular legislation shows so little concern for the interests of a minority group as to warrant an inference of improper motive), the Court must necessarily make a value judgment as to the substantive fairness of the legislative outcome.

Summary of argument

To summarise my argument to this point, I believe that a weak utilitarian conception of fundamental rights does not provide a sufficient justification for adoption of an entrenched constitutional Bill of Rights. And to the extent that Ely's "process-based" approach to judicial review invalidates *some* majoritarian outcomes, it must be based on some prior assumption about what "rights" individuals have to resist purely utilitarian policies.

A "strong" view of fundamental constitutional rights

In my view, the most meaningful conception of a constitutional "right" is that provided by the analogy of "rights as trumps" drawn by Ronald Dworkin from the world of card games.

Dworkin argues that:

> claims of political right must be understood functionally, as claims to trump some background collective justification [for political decision-making] that is normally decisive.[12]

Since the normal justification for political decision-making in a democracy such as ours is the utilitarian goal of securing maximum overall welfare, rights must be understood as trumps held by individuals over unrestricted utilitarian justifications for political decisions. If individual citizens are to be recognised as having fundamental rights against the State, and those rights are to be "taken seriously", the Government cannot be entitled to remove or limit a right "on no more than a judgment that its act is likely to produce, overall, a benefit to the community".[13]

When constitutional rights are understood in this "strong" sense, it is quite inappropriate for Courts to see their role as being to "Strike a balance" between the rights of the individual and the welfare of society at large. The whole point of the constitutional guarantee is to indicate that this balance has already been struck in favour of the individual's claim. Judicial "balancing" is appropriate only where constitutionally guaranteed rights conflict, so that unrestricted exercise of one such right interferes with enjoyment of another.

The same basic idea underlies the earlier formulation by John Rawls in his book *A Theory of Justice* of two fundamental "principles of justice". Rawls' first principle requires that every person should have "an equal right to the most extensive basic liberty compatible with a similar liberty for others".[14] He identifies the "basic liberties" at p 61 as:

> Political liberty (the right to vote and to be eligible for public office) together with freedom of speech and assembly; liberty of conscience and freedom of thought; freedom of the person along with the right to hold (personal) property; and freedom from arbitrary arrest and seizure as defined by the concept of the rule of law.

Rawls' second principle of justice relates to claims to economic and social benefits. It provides that:

> Social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone's advantage, and (b) attached to positions and offices open to all (p 60).

The crucial feature of Rawls' theory is that his first principle of justice takes priority over the second, so that the basic liberties cannot be restricted for greater social and economic advantages. The basic liberties comprise a self-contained set of fundamental rights which can be limited only to the extent necessary to resolve conflicts between those rights: "liberty can be restricted only for the sake of liberty".[15] It is appropriate to define and guarantee basic liberties by entrenched constitutional provisions, while economic and social policies can be left for determination by the legislature, guided of course, by Rawls' second principle of justice.

Self-respect as a human good

Rawls is somewhat vague as to why his basic liberties should have priority over claims to economic and social benefits, and how conflicts between the basic liberties should be resolved. However in the end he does identify a "main primary" human good by reference to which these gaps in his theory can be filled. This primary human good is "self-respect", and it includes, as said at p 440 (with emphasis added) two elements, first:

> A persons's sense of his *own value*, his secure conviction that his conception of his good, his plan of life, is *worth* carrying out

and second:

> A confidence in one's ability, so far as it is in one's power, to *fulfill* one's intentions.

Rawls explains that self-respect is fundamental because:

> Without it nothing may seem worth doing, or if some things have value for us, we lack the will to strive for them. All desire and

> activity becomes empty and vain, and we sink into apathy and cynicism.

Rawls's identification of self-respect as the paramount human good expresses an idea that lies at the heart of liberal ethical theory. Obviously it bears a close affinity with Kant's imperative that human dignity and automony are supreme values which must be respected as ends in themselves. Dworkin's identification of the individual's right to "equal concern and respect in the design and administration of the political institutions that govern them" as the fundamental background right from which all "particular" rights are derived expresses the same basic idea.[16]

Self-respect requires some minimum level of public social recognition of the equal worth of the indvidual and respect for his personal conception of what is good for him. According to Rawls, this should take the form of equal assignment of his "basic liberties". Rawls does not maintain that this should be the ideal for *all* societies. His aim is to identify those forms of institutional recognition of equal worth that are practical and viable in a western liberal democracy.

Since Rawls believes that insistence upon equal division of all economic and social benefits is impractical in a pluralistic liberal democracy, equal entitlement to the basic liberties becomes the essential social basis for self-respect. He concludes at p 54 that:

> The best solution is to support the primary good of self-respect as far as possible by the assignment of the basic liberties that can indeed be made equal, defining the same status for all.

So the particular rights which merit protection in an entrenched constitutional Bill of Rights are those which express the minimum conditions necessary to secure individual self-respect. Such constitutional rights must not be sacrificed for utilitarian gains in overall welfare, and conflicts between these rights must be resolved by giving priority to the right that bears the closer nexus with the fundamental norm of self-respect, in the sense that public institutional recognition of that right is a more essential means to protect individual self-respect. Of course this view of a constitutional Bill of Rights as a self-contained set of basic individual liberties which can never be limited or overriden by utilitarian considerations of greater overall welfare is incompatible with the structure of the draft New Zealand Bill.

Collection goals

It is true that both Rawls and Dworkin compromise their strong theories of rights by conceding that sometimes even the most important individual freedoms may be overriden by collective goals of "special urgency".[17] Of course the reason for this is not difficult to grasp. It is because the particular rights which Rawls and Dworkin recognise are so wide-ranging and expressed in such broad terms that there is no realistic prospect of any particular society (even the most liberal and homogeneous democracy) adopting them as a completely self-contained set of individual entitlements which can never be compromised for utilitarian goals. And of course this is also the reason for the inclusion of broad limitation provisions in the New Zealand draft Bill and the overseas models on which it is based.

Conclusion

If a New Zealand Bill of Rights is to offer meaningful protection of fundamental human rights, and the Courts are to be spared the need to undertake the kind of unrestricted utilitarian calculation to which they are directed by Article 3 of the present draft, the guaranteed rights must be limited to those which our society holds to be such essential conditions of individual self-respect that their integrity and equal distribution must *always* be upheld against utilitarian goals. They would be limited to rights to resist the most substantial and overt institutional denials of equal individual worth.

Of necessity, such a list of fundamental individual rights would be short and carefully circumscribed. It would lack the immediate public appeal of the broad assertions of freedom contained in the present draft Bill. However, such a document would demonstrate that we do indeed take seriously the particular rights selected for inclusion, and that those rights may be limited by reference to the fundamental norm of self-respect only where they conflict with one another.

Presentation of a complete alternative draft Bill of Rights which satisfies my own criteria is impossible in the space available for this paper. However the practical implications of my recommended approach can be demonstrated by comparing the text of a few important provisions of the present draft Bill with my own alternative provisons.

Article 3 of the present draft Bill

3 Justified limitations

The rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

My alternative provision

3 Fundamental right to self-respect

(1) The fundamental human right from which all the particular rights and freedoms guaranteed in this Bill of Rights are derived, and by reference to which all conflicts between guaranteed rights and freedoms shall be resolved, is the equal right of all persons to self-respect. Self-respect requires recognition that every human person is an autonomous being capable of choosing and pursuing a worthwhile conception of his or her own good over a complete life.

(2) Each of the rights and freedoms guaranteed in this Bill of Rights may be subject only to such limits prescribed by law as can be demonstrably justified in order to safeguard other persons in their equal enjoyment of the rights and freedoms guaranteed in this Bill of Rights.

(3) The onus of proof under paragraph (2) of this Article will lie on the party seeking to justify a limitation on one of the rights or freedoms guaranteed in this Bill of Rights.

Comment

There is no place for a general limitaton such as Article 3 of the present draft in a "strong" Bill of Rights of the kind I envisage. My

alternative provision provides a clear statement that the fundamental background right which underlies the particular rights guaranteed by the Bill, and by reference to which all conflicts between guaranteed rights shall be resolved, is the equal right of all persons to self-respect. Article 3(1) also defines this term. While it is appropriate, in the context of a constitutional Bill of Rights, to describe the equal right to self-respect as a fundamental "right" in positivist terms, it is really a normative postulate that expresses a fundamental human good which I, like John Rawls, believe inheres in the nature of the human person. Together, Articles 3(1) and 3(2) ensure that a guaranteed right may be limited only to the extent necessary to resolve a conflict with another guaranteed right which is, in the circumstances, a more essential condition of individual self-respect. Article 3(3) places the burden of proof on the party seeking to rely on a limitation on a guaranteed freedom.

Article 7 of the present draft Bill

7 Freedom of expression
Everyone has the right to freedom of expression, including the freedom to seek, receive and impart information and opinions of any kind in any form.

My alternative provision

7 Freedom of expression
Everyone has the right to freedom of political, religious and ethical expression, subject to limits prescribed by the law of defamation.

Comment

In its present unqualified form, Article 7 of the draft Bill is unsuitable for inclusion in a strong Bill of Rights which has no general limitation provision. Clearly there is no consensus in New Zealand society that unrestricted freedom of expression and access to government information must always outweigh such collective welfare goals as the security of the State, the preservation of moral standards and the economic interests of consumers, far less the individual's interest in protecting his reputation and public dignity.

The authors of the draft Bill assume the continued validity of a wide range of existing laws which restrain expression to protect such interests. In particular, it seems that there is no substantial agreement in our society that rights to free commercial and sexual expression are such essential conditions of individual self-respect that they should never be the subject of government restraint.

However freedom to express political, religious and ethical viewpoints (subject expressly to the limits imposed by the law of defamation to protect the individual's reputation and dignity) does qualify for inclusion under my criteria. Free dissemination of religious and ethical opinions is essential in order to provide the background of full information necessary for rational formation, revision and pursuit by the individual of his or her life plan. Freedom of political expression is necessary in order to make the right of equal participation in the political process a meaningful one, and overt denial of the value of one's opinions as to how society should be organised and regulated strikes a direct and substantial blow at the individual's sense of self-worth.

Obviously the Courts would still be required to make difficult decisions of substantive policy in the course of applying this more limited right to freedom of expression. First, they would be called upon to determine the boundaries of the protected categories of expression. (Cf *Cohen v California*, 403 US 15 (1971) where the United States Supreme Court was required to distinguish between constitutionally protected political speech and unprotected obscene expression.) Secondly, the right is not absolute; expression may be restrained to the extent necessary to protect other guaranteed rights which are more essential conditions of the fundamental right to self-respect.

So political expression may be restrained where this is necessary in order to protect the rights of others to life and the integrity of their physical persons (see Article 14), and it would be for the Courts to determine when inflammatory speech raises such a strong expectation of violent disorder as to justify government restraints. Of course, merely advocating the overthrow of established institutions by force should not be sufficient to justify government intervention. The Courts should insist upon proof that such subversive advocacy was both *intended* and *likely* to produce *imminent* violent action. (Cf *Brandenburg v Ohio*, 395 US 444 (1969), and Tribe, *American Constitutional Law* (1978) ch 12-9.)

Some government regulation of the timing and funding of political expression, and the use of limited facilities for the communication of political speech (but never its *content*) may be justified in order to protect the equal right of others to communicate opposing political arguments to the public, and generally to safeguard the right to equal participation in the process of government guaranteed by Article 5. Reasonable regulation of election expenditure, free use of public broadcasting facilities, and access to public places for election meetings may be justified on this basis.

Rights of access to government information should continue to be governed by statute, subject to judicial review of Ministerial decisions for compliance with the conditions laid down in the Official Information Act 1982. (The right to such review would seem to be secured by Article 21(2) of the draft Bill.) So while difficult problems of interpretation would remain under my more limited formulation of the right to freedom of expression, at least the Courts would be spared the controversial political task of deciding what substantive limits on expression are justified in order to protect community interests in preserving State security and standards of morality. Commercial expression would also be left to unrestricted regulation by Parliament.

Article 10 of the present draft Bill

10 Freedom of association
(1) Everyone has the right to freedom of association.
(2) This right includes the right of every person to form and join trade unions for the protection of that person's interests consistently with legislative measures enacted to ensure effective trade union representation and to encourage orderly industrial relations.

My alternative provision

10 Freedom of association
Everyone has the right to

freedom of association for political, religious, ethical, social and cultural purposes.

Comment

My alternative provision has been drafted so as to deny constitutional protection to association for purely economic purposes. This would remove from the Courts the need to consider the constitutional validity of legislative limitations on the rights of both producers and employees to associate for the purpose of promoting their own economic interests. Regulation of unfair trading practices and trade union activities would remain the exclusive preserve of the legislature. The Courts would also be spared the need to resolve the highly controversial issue of the existence and scope of "negative" rights to refuse to join trade unions and professional societies. □

1 *A Bill of Rights for New Zealand. A White Paper.* Government Printer, Wellington, 1985 (hereafter referred to as *White Paper*).
2 Roberto Unger, *Law in Modern Society* (1976) 192-200.
3 The Courts can be expected to give meaning to this term by adopting the "overbreadth" and "vagueness" doctrines developed by United States Courts (see Tribe, *American Constitutional Law* (1978) 710-720) and adopted in Canada (*Re Ontario Film and Video Appreciation Society and Ontario Board of Censors* (1983) 147 DLR (3d) 58, aff'd (1984) 5 DLR (4th) 766) which invalidate restraints on protected freedoms imposed pursuant to vague delegated discretionary powers.
4 See, eg *Public Service Alliance of Canada v The Queen* (1984) 11 DLR (4th) 337 at 358-366 (FC); *Re Service Employees' Int'l Union and Broadway Manor Nursing Home* (1983) 4 DLR (4th) 321 (Ont HC); *Re Southam Inc and The Queen* (1984) 14 DLR (4th) 683 (Ont HC); *R v Bryant* (1984) 15 DLR (4th) 66 (Ont CA); *National Citizens Coalition Inc v Attorney-General for Canada* (1984) 11 DLR (4th) 481 (Alta QB); *Re Regina and Videoflicks Ltd* (1984) 14 DLR (4th) 10 (Ont CA).
5 See, eg the detailed analysis of economic evidence by Reed J. In *Public Service Alliance of Canada v The Queen* (1984) 11 DLR (4th) 337 at 358-366.
6 On appeal from the decision of Reed J in *Public Service Alliance of Canada v The Queen* ibid the Federal Court of Appeal expressed serious doubts about the value of the expert opinions of economists, and questioned the wisdom of Reed J's attempt to undertake an objective analysis and assessment of economic evidence: (1984) 11 DLR (4th) 387 at 392-393, 395.
7 *Re Federal Republic of Germany and Rauce* (1982) 141 DLR (3d) 412 at 423 (Ont HC); *Re Red Hot Video Ltd and City of Vancouver* (1983) 5 DLR (4th) 61 at 66 (BCSC); *Re Retail, Wholesale & Department Store Union and Government of Saskatchewan* (1984) 12 DLR (4th) 10 at 24 (Sask QB).
8 Mr Justice Richardson, "The Role of Judges as Policy Makers" (1984) 15 VUWLR 46 at 52.
9 See, eg *Re USA and Smith* (1984) 44 OR (2d) 705 at 722-727 (Ont CA); *Re Southam Inc and The Queen (No 1)* (1983) 146 DLR (3d) 408 at 424-429 (Ont CA); and *White Paper* para 10.34.
10 Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard U Press, 1980) 105.
11 Ibid para 10.79. Cf section 15(2) of the Canadian Charter of Rights and Freedoms.
12 Ronald Dworkin, *Taking Rights Seriously* (Harvard U Press, 1980) 364, and Introduction p (xi).
13 Ibid 192.
14 John Rawls, *A Theory of Justice* (Oxford U Press, 1972) 60.
15 Ibid 250. See also 61-64.
16 Dworkin, *Taking Rights Seriously* 180, 272-273, 356, Introduction p (xv). See also William Conklin, *In Defence of Fundamental Rights* (1979) Ch VI: "respect for persons as open-ended potentialities".
17 Dworkin, *Taking Rights Seriously* 92, 195, 200, 354; Rawls, *A Theory of Justice* 212-213.

Rights and Tribunals of justice

The provisions of the Bill of Rights that safeguard fair legal procedures came about largely to protect the weak and the oppressed from punishment by the strong and the powerful who wanted to stifle the voices of discontent raised in protest against oppression and injustice in public affairs. Nothing that I have read in the congressional debates on the Bill of Rights indicates that there was any belief that the First Amendment contained any qualifications. The only arguments that tended to look in this direction at all were those that said "that all paper barriers against the power of the community are too weak to be worthy of attention". Suggestions were also made in and out of Congress that a Bill of Rights would be a futile gesture since there would be no way to enforce the safeguards for freedom it provided. Mr Madison answered this argument in these words:

> If they [the Bill of Rights Amendments] are incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against any assumption of power in the legislative or executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights.
>
> — **Justice Hugo Black** of the US Supreme Court

Butterworths Travel Award 1985

A Butterworths Travel Award for 1985 has been made to Stephen Bull, and one to A W Sheppard.

Stephen Bull was born at Gisborne in 1961. He completed his university education doing an arts and law degree at Victoria University of Wellington, where he won the Robert Orr McGechan Memorial Prize in 1982 and the Highfield Administrative Law Prize in 1983. In 1983 he was Senior Scholar. He was admitted in 1985 and is presently employed in Wellington by Bell Gully Buddle Weir. He will be going to Harvard Law School to do his Masters degree. He has been awarded the Frank Knox Memorial Fellowship from Harvard University. Following the year of study at Harvard, he plans to travel and work overseas before returning to New Zealand.

Praise where praise is due

Hart v O'Connor *[1985] 2 All ER 880 was argued before their Lordships in the Privy Council by New Zealand counsel, namely D L Mathieson for the successful appellant and A P C Tipping and J L D Wallace for the respondents. The judgment of the Board was given by Lord Brightman who concluded his judgment thus:*

Their Lordships desire to record their great appreciation of the skill with which this difficult case was presented and argued by counsel on both sides; they could not have had more assistance than that which they were so fortunate as to receive.