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Yes, Virginia, there is . . .

Casual browsing has its rewards. Looking through a book about Christmas recently I came across the famous article in the New York *Sun* of 1897 in which the editor replied to the inquiry of a little eight-year-old girl and said:

Yes, Virginia, there is a Santa Claus.

This is a sentence that has entered into American folklore. The letter from Virginia O'Hanlon, who died only 15 years ago, and the editor's reply, were published every Christmas time after 1897 by the *Sun* until the newspaper folded in the 1950s.

While I knew the particular sentence well enough because of its common use as a reference phrase in American writing, I had not read the full reply. This editorial response to Virginia's question of whether there is a Santa Claus is appropriately sentimental and simplistic; but it does contain a profound thought, one that illuminates the continuous validity of fairy tales and of imaginary tales like novels, and the permanent appeal of rhythm, metaphor and imagery that are the constituent elements of poetry.

Justice too is one of those elemental things that deep down we know to be more than a word, more than an idea. The history of philosophy for centuries was concerned with this problem, that of universals. Plato's solution was his theory of forms, that are real though immaterial. The realist school, on the other hand, has always maintained a materialistic sense of life and seen references to abstractions, such as justice, as being unreal human inventions. The moderate realists from Aristotle, through Aquinas and the Schoolmen have argued for a position that tries to combine aspects of the idealist view and of the mechanistic view.

In jurisprudence, of course, the issue is of direct relevance to the relationship, if any, between justice and law. Some, like the American legal positivists and pragmatists, conscious or unconscious disciples of Comte and Pierce, see no necessary connection. For them the law is merely a declaration of what is practical and expedient by the current power elite, whether a political party or a faction within a political party. In effect this is the position, when reduced to its bare bones, of both Rawls and Dworkin, despite their differences. The argument on the relationship between law and morality as exemplified at the end of the 1950s and the beginning of the '60s, by Devlin and Hart expressed the issue starkly. The influence of Hart now seems all-pervasive in New Zealand. This has become more obvious in the past few years. Some politicians advocating change seem to label a particular issue as a moral one, *and therefore*, they say, the law should not be concerned with it.

A pluralist society of tolerance and accommodation is different from one that claims that it is neutral in all moral matters. That this extreme idea of a neutral value-free social, and therefore legal, system is an absurdity, may be illustrated by the proposed Royal Commission on Social Policy. This can be seen, from one point of view, as an attempt to create a new secular set of social values. The idea that a Royal Commission can establish a new set of values as the basis for social policy is as entertaining as it is naive. It is significant, and would be farcial were it not so obviously depressing, that two of the members of the Royal Commission are psychologists – members of what is sometimes described, whatever may be the personal views of those involved, as the modern priesthood of secular rationalism. Surely one would have been enough.

Perhaps we will yet see our own antipodean version of the French Revolution when in 1793 the Cathedral of Notre Dame was "consecrated" to the worship of Reason with what the Cambridge Modern History describes genteelly as "much childish profanity."

Presumbaly Waitangi Day or some other suitable occasion, like the opening of Parliament, can have its public ceremonies reshaped and made "relevant" so as to be a ritualistic expression of our new revolutionary set of secular social values when these are presented to us. Then the Government Printer could arrange for the report of the Royal Commission to be engraved in stone as a suitable replacement for the tablets of Moses! Well, this is after all the season for whimsical fantasy!

One can only wish Mr Justice Richardson and his fellow Commissioners well as they set about the construction of a New Zealand version of that new order that has so entranced and inflamed social theorists from Rousseau through Marx to Mussolini; not to mention many earlier examples of a fascination with the idea of Utopia, from the seriousness of Plato to the satire of Thomas More. By comparison with such illusory dream-worlds, what this Royal Commission produces will surely be much more pedestrian and pragmatic. For our own peace of mind at least let us all hope that this will be so.

But in the meantime, and while we may, let us remember Santa Claus and the "reality" that the editorial

writer Francis Pharcellus Church described when he wrote his reply to the worried little Virginia O'Hanlon back in 1897.

What Church had to say about Santa Claus echoes what many still feel about justice in the world as expressed in law, for they know that there is a seamless web of justice more beautiful and therefore more enduring than power, a web "which not the strongest man, not even the united strength of all the strongest men that ever lived, can tear apart".

Christmas is the time for simplicity, for a childlike willingness to enjoy the gift of life, to accept things and to recognise the common humanity of us all without undue subtlety, without fine distinctions, without being tendentious, without refined argument or logic-chopping. So here in the spirit of Christmas joy, and in celebration of the abiding reality of all the virtues, including justice, is the letter from Virginia in 1897, and the warmly enduring, sentimental editorial response.

P J Downey

Dear Editor:
I am 8 years old.
Some of my little friends say there is no Santa Claus. Papa says "If you see it in 'The Sun' it's so." Please tell me the truth, is there a Santa Claus?

Virginia O'Hanlon,
115 West 95th Street,
New York City.

Reply by Francis Pharcellus Church

Virginia, your little friends are wrong. They have been affected by the skepticism of a skeptical age. They do not believe except they see. They think that nothing can be which is not comprehensible by their little minds. All minds, Virginia, whether they be men's or children's, are little. In this great universe of ours man is a mere insect, an ant, in his intellect as compared with the boundless world about him, as measured by the intelligence capable of grasping the whole of truth and knowledge.

Yes, Virginia, there is a Santa Claus. He exists as certainly as love and generosity and devotion exist, and you know that they abound and give to your life its highest beauty and joy. Alas! how dreary would be the world if there were no Santa Claus! It would be as dreary as if there were no Virginias. There would be no childlike faith, then, no poetry, no romance to make tolerable this existence. We should have no enjoyment except in sense and sight. The external light with which childhood fills the world would be extinguished.

Not believe in Santa Claus! You might as well not believe in fairies! You might get your papa to hire men to watch in all the chimneys on Christmas Eve to catch Santa Claus, but even if they did not see Santa Claus coming down, what would that prove? Nobody sees Santa Claus, but that is no sign that there is no Santa Claus. The most real things in the world are those that neither children nor men can see. Did you ever see fairies dancing on the lawn? Of course not, but that's no proof that they are not there. Nobody can conceive or imagine all the wonders that are unseen or unseeable in the world.

You tear apart the baby's rattle to see what makes the noise inside, but there is a veil covering the unseen world which not the strongest men, not even the united strength of all the strongest men that ever lived can tear apart. Only faith, fancy, poetry, love, romance, can push aside that curtain and view and picture the supernal beauty and glory beyond. Is it all real? Ah, Virginia, in all this world there is nothing else real and abiding.

No Santa Claus! Thank God he lives, and he lives forever. A thousand years from now, Virginia, nay, ten times ten thousand years from now, he will continue to make glad the heart of childhood.

Christmas message to the Profession

From the Attorney-General, Rt Hon Geoffrey Palmer

The Attorney-General is the titular head of the legal profession. This permits him to give an annual message to the legal profession. Indeed there are [illegible] privileges attaching to the office — [illegible] but not so many privileges.

It is in the nature of people that at the end of a hard year they will look back and try and estimate their efforts. Lawyers work hard, perhaps too hard. It is one of the characteristics of the profession. I would venture to say that lawyers in Parliament work just as hard and sometimes harder.

But neither in law nor in politics can progress be easily measured. We have had a lot of law reform lately. But it is never clear that all the objects of any reform are achieved. And it is sometimes not clear what the object is anyway.

One report which should interest the legal profession is the *Report on the Royal Commission of Electoral Law* due to be published before Christmas. Mr Justice Wallace and his colleagues will, I believe, produce a document of enduring importance to democracy in New Zealand. It is a subject which should interest the profession and could well be included in your holiday reading.

As the Attorney-General I am interested in trying to engage the interest of the legal profession in matters of public law. The Bill of Rights debate is one example. But there are many others. Lawyers should not be consumed with narrow and private disputes. They should turn their quality intellects to the more pressing and intractable issues of public policy and public law.

Reflection, attention to the public philosophy and principle — these are the proper concerns of lawyers at Christmas. Think sometimes of the contribution that might be made to the wider world of affairs which lies beyond the legal profession.

In a world of increasing specialisation lawyers are among the last of the generalists. Merry Christmas.

Case and Comment

Television and the Courts

Broadcasting Corporation of NZ v Marfart and Prieur [1986] BCL 720.

"Publicity is the soul of justice", as Jeremy Bentham said. Thus Court proceedings should normally be held in open Court, and the media should be allowed to report them. The newspapers, of course, make the most of this, and important trials are often covered very fully. Yet our judicial system has never been prepared to take this publicity principle to what some regard as its next logical stage: the televising of Court proceedings. Nearly all of us regard this suggestion as repugnant, a response which is based on emotion as well as reason.

No doubt some sort of case can be mounted for the use of television in this way. Television, it could be argued, would show us no more than any member of the public could see by attending in person, as is his right; moreover the words transmitted would be the ipsissima verba of the witnesses and not the paraphrases or summaries which appear in the daily paper. Again, if it really is important that justice be seen to be done, television would ensure that it is seen by a large audience – for television is today the most effective form of communication.

Yet such arguments make little impact on the strong antipathy felt by the legal system, and society in general, to this form of publicising trials. As one disgruntled television programme controller put it, "Television sets up a whole new set of panics among the judiciary and others." There are reasons for these "panics". The knowledge that they were being filmed might disconcert witnesses, or cause them (and perhaps even legal counsel) to "play to the gallery". Again, while the open Court principle is necessary to provide a watchdog on the system, television exposure to the whole nation (and perhaps beyond) is more of an intrusion into the privacy of the participants than that principle requires; it could lead to an accused being recognised and identified by a large sector of the population long afterwards. There is also a danger, given the limited time available on television, that the film would be distorted by drastic or inexpert editing. And finally television, to a greater extent than the newspapers, provides entertainment as much as instruction, and there is a fear that it could trivialise and vulgarise Court proceedings to have them treated as some form of television entertainment.

In England the Criminal Justice Act of 1925 prohibits filming in the precincts of a Court. In New Zealand such prohibition is left to the inherent jurisdiction of the Court. A recent attempt to skirt around this principle in England is of interest. In 1985 Clive Ponting was tried (and acquitted) on a charge under the Official Secrets Act. The trial created great public interest. Television was not allowed to cover the trial directly, so what Channel 4 attempted was, at the close of each day of the hearing, to have experienced actors play the part of the participants and read the transcript of the day's proceedings. On hearing of what was proposed the Judge, McCowan J, immediately made an order under the Contempt of Court Act 1981 prohibiting this type of broadcast, apparently on the ground that the jurors might confuse the impression made by the real witnesses with that made by the actors: the trial could thus be prejudiced. The television channel was not granted a hearing, and was told that there was no appeal against the order. Channel 4 boldly adopted another tactic, and seems to have got away with it: they had news readers simply read the evidence of the witnesses, with no attempt at acting. The result was apparently a rather boring presentation, but nevertheless one which attracted a large viewing audience (up to one million). Yet the swift and unequivocal nature of the Judge's reaction to the initial proposal is illustrative of the dislike of television intrusion in our system of justice. Channel 4 have now appealed to the European Court of Justice against what they see as the harshness of the ruling. (An account of the case and some interesting comment on it is found in 6 *Journal of Media Law and Practice*, 195 et seq.)

New Zealand now has its own cause celebre in this area. It arose out of the *Rainbow Warrior* affair, and the resultant Court proceedings are found in *Broadcasting Corporation of NZ v Marfart and Prieur* [1986] BCL 720. Judge Gilbert, who presided at the preliminary hearing at which the French agents pleaded guilty to manslaughter, had directed that the hearing be held not in the District Court but in the old High Court at Auckland. At about the same time, he authorised that the proceedings be recorded on video. In February 1986, some three months after the hearing, he decided that the video tapes might be used in a television documentary. In the event, the documentary contained an excerpt of 1 minute 22 seconds from the tapes. Judge Gilbert viewed the documentary, and indicated that the excerpt had been used in terms of his authority.

The French agents then brought proceedings under the Judicature Amendment Act 1972 for a review of the Judge's authorisation order, and for an interim order under s 8 of that Act prohibiting the broadcast of any part of the video tapes of the hearing. Sinclair J at first instance granted such an interim injunction. Sinclair J weighed the claims of the applicants that they should not be subjected to greater publicity than other defendants against the right of the public to know, and concluded that

there was an arguable case for the review of the Judge's ruling. The Court of Appeal upheld Sinclair J's decision.

In the Court of Appeal, most of the argument centred on whether Judge Gilbert's authority to release the tapes was reviewable under the Judicature Amendment Act 1972. To be so reviewable it was necessary to find that Judge Gilbert's authorisation was an order made in purported exercise of a statutory power. The Court of Appeal found that it was. The series of orders to hold the hearing in the High Court building, and to install video cameras, could be said to have been purportedly made under s 4A of the District Courts Act 1947 and s 155 of the Summary Proceedings Act 1957, both of which expressly deal only with the Court in which proceedings are to be held. The authorisation to release the tapes to the Corporation was further made in his capacity as a Judge, and could thus be said to be statutory in origin also.

The case, involving an interim order only, did not require a final determination of the merits, but some dicta in the Court of Appeal are of interest on the matter of televising Court proceedings.

Cook J said that

> in the absence of such orders the applicants would be exposed to international visual publicity. . . . That would be a unique event in New Zealand legal history. It would subject the applicants to consequences of criminal proceedings never previously visited on any defendant charged in this country.

An interim order, he said, was necessary for the purpose of preserving the position of the applicants. Cooke J further said that he would not find it easy to infer from any statutory provision that had been mentioned, including s 4 of the District Courts Act, that there was an implied power to release the tapes to the media. He concluded by saying that there is manifestly a public interest in knowing the course and result of New Zealand Court proceedings.

> That is different, however, from any interest in seeing a film including a video-taped part of the proceedings.

Richardson J said that among the things which had to be weighed in the balance was

> the right of accused persons to a fair trial which may arguably extend to a right not to be unnecessarily subjected in the judicial process . . . to potentially harmful personal publicity more extensive than that ever previously occasioned to defendants in New Zealand Courts.

Casey J referred to Sinclair J's statement that the applicants had a legitimate expectation that they would be dealt with in the same manner as other accused. He said that whether Sinclair J was correct in that statement or not, the question still remained whether the applicants were entitled to have the Court investigate the limits to procedural powers whereby an accused person is "not subjected to treatment or public exposure going beyond the legitimate requirements of the criminal judicial process".

In all judgments, therefore, it was assumed that it was the effect on the accused that lay at the heart of the question whether television coverage should be permitted. There should be publicity of Court proceedings, but not too much.

J F Burrows
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Consideration and Cheques

Spencer v Crowther [1986] BCL 422; *Darby & Associates Ltd v Meates* [1986] BCL 854.

The new summary judgment procedure which has replaced the bill writ has been used in two unreported decisions concerning cheques this year, both, coincidentally, raising the issue of consideration, although different aspects of it. The first decision was that of Prichard J in *Spencer v Crowther* [1986] BCL 422, in which the question was whether there was any consideration for a deposit cheque when the vendor had cancelled the agreement. A cheque for the amount of the deposit payable under an agreement for sale and purchase had been made out by the purchaser and handed to the agent. Subsequently, the purchaser refused to complete and the cheque was dishonoured. The vendor cancelled the contract and issued a bill writ, which, by consent, was dealt with as an application for summary judgment under the new rules.

The first point to be decided was whether the vendor had the right to sue the purchaser for the deposit apart from any liability created by the cheque. Prichard J agreed with the decision of McMullin J in *Johnson v Jones* [1972] NZLR 313 and decided that, since the agreement had been cancelled, the vendor was unable to recover the deposit. That left the question of liability on the cheque itself. This had been made out to the agent, who had handed it over to the vendor, which, because it was a bearer cheque, meant that the vendor had become its holder and the person entitled to sue on it. It also had a "Not Negotiable" crossing, which meant that any defect attaching to the cheque when it was created survived its negotiation to the vendor and, in this instance, raised the question whether there had been any consideration. The decision was that there had been consideration and summary judgment was awarded to the vendor. The basis on which consideration was found to exist is interesting. A similar set of facts had come before the English Court of Appeal in *Pollway v Abdullah* [1974] 2 All ER 381, where the vendor had elected to treat a sale by auction as discharged and the auctioneers were suing the purchaser on the deposit cheque. The Court decided that there was consideration for the cheque, offering two different explanations of where it could be found. The one accepted by Prichard J was that it consisted of the acceptance by the agent of a cheque for the deposit instead of legal tender, which was how the purchaser, strictly speaking, should have paid.

The other decision is that of Williamson J in *Darby & Associates Ltd v Meates* [1986] BCL 854, in which the issue was whether consideration provided to someone other than the drawer of the cheque was sufficient. The cheque being sued on had been drawn by one company, the second defendant, in payment of a debt incurred by another company for advertising costs, the two companies being connected by virtue of the fact that Mr Meates, the first

defendant, was a major shareholder and director of both. Williamson J awarded summary judgment on the cheque. He followed the principles stated by Speight J in *Bonior v Siery Ltd* [1968] NZLR 254 at 258 as to the circumstances in which the debts of a third party can constitute consideration for a bill of exchange, which are as follows:

(a) An express or implied promise by a creditor to forbear from suing a third person is good consideration.
(b) In some cases the relationship between the antecedent debt of the third person and the giving of the bill to the creditor is so close that as a result it amounts to consideration, ie, benefit to the drawer or detriment to the promisee.
(c) If no benefit is so received or no act of forbearance or promise thereof takes place, then it cannot be said that the antecedent debt "relates" in any way, and consequently the third party's antecedent debt is not consideration.

In this case, the important facts establishing the necessary relationship between the debt and its payment were that the creditor had indicated that it would not do any more work for Mr Meates or any companies controlled by him unless the debt was paid, and that this threat was at least one of the reasons for the drawing of the cheque. Thus the drawer of the cheque received the benefit that the company itself, its principal shareholder and director and its associated companies could continue to use the services of the creditor.

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Police powers — unlawful arrest — power to search upon arrest — damages

The Courts are often faced with the task of attempting to balance the community's need for an efficient police force against the necessity for ensuring the police act within their lawful powers. Whilst the powers of arrest enjoyed by the police in New Zealand have been reasonably well defined over the years by statute and subsequent judicial interpretation, the same could not have been said for the common law power of search upon arrest. Thus the discussion of Tompkins J on this matter in *Craig v Attorney-General* [1986] BCL 1538 will be of considerable interest to both the police and practising criminal lawyers.

The facts of the case were that the appellant, a company director and former policeman, had been dissatisfied with the service provided him at a restaurant and he thus proposed to pay the restaurant proprietor only half the charged price. The appellant had given the proprietor his surname, telephone number and business address but he declined to give his full name and residential address. The appellant's wife noticed two police officers on the other side of the road and asked for their assistance. The officers attempted to resolve the dispute, without success, and the appellant subsequently left the restaurant without paying anything. The officers followed the appellant and his party along the street and reported by radio. A police van arrived and after a heated discussion with one of the detectives in the van, the appellant started to move away. At this point he was arrested for obtaining credit by fraud. He was then pushed against the side of the van with his arms thrown up and was searched by another detective.

The appellant was charged in the Auckland District Court with having obtained credit by means of a false pretence or other fraud but the information was subsequently withdrawn. The appellant then brought an action in the District Court claiming $6,000 general damages and $6,000 exemplary damages for wrongful arrest and false imprisonment. Judge Blackwood awarded $1,000 exemplary damages and the appellant appealed to the High Court.

It is Tompkins J's findings on the common law power to search upon arrest which are of particular interest. In giving evidence the arresting detective sergeant had stated that ". . . any person I arrest gets a full arrest". Tompkins J, however, followed the recent English authorities of *Lindley v Rutter* (1981) 72 Cr App R 1 and *Brazil v Chief Constable of Surrey* [1983] 1 WLR 1155, and held that it is unlawful to search a person simply because he/she had been placed under arrest. His Honour stated that the police should only exercise the right to search upon arrest for good reason — eg, if there is cause to suspect the arrested person may have a weapon or incriminating evidence on their person, or if there is reason to suspect that he or she has something which may facilitate escape. Moreover applying the reasoning of Goff LJ in *Brazil's* case Tompkins J stated that generally an explanation and reason should be given to a person as to why a personal search was being carried out. Thus in the circumstances of this case the Judge held that the detective sergeant had acted unlawfully in searching the appellant without having any particular reason for so doing. Accepting that there may be degrees of affront involved in a search, his Honour observed that the indignity of this search was all the greater for it being conducted in a public street in the presence of the appellant's acquaintances.

Tompkins J had little difficulty in confirming Judge Blackwood's conclusion that the appellant had not obtained credit by fraud contrary to s 247 of the Crimes Act — for any intent to defraud did not exist at the time appellant ordered drinks and food. Moreover Tompkins J agreed that s 32 of the Crimes Act did not save the arrest. Following the approach declared by Eichelbaum J in *Duffy v Attorney-General* (1985) 1 CRNZ 599 His Honour stated that in determining, objectively, whether the detective sergeant had "reasonable and probable grounds" for arresting on the stated grounds the detective sergeant was assumed to know the law relating to the offence. Also, Tompkins J observed, the detective sergeant could have been expected to make inquiries from the appellant's party in an endeavour to ascertain the facts. His failure to do so prior to making an arrest contributed to the conclusion that the detective sergeant lacked "reasonable and probable grounds".

Such a conclusion and finding should serve as a salutary reminder that the power of arrest without a warrant is not to be lightly exercised. Certainly it may be true that the Court will not hinder the police with an ". . . over-zealous ex post facto examination of the reasonableness of their actions" (*Williams v Police* [1981] 1 NZLR 108, 113 per Hardie

Boys J). But the judgment of Tompkins J makes it clear that if there is no need to act speedily the police should ". . . act on the assumption that their prima facie assumption may be ill-founded" (*Dumbell v Roberts and Ors* [1944] 1 All ER 326, 329 per Scott LJ). This means that in appropriate circumstances the police must make reasonable enquiries from persons readily available.

Thus the emphasis in Tompkins J's judgment is on the protection of individual liberties. And indeed it seems right in principle that the interference with a person's liberty and privacy by way of arrest should not *automatically* authorise further interference with that person's liberty and privacy by way of a search. But it is interesting to compare the approach of the English Courts and Tompkins J to that of the United States Supreme Court. For in a series of judgments the majority of the United States Supreme Court has ruled that the potential danger lurking in all arrests makes a warrantless search upon arrest constitutionally lawful regardless of the rationale, if any, of the search (see *United States v Robinson* 414 US 218, 38 L Ed 2d 427, followed in *United States v Chadwick* 433 US 1, 53 L Ed 2d 538 and *State of Michigan v De Fillipo* 443 US 31, 61 L Ed 2d 343). Clearly the Supreme Court had been impressed by statistical data which indicated that in their heavily armed society even the arrest of a disqualified driver could pose real dangers to the police. We can be thankful that such dangers are not yet regularly faced by our own force.

Finally in *Craig's* case it can be noted that following *Blundell v Auckland City Council* [1986] BCL 531 and *Howley v Attorney-General* [1986] BCL 1185 Tompkins J maintained that compensatory damages for the embarrassment and humiliation occasioned by the false imprisonment were available, notwithstanding the Accident Compensation Act 1982. (*Blundell's* case was considered by the Court of Appeal in early October: see *Capital Letter,* 14 October 1986, p 1.)

Tompkins J also accepted that the appellant's conduct could be relevant in reducing the assessment of either the aggravated or the exemplary damages for false imprisonment. But His Honour held the appellant's "unreasonable" attitude to the police officers could not mitigate damages to "any significant degree", for the ". . . plaintiff was not bound by law to be cooperative and, if he had committed no offence, he was entitled to be arrogant and offensive".

In considering an appropriate award of damages Tompkins J paid regard to two factors not expressly taken into account by Judge Blackwood – firstly the matter of the unlawful search and secondly the conduct by the police after the false imprisonment had ceased, which included a rather clumsy attempt to "buy-off" the appellant. Having regard to all the circumstances Tompkins J reached the conclusion that the appropriate global sum for damages would be $5,000.

J L Caldwell
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Christmas message to the Profession

From Peter Clapshaw, President of the New Zealand Law Society

I thank Butterworths and the Editor for allowing me this opportunity to send a Christmas message to you.

1986 has been an interesting and challenging year for the New Zealand Law Society and the profession. Legislation was introduced to enable the Housing Corporation to offer conveyancing services, notwithstanding submissions from the Society that such a service was unnecessary and was likely to amount to unfair subsidised competition. However as a result of the removal of the conveyancing scale of charges and the almost total removal of the restrictions on advertising we have also seen the emergence of real and obvious competition within the profession. I believe that the competition has always been there but it is now apparent to our clients, the consumers. I know there are those who are unhappy at some of the ways in which competition manifests itself and to some extent I share their concern. But we have to recognise that in today's climate we must not only be competitive, we must be seen to be competitive.

It is in the interests of our clients that the provision of legal services continues to be the domain of laywers who are qualified and trained for the work. I believe that most of the profession is efficient and delivers and is seen to deliver its services at a reasonable and competitive price. It is essential that this situation continues if we are to withstand attacks on our traditional areas of work from those who misguidedly consider they could do it just as well. It should be noted that these attacks are not confined to conveyancing.

Next year looks to be just as eventful. The highpoint of the year will be the triennial conference to be held in Christchurch from 1-5 October 1987. The organising committee has been hard at work for some time preparing a stimulating and varied programme for our information and entertainment. I look forward to seeing you all there.

On behalf of the Council of the NZLS I wish all readers of the *Journal* a very happy and relaxing Christmas so that we can enter upon 1987 with our batteries fully recharged for the challenges which lie ahead.

Union membership:

A critical review of decisions of the Union Membership Exemption Tribunal

By Martin Vranken, Lecturer, Industrial Relations Centre, Victoria University of Wellington

This article looks at the question of Union Membership in the light of the decisions of the Union Membership Exemption Tribunal. The article is a critical review of the first 10 months of the work of the Tribunal. The author suggests some possible changes in requiring a payment into a fund in lieu of Union fees and extended coverage by the grievance procedure to all employees.

I The Union Membership Exemption Tribunal

A Statutory Provisions

Compulsory unionism is an issue with a long history in New Zealand. It goes back as far as the beginning of the Industrial Conciliation and Arbitration system in 1894[1]. Currently, the Industrial Relations Amendment Act 1985 requires all awards or collective agreements to contain a clause obliging employees to join the appropriate union within 14 days following the commencement of their employment and to remain a union member at any stage during the employment relationship (Industrial Relations Act 1973, s 98). This statutory requirement is subject to two major qualifications. First, the statutory insertion of a union membership clause into awards or agreements is for a maximum period of 18 months ending on 31 December 1986 (or until there is a membership ballot, whichever is sooner); thereafter, a three-yearly system of ballots organised on a union by union basis will allow a majority decision to determine whether or not workers should be required to become union members. Secondly, and most important for our purposes, any individual employee who objects to so having to join a union may apply for an exemption of membership to be granted by the newly established Union Membership Exemption Tribunal (s 105 of the 1973 Act).

The principal function of the Tribunal is to consider and determine applications for certificates of exemption from union membership (s 106). Such applications may be made only on the basis that the applicant genuinely objects, on the grounds of conscience or other deeply held personal convictions, to becoming or remaining a member of any union whatsoever or of a particular union (s 112c). The power of the Tribunal to grant exemptions is indeed confined to the above mentioned grounds of objection (s 112L). A major consequence of granting an exemption is that it permits the employment of the person holding an exemption certificate in any position or occupation as if that person were a union member (s 112O).

B Decisions Rendered

Although the Union Membership Exemption Tribunal commenced its functions only at the end of September 1985, there are already indications to support the argument that the approach taken by the Tribunal is a most liberal one. This becomes clear when the actual number of exemptions granted is looked at. The most recent figures available reveal that, as at 23 July 1986, 480 applications for an exemption have been received by the Tribunal. While the vast bulk of these applications is still awaiting a decision, 83 formal judgments were issued by 1 May 1986. In all but 11 cases, an exemption for life has been granted. The total number of exemptions amounts to well over 1000 when the people who already were exempted from membership prior to 1 February 1984, being the cutting-off point as established by s 19 of the Industrial Relations Amendment Act 1985, and to whom a certificate has been issued by the Secretary of the Tribunal under the transitional provisions of the Industrial Relations Amendment Act 1985, are added.[2]

A further indication of the Tribunal's liberal approach is provided by an analysis of the reasons for granting an exemption. Although it must be stressed that "grounds of conscience" and "deeply held personal convictions" are treated as matters of fact, which basically means that each case is to be decided on its own merits, some guidelines can be derived. From the decisions rendered so far, a number of principles have been outlined by Szakats in *Industrial Law Bulletin*, April 1986, no 2, pp19-23, including the following:

1 The Tribunal does not enter into a value-judgment as to the correctness or incorrectness of a particular conviction. Thus, no second-guessing of the validity of

the applicant's alleged convictions takes place: it suffices that they are deeply and sincerely held by the applicant (see *Robinson* UMET 5/85 and *Taylor* UMET 29/85).

2 The requirement of a personal conviction to be "deeply" held does not prevent such conviction from being recently held (see *Lawson,* UMET 4/85).

3 The objection must be either to unions as such (whether a particular union or any union whatsoever), or to some significant aspects thereof. Examples are an objection to the use of strike tactics by the union, or the union's insistence on uniform pay rates (see *Robinson,* UMET 5/85 and *Lawson,* UMET 4/85). Even a deeply held personal belief that the union has failed to look after the applicant's interests has been accepted (see *Allerby,* UMET 44/85 where the Tribunal quoted from a judgment of the UK Employment Appeal Tribunal, and for a more recent confirmation of this principle see *Hatcher,* UMET 15/86).

To hold that the Tribunal takes a most liberal approach when deciding whether or not to grant an exemption does not imply that no limits whatsoever are applicable. It has already been pointed out here that the objections to union membership must be deeply and sincerely held ones. This may explain why, for instance, not just any objection to strikes will necessarily be accepted as a valid ground for granting an exemption, especially where the Tribunal is not convinced that such objection amounts to a deeply held conviction. Compare *Summers,* UMET 1/85 (held: the applicant's objection to strikes does not amount to a deeply held conviction) with *Lawson,* UMET 4/85 (held: the applicant's objection to the possibility of being involved in a strike is related to a basic aspect of membership and therefore a good ground for exemption).

A more important, and questionable, limitation as to the granting of an exemption concerns an objection to being compelled to become a union member (see *Summers,* UMET 1/85, *Lewis,* UMET 12/85, and *McDougall,* UMET 32/85). A related and, what is considered to be, equally insufficient objection is regarding the limited freedom of choice about which union to join (see *Oldfield,* UMET 19/85 and *Emslie,* UMET 20/85). The Tribunal has also ruled that the union's objection to the granting of an objection, when such objection is based upon the argument that a successful applicant will continue to benefit from the fruits of that union's activities, is not in itself an adequate reason to withhold a certificate of exemption (see *Bruce,* UMET 2/85) and *Rulkens,* UMET 45/85).

C Comments

Any attempt to evaluate the Tribunal's determinations in accepting or rejecting objections to union membership must necessarily start off with an assessment of the reasons behind the statutory introduction of compulsory unionism itself. Compulsory unionism is indeed the general rule in New Zealand to which the provision for exemption of membership constitutes but an exception.

The concept of compulsory unionism represents an officially held belief by the legislature in the values of unionism as such. This is not an appropriate place to question the validity of promoting those values by way of compulsion. It suffices to acknowledge that the Tribunal is quite correct in holding that it lacks any authority to do so. Be this as it may, the exemption provision of s 112C stands (at least in part) for a statutory attempt to reconcile the perceived merits of compulsory unionism with the values inherent to individual freedom. That is why genuine objections on the grounds of conscience or other deeply held personal convictions are deemed to be legally acceptable reasons for allowing an exception to the general principle of compulsory membership.

The role of the Tribunal in this respect is not to check the validity of the reasons for filing an objection; Parliament has not granted it that authority. Sections 112C and 112L do not indeed distinguish in any way between the various grounds on which a conscientious objection or personal conviction can be based. All they require is that the objection be a *serious* one, ie genuine and based on deeply held personal convictions. Of course, the origin of the objection may play an (often crucial) role in assessing the seriousness of the applicant's sentiments. For instance, membership of the Exclusive Brethren or Seventh Day Adventists will undoubtedly facilitate the Tribunal's task when forming its opinion about the sincerity and strength of the conscientious objection by the applicant to becoming or remaining a union member. However, as such it is irrelevant whether the objection is inspired by religious considerations, political feelings, or whatever. The (delicate) task of the Tribunal is simply to determine whether it can be satisfied that the applicant's objections, whatever their origin, are genuine and based on deeply held personal conviction. It is submitted that it therefore ought to make no difference whether the applicant is opposed to joining the union because he does not approve of, say, violence or because he does not believe in compulsion.

Why is it that *only* serious objections (as defined above) are a legally acceptable ground for exemption of union membership? The answer to this question presupposes an answer to the preliminary question as to why the legislature recognised the need for an exception to compulsory unionism at all. An obvious answer to the latter question is, as it has already been suggested, the belief in there being some merit to individual freedom as well as to unionism. Another, more pragmatic reason undoubtedly lies in past experiences with compulsory unionism. As Woods puts it so eloquently, the existence of compulsory unionism from 1936 to 1961 had:

> bad effects on trade union development and engendered an increasing groundswell of discontent among workers (N S Woods, *Troubled Heritage,* Occasional Papers in Industrial Relations, no 23, 1979, Industrial Relations Centre, Victoria University of Wellington, p 12 (in fine)).

Briefly, compulsory unionism, if applied too rigidly, may turn out to be counter-productive. A stable union membership should therefore never be at the cost of a loyal membership. To put the same thing differently, people who really do not consider themselves "suitable" for membership (or rather membership suitable for them) should not be forced into it either. Of course, if there were to be no control whatsoever as to who is to join the

union and who is not, we would soon be in a situation of voluntary unionism. This is why the Tribunal has to distinguish between the deeply held and the not so deeply held personal convictions forming the basis of the objection. Moreover, without any control, the door is wide open for abuse by those who are quite happy to enjoy the benefits of unionism without, however, being prepared to assume any of its responsibilities (especially the payment of union dues). Here lies a most important role for the Tribunal: to distinguish the genuine objectors from the non-genuine objectors, most notably free riders.

It is submitted that the Tribunal by and large holds on to the criteria for union exemption as put forward by Parliament and that it therefore also performs the above functions of selection. However, note that the Tribunal in at least two cases seems to introduce an extra (not statutorily provided for) requirement of special harm by ruling that, if an applicant fails to show that he would suffer in some special way as a result of becoming a union member, he cannot be said to object to union membership. It is submitted that such "extra" requirement would only make sense to the extent that it stresses the importance of the personal element in the applicant's objection (see *Speirs,* UMET 4/86 and especially *Saunders,* UMET 10/86). It can even be argued that the Tribunal, when it rejects an objection to the idea of compulsion as a sufficient ground for exemption, is in fact attempting to distinguish the grain from the chaff in this respect. The cases here reveal that the applicant's objection to compulsory unionism tends to be phrased in terms of basic human rights applicable in a democratic society, rather than being formulated as a genuinely and deeply held personal conviction. It may very well be that the Tribunal was not always convinced as to the seriousness of the objector. (See, however, *Summers,* UMET 1/85 where the Tribunal did not doubt that the applicant's objection had the character of a deeply held personal conviction while yet stating that its duty (to strive for consistency with human rights) does not require or entitle it to read into the words "objects . . . to becoming . . . a member of any union" the concept of an objection to being compelled to become a member.) Rather surprisingly, however, the Tribunal's answer goes to the validity of the objection itself when it observes that, in a democratic society, it has to take account not only of the individual rights of applicants but also of the collective rights of the union as well as the interests of the community as a whole. While not denying the value of the Tribunal's point that individual rights have to be balanced against collective rights, it must be stressed again that the legislature has drawn this line already. If viewed in this perspective, the Tribunal's legal arguments that an objection to compulsion amounts to an objection to a statutory provision rather than to union membership as such, and that to regard an objection to the statutory compulsion as falling within s 112L would cut across the whole scheme of the Industrial Relations Act, immediately becomes highly doubtful. (See *Summers,* above.) After all, s 117L itself constitutes nothing but a statutory exception to the general rule of statutory compulsion.

D Legal Position of the Exempted Worker

A certificate of exemption permits the employment of the holder in any position or occupation as if that person were a member of the union to which that person would, but for the exemption, be required to belong (Industrial Relations Act 1973, s 112O(2)). It follows that the dismissal of an exempted worker, if based on grounds of non-union membership, would necessarily be unjustifiable. Unfortunately, the question of justification under common law arises only in the case of summary dismissal, ie a dismissal without notice. Indeed, "unjustified" dismissal as distinct from "wrongful" dismissal is a statutory concept under the Industrial Relations Act, and is not generally recognised by the common law. In order to invoke remedies under the Industrial Relations Act, especially those provided for by the grievance procedure, both award (or collective agreement) coverage and actual union membership are a prerequisite. Whereas exempted workers do not miss out on general award coverage — union membership is no pre-condition for award coverage — they can therefore not benefit from the grievance procedure. Leave to proceed under s 117(3A) is not available either, since the Arbitration Court grants leave only upon proof that:

(a) the worker is a union member at the time of dismissal; and
(b) the worker has requested the union to act for him, and
(c) the union has failed to act or failed to act promptly.

(See A Szakats and M A Mulgan, *Dismissal and Redundancy Procedures,* Butterworths, Wellington, 1985, p 42.)

Thus only an action at common law in the case of a dismissal without notice is possible. Because of the notorious shortcomings of common law remedies,[3] the legal position of an exempted worker can be interpreted but as a sanction which is arguably undesirable.

The non-availability of the grievance procedure constitutes a sanction which is wholly unwarranted, provided that the exemption of union membership has been granted for serious objections. Such sanction mechanism could be viewed as less objectionable, however, if the exempted worker were a free rider. It was already submitted here that a crucial function of the Tribunal lies in distinguishing between genuine objectors and free riders. As it will be argued below, the only way out of this impasse is by making some (minor but crucial) changes to the current procedure for exemption of union membership.

II Union security arrangements in context: Some overseas experience

New Zealand is by no means the only country where union security arrangements in one form or another can be found. Historically, such arrangements have indeed appeared in a number of countries and situations where trade unions confronted serious difficulties of recognition and survival. They are typically contractual clauses which aim at obtaining certain guarantees and facilities vis-a-vis the employer in order to overcome the apathy of certain groups of workers or the particular characteristics of certain labour markets where turnover is frequent and the workforce dispersed. Basically two variants developed in this connection: while some clauses sought to strengthen unions by making membership a condition of

employment (closed shop and union shop), others provided for the compulsory payment of union contributions (agency shop and compulsory check-off), see E Cordova, "Collective Bargaining", in R Blanpain (ed), *Comparative Labour Law and Industrial Relations,* Kluwer, Deventer, 1982, p 235, no 59.

Union security arrangements developed mainly in the UK, USA and other English-speaking countries. These are all countries where unions traditionally perform a crucial role in industrial relations, particularly as collective bargaining agents. It is the recognition of the important functions performed by unions which provides a more modern justification for maintaining such arrangements even nowadays, since the very survival of the union movement in Western society can no longer be seriously doubted.

A Western Europe

Although various forms of union arrangements do operate in several Western European countries as well, they are nowhere as widespread as in the UK. As for the situation of closed shop, no formal arrangements are to be found in the Federal Republic of Germany and Italy; in the Netherlands, formal closed shop provisions only operate in the graphical sector. In Belgium and France, informal arrangements operate in sectors with a long tradition of union organisation, notably the diamond industry, the construction industry, the docks, and parts of the printing sector. In Denmark, both formal and informal closed shop arrangements exist in parts of the private sector. (For a survey of union-security devices in the EEC countries, see *European Industrial Relations Review,* London, 1981, no 93, pp 12-16.)

To attract (loyal) members, unions on the Continent have indeed generally been able to count upon a deep and abiding sense of class consciousness among workers (see E M Kassalow, *Trade Unions and Industrial Relations: an International Comparison,* Random House, New York, 1969, p 141). Also, European employers seem to have accepted unions and their institutional role to a degree still unknown in the USA or even the UK. Yet another more practical explanation for the relative absence of union security arrangements on the Western European Continent, is undoubtedly the broader public functions performed in countries such as Belgium. There, the unions are actively involved in a variety of public administration schemes, including health care, unemployment services, etc (see R Blanpain, "Belgium", in *International Encyclopaedia for Labour Law and Industrial Relations,* Kluwer, Deventer, 1985, p145, no 191).

Of course, the greater emphasis on the safeguarding of the individual rights is an important consideration as well. Where union security arrangements are regarded as an infringement of the freedom not to belong to a union, ie the so-called "negative" freedom of association, legal provisions consequently prohibit or limit their use. The legal status of union-security devices is most clear-cut in Belgium, France and Italy; (positive and negative) freedom of association rights are statutorily guaranteed and provisions requiring workers to join particular unions are specifically outlawed or rendered of no effect. In Denmark, a recent change in legislation aims at providing limited (financial) protection for non-union employees in closed shop situations for the first time in Danish history. The new legislation is a direct response to a 1981 ruling of the European Court of Human Rights concerning the legitimacy of certain closed shop provisions. See *European Industrial Relations Review,* 1982, No 98, p 18 and no 104, p 3.

Following the 1979 re-election of a Conservative government in the UK, legislative provisions have been enacted which provide for more freedom of choice for individual workers in closed shop situations. Thus, the so-called "conscience escape" clause for workers who object to union membership has been widened by the Employment Act 1980. The practical effect of this clause is to render dismissals for non-membership in a closed shop situation unfair. At the same time, a requirement of an 80% ballot majority was introduced for new closed shops. The latter requirement has been extended to existing closed shops by the Employment Act 1982 (see M. Vranken, "Deregulating the Employment Relationship: Current Trends in Europe", *Comparative Labor Law* (USA), 1986, Vol 7, no 2, p 160, 161).

Although the 80% majority support rule does not mean that closed shop agreements without this level of support are invalid, it does make the operation of such agreements difficult in practice. It gives workers a right to (financial) compensation in case of dismissal for non-membership. This entitlement to compensation can be claimed not only against the employer, but also against the union (see Vranken, above). The practical effect of the new legislation is still unknown. Anyway, it is clear that closed shops in their various forms have a long tradition on the UK industrial scene. In 1980 an estimated 6 million workers, ie 25% of the UK working population, were covered by some sort of closed shop arrangement, see *European Industrial Relations Review,* 1981, no 93, p 12. The statutory changes are too recent to fundamentally upset this long-standing tradition as yet. Noteworthy though, is that the emphasis on the protection of conscientious objectors against dismissal for non-membership, is a concern the New Zealand provisions regarding union membership exemption miss out on. S 146A of the Industrial Relations Act provides indeed little (if any) comfort to the exempted worker in making it a penal offence for any employer or union to exert undue influence with intent to induce the worker, on account of his/her non-membership status, to resign or to leave any employment.

B USA

About 97% of all collective agreements in the USA contain some form of union security provision, (see A L Goldman, *Labour Law and Industrial Relations in the USA,* Kluwer, Deventer, 1979, p 232, no 565). Whereas agreements requiring union membership prior to becoming employed ("closed shop") are illegal, a requirement of post-employment union membership ("union shop") is not. However, not even union shop agreements are legally enforceable beyond the duty to pay a fee equal to the union dues. (The leading Supreme Court decision is *Radio Officers Union v NLRB,* 347 US 17, 74 S Ct 323, 98 L ed 455 (1954).) An alternative to a union shop clause is therefore often the so-called "agency shop" clause. This is a clause requiring a person to submit to the financial obligations of union membership. Usually, the worker is given a choice between either union

membership or payment to the union of an amount equal to union dues. However, in the health care industry, employees raising religious objections to having to join or financially support a union may pay an amount equal to the union's initiation fees and periodic dues to a tax exempt non-religious (charitable) organisation. This is a pre-condition for continuance of employment after the statutory minimum period of 30 days has expired. (The special circumstances of the building and construction industry, especially the transient nature of its workforce, means that the statutory minimum waiting period for that industry has been reduced to seven days.) Thus, the problem caused by free riders is adequately taken care of.

The legal enforceability of agency shop clauses in collective agreements must be viewed in light of the union's status as exclusive bargaining agent and its corresponding duty to fairly represent all workers, irrespective of their membership or non-membership in the union. This duty was first established in a series of Supreme Court cases decided in 1944. Today, the Duty of Fair Representation constitutes one of the corner-stones of industrial relations in the USA. It implies a legal obligation for the union to serve the interests of all members of the bargaining unit without hostility or discrimination, in good faith and honesty and without arbitrary conduct.

The most important remedy in case the duty of fair representation is violated, is through a charge for unfair labour practices. Moreover, such union "misconduct" may result in the removal of that union's status as exclusive bargaining agent. Concerning the union's duty of fair representation in general, see *Goldman,* op cit, pp 196-203. The gravity of this sanction mechanism means that the union's duty to represent members and non-members alike, also in grievance proceedings, is never taken lightheartedly in the USA.

III Conclusions: Suggestions for Change

The 1985 Amendment to the Industrial Relations Act 1973 requires the Union Membership Exemption Tribunal to grant an exemption certificate if, and only if, the Tribunal considers that the applicant genuinely objects to union membership on the grounds of conscience or other deeply held personal convictions. As for the general principle of compulsory unionism in New Zealand, a threefold guarantee is thus provided for:

1 only genuine objectors can be exempted;
2 objections are to be based on grounds of conscience or other deeply held personal convictions;
3 a specialised judicial body is to decide upon each application for an exemption on an individual basis.

The Union Membership Exemption Tribunal is a unique institution, unavailable in the UK or the USA, in that it deals exclusively with the applications for exemption of union membership. Given the strong powers of compulsion in the New Zealand system, its existence is warranted if only to provide a necessary counterbalance for individual workers who have *serious* objections to union membership being genuine and based on deeply held personal convictions.

Any determination by the Tribunal regarding the seriousness (or lack thereof) of an alleged objection to union membership is necessarily a matter of fact and degree. The actual composition of the Tribunal, because of the emphasis on knowledge and expertise in both religious beliefs and human rights as well as industrial relations, is a major key to the success of the Tribunal in performing this delicate task. However, two crucial problems remain as yet unsolved. Although free riders are not specifically being singled out by the legislature, they form a readily identifiable category of applicants, at least in conceptual terms, for which not only an exemption of membership but also compulsory membership would be most inappropriate. And yet, the current statutory provisions imply that the Tribunal must group free riders along with all other non-serious objectors. It follows that the Tribunal's task is a particularly difficult one.

As for the serious objectors, its task is further complicated by the lack of adequate protection against dismissal for non-membership. Under the previous procedure before the Conscientious Objection Committee, a successful objector had to pay an amount equal to the union subscription for the period of the exemption into a Consolidated Revenue Account or into a special union account, the moneys from which were to be applied to the union welfare fund or for a charitable purpose.[5] An extra deterrent for free riders was thus provided for, the impact of which could arguably be felt at the initial stage of application itself: potential free riders simply were given no incentive whatsoever to apply for an exemption of union membership.

It is suggested that the Tribunal be accorded additional powers to make the granting of an exemption certificate conditional upon the payment of such amount (or a fraction thereof), at the discretion of the Tribunal. It is indeed submitted that this legislative amendment would greatly facilitate the Tribunal's task as well as strengthen the promotion of unionism by the legislature, for it safeguards the union's financial security while yet making due allowance for the individual freedom of serious objectors (who may or may not end up paying the financial contribution). The amendment would furthermore be in line with overseas developments, especially the agency shop provisions in the USA.

A second suggested change in legislation concerns the personal coverage of the grievance procedure. Currently, no alternative procedure exists for the settlement of personal grievances other than the procedure laid down in s 117 of the Industrial Relations Act. However, if genuine and deeply held objections to union membership are to be recognised fully as a necessary but also sufficient ground for exemption, any indirect sanction to granting of an exemption certificate must be removed from the statute. As the British case makes clear, it is essential that adequate protection against dismissal for non-membership is provided for.

A practical solution could be to extend coverage by the grievance procedure to all persons covered by the award or collective agreement of which the grievance procedure is part and parcel, irrespective of union membership. Here again, the American experience may prove a valuable indication as to the practical feasibility of the resulting introduction of a Duty of Fair Representation on behalf of the union for all and not just for union members. Since registered unions in

Continued on p 408

Standing in the shoes of the rape victim: Has the law gone too far?

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This article considers the legislative changes made at the end of 1985 in respect of the crime of rape. The author notes that the legislation as passed differs from certain recommendations made by professional bodies. There have been substantive changes in new terminology and definitions, and procedural changes to provide more protection to complainants. She argues that the law has certainly not gone too far in the changes that have been made.

On Saturday 7 December 1985 Parliament passed the third reading stages of amendments to the Crimes Act 1961, the Evidence Act 1908 and the Summary Proceedings Act 1957. This package of measures substantially changed the law relating to the definition of rape and the Court procedures governing the offence of rape.

Ninety eight of the 139 submissions on the first Bill and 50 of the 86 submissions on the second Bill, were from groups whose membership was principally female or whose aims were female orientated, and individual women. The Rape Law Reform Bill (No 2) was introduced in August 1984 after the change of government in July of that year. It represented where the Select Committee had reached in its deliberations prior to the proroguing of Parliament.

Some may argue that Parliament succumbed too readily to the pressure of the feminist women groups who presented the greatest number of submissions to the two Select Committees on the Rape Law Reform Bills, and that reform has gone too far. This would almost certainly be the position of the New Zealand Law Society whose submissions were largely not adopted in the final legislation.

On first glance the legislation appears radical: four new offences are introduced into the Crimes Act 1961 by s 128, 129, 129A and 142:

(1) Section 128 Sexual violation –
1 Sexual violation is –
(a) The act of a male who rapes a female; or
(b) The act of a person having unlawful sexual connection with another person.

(2) Section 129 Attempt to commit sexual violation – Every one who attempts to commit sexual violation or assaults any person with intent to commit sexual violation is liable to imprisonment for a term not exceeding 10 years.

(3) Section 129A Inducing sexual connection by coercion –
1 Every one is liable to imprisonment for a term not exceeding 14 years who has sexual connection with another person knowing that the other person has been induced to consent to sexual connection by –
(a) An express or implied threat

Continued from p 407

New Zealand already have to represent all workers regardless of membership in award talks (as reflected by the scope of application of the awards or collective agreements), it would take but a small step to extend such broad coverage to arguably the most important clause of the award or agreement, ie the grievance procedure. The risk (if any) of thus giving free riders an unfair advantage is limited, especially if both suggested legislative changes are considered in a combined fashion. □

1 For a brief but accurate historical overview of the law relating to the obligation to join a union, see A Szakats in *Mazengarb's Industrial Law,* Butterworths, Wellington, s d, p 97-98.

2 Parliamentary question by K. O'Regan to the Minster of Labour, *House of Representatives Order Paper,* no 5, Tuesday 11 March 1986.

3 A Szakats and M A Mulgan, *Dismissal and Redundancy Procedures,* Butterworths, Wellington, 1985 p 16, 17. The Courts occasionally complain about the unsatisfactory legal position of non-union members. See, for instance, *Gee v Timaru Milling Company Limited,* A387/85; (1986) *Industrial Law Bulletin,* 19. There it was observed that "industrial relations law provides remedies for unlawful dismissal for members of unions; however, for persons not belonging to a union, the law has lagged behind . . . One would hope that some reform of the law might be possible".

4 Reference is made here to the National Labor Relations Act and therefore federal legislation. State law, especially the so-called "Right-to-Work" laws in more agricultural parts of the South and Midwest, may render any or all of the foregoing types of union security clauses unlawful. See Goldman, *Labor Law and Industrial Relations* in the USA, Kluwer, Deventer, 1979, p 233.

5 *The New Zealand System of Industrial Relations,* Industrial Relations Centre, Victoria University of Wellington, 1985, p 12. Under the 1985 legislation, the successful applicant is no longer required to make this financial contribution.

In the past, all applications for an exemption also had to be accompanied by a deposit equal to the annual union subscription. The latter requirement has not been abolished entirely in that s 112E of the Industrial Relations Act now requires that every application shall be accompanied by "the prescribed fee", the actual amount of which may change periodically. Since said fee (currently $100) is to be paid by all applicants (irrespective of the outcome of their case) and, henceforth, has no immediate connection to the level of union subscription, it cannot be viewed as an adequate deterrent for free riders. Its purpose is indeed solely to cover the administrative costs of the Tribunal.

that the person having sexual connection or some other person will commit an offence which is punishable by imprisonment but which does not involve the actual or threatened application of force to any person; or

(b) An express or implied threat that the person having sexual connection or some other person will make an accusation or disclosure (whether true or false) about misconduct by any person (whether living or dead) that is likely to damage seriously the reputation of the person against or about whom the accusation or disclosure is made; or

(c) An express or implied threat by the person having sexual connection to make improper use, to the detriment of the other person, of any power or authority arising out of any occupational or vocational position held by the person having sexual connection or any commercial relationship existing between that person and the other person.

(4) Section 142A Every one is liable to imprisonment for a term not exceeding 14 years who compels any other person by the actual or threatened application of force to that other person or some other person, to perform, or to submit to or acquiesce in, any act of indecency with an animal, whether or not involving penetration.

Sexual violation — a term without a commonly defined meaning — now includes rape. It is possible for any person to have an unlawful sexual connection with any other person regardless of their sex. For the purposes of ss 128 and 129A sexual connection (as defined in s 128 (3)) means —

A person has unlawful sexual connection with another person if that person has sexual connection with the other person —

(a) Without the consent of the other person; and

(b) Without believing on reasonable grounds that the other person consents to that sexual connection.

An objective test of criminal liability is introduced. There is a move away from the tradition of the open Court. There is a presumption that a complainant's evidence will be in the form of a written statement and District Court Judges, not JPs, are to preside over the preliminary hearings of the newly created offences. The corroboration warning is no longer required, and whenever it applies a Judge may explain to a jury the good reasons as to why a complainant refrained from or delayed in making the complaint initially. There are further amendments to the most recently introduced 1977 changes to the Evidence Act 1908 s 23 limiting the evidence of witnesses in sexual cases. Rape in marriage becomes legally possible and the limited protection of the Family Proceedings Act 1980 is removed. (The Family Proceedings Act 1980) amended s 128(3) of the Crimes Act 1961. It narrowed the spousal immunity so that it applied only when the wife and husband were living in the same residence at the time of the offence.

These changes are substantial and single out the offences in the amended ss 128, 129, 129A and 142A of the Crimes Act 1961 as a separate "special category of sexual offences" to be treated differently by the justice system. The specially created procedural provisions do not apply to any other sexual offences in the Crimes Act such as s 130 incest, s 135 indecent assault on a woman or a girl, s 140 indecency between man and boy, or s 142 sodomy. How long will it be before further amendments are suggested to allow the provisions to apply to all sexual offences?

While it may not generally be desirable in principle to have special provisions specific to offences, it cannot be said that this has resulted from the legislation being rushed through in a typical pre-Christmas flurry of law making. Many of the changes were in the first Rape Law Reform Bill introduced in December 1983, which was the result of eighteen months of research, public meetings and consultation with a diverse range of people who impact on how rape victims and the offence of rape are treated in the justice system.

Rape with a new label?

Rape in the narrow sense as it has been traditionally understood is now only one of several possible sexual offences all with the same maximum penalty of 14 years. The large umbrella offence of sexual violation includes, in addition to rape, acts of a person who has unlawful sexual connection with any other; this would incorporate anal and oral intercourse, and the insertion of any objects into the vagina or anus. However the offence of sodomy still remains. As consent is a defence for sexual violation, but not for sodomy, it is unlikely that charges for this kind of behaviour will be made under the newly created offence.

The changes in legislation provide for two parallel offences to which exactly the same procedural and evidentiary rules apply. However when viewed from the perspective of actual behaviour there is some overlap with existing sexual offences. (Department of Justice, 1983, "The Victim Survey" *Rape Study Research Report 1; Rape Study Volume 2,* pp 102-105.)

The Justice Department research revealed that from the victim's perspective all these acts were equally degrading and humiliating and the nicety of the legal distinction between rape and some of the more serious indecent assaults was not apparent. By using the umbrella offence of sexual violation Parliament has attempted to retain rape as a specific offence committed by men, parallel with other equally debasing acts of sexual violation which are defined as gender neutral. It is not so much that rape has a new label, but rather that the legislation seeks to make some other sexual acts equally deplorable.

Inducing sexual connection by coercion

Proponents of the view that the reform has gone too far may argue that the new offence, inducing sexual connection by coercion, s 129A, is unnecessary and irreconcilable with s 128A:

Section 128A Matters that do not constitute consent to sexual connection —

(1) The fact that a person does not protest or offer physical resistance to sexual connection does not by itself constitute consent to sexual connection for the purposes of s 128 of this Act.

(2) The following matters do not constitute consent to sexual connection for the purposes of

s 128 of this Act:

(a) The fact that a person consents to sexual connection by reason of –
  (i) The actual or threatened application of force to that person or some other person; or
  (ii) The fear of the application of force to that person or some other person:

(b) The fact that a person consents to sexual connection by reason of –
  (i) A mistake as to the identity of the other person; or
  (ii) A mistake as to the nature and quality or the act.

Broadly s 129A covers situations where the victim consents to the sexual connection because of threats of criminal behaviour, blackmail, or abuses of power or authority arising from the occupational positions or the commercial relationship between the parties. The argument is sometimes heard that if there were threats of this kind then surely there is not consent in terms of s 128A, so why create a new offence?

To argue thus denies the reality of rape revealed by the Department of Justice rape study reports (see above). The kind of behaviour covered by s 129A had not previously been held to constitute an offence, yet women perceived it as involving situations where consent was not freely given. (A significant number of submissions on the first Bill (which did not include this offence) recommended that circumstances constituting that consent was not given, should be broadened to include: actual or threatened non-physical coercion, economic blackmail, public humiliation, abuse of authority, deprivation of employment opportunities or property and fear of future punishment, for instance.) There is no precedent to support the proposition that the Courts would find that such conduct amounted to sexual violation without some statutory signposting. The police, for example, have always been unlikely to lay charges in such situations as are now included in s 129A offences. There was no legal redress in such circumstances previously.

By creating a separate offence the difficulties of proving lack of consent are avoided, but real problems associated with proving the offence nevertheless remain.

It is unlikely that initially there will be large numbers of s 129A charges reaching the Courts. However the criminal law now provides some protection where it did not before. The first cases will be important in determining how widely the police and the Courts interpret the wording of this section.

Mens rea defined for sexual violation

The final form of the legislation is a considerable simplification over the earlier Bills in formulating the requisite states of mind. This must be applauded. The test which is now applied to both forms of sexual violation (s 128(1)(a) and (b)) is that where the person acts "without believing on reasonable grounds that the other person/she consents to that sexual connection" (s 128(1A)(b) and s 128(1B)(b) Crimes Amendment (No 3) 1985), then mens rea is established.

In arguing that the reform has gone too far (in their submissions both the Law Society and the Criminal Law Reform Committee argued against adopting the test of reasonableness), opponents of this formulation might make some of the following points:

— that an objective test is contrary to criminal law principles and any departure from subjective criminal intent is unsound in principle;
— that even if an objective test is acceptable this particular formulation is unnecessarily harsh for those who are genuinely unable to understand whether consent was given (the intellectually handicapped for instance);
— and that the accused who do not have any intent to have sexual connection without consent may be wrongfully convicted when they have an honest belief that the other was consenting.

The statute represents a reversal of *D P P v Morgan* [1975] 2 All E R 347, which held that a mistaken belief as to consent did not have to be a reasonable one, and the legislation has not followed the recommendations of the 1980 Criminal Law Reform Committee Report (Criminal Law Reform Committee, 1980; *Report on the Decision in D P P v Morgan).*

However support for the belief that reasonableness should not be a requirement has no place in the 1980s. It assumes that one proceeds in sexual relationships on the basis that consent has been given unless there is behaviour to the contrary. It denies the reality of behaviour frozen by fear. As long as the accused honestly believes, however unreasonable that belief may be, the accused escapes liability. It is not desirable for sexual relationships to proceed on "a consent unless..." basis. Rather if there is any possible doubt about consent then the other person should be consulted and their wishes positively established first. It is hoped that this requirement of reasonableness will encourage the accused (and perhaps everyone else) to think about consent more fully.

The principle of an objective test of criminal intent has not been unassailable in the past; nor is the notion of reasonableness a new departure for the criminal law.

It is uncertain whether the change will actually make a great deal of difference to the practical operation of the law (for instance before *Morgan* it was not unknown for Judges to direct juries on the requirement of a reasonable belief in consent). However the law now states that it is not enough to assume consent. At the very least this is an important symbolic statement as it upholds the integrity of women who will continue to form the majority of victims.

In arriving at an objective and reasonable test Parliamentarians rejected an alternative put to them by at least one feminist group, that the test should be that of absolute liability wherein once the existence of the prohibited act was established the only issue remaining was whether the victim consented. If s/he did not the offence would be proven. Also rejected were submissions urging that consent be defined in a positive manner, and that the persuasive burden of proof as regards consent should lie on the accused. For some groups therefore the law changes have certainly not gone far enough.

Oral evidence: once or twice?

A complainant's evidence shall be given in the form of a written

statement and the complainant shall not be examined or cross-examined on that statement at the preliminary hearing unless the complainant nevertheless wishes to give evidence orally, or the Judge orders so, either on the Judge's own motion or after application by the defendant (Summary Proceedings Amendment Act (No 4) 1985 s 185C).

Why has a special provision been accorded the victims of these sexual offences? It might possibly be questioned on the bases that:

— the complainant would benefit from a trial run at giving evidence, and the experience gained from a rehearsal outweighs any possible benefits to the complainant of giving evidence only once; and
— the lack of an oral hearing would make it less likely that defendants will plead guilty prior to trial; and
— there is a natural right for all defendants to hear their accusers; and
— special procedures should not be provided solely for particular offences.

But if proponents of such arguments thereby suggest that the law has gone too far, they show firstly a lack of awareness and sensitivity to the complainant's position, and secondly a misunderstanding of the purpose of the preliminary hearing. Let us examine each of these allegations.

Complainants in the Rape Study (op cit pp 75-78) found that giving evidence in Court had elements of reliving the rape experience; the Court process was a barely tolerable ordeal. In the High Court they had the overwhelming feeling it was they who were on trial. If complainants had to survive giving evidence only once that was preferable to having to repeat the experience.

To compensate for possible poor testimony from complainants giving evidence orally once, prosecutors might spend more time with complainants before a trial, establish a rapport with them and prepare them psychologically for counsel's questioning, which should be possible to achieve without coaching.

There is no authority to reveal that defendants are more likely to plead guilty after they hear the oral evidence of witnesses, although this is sometimes argued. The Rape Study (Department of Justice, 1983; "Rape Complaints and the Police" *Rape Study Research Report 2; Rape Study Volume 2* p 55) stated that it was not easy to ascertain why the defence proceeded to the preliminary hearing rather than electing to plead guilty earlier. In six of the 94 rape and attempted rape cases, defendants pleaded guilty at the conclusion of the preliminary hearing, but in three of these six cases the defence had been amenable to having all the prosecution evidence in statement form anyway. Furthermore these changes for specific sexual offences may be part of a move towards admitting written evidence generally (Department of Justice, Planning and Development Division 1983: *The Effect of Written Depositions at Preliminary Hearings;* Study Series No 9). The majority of committals in the United Kingdom are done on the papers, and both South Australia and Victoria have enacted similar legislation to our new rape laws.

What is the true purpose of a preliminary hearing? Surely it is to ascertain whether or not there is a prima facie case against the defendant. A "right" to test by cross examination is incidental to this purpose. If the Judge is not satisfied that this purpose is met, and there are wide grounds for the Judge to so order, then the prosecution's case will have to be established orally. The grounds are:

(i) that the written statement of the complainant together with any other evidence tendered is not sufficient to justify putting the defendant on trial; or
(ii) that it is necessary in the interests of justice that the evidence be given orally (Summary Proceedings Amendment Act (No 4) 1985 s 185C (1)(b)).

If the grounds for the exemption were to begin to be applied as a matter of routine this would be to defeat Parliament's intention. Parliament has sought to protect the defendant's position in this balancing act. Earlier drafts at the Bill stages did not specifically provide for defendants to apply for evidence to be given orally.

These special provisions (a presumption in favour of written evidence, limiting publication of particular evidence, and non-disclosure of address and occupation) should apply to all crimes of a sexual nature (ss 127-144 Crimes Act 1961), and there may be calls for the legislation to be so amended. (Why could not the politicans have thought this far during the extensive reform?) It will cause great awkwardness for the Court where multiple charges are laid such as indecent assault and attempted sexual violation; and separate provisions apply to the two offences. It is true that significant changes to procedures have been made, but the argument that it is desirable to assess how well they work before extending them to other offences belies a lack of conviction in their effectiveness.

Closing the Court

When the complainant in a case involving sexual violation is giving oral evidence, an amendment to the Crimes Act 1961 s 375(a) (2) limits the people who may be present in the courtroom. Effectively those excluded are general members of the public, friends and family of the defendant, although there is provision for the Judge to expressly permit any person to be present. In many ways the new legislation is little more than an extension of already existing provisions in the Criminal Justice Act 1985 which gives the Court power to clear the Court, but it does appear to tilt more in the complainant's favour. However it still does not go as far as some submissions which asked for the Court to be closed for the whole trial, or that the accused be screened from the complainant's view, or even that the defendant be excluded from the Court.

As with the provisions relating to written evidence several submissions called for whatever closure provisions were adopted to be extended to all crimes of a sexual nature, but this fell upon deaf Parliamentarian ears.

Significant changes have been made to the laws pertaining to rape and related offences. As to how these are now defined it will take time for the new definitions to be accepted, and any inconsistencies resulting from the changed definitions to be established. For many victims and women's groups the procedural changes will go only a small way to affording more protection to complainants who have often felt they were on trial. There may well be calls for the newly created legal procedures to apply to all sexual offences. The law has certainly not gone too far. □

Books

Anatomy of a Jury

By Seymour Wishman *Published by Random House*

Reviewed by Jeffrey Miller

This review orginally appeared in the Canadian publication The Lawyers Weekly *vol 6 No 11 of 11 July 1986. This publication was until recently called* The Ontario Lawyers Weekly. *The review is reprinted with permission.*

When Patty Hearst was on trial for robbery, lawyer F Lee Bailey told her to wear an oversize dress so that the jury would find her frail and pathetic. Then there was the San Francisco advocate who won an acquittal for a group of striptease dancers by demanding that the arresting officer show the jury the difference between a kosher bump-and-grind and an indecent one.

A pulchritudinous Chicago woman was acquitted of murder after her lawyer challenged the jury during summation, "I ask you, ladies and gentlemen of the jury, are these the legs of a murderess?" And possibly the most ardent defender of all drank a vial of poison to prove to the jury it wasn't.

Criminal lawyers will be familiar with the litigation legends in *Anatomy of a Jury* by Seymour Wishman (Random House, $26.25), but everyone can admire Mr Wishman's popular account of the jury in criminal trials. By setting the book up as a hybrid murder mystery/intensive courtroom tour, Mr Wishman brings a mass of facts and statistics to vibrant life.

Mr Wishman is a criminal lawyer but also a novelist, and expertise in both areas is much in evidence here. The book begins in the cruiser of a middle-aged cop who has been pastured out to a quiet New Jersey suburb. Somehow, although he has patrolled this beat for 18 years, the air-conditioned sedan that goes with such faithful service has eluded him.

Two streets up, a fourteen-year-old boy walks home from school, playing hooky from swimming practice. When he enters the livingroom of his parents' house, he finds a black and white rope. He follows the rope into the kitchen. It ends around his mother's neck, where she lies naked and battered on the floor.

A suspect is arrested – a tough black "bodyguard" hired by the woman's husband after he was threatened by his mistress's boyfriend – while, downtown, a Judge pushes a computer button to select the next jury pool: a workaholic engineer; an old woman who, to improve her chances of jury duty, will not wear her hearing aid to the courthouse; a down-and-out pet shop owner whose girlfriend has just disappeared; a young actress who takes a professional interest in litigation as "performance"; an elderly Jewish refugee who would rather live out his days in nervous obscurity. . . .

Through all the players in this collation of real cases – the legal personnel, the jury pool, the witnesses, the victim, the accused – Mr Wishman gives us the modern jury in its historical context. And his style, that of an intelligent and clever conversationalist, is exactly suitable.

The deluge of information would have drowned a lesser writer and his readers with it: US defendants (accused) testify in 82 percent of trials. Seventy-four percent of these have criminal records, which are thus open to presentation in evidence. The conviction rate drops more than 20 percent when women are on juries, although women are more likely to convict for sexual crimes than property crimes. Housewives are the most likely of all people to convict, except Judges, who would convict twice as often as juries.

The greater the difference between the income of juror and accused, the more likely a conviction; US jury pay ranges from two dollars in parts of South Carolina to 40 dollars in Middlesex County, Massachusetts; 22 percent of US Judges were prosecutors.

Fifty percent of peremptory challenges (when jurors are dismissed without cause) are based on the juror's occupation; prosecutors like to pack the jury with "men, Republicans, the prosperous, bankers, engineers, and accountants", defenders plump for "women, Democrats, poorer people, social scientists, and minorities".

Because of increasing reliance on scientifically-directed jury challenges, Mr Wishman pays close attention to the role of the psychologists and other social scientists some lawyers hire as consultants. The 1971 acquittal of the Berrigan brothers on charges of conspiracy to kidnap Henry Kissinger popularised the use of these consultants.

But because of volunteer help, the survey work in that case – which determined that the best "defence juror" would be 30, black, "counter-culture" oriented but not university educated, oppose the Vietnam war, and have a male relative at or near draft age – cost only $450. Generally, only the rich, or those who have a network of support, can afford jury consultants. The survey in the Joan Little case over ten years ago cost $38,992.

Although in some quarters the jury system is embattled these days, Mr Wishman concludes that, even in its truncated six- or nine-juror format, it does what it was intended to do: act as the people's restraint on the state's rush to judgment.

He does not forget, however, its several weaknesses. Even if everyone could afford "scientific jury selection", it is the same sort of jury-packing that has often denied US blacks (and women) a right to be tried by their peers. Especially zealous jury "scientists" scour financial records for reading, buying, travel, and social habits, and "some investigators have even checked out the lawns and the bumper stickers of prospective jurors".

Much of Mr Wishman's data is distilled from the Chicago Jury Project, a remarkable piece of research whose only great weakness is that it is more than 30 years old. But Mr Wishman has taken pains to update the data wherever he can, and it is unlikely that there is a more readable book of this scope on the Anglo-American jury system. □

A Matter of Principle

By Ronald Dworkin. Published by Harvard University Press. 480pp US$25.00.

Constitutional Choices

By Lawrence H Tribe. Published by Harvard University Press. 480pp US$29.95.

The Federal Courts: Crisis and Reform

By Richard A Posner. Published by Harvard University Press. 384pp US$24.00.

Reviewed by Terence J Pell, Attorney Advisor and Special Assistant to the Secretary of Education of the United States of America.

This review is reprinted with permission from the American quarterly The Public Interest *published from 10 East 53rd Street, New York, NY10022, USA. The books reviewed all touch in some way on issues that could be very relevant to the New Zealand situation if the Bill of Rights is enacted as superior law.*

Ronald Dworkin warns his readers that "the man now president may appoint enough Supreme Court Justices to set the character of that commanding institution for a decade". That dawning realisation has occasioned a spate of recent pronouncements by legal scholars. The point made by many seems to be that President Reagan's appeal to judicial restraint is only a smokescreen for the right-wing agenda. A "Reagan Court," these thinkers caution, would use the rhetoric of judicial restraint to further its own goals, such as prohibiting abortion, permitting school prayer, enforcing free-market rights, and so forth. These same scholars, of course, have long admired the "living" Constitution for its malleable power to support popular causes. Now we are told, however, that judicial restraint, long thought to be empty and formalistic, is really ideological and unprincipled, no matter how popular it may be.

As might be expected, then, these three books, all published within the last year, try to get constitutional law back onto neutral ground. They attempt to do so generally by transforming principles of constitutional law into issues of philosophic inquiry. For these authors, the criterion of a "good" judicial decision is its value as a statement of moral or scientific truth. Once constitutional law is understood principally as an exercise in theory, then judicial restraint has no more claim to be the favourite mode of thought than does judicial activism: The legitimacy of each depends only on the ideological bunker from which it is tossed.

Philosophical crisis

Dworkin's *A Matter of Principle* and Tribe's *Constitutional Choices* are both collections of essays, all of which have been published elsewhere. Both books share a single concern: Should the Court go beyond the Constitution and base its decisions on one or more theories of political morality? Both say the answer is yes. Yet both struggle to make sure that the theory of "political morality" in question rests well within boundaries defined less by politics and morality than by familiar leftish orthodoxies.

For Dworkin, the crisis confronting the judiciary is a philosophic one, and the solution is for Judges to become philosophers. The rule of law, Dworkin tells us, requires that a Judge decide particular cases in such a way as to create "a coherent and uncompromised vision of fairness and justice". Central to Dworkin's conception of the role of the philospher-Judge is his by now well-known distinction between principle and policy, a distinction that, he tells us, "defines the interplay between practical problems and philosophic theory". Put crudely, Dworkin's view is that a Judge has an obligation to decide cases on the basis of political morality when the case involves an individual's right; but when the issue at hand concerns only a community-wide goal, the Judge must defer to legislative authority. Dworkin informs us that "legal analysis, in the board sense, is more concrete than classical philosophy, more principled than political craft. It provides the right theatre for philosophy of government".

If law is a type of theatre, Dworkin's essays are intended chiefly as plausible scripts. They do not refine the distinction between a principle and a policy. Rather, they proceed by way of example. Thus, in his essay on reverse discrimination he tells us that although there is no right to affirmative action, no right can be found to conflict with it either. Each instance of affirmative action must be judged on its own, by "weighing its practical costs and benefits". By the same token, the principles of freedom of sexual choice and moral independence preclude censorship of pornography, even if certain such choices do not make the community better in the long run.

Having discovered that the judicial enterprise is to be conducted as a series of moral symposia, Dworkin next claims that a philosopher-Judge will inexorably apply only those moral principles as might be comfortably located within a liberal conception of the welfare state. This is neither coincidence nor, it seems, an embarrassment. It is no coincidence, because Dworkin tells us it is not: "The obligation to show the political character of the decision as a decision about individual rights . . . must act as a general liberal influence".

That Dworkin's theory generates only liberal results turns out, moreover, to be its primary justification. *A Matter of Principle* illustrates Dworkin's well-known, albeit watered-down, version of the method of moral theorising of John Rawls. In his earlier work, *Taking Rights Seriously*, Dworkin explained that a Judge may properly rely only on those principles of political morality that are in "reflective equilibrium" with considered moral intuitions. Dworkin's latest book may be read as a series of illustrations of "reflective equilibrium". Each essay attempts to demonstrate how the use of political morality is not only consistent with our intuitions about how a democracy is supposed to work, but consistent too with the

results that Dworkin and others hope a democracy will generate: free sexual choice, free expression, affirmative action, state support of the arts, and so forth. Thus, because the use of political morality is in "reflective equilibrium" with Dworkin's considered intuitions, it is justified as a method of judicial decision making.

A Matter of Principle does not significantly advance the argument put forward in Dworkin's earlier work, but it does confirm Dworkin's characteristic inability to distinguish between method and result. For Dworkin, it seems, a method of legal justification is itself justified if it produces characteristically liberal results. This view of justification, of course, completely obscures the nature and end of legal "rationality". If nothing else, legal reasoning must proceed on the assumption that there is a distinction, and an important one, between a moral ideal (however arrived at), and an actual law. What is so troubling about Dworkin is that he only pretends to preserve the distinction in the guise of such conceptual contraptions as "reflective equilibrium". In fact, he disregards the distinction altogether.

Ephemeral style

Harvard law professor Laurence H Tribe's *Constitutional Choices* rejects at the outset any attempt to provide a method or theory of adjudication – attempts that Tribe describes as the "antithesis of humane struggle with those commitments and visions that are the stuff of genuine constitutionalism". Like Dworkin's, Tribe's book adopts the method of argumentation *cum* illustration, but his style is even more ephemeral. "This book is about our making of constitutional choices," Tribe says. Yet, "it does not offer a theory of choice . . . it is an experiment in choosing".

Constitutional Choices begins with four short chapters on the legitimacy of the judicial enterprise – in the words of one of their titles, "The Futile Search for Legitimacy". In Tribe's view, constitutional theory necessarily consists of the following either/or: *either* constitutional decisions reflect an "external . . . eternal, impersonal and inexorable . . . 'will of the law'," *or* constitutional decisions must be nothing more than the "whimsical . . . personal and unconstrained 'will of the Judges' ".

Thus, Tribe rejects the very possibility of providing criteria by which a good Judge could make constitutional choices. He goes on to say, however, that he does not "mean to play the cynic or the legal nihilist".

Thus does he address himself to his left-wing colleagues of the "critical legal realist" school: "I am . . . not writing for those who have convinced themselves that 'anything goes' as long as it helps end what they see as injustice. . .".

Having told us what constitutional adjudication is not, he can only offer us the barest hint of what it is – and what it is depends, it seems, upon a "repeated act of faith" that "constitutional interpretation is a practice alive with choice but laden with content; and that this practice has both boundaries and moral significance not wholly reducible to, although never independent of, the ends for which it is deployed". Hardly a clarification – but, of course, it is not meant to be. For Tribe thinks that the attempt to ground constitutional interpretation upon some form of legitimating theory is futile: "There is no escape from the need to make commitments to significant premises," he tells us. Again, one wants to object that one point of such theories is to show the "significant premises" upon which constitutional adjudication *does* rely, and to say something about the legitimacy of those premises.

The remaining two sections of *Constitutional Choices*, which focus on the separation of powers and substantive constitutional rights, are supposed to illumine the choices actually involved in making constitutional law by describing the choices Tribe himself has made. However, Tribe's failure to delineate his standards of judgment renders nearly incoherent much of the substantive discussion of the book.

Like Dworkin, Tribe advances his convictions largely by trivialising the alternatives. Like Dworkin, too, Tribe realises that moral and political attitudes play decisive roles in debate about constitutional first principles. But instead of being liberated by that insight, Tribe is very nearly paralysed by it. His answer to the problem that "*all* social description and observation are bound up in the describer's point of view" is to understand and expose his own viewpoints and values "as starkly . . . as possible". Unfortunately, in this case, such stark exposure obscures rather than reveals truth.

Refreshing practicality

Richard A Posner's *The Federal Courts* offers refreshing practicality after the abstractions of Dworkin and Tribe. Posner, a US Appeals Court Judge for the Seventh Circuit, devotes his book almost exclusively to the most concrete manifestation of the judicial "crisis": the burgeoning caseload at the appellate level. The first portion of the book offers statistical data establishing the dimensions of the problem, and Posner finds that appellate Court cases have increased by 686 percent since 1960.

As might be expected of the chief representative of the Chicago "law and economics" school of legal analysis, Posner organises his data according to the principles of an economic model. This analysis treats judicial services as a product "whose output, like that of other products, is governed by the laws of supply and demand". Posner attributes the explosive demand for the services of the federal judiciary to two factors: The price of the product has fallen, and the value of the product to the consumer has risen. The price has fallen because of inflation's effect on the minimum dollar amount in dispute needed to litigate a case in federal Court; and the value of federal Court jurisdiction has increased because of the expansion of the number and scope of federal rights.

The remainder of the book consists of a "general reconsideration of the federal judicial process". By applying his model of economic analysis, Posner concludes that federal jurisdiction should be limited to those cases involving either cost-benefit "externalities" or areas of "especially complex federal law". Posner would also limit the Court's Fourteenth Amendment power to invalidate state laws to only those cases where a state law violates a "fundamental social norm held by most of the nation". He proposes to have the Supreme Court analyse the state statutes of all fifty states in order to

determine which social norms are part of such a national consensus. To the possibility that twenty-six states might someday adopt the Islamic code of criminal justice, Posner simply asks, "who are the Judges to try to stop such revolutions?"

Posner estimates that the redistribution of the federal caseload according to his principles would result in state Courts receiving 20 percent of the cases now before the federal district Courts, and 21 percent of the cases now before Courts of Appeal – a reassignment that, unfortunately, "would only postpone the ultimate crisis a few years". accordingly, Posner turns his attention to judicial "self-restraint" as a "natural prescription for a Court system suffering from acture overload". Posner's conception of "restraint", though, is disappointingly superficial: It means merely the "Judge's trying to limit his Court's power over other government institutions". As his definition suggests, Posner rejects the idea that there are principles at stake in the debate over "activism" and "restraint". In fact, he believes that the debate is scarcely over principles at all: both "activism" and "restraint", in his usage, are appropriate at different times and places, depending upon the substantive policies of the other branches of government.

Posner's analysis of so-called "hard cases" – those in which prior law does not unambiguously determine a clear outcome – is eerily similar to Dworkin's: a Judge may use any principle "if and only if the ground of decision can be stated truthfully in a form the Judge could publicly avow without inviting virtual universal condemnation by professional opinion". In other words, "the 'unprincipled'. . . are simply those grounds that at the particular historical moment are so generally rejected that they would never be announced as the true grounds of decision". To his credit, Posner notes that on his theory of decision making " 'principled' is only a tepid compliment".

Posner's discussion illustrates the general problem of attempting to graft cost-benefit analysis, or any other type of functionalist analysis, onto legal decision-making. Posner inevitably assumes the validity of one or two very general criteria of judicial decision-making that, unfortunately, he does not elucidate. For example, he attaches great importance to the "quality" of a judicial decision and argues that the "quality" will be improved if the federal caseload is reduced. It is hard to dispute the importance of such a general goal, and it is easy to agree with Posner that a reduced federal caseload might in general improve the "quality" of federal decisions. But just when we need to know exactly what he means by a "quality" decision, Posner's argument proves surprisingly empty. For example, he tells us that a Judge should not apply his own principles of political morality (in Posner's own case, the principles of cost-benefit analysis) to decide a case before him unless and until "the springs of authoritative guidance run dry". Well enough – but precisely what is contested in hard cases is just whether the "springs" have run "dry". Moreover, Posner's suggestion, that a Judge use any principle that can be applied consistently without fear of public disapprobation, is just as empty. Where Dworkin and Tribe obscure the problem of judicial legitimacy with the rhetoric of moral theorising, Posner substitutes the false precision of cost-benefit analysis. As with Dworkin and Tribe, the result of Posner's analysis is a very unprincipled form of decision making, where the ultimate values, though neutral and "value free", provide no constraint on judicial power.

Judicial restraint

At their root, these books share the conviction that judicial restraint is no more a question of social policy than, say, controlling inflation or regulating toxic waste dumps. In Dworkin and Tribe's view, the principle of judicial restraint is a smokescreen for right-wing objectives, so they try to show that judicial restraint could never serve as a doctrine of constitutional interpretation. Dworkin thinks it is a bad doctrine; Tribe thinks all doctrine are bad. Posner thinks the concept empty, obscuring as it does principles of institutional cost and benefit. Posner understands judicial restraint to reflect only the momentary distribution of power between competing political institutions.

These self-appointed guardians of the Constitution effectively trivilise the principle of judicial restraint by denying that it has anything at all to do with principle. For if judicial restraint is just one more policy preference to be tossed around with the rest, it is all too easy to ignore. If a Judge can identify a policy that is more important than judicial restraint, he will inevitably discard restraint in favour of that policy. Can it ever be said that attention to mere judicial formality is more important than some goal or end to be achieved? It is not surprising that these authors conclude that judicial restraint is secondary to redressing discrimination, protecting the right to an abortion, and even reducing the federal caseload.

It is in the nature of a democracy to be deeply skeptical of legal principles, which are viewed as "mere" formalities to be discarded if they stand in the way of the "people" achieving a more immediate objective. In appearance, at least, contemporary constitutional scholarship stands well within the tradition of common-sense skepticism. Legal scholars replace a concern for the manner in which a judicial decision is formally justified with an investigation into the end to be achieved, whether that be the securing of philosophical truth or the readjustment of institutional workloads.

At its foundation, however, this approach to constitutional law is as uninformed by an understanding of populist skepticism as it is unmotivated by an understanding of the Constitution. For all of their sensitivity to historical and political context, none of these thinkers seems aware of the peculiar nature of his own anxiety over legal formality. The argument proceeding from the variety of laws to the conclusion that law is mere convention is as old as philosophy itself. Only among constitutional scholars, however, does this conclusion proceed less from discomfort with the conventional or formal aspect of law than from a thoroughgoing anxiety about the possibility of principled argument *per se*. In their view, no meaningful debate of fundamental issues is

Continued on p 424

The challenge of a Bill of Rights: A commentary

By Philip Joseph, Senior Lecturer in Law, University of Canterbury, Barrister and Solicitor of the High Court

This commentary is the revised text of a speech given by Mr Joseph at the New Zealand Political Studies Association Conference *at the University of Canterbury, 14-16 May 1986. The Conference section,* The Bill of Rights, *comprised papers delivered by the Minister of Justice, the Rt Hon Mr Geoffrey Palmer, and Dr Jerome Elkind, Senior Lecturer in Law at the University of Auckland with commentary by Mr Joseph. Mr Palmer's paper,* Bill of Rights – Some Practical Examples II, *addressed the practical implications of a Bill of Rights, alluding to five current New Zealand statutes which would invite judicial scrutiny under the draft Bill. Dr Elkind's paper,* The Challenge of a Bill of Rights, *was based upon his monograph,* a Standard for Justice (1986, OUP) *(co-authored with A Shaw). Dr Elkind proposed several changes to the draft Bill, advocating more faithful adherence to the International Covenant on Civil and Political Rights on which the draft Bill is in part modelled. Mr Joseph structured his commentary on Dr Elkind's paper albeit with references also to the Minister's speech. A response by Dr Elkind to this present commentary is published at p 423.*

A Introduction

It has been said that if the Bill of Rights proposal is to succeed, there must be more discussion and debate about the issue. The speeches this morning will no doubt contribute in small measure. Broad terrain was traversed in eighty minutes. Dr Elkind discussed the nature and operation and effect of the proposed Bill of Rights: how it would function as a criterion of legal validity; affect discussions between lawyers and their clients; and enhance public perception of civil and political rights. The Minister sought a more "practical dimension" giving several illustrations of how a Bill of Rights would cull statutory excesses that threaten individual liberties. He instanced the Clutha Development (Clyde Dam) Empowering Act 1982 (granting planning consents withheld by the Planning Tribunal), s 81 of the Crimes Act 1961 (dealing with seditious intent), the Whangarei Refinery Expansion Project Disputes Act 1984 (creating a criminal offence of picketing by failure to comply with a police direction); the Customs Act 1966 (authorising general search warrants and containing reverse onus provisions); and the Public Safety Conservation Act 1932 (conferring "unfettered power" to make regulations such as the Waterfront Strike Emergency Regulations 1951).

My official appellation this morning is "discussant", which I assume to mean "commentator". The Minister very graciously apologised for being unable to supply an advance copy of his paper. Dr Elkind's paper I received yesterday. So I propose to take points from Dr Elkind's address and dovetail comment I would make with regard to the Minister's speech.

B The threshold question

Dr Elkind began by confessing to impatience with the "endless debate" whether we should have a Bill of Rights. He said, "In my view the debate, by never moving away from that question, has hindered discussion and analysis of the actual draft [Bill of Rights]." But few lawyers are as enthusiastic for a Bill of Rights as Dr Elkind. It was Machiavelli who said, "Let no man who begins an innovation in a State expect that he shall stop it at his pleasure or regulate it according to his intention." Whether New Zealanders really want a Bill of Rights is the threshold question, the answer to which will depend only in part on analysis of the draft legislation currently before the Select Committee (see the Government White Paper, *A Bill of Rights for New Zealand*, presented to the House of Representatives by leave of the Minister of Justice on 3 April 1985).

Many things may be said against a legal mechanism that substitutes judicial for political judgment. But few as quotable as this:

> There are many definitions of democracy, but government of the people, by the Judges, for the lawyers, is not one of them. (D Dugdale, "Commonsense about the Bill of Rights: A criticism of Geoffrey Palmer's super-law" [1986] NZLJ 127, at 128)

That quip may be unduly cynical because there does exist the theoretical possibility of pernicious legislation by a Parliament that can make or unmake any law by simple majority in the House. Dr Elkind said there is something fundamentally wrong with an allocation of power where there is even a "*theoretical* possibility" of legislation that would deny civil and political rights. To similar effect, the Minister:

> Without an effective controlling mechanism [on what Parliament may or may not do] there must always be an inherent danger of infringement of rights and freedoms.

The past President of the Court of Appeal, Sir Owen Woodhouse, in his 1979 *J C Beaglehole Memorial Lecture*, "Government under the Law", quoting English Queen's Counsel, Anthony Lester QC, "Democracy and Individual Rights" (1968), at p 5, warned of the sacrifice by Parliament to popularism during some future period of social tension. Sir Owen once used this analogy when reflecting upon the need for constitutional protection. "Like fire and other kinds of insurance the protection is normally not needed." "When it is," Sir Owen observed, "the need arises very suddenly."[1]

This is an answer to commentators who would insist on constitutional crisis before considering reform: homeowners take out fire insurance as protection against the mere risk, not the likelihood, of fire damage. Similarly, can we be sure that, in some future period of tension or instability, public order and national security will not be purchased at the expense of minority interests? Events from the 1970s have exposed New Zealand's institutions to scrutiny, revealing what many now see as the fragility of our constitutional system. Pervasive government powers under the mantle of parliamentary supremacy is today a familiar theme. There is less confidence in the adequacy of common law safeguards.

In Sir Owen Woodhouse's 1979 *J C Beaglehole Memorial Lecture*, "Government under the Law", Sir Owen observed that Parliament recognises ultimate limits on its constitutional power to legislate. Sir Owen would therefore refute Elkind's statement this morning when he said, "*In fact* and in theory there are no limitations on the power of Parliament to pass legislation." Whatever the legal theory, there *are* ultimate limits on legislative power — whether sanctioned by revolution, active or passive public resistance or simply instinctive commonsense. "If that be so," asked Sir Owen, "why should there be hesitation to make plain [through a Bill of Rights] what some may be ready to ignore?" I wonder whether many today would not concede the case for some insurance against the "inherent danger" and "theoretical possibility" addressed by this morning's speakers.

There is a further consideration, less dramatic than the spectre of totalitarianism through democracy. Namely, the erosion of political and civil rights through well-intentioned bureaucratic excesses perpetrated under the broad discretions accorded the Government by modern legislation. Sir Robin Cooke in the 1984 F S Dethridge Memorial Lecture, "Practicalities of a Bill of Rights" (reprinted in (1984) 112 *Council Brief* at p 4 *et seq* under the title "Bill of Rights: safeguard against unbridled power"), reflected that:

> . . . an invasion of liberty, by the authority of an ordinary Act of Parliament, is too easy in New Zealand . . . if only because of the complexity of modern legislation.

The question is whether a Bill of Rights is not a logical culmination of the judicial activism observed in our administrative law from the 1970s. From the "high ground" taken by our Courts in reviewing executive action, it may not be such a quantum leap in our jurisprudence to extend the Courts' control to legislation as well as executive action under a Bill of Rights. This is not to ignore the added legal complexities and uncertainties a Bill of Rights would create. It *would* make the law more complex (constitutional challenges would expand the grounds for litigation) and more uncertain (although the point may be made that the law is already uncertain and will become increasingly so without a Bill of Rights).

C Entrenchment

Elkind ventured that the Bill of Rights will launch a legal revolution. This is a statement about the doctrine of legislative supremacy. One appreciates that political scientists are not much concerned with received legal theory. They are concerned with observable political conduct and they observe that, by and large, New Zealand governments do not engage in manifestly absurd or malevolent legislation. Still, I would remind them of the doctrinal straitjacket parliamentary sovereignty imposes on a legal system. Because if the decision is made to adopt a Bill of Rights, the success of the reform will depend on whether New Zealand can break free of this straitjacket: the judicial theory of the constitution would need to change.

The problem is that if Parliament is sovereign, then theoretically any attempt by Parliament to limit its omni-competence is of no effect. How, then, can Parliament enact an effective Bill of Rights — one that can fetter the actions of future Parliaments? The answer given in the Government's White Paper, *A Bill of Rights for New Zealand*,[2] is that a change in judicial attitude may be perceived over the past 35 years indicating acceptance of a "new view" of parliamentary sovereignty. Dr Elkind referred to this in his paper.

The new view of parliamentary sovereignty distinguishes between the "manner and form" of legislation, and the power of Parliament to legislate on any topic. It is argued that an entrenched Bill of Rights, rather than limit the power of Parliament (which sovereignty theory holds to be a legal impossibility), really only alters the procedure or "manner and form" of legislation. Article 28 of the draft bill contemplates amendment or repeal of the Bill of Rights by a special 75% majority vote of the House or with the electors' approval at a referendum. Advocates of the

new view would argue that these manner and form affect the procedure, not the power, of Parliament to legislate. They would say that the proposed Bill of Rights, rather than derogating from Parliament's sovereignty, simply redefines Parliament for purposes of amendment or repeal of the Bill of Rights itself.

But is this construct of legislative supremacy realistic or even relevant? Is it not a mechanistic means to do *indirectly* what Parliament (according to extant judicial theory) cannot do *directly* – limit its future competence? Can it account for what the Bill of Rights in law and in fact seeks to achieve – a new benchmark and criterion of validity for legislation? Any attempt to reconcile entrenchment and legislative supremacy obscures the crucial issue: whether the Courts are prepared to recognise a limited parliamentary authority to legislate. In the 1984 Dethridge Memorial Address, Sir Robin Cooke observed that:

> . . . the authority of Parliament – "supremacy" as it is often called – ultimately turns on judicial recognition. . . . Whether guaranteed rights are really fundamental does not depend upon legal logic. It depends upon a value judgment by the Courts, *based on their view of the will of the people* (emphasis added).

Sir Robin therefore stressed the need to give the proposed Bill of Rights "practical sanctity" through community consensus. His Honour suggested a virtually unanimous vote in Parliament or a travelling Select Committee of the House or a referendum or a fully representative constitutional conference to achieve a consensus for entrenched rights.

Legal logic

If legal logic has little to commend attempts at constitutional entrenchment, then we must question Dr Elkind's view, that "some more clearly signalled break with the present system would be desirable". He did not elaborate on what he meant by "some more clearly signalled break", but in his monograph *A Standard for Justice* 1986, OUP, co-authored with A Shaw, at pp 148-150, Elkind listed five methods of circumventing "continuing" sovereignty.

(1) Have Parliament commit "suicide" reconstituting itself as a subordinate legislature possessing legislative power subject to the restrictions imposed by the Bill of Rights. The Privy Council has held in *Bribery Commissioner v Ranasinghe* [1965] AC 172, that a subordinate Parliament cannot ignore the conditions of law-making imposed upon it by its constating instrument.
(2) Adopt Professor Wade's suggestion in *Constitutional Fundamentals* (Hamlyn Lectures 32nd series, 1980), p 37, and alter the oaths of judicial office to obtain judicial allegiance to the Bill of Rights. Judges would swear allegiance to the Queen *and* to uphold the supreme Law, the Bill of Rights.
(3) Create a special Constitutional Court to hear all matters concerning the Bill of Rights.
(4) Avail ourselves of the "request and consent" procedure under s 4 of the Statute of Westminster 1931 (Imp) and have the United Kingdom Parliament enact the Bill of Rights as superior law applying to New Zealand.
(5) Stipulate in the Bill of Rights that no bill to amend or repeal its provisions shall be submitted to the Governor-General for assent unless it has been passed in the prescribed form.

Elkind and Shaw comment at p 151:

> The [above] possibilities are set out in order of potential effectiveness. . . . Of the five [possibilities], the first four are clearly superior to the method of "double entrenchment" adopted in the White Paper Draft.

I disagree. None of the above alternatives could guarantee the primacy of the Bill of Rights. The question concerning constitutional entrenchment will depend not on legal logic but on whether there is sufficient groundswell for the entrenchment of rights to legitimise changing a centuries-old constitutional pact between the Courts and Parliament. Nevertheless, consider each of the alternatives preferred by Elkind and Shaw.

It is understandable why the last alternative is listed as potentially least effective. What would stop a Government advising the Governor-General to assent to a bill which it had passed in contravention of the manner and form? A Prime Minister could insist on the convention that the Governor-General accede to the advice and grant his assent. The prohibition against submitting a bill for the Royal Assent, to be legally effective against simple repeal, would itself presuppose the efficacy of entrenchment under the Bill of Rights. In the case of legislation later found to contravene the Bill of Rights, the only remedy would be a declaration that the legislation should not have become law – thus again leaving the entrenchment question moot. It may even be that the Courts would decline to enforce the prohibition at the bill stage given the Courts' respect for Parliament's ancient privilege to exercise exclusive control over its own internal proceedings.[3]

The fourth alternative would be unacceptable to New Zealand. To ask the United Kingdom Parliament to enact a Bill of Rights for New Zealand would reek of neo-colonialism. The question may be posed whether the New Zealand *grundnorm* any longer recognises the authority of the United Kingdom Parliament to legislate for this country notwithstanding the operative provisions of s 4 of the Statute of Westminster 1931. Only once, upon the adoption of the Statute of Westminster into New Zealand law in 1947, has this residual power of "request and consent" been used.[4] Significantly, the Constitution Bill which is the subject of a Government White Paper proposes the abolition of the request and consent power as being no longer consonant with New Zealand's international status (*Constitutional Reform*, Report of an Officials Committee, Department of Justice, Feb 1986, paras 2.6 and 2.8).

The third alternative draws on several European countries which have established a special Constitutional Court to rule on issues of constitutionality. Elkind and Shaw suggest at p 149 that a special Constitutional Court would have the advantage that the tribunal interpreting the Bill of Rights would

depend for its existence on the validity (and *pro tanto* efficacy) of the Bill of Rights. A Constitutional Court would relieve the ordinary Courts of the question whether Parliament's latest word should continue to prevail through the doctrine of implied repeal. But if the Bill of Rights is to be "supreme law", then it is questionable whether it could feasibly exclude the jurisdiction of the ordinary Courts. A special Constitutional Court would be contrary to the Anglo-American tradition of a single, integrated system of Courts exercising dual public and private law jurisdiction. Even within our current judicial system, the trend is away from rigid public/private law classifications (see *Finnigan v New Zealand Rugby Football Union Inc* [1985] 2 NZLR 175, (CA), at p 179 per Cooke J).

The second alternative would not prove any more feasible. In the absence of a community consensus, it is unlikely Judges would feel bound by an avowedly coercive ploy as an altered judicial oath demanding allegience to a Bill of Rights. It is idle to reply that ". . . Parliament is coercing Judges every time it changes the law" (Elkind and Shaw, *A Standard for Justice*, OUP, 1986, at p 149). If a Bill of Rights were passed by simple government majority without Opposition support, an altered judicial oath would be highly improper as placing the Judiciary in an invidious position.

Clearest and most effective way

Elkind and Shaw consider the first alternative to be the ". . . clearest and most effective way" to circumvent continuing sovereignty (p 148). It is true that Dicey envisaged a sovereign Parliament consenting to its own demise – perhaps the ultimate, if not final, expression of sovereign will. Dicey though did not envisage "feigned suicide", a prospect which would have appeared to him as illogical and contradictory as "limited sovereignty". Several writers have assumed the efficacy of this method of adopting a written constitution or Bill of Rights (eg K J Scott, *The New Zealand Constitution*, OUP, 1962, at p 16). But consider the view from Molesworth Street. The "despotism of the eye"[5] would tell Judges that Parliament had undergone no metamorphosis: they would see the same Members, the same bricks and mortar, the same institution. Compare this with Art 47 of Elkind's and Shaw's alternative draft Bill of Rights preserving the same constitution and composition as the "former" House of Representatives and declaring that the Standing Orders of the "former" House shall continue in force: *A Standard for Justice*, p 188. It is doubtful they would hesitate for long over a statute that said the new Parliament was in nature different from the old Parliament; Parliament alone cannot change the rule of recognition. The Legislative Council Abolition Act 1950 is a precedent that Parliament can redefine itself through abolition of a component part: it is not a precedent that Parliament can limit or divest itself of its sovereignty through feigned suicide.

The authors of the White Paper accept that the Courts would be unlikely to uphold entrenchment under a Bill of Rights enacted by simple majority in Parliament: (para 7.19). Sir Robin Cooke was clearly of the same mind in his Dethridge Memorial Address. This, then, is a further reason why a statute feigning Parliament's suicide would be unlikely to succeed in entrenching a Bill of Rights that did not enjoy the Opposition's or the people's support. What special ingredient could a suicide statute enacted by simple majority claim as against a Bill of Rights enacted by simple majority? Each of the above alternatives fails to recognise that the "political" pact securing judicial obedience to statute must change to successfully entrench rights prevailing as against Parliament itself. Hence Sir Robin Cooke's observation in his Dethridge Memorial Address that the Courts must make ". . . a value judgment . . . based on their view of the will of the people". The implication is that the Bill of Rights cannot succeed if Judges feel unable to recognise a changed constitutional psychology legitimising a retreat from parliamentary sovereignty.

D Courts and political decisions

Dr Elkind assured us there is little foundation of the fear of political decision-making in the Courts applying a Bill of Rights. He sought to distinguish the political role performed by Judges from political decisions *per se*. He said:

> In so far as they uphold the policy and values of the social system, Judges inevitably play a political role. Policy choices must enter into the process of judicial decision-making. But that does not make a judicial decision "political". What makes a decision "judicial" is not the subject-matter of the decision but the intellectual and juridical process by which the decision is arrived at.

Even a lawyer would hold that to be a fine distinction. The American reports show that Courts under their Bill of Rights do, at times, adjudicate upon legislative policy: they make "political decisions". However the Minister is sanguine about judicial restraint under a New Zealand Bill of Rights. He said, ". . . the main effect of the Bill would be to restrict the *means* Government uses to implement its policies". He would thus commend the American doctrine of "procedural" due process (denoting judicial review of the means employed to implement legislative policy and typically invoked by the American Courts under the 5th and 14th Amendments), as opposed to "substantive" due process (denoting judicial review on substantive grounds involving judicial scrutiny of legislative policy itself). The doctrine of "substantive due process" was vigorously employed by American Courts in the late 19th and early 20th centuries to strike down laws interfering with freedom of contract held to be guaranteed by liberty of property under the 5th and 14th Amendments: see eg, *Butchers' Union Co v Crescent City* 111 US 746 (1883); *Lochner v New York* 198 US 45 (1905). Yet the Minister would be aware of the recent activism of New Zealand Courts in expanding their supervisory powers beyond procedural rights. A concomitant of judicial activism is the tendency of Judges to substitute their view of policy for that of the administrative decision-maker (see Sir Owen Woodhouse in his 1979 *J C Beaglehole Memorial Lecture* "Government Under the Law").

Cooke J, for instance, has said in *Daganayasi v Ministry of Immigration* [1980] 2 NZLR 130, at p 149, that ". . . fairness [natural justice] is not simply a procedural requirement". This already inclines the law of natural justice in New Zealand towards "substantive" judicial review, introducing through the concept of "fairness" a hierarchy of legal values implicit in natural law thinking. If we accept that, then Art 21 of the draft Bill of Rights (guaranteeing a right to observance of the principles of natural justice) raises the spectre of substantive judicial review under the draft Bill. Current trends of judicial review applied to legislation would require us to accept a greater degree of "political decision-making" (or policy review) in the Courts.

Judicial skills in interpretation

Elkind postulated:

> For the most part, we can expect Judges to bring the same judicial skills to the task of interpreting a Bill of Rights that they employ in all other areas of judicial activity. . . . This does not mean that the judicial function will not change. In some ways it will change profoundly.

In what ways? He did not elaborate. At the outset, it is difficult to believe that Courts, asked to rule on the validity of legislation, will find any real guidance in what Elkind terms "the chief hallmarks" of judicial decision: namely, impartiality and commitment to legal principles and precedent. Elkind appealed to these characteristics as reassurance of the intellectual constraints on judicial decision-making. Impartiality? Political neutrality is a prerequisite to, not a guide for, adjudication. Commitment to legal principles? Exactly what legal principles could a Court pray in aid? As explained below, little assistance is to be had from attempting to identify the purpose or object of a controverted guarantee in a Bill of Rights. Commitment to precedent? Only in the event of an earlier unsuccessful challenge to a statute would there be a precedent.

Undoubtedly the Courts over time would develop guidelines broadly circumscribing their parameters of review of legislation. And we could expect certain points of doubt involving the Bill's operation to be quite quickly resolved by the Court of Appeal. But beyond that, Judges applying a Bill of Rights would need to be guided by their own conceptions of the public interest. The "Brandeis brief" would become a feature of New Zealand law.[6] This type of litigation in the United States has shown that the validity of legislation is frequently resolved by recourse to questions of fact as the basis of a utility test: "where does the balance lie in terms of overall public welfare?" (see J A Smillie, "The Draft Bill of Rights: Meaningful Safeguards or mere Window-Dressing" [1985] NZLJ 276, at p 278). This would show that a Bill of Rights does transfer a power of political decision to the Courts despite the intellectual constraints on judicial decision-making imposed by impartiality and commitment to legal principles and precedent.

Whether this would be as "anti-democratic" and retrograde as some would believe is a more complex issue. I would make three comments. First, the power of judicial review of legislation is to declare what the legislature *cannot* do, not what it *must* do. Secondly, the creative and political role of Judges is already visible in their policy choices in interpreting and applying statutes and in developing and applying common law principles. Whilst a Bill of Rights would give this role a higher profile, judicial restraint (commending "procedural" rather than "substantive" review) would avoid uncompromised political decisions in the Courts. And thirdly, Western democracy has never guaranteed absolute majority rights at the expense of minority interests. As Sir Owen Woodhouse observed, Parliament already recognises political and ethical restraints on its law-making power. In effect, a Bill of Rights converts some of these extra-legal restraints into binding limitations enforceable in the Courts. A power of judicial review of legislation is not so much "anti-democratic", therefore, as a change in sanction from extra-legal to legal. Otherwise countries operating Bills of Rights such as the United States would be less democratic than New Zealand, a contention which no one could seriously entertain.

E Interpreting fundamental rights

Dr Elkind perceives an "internal inconsistency" in the interpretation provisions of the draft Bill. I question whether such inconsistency exists. Article 23 reads:

> The interpretation of an enactment that will result in the meaning of the enactment being consistent with this Bill of Rights shall be preferred to any other interpretation.

I agree with Elkind that Art 23 is arguably "redundant" given the almost universal practice of Courts applying Bills of Rights to first attempt to find an interpretation which allows a statute to be upheld. But then Elkind points to Art 3 (the express limitation clause) and concludes that this, juxtaposed with Art 23, creates an "obstacle to invocation of the Bill of Rights". He contends that Art 23 may impose a prima facie obligation on Courts to find that a statutory limitation upon a guaranteed right is reasonable and justifiable within the meaning of Art 3 — thereby reversing the onus of proof under Art 3 which would seem to require the party seeking to rely on the limitation (most often the Government) to prove the limitation is justified.

This juxtaposition, however is untenable. Article 23 is clearly logically prior in application to Art 3. Article 23 would oblige Courts whenever possible to interpret a statute so as to avoid any abrogation of the rights and freedoms guaranteed. If the Bill of Rights and the statute in question could be reconciled thus, then Art 3 would be superfluous — there would be no need to invoke it, there would be no legislative "limitation" to be saved. No "internal inconsistency" arises, then, from these express interpretive aids.

Need for Bill of Rights to evolve

The second matter is more problematic. Elkind points to the need for Bills of Rights to evolve through changing judicial interpretations. He referred to the prophetic words of Chief Justice Marshall, ". . . a constitution [is] intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs

(*McCulloch v State of Maryland* 4 Wheat 316 (1819)), and to the popular metaphor, ". . . a living tree capable of growth and expansion" (*Edwards v Attorney-General for Canada* [1930] AC 124 (PC), at p 136 per Viscount Sankey). To this end, Elkind adopted the words of Lord Wilberforce in *Minister of Home Affairs v Fisher* [1980] AC 319, at p 328, that what is called for is "a generous interpretation avoiding . . . 'the austerity of tabulated legalism' ". However while this may provide a general blueprint for interpretation, it would only marginally assist Judges applying a New Zealand Bill of Rights. How *specifically* would it assist Courts faced with a policy choice between an impugned statute and the draft Bill? A "generous" interpretation of fundamental rights would not relieve Courts of the question whether a legislative restriction was "reasonable" and "demonstrably justified in a free and democratic society".

Elkind also referred to the Privy Council in *Attorney-General of the Gambia v Momodou Jobe* [1984] AC 689, at p 700. There, Lord Diplock added to Lord Wilberforce's prescription stating that Bills of Rights are to be given "a purposive construction". But the very inquiry as to the purpose of fundamental freedoms collapses into tautology. A guarantee of speech is exactly that: *a guarantee of free speech*. That *is* its purpose, and to seek it out would scarcely assist Courts to develop a "higher law" jurisprudence (except perhaps to make explicit the constitutional value underlying the guarantee). It would therefore seem that if there is a set of coherent, methodological principles for interpreting fundamental rights, it has yet to be discovered (see D L Mathieson, "Interpreting the proposed Bill of Rights" [1986] NZLJ 129, 160).

Creative and political role of Judges

Several minor aids to interpretation can be extracted from the 30 or more Privy Council decisions on Commonwealth Bills of Rights, yet these cannot substitute for the "creative and political" role of Judges (see p 131 of above, referring to A C Hutchinson, "The Rise and Ruse of Administrative Law and Scholarship" (1985) 48 MLR 293, at p 305) in arriving at acceptable compromises between fundamental and ordinary law. Of the various aids to interpreting a New Zealand Bill of Rights, perhaps the most helpful would be the well-developed understandings that currently guide our Courts in drawing the boundaries of traditional democratic freedoms. Through the common law and the open texture of language employed in statutes, the Courts do retain discretions and policy choices as to how they balance the interests of the individual and the state. Our Courts recognise, in other words, not only the supremacy of Parliament but also the fact that New Zealand is a democratic society based on the rule of law and the worth of individual human personality.

F The international law environment

Here, Dr Elkind's address should not be taken seriously.[7] He said, "It is startling to see [the New Zealand Law Society] take a stand which advocates defiance of the law." Referring to the International Covenant on Civil and Political Rights to which New Zealand is a party, he said:

> There is not one word in the Law Society's published opposition to the Bill of Rights which mentions New Zealand's international legal obligations. Ignorance of the law is no defence for a layman. What can be said when the highest legal professional body in New Zealand seems utterly unaware of a particular area of the law? . . . New Zealand is under a *legal* obligation to extend the rights and freedoms granted in the Covenant to every person in New Zealand. But the Law Society seems completely unaware of the relationship between the Covenant and the Bill of Rights.

What is New Zealand's international legal obligation under the Covenant? To adopt a constitutional Bill of Rights? The Preamble to the Covenant states that "The States Parties to the present Covenant . . . Agree upon the following articles": *inter alia* Arts 1-27 guaranteeing civil and political rights recognised by the international community. Under Art 2(1) each signatory to the Covenant undertakes to respect and to ensure to all individuals the rights recognised in Arts 1-27. Article 2(2) imposes a positive obligation on each state "to take the necessary steps, in accordance with its constitutional processes . . ., to adopt such legislative or other measures as may be necessary to give effect to the rights recognised". Under Art 2(3) each state undertakes to provide effective legal remedies to those whose rights under the Covenant have been violated.

It will be noted that Art 2(2) does not oblige any state to change its "constitutional processes". It requires, in the event of a state failing the standards exacted of it, that it "adopt such legislative or other measures as may be necessary to give effect to the rights recognised". It anticipates that that shall be done "in accordance with its constitutional processes". New Zealand does not have a Bill of Rights. How opposition to the draft Bill counsels violation of international law, therefore, is difficult to fathom. That New Zealand now chooses to introduce a Bill of Rights and to model it on *inter alia* the Covenant does not convert the introduction of the Bill into a matter of international legal obligation. It is therefore this morning's speaker, not the New Zealand Law Society, who misconceives the relationship between the Covenant and the draft Bill.

First Report to the Human Rights Committee

Did New Zealand to the best of its knowledge fulfill its international obligations upon ratifying the Covenant on 28 December 1978? An obligation New Zealand accepted under the Covenant was to submit reports (the first within one year and thence periodically) to the Human Rights Committee on measures taken to ensure compliance with the Covenant (Art 40). New Zealand's First Report to the Committee (*Human Rights in New Zealand*, Ministry of Foreign Affairs, Information Bulletin No 6, Jan 1984), was presented in November 1983 by Mr C D Beeby, Assistant Secretary, Ministry of Foreign Affairs. New Zealand reported that it had undertaken an extensive review of its law and practice: "That the review was a lengthy one reflected, in part, New Zealand's wish to ensure scrupulous compliance with the obligations which it was about to accept." It was stated that that review led to the

enactment of the Human Rights Commission Act 1977 "to promote the advancement of human rights . . . in general accordance with [the] Covenant". The review also initiated the setting up of a Deportation Review Tribunal under the Immigration Act 1964 and an amendment to the Criminal Justice Act 1954 to strengthen, with reference to Art 15, the existing common law rule against retrospective penal legislation. The Report also alluded to the coming into force of the Official Information Act 1982 (repealing the Official Secrets Act 1951 and granting greater rights of access to official information), on 1 July 1983. When ratifying the Covenant New Zealand entered reservations against four articles: *inter alia* Art 22 (guaranteeing freedom of association) as it relates to trade unions and unqualified preference governing union membership in New Zealand.

Finally, I would remind Dr Elkind of the very favourable response New Zealand received before the Human Rights Committee: ". . . New Zealand's report was regarded of high quality and . . . [New Zealand's] record of protection of civil and political rights was thought to be impressive" (see above, p 6). The Committee did not apparently think New Zealand to be in breach of the Covenant because it had not then taken steps to introduce a Bill of Rights.

G The Treaty of Waitangi

Here I part company with Dr Elkind and the Minister. Each has said he could not conceive of a New Zealand Bill of Rights which did not entrench the Treaty of Waitangi. I question the wisdom of this.

Firstly, its inclusion in the draft Bill shows a failure to distinguish between the objectives of a Bill of Rights on the one hand, and a written constitution on the other. Elkind this morning said that many people are confused over the difference between these two types of document: yet he would prey on this confusion by advocating inclusion of the Treaty.

In their monograph Elkind and Shaw state that a Bill of Rights is "an expression of national identity" (*A Standard for Justice*, p 2), albeit the guarantees contained in a Bill of Rights may embody values *implicit* in a country's national identity. On the contrary, whilst written constitutions preambling social and state policy are manifestly expressions of national identity, a Bill of Rights is an apparatus solely for the protection of individual freedoms. Observe the traditional rights and freedoms included in the draft Bill and those which Elkind would include in his alternative bill: namely, freedom of thought, conscience and religion; freedom of expression; freedom of peaceful assembly; freedom of association; freedom of movement, and the criminal law "due process" rights on arrest; the right not to be arbitrarily detained or subjected to unreasonable search and seizure or to torture or cruel or degrading punishment. These are rights attaching to *individual* human personality. The Treaty, by contrast, represents a pact between two peoples: Europeans and Maoris. It is concerned with *collective* rights, responsibilities and privileges. If New Zealand desires to give fundamental law status to the Treaty as an expression of national identity, then its place is in a written constitution. It is too much to expect a Bill of Rights to unify a people.

Secondly, both speakers advocate the exclusion of wider social, economic and cultural rights as being inappropriate for a Bill of Rights. Yet the Treaty is a collective of residual social and cultural rights embraced in the Maori phrase, *ratou taonga katoa* (things prized by them, translation from the White Paper, para 10.37). For this reason, the Treaty does not sit comfortably in a Bill of Rights that is subject to judicial enforcement. That it was included at all in the draft Bill runs counter to the explanation given in the White Paper for excluding social, economic and cultural rights.

Justiciability

Thirdly, the White Paper states that the ". . . application of the Treaty's principles must be considered in the light of the whole ambience – social, economic and so on . . ." (para 10.42). The White Paper quotes what the Waitangi Tribunal said in its *Motunui* report: that the ". . . wairua or spirit [of the Treaty] is something more than a literal construction of the actual words used can provide. The spirit of the Treaty transcends the sum total of its component written words and puts narrow or literal interpretations out of place". (para 10.44). The White Paper accepts that the Treaty does not lend itself to "a literal dissection of [its] provisions" (para 10.45). A Bill of Rights is about justiciability, and this begs whether the Treaty is appropriate for judicial enforcement as fundamental law.

The authors of the White Paper accept the "inherently impossible task" of defining precisely the rights of the Maori under the Treaty: "This impossibility arises from the concept of the Treaty as living and organic" (para 10.36). Therefore to include the Treaty as fundamental law arguably amounts to an abdication of political responsibility to the Courts to perform an "inherently impossible task" – to make judicially specific and certain an historical document having a "wairua or spirit" but no ascertainable literal meaning. Article 26 of the draft Bill would enable the Courts to seek advisory opinions from the Waitangi Tribunal, yet the final responsibility would remain with the Courts. □

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1 27 March 1980 (correspondence with R J Granville Glover, "With Loud Voices" (1980), unpublished LLB Honours Paper, University of Canterbury). For comment, see Joseph "The Apparent Futility of Constitutional Entrenchment" (1982) 10 NZULR 27, at pp 38-39. Elkind's reference in [1986] NZLJ 205 to Sir Owen's 1979 *Beaglehole Memorial Lecture* was incorrect. Nor was the analogy attributed to Sir Owen the one Sir Owen used.

2 Paragraphs 7.10 and 7.11, citing *Attorney-General for NSW v Trethowen* [1932] AC 533 (PC) (affirming the majority decision of the High Court of Australia (1931) 44 CLR 394); *Harris v Minister of the Interior* 1952 (2) SA 428; *Bribery Commissioner v Ranasinghe* [1965] AC 172 (PC); *Liyanage v The Queen* [1967] AC 259 (PC).

3 *Ashby v White* (1703) 2 Ld Raym 938, *Paty's Case* (1704) 2 Ld Raym 1105. For more recent affirmation, see *Pickin v British Railways Board* [1974] AC 765 (HL).

4 See the New Zealand Constitution Amendment (Request and Consent) Act 1947 (NZ) requesting and consenting to the New Zealand Constitution (Amendment) Act 1947 2 Geo VI, Ch 4, granting New Zealand full powers of constitutional amendment.

5 From O Barfield, *What Coleridge Thought* (Connecticut, Wesleyan UP, 1983), at pp 19-20 on thought, perception and our visual organs.

6 See Joseph, "Towards Abolition of Privy Council Appeals: The Judicial Committee and the Bill of Rights", forthcoming *Canta LR*. Cf K J Keith, "A Bill of Rights for New Zealand? *Judicial Review versus* Democracy" (1985) 11 NZULR 307.

7 This part of Elkind's address is reproduced in slightly ameliorated form in "International Obligations and the Bill of Rights" [1986] NZLJ 205.

Response by Dr J Elkind

The editor of the *New Zealand Law Journal* has offered me the opportunity to comment briefly on Mr Joseph's remarks, an opportunity for which I thank him.

May I say at the outset that I welcome any thoughtful and intelligent discussion of the Bill of Rights. I offer no apologies for my forcefully expressed annoyance with the level at which the debate has heretobefore been conducted. I would have expected and still hope for much more interest to be shown by the media and for far more thoughtful consideration to be given to the matter by senior members of the legal profession and senior political leaders. I do have a few comments on Mr Joseph's paper.

My first objection is to Mr Joseph's quotation of Machiavelli to chide me for my annoyance at the direction which the debate is taking. The quote begins "Let no man who begins an innovation in a State. . . ." I may be an enthusiastic supporter of a constitutional bill of rights. But it can hardly be described as my innovation. It is precisely because I am less than enamoured of the draft that has been presented that I am impatient to get on with the business of discussing the actual draft.

Entrenchment

With regard to entrenchment, I agree emphatically with Sir Robin Cooke and Mr Joseph that the authority of Parliament ultimately turns on judicial recognition and on the Judges' perception of their constitutional duty. I believe I have made this point myself. It certainly does not turn on the bricks or mortar of Parliament buildings nor even the composition of the membership. Another point on which Mr Joseph and I agree is that we are both less than enthusiastic about the self-embracing theory of Parliamentary sovereignty. My quarrel with the method of double entrenchment is that it involves the pretence that Parliament is still sovereign while trying "indirectly" to place limits on its competence. My advocacy of altering the nature of Parliament or the oath of the Judges stems from the fact that I want to indicate that an alteration of our constitutional structure is precisely what is intended. Joseph may call my proposal "feigned" suicide. I prefer to view it as "symbolic". I cannot speculate on what Judges will finally do but at least they will know what is intended. I agree that the effectiveness of a bill of rights does not depend entirely on legal logic, but I am concerned to make the legal logic as tight as possible. To call these solutions "mechanistic" is clever rhetoric, but it is rhetoric.

I hope however that the question whether guaranteed rights are really fundamental does not depend on a value judgment by the Courts, *based on their view of the will of the people.* Since the most important purpose of a bill of rights is the protection of minorities, I hope that Judges will not transform themselves into pollsters to ascertain "the will of the people" which presumably means "the will of the majority". I do not think that this is what Sir Robin Cooke meant although that is the way it is rendered in Mr Joseph's presentation.

Mr Joseph's arguments on the Bill of Rights and political decision-making are quite complex and I cannot reply fully and briefly at the same time. I have conceded that Judges do make policy choices and value judgments in their interpretation of the law. Joseph has very skilfully demonstrated that this is the case even now in New Zealand without a Bill of Rights. I remain unconvinced that, in this process, a Judge is no different than a politician. My point is that Judges do not question the propriety of legislative policy in a vacuum. With a Bill of Rights, legislative policy will be subject to legal constraints. In New Zealand such decisions are called "political decisions". Elsewhere they are regarded as legal decisions. The question is largely semantic. I have also tried to indicate in my book where Judges will look, at least initially, for authority. They will build up a body of precedent soon enough.

Article 23

As to Mr Joseph's criticism of my cautions about Art 23 of the draft Bill of Rights. I hope that Mr Joseph is right and that a Judge will hold that Art 23 is logically prior to Art 3. If I ever have to face a Judge on this question, I hope Mr Joseph will not mind if I quote him on the question. I merely wished to point out that the other interpretation is a possibility and that therefore Art 23 is not merely superfluous, but dangerous.

International environment

With regard to the Bill of Rights and the international environment, Mr Joseph should be advised that I take very seriously the remarks of Oscar Schachter in 73 *American Journal of International Law* 462 (1979) and F A Mann in (1978) 94 *Law Quarterly Review* 512. According to Schachter, Art 2(2) entails a specific obligation to provide an effective remedy for violation of the rights and freedoms described in the Covenant. He did not feel that express obligations in a legal instrument could be dismissed with a sweeping assertion that the obligations are adequately fulfilled by other means (at p 462). Thus Art 2(3)(a) and (b) require that there be some independent authority to which an individual can go when she or he feels that rights under the Covenant are being violated. That body must have the power to authoritatively determine whether such allegations are valid and to order redress if they are. In short, the Covenant requires that some sort of law-determining agency be given such power.

The United Kingdom which has a constitutional structure similar to our own faces the same sort of constitutional problem. Commenting on that problem, Mann found it paradoxical in no less than three respects:

> Firstly, Britain has assumed international obligations but prima facie done nothing to secure their implementation, and even where the terms are at present being observed nothing has been done to prevent future inconsistent legislation coming into force and superseding the present law by virtue of the rule *lex posterior derogat priori.* Nor can it be asserted that as a result of a non-legal, non-binding convention Parliament will in fact refrain from interference

> with such rules of constitutional significance as the common law has developed (at p 515).

He concluded:

> That is not to say that in law the Covenants fail to impose effective legal duties upon the Contracting States. Their disregard constitutes a breach of treaty. States in general and the United Kingdom in particular would do well to review their legal systems with a view to eradicating or avoiding such breaches. Thus in England it is a matter for serious reflection that the country has undertaken "to ensure that any person whose rights and freedoms as herein recognised are violated shall have an effective remedy. . . . (at p 552)

The United Nations Human Rights Committee has the duty to receive reports from States on measures taken to ensure compliance with the Covenant. But it does not systematically enquire into the extent to which each reporting State complies with the Covenant. The members of the Committee may ask questions but usually they concern only the grossest inconsistencies with the Covenant. Their acceptance of a report cannot be regarded as a finding either that a State is in compliance or not in compliance. It is usually a comment on the style and comprehensiveness of the report. The Human Rights Committee is only permitted to enquire into compliance once a State has accepted the right of individual petition under the Optional Protocol to the Covenant and then only with regard to the specific case before it.

New Zealand's First Report

I have seen New Zealand's First Report and I agree that it is comprehensive and admirable. I was so impressed with it that I asked, under the Official Information Act, to see any material prepared by the Foreign Affairs Department concerning New Zealand's compliance with the Covenant. They very kindly supplied me with a great mass of material some of which I have found very useful indeed. But I was not able to identify any report of "an extensive review of [New Zealand's] laws and practices" of the type described in the First Report. I am somewhat bemused by this since this review has been cited many times.

Quoting the Human Rights Committee's praise for Beeby's Report hardly replies to my criticism of the Law Society which showed no awareness either of the Covenant, or the Report or even the existence of the Human Rights Committee.

Mr Joseph's paper conveys a typically sanguine view of our compliance with the Covenant. British Foreign Office officials expressed similarly sanguine views in the early 1960s when the United Kingdom first considered entering into the European Convention on Human Rights. On the whole, Britain's compliance is reasonable. But both the European Commission and the European Court of Human Rights have ruled against the United Kingdom in respect of a number of complaints against it.

The point is that the question of our compliance cannot really be fully determined unless there is an authoritative body looking at specific issues. This could be the Human Rights Committee under the Optional Protocol. But, in my view it would be preferable if the law-determining agency was a New Zealand Court interpreting a Bill of Rights which is reasonably faithful to the Covenant.

Treaty of Waitangi

Finally I would like to comment on the Treaty of Waitangi. The relationship between the two founding cultures in our society must be settled by some sort of constitutional arrangement as are inter-cultural relationships in many countries. I take Mr Joseph's point that this would sit more comfortably in a written constitution. But that is not what is being considered.

New Zealanders have a limited notion of justiciability. When Britain entered the EEC, many people thought that EEC law would not be justiciable in British Courts. It is, even though it is very different in structure and style from British Statute law.

In fact his view about justiciability proceeds from a monocultural view of New Zealand. Inclusion of the Treaty of Waitangi in the Bill of Rights may be seen as coming to terms with our bicultural heritage. If the Treaty of Waitangi appears to sit uncomfortably in a Bill of Rights, it is because the Treaty makes the Bill a bicultural document and this is bound to look odd to lawyers versed in English Common Law.

A Court may not be the forum most suited to enforcement of the Treaty of Waitangi. Indeed, the present author has suggested that it would be more appropriate to vest enforcement entirely with the Waitangi Tribunal. (See Elkind and Shaw, pp 45-46, *Alternative Draft Bill of Rights*, Art 4(3)-(7) at pp 174-5.) But we must begin to incorporate Maori values into our law and the Bill of Rights is the best place to start.

Finally, Mr Joseph's argument that inclusion of the Treaty in the Bill of Rights would be an abdication of political responsibility to the Courts is largely a restatement of the "political decision" argument. If it is left to politicians to make the final determination of rights under the Treaty of Waitangi, then a legal instrument, the Treaty, will be subject to political interpretation without being subject to authoritative contradiction. □

Continued from p 415

possible; the principles advanced by both sides are either ideological or empty. Directed not against legal principles, nor even against particular arguments about such principles, the contemporary critique of constitutionalism seems rather to be a critique of principled thought as such.

As these books make clear, however, such a thoroughgoing critique can barely achieve internal coherence, let alone support a legal system based upon anything so complicated as a constitution. It is difficult to see how constitutional law can exclude mere ideology if one assumes at the outset that fundamental principles (such as separation of powers) are in fact not principles but just policies. If Dworkin and Tribe show too much concern with cloaking this contradiction in philosophic respectability, Posner, for his part, shows too little. For whatever desire one might have for a theory of law that excludes only certain policy preferences but not others, the product of such a desire should not be called law, nor philosophy. □

NEW ZEALAND LAW JOURNAL
1986 – INDEX