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Electoral law reform

By the time this editorial is published the 1987 election will have been held. From the point of view of electoral law reform and the report of the Royal Commission on the Electoral System published in December 1986 the most significant point of the elections will have been the fate of third parties. If in fact the election results have borne out the indications of the opinion polls taken over the last few months then the whole argument for proportional representation in New Zealand might well disappear. If the two major parties represent almost the entire electorate on a rough percentage basis then arguments for or against the existence of proportional representation for the benefit of minority political parties will be largely irrelevant.

The issue of proportional representation is not of course dependent only on the question of the unfairness of past results. There is also an argument which can be adduced that the existence of proportional representation would encourage the formation of third, fourth or more parties, and that this in itself is a desirable democratic development. That is not however the argument that is usually put forward and it is one that is very much open to dispute.

Table 2.1 on p 15 of the Royal Commission report is particularly interesting in that it shows for how long Social Credit has been a significant political force in New Zealand, under whatever name it uses. The first significant appearance of the Social Credit party as a third party was in the election of 1954 when it secured 11% of the valid votes cast but received no seats in Parliament as a result. In 1966 it won one seat with 14.5% of the total valid vote. Its vote then slipped again in succeeding elections and its Parliamentary seat disappeared. Then in 1978 when it obtained 16.1% of the valid vote it had one member returned to Parliament. In 1981 with 20.7% of the valid vote it had two members returned to Parliament. Oddly enough in 1984 when its percentage of the valid vote dropped to 7.6% it still retained two members of Parliament, although they were different members in that Mr Beetham was replaced by Mr Morrison.

What the figures for Social Credit quite clearly indicate is that there has been no correlation since 1954 between the representation in Parliament and the percentage of valid votes cast for that party up and down the country. At the same time this is also true of the other two parties. In 1978 for instance Labour got 40.4% of the valid vote and received 40 of the Parliamentary seats. The National Party won a smaller proportion of the valid vote being only 39.8% but nevertheless got 55.4% of the seats in the House. Again in 1981 the Labour percentage of the valid vote was slightly higher at 39% than that of the National Party at 38.8%. The Parliamentary seats however went the other way with the National Party with a slightly smaller number of votes getting 47 seats as against the Labour Party's 43 seats.

If the test is that there should be a direct correlation between seats in the House and percentage of votes cast for a political party on a national basis then obviously the system as we have it is most unsatisfactory, not only for the third party but also as between the two major parties.

There is however another way entirely of looking at it. Our Parliament is elected on a basis of geographical electorates of approximately the same size. The person who is elected for a particular seat can therefore be said in a very real sense to have been elected as the representative *of that specific area.* The question that needs to be asked therefore is, when a member of Parliament is elected whom does he represent? Does he for instance represent a particular constituency or does he represent a particular party? This goes to the heart of the question of control by political parties of members of Parliament.

The argument for some form of proportional representation has of course been given emphasis by the result of the recent election in England. As Ian Hislop pointed out in an article in *The Listener* of 18 June 1987 at p 37:

> The Alliance polled 23% of the total and ended up with a miserable 3% of the seats. The Conservative Party polled 43% of the total and ended up with over 60% of the seats.

Within the last few weeks the Deputy Prime Minister Mr Palmer has stated that he favours a system of proportional representation. The Prime Minister Mr Lange on the other hand has said that he does not. In the same issue of *The Listener* from which the above quotation was taken there is another comment which probably explains the basis for Mr Lange's unwillingness to support a system that would presumably have the inevitable effect of encouraging one or more minor parties. John Cole commented about the likelihood of coalition Governments and what that would mean. He wrote:

> For the Alliance would be the inevitably permanent member of coalition Governments. One of the better election jokes was Roy Hattersley's cruel reflection on German politics and Hans-Dietrich Genscher's shift from supporting the Social Democrats to supporting the Christian Democrats, without the benefit of democratic mandate; coalition, Hattersley observed [obviously referring to Dr Owen] was good for ambitious doctors who led small parties and wanted to be Foreign Minister.

If there would inevitably be a coalition what portfolio might Mr Palmer have had in mind for Mr Morrison and Mr Gary Knapp? The possibilities which come to mind are as entertaining as they are unlikely. Presumably one of the necessary components of any coalition would be that the leader of the minority party would become the Deputy Prime Minister as has been the common practice in Australia and many other countries. Had Mr Palmer considered that?

P J Downey

Case and Comment

False imprisonment and the Accident Compensation Corporation

In the article entitled "Accident Compensation Act and Damages Claims" [1987] NZLJ 159, it was argued that damages claims for false imprisonment/unlawful arrest raised questions of personal injury by accident and should be referred to the Accident Compensation Corporation for a decision under s 27 of the Accident Compensation Act 1982.

In *Sinclair v Invercargill City Council* and *Haberfield v AG* [1987] BCL 516, Tipping J has done just that.

His Honour was not persuaded by the three arguments raised by the plaintiffs to limit the effect of the Act. In the article referred to above it was noted that there are at least seven arguments that have been made in various cases to limit the effect of the Act. The three used unsuccessfully in this case were:

1 Mental consequences

The plaintiffs argued that mental consequences in the definition of personal injury by accident in Section 2 of the Act only referred to some medically identifiable state and not transient mental consequences. Tipping J pointed out that as the statement of claim only referred to mental distress it was not possible to say what form or degree of mental consequences were suffered. The matter was therefore left for the ACC to determine. In the Court of Appeal in *Blundell* [1986] BCL 1570 it will be remembered that the Court considered it "very arguable" that mental consequences were not limited to medically identifiable states but could include the emotional effects of the injury such as worry and distress.

2 Accident

The plaintiffs argued that no accident had occurred here in the true and ordinary meaning of the word. Tipping J however considered that in the light of the *Blundell* case "it is bona fide arguable that the torts of false imprisonment and wrongful arrest are accidents from the point of view of the victim" (p 20). It is submitted, with respect, that this is correct though it has to be remembered that it was in *Blundell's* case that the Court of Appeal indicated that this might be the area where they would limit the effect of the Act.

3 Availability of compensation

Following the judgment of Heron J in *Wise v AG* (A33/84, Wellington Registry, 10/9/86) the plaintiff argued that it was only when there was entitlement (here apparently used in the sense of an actual award) to compensation under the Act that the claim was barred. If, as was argued by the plaintiff, there was no entitlement for mental distress under the Act the plaintiffs could proceed with their claim at Common Law.

Tipping J, with respect, correctly rejected this interpretation of the Act. From his analysis of the Act he considered that it was clear that "it is the simple suffering of personal injury by accident in NZ which brings in the statutory bar" (p 18).

As the claims raised a bona fide question as to whether the plaintiffs had suffered personal injury by accident the actions were stayed and the matter referred to the Corporation for a decision within three months.

The ACC has indicated that it might be impossible to give an answer within the three-month period given that a proper inquiry has to be made with both sides being given the opportunity to make submissions on the facts and the law. Furthermore the ACC have found that these matters are drawn out through no fault of their own because one side to the dispute has often had the matter referred to the ACC as a tactical device and has no real interest in having the matter dealt with expeditiously.

It seems, therefore, as if it will still be some time yet before the Court of Appeal is given an opportunity to rule decisively on this matter.

Meanwhile it is pleasing to see that the provisions of the Act are being followed and that these matters are now being referred to the ACC by the High Court. This means that we will obtain a consistent approach rather than the variety we have had up to now.

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Trespass to the Person and the Accident Compensation Act

The victim of a trespass to the person who suffers personal injury, pain and suffering cannot, of course, recover compensatory damages for that injury and suffering. His claim is barred by s 27(1) of the Accident Compensation Act 1982. In *Donselaar v Donselaar* [1982] 1 NZLR 97, however, it was decided by the Court of Appeal that the victim can still recover exemplary damages standing alone. *Donselaar* is by now a well-known decision but the Court's reasoning bears repetition. It can be summarised as follows. The function of s 27(1) is solely to prohibit suits for damages in certain cases. It does not abolish causes of action for battery or other forms of trespass to the person. It is concerned with remedies and leaves rights of action intact. Proceedings for damages are barred only where those damages arise directly or indirectly out of injury or death. It is not sufficient that the cause of action should arise out of the injury. The particular damages sought to be recovered must do so. The function of exemplary damages

being to punish and deter, it could not be said that they arise out of the injury sustained by the plaintiff. Such damages are awarded against a defendant because of the outrageous manner in which he has behaved in the course of committing the tort. If they "arise" at all, they arise solely out of the acts of the defendant.

The adoption of this view presented the Court with a practical problem. In both *Rookes v Barnard* [1964] AC 1129 and *Broome v Cassell and Co Ltd* [1972] AC 1027 the House of Lords had made it clear that exemplary damages could only be awarded in an appropriate case if the sum awarded by way of compensation was in itself an inadequate punishment of the defendant. Thus to set about assessing exemplary damages without the possibility of saying compensatory damages are enough punishment was, in the words of Cooke J "to travel into terra incognita on a course never contemplated by their Lordships". The Court nonetheless recognised a need to maintain a punitive remedy for the commonplace types of trespass or assault, if accompanied by insult or contumely, which touch the life of ordinary men and women. The need could be met by allowing actions for damages for purely punitive purposes and accepting that exemplary damages would have to take over part of the role of compensatory damages. There would remain a need for restraint in this area and any temptation to give exemplary damages merely because the statutory benefits might be thought to be inadequate should be resisted.

It is important to note that *Donselaar's* case cannot be applied where a trespass to the person causes the death of the victim. The conduct of the defendant may be especially outrageous and deserving of punishment, but exemplary damages do not survive death for the benefit of the deceased's estate (Law Reform Act 1936 s 3(2)(a); and see *Chase v Attorney-General* HC, Wellington, A106/84, 18 Sept 1986). This limitation upon the scope of the survival action deserves to be reconsidered. Unlike in a defamation suit, to which s 3 is also expressed not to apply, a claim for exemplary damages is in no sense personal to the deceased. The only purpose of these damages is to punish, not to compensate, and this need, if it exists, is hardly lessened or removed by the death.

A further question not determined in *Donselaar* is whether *compensatory* damages are recoverable to the extent that they compensate not for actual personal injury but for loss and harm by way of distress, humiliation and annoyance caused by a wrongful trespass. On the face of it the answer would seem to be yes. "Personal injury by accident" is defined in the Act as including "the physical and mental consequences of any such injury or of the accident" (s 2(1)(a)). It has been held by the Accident Compensation Appeal Authority that the "mental consequences" which are contemplated are those which can be classified in medical or psychiatric terms. There was, therefore, cover under the Act where the claimant's pre-existing mental state was exacerbated by the conduct of the police in wrongfully arresting and interrogating him. (*Re Attorney- General : Decision 1011* [1983] NZACR 553.) In a number of High Court decisions, however, it has been held that the phrase does not extend further to include the natural emotional response of humiliation and embarrassment to the wrongful conduct. (*Howley v Attorney-General* [1986] BCL 1185; *Blundell & Thompson v Auckland CC* [1986] BCL 531; *Craig v Attorney-General* [1986] BCL 1538; *Wise v Attorney-General* HC, Wellington, A33/84, 19 Sept 1986.)

In *Auckland City Council v Blundell* CA 182/85, 2 Oct 1986, an appeal from one of these decisions, the Court of Appeal leaned against this view. Cooke P, delivering the judgment of the Court, thought it very arguable that a claim for the emotional effects of an injury or accident might well be "mental consequences" within the definition. His Honour said the words "the physical and mental consequence of any such injury or of the accident" may have been intended by the legislature as a comprehensive expression covering all consequences to the victim's person. Whether or when false imprisonment or arrest was an "accident" within the meaning of the Act was, he thought, a more difficult question.

It was unnecessary for the Court to express any final opinion on the matter because the plaintiff had amended his pleadings by removing any claim for compensatory damages and seeking exemplary damages alone. Cooke P did, however, go on to provide guidance to trial Judges by setting out an express statement of the essential points that needed to be explained to a jury about the legitimate purposes of awarding damages since the accident compensation legislation and in the light of *Donselaar's* case. In this statement personal injuries were said to include not only obvious physical hurts like broken bones but also pain and suffering and mental consequences such as worry and distress. The jury should be directed that it was not entitled to award the plaintiff damages for any of those things.

Assault, battery and false imprisonment are actionable per se. Damage is not an ingredient of the cause of action. A plaintiff can sue for assault where no contact with his person has occurred or for an unpermitted touching causing no hurt or for a wrongful detention whatever its duration. Certainly nominal damages are recoverable in all these cases. Their purpose is to vindicate the sanctity of the person, not to compensate for harm. Furthermore, at least as regards false imprisonment it would seem that the plaintiff is entitled to be compensated simply for damage caused by the restraint as such. The clear hint in *Blundell* that in all these cases compensatory damages for humiliation, distress and embarrassment are barred by the 1982 Act is surprising. It is only within the last 10 or 15 years that general damages of this nature have been allowable at all, but the award of modest damages under this head is now commonplace. They have, for example, been recovered in claims against builders and local authorities for negligence in building and inspecting defective and dangerous houses (*Gabolinscy v Hamilton CC* [1975] 1 NZLR 150; *RA & TJ Carll Ltd v Berry* [1981] 2 NZLR 76; *Stieller v Porirua CC* [1986] 1 NZLR 84 (CA)) and in contractual actions for deprivation of the enjoyment of a holiday, (*Jarvis v Swan's Tours Ltd* [1973] 2 QB 223) for wrongful expulsion from a social club (*Byrne v Auckland Irish Society* [1979]

1 NZLR 351) and for a purchaser's repudiation of a contract to buy land (*Sing v O'Driscoll* [1984] BCL 124). Damages in defamation suits also seem to involve similar elements. In *Blundell's* case itself it was accepted that claims for damages for malicious prosecution and conspiracy are unaffected by the Act.

It is submitted that damages for distress in assault, battery and false imprisonment stand on exactly the same footing. Whatever the cause of action which is being asserted, the fact that the compensation sought is in respect of a bodily sensation is not a sufficient reason to bring it under the umbrella of the accident compensation scheme. It does not seem likely that the Act was intended to cover such loss. Accident compensation was introduced for the purpose of dealing with the serious social problem of accident victims suffering a degree of incapacity. Where it is a person's mental state which is in issue, it is perfectly possible to draw the distinction suggested earlier between medical or psychiatric conditions, where cover should be available, and distress, humiliation and the like, where it should not. The distinction seems, moreover, to be contemplated by s 79 of the Act, authorising discretionary lump sum payments by the Accident Compensation Corporation for non-pecuniary loss in cases where cover exists. The section refers to payment for, inter alia, "pain and mental suffering, including nervous shock and neurosis" and provides that no compensation is payable unless, in the opinion of the Corporation, the loss, pain or suffering, having regard to all the circumstances, has been or is or may become of a sufficient degree to justify such payment. It goes on to provide for payment as soon as practicable after the "medical condition" of the claimant has become sufficiently stabilised to enable an assessment to be made for the purposes of the section, and in any event no later than two years from the date of the accident. This section surely throws some light on the *nature* of the "mental consequences" Parliament had in mind in the definition it gave to "personal injury by accident" for the purposes of the Act.

Looking at the matter broadly, it is hard to see that a claim for distress, as distinguished from actual physical or mental injury, which is caused by, for example, a false imprisonment has any connection at all with the accident compensation scheme. The claim nonetheless can provide a remedy irrespective of the question whether the conduct of the defendant is especially deserving of punishment and this, it is submitted, is a legitimate and useful role. On the other hand, if cover existed the Corporation seemingly would be most unlikely to make a discretionary payment in the kind of case under discussion. Any remedy for the loss would be extinguished in fact if not in theory.

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Passing off: Use of the Name "Budget"

Dominion Rent A Car Ltd v Budget Rent A Car Systems (1970) Ltd et al; Mutual Rental Cars Ltd, et al v Budget Rent A Car Systems Pty Ltd, et al. (Court of Appeal, No 70/83)

As Cooke J succinctly puts it in the first sentence of his judgment:

> These two appeals, heard together, mark the confluence of litigation of outstanding complexity about the use in rental vehicle business in New Zealand of the name Budget.

Without going into a detailed description of the facts, it is clear that sometime in the early 1970s Mutual Rental Cars, a New Zealand company, began operating in Auckland a small car rental business under the name of Budget apparently in accordance with a covenant in an agreement *not* with the internationally known American firm of Budget Rent A Car, but with one of its two main competitors, Avis, to make a minimal use of the name Budget for the purpose of forestalling the entry of Budget US into the New Zealand market. The main body of this contract was a franchise agreement between Mutual and Avis. This Auckland Budget business was founded "with the full knowledge and encouragement" of an Australian company also using the name Budget but without, at this time, any agreement with the American parent company. The encouragement took the form of a shared logo, communication, co-operation in trans-Tasman bookings and visits from New Zealand to ascertain how the Australian operation was conducted. Budget US became aware of the New Zealand company's operations but did nothing to assert any rights it may have had in New Zealand at this time.

In 1973 Budget Australia switched its attentions from Mutual to another New Zealand car rental company, Dominion Rent A Car. At first this arrangement appears to have been as informal as the earlier arrangement with Mutual. But, in 1975, Budget Australia entered into a formal franchise agreement with Budget US and, in 1978 and with the approval of Budget US, a franchise agreement was entered into between Budget Australia and Dominion in New Zealand. Some attempt was made to buy the Auckland Budget business from Mutual, but negotiations led to nothing.

The two businesses operating under the name of Budget in New Zealand were (and are) very different in scope. The Auckland Budget operation is essentially a small local off-shoot from Mutual who are mainly involved as a franchisee of Avis. Dominion on the other hand was involved as a franchisee of Budget Australia in setting up a New Zealand-wide Budget Rent A Car operation using the international logo. Dominion has since disappeared altogether and this action can be described as a dispute between a local business undoubtedly associated with larger interests, including, Avis US, and the international interests of Budget Rent A Car. Or, as Cooke J puts it:

> . . . the present appeals can be seen as manifestations of a continuing power struggle between two of the industry leaders.

The present appeals are from two conflicting judgments; one by Moller J granting a nation-wide injunction in favour of Mutual and the other by Vautier J granting an injunction in favour of Dominion. The Court of Appeal was therefore

faced with a stand-off.

The solution that was reached was a compromise – *both* companies may continue to use the name Budget. The approach favoured by Cooke J is the "Concurrent Rights Approach".

It is a consequence of the internationalisation of trade that international companies may extend their goodwill into jurisdictions even though their connection with that jurisdiction is slight. In such cases the goodwill and reputation of the company are entitled to the protection a passing off action may bring (cf Ricketson, *The Law of Intellectual Property*, paras 25.17 to 25.28). In addition there is created the increased risk of confusion where a trade name of international repute comes into conflict with a local business using the same or similar name in good faith. This case is not quite that but, nevertheless, where there has been acquiescence, it may be unfair for one business to prevent the use of a name by another.

A number of recent decisions were cited by Cooke J; in particular *Annheuser-Busch* [1984] FSR 413 (the "Budweiser case") and *Habib Bank* [1981] 2 All ER 650. Although neither of these cases is exactly parallel with the present case (in particular in neither is there any suggestion that either of the business entities in dispute had begun using the disputed trade description in such a way that an inference could clearly be drawn that the purpose was to forestall the entry of the opposing party into the jurisdiction – as seems the case here), nevertheless Cooke J was prepared to hold that both parties had merit to their claims and that a compromise similar to that reached in other cases could be reached. See also *Peter Isaacson Publications* (1984) 56 ALR 595 and *Chase Manhattan* (1985) 63 ALR 345 as cited by Cooke J. In the latter case a concurrent rights approach was adopted but, since there was very little common field between the disputants, it can clearly be distinguished from this case. In the first decision, the "Sunday Territorian" case, two rival newspapers were set up at the same time with the same name. Again there was no suggestion of market manipulation here and the result was not, as Cooke J suggests, a concurrent rights compromise, but a stand-off in which both parties were restrained from using the disputed name without clearly distinguishing their newspapers from each other in some other way.

One should also note that in the other cases cited by Cooke J; in particular the New Zealand case of *Esanda* [1984] FSR 96 no suggestion of a concurrent rights theory is mentioned. *Esanda* however may be distinguished on two grounds – "Esanda" is a fancy rather than a descriptive name (which may or may not be relevant) and, more importantly, there was no acquiescence on the part of Esanda Australia in the use of the name by the New Zealand corporation – they acted immediately to restrain its use.

In the judgments of Cooke J and Somers J it is clear the acquiescence on the part of Budget Australia in the activities of Mutual was crucial in defeating any claim against Mutual in the use of the name Budget. In addition the differing scope of the two businesses and the present differences in logo used were also mentioned, although, as Cooke J points out such distinctions may be too simplistic. He states:

> The most reasonable explanation of the comparatively sharp growth in Mutual Budget's business after 1977, and the notably high percentage of Australian and other overseas hirers in the years following 1977, is that Mutual Budget were reaping some "spin-off" benefit from Dominion Budget's campaign to publicise the international Budget service.

In other words there does appear to be some evidence that Mutual Budget did reap and will probably continue to reap some reward, to Dominion Budget's detriment, from the confusion of names.

The basic principles of a passing off action were set out in *Erven Warnink Beslo ten Vennootschap* [1979] AC 731 (the "Advocaat case") by Lords Fraser and Diplock. The first four points in Lord Fraser's definition establish the requirement of goodwill – in this case both Mutual Budget (by prior use in New Zealand) and Budget International (US & Australia), have competing claims to the goodwill attached to the name Budget. Lord Diplock sets out the requirements which must exist to establish a case of passing off. There would appear to be some basis for claiming that Dominion Budget suffered damage, but is there any misrepresentation on the part of Mutual? They cannot be said to have come to this action with clean hands having agreed to use the name Budget in an attempt to gain an advantage over their international competitors of that name. But then neither does Budget International represent any stronger position in that as a result of the actions of Budget Australia, Mutual was actually encouraged in their activities at least up until 1973. In the event Mutual Budget's motives were not considered serious enough to defeat their claim (see Casey J).

What this case represents is the difficulty Courts have in balancing the interests of business competitors where the alliances formed are constantly shifting and actions indicate either the muddle of unplanned response to events over a long period of time (nearly 20 years in this case) *or* deliberate moves and counter-moves to obtain a favourable market position. It would appear from this case firstly, that the trend to allow the existence of goodwill even where there is very little connection with a jurisdiction (as in the *Esanda* case) has received further support by the Court of Appeal. In particular, the trend is continuing to have support on both sides of the Tasman in a seemingly conscious effort by the Courts to encourage a "common market" type approach to Australian/New Zealand business situations (cf Cooke J's judgment, *Esanda* case, *Chase Manhattan* case). Secondly that, even where some confusion may result to the benefit of one party over another, where there is no clear weight of equity on one side or another, both parties in dispute may continue to use the single name in what Cooke J refers to as a concurrent rights approach.

What is quite missing in any of the judgments in this case is any consideration of the rights of consumers. Only Somers J refers to " . . . two conflicting objectives, on the one hand the public interest in free competition . . . ". Is the public interest served in this case? Would the confusion lead to members of

the public receiving what they thought was a service of the quality of Budget International but which was in fact an inferior service offered by another company? There does not seem to be much evidence either of the existence of confusion, or of any inferiority in Mutual Budget's service which may be of detriment to consumers. There is some suggestion that Mutual Budget offers a cut-rate, no frills service (living up to the name Budget in a way the international company does not) which may be desirable from the consumer point of view. But this has nothing to do with the dispute as to the name. In conclusion, this represents an interesting case in the recent development of passing off. I have neglected to discuss Casey J's judgment as he is largely concerned with such issues as *res judicata*, copyright and tortious conspiracy which seem of lesser interest than the principle dispute over the use of the name Budget.

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More on the Contractual Mistakes Act 1977

Hawkins Construction Ltd v McKay Electrical (Whangarei) Ltd [1987] BCL 713 is another significant decision on the Contractual Mistakes Act 1977. Until 1983 it would be fair to say that this Act had little impact on the legal system. But since that date it has been subjected to some applications which would have seemed odd, to say the least, under the pre-existing common law, and have made some commentators speculate about a new conception of contract. In *Ware v Johnson* [1984] 2 NZLR 518, a case where both vendor and purchaser of an orchard laboured under the same mistaken belief as to the type of spray which had been used to treat it, the purchaser was allowed monetary compensation under the Act as an alternative to damages for misrepresentation. Such a decision is clearly within the empowering provisions of s 7, but would have been beyond the ken of the Courts at common law, under which operative mistake could at most render a contract void: to succeed in an action for compensation one would have had to show that there was a *valid* contract a term of which had been *broken*. *Conlon v Ozolins* [1984] 1 NZLR 489, which was followed in *Engineering Plastics Ltd v J Mercer & Sons Ltd* [1985] 2 NZLR 72, caused the greatest stir by holding that despite a clear written, signed, contract to sell four lots a vendor was eligible for relief under the Act because she had always intended to sell only three even though her intention in this regard was unknown to the purchaser. The parties had made "different mistakes about the same matter of fact". There can be, and has been, considerable debate as to the moral justification for such to decision, and as to the inroads it is capable of making into contractual certainty. There is an even greater question as to whether the decision in *Conlon* is really justified by the wording of the Act: to fit the facts into the kind of mutual mistake envisaged by s 6(1)(a) (iii) involves an interpretative exercise which requires all the assistance of s 5 (j) of the Acts Interpretation Act.

The Act has also been used to *validate* a contract which would otherwise be void. In *Development Finance Corporation of NZ v McSherry Export Kilns Ltd* (1986) BCR 151 a debenture was executed the day before the company was incorporated, the parties having mistakenly supposed the company would be incorporated on the same day. (ie they had both made the *same* mistake.) Although the debenture was unquestionably void at common law, the Court validated it under the Act in the exercise of a jurisdiction that reminds one of the Courts' powers under the Illegal Contracts Act 1970. This jurisdiction to validate seems to be squarely within s 7, and was certainly within the contemplation of the Contracts and Commercial Law Reform Committee in its Report on Mistake in Contract. But it is the reverse of what one assumes will be the normal class of case; it can also, incidentally, pose some logical problems for the application of the "unequal exchange of values" criterion in s 6(1)(b).

However, it would be fair to say that since *Conlon* the prevailing note has been one of caution, and in a series of recent High Court decisions arguments based on the Contractual Mistakes Act have failed. Thus relief was refused:

> where it was discovered that an undisclosed principal was someone other than the vendor thought (*Heard v Smith* [1986] BCL 193);
>
> where a settlement of a claim under the Testamentary Promises Act 1949 was affected by one party's reliance, unknown to the other, on an out-of-date valuation of the property (*Davey v NZ Guardian Trust Co Ltd* [1986] BCL 871);
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> where parties to an argument to lease had, unknown to each other, different understandings about the rent (*Langdon v McAllister* [1985] BCL 1353);
>
> where a vendor's agent sold a lot to a buyer without disclosing that the vendor proposed to subdivide a small area off the lot (*Ciochetto v Ward* [1987] BCL 231);
>
> where one party but not the other thought that two contracts to buy two properties were interdependent so that if one became void both did (*Grose v NZ Farmers Co-op* [1987] BCL 586).

These decisions involve a great variety of reasons for holding relief to be unavailable: that the mistake did not influence entry into the contract; that one party's mistake was unknown to the other; that there was no substantially unequal exchange of values; that the mistake was one of interpretation; that neither party was truly mistaken; that the mistake was the fault of the party seeking relief. It has also been held that the Act does not override the principle of indefeasibility of title under the Land Transfer Act 1952: *Mitchell v Pattison* [1986] BCL 1106.

No doubt these cases involved decisions on their own facts, and too much should not be read into them. But it is at least arguable that in a number of them *Conlon v Ozolins* could have justified an argument that the mistake was of a kind which would have entitled the Court to consider a plea for relief. (See for instance the note on *Ciochetto v Ward* in (1987) 4 BCB 148.) The fact

that relief was so studiously not granted suggests that the Courts are taking seriously the injunction in s 4(2) of the Act that it is not to be used in such a way as to prejudice the general security of contractual relationships. There is also apparently some concern as to whether *Conlon* was rightly denied: for instance Williamson J in the *Grose* case carefully sets out the various criticisms to which *Conlon* has been subjected.

However the most recent case on mistake — *Hawkins Construction Ltd v McKay Electrical (Whangarei) Ltd* (supra)— is a straight-out application of *Conlon* to a set of facts which cannot in any way be described as unusual. A written contract specified a price of $73,656 for electrical work to be performed under subcontract. There was, however, confusion between the parties as to whether this figure included a sum of $7,000 being a prime cost sum in respect of a power connection and transformer. On the construction of the written contract, it "could not have left any objective reader with any doubt about the subcontract not including the transformer or any prime cost sum in respect of it". (Chilwell J): the quotation had a comprehensive breakdown of the works included and there was no reference in it to the transformer or the prime cost sum. At common law, therefore, the matter would have admitted of no argument.

However, Chilwell J held that as a result of the Act as interpreted in *Conlon v Ozolins* "the common law principles of mistake have gone by the board". No plea of estoppel by signing a clear document was available, for this was precluded by the Court of Appeal in *Conlon* when it overruled *McCullough v McGrath's Stock and Poultry Ltd* [1981] 2 NZLR 428.

In the event, His Honour found that *Conlon's* case was indistinguishable from the present. In both cases only one party had really made a mistake; moreover in both cases the contract documents were perfectly clear. If the mistaken party in *Conlon* satisfied the criteria for relief in s 6(1)(a), so he did here. Chilwell J said:

> It must follow, I think, as demonstrated by *Conlon v Ozolins,* that once the Court finds influencing error in the thinking of one party about a matter of fact or of law which differs from the thinking of the other party about the same matter of fact or of law, so long as that thinking influenced each party to enter into the contract, then section 6(1)(a)(iii) will apply.

However, the Judge found that he did not have enough information before him to decide whether there had been an unequal exchange of values under s 6(1)(b), or whether relief should actually be granted under s 7. He therefore remitted the matter to the District Court whence it had come.

On purely interpretational grounds one has the same misgivings about this case as about *Conlon.* Section 6(1)(a)(iii) requires that the parties must have made "different mistakes about the same matter of fact". Yet can it really be said here that *both* parties made a mistake? One party thought that the figure of $73,656 did not include the prime cost sum, and nor, in the written contract, did it. Chilwell J appears to have accepted defendant counsel's explanation:

> *First,* the defendant's mistake was in believing that the second quotation still contained and included the $7,000 in respect of the Power Board charges.
>
> *Secondly,* the plaintiff's mistake was in believing that the defendant intended to accept the final quotation (which did not take into account the $7,000), the defendant knowing that it did not include the $7,000 for Power Board charges.

Roughly translated, in other words, the plaintiff's only mistake was in not realising that the defendant had made a mistake. Chilwell J clearly recognised the difficulty and took the point made by Somers J who dissented in *Conlon,* and by S Dukeson in [1985] NZLJ 39, that such a result means that almost any party who enters a contract under a mistake, whether known to the other party or not, will be eligible for relief: one wonders, therefore, what point there was in the legislature including s 6(1)(a)(i) in the Act. However, Chilwell J felt himself constrained by *Conlon* to decide as he did, and also made the interesting point:

> If one can assume . . . that one party thinks right about a matter of fact affecting price and the other thinks wrong . . . each is clearly thinking differently about the same matter of fact. It cannot be said that only the wrong thinker made a mistake because that begs the question: what was the correct price?

His Honour added:

> The Judge has to abandon common law objective standards and approach the evidence in relation to proof of mistake from the subjective view point of the parties to the contract.

It is precisely this point which is so concerning so many contract lawyers, and against which one's common law instincts so rebel. And yet once one gets over the evidential difficulty of *proving* such a mistake the departure from tradition is perhaps not quite as great as may at first appear. One must still use an objective approach to determine what the contract *is*: in this case, for instance, there was undoubtedly a contract for $73,656 excluding the prime cost sum of $7,000. It is just that, if certain types of mistake exist, the Court may consider whether various types of relief should be granted to one of the parties to that contract. The contract is not automatically void or voidable: indeed the Court in its discretion need not grant any relief at all. One does not know what relief would eventually have been awarded in *Conlon*, or indeed what relief will be awarded in this present case. In this respect all the Act does is to allow a court to grant the relief where adherence to the objective terms of the contract would cause real hardship. One would assume that in making its discretionary order, the Court will have regard to how much reliance the other party had placed on the objective contract. The line of authority previously referred to would lead one to hope, with some confidence, that contractual certainty is still a valued consideration.

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New Zealand Maori Council v Attorney-General:

The case of the century?

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This article is a critical analysis of the important judgment of the Court of Appeal in The New Zealand Maori Council v Attorney-General and others (1987) 6 NZAR 353. *In his conclusion the author emphasises the point made in the judgments that the status of the Treaty of Waitangi as a constitutional document has not been formally altered, and it was only because of the statutory provision in the State-Owned Enterprises Act 1987 that the Court could come to the decision it did. However he notes the willingness of Cooke P to see the Treaty as an aid to interpretation. In this respect attention is drawn to the Judge's earlier decision on the use of treaties for this purpose in* Van Gorkom [1977] 1 NZLR 535.

I Introduction

Few readers of this Journal will be unaware of the publicity and excitement surrounding the Court of Appeal's recent decision in *The New Zealand Maori Council and Latimer v Attorney-General and others* (1987) 6 NZAR 353. The delivery of the judgments on the morning of 29 June 1987 was followed by scenes of emotion and elation at the Court of Appeal. The decision has been hailed as a "historic case", a "landmark judgment". (Editorial in the *Evening Post* (Wellington), Tuesday June 30 1987) Dr Rangi Walker, chairman of the Auckland District Maori Council, has been reported as stating that the decision, a unanimous finding by all five Judges for the Maori applicants against the Crown, showed New Zealand "had finally moved into a post-colonial era". The Project Waitangi organisation congratulated the Court of Appeal for "finally restoring the Treaty of Waitangi to a central role in the legal system". (*Evening Post* (Wellington), Tuesday 30 June 1987, p 5) The statements of the Court itself were somewhat more muted, but there emerges from all of the judgments a strong sense of history in the making. Cooke P begins his judgment with the assertion that "this case is perhaps as important for the future of our country as any that has come before a New Zealand Court". (*Maori Council v Attorney-General*, Judgment of Cooke P, p 2) In similar vein Somers J noted that the case "has included consideration of the social and political history of New Zealand and is of great importance not only to the parties to it but also for the impact it may have on the social future of the country". (Judgment of Somers J, p 5) Indications of such a kind from the Court of Appeal are unusual, and any commentary on the case must acknowledge at the outset the Court's own insistence that the case marks a turning-point in New Zealand's legal history.

This case belongs to a select group where the moral, historic and emotional significance of a decision may equal or even surpass its importance as a precedent considered more narrowly as a legal text. It is not, of course, being suggested that *New Zealand Maori Council v Attorney-General* is of limited significance as a legal precedent. Nothing could be further from the truth. Nevertheless, it is important to be clear about precisely what the case does say, and (even more importantly) what it does not say. The Court has not laid down any new principle of law that the Treaty of Waitangi overrides statutes, and this Treaty's status in the general law has not been changed. The Treaty of Waitangi was in issue only because of the statutory references to it made in the State-Owned Enterprises Act itself. Thus if the Project Waitangi organisation is correct in its claim that the Treaty has been placed in a "central" position in the legal system — a very debatable proposition — that is due to legislative as much to judicial innovation, a fact which Cooke P was at pains to make very clear[1] but which has been somewhat overlooked by the Press. Nor were the issues debated in the Court of Appeal and analysed in the judgments wholly new. Many matters considered by the Court had already been extensively grappled

with in earlier decisions of the Waitangi Tribunal. (Noted by Cooke P at p 29 of his judgment. Leading Tribunal opinions are *Kaituna* (WAI 4, 30 November, 1984), *Te Atiawa* (WAI 6,) 7 March 1983), *Manukau* (WAI 8,) 9 July 1985) and *Te Reo Maori* (WAI 11, 29 April 1986).) Finally, the Court of Appeal's decision needs to be set in its historical and political context. Its decision should be viewed as part of a process of constitutional change embodied in the creation and subsequent widening of the jurisdiction of the Waitangi Tribunal, the growing practice of referring to "Treaty principles" in statutes, decisions of the Courts (not only with this case but at the High Court level too)[2] and in the recommendation of Royal Commissions and other investigatory bodies. (See eg the *Report of the Royal Commission on Electoral Reform* (Wellington, 1986) para 3.21.) The process is far from complete. Much more needs to be done if the shameful history of broken promises, misunderstandings and plain greed and chicanery traversed in the judgments and in earlier Waitangi Tribunal decisions is to be put right.[3]

II Background to the case

As is well-known, the New Zealand government, as part of a programme of reorganising the public sector, embarked on the creation of a number of state owned commercial concerns known as State-Owned Enterprises (SOEs) to carry on commercial and land management activities formerly undertaken by government departments. Legislative effect to these changes is given by the State-Owned Enterprises Act 1987. As part of the arrangement it was proposed to transfer to the SOEs some four to five million hectares of Crown land. Lengthy negotiations commenced in early 1987 between the government and the management boards of the various SOEs, relating in particular to the identification, valuation and transfer of assets. These developments were watched by many Maoris and the Waitangi Tribunal with mounting concern. The litigation may be said to have its origins in an interim report of the Waitangi Tribunal dated 8 September 1986. It was sent to the Minister of Maori Affairs from a remote marae at Te Hapua, near North Cape, where the Tribunal had just begun to hear an important application brought by five Northland tribes relating to Crown lands in the far North. At the commencement of the hearing, counsel for the claimants, Mr W D Baragwanath QC, made some preliminary submissions on the likely effects of the State-Owned Enterprises Bill then about to pass to its Third Reading. In its interim report the Tribunal stated:

> We consider the Claimants are likely to be prejudicially affected by the Bill. The policy proposed in the State-Owned Enterprises Bill involves a transfer of Crown land to the Forestry Corporation, the Land Corporation and other Corporations. It will then cease to be Crown land. Although it appears Ministers will retain a power of direction to the proposed Corporations, that power, it seems to us, is likely to be limited and insufficiently wide to enable the return of Crown land pursuant to a recommendation of this Tribunal, or might otherwise involve claimants in an additional adversary. Nor, it seems, would the Bill necessarily prevent the alienation of lands that did not provide reasonable economic return. (Waitangi Tribunal, Claim No A23 (Claims by the Honourable Matiu Rata and members of the Ngati Kuri Tribe and other Northland Tribes and Incorporations), Interim Report (Te Hapua, 8 December 1986), p 2.)

This prompt intervention by the Tribunal played a large part in shaping the events which were to follow. Two significant changes were made to the Bill: the addition of what is now s 9 stipulating that

> Nothing in this Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi

and s 27 which set out an elaborate procedure to deal with pending as well as future Waitangi Tribunal claims. Section 27(1) restrained the alienation of any land owned by an SOE except to the Crown where the land was the subject of a claim before the Tribunal. It was necessary that the claim be lodged before the State-Owned Enterprises Act had received the Governor-General's assent. Section 27(2) dealt with the situation which could arise *after* the Waitangi Tribunal had made a recommendation – whether or not the recommendation arose out of a claim lodged before the enactment of the State-Owned Enterprises Act. The Governor-General was given a discretionary power to order the resumption of the land from the SOE to the Crown upon payment of compensation to the SOE. The procedures of s 27 left a small (but to many minds worrying) gap – nothing was said about land which was the subject of a claim lodged after the enactment of the State-Owned Enterprises Act which had in the interim been alienated by the SOE to private hands.

The alterations to the Act did not allay the concerns of the Tribunal. Precisely what those concerns were is documented by the Statement of Claim filed on March 30 at a time when the convoluted negotiations between the government and the SOEs were at last nearing completion. The event which triggered the decision to issue proceedings was a statement by the Prime Minister reported in the *New Zealand Herald* on Saturday 28 March 1987, to the effect that lands were about to be transferred to the SOEs on April 1. The Applicants were the New Zealand Maori Council and Sir Graham Latimer, himself a member of the Waitangi Tribunal, suing on behalf of himself "and all persons entitled to the protection of Article II of the Treaty of Waitangi". The Statement of Claim, brought in the form of an Application for Review pursuant to the Judicature Amendment Act 1972, raised concerns less about the risk of alienation of land than about the much broader question of the nature and purposes of the SOEs and especially the statutory direction in s 4(a) that they are to operate as profitable businesses. "Were such assets", it was pleaded, "to be transferred to a State-Owned Enterprise such enterprise would lack the Crown's capacity to give effect to the principles of the Treaty . . ." The elaborate procedures of s 27(2), requiring resumption by Order-in-Council and payment of

compensation would "create a substantial impediment to the performance of the Crown's Treaty obligations." (*Maori Council v Attorney-General* Statement of Claim (High Court, Wellington Registry, 30 March 1987) p 5.) The formal pleadings are amplified by an affidavit by Mr Latimer dated 29 March 1987 which makes the concerns of the Applicants very clear:

> 3 The applicants have no knowledge of the basis on which such transfer is proposed, what lands are involved, and what enquiry if any has been made to establish that s 9 is complied with . . .
>
> 10 As matters stand there has been no system put in place for identifying to the Maori community what Crown lands are to pass to State-Owned Enterprises and which will continue to be held by the Crown. This information must be held by the Crown and be readily supplied to the Tribes.
>
> 11 Without such consultative process it will be impossible for the Crown to know whether or not it is infringing the provisions of s 9 of the State-Owned Enterprises Act 1986. Without such enquiry it is inevitable that there will be such breach in a substantial number of cases.
>
> 12 A further and fundamental factor is that the title of the Crown to a good deal of what is listed on the public records as "Crown land" is disputed by Maori Tribes. By transfer of Crown lands en bloc to State-Owned Enterprises the capacity of the Waitangi Tribunal to investigate and make effective recommendations in such cases will be lost.
>
> 13 A further factor is that much land which was lost to the Maori Tribes by wrongful confiscation or otherwise has passed into the hands of bona fide purchasers for value without notice. In such cases the most effective method of providing compensation would be by substituting other land of the Crown. But if such other land has passed into the hands of State-Owned Enterprises that avenue of compensation will be lost.

III Preliminary procedures

On 31 March the matter came before Heron J in the High Court at Wellington, who in an oral decision given on 1 April (*Maori Council v Attorney-General*, High Court, Wellington, CP 139/87, 1 April 1987 (Heron J)) made an order that because of its unique importance [4] the case was to be transferred to the Court of Appeal pursuant to s 64 of the Judicature Act 1908 and the criteria laid down in *Re Erebus* [1981] 1 NZLR 614. Interim relief was granted in the form of a declaration that the Crown should refrain from taking any action pursuant to the State-Owned Enterprises Act relating to any assets which were

> the subject of any claim pursuant to any application to the Waitangi Tribunal filed on or before 31 March 1987.

Wider orders were made in the Court of Appeal on the same day. On 15 April an important Chambers hearing took place, where, amongst other orders, the Court required the first and second respondents (the Attorney-General, and the Ministers of Finance, Energy, Lands and Forests) to answer an interrogatory asking whether the Crown had established any system

> to consider in relation to each asset passing to a State-owned enterprise whether any claim by Maori claimants in breach of the principles of the Treaty of Waitangi existed.

The answer subsequently given was "No". This was undoubtedly the single most important piece of evidence in the case. The Court's interpretation of the State-Owned Enterprises Act coupled with the Crown's response to this interrogatory admitting that no system of any kind had been set up was ultimately to prove decisive. The substantive hearing, which took place in early May, was distinguished by the enormous amount of background material presented in evidence, including lengthy affidavits, historical works, PhD theses, articles and other papers by academic lawyers and official documents and papers of various kinds, all of which provide a collection of material fascinating to the legal historian but not all of which seems to have been particularly relevant to the issues before the Court. The Court nevertheless admitted it all, due to, as Cooke P put it

> the exceptional nature of the case, and in particular its genesis in national circumstances and events more than a century ago . . . (*Maori Council v Attorney-General*, Judgment of Cooke P, p 13)

IV The statutory interpretation issue

To a very large degree the judgments of the Court of Appeal are an exercise in utterly orthodox statutory interpretation, the object being to determine whether s27 amounted to a complete code. If so, then the transfer of assets to the SOEs could proceed. On this point the outcome could hardly have been in doubt. Any attempt to convert s 27 into an exclusive code could not accurately reflect Parliament's intentions, as to do so would render superfluous s 9, the general requirement restraining the Crown from acting in a manner inconsistent with the principles of the Treaty. (See the Judgments of Cooke P, pp 20-21; Richardson J, pp 30-31; Somers J, pp 29-30; Casey J, p 12; Bisson J, pp 25-26.) The Court rejected the ingenious but surely untenable proposition advanced by the Crown that s 9 was intended to deal with matters other than land. It was difficult to imagine what those other matters might be. The Crown advanced the possibility of fishing rights, but this was dismissed as fanciful:

> . . . Even if any such [ie fishing] rights could be affected by transfers of assets under the Act, they were certainly not in the forefront of parliamentary consideration. Certainly the Act extends to a range of assets other than Crown land, but patently

> the transfer of Crown land is a central subject dealt with by the Act. It would be strange if the uncompromising wording of s 9 — "Nothing in this Act . . ." were read as meaning nothing except the provisions about Crown land. (Judgment of Cooke P, p 20)

Aficionados of the fine art of statutory interpretation will be intrigued by the Court of Appeal's use of Hansard as an aid to interpretation. Cooke P discusses this at some length. Not to examine Hansard, in a case "of the present national importance", said His Honour, "would seem pedantic and irresponsible".[5] As it happened, the search for guidance from the legislators' words of wisdom proved fruitless. No member of the House had anything useful to say about s 9 or the relationship between the two sections. Cooke P concluded his analysis of the debates with the rueful comment that this case is

> an illustration of some of the reasons for the former practice of never referring to Hansard on questions of statutory interpretation. (*Maori Council v Attorney-General*, Judgment of Cooke P, p 24)

It also, said His Honour in an interesting aside, illustrates some of the disadvantages of the unicameral parliamentary system. Discussion in an upper house might have brought to light and resolved a problem of interpretation such as this before the Act was passed.

V The principles of the Treaty

Since s 9 expressly forbids the Crown to act in a manner "inconsistent with the principles of the Treaty of Waitangi" the Court had to determine what those principles were. The growing trend to incorporate a reference to Treaty principles in land use statutes obviously gives importance to this part of the Court of Appeal's analysis. Examples of this trend include the Environment Act 1986 and the Conservation Act 1987. (See the Environment Act 1986, Long Title and s 17(c); Conservation Act 1981 s 4. The obligation here imposed on the Crown is stronger than is required by the State-Owned Enterprises Act, in that whereas s 9 of the latter requires the Crown not to act in a manner contrary to the principles of the Treaty, the obligation required by these two statutes is to promote Treaty principles. Section 4 of the Conservation Act 1981 states that "this Act shall be interpreted and administered *as to give effect* to the principles of the Treaty of Waitangi" (emphasis added). Further re-castings of other important land use statutes, such as the Water and Soil Conservation Act 1973 or the Town and Country Planning Act 1977 will also undoubtedly include a reference to Treaty principles.

Analysing Treaty principles is a difficult task. In a paper published by the New Zealand Maori Council and referred to by Richardson J the observation was made that

> the Treaty was drawn up by amateurs on the one side and signed by those on the other side who understood little of its implications. (New Zealand Maori Council, *Kaupapa-Te Wahanga Tuatahi* (February, 1983), cited in *Maori Council v Attorney-General*, Judgment of Richardson J, p 10)

The Treaty is a short, sparse document, full of ambiguities; nor are the English and Maori texts literal translations of one another. Problems of construction and interpretation can easily arise. In respect of the difficulties arising out of the discrepancies between the two texts, the Waitangi Tribunal has, relying on a number of sources such as rules of international law, the *contra proferentem* rule and Canadian and US precedents, concluded that in the event of a conflict the Maori text ordinarily should prevail.[6] This precise issue did not arise in this case and the Court of Appeal has left the matter open for the time being. Cooke P stated that the "differences between the texts and the shades of meaning do not matter for the purposes of this case. (*Maori Council v Attorney-General*, Judgment of Cooke P, p 34) The absence of textual difficulties of that kind left the Court of Appeal free to concentrate on the broader spirit of the Treaty, which it was able to derive from a sympathetic reading of both texts. "What is important for present purposes", said Richardson J, "is the approach and the emphasis rather than the differences." (Judgment of Richardson J, p 35)

The key concept used by the Court to define the relationship between the Crown and the Maori people is that of partnership, (Judgment of Cooke P, p 35; Somers J, p 21) a concept which would appear to give much scope for future development in a process of continued borrowing and adaptation of common law principles. A consequence is that the relationships between the parties are in a sense fiduciary, as was submitted by counsel for the Applicants relying on the Canadian decisions of *Guerin v The Queen* (1984) 13 DLR (4th) 321, and *Kruger v The Queen* (1985) 17 DLR 591. (*Outline of Submissions in Support* (applicants), p 33) This argument was accepted by the Court, in the sense that the relationships between the Treaty partners "creates responsibilities *analogous* to fiduciary duties". (Judgment of Cooke P, p 37) Clearly the partnership analogy cannot be insisted on too literally. The Court would not accept that the relationship between the partners involved a duty to consult, as the applicants unsuccessfully contended. The relationship, while having elements of a partnership, also seems to resemble a "trust in the higher sense".[7] The responsibilities of the parties to the relationship are to act towards one another in a spirit of reasonableness and good faith (or the "utmost" good faith).[8] The Crown's obligation, moreover, is not a passive one, as Cooke P emphasised, endorsing as he did so the general approach already developed by the Waitangi Tribunal:

> What has already been said amounts to an acceptance of the submissions for the applicants that the relationship between the Treaty partners creates responsibilities analogous to fiduciary duties. Counsel were also right, in my opinion, in saying that the duty of the Crown is not merely passive but extends to active protection of Maori people in the use of their lands and waters to the fullest extent practicable. There are passages in the Waitangi Tribunal's Te

> Atiawa, Manukau and Te Reo Maori reports which support that proposition and are undoubtedly well-founded. (Judgment of Cooke P, p 37)

VI Was the Crown acting in a manner inconsistent with Treaty principles?

Counsel for the applicants had to convince the Court that the actions of the Crown amounted to a breach of this rather amorphously defined relationship. To translate the actions of the Crown into the conceptual language of a breach of Treaty principles was a challenging task for the applicants, and this will usually be the most difficult and demanding role of counsel involved in litigation relating to the Treaty.

In this case, the statement of claim sought declaratory relief on two bases. Firstly, a declaration was sought to the effect that the "proposed exercise of the statutory power to transfer . . . the said lands and waters to a State-owned enterprise prior to giving the Applicants and those they represent reasonable opportunity for the submission to and investigation by the Waitangi Tribunal of existing and potential claims" would be unlawful. If the Crown was required to afford such an opportunity to lay a claim before the Tribunal it would in effect be obliged to consult with the applicants "and those they represent" in respect of every asset sought to be transferred to one of the SOEs. The applicants submitted that:

> It is one of the principles of the Treaty that the Crown must consult with the Treaty partner concerning action which might affect it. The fact that it has been readily infringed in the past may account for why the list of assets proposed to pass were drawn up without consultation. (*Submissions of applicants*, para 8.4 (p 37)

This submission was rejected by the Court of Appeal. Who should be consulted? Just the Maori Council? A tribe, a sub-tribe, affected individuals? Such an "absolute open-ended and formless duty" was incapable of "practicable fulfilment" and "cannot be regarded as implicit in the Treaty". (Judgment of Richardson J, p 20)

The Court of Appeal was much more attracted by the alternative claim for relief. The applicants sought:

> A declaration that the transfer of assets en bloc to State-owned enterprises whether such transfer would be inconsistent with the principles of the Treaty of Waitangi would be unlawful.

It will be recalled that, in its response to the applicants' interrogatory, the Crown had admitted that no such monitoring system had been established. Setting up a "system", clearly, is a very different proposition from an obligation to consult and afford an opportunity of bringing a Waitangi Tribunal claim in respect of every asset proposed to be transferred. Cooke P illustrated this in a concrete way by observing that the State-Owned Enterprises Act did not necessarily require outright transfers of Crown land to the SOEs. Assets could be transferred conditionally, restricting their transfer to third parties. More generally, "a further stage of planning and opportunity for comment" by the Maori people is needed. All that the Crown needed to do was set up "a reasonably effective and workable safeguard machinery". (Judgment of Cooke P, p 39, 40)

Cooke P's reference to the need for a further opportunity to be given to the Maori people for comment makes it clear that the duty to consult, rejected by the Court in the form claimed by the applicants, and the duty to set up a system, which the Court thought *was* essential, are not mutually exclusive. Certainly, there must be some consultation. The Court of Appeal should not be understood to suggest that the Crown has no obligations of any kind to consult with the Maori people about Crown land intended to be transferred to the SOEs. The Court's objection to consultation as a principle was founded on the suggestion implicit in the pleadings that no land could be transferred unless consultations took place between actual or potential Waitangi Tribunal claimants and the matter referred to the Tribunal should no solution be possible. That would be an unacceptable inroad into the Crown's right to govern. On the other hand, there needs to be some consultation at least at the stage of setting up the system. A system of check lists, for instance, acceptable to all parties, could be established. Most subsequent decision-making could thereafter be routine and administrative, although sometimes there might be a need to consult further in respect of particular pieces of land. The criteria governing when that should be done could also be fixed in advance. The obligation to set up a "system" is thus *partially* consultative, as is demonstrated by the particular orders made by the Court, requiring the Crown to submit its proposals for establishing a system to the Maori Council.

Requiring the Crown to establish a system can hardly be seen as impossibly onerous, and the Crown's failure to do so went right to the heart of the quasi-partnership established by the Treaty. The Crown's failure in this regard was a clear breach of Treaty principles. The Court granted a declaration to the effect that

> the transfer of assets to State enterprises without establishing any system to consider in relation to particular assets whether such transfer would be inconsistent with the principles of the Treaty of Waitangi would be unlawful.

This was supplemented by the direction requiring the Crown to devise a system within 21 days and submit it to the Maori Council for its comments. The Court of Appeal evidently means to ensure that it keeps a firm control on events, for the Court has also ordered that the draft system should be lodged in the Court. Once that has been done, a priority fixture will be arranged and the system will not be put in place until it has received the final blessing of the Court of Appeal. This kind of on-going judicial supervision, familiar enough in ordinary civil proceedings, is an interesting development in the context of litigation relating to the obligations of the Crown. The Court is taking upon itself a responsibility to supervise government policy at a high level. It has certainly shown itself willing to act as arbiter between the Maori people and the state. This extension of judicial supervision may turn out

to be the most significant development of all.

VII The status of the Treaty of Waitangi

The status of the Treaty in the general law was not in issue in this case and has not, therefore, been affected. The general rule was authoritatively stated by the Privy Council in *Hoani Te Heuheu Tukino v Aotea District Maori Land Board* [1941] AC 308 that rights conferred by the Treaty are unenforceable unless incorporated into a statute. The *Maori Council* case is, if anything, an illustration of the rule. There was no suggestion that the quasi-partnership or fiduciary relationship said to characterise the obligations of the Treaty partners would itself give rise to any kind of action (for breach of trust for instance) should one of the partners be in breach. It is much too early to predict whether such a development of the law is a likely possibility, but perhaps it should not necessarily be ruled out. The Court of Appeal may have been quite deliberately characterising the Treaty relationship in the way it did at least not to foreclose subsequent development in the direction of developing remedies for those situations where the Treaty is *not* referred to in a statute. A partnership which contains no remedy for breaches of the obligations it entails might be thought to be a rather pointless relationship. This, however, is to enter into the realms of pure speculation. At the present time the basic principle of law set out in *Te Heuheu's* case remains intact.

Cooke P did, however, leave some scope for the Treaty to have a place in the Courts in a more indirect sense — as an aid to interpretation, resembling interpretive canons such as the principles of natural justice. His Honour accepted a submission

> that the Court will not ascribe to Parliament an intention to permit conduct inconsistent with the principles of the Treaty. (Judgment of Cooke P, p 15)

He went on to say that this would be the correct approach not only for "working out the import of an express reference to the principles of the Treaty" but also for "ambiguous legislation". Thus if the Court is confronted with a problem of statutory interpretation it will, where appropriate, lean towards the meaning which is most in accordance with Treaty principles. This will be so even where the statute in question itself makes no reference of any kind to the Treaty.

This is an approach which might well lead to some very interesting developments. A significant use of Treaty principles as an extrinsic aid to statutory interpretation is Chilwell J's decision in the *Huakina Trust* case, noted above. A place in the law as a mere aid to interpretation may not sound very promising to ardent supporters of the Treaty of Waitangi, but every lawyer knows what surprising things the Courts have managed to accomplish with the principles of natural justice.

Conclusion

It must be re-iterated that the Court in this case could only discuss the principles of the Treaty of Waitangi because of the changes to the State-Owned Enterprises Act made by the legislature after the intervention of the Waitangi Tribunal. The Maori Council case has to be seen as but a part of a continuing process of constitutional change concerning the status of the Treaty, a process which is taking place simultaneously on a number of different fronts. The legal status of the Treaty itself, however, remains essentially unaltered, although Cooke P's willingness to give express sanction to the use of the Treaty as an aid to interpretation may have significant consequences. That remains to be seen. □

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1 See the judgment of Cooke P, p 47: "I have called this a success for the Maoris, but let what opened the way enabling the Court to reach this decision not be overlooked. Two crucial steps were taken by this Parliament in enacting the Treaty of Waitangi Act and in insisting on the principles of the Treaty in the State-Owned Enterprises Act. If the judiciary has been able to play a role to some extent creative, *that is because the legislature has given the* opportunity." (emphasis added)

2 Two important High Court decisions are *Te Weehi v Regional Fisheries Officer* (1986) 6 NZAR 114 and the recent decision of Chilwell J in *Huakina Development Trust v Waikato Valley Authority*, Administrative Division, Wellington, M430/86, June 2 1987. The latter case is especially significant in that — in contrast with both *Te Weehi* and the *Maori Council* cases — the legislation in question made no reference either to traditional rights or to Treaty principles. In *Huakina* Chilwell J reinterpreted the Water and Soil Conservation Act 1973 to conclude that Maori spiritual values can be taken account of in the determination of applications for water rights made to regional water boards. This reversed long-standing water board and Planning Tribunal practice. In reaching this conclusion Chilwell J drew heavily on the Treaty and on recent constitutional changes, especially the growing importance of the Waitangi Tribunal, and in so doing was able to reinterpret the Act despite the absence of any kind of reference in the Act to Maori values generally (as may be found in s 3(17)(g) of the Town and Country Planning Act 1977) let alone to the principles of the Treaty of Waitangi.

3 The Court of Appeal heard evidence on three illustrative cases, these being those concerned with the Otakou Block, certain Crown land in Taranaki "confiscated" from the Ngati Tama, and with Woodhill State Forest. The history of each of these three matters, each one a dismaying saga of injustice and frustration on the part of the former Maori owners to obtain redress, is set out in a restrained way in the judgments. The Court was not concerned with reaching specific conclusions of fact on these matters, but merely to allow the applicants to particularise their claim that the principles of the Treaty would be contravened by the proposed transfers. An equally dismaying saga is related by the Waitangi Tribunal in its *Manukau* decision, cited above, dealing with the long history of grievances suffered by the *tangata whenua* of the Manukau region.

4 The precise reasons given by Heron J for ordering the transfer into the Court of Appeal were because, firstly, the case involved for the first time "a consideration of the principles of the Treaty of Waitangi in the context of transfers of Crown assets where those principles have been directly incorporated into a statute"; secondly "the gathering momentum of public concern as to the Treaty of Waitangi and its implications for both Maori and Pakeha"; thirdly, the "significant public interest in the advent of state owned enterprises"; and, finally, the urgency of the case and the likelihood of an appeal. See the decision of Heron J cited at n.13 above, p 14.

5 See the Judgment of Cooke P, p 22. This case is not, of course, the first occasion on which the Court of Appeal has referred to Hansard as an aid to statutory interpretation: see *Proprietors of Atihau-Wanganui v Malpas* [1985] 3 NZLR 468, *Marac Life Assurance Ltd v CIR* (1986) & TRNZ 331, and *Howley v Lawrence Publishing* (1986) 6 NZAR 193. Quite when it is, and when it is not, proper for counsel to advert to Hansard is difficult to say: the Court of Appeal appears to be carefully resisting the temptation to confine itself to any precise test.

6 This may be an oversimplification of the Tribunal's position, but appears to be the effect of, for example, the Tribunal's discussion of this question in *Manukau*, WA18, 19 July 1985, p 88. Here the Tribunal refers to the general rule of international law that in the construction of a treaty in two or more languages no text has superiority.

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LAWASIA after 21 years

By Dr David Geddes, Secretary-General of LAWASIA

Dr David Geddes has been Secretary-General of LAWASIA for 14 of its 21 years. He will be retiring from that position after the 1989 Conference. At the opening session of the 10th Conference in Kuala Lumpur in July he was the third speaker after the new President of LAWASIA, Mr G T S Sidhu, and the President of the Bar Council of Malaysia, Mr Param Cumaraswamy. In his brief address published below, Dr Geddes frankly noted the continuing difficulties for the rule of law within the Asia and Pacific region, but took a positive view of the work that has been done and the commitment of lawyers within the region.

LAWASIA is a 21-year-old organisation and during this week much will be made of the fact that we have survived that 21 years. Twenty-one years is a short time, but we are in that time a well-travelled organisation. We have seen many important things and we have come to believe in many important things. In the commercial law area we have seen enormous developments in regional countries over the 21 years, we have seen an enormous expansion of regional economies and we have seen the fields of commercial law develop to cover areas not contemplated at the beginning of LAWASIA's existence.

In particular in the field of energy law, intellectual property, communications law, and other new fields the profession has had to come to grips with, LAWASIA has attempted to provide standing committees and sections to deal with those matters. We hope that we have provided a useful service to the commercial legal profession in the region through the existence of those committees and sections. I think that the activity of those bodies has indicated that there is an ability in the profession to cope with the technological changes which are appearing in the region and to develop new expertise in those areas. We have also been concerned with legal education, with judicial education and these are matters with which we will continue to be concerned in the future.

We have, I think, developed over the past 21 years a faith in the profession, and a faith in the strength of the profession on a regional basis which did not exist 21 years ago. I think that has been an important contribution on LAWASIA's part. In the social law area we have seen even more important changes. We have seen constitutions overthrown; we have seen Judges dismissed and moved or transferred without reason; we have seen press restrictions imposed; we have seen restrictions imposed not only on other professions but on our own profession as well; we have seen also salvagings and we have seen disappearances and we have seen massacres. We have seen what has in fact come to constitute the dark side of human nature in the region. But we now believe that merely because we lawyers think that ought to change, that it will change. We know that it will not. So we have taken consolation in what we can do as a regional organisation.

We have maintained our belief in the rule of law, we have tried to work to ensure the independence of the profession and in particular the independence of the judiciary. We believe in the right to press freedom, we believe in the right not to be detained without trial, we believe in the right to counsel and we are concerned as an organisation to work as strongly as we possibly can in all of those areas. Having listened to Tara Sidhu and Param Cumaraswamy I recognise there is a thread running through these three speeches which is a common one. That is a belief in the strength of the regional legal profession both nationally and at a regional level to cope with the very difficult issues that arise in the social law area. This is not in a political sense because we are not a political organisation and our constitution prohibits us being involved in politics, but as a strong and independent regional legal profession we are very much concerned with these issues.

Over the 21 years we have seen these problems and we think we have understood them, and we have survived as an organisation. We are proud of what we have done in some areas. We have weaknesses in other areas and I hope that these will be discussed in this afternoon's session but we are delighted to be in Kuala Lumpur at the end of this 21-year period, because in a sense Kuala Lumpur was the beginning of LAWASIA.

T S Eliot wrote some time ago "in my end is my beginning" and at the end of the 21 years of LAWASIA the first 21 years is in fact another beginning. I personally am confident, and I hope that you will be as well, after today and after the rest of this week, that you are dealing with a strong and an independent and a viable and a surviving regional organisation. □

LAWASIA — its regional role

By Mr Fali Nariman, Senior Advocate, Bar of the Supreme Court of India

The paper published below was the presidential address given by Mr Fali Nariman as the retiring President at the 1987 LAWASIA Conference in Kuala Lumpur, Malaysia at the end of June. The address considered particularly the need for and value of a regional lawyers' organisation in the Asian and Pacific area.

Since the ninth LAWASIA held at New Delhi two years ago I have often wondered about the utility of a President for an organisation like LAWASIA. There is of course legal justification for the office — a body cannot be seen to function without a head. So once in every two years, we change the head. This biennial rotation of Presidents underscores the trans-national aspect of LAWASIA — it emphasises its truly regional character.

The President of LAWASIA is at best a torch-bearer — of an organisation which grows from strength to strength, only because it is seen to be helpful *by* lawyers and *for* lawyers in the region. As I lay down office today, I am convinced that what has made LAWASIA go forward — at any rate from the ninth to tenth LAWASIA — what has made LAWASIA meaningful and functional — in other words what has made it "tick" — is not its Chief Executive, but its Secretariat. It is the Secretariat located in Sydney that is the heart and soul of this great body of Bar Associations, judges and lawyers.

I am particularly beholden to our Secretary-General Dr David Geddes not only because since October 1985, he has continued to shoulder the increasingly heavy burden of a fast-growing organisation, but because when I took office, he agreed (at my personal request) to continue for a further term. A torch-bearer particularly if he is not very athletic, requires a runner — and David has been a runner of Olympic standards.

Term of office

Last year, the Chief Justice of New York State Court of Appeals addressed members of the International Bar Association at its session in New York. He said that when he was first appointed Chief Justice of the Court of Appeals he proudly showed his wife the table of Justice Benjamin Cardozo, his most illustrious predecessor in office. He said to his wife in a reverent voice:

> See, this is Cardozo's table which I now use

His wife replied (not very reverently):

> Yes and after 50 years and five more Chief Justices it will still be Cardozo's table!

I will only say that just as some countries get along *because* of what their governments do, and a few pull through *despite* what their governments do, so it is with LAWASIA in the past two years: it has got along quite splendidly despite the little that I have attempted. LAWASIA — now in its year of full maturity — functions almost on its own mainly because of its well-organised Secretariat; so well-organised that it would have made no difference to LAWASIA whether I did or did not do anything during my term of office as its President.

But say what you will there is one trumpet I must blow. I am proud to leave LAWASIA a more representative organisation than when I stepped in as its President — the Council of LAWASIA at its meeting in Kathmandu last year warmly welcomed the representative organisation of lawyers from China. The LAWASIA region now stands extended to include the Peoples Republic of China.

The Asian and Pacific region

I have been frequently asked about the necessity of a regional organisation like LAWASIA. My answer always has been that the pattern of problems in this part of the developing world are often of a type: third world problems which get magnified by the pressures of strong ethnic identities: it makes this a region apart: the problems are, if I may be permitted to coin the word, LAWASIAN. The other reason for LAWASIA is the importance (in fact the necessity) of regional co-operation in matters of common interest. When we humans feel an attachment for the region in which we live as intensely as we do towards the country of our birth, only then will we begin to see the dawn of universal peace. When we are as proud of our region as we are of our

nation – only then – will we have taken the first step towards being citizens of the world.

A person whose horizons are limited only by national frontiers is not entirely human. LAWASIA helps lawyers in the region to widen their horizons – to think regionally. This is I think the major contribution of LAWASIA. It once encompassed what was known as the ESCAP region. The test of its having grown to maturity is that the region itself is now know the world over as the LAWASIA region.

Conferences

Some of my friends have questioned the utility of a biennial conference of the sort that we are staging here this week. "What does one learn from such a Conference?" The more studious are accustomed to ask; the not-so-studious look for detailed information on free tickets and free social events! About the first, there is the touching story of the Master in Zen Buddhism – he invited one of his students over to his house for afternoon tea.

They talked for a while and then the time came for tea. The teacher poured the tea into the student's cup. Even after the cup was full, he continued to pour. The cup overflowed and the tea spilled out onto the floor. Finally, the student said:

> Master you must stop pouring; the tea is overflowing from the cup.

The teacher replied:

> That's very observant of you. And the same is true with you. If you are to receive any of my teachings, you must first empty out *what you have in your mental cup.*

We attend each LAWASIA Conference with our mental cups full to the brim. Some of us leave such conferences with the humbling thought that what we know is not all there is to know.

The still more humble leave the conference table having acquired the ability to unlearn what they thought they knew. Emptying, and then filling the mental cup – that in the end is why we hold biennial conferences.

Topic of Justice

A last word about the topic. The key word in the theme of the conference is JUSTICE – it is I think a word used in the broadest sense. The sense in which the Prophet asked the now famous question:

> When will injustice be removed from the earth?

And himself gave the answer:

> Not until he who sees injustice being done to another suffers from the sight of the injustice being perpetuated – as much as its victim.

The traditional sense in which the word JUSTICE has been used is, of course, addressed to judges and lawyers in the region.

Two decades ago a distinguished American Judge Mr Justice William Douglas – a great traveller in these parts – said in the course of the Tagore Law Lecture of that year:

> The Judiciary has no army or police force, no control over the purse strings of the government. These were passed over the years to other hands.

He then concluded that the strength of Judiciary was in the command it had over the hearts and minds of men. But he warned that respect and prestige do not flow suddenly; they flourish with Judges who are independent and courageous.

The legal profession

And what about the Bar, the legal profession? When they speak of Justice, they are apprehensive of the increasing erosion in these last few years of the 20th century to the essential Freedoms – the Four Freedoms on which the UN Charter was founded – Freedom of speech and expression, Freedom of worship, Freedom from want, and Freedom from fear. One or more of these are in constant jeopardy – at any one time – in some area in the LAWASIA region. It is for us lawyers to help preserve and maintain these freedoms.

Last year in New Delhi, we heard the famous astronomer Dr Peterson. He assured us that when the world ends, it will not be with a Big Bang – the stars will extinguish themselves one by one and the entire world will slowly become a cold dark eternity. So with our great freedoms – they will not go out with a Bang: and we lawyers must take particular care that they are not extinguished almost imperceptibly, one by one. We must fight against the prospect of a cold dark eternity of suppressed freedoms. But to do so lawyers too, like Judges, must be independent and courageous.

I am proud and delighted that your torch-bearer for the next two years is one such person – a lawyer of independence and courage. Mr Tara Sidhu and his colleagues have been tried in the crucible of hard times – they have been tried and not found wanting. LAWASIA in this its twenty-first year is in good hands. □

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However, said the Tribunal, regard must also be had to other principles. Mention is made of the rule in *Jones v Meehan* (1899) 175 US 1 that treaties should be understood "in the sense which they would naturally be understood by the Indians", a rule which would seem to lean towards a preference for the text in the indigenous language (should one exist) in the event of an ambiguity arising from differences of meaning or emphasis arising from texts in a native language and that of the European power. The Tribunal also refers to the contra proferentem rule and notes "the predominant role the Maori text played in securing the signatures of the various chiefs".

7 For a discussion of the meaning of a "trust in the higher sense see *Tito v Waddell* 1977 1 Ch 106, 214-15. The essence of a trust in "the higher sense", however, is that it is not enforceable by a Court of equity. The Court of Appeal did not anywhere use the phraseology of a higher sort of trust (which does not afford a legally enforceable remedy for breach) but instead used the concepts of partnership and fiduciary relationships, which are of course relationships which the Courts will usually protect through granting remedies in appropriate cases.

8 See *Maori Council v Attorney-General*, Judgment of Cooke P, p 37. Richardson J says that the compact between the Crown and the Maori people "rested on the premise that each party would act reasonably and in good faith towards the other within their respective spheres" (Judgment of Richardson J p 34). Somers J states at p 21 of his judgment that "each party in my view owed to the other a duty of good faith. It is the kind of duty which in civil law partners owe to one another." Casey J, at p 17 of his judgment, speaks of the concept of an "on-going partnership" implicit in which "is the expectation of good faith by each side in their dealings with the other". Bisson J (at p 23) refers to the Crown's assurance of "the utmost good faith" with which Maori rights were guaranteed under the Treaty.

The 1987 LAWASIA Conference

By Stephen Kos, a Wellington practitioner

The 1987 LAWASIA conference in Kuala Lumpur was Stephen Kos's first experience of either LAWASIA or Malaysia. In this article he offers some observation on both event and place.

The LAWASIA 21st Anniversary Conference, which concluded in Kuala Lumpur on 4 July 1987, adopted as its theme

> To uphold the cause of justice without fear or favour

An apt sentiment for these times. On the one hand the continuing military coup in Fiji had pitted the Judiciary of that nation in direct confrontation with leaders of the self-installed military regime there. (Present at the conference was Mr Justice Govind, who had led an impromptu choir of counsel and parties in singing the Fijian national anthem in his Court as he rose at the end of the coup's first day. For reasons unrelated to his musical talents, the conference elected him a Vice President of LAWASIA. He was retiring from the office of Treasurer of LAWASIA which he had held for some years.) On the other hand, the President of the Malaysian Bar Council (which hosted the conference), Mr Param Cumaraswamy had only lately himself been acquitted of sedition charges – brought by Malaysian authorities who had taken exception to his statement arising out of a particular case, that people might come to the view that "there was one law for the Malays and another for the rest". Thus the conference theme was imbued also with a certain irony.

One of the conference sessions addressed "Freedom of the Press". Whether because of Malaysia's oppressive regulation of its media, or inclination, Malaysian newspapers offer a largely uncritical and often adulatory commentary on Prime Minister Dr Mahathir ("Dr M")'s administration. The *New Straits Times* devoted its two nights' worth of headlines to what struck a New Zealander as sycophantic coverage of Dr Mahathir's return from the Viennese conference on drug trafficking. Malaysia is justly sensitive to criticism of its own trafficking laws – and particularly its mandatory death penalty (the application of which saw the hanging of a 69-year old grandmother during the week of the conference). No visitor can fail to be aware of the existence of this law. Airlines announce its existence (as an adjunct to the safety demonstration?) and 10-metre high posters in Kuala Lumpur reinforce the lesson. One questions both the ethics and the efficiency of relying on the mere imposition of so retrograde a penalty as a primary means of excluding trafficking.

The *New Straits Times* did indeed give the conference extensive – but selective – coverage. Our chief host, Mr Cumaraswamy, earned headlines for an often swingeing address on the state of Malaysian civil liberties – headlines which read

> Only 25 Political Prisoners in Malaysia, Bar President Says.

And in the "Press Freedom" session of the conference, the anticipated assault on Malaysian press censorship expected of two supposedly independent journalist speakers, failed to eventuate. The session chairman, a senior Malaysian Judge, described the session as "less thought-provoking and controversial than expected", while offering an excuse on behalf of the journalists, that they may have feared "official surveillance".

Controversy did emerge in the session on "Protection of Minorities", though. In the context of violence involving minorities in India and Sri Lanka, a passionate debate arose among delegates from those and other states, often punctuated by exchanges of courteously-crafted insults.

While the conference, reflecting LAWASIA's raison d'être, tended to dwell on public law issues (other sessions concerned domestic violence, the law of the sea, industrial law, the role of Bar Associations and the administration of law Courts), private law interests were catered for in sessions on commercial law and shipping, trading with China, intellectual property and communication law.

To say the conference papers sometimes lacked depth (and that greater black letter learning could be achieved by staying at home and reading the appropriate texts and journals) is not a hard assessment. Indeed the format of the conference would permit little else. The real merit of the event was in the opportunity to discuss the differing experience of lawyers from widely varying jurisdictions, in particular from the host country (and the courage, courtesy and hospitality of the Malaysian Bar is due the greatest praise). As Bruce Slane put it:

> During the conference we learned of the differences between our legal systems. But, more important, we found what we have in common as lawyers.

At the conclusion of the 21st Anniversary LAWASIA Conference (LAWASIA being "the Law Association for Asia and the Pacific") it was observed that there was a real need for more participation from the Pacific. As the 21st Century approaches, ushering in what may prove to be the economic age of the Pacific rim, LAWASIA offers the best means for substained dialogue between lawyers around the Pacific. □

Legal perspective of the Third World

By the Right Honourable Tun Mohamed Salleh bin Abas, Lord President, Supreme Court of Malaysia

This article was the keynote address delivered at the 10th LAWASIA Conference in Kuala Lumpur, Malaysia on 29 June 1987. The author's title of Lord President is one adopted from Scottish law. The position is analogous to, although not precisely the same as, the Master of the Rolls in England or the President of the Court of Appeal in New Zealand. Quotations from the Holy Quran instead of from the Epistles of St Paul, as we might expect, help to emphasise the point of the address which is the necessity to relate and adapt the system of the common law that has been inherited from England with its Western tradition to the religion, culture, customs and attitudes of Asia.

This 10th LAWASIA Conference is indeed an auspicious occasion. Today LAWASIA celebrates its 21st anniversary, having been formally established in 1966 in Canberra, Australia. This is also a special occasion as this is the second LAWASIA Conference to be held in Kuala Lumpur. In 1967, Kuala Lumpur was chosen as the venue for the first LAWASIA Conference. It is therefore a great honour to me to be invited to address this 10th LAWASIA Conference today.

Other conferences

We Malaysians have every cause to be proud and happy to be hosting this Conference. This is the third major law conference to be held in Kuala Lumpur this year. Early this year, the Supreme Court of Malaysia hosted the Fourth International Appellate Judges' Conference and the Third Commonwealth Chief Justices' Conference. As some of you would know, at these two conferences which were held two months ago, 56 countries were represented. 46 Chief Justices from all over the world attended the conferences. The holding of these important law conferences here in Kuala Lumpur is indeed a great tribute to our capital city and to the Malaysian legal profession. We hope many more such conferences will be held here.

Ladies and Gentlemen, let me on behalf of our King, the Government and the people of Malaysia welcome each and everyone of you to Malaysia and to our capital city of Kuala Lumpur. We hope that your stay here will be a memorable one.

Lawasia background

In 1967 the countries represented in LAWASIA were 18 in number — Australia, Afghanistan, Hong Kong, India, Indonesia, Iran, Japan, The Republic of Korea, Malaysia, Nepal, New Zealand, the Philippines, Singapore, Sri Lanka, Taiwan, Thailand, Vietnam and Western Samoa. Shortly afterwards three countries, Fiji, Pakistan and Papua New Guinea joined the Association. Afghanistan, where the ideal of LAWASIA was first mooted at a UN Seminar in 1964 on *Human Rights in Developing Countries*, is now no longer represented. Neither is Vietnam. Bangladesh and the People's Republic of China have now joined the Association. Thus LAWASIA has become an organisation which represents the greatest concentration of mankind in the world today. In terms of population, it outstrips every other regional association in the world. Its voice therefore cannot remain unheard.

The region covered by LAWASIA is served by two great oceans, viz: the Indian Ocean and the Pacific Ocean. It is a region which has become increasingly important in international affairs given the present bipolarisation of the world order. The demand for the region of a zone of peace and neutrality for these oceans reflects the concern of the coastal States to keep the region free from political rivalries between the super powers for the purpose of ensuring peace and order in the region.

There can be no doubt that the region covered by LAWASIA is also very important economically as well as culturally, it being the home of the most diverse humanities with different languages, cultures and religions. Even climatic conditions are also different. But there is one common element shared by most of the countries in the region, and that is this, with the exception of very few, most of these countries were at one time or another in the past subject to western colonial rule. For this reason, they all share common experiences and aspirations, and most of them are inter-nationally part of the Third World, because of the nature of their economies which are characteristically ones of under development.

Legal environments

It is the common feature of these economies that the people are generally poor, struggling for their daily existence and facing many social and economic problems. Illiteracy, ignorance, poverty, poor health and sanitation facilities, lack of communication are only a few problems to mention here. These are further complicated by the very nature of their populations, which are not homogeneous but multiracial, multi-religious and

multicultural.

In most of these countries, the use of the legal process as a means to pursue one's violated right has yet to pervade through all strata of the society. It is only confined to those who can appreciate the use of the law or to those who can afford the expenses. The rest of the population seems to be far removed and divorced from the law. Whilst lawyers argue the niceties of legal concepts in the court rooms, farmers in the field and fishermen at sea are grappling with their daily toils to earn their living.

It is therefore important that jurists of the Third World do appreciate the different environments in which the law operates in their own countries. After all, the law applicable in most of our country is not of native origin. It is a transplant of the western legal system be it the common law or the civilian legal system. This was introduced by the colonial regimes to native soils as a means to govern their colonial territories. If law, I mean the Western-oriented law, is to continue to be of an enduring value and as a living institution for the governance of the Third World countries, we must take into account the differences between the local environments and those in its countries of origin, such as England, France or America.

Granted that these are not the same, our function as jurists is to find a common denominator which is an essential element for the application of any legal principle. Most of the countries in LAWASIA have only gained independence less than half a century ago. We therefore have to nurture the growth of this law to the cultures of our peoples so that in time it will grow from strength to strength to become completely identified with our native soils.

Austin, Dicey, Kelsen, Savigny, Ehrlich, Pound and many other great scholars of western jurisprudence and legal philosophers may well be revered because of their profound knowledge shown in their writings, but their theories may not necessarily be applicable in the same manner as they are applied in their home countries. It therefore becomes a very great responsibility for the legal fraternity of this region to define the frontiers of these philosophies and look for a common denominator, a common system, a common understanding, lest our social values may be adversely affected and social cohesion needed for the maintenance of law and order weakened, thus making the State in which we live vulnerable to political crisis and disorder.

There can be no doubt that amongst the most precious values to be preserved and watched with care are the Rule of Law, an independent judiciary and a responsible or accountable executive. These concepts become all the more imperative, given the doctrine of Supremacy of Parliament, which in practical terms and in essence is being controlled by the executive, lest this supremacy may lead to arbitrary results and negation of liberty.

Justice and the Law

Hammurabi of Babylon who, according to historians, ruled Babylon from 1792 to 1750 BC, declared that his mission was to give justice to the people and so the purpose of his Code was to make justice appear in the land, by destroying the evil and the wicked so that the strong might not oppress the weak. The elimination of the evil and the wicked deeds was therefore according to Hammurabi an essential condition for justice to prevail. This could be compared to the Islamic conception of justice which is revealed in the following verses of the *Holy Quran*:

> God doth command you
> To render back your Trusts
> To those to whom they are due;
> And when ye judge
> Between man and man,
> That ye judge with justice:
> Verily how excellent
> Is the teaching which He giveth you!
> For God is He Who heareth
> And seeth all things.
>
> (IV - 58)
> *The Holy Quran*
> Text, Translation and Commentary
> A Yusuf Ali

The Western concept of justice can be traced to that famous Roman jurist, Ulpian, whose definition later was incorporated in the *Justinian Code* as follows:

> Justice is a set and constant purpose giving to every man his due.
>
> Jurisprudence is the knowledge of things divine and human, the science of the just and the unjust.
>
> The precepts of the law are these — to live honestly, not to harm another, to give every man his due.
>
> (*Book I Title I*)

Proper and right conduct

Thus, how similar through the ages is the concept of justice amongst mankind, irrespective of western or eastern civilisations where it comes from. Justice is for the elimination of evil and wicked deeds and for the rendering of remedy or trust or due, once certain acts which are considered to be wicked are committed. In other words, justice stands for the maintenance of proper and right conduct. The central theme is therefore: what is the proper and right conduct for the breach of which gives rise to a remedy? Or simply what are the evil and wicked deeds?

The search for the proper and right conduct throughout the ages has become the concern of every ruler and the governed. Many theories were advanced to support differing ideologies of what justice should be. Many wars were waged, many battles were fought at the expense of many lives in order to establish and maintain regimes after regimes supported by these differing ideologies.

The lesson to be learnt from all these gruesome events and tragic episodes is that justice and equality in its absolute sense cannot be achieved in any human society. Even the battle cry for equality in the western democracies has to recognise that the concept of equality does not aim at the abolition of social distinctions and differences due to wealth and social standing of human beings, because such abolition is factually impossible; but is rather aimed at ensuring only equality of treatment of those in like situation. However, the same demand for equality in

countries with different forms of democracy insists upon abolition of social strata which together with law is seen as an evil; the underlying theory being that once the society becomes classless, justice and quality prevails and in such situations law ceases to be necessary and it will ultimately wither away.

Social cohesion

For us lawyers who accept law from western European countries, justice must be a system of values which law encapsulates. Thus law is the formal expression of justice whilst moral value is its content or essence. Taking these two aspects together, justice is seen therefore as an ideal standard which cannot be precisely defined, and mankind therefore has to settle with a rough and practical definition, which is none other than the general consent of right-minded and right-informed persons relating to a particular subject matter.

This is what lawyers sometimes refer to as "Reason" and persons with a philosophical bent of mind as "the law of Nature". The sum total of these values are the basis upon which social cohesion which is so essential to the establishment and well-being of a modern nation is formed. This is particularly important in the case of a nation with a multiracial population with different languages, religions and cultures.

Social cohesion may at times come under severe strain if policy taken by the government or demand made by certain sections of the population is so extreme and unreasonable that it becomes inconsistent with or derogatory of that general consent. Whilst these pressures arising from such extreme policy or demand can be absorbed if an atmosphere of goodwill and compromise prevails, there are however limits to what the social cohesion can bear. Certain pressures can be absorbed by the society but drastic policies and drastic demands can lead to the breaking of it.

In developing countries, not only politicians, judges, and lawyers but also the general public must play their part in observing this danger sign and above all, they must appreciate the interaction between social pressures and social cohesion and the limits of tolerance. Personal pride must not be pushed to the very extremities without regard to the welfare of the whole societal needs.

The Executive and the Judiciary

One of the cardinal principles of public order is that the executive and the judiciary should understand the limits of each other's function. Mutual confrontation is a dangerous line to take whilst a submissive judiciary is equally hopeless, as it leads to an unhealthy speculation which brings no good result to both the executive and the judiciary as well as to the country. Between these two modes of conduct granted that the judiciary is the third arm of the government, a mutual respect between the executive and the judiciary is the best and this precept requires the judiciary to act at arm's length in its relationship with the executive and it also requires the executive's commitment to the Rule of Law and restraint from too frequent resorts to amending legislation to overrule judicial decisions. Any other type of relation will compromise the judiciary's independence.

If we focus our attention on the post-independence history of most ex-colonial countries we see that democracy, which is planted with a great expectation to bloom to fruition as it would after the manner of the mother countries, has failed to fulfil the wishes of its founding fathers. There are, of course, many reasons for this failure but one thing is clear – that justice and democratic values can only be maintained if there is a spirit of general consensus and tolerance amongst the populace.

In a situation where people are lacking in this spirit, justice and democratic values have a good deal of problems. That is why those who are concerned with the application of these institutions have to survey the local soil and its terrain and apply them accordingly. This is not to say that judges must compromise their independence in performing their function.

The Legal Profession

Any discussion on law and justice must inevitably centre around lawyers and judges, their role and their function in the society.

The practice of the law is more than a mere trade or business. Lawyers should realise that they are the guardians of ideals and traditions to which it is right that they should from time to time dedicate themselves anew. The process of applying and adapting abstract law to the concrete cases of the moment in all their diversity of circumstances and the contribution they make to the development of the body politic are more important than commonly realised.

Law is not an exact science. Despite the majesty and gravity with which its administration is properly invested, it is a very human affair after all. It deals with the everyday concerns of ordinary citizens. The cases that come before the courts reflect the struggles and rivalries, desires and emotions to which human relationship gives rise and to which adjustment is required. Both lawyers and judges engaged in this work perform a public function of the highest utility and importance. The better the case is presented on each side, the keener and more skilful the debate before the court, thereby resulting in a just and sound judgment. That is why it is said that a strong Bar makes a strong Bench.

Yet despite all these, lawyers remain suspect in the eyes of the public. From the beginning of history this has been their lot. Gibes at the expense of the hired disputants are as old as the days of Greek comedy. The mercenary character of their forensic triumphs is constantly cast up against them and affords cheap entertainment to the cynic. Revelation of cases of misconduct and squandering of clients' money by lawyers, though these are not prevalent, add further to this inherent prejudice.

Thus in order to maintain their proper place in society and to enable them to perform their public duty well, lawyers should strive for a better public image and for the eradication of instinctive public mistrust of their profession. They must conform strictly to the commands of their professional ethics, for their worth and credibility are measured by their moral probity no less than by their intellectual ability and integrity.

Duty to clients and others

In espousing the cause of justice for their clients lawyers sometimes have come face to face with the authorities. In this situation they have a delicate problem at hand which requires a careful handling. The authorities may well feel

threatened, but the lawyers are not concerned with usurping or arrogating to themselves the powers which are not theirs. They are simply concerned with the quest for justice on behalf of their fellow humans for the protection of their civil rights and liberties and for the maintenance of the Rule of Law.

They must remind themselves that in the discharge of their office they have a duty to their clients, a duty to their opponents, a duty to the court, a duty to the State and also a duty to themselves. To maintain a perfect balance amidst these various and sometimes conflicting claims is not an easy task. Transgression of any of these honourable obligations is not just a mere making of a mistake, but involves an infringement of their moral duty and conscience.

Independence of the Judiciary

That independence of the judiciary is a must for an orderly development of society is a self-evident truth. This requirement is not only exclusively the product of western thought, but a *sine qua non* of every legal system of which the judiciary is a living repository of knowledge and wisdom to whom the ruler and the governed alike refer their disputes for settlement.

In Islamic law, this concept of judicial independence was considered as a vital necessity. About 1400 years ago, it was Omar the second Khalif who introduced this concept by separating the judiciary from the general administration. His insistence upon judges to act correctly is legendary. Once he had a law suit against a Jew and both of them went before the *Qadzi* ie a judge. When the *Qadzi* saw the Khalif, as a mark of respect, the *Qadzi* stood up. This behaviour was considered by Omar to be an aberration of judicial duties because it displayed that he was a superior party to his opponent, the Jew. Omar therefore had the *Qadzi* dismissed at once. In another instance Omar found his son Abu Shana drunk and despite his love for the son, he had him punished in the same way as others guilty of the same offence. Such is justice and equality before the law which was practised in the flourishing period of Islamic history.

In modern time, as part of the ramification to prop up judicial independence, recognition is given to the need that judges should be paid reasonably well so as to free them from anxieties which would otherwise hinder them from proper performance of their duties. In Islamic Law this principle was introduced by Omar who insisted that his *Qadzi* be paid suitable allowances. The fourth Khalif, Ali in his letter to the newly appointed Governor of Egypt gave an elaborate instruction as to how a judge should be selected. Once a judge is selected, he said:

> you must pay him handsomely enough to let him live in comfort and in keeping with his position – enough to keep him above temptations. Give him a position in your Court so high that none can even dream of coveting it and so high that neither backbiting nor intrigue can touch him.

Now has any modern society done much better than this prescription? Indeed, in certain societies judges are not placed as high as they should be. In some countries, their position is so low that many a good candidate is not disposed to accept the honour. The glamour of political life with its attendant publicity, status, influence, respect and above all its freedom and the facilities available at the command of a politician is the new phenomenon in most developing countries. The importance attached to politics has completely overshadowed the judiciary, and denied the latter of its rightful place and honour. Indeed its position is reduced to a level slightly better than that of timid civil servants.

Basic social values

Law is not just a series of dry commands emanating from the ruler to the governed, but it has to be consecrated with a basic value of society's right and wrong – a value generally acceptable to the general public. When a judge is looking for a legal solution to the problem at hand he is in fact trying to discover this basic value upon which his judgment is erected. Thus only persons whose profession is involved in the search of this standard should qualify to be judges. Yet judges are not given the due respect and honour they deserve.

Judges and the Constitution

Judges on their appointment are sworn to preserve, protect and defend the Constitution. This is the same Oath sworn by members of Parliament and the executive. In so far as judges are concerned they fulfil their vow through their interpretative function. It is their duty to say what a given Constitutional provision means.

Although in the final analysis the Constitution is what the judges say, this, however, does not mean that they should interpret it according to their own passion and their personal belief, for there are rules which they have to observe. They have to look to the past, because they are the inheritors of past legacy and at the same time to look to the void future in order to give appropriate solution to the present problems. In the process some parts of the past have to be discarded if law and the Constitution is to progress. No one would agree that the present should be the prisoner of the past, and yet the past cannot be totally discarded, if the society has to be maintained on an even keel and free from turbulences.

Granted that the future destiny is in the hands of the present, a compromise between partial rejection of the past and acceptance of what the future is likely to be in a given situation is the hallmark of judicial wisdom. This was described by Sir Frederick Pollock in his celebrated lecture in 1929 as "judicial valour and caution". Fear of departing from the past makes the society stand still, whilst too much breaking with it will leave the society without roots and foundation. A compromise between the two attitudes is the best solution. This is the lesson which is to be learned and understood not only by judges and lawyers, but also by legislators whose business is to make legislation.

The People

It is a mistake to think that every problem can be solved by judicial methods. The judiciary has its limitations. Although many people expect judges to entertain all kinds of disputes, irrespective of their nature, this is not possible. Justice is divided into two types, substantive and procedural justice. As far as the courts are concerned, they only deal with procedural justice. Substantive

justice deals with the question of fairness and fair play and this is entirely left to those who have power and capacity to do it.

If on the other hand the opinion of Coke CJ in *Dr Bornham's* case (1610) had prevailed, judges in the common law countries would have possessed jurisdiction to deal with substantive justice and to declare not only Acts of Parliament but also government policies void on account of repugnancy of righteousness. If it were so, the doctrine of supremacy of the judiciary, rather than that of Parliament as it is today would have been established.

Who then should determine the issue of fairness and fair play if the court abstains from doing so? Should the executive and Parliament be allowed to pass legislation which rids of all or any of the provisions of the law which are regarded so vital to the freedom of the subjects and the functioning of a good government? The answer to this question cannot be given by the courts. The responsibility to ensure the observance of fairness and fair-play by the executive and the legislature lies on the masses, the general electorate and the public opinion, mobilised through the freedom of the press. If the executive and the legislature are to be prevented from initiating and enacting undesirable laws, the electorate should be vigilant.

This is clearly pointed out by Lord Wright in the classic case of *Liversage v Anderson* (1942) AC 206. At p 261 the learned Law Lord said:

> But in the constitution of this country there are no guaranteed or absolute rights. The safeguard of British liberty is in the good sense of the people and in the system of representative and responsible government which has been evolved.

and at p 270:

> But if the sense of the country was outraged by the system or practice of making detention orders, or indeed by any particular order, it could make itself sufficiently felt in the Press or in Parliament to put an end to any abuse and Parliament can always amend the regulation.

The sense of the country, or the good sense of the people and the function of the press coupled with an independent judiciary and a responsible executive, ie one that is responsive to public opinion, are keys to the maintenance of democratic values and institutions. The judiciary alone is not sufficient, short of a total involvement of the whole body of citizenry or electorate. If the electorate allows the executive or Parliament to legislate bad law, there is nothing the courts can do. If this happens it is a sign that the country has lost its vitality and unless the process is arrested it leads to its disintegration. "But this much", – declared Judge Learned Hand in his address delivered in 1942 to the Massachusetts Bar Association entitled: *The Contribution of the Independent Judiciary to Civilization* –

> I think I do know – that a society so riven that the spirit of moderation is gone, no court *can* save; that a society where that spirit flourishes, no Court *need* save; that a society which evades its responsibility by thrusting upon Courts the nurture of that spirit, that spirit in the end will perish.

The good sense of the people spoken of by Lord Wright and the spirit of moderation by Judge Learned Hand and fairness and fair play by most of us are all one and the same thing. This is the ethos, the *volksgeist* in the language of Savigny (1831) and "the living law of the people" of Eugen Ehrlich (1912) which is the criterion for social cohesion necessary for building and keeping a nation together. If this is lost, no court can save it, and indeed if it is damaged it requires a great deal of patience, self-restraint and experiments, often accompanied by crisis and bloody violence before public confidence can be restored and the nation can be resurrected. We see this happening in Lebanon.

Differences of language, faith and culture

The importance of the spirit of moderation is further enhanced in the context of ex-colonial countries whose population is no longer homogeneous, but due to policies of colonial administrators has been transformed into a multi-racial society dissected by different languages, faith and cultures. These countries have a dual task – both of which are equally difficult – of not only maintaining their existence as nation states, but also of developing their economic resources so as to give meaning to their independence and existence.

Success will only come if the spirit of moderation prevails. And for this purpose there must prevail an attitude which does not press a partisan advantage to its extreme limit. It is a spirit which understands, appreciates and respects the views of the other side and places a high premium on a unity of the citizens. In other words, it is a "live and let live" spirit. This is the spirit which comes out through wisdom which is a product of experience and pure heart. This is the spirit that will kindle the nation and forge its progress ahead. The guardianship of this spirit is not left to be protected by the courts and judges alone, but by a total involvement of the three arms of government, the court, the executive, the legislature and above all the vigilance of the masses.

The sooner this is appreciated and practised, the better the world as a place to live in will be. Thus it is the responsibility of us lawyers, as leaders of the community to inculcate this spirit in the world, or at least in our respective home countries so that the nations of ours can remain united. If we succeed in doing this our lives are worth living and we shall long be remembered.

To conclude this speech, please allow me to quote Napoleon, one of the greatest military commanders of all time. Writing from St Helena where he was exiled, he observed:

> My true glory is not to have won many battles . . . my defeat at Waterloo will erase the memory of so many victories – but what nothing will destroy, what will live forever is my Civil Code.

ie, the *Code Napoleon*, which is the basis of French Law and of all other countries outside the Anglo-American common law system. Must we not strive for the memories of the future generations? □

Bar Associations and human rights

By Justice P N Bhagwati, former Chief Justice of India

This paper was the keynote address given to the human rights section of the 1987 LAWASIA Conference. Justice Bhagwati is recognised as one of the great judicial figures of Asia. He will be attending the NZ Law Society Triennial Conference in Christchurch in October. The final part of his address at Kuala Lumpur, which is not reproduced here, dealt with the inevitability of the acceptance of the need for administrative discretion and therefore as a corollary the need for open government. In the part of his paper published below, Justice Bhagwati emphasises the responsibilities of the legal profession in the light of prevailing social economic and political realities. He suggests that lawyers have what he calls both an agitational and educational role to play.

I consider it a great honour to have been invited to speak to you this morning on a subject of great importance namely "The Role of the Bar Associations in the implementation of human rights". It is a subject vital to the democratic way of life and the maintenance of the rule of law and I am glad that it has been included in the agenda of this Conference. Lawasia has always shown great concern for enforcement of human rights and in fact a Human Rights Standing Committee has been set up by Lawasia for promoting respect for human rights and fundamental freedoms for all in the Asia/Pacific region and exposing violations of human rights whether by states or by centres of economic power in this region. My friend Fali Nariman, who is the outgoing President of Lawasia, guided the activities of the Human Rights Standing Committee for a number of years and I believe the Asian Coalition of Human Rights Organisation was also set up by Lawasia for supporting and monitoring the human rights movement in the different countries in Lawasia. Various strategies have been adopted by the Human Rights Standing Committee and ACHRO for creating awareness about human rights and mobilising the legal profession for securing implementation of human rights.

Independence of Bench and Bar

The legal profession has a vital role to play in the enforcement of human rights and at all times the role of lawyers in the protection and maintenance of human rights has been central to the development in Human Rights jurisprudence. But today more than ever before this topic has assumed importance because the legal profession which has always been in the vanguard of the struggle for human rights is under attack in various countries. The independence of the Bar is threatened in a few jurisdictions because of its zeal for protection of human rights and the bold and courageous stand taken by it wherever and whenever it has forms of violations of human rights.

Attempts have been made in the recent past to browbeat the Bar and to interfere in its functioning by intolerant repressive regimes and divisions have been sought to be created with a view to weakening and emasculating the Bar. But fortunately the Bar has stood up against these onslaughts on its independence and integrity against repression and unfalteringly and unflinchingly carried on its crusade against repression and continues to fight for protection and maintenance of human rights. Nevertheless, it is necessary for us lawyers to remind ourselves on an occasion like this that independence of the Bar is a quality which we can ill afford to neglect if we want to protect and preserve human rights and fundamental freedoms in our respective countries.

We have always shown and articulated great concern for the independence of the judiciary because the judiciary has a high visibility as the wielder of state judicial power, but, in my opinion, independence of the Bar is no less vital. In fact, independence of the judiciary is not possible unless we have a strong and independent Bar which is ready to uphold and maintain the independence of the judiciary. Let us not forget that the judiciary is an institution and its constituent elements are the Bar and the Bench. While the judges of course maintain their personal integrity as they must, it is the Bar that fiercely maintains and strengthens the independence of the judiciary. While the judges adjudicate and pronounce judgments, it is the diligence and research of the Bar that goes into the judgments and unfolds the work of the judges and it is the Bar which fearlessly selects the causes of action upon which the judges pronounce. It is not enough to fight zealously for the independence of the judiciary, we need to be equally zealous to fight for the independence of the Bar. Those who threaten the Bar with external control, explicitly or insidiously must realise that when they do so, they

threaten both the independence of the judiciary and the independence of the Bar for the Bar and the Bench act and react on each other. A supine Bar will produce a subservient judiciary and both will in the end result fail in protecting human rights.

General observations

There are also one or two other observations of a general nature which I would like to make before I go on to consider the role of the legal profession in the implementation of human rights.

It is evident that in most democracies in the Third World where there is a multi-religious, multi-ethnic society, religion as a principle of social ordering has lost its vitality and significance. Morality, though undoubtedly important and certainly complementary, is unable to solve the complicated problems of modern society. Individual self-interest, even if enlightened, pursued through competition, has ignored the social costs of private activities and has become a weapon of self-aggrandisement of private empires, of unprecedented control over the lives of millions and has succeeded in creating and perpetuating concentration of wealth in the hands of a few to the detriment of many.

The only valid principle of social ordering which is an antithesis of anarchy on the one hand and despotism on the other is where law is utilised as an instrument of social ordering. This law is no longer the old order: it is not the traditional lawyer's law; it is no longer the law which simply provides the framework for private ordering. It is the new law — the law of social or public welfare — the law of the twentieth century welfare state whose function is that of comprehensive social engineering, ie, maximisation of total human welfare by the maximum satisfaction of the largest number of wants with minimum friction and least waste. Its guiding principle is no longer maintenance of peace and order but justice, not formal but substantive, and that too in all spheres of society. The growing use of law as a device of organised social action directed towards achieving social change is one of the main characteristics of modern society and that is why the modern age has been described by Professor Roscoe Pound "as the age of socialisation of law".

It is for this reason that law is no longer a static instrument relying upon the dynamism of private ordering but it is acknowledged on all sides as a dynamic instrument with explicit purpose of conscious direction of all human activities. It is recognised that not only order but justice is also an equally important end of law; both order and justice are in fact complementary; one cannot exist without the other and hence the law is increasingly preoccupied with the problems of distributive justice. It is a flexible instrument in the hands of society by which socio-economic change can be brought about and socio-economic adjustments can be made with the object of establishing social justice and removing the existing imbalances in the social and economic structures for otherwise human rights cannot be a reality for everyone in our respective countries.

Photograph taken at the concluding session of the 1987 LAWASIA Conference.

(l to r) Mr Bruce Slane (New Zealand), Mr F Nariman (Retiring President, India), Rt Hon Tun Mohamed Salleh Abas (Lord President of Malaysia who presides over the Court of Appeal), Mr Param Cumaraswamy (President Bar Council of Malaysia), Hon Tan Sri Dato Abdul Hamid Omar (Chief Justice, Malaya), Dr D Geddes (Secretary-General, Australia), Hon Justice Govind (Fiji).

This being the true purpose and function of law in a democratic society wedded to the twin principles of social justice and human rights, it is evident that a lawyer must necessarily play a major role in the society, for it is he who, to a large extent, shapes the processes of law. This means that our society cannot afford to be content with having merely professional lawyers. What Lord Sankey said years ago in regard to democracy in England holds true with greater force and efficacy in regard to democracy in our Third World countries. He said that what democracy needs today are not merely professional lawyers, but what it needs are "jurists who by their juridical concepts and ideology will guide the regulatory process of democracy".

While discussing the scope and content of the rule of law, Friedman expressed the same view when he said:

> The fact that the content of the rule of law cannot be determined for all times and all circumstances is a matter not for lament but for rejoicing. It would be tragic if the law were so petrified as to be unable to respond to the unending challenge of evolutionary or revolutionary changes in society. To the lawyer, this challenge means that he cannot be content to be a craftsman. His technical knowledge will supply the tools but it is his sense of responsibility for the society in which he lives that must inspire him to be jurist as well as lawyer.

Adequacy of legal system

It is also necessary that we lawyers should not allow ourselves to be lulled into a sense of belief that the present legal system is the best because it has been with us for over a hundred years. We must examine it objectively and critically to see whether it is adequate to meet the needs of the new society which is emerging in our country, whether it is effective to provide a solution to the new problems which are coming up and presenting a challenge to contemporary society, whether it is sufficiently responsive to the new norms and values which are replacing the old and whether it reflects properly and adequately the new attitudes and approaches which characterise our thinking in regard to the true purpose and function of law. We must not forget that in examining the legal system as a process, our approach must be that of a reformer. With respect to the existing institutions for making and applying law, as with existing professional obligations of lawyers, we must appropriately ask: "Why do it this way? Is another way not better?" Questions like these help us to understand how the existing institutions work and what are their defects and deficiencies and they lead us towards exploration of alternative solutions. Additionally, such questions help to create and maintain the critical questioning frame of mind which is an important part of the lawyer's stock in trade.

Now, it must be remembered that the legal process is not an end in itself. Ultimately no legal system can be evaluated apart from the substantive social product that emerges from it. But it is precisely this interconnection of process and outlook that makes the legal process a fit subject for special attention. Obviously lawyers are the experts on this subject and for that reason, they have a special obligation to see that the end product of the system is just. And justice normally depends on making the right institutional choices, for means have a way of swallowing up ends. What should be the institutional choices in regard to the legal process is, therefore, a matter to which we must seriously devote our attention in a critical and questioning frame of mind.

Universal Declaration of Human Rights

Now, what are human rights? The story of human rights began with the Charter of the United Nations which included as one of its basic principles, promotion, encouragement and respect for human rights and fundamental freedoms. This concern of the United Nations for human rights and fundamental freedoms was encapsulated in the Universal Declaration of Human Rights adopted by the General Assembly on 10 December 1948. The Universal Declaration merely laid down certain general principles having moral force and setting the standards for achievement of human rights. It did not have the force of law and it was more in the nature of a binding moral commitment, a yardstick of international standards and a path-finding instrument.

The most apt description of the Declaration has been given by René Cassin. He compared the Declaration to "the vast gateway of a temple". The Preamble he described as "the forecourt containing the general principles of liberty, equality, non-discrimination and fraternity". There were he said, four columns: first – personal right; second – the rights of the individual in his relationship to the outside world and the community; third – political rights; and fourth – economic, social and cultural rights. Cassin saw these four columns as surmounted by a pediment linking the individual with society. This expressed the need for a social and international order in which the rights and freedoms set forth in the Declaration can be fully realised by everyone without distinction of any kind such as race, colour, sex, language, religion, political and other obscure national or social origin, property, birth or other status.

The Declaration represents the first endeavour of the United Nations to elaborate upon the normative ramifications of the concept of human rights. Though in some of its Articles it dealt with social and economic rights, its greatest emphasis was on civil and political rights. Of the thirty Articles of the UN Declaration, only seven dealt with economic and social rights. The reason was that at that time the world was still haunted by the nightmarish experiences of the horrible Nazi and Fascist regimes. It was also a world in which the majority of the developing countries of today were still under foreign yoke and did not have an opportunity of participating in the framing of the Declaration as they did in the framing of the two subsequent International Instruments.

The fact remains that the Declaration made tremendous impact throughout the world inspiring national constitutions and laws as well as conventions on various specific rights and it has been invoked on numerous

occasions by the United Nations in support of action on worldwide scale for the solution of human rights problems in specific fields as also in regard to concrete human rights situations. The legal profession must also make use of it to develop component rights out of the basic human rights enshrined in National Constitutions and to enforce such rights. The human rights jurisprudence must be evolved by the legal profession on the basis of the human rights and fundamental freedoms enshrined in the Declaration. How it can be done I shall presently demonstrate before you.

Covenants and Treaties

The Declaration was soon followed by two important documents transforming the principles enunciated in the Declaration into treaty provisions establishing legal obligations on the part of each ratifying country. One was the International Covenant on Civil and Political Rights and the other was the International Covenant on Social, Economic and Cultural Rights. On ratification by the requisite number of States, the International Covenant on Social Economic and Cultural Rights, came into force from 3 January 1976 and the International Covenant on Civil and Political Rights came into force with effect from 23 March 1976. These social, economic and cultural rights form as much part of human rights as civil and political rights and they came to be recognised as such. As a result of the impact of the socialist approach which was influenced by an intense concern for human dignity and the pressure of the Third World countries where it was felt that civil and political rights though precious and indispensable can have no meaning for the large masses of people who are living a life of want and destitution in those countries, it is not correct to say that one category of rights is more important than the other.

You cannot suppress civil and political rights in the name of social and economic rights and vice versa. Both categories of rights are equally important and they are mutually inter-related and inter-dependent. That was pointed out in the Teheran Declaration and even the Preamble of the Declaration of the Right to Development adopted by the General Assembly on 23 January 1987 recognised that all human rights and fundamental freedoms are indivisible and inter-dependent and in order to promote development, equal attention and urgent consideration should be given to the implementation, promotion and protection of both these categories of rights and accordingly the promotion of respect for and enjoyment of certain human rights and fundamental freedoms cannot justify the denial of other human rights and freedoms.

New élites

It is a strange fact of history that the élites who came to power at the end of colonial rule, having been victims of suppression of civil and political rights, are strong protagonists of civil and political rights before accession to power. However, after they came to power, they find themselves amidst the poverty of the masses and the rising demands and expectations of the people for a better standard of life. The counter-élites or have-nots, taking recourse to civil and political rights, highlight poverty and mobilise discontent. The established élite who are in power and who were, until they came to power, strong advocates of civil liberties, then start resorting to measures of suppression of civil and political rights in order to preserve and protect their power.

This is a state of affairs which has to be guarded against by the legal profession by creating public awareness and fighting for the civil and political rights of the counter-élites or have-nots. The legal profession has to combat repression and denial of basic human rights to the large masses of people. These counter-élites or deprived sections of the community cannot secure their basic social and economic entitlements unless there is an atmosphere of freedom in which they can agitate for their rights and equality, they cannot enjoy civil and political rights unless they have real social and economic freedom. There may be a close linkage between the two categories of human rights.

Right to development

But we have now reached the third stage in the evolution of human rights and that is the recognition of the right to development.

It is now realised that the right to development is a basic human right without the realisation of which it is not possible to enjoy any other human rights. It is not only social, economic and cultural rights which are geared to the level of economic development prevailing in a country but even the protection of civil and political rights is, to some extent, linked with the stage of development in the country. There can be no meaningful exercise of many human rights in a country where economic resources are scarce and the bulk of the population lives below the poverty line or at best on marginal levels of subsistence. The right to development is, therefore, one of the most important basic human rights and it constitutes the culminating point of the human rights movement. The right to development is now recognised both as an individual and a collective right and in fact several international bodies such as the International Commission of Jurists have started concentrating their efforts on developing and elaborating the various constitutent elements of this right to development.

The General Assembly of the United Nations has also adopted the Declaration on the Right to Development in its 41st Session. The International Commission of Jurists in its Report submitted to the UN working Group states in paragraph 5:

> The promotion of human rights is both an instrument and a goal of development. The right to development . . . but is a negation of the concept of development.

In fact, the right to development is the most comprehensive of all human rights and all these three categories of human rights, I would subsume under the rubric of the *Right to Happiness.*

Agitation and education

Now, broadly there are two strategies which can be adopted for the purpose of promoting and

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New Zealand Law Reports

New Publishing Arrangements

The Council of Law Reporting and Butterworths of New Zealand Limited are together setting up new arrangements for the editing and publishing of the New Zealand Law Reports. The high quality of the Reports will be maintained, but it is expected that reports of judgments will be able to be put in the hands of users more quickly than has proved to be possible in the past. When the present backlog problem has been overcome consideration will be given to publishing a third volume annually which should enable the reporting of a wider range of judgments.

The Council has brought the cumulative index to the Reports up to 1985 and both [1986] and [1987] NZLR are now in the course of production. Miss Frances Wilson will continue to be the Council's Editor-in-Chief of the Reports but Butterworths of New Zealand Limited has invited selected practitioners throughout the country to write headnotes for judgments. Each person who undertakes this work will be acknowledged in the Reports as the reporter of the judgment concerned.

The success of this joint endeavour by the Council and Butterworths to improve the service to users of the Reports will depend very much on the willingness of experienced practitioners to participate and to accept the time constraints and guidance on the technique of reporting which will ensure that standards of quality and timeliness are maintained.

Publishing Editor

The new arrangements for publishing the New Zealand Law Reports include the appointment of a Publishing Editor. Now that the negotiations with the Council of Law Reporting have been completed Butterworths is pleased to announce that Mr Brian Blackwood has accepted this position in which he will be responsible directly to Butterworths. It is the confident expectation of Butterworths that Mr Blackwood's involvement in the project will be welcomed by the profession and be a guarantee of its success and the reliability of the new undertaking. Miss Frances Wilson as Editor-in-Chief will continue to be responsible directly to the Council of Law Reporting. □

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realising human rights in all their three dimensions. The first is what I may call the agitational strategy and the second is the educational strategy. The legal profession has a role to play on both these strategies. Let me first say a few words about the agitational strategy. The agitational strategy is divisible under two broad heads. Under the first head, I would classify all modes of enforcement of human rights through traditional forums such as the Courts. There has been considerable progress made in enforcement of human rights under this head.

The Supreme Court of India has in furtherance of its concern for human rights developed five commitments. The first is the commitment to participatory justice, the second is the commitment against arbitrariness in State action, the third is the commitment to just standards of procedure, the fourth is the commitment to immediate access to justice and legal aid and the fifth is the commitment to community rights mobilisation. Those who are familiar with the recent decisions of the Supreme Court will find no difficulty in allocating the decisions under these different five commitments. The Supreme Court has widened the concept of standing or locus standi in order to enable the rights of the weaker sections of the community to be vindicated through the judicial forum. The Supreme Court has expanded the reach and ambit of some of the basic human rights enshrined in the Constitution and by a process of judicial interpretation made the right to live with human dignity a basic fundamental right.

But this mode of realisation of human rights cannot go far enough and it is necessary to resort to the second mode of agitational approach which consists of mobilisation of autonomous, endogenous, participatory organisations and "self-reliant" collective actions by the poor for securing their basic human rights. Such organisations are essential vehicles to enable the vast majority of the people in the developing countries to secure satisfaction of three kinds of needs deemed essential for human development:

1 the need for land, habitat, food, conditions of employment and goods and services which are essential to physical and economic well-being;

2 the need for other kinds of intangible resources which enable people to become more self-reliant in social and political as well as economic terms and

3 the need for participatory social structures which enable people to gain more power in decision making concerning allocation of resources which affects their immediate social and physical environment.

Efforts to activate this kind of social change with a view to realisation of human rights for the large masses of the people cannot depend upon a State sponsored master-design nor upon the existence of a benign Government, but they must spring from the mobilisation of the very people who have been impoverished, politically excluded and socially disadvantaged by the existing socio-economic structure. □

Protection of minorities

By Chief Judge Durie of the Maori Land Court and Chairman of the Waitangi Tribunal.

This article was given as an introduction to his main paper by Judge Durie at the 1987 LAWASIA Conference in Kuala Lumpur at the beginning of July. The paper writers were invited to speak briefly to their papers. Judge Durie chose not merely to summarise his paper which was descriptive of the Maori situation in New Zealand and of the working of the Waitangi Tribunal, but to speak more directly of the problem for the Maori today in regard to the legal process.

In New Zealand I would welcome you here with "tena koutou". My tradition is that in this country I should say instead "salamat datang", "salamat pagi" and "apa khabar".

My paper is on the Maori people of New Zealand. It is largely descriptive but poses a question of whether in the process of international norm setting for the protection of minorities, there ought to be a special category of rights for those minorities that are also indigenous.

The Maori are the *bumipatra* of New Zealand – the sons of the soil. We call ourselves the *tangata whenua* – the people of the land. Most islands of the Pacific share the same concept though with dialectal differences – *tangata* or people is in New Caledonia *Kanaka* and thus the Kanaks. *Whenua* or land, is *Vanua*, for those of Vanuatu.

We relate especially to the original tribes of this district, the Orang Asi. We would say "oranga ati", those at the beginning of life, for there is some tradition, and a deal of anthropological speculation, that the Maori came originally from here.

Bumipatra or sons of the soil has an element of reality however. *Tangata whenua* is something of a euphemism for the Maori. Most of the *tangata* in New Zealand are of British origin. They comprise nearly 90% of the people. The Maori are a mere 10%, a small minority in their own homeland. As for the *whenua*, the land, most Maori are landless. Less than 5% of the land in New Zealand is Maori-owned and much of that is poorer land, land that cannot be developed. It represents the scattered remnants of past wholesale acquisitions.

I find then I must concur with Mr Nariman's description of democracy as threatening the rights of minorities. Under the laws of democratically elected governments in New Zealand, the Maori lost most their land. Under the laws of democratically elected governments, the Maori suffered a process of assimilation that deprived them of their own law and their traditional methods for maintaining social control. Because we produce much milk in New Zealand and homogenise it to remove impurities and make it whiter, the Maori call the assimilation process homogenisation. It is not however the Maori view that purity and whiteness are in any way synonymous. I should add that Maori people are not entirely enamoured of western legal processes or western legal norms. They refer not so much to the Rule of Law as to Te Riri Ture – the anger of the law. It is a problem, in this respect, that there are few Maori lawyers and Judges and no tribal Courts. I find it difficult then to talk to my own people about an independent judiciary when they are without representation upon it.

As a Maori I can relate too to Mr Nariman's description of communities (at p 9 of his paper), that people change best when change is on their own terms. When the Maori were the predominant population, they adapted rapidly to western commerce, built and owned most of the western-style shops of the 1850s, exported to Australia, opened their own printing presses and even their own bank. When the population proportions were reversed, through massive immigration and British settlement, the Maori lost not only his land, but his ability to adopt, adapt and improve. Today the Maori comprise less than 1% of those in business, less than 1% of those in professions, and although about 10% of the population, they comprise nearly 50% of those in prisons.

I do not think most New Zealanders appreciate the extent of Maori losses, or the extent of Maori grievance and the wide sense of injustice that predominates amongst Maori people. It is from my own broad sense of what social justice entails and the experience of my own people, that I advocate special rights for indigenous minorities. Just what those rights should be is no doubt open to much debate, but I would include amongst them, if there are to be any at all, rights of reparation, rights of tribal self government, the right to independent economies for the funding of tribal programmes, and the right to maintain one's own culture. I would add to that, in the Maori context, the right to state

funding so that these inchoate rights may also be made a reality.

Mr Nariman suggests, and I would certainly agree, that in a democracy the maintenance of minorities' rights, and in this case the rights of indigenous minorities, must largely depend upon the Courts. In my paper, I describe in this context the work of the Waitangi Tribunal. I will not describe that Tribunal now, for it is covered there. I will refer instead to the judicial activism that has recently developed in New Zealand in this human rights area.

The New Zealand Courts have recently come to recognise the plight of Maori people. A year or so ago, the New Zealand High Court found that the Maori did in fact enjoy certain fishing rights by virtue of their indigenous status. More significantly I think, on Monday, so I am told, the full bench of the New Zealand Court of Appeal unanimously determined that the transfer of certain large areas of State land, pursuant to a highly important policy of State, ought not to proceed without prior negotiation with the Maori tribes for the reparation of past land losses. [See *The New Zealand Maori Council v Attorney-General and others* (1987) 6 NZAR 353 – Ed.]

I should add too that another High Court Judge recently conducted a Commission of Inquiry into our electoral system. The Commission's report noted Maori powerlessness in the democratic system and recommended improvements through a system of proportional representation.

Judicial activism, I suggest, is alive and well in New Zealand at least at High Court and Court of Appeal levels. I am not so sure however, that the same mood has permeated through to the Bar. New Zealand has no Bill of Rights, but one is proposed. Most lawyers, when surveyed last year, were opposed to such a Bill and even more were opposed to a provision that would give special rights to the Maori.

Most New Zealanders, it seems, feel that in our country a Bill of Rights is not necessary. That however, is not surprising, for in our democratic country, most New Zealanders have not shared the experiences of the Maori. □

Butterworths Travelling Scholarship in Law:

This year Butterworths has altered the system relating to the travelling scholarship it has awarded for some years now. For this year and the future a single substantial travel award, which this year was $3,000.00 will be made instead of four small awards of $500.00 each. It is proposed that the sum will be increased from time to time.

The general purposes of the scholarship are to encourage a high standard of legal writing and research, and to assist a candidate to further his or her studies overseas. In making an award consideration is to be given to such matters as legal research undertaken and legal writings of the candidate along with the proposed course of study and legal research intended to be taken overseas. In addition to the academic record and cultural interests of applicants, their economic circumstances can also be taken into account.

The 1987 selection committee comprised the Chief Justice Sir Ronald Davison, the President of the New Zealand Law Society Mr Peter Clapshaw, Wellington barrister Dr George Barton and the Editor of the New Zealand Law Journal Mr Patrick Downey. Applications were received from nine candidates. The Committee decided to award the scholarship to Mai Chen of Dunedin.

Mai Chen is an assistant lecturer at the Law School at Otago University where she obtained a first class honours degree in 1986. She has obtained a number of scholarships and had to choose finally between going to Harvard for a one year course or Toronto for a three year course. She has chosen Harvard in the first instance. She is married to J A Sinclair who is completing his PhD at Otago in English. He will travel to the United States with his wife.

The Committee was very impressed with the standard of all the applicants. Mai Chen came to Wellington at the end of July when she was presented with a cheque by the Chief Justice as Chairman of the selection committee.

Butterworths Travelling Scholarship in Law
Photograph taken on the occasion of the award of the scholarship by His Honour the Chief Justice to Mai Chen of Dunedin.

(l to r: Mr P Kirk Managing Director Butterworths of New Zealand, Mai Chen, His Honour the Chief Justice Sir Ronald Davison.)

Control of discretion of the Commissioner of Inland Revenue (II):

Estoppel

By Kristy P McDonald, Crown Counsel, Wellington

This is the second part of a three-part article discussing the control that affects the exercise by the Commissioner of his statutory discretions. The first part considered the legal status of the Commissioner and was published at [1987] NZLJ 212. This part looks at the effect of estoppel whether by res judicata or by representation. The author also deals with what she says is sometimes called exhaustion of discretion. The third part will deal with the decision in the Lemmington Holdings *case.*

Part II — Estoppel

As was seen in Part I of this article — the two main avenues of control over the exercise of the Commissioner's discretion are the Court's powers of judicial review and the statutory objection procedure. There is however, a further possible means of control, that is, estoppel.

"Estoppel" has been defined as

> a disability whereby a party is precluded from alleging or proving in legal proceedings that a fact is otherwise than it has been made to appear by the matter giving rise to that disability. (*Halsbury's Laws of England*: 4 ed, vol 16, para 1501)

There are two main types of estoppel relevant to this discussion:
(A) Res Judicata
(B) Estoppel by Representation.

A third doctrine which has been used to control or limit the powers of the Commissioner is something called "exhaustion of discretion", which in a number of cases has been identified as a form of estoppel. (See *Robinson v CIR* (1957) 7 AITR 161, 165, *Europa Oil (NZ) Ltd v CIR* (No 1) (1966) 1 ATR 151, 179-181 per Gregor J)

Res Judicata:

A plea of Res Judicata may be raised where a judgment has been pronounced between parties and findings of fact are involved as a basis for that judgment. All the parties affected by the judgment are then precluded from disputing those facts, as facts in any subsequent litigation between them.

It is well established that this doctrine does not apply to income tax cases to the extent that a decision given in regard to one year's income tax assessment cannot bind either party with respect to assessments of the taxpayer's tax in future years. (See *Caffoor v ITC* (Colombo) [1961] AC 584 and *Maxwell v CIR* [1962] NZLR 683)

In the decision of *Maxwell v CIR* the taxpayer attempted to defend an action for recovery of unpaid tax by alleging that the Commissioner was estopped by a previous decision of the Court between the same parties from asserting that the tax claimed in the second proceeding was due. The taxpayer argued that since he had been acquitted in the earlier proceeding on a charge of wilfully making false returns, the Commissioner should be estopped from asserting in the later proceeding that those same returns were fraudulent or wilfully misleading. The Court of Appeal rejected this submission, despite the fact that both proceedings related to tax payable in the same year. The reasons for the decision were twofold:

(a) That the issue in the criminal proceedings and the issue in the civil proceedings were not exactly the same.
(b) That s 26 of the Land & Income Tax Act 1954 prevented the taxpayer from disputing the assessment.

The effect of the decision is that if the taxpayer wants to set up an estoppel per rem judicatam against the Commissioner of Inland Revenue, it must relate to the same tax year as the decision which is res judicata. Further, he must use the statutory objection procedures or the privative clause will defeat his claim.

The New Zealand Court of Appeal in *Gregoriadis v CIR* (1985) 8 TRNZ 705 recently discussed the question of estoppel per rem judicatam and in particular considered the *Maxwell* decision. In *Gregoriadis*

Richardson J identified three criteria which must be present to found an estoppel per rem judicatam, namely:

(a) identity of parties
(b) identity of subject matter; and
(c) sufficient co-extensiveness of the standard of proof.

It was the second of these criteria – identity of subject matter, that was the issue in *Maxwell*.

The facts of *Gregoriadis* were that the Commissioner had successfully brought evasion charges against the taxpayer in the Magistrates Court. The taxpayer appealed and the Supreme Court allowed the appeal on the basis that certain evidence that had been admitted in the Court below was inadmissible. In the meantime, as a result of the outcome of the prosecutions in the Magistrates Court, the Commissioner had assessed the taxpayer for penal tax. The taxpayer objected. The case came before Quilliam J in the High Court where the issue was whether the acquittal on the prosecutions debarred the Commissioner from charging the taxpayer in penal tax. Quilliam J held that it did not and that the taxpayer was chargeable.

However, in the Court of Appeal it was held that the matter was res judicata and the appeal was allowed.

The law of *Res Judicata* is an area which requires exactitude of expression. Its basis is that *the same question* shall not be the subject of relitigation between those whom, or their privies, it has already once been decided. *But the question must be the same.* Were the questions before the Court in *Gregoriadis* the same or not? Clearly not. This is accepted by Richardson and McMullin JJ at p 711 where they expressly admit that no more than a "sufficient approximation" between the two questions can be contended for. They then excuse making the leap over the gap, by saying that it does not matter, for if the standard had been the same (which it was not) the Commissioner would still have failed. This sort of "near enough" approach would seem to be unjustifiable in the area of the law of estoppel.

Somers J seemed also to be troubled by the problem. He devotes the whole of p 712 to this difficulty and then says expressly "the different standard of proof *destroys the identity of issue*". He carries on, influenced by the merits of the case, in which it seems to him that the Crown is persecuting the appellant, to justify his support of the judgment of Richardson J and McMullin J by saying

> Here however the onus is on the Crown in the (civil) objection proceeding and the matter to be established by it is precisely the same, and having regard to its criminal character would have to be established to a standard of proof *sufficiently proximate to the criminal persuasion* to render the technical differences not material.

The trouble is that the questions in the two proceedings were *not the same.* In one, it was whether, using the standard of proof necessary in criminal proceedings, the Court was convinced beyond all reasonable doubt that the appellant had furnished false returns. In the second it was, using a different standard of proof, will it be held as a matter of fact the appellant had furnished false returns?

Can it be assumed that the Commissioner will not in the second proceedings tender evidence not tendered in the first, to clinch his case? This question was not faced, let alone answered, in the judgments. It is clear enough of course that the Commissioner's case on a criminal charge cannot be reopened later, with new evidence tendered; the plea of *autrefois acquit* would dispose of this. But where a *different question on the same facts* is the subject of litigation cannot a fresh case be made out by the Commissioner, in which the original acquittal is untouched, but a question of fact, necessary indeed to be decided in the earlier case, but on a different standard of proof, is again before the Court, and has to be decided on another, and more liberal standard of proof?

Some may see the *Gregoriadis* decision as providing an example of where the doctrine of estoppel per rem judicatam will apply and that the foundation now exists for a future move by the Courts away from the traditional and restrictive approach of the past where decisions such as *Maxwell* provide examples of the Court drawing fine distinctions to exclude the doctrine. A more proper conclusion, in the writer's view, is that *Gregoriadis* should be seen as a decision of the Court of Appeal, perhaps flying in the face of established rules as to *Res Judicata*, resulting in the dismissal of subsequent civil proceedings by the Crown in a case where (a) the question of criminal liability had already resulted in an acquittal and (b) the facts appeared to justify the conclusion that further litigation, if permitted, would very probably lead to the same conclusion. Further, the case, when examined should not be represented as a new departure in, or modification of, existing rules as to a *eadem quaestro* in *Res Judicata.*

It is interesting to note that Gresson P in *Maxwell* considered that the concept of res judicata was inappropriate for another reason: (*Maxwell v CIR* [1962] NZLR 683 at 698)

> The importation of the legal doctrine of estoppel per rem judicatam, is, in my opinion, inappropriate in regard to the exercise of the Commissioner's powers in the statutory setting in which they are contained. Where a statute imposes a duty or confers powers the doctrine of estoppel cannot prevent the carrying out of the duty or the exercise of statutory powers.

(There is obiter support for this statement – see *Society of Medical Officer of Health v Hope* [1960] AC 531, 568 per Lord Keith; cf *Taylor v AG* [1963] NZLR 251.)

The decision of *Caffoor v ITC* is an example of where, in the issue of an assessment, the Commissioner is not necessarily bound by any determination that might have been made in respect of an assessment for a previous year. The facts of this case were, that in respect of the 1950 income year the taxpayer had established before an income tax board of review that the taxpayers were trustees of a charitable trust, and therefore their income was exempt from income tax. For the 1951 income year the Commissioner issued an assessment on the footing that the taxpayers were not trustees of a charitable trust.

One of the grounds of objection against the assessments for the 1951

year was that the decision of the Board of Review in respect of the 1950 income year set up an estoppel per rem judicatam and therefore the Commissioner was bound to follow the decision of the board when he came to issue an assessment for a later year. The Privy Council rejected this view ([1961] 2 All ER 441):

> It is in this sense, that in matters of a recurring annual tax, a decision on appeal with regard to one year's assessment is said not to deal with "eadem quaestro" as that which arises in respect of an assessment for another year and consequently not to set up an estoppel.

The decision in *Caffoor* is unusual because the Board was called on to decide between two previous conflicting decisions of the Privy Council. In *Broken Hill Pty Co Ltd v Broken Hill Municipal Council* [1926] AC 94 the Privy Council had held an appeal against a rating assessment that a decision on an assessment for one year does not support an estoppel in relation to an assessment for a subsequent year. However, in the same year the Privy Council in *Hoysteed v FC of T* [1926] AC 155 had taken the opposite view. In *Caffoor* the Privy Council followed the *Broken Hill* case. It should be pointed out that the two cases were heard before two differently constituted Boards, no member of either Board being present at the hearing conducted before the other. While the decision may provide one of the rare examples of the Privy Council overruling one of its previous decisions, it would seem that the Board was compelled by the quite unusual circumstances to overrule one decision or the other.

In *Duff & Ors v CIR* (1979) 3 TRNZ 158 Beattie J was asked to consider the question of Issue Estopped (that is, estoppel per rem judicatam). That case concerned the purchase of land for the purpose of sub-division. The land was compulsorily acquired and the Commissioner included the compensation received in the taxpayer's assessable income. One of the contentions made by the taxpayer was that the assessment of the profit was estopped by the decision in an earlier case (*Railway Timber Company Ltd v CIR* (1979) 2 NZTC 61, 172), because the parties were the same in effect or within the class of privies to that case. With regard to that contention Beattie J held that the parties in the present case were different in fact and law, differently linked. The facts and central issue in the *Railway Timber* case were different.

It would seem however, that had the facts and issues been significantly similar Beattie J may have been influenced by the issue estoppel argument.

In light of the *Gregoriadis* decision it is no longer possible to say with any certainty that the doctrine of estoppel per rem judicatam will not apply to a taxpayer. What is clear however is that it cannot be used to preclude the dispute or alteration of a later year's assessment, even where the issues are identical. Furthermore, even if an issue should arise relating to the same year, the privative provisions of the Act may prevent the success of the defence, unless it arises in objection proceedings because it necessarily involves disputing the Commissioner's assessment. Although the possibilities of successful invocation of the doctrine of estoppel per rem judicatam against the Commissioner are, in practical terms, limited, the scope still exists for the use of the doctrine and its future development.

Estoppel By Representation:

Estoppel by representation is defined in Spencer-Bower and Turner (*Estoppel by Representation*, 3 ed, 1977, p 4) as follows:

> Where one person (the representor) has made a representation to another person (the representee) in words or by acts or conduct, or (being under a duty to the representee to speak or act) by silence or in action with the intention (actual or presumptive), and with the result of inducing the representee on the faith of the representation to alter his position to his detriment, the representor, in any litigation which may afterwards take place between him and the representee, is estopped, as against the representee, from making or attempting to establish by evidence, any averments substantially at variance with his former representation if the representee at the proper time, and in the proper manner objects thereto.

In the context of taxation the situation in which "estoppel by representation" may apply is where the Commissioner (through his officers) represents to a taxpayer that if the taxpayer conducts his affairs in a certain way, he will attract certain tax consequences. If the taxpayer arranges his affairs accordingly is the Commissioner then estopped from later saying that the tax consequences will be different? For example, if a taxpayer receives information from the Commissioner as to the deductibility of travel expenses (such as an academic on leave) and the taxpayer arranges his affairs in reliance on that advice, can the Commissioner change his mind when assessing the taxpayer, or even later re-assess the taxpayer? Situations like this occur frequently, particularly where the Commissioner issues advance rulings or guidelines for taxpayers. A taxpayer who acts in reliance upon an advance ruling and subsequently discovers that the Commissioner has altered his position with regard to that ruling will understandably feel aggrieved.

The Commissioner's duties and discretions are conferred by statute. In order to determine whether representations or actions on the part of the Commissioner can bind him to exercise those duties and discretions in certain ways, it is necessary to consider whether the doctrine of estoppel by representation is effective against acts or decisions made pursuant to statutes.

Statutory Powers:

It is established law that an estoppel must fail, if its establishment results in an illegality, so too, it cannot be set up if its establishment results in preventing the performance of a statutory duty. The authority for this principle is contained in the judgment of Lord Maugham in *Maritime Electric Co Ltd v General Dairies Limited* [1937] AC 610 at 619-620.

That case concerned certain

provisions of the Public Utilities Act 1927 which imposed a duty on an electric company to charge a dairy company for all electric current supplied and used. The specific question for determination by the Court was whether the duty created by statute can be defeated or avoided by a mere mistake in the computation of accounts. The Court concluded that it could not. The particular sections of the Public Utilities Act under consideration were enacted for the benefit of the public; that is, on grounds of public policy in the general sense. Accordingly, it was not open to the Defendant to set up an estoppel.

In *Europa Oil (NZ) Limited v Commissioner of Inland Revenue* [1970] NZLR 321 the New Zealand Court of Appeal, inter alia, considered whether an estoppel could be raised against the Commissioner when acting in his statutory duty to assess a taxpayer in accordance with the Act.

Turner J (ibid at p 418. See also *CIR v Lemmington Holdings Ltd* (1982) 5 TRNZ 776) stated that the Commissioner cannot be precluded by the doctrine of estoppel from doing his duty as directed by Statute. Although, because of the particular conclusions reached by the Court he did not need to consider the question. He expressed a clear approval of the findings of McGregor J in the Supreme Court on the point. McGregor J held that the taxpayer could not rely on any principle of estoppel for the following reasons:

1 That the Commissioner was not exercising any discretion when he decided that there would be no re-assessment, and
2 That the Commissioner was deprived of relevant information which was in the hands of the taxpayer.

Further, he held that the Commissioner could not bind himself in regard to his future actions.

In *AGH Finance Limited v CIR* (1982) 5 NZTC 61, 189 the taxpayer sought and obtained a written ruling from a District Commissioner of Inland Revenue as to the likely effect a takeover transaction would have on its entitlement to an export incentive.

The Commissioner issued an assessment disallowing the export incentive largely resiling from the advice in the Commissioner's letter. In a case stated Ongley J took the view that the Commissioner of Inland Revenue could not be bound by the statement in the letter remarking that "there is no estoppel against the Commissioner". In any event, His Honour went on to conclude that the advice contained in the letter was correct and so the taxpayer was, in fact, entitled to the export incentive.

Perhaps the proper conclusion to be drawn from the *AGH Finance* case was that since the letter referred to amounted to nothing more than an expression of opinion by the Commissioner, then, on ordinary principles of estoppel it could not properly be relied on in any event since it was not made with the knowledge that it would be relied on.

The Commissioner took this case on appeal (*CIR v AGH Finance Ltd* (1985) 8 TRNZ 353) and the finding of Ongley J in the High Court was reversed. The Court of Appeal comprising Cooke, McMullin and Savage JJ unanimously held that the taxpayer had acquired the business of the company in liquidation.

For the purposes of this paper there is no need to go into the reasons the Court of Appeal gave for reversing the decision. Of interest however, is that both Cooke J and McMullin J considered the effect of an assurance given by the Commissioner to a taxpayer on the basis of which the taxpayer had asked for and received confirmation that it would be entitled to full export tax incentives.

Their Honours pointed out that the Commissioner's letter in reply did not give rise to an estoppel but that nevertheless if the facts had been correctly put to the Commissioner they may have held differently.

Discretion

Problems arise where the particular authorising provision in the Statute is prima facie directory or gives a discretion as to its exercise. If, on a proper construction the section imposes a duty to exercise the discretion then again the Commissioner cannot be estopped from exercising that discretion. (*Southend-on-Sea Corporation v Hodgson Ltd* [1962] 1 QB 416) To hold otherwise would be to allow an administrative authority to fetter its discretion, which the Courts will not do. (*Ayr Harbour Trustees v Oswald* (1883) 8 App Case 623)

North J in *Taranaki Electric Power Board v Proprietors of Puketapu 3A Block Inc* [1958] NZLR 297, had to consider s 82(o) of the Electric Power Boards Act 1925, which authorised power boards to sell electricity to any local authority or consumers generally within the district in bulk or otherwise on such terms and conditions as it deems fit. Owing to a defect in the meters, the Board had charged the defendants for less supply than had actually been supplied. It was held that no offence or breach of a statutory prohibition was committed by the Board in supplying electricity to the defendants at the amount charged in the monthly statements, and that there were, therefore no obligations imposed by the provisions of the Electric Power Boards Act 1925, and the regulations made thereunder, either on the Board or on the Defendants, which prevented the plea of estoppel being raised. This case, therefore is clearly one where the Court had to consider the exercise of a discretion rather than of a strict duty, it does not therefore, amount to a true exception to the general rule.

While it seems clear that after the *Maritime Electric* case (supra) an estoppel cannot lie in the face of a statutory duty, that is, where its effect would be to authorise an ultra vires act or prevent the performance of a lawful duty. It is perhaps not quite so clear whether an estoppel can lie in the face of a statutory discretion.

In the *Southend-on-Sea Corporation* case (supra) Lord Parker of Waddington rejected a submission that a public corporation could be estopped from exercising its discretion in a particular way, even though the result would not have been ultra vires.

The *Southend-on-Sea* case appears to leave no room for the operation of an estoppel against a Statute. One justification for this result is the administrative law principle that public authorities cannot fetter the exercise of their

discretion by contract. Although the Southend-on-Sea Corporation could exercise its discretion to zone land in various ways, including the way which had been represented to the Department, this discretion was required to be exercised for the benefit of the public generally. Thus, the Corporation was under a duty to exercise it without any contractual fetter, which might not be in the best interests of the public.

In *Lever Finance Limited v Westminster LBC* [1970] 3 All ER 496 the planning officer for the defendant corporation led the plaintiff to believe that it did not require consent to make certain alterations to buildings which it proposed to make.

After representations by local residents and, at the suggestion of the defendant's planning officers, the plaintiff applied for planning permission for the variations and permission was refused. The Court of Appeal held that the defendant had delegated authority to its planning officer to tell the plaintiff that the planning consent was not material, that the plaintiff had acted on that information and accordingly further planning permission was not required. Denning MR (ibid at p 500) concluded that if the planning officer tells the developer that a proposed variation is not material, and the developer acts on it, then the planning authority cannot go back on it. His Honour considered the *Southend-on-Sea Corporation* decision but considered that that decision must be taken with considerable reserve because there are many matters which public authorities can now delegate to their officers, and if such an officer, acting within the scope of his authority, makes a representation on which another acts, then a public authority may be bound by it. His Honour cited as authority for this conclusion the decision in *Wells v Minister of Housing & Local Government* [1967] 2 All ER 1041. It was proved in that case that it was the practice of planning authorities, acting through their officers, to tell applicants whether or not planning permission was necessary. A letter was written by the Council engineer telling the applicants that no permission was necessary. The applicants acted on it. It was held that the planning authority could not go back on its statement.

Denning MR therefore concluded that so long as the decision was within the ostensible authority of the planning officer, then being acted on it was binding on the planning authority.

The more recent decision of *Wormald v Gioia* [1980] 36 SASR 393 considered the *Southend-on-Sea Corporation* case. The lower Court rejected the argument that a caravan was not a shop within the meaning of the regulations but dismissed the complaint because it held that the council was estopped, by reason of the information given to the Respondent, from alleging that the Respondent was not entitled to sell fruit and vegetables from a caravan without council consent. The Supreme Court concluded that the question to be determined was on all fours with *Southend-on-Sea Corporation* where the Court had held that even assuming that the particular statement in issue was a pure representation of fact, there was no estoppel against the council. The Judge in *Wormald* referred to *Brickworks Limited v Warrington Corporation* (1963) 108 CLR 568 at 577 where Windeyer J distinguished *Southend-on-Sea Corporation* but did not cast any doubt as to the correctness of the decision. In the *Brickworks Ltd* case a document signed by the President of a shire council was held by the majority to give rise to a presumption that the council's consent had been given to a particular use for certain land, a presumption which was strengthened by the council's subsequent actions. In the *Wormald* case there was no question of a presumption that consent had been given.

It was argued in *Wormald* that the Court of Appeal in England had departed from the decision in *Southend-on-Sea* and that there were later decisions which were applicable to the present case and which should be followed. In particular reliance was placed on *Lever Finance Ltd* (supra and, to a lesser extent *Wells*. Unlike the conclusions reached in *Wells*, the Court in *Wormald* could not find any suggestion on the facts that the local planning authority had made any determination concerning the necessity for planning permission.

The *Lever Finance* decision was considered in *Norfolk County Council v Secretary of State for the Environment* [1973] 1 WLR 1400 where a planning officer had, by mistake, sent to a company a notice stating that planning permission had been granted. In that case the divisional Court considered an argument based upon the ostensible authority of the officer and Lord Widgery CJ in whose decision the other members agreed stated: (idem)

> His ostensible authority, as far as I can see, only went to his authority to transmit the decision which had been made, so I have no hesitation in saying that there never was planning permission, and that it is open to the planning authority to show that by reference, amongst other things, to the actual resolution on which the permission is said to have been based, and by reference to the authority or lack of authority which that particular officer had in the matter.

The Court decided, that in any event, the ordinary law of estoppel could not operate because the company had not been shown to have acted to its detriment.

In *Western Fish Products Ltd v Renwith District Council & the Secretary of State for the Environment* [1978] JPL 623 a letter from its chief planning officer was claimed to bind the Council to determination that planning permission was not required. The question of proprietary estoppel was discussed.

There, then, the Court seemed to be saying that *Lever Finance* properly interpreted is a case of res judicata not estoppel by representation. The Court expressed the clear view that the principle laid down by Lord Denning in *Lever Finance* was not an authority for the proposition that every representation made by a planning officer within his ostensible authority bound the planning authority which employed him. The Court referred to the statement of Lord Denning that "any person dealing with them (ie officers of a planning authority) is entitled to assume that all necessary resolutions have been passed". (supra at p 231)

With reference to that statement the Court said that it had not been necessary for the conclusion reached

by Denning LJ and that it was obiter and stated the law too widely. The Court referred to the situations in which estoppel would arise.

1 Where there was evidence justifying the person dealing with the planning officer for thinking that what the planning officer said would bind the planning authority.
2 Where a planning authority waived a procedural requirement relating to any application made to it for the exercise of its statutory powers.

The Court expressed the views that, except in these two cases, there was no justification for extending the concept of estoppel and approved statements made by Lord Widgery CJ in *Brooks and Burton Ltd v Secretary of State for the Environment* [1977] LGR 285, at 296 deprecating any attempt to expand the doctrine of estoppel.

Exhaustion of Discretion

In the context of this article "Exhaustion of Discretion" simply means, that where, with full knowledge of all the facts, the Commissioner has exercised his discretion or has outwardly appeared to do so, he is precluded from any further review of it.

A discussion of this doctrine must begin with the case of *Rhodes v C of T* (1910) 2 NZLR 725 where Stout CJ held that the Commissioner was unable to amend the taxpayer's assessment, even though the statutory time limit had not expired, because his purported assessment related to an exemption from mortgage tax granted under a provision which made his determination final and conclusive.

A year earlier, Denniston J refused to allow the Commissioner to amend an assessment to alter the rate of depreciation which he had previously allowed under a section similar to the present s 108. (*Wood Brothers Ltd v C of T* (1909) 11 GLR 484) The basis for this refusal was that the Commissioner could only exercise his discretion once in any income year, unless it could be shown that he was not aware of all the relevant facts at the time he exercised his discretion. This approach was adopted by the Court of Review in Queensland in *In re Income Tax Act (No 4)* [1933] St.R Qd 166 (see also *FCT v Aust Tesselated Tile Co Pty Ltd* (1925) 36 CLR 119, 123). The Commissioner was held unable to amend the assessments in issue because it would have had the effect of reversing his previous exercise of discretion to allow a deduction for a director's fee. Webb J stated: (supra at 172)

> [I]f the Commissioner once exercised his discretion for a particular year, he could not exercise it again for that year unless he could show that he had been misled or had not sufficient material in the first instance.

In *Robinson v CIR* (1957) 7 AITR 161 Adams J referred to these authorities, but found them inapplicable in that case, as the Commissioner had not been informed of all of the relevant facts at the time he exercised his discretion. The learned Judge appeared to consider exhaustion of discretion to be a form of estoppel.

A submission that the Commissioner had exhausted his discretion to amend the taxpayer's assessment was rejected in the *Union Steamship Co* case by Leicester J, who nevertheless acknowledged the possibility of the "discretion" to amend being exhausted [1962] NZLR 656. *In Europa No 1* [1970] NZLR 321 the taxpayer argued that the Commissioner had exercised his discretion to allow the taxpayer deductions and therefore could not re-exercise that discretion by amending the assessments. McGregor J rejected this submission for the reasons: *First*, there had not been full disclosure of the relevant particulars to the Commissioner, *second*, neither s 111 (Section 104 of the Income Tax Act 1976) nor s 22 (ibid, s 23) conferred a discretion on the Commissioner.

His Honour implicitly accepted the applicability of this doctrine to situations where the Commissioner exercises an express statutory discretion, such as in granting a depreciation allowance. However, since the deduction provision was cast in objective terms, the Commissioner was under a duty to apply it correctly, and no exercise of discretion could validly be made. In the Court of Appeal this issue was not fully dealt with, but it appears that both North P and Turner J considered that the principle was inapplicable because the Commissioner had been performing a *duty* in reassessing the taxpayer and was not exercising a discretion. ((1969) 1 ATR 453 at 479 per North P and at 501 per Turner J)

In New Zealand the position seems to be that the Commissioner can exercise a discretion, such as determining the amount of a depreciation allowance under s 108, only once each income year, provided he is in possession of all relevant facts. If he attempts to change his mind, the Courts will prevent him from doing so for that particular year. This result raises the question of what relationship there is between exhaustion of discretion and estoppel by representation.

In a number of cases which involve exhaustion of discretion the Court has talked of "estopping" the Commissioner. (See *Robinson v CIR* (supra) and *Case 4* 1 TRNZ 64) Prima facie the effect of the doctrines is very similar in that the Commissioner is prevented from exercising a discretion which he purports to be able to exercise. The vital distinction is that the doctrine of estoppel operates to prevent a representor from asserting a legal right or privilege, whereas exhaustion of discretion results in an authority having no legal discretion to exercise.

In the former cases the authority is prevented from exercising a *valid* discretion. In the latter, he has no discretion to exercise, and is prevented from re-exercising the discretion he had.

Exhaustion of discretion bears some similarity to the principle of "functus officio" in that an authority empowered to exercise a discretion loses his "jurisdiction" or power once he had made a valid and final exercise of it. He cannot change his mind. (See *Nahkla v McCarthy* [1978] 1 NZLR 291, 296) In applying the principle of exhaustion of discretion the Courts are simply invoking a basic principle of administrative law – that all governmental and administrative action must be performed according to law. In this respect exhaustion of discretion is more appropriate in public or administrative law than estoppel, which operates to prevent the performance of an otherwise lawful act.

To allow the Commissioner to be estopped from exercising a discretion would be to create a fetter on his discretion. The position is different in cases where "exhaustion of discretion" is used. An administrative authority is said to have fettered its discretion when it does not, or is unable to, exercise that discretion freely.

If the authority is said to have exhausted its discretion, then it must have already exercised the discretion in the proper manner. Far from fettering its discretion so that no exercise is made it is attempting to exercise the same discretion twice. The doctrine of exhaustion of discretion supports, rather than contradicts, the administrative law prohibition on fettering a discretion.

If liability to law is imposed by the Act then it follows that the Commissioner should be free . . . or required . . . to amend all assessments which are incorrect. Is the doctrine of exhaustion of discretion inconsistent with this principle? It is important to identify and distinguish the Commissioner's duties and discretions under the Act. Some provisions which are cast in discretionary language actually impose duties . . . such as the "discretion" to amend incorrect assessment. All of the provisions of the Act which outline the conditions and requirements for their application are not truly discretionary. The Commissioner will be obliged to assess any taxpayer who fulfils these provisions in accordance with their terms, regardless of phrases such as "in the opinion of the Commissioner" and "if the Commissioner is satisfied". To decide otherwise would be to reject the idea that Parliament imposes taxes, rather than the Commissioner. Given that express criteria for the operation for these provisions are provided, it is difficult to accept that they are intended to confer any real discretion on the Commissioner.

However, there are also "five" discretionary provisions in the Act. These are provisions which allow the Commissioner to determine the amount of any rebate, allowance, a deduction, for example, to be granted to taxpayers, while providing no explicit guidance for their exercise. It is in exercising his discretion under these sections that the Commissioner can "exhaust" his discretion. Although liability is still imposed by the Act, in the sense that these discretions generally allow the Commissioner to grant rebates or deductions from the liability imposed by the objective changing provisions, no precise quantification of that liability can be determined, except by the Commissioner exercising these discretions. The "liability is imposed by the Act" idea is misleading, in that it suggests that any taxpayer can determine the amount of his liability from reading the Act. This is impossible where the Commissioner has power to allow deductions "as he thinks just". The exercise of these discretions is part of the Commissioner's function of "quantification", but it is not dependent on objective criteria, as it is under a provision such as s 104. Under that section the taxpayer is also able to "quantify" his liability, under the "true" discretion provisions he cannot.

Where the Commissioner exercises a wide discretion which is not subject to express statutory criteria, he is not imposing liability. Liability is imposed by the charging provisions, and in exercising his statutory discretions the Commissioner is merely quantifying that liability. Therefore, to hold that he has exhausted his discretion once he has exercised it validly, and quantified or assessed liability of a taxpayer, in full knowledge of the relevant facts, does not conflict with liability being imposed by the Act. For example, if the Commissioner allows a taxpayer a deduction for depreciation under s 108, he is not affecting the taxpayer's liability to tax – he is still liable to pay tax on his income but rather the amount or quantification of that liability. Now the taxpayer has a deduction to be offset against his total liability. There is no basis on which the Commissioner can alter his quantification of the deductions, because his power to amend assessments is only provided for the purpose of "ensuring the correctness thereof". By properly exercising his discretions in the first place, the assessment is deemed by the Act to be correct. (See s 27)

The "exhaustion of discretion" doctrine is thus appropriate in situations where the Commissioner has validly exercised one of these "true" discretions, and purports to re-exercise it by amending the taxpayer's assessment.

Conclusion

Although it had been generally accepted that the doctrine of res judicata would not apply to income tax cases the recent decision of *Gregoriadis* appears to have opened the possibility for the future use of this doctrine.

The concept of estoppel by representation is slightly different, and must fail if its establishment results in an illegality or in the prevention of the performance of a statutory duty, however it may be argued that there is a distinction between a duty imposed and a distinction conferred. In the latter case there is some authority for the proposition that a public corporation can be estopped from exercising its discretion in a particular way (*Lever Finance Ltd v Westminster LBC*). Whether such an authority could be extended to apply to the Commissioner of Inland Revenue is doubtful. Although it is reasonable to expect that a person misled by a Government officer should not bear any ensuing loss, it does not necessarily follow that estoppel provides the proper remedy. An action in negligence for damages may be more appropriate. The whole basis of administrative law would be undermined if estoppel could be set up to prevent the exercise of legal duties or to validate ultra vires acts. □