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Other Tribunals

There is nothing sacrosanct or unchangeable in our inherited legal system or the structure of our Courts. There are some basic principles, including the independence of Bench and Bar, that are essential not just to the legal system but indeed to the very nature of our constitution and our civil liberties. Those who would casually or callously trade them in for administrative efficiency or the Maori way or some other political, economic or cultural ideology have a very difficult case to make. It is well to remember the sharp rejoinder of Mr Justice Kirby, [*Reform* No 33, January 1984], to an attack on the concepts of Anglo-Saxon justice as they had been developed in the common law by the Judges over the centuries. Responding to those in Australia who derided the English common law tradition in favour of legal values drawn from multiculturalism and particularly the folklore of the Aborigines, the Judge said:

> At the heart of multiculturalism is the ideal of tolerance – that our society in Australia is sufficiently mature to permit people, in the one community, to be themselves and not to suppress their linguistic and cultural origins. I know of no non English-speaking country that accepts these principles. The English-speaking world, with institutions derived from Britain, is in the vanguard of the movement for tolerance. It does the cause of cultural diversity a dis-service to think that we advance those from other ethnic groups by denigrating, insulting or belittling the unique, indispensable and central contribution to Australian life of people from the British Isles.

It is not the purpose of this editorial to develop that point further. Valid as it is, there is no way that the legal system should or can be petrified at this particular stage of its development. Nor can we look to England or the United States or the Commonwealth of Australia as models to be adopted in a total way. New Zealand will find its own way forward because of its peculiar inheritance, its present situation and its changing social and ethnic patterns in the future. No doubt there may well be greater political tensions and conflicts than there are now. These problems must be faced as they arise and worked at with greater or lesser degrees of emotion, of rationality and of simple luck – good or bad.

There are at present a number of fads and fashions often encapsulated in slogans or contemporary phrases. Access to law is one. Those who have been charged, tried and convicted can be said to have had access to law in one sense, but it is not the sense in which the phrase is usually meant. In a different context another commonly proposed idea is that of alternative dispute resolution. Articles by T Kennedy-Grant on alternative dispute resolution in the Pacific region and in New Zealand have been published in this *Journal* at [1987] NZLJ 294 and [1989] NZLJ 21. There was also an article on a New Zealand experiment in pre-trial dispute resolution by way of a mini-trial by P T Cavanagh published at [1989] NZLJ 23.

In Wellington's *Dominion* newspaper of 24 June 1989 there was an article on the development in California of a rent-a-Judge system. This is partly a form of arbitration, but with the extra twist that the parties have their dispute adjudicated on (if that is an appropriate term, which is at least disputable) by a retired Judge. According to the report, a recent dispute went further. Not only was a Judge hired, but so were a bailiff, a clerk, a Court reporter and the "trial" took place "in a rented public Courtroom before a jury selected from the public rolls". The Law Commission in its recent report on restructuring the Courts seems to have overlooked this possibility for a more economic use of Courtrooms.

Arbitration instead of a Court hearing is nothing new for New Zealand. We have had an Arbitration Act since 1890 at least. And there would seem to be nothing to stop parties, by contract, agreeing to resolve disputes between them in any way they choose. Dispute resolution in terms of the Arbitration Act 1908 has been common enough, but the provisions of the Act have themselves been a part of the legal system. The Courts are directly involved in supervisory, appellate, and, in the compellability of witnesses for instance, procedural roles. What is now spoken of as alternative dispute resolution is something different altogether.

The very concept of alternative dispute resolution outside the Court system has its critics. It has been questioned in California by the President of the American Bar Association, Robert Raven. In Canada it has been sharply attacked by the Chief Justice of British Columbia, Mr Justice McEachern.

According to the *Dominion* newspaper report Mr Robert Raven expressed concern about the development. He is reported to have said:

> I'm worried we're getting a two-tiered system of justice: one for the group of people who can afford to hire a Judge and one for the group of people who cannot.

From Vancouver BC the Chief Justice of the Province, Mr Justice Allan McEachern is reported to have delivered a hard-hitting attack on the trend toward alternative dispute resolution. His criticisms are reported in the

Canadian publication *The Lawyers Weekly* for 24 February 1989 at p 2. The following extracts set out the criticism of the Chief Justice.

> Describing ADR as nothing more than a trend of the 1980s — replacing the '60s and '70s love for law reform — he said arbitration "sometimes becomes just another layer of expense in an already too-expensive procedure".
>
> Putting on his "black hat" to talk about the undiscussed disadvantages of conciliation and mediation, the Chief Justice warned the assembled students, lawyers and professors that ADR is often supported by "earnest, well-intentioned people who, for a variety of reasons, are anxious to re-organise society and procedures of Courts with naive, theoretical concepts of humanity and efficiency".
>
> Social workers think they can resolve social problems best, while engineers feel they are best equipped to handle construction disputes, he noted. "The problem with all these theories," the Judge said, "is that they never recognise the human element. They assume that all people in disputes are honest, decent, rational, understanding people" who are anxious to compromise. . . .
>
> According to the Judge, ADR ignores the fact that not all disputants are interested in settlement or honesty and that some do not even have valid claims.
>
> He also noted ADR emphasises compromise while there are some cases that should not be compromised. "We will have a very soft and compliant society if no one is allowed to say 'no'," he said.
>
> Non-consensual litigation, on the other hand, puts each side on an equal footing and the parties do not have to put up with posturing and bluffing.
>
> Another factor the Chief Justice noted was that cross-examination often brings out the truth. "I don't think ADR is a successful device for discovering or uncovering the truth. I think it starts with a bias towards compromise."
>
> Good counsel, he said can do just as good a job as a social worker or an engineer in dispute resolution. . .
>
> Turning to another point, he noted ADR's proponents often ignore conventional litigation's tremendous settlement rate: "Lawyers doing what they do best and for which they seldom get much credit are able to resolve huge volumes of litigation using the Court process but without requiring trials."

Alternative dispute resolution no doubt has its uses. But it also has its drawbacks. In addition to the ones noted by Mr Justice McEachern there is the problem of enforceability. If there is a contractual provision for settling disputes then that contractual relationship and its procedural meaning is open to interpretation by the Courts. And eventually, if the successful party has difficulty in obtaining the redress it has been found entitled to, it will still have to bring Court proceedings, prove the decision in its favour (perhaps now by summary judgment) and then seek orders for a winding-up in the case of a company, or distress or insolvency.

Alternative dispute resolution should not therefore be seen as a new panacea. It has restricted uses; but it is not and should not be thought of as an alternative legal system.

P J Downey

Compromise

Middle Ground. If you are mediating between a decent, moderate man, and a foaming nutter, and you go for the middle ground, you are failing, just as you are when you "strike a balance" between modest proposals, and some hard nosed pressure in the opposite direction. On the opening day of the Cleveland Child Abuse inquiry, the judge underlined "the crucial importance of finding the middle ground". What about the importance of finding the right ground?

Nigel Burke
"A Dictionary of Cant"
Spectator, 10 June 1989

Recent Admissions

Barristers and Solicitors

Abbott JB	Christchurch	2 June 1989
Baldwin SP	Christchurch	2 June 1989
Bray SE	Christchurch	2 June 1989
Brownie CB	Christchurch	2 June 1989
Bunce DN	Christchurch	2 June 1989
Caldwell DC	Christchurch	2 June 1989
Ch'ng MGS	Christchurch	2 June 1989
Collins LK	Christchurch	2 June 1989
Cooper CJ	Christchurch	2 June 1989
Dalziel KT	Christchurch	2 June 1989
Ford KA	Auckland	19 May 1989
Garing PD	Christchurch	2 June 1989
Gibb AM	Christchurch	2 June 1989
Graham RM	Auckland	19 May 1989
Gunn AD	Christchurch	2 June 1989
Hay JMG	Christchurch	2 June 1989
Johnston JAR	Gisborne	23 May 1989
Khan MF	Auckland	24 May 1989
Khoo EKH	Christchurch	2 June 1989
Krawczyk KJ	Christchurch	2 June 1989
Lancaster MJ	Christchurch	2 June 1989
Lankovsky AE	Napier	15 June 1989
Leaper A	Christchurch	2 June 1989
Lennon SF	Christchurch	2 June 1989
Marsden SH	Christchurch	2 June 1989
Marshall KA	Christchurch	2 June 1989
Mulligan DJ	Christchurch	2 June 1989
Munn MJ	Christchurch	2 June 1989
Porter ADJ	Christchurch	2 June 1989
Prisk DM	Christchurch	2 June 1989

Case and Comment

Abolishing the hearsay rule?

R v Baker [1989] BCL 791

Almost the only statement about the hearsay rule that would command universal support is that it is in need of change in some way. Thereafter no consensus is to be found on any question, even the definition of the word "hearsay".

The generally accepted definition is that in *Cross on Evidence* (4 ed, NZ, p 8, para 1.15):

> An assertion other than one made by a person while giving oral evidence in the proceedings is inadmissible *as evidence of any fact asserted.* (Original emphasis.)

This is commonly characterised as the assertion-based definition. Its use however leads to a paradox namely, that a statement that fact X exists will be excluded while a statement from which the existence of fact X can readily be inferred will be admitted. This definition is also incapable of accommodating some of the cases, in particular *Wright v Doe d Tatham* (1837) 7 A & E 313, (1837) 132 ER 877, and *Blastland v DPP* [1986] AC 41. It is quite normal to find together statements in both categories and if any semblance of rationality is to remain they must obviously stand or fall together.

This is the basis for the so-called declarant-based theory whose adherents point out that a statement by a person out of Court from which a fact in issue can be inferred suffers from all the same disadvantages as one in which a fact is directly asserted. In particular any ambiguity or insincerity cannot be probed by cross-examination. This is the view espoused by, for example, Professor Tribe at 87 *Harv LR* 957. The declarant-based theory in its turn suffers from the disadvantage that if it is rigidly applied a great deal of obviously reliable evidence will be excluded.

In *R v Baker* [1989] BCL 791 appeals were mounted by both parties against rulings on evidence under s 344A Crimes Act 1961. Of concern for our purposes was the appeal by the Crown against the rejection of evidence of statements by the victim concerning her fear of the accused. Baker was charged with raping and murdering his estranged wife. He himself suffered a bullet wound in the course of the incident and the Crown case was that he attempted suicide after murdering his wife. The accused's case was that his wife telephoned him the previous evening and asked him to come round to her house to shoot stray cats with his .22 rifle. She took his rifle, shot him and then committed suicide.

The Crown wished to introduce evidence of various statements made by the deceased in order to show that she was afraid of him and therefore that she was highly unlikely to have telephoned him with this request. One such statement was, on any definition, hearsay since it was a direct statement by the deceased that she was afraid of the accused because of threats he had made to her. This statement was said to have been made after 4 pm the day before the fatal incident. Other statements would, on the *Cross* definition not have been hearsay. These included a statement to the effect that the deceased was considering obtaining a non-molestation order and another to the effect that one day they would find her dead and then it would be too late. From these statements it can readily be inferred, provided the deceased was being truthful and unambiguous, that she was very afraid of her husband.

In the Court of Appeal Casey J considered whether these statements were admissible as evidence of the state of mind of the deceased. Casey J found no difficulty in agreeing with Lord Bridge in *Blastland* that:

> [i]t is, of course, elementary that statements made to a witness by a third party are not excluded by the hearsay rule when they are put in solely to prove the state of mind either of the maker of the statement or the person to whom it was made.

It should be noted in passing that whatever else the exception in favour of declarations as to present state of mind may be it is not a "reliability-based" exception. Evidence as to one's state of mind can be manufactured as easily as evidence of anything else. Casey J then went on to consider the relevance of the deceased's state of mind and then to admit the evidence.

The distinction blurred here is between the direct statement of fear, which is undoubtedly admitted under an exception to the hearsay rule and the indirect statements which, according to the *Cross* definition, were not hearsay at all. Casey J dealt with them together, as reason demands, and thereby provides ammunition for adherents to the declarant-based theory.

Cooke P did not draw any distinction between the statements either. His approach was however radically different. First he considered the relevance of the deceased's state of mind to the case. He quoted (as had Casey J) Lord Bridge in *Blastland*:

> The state of mind evidenced by the statement [must be] either itself directly in issue at the trial or of direct and immediate relevance to an issue which arises at the trial.

Cooke P was of the opinion that "there is obviously no difficulty in treating relevance to an issue as a matter of degree." It is respectfully submitted that there may indeed be some difficulties, as witness some

120 pages devoted to the proposition that there are no degrees of relevance, only of probative value, by Michael and Adler: "The Trial of an Issue of Fact" (1934) 34 *Columbia LR* 1224. The chief practical difficulty is that if there is no distinction between the concepts of relevance and weight it is difficult to see why the Judge decides questions of relevance while matters of weight are classically left to the jury. Nonetheless Cooke P probably reflects the mainstream of modern opinion in believing that relevance may be a matter of degree. Cooke P went on to question the meaning and application of Lord Bridge's words "direct and immediate relevance".

Again there is no consensus as to the meaning of the word "relevant". The most commonly accepted definition however is that of Stephen:

> The word relevant means that any two facts to which it is applied are so related to each other that according to the common course of events one, either taken by itself, or in connection with other facts proves or renders probable the past, present or future existence or non-existence of the other. (*Digest of the Law of Evidence*, 2 and subs eds, Introduction)

This is turn probably stems from Bentham's belief that a *factum probans* is relevant to a *factum probandum* if it "probabilises or disprobabilises" the *factum probandum*. It is submitted that there is no difficulty in finding that the fact that the deceased was very afraid of the accused affects the assessment of the probability that she telephoned him as alleged and that it is therefore relevant as indeed Cooke P found.

Having found the matter relevant Cooke P went on to consider the rule against hearsay. He noted that there are some 300 pages devoted to hearsay in the current Australian edition of *Cross* and then said that this is one of several areas of the common law where despite the inability of the Judges to achieve intellectual coherence "just results are no doubt usually managed in practice". It is submitted that this is a dangerously complacent assumption. The only conclusion merited by the evidence is that in no reported appeal case in which evidence has been allowed by the Court does injustice seem to have been done. (This claim is often made in regard to similar fact evidence. For a case in which appalling injustice resulted from the exclusion of similar fact evidence see *The Trial of Adolf Beck*, E R Watson ed, Notable British Trials series.) If, as Cooke P says, "the Courts have not succeeded in working out or articulating rules supplying deductive answers to practical problems" one wonders why the attempt is not abandoned. The vagaries of life are such that deductive reasoning about facts is seldom profitable and the mode of reasoning in proving facts in Court is invariably inductive. Abandonment of the attempt to frame deductive rules for including or excluding hearsay appears to be the course favoured by Cooke P. In the key paragraph of his judgment he said:

> At least in a case such as the present it may be more helpful to go straight to basics and ask whether in the particular circumstances it is reasonably safe and of sufficient relevance to admit the evidence notwithstanding the dangers against which the hearsay rule guards. Essentially the whole question is one of degree. . . . If the evidence is admitted the Judge may and where the facts so require should advise the jury to consider carefully both whether they are satisfied that the witness can be relied on as accurately reporting the statement and whether the maker of the statement may have exaggerated or in some cases even lied. The fact that they have not had the advantage of seeing that person in the witness box and that he or she has not been tested on oath and in cross-examination can likewise be underlined by the Judge as far as necessary.

Now when a Judge considers *any* evidence he must consider whether it is relevant and also whether it is "reasonably safe" to admit it – ie what is its likely prejudicial effect, if any? He must then point out to the jury any factors which may affect the reliability of the evidence. If Cooke P's reasoning is to be followed therefore hearsay evidence is on exactly the same footing as any other evidence, in other words the rule against hearsay is abolished.

The third member of the Court, Ellis J agreed with both his learned brethren.

The issue of judicial reform of the hearsay rule has been contentious since the House of Lords in *Myers v DPP*, [1965] AC 1001, by a 3-2 decision declined to create a new exception to the rule. Lords Pearce and Donovan roundly condemned the pusillanimity of their noble colleagues but it should be noted that Lord Reid, at least, invited the legislature to engage in "a wide survey of the whole field and I think such a survey is overdue. A policy of make do and mend is no longer adequate." (at p 1022) What followed of course, both in England and in New Zealand, was a legislative make do and mend in which new exceptions to the hearsay rule were created based on the type of evidence which arose in *Myers*. The basic approach in which admissibility was decided according to the categorisation of the evidence and not by its apparent reliability was continued.

As Lord Reid candidly admitted in *Myers* (at p 1021)

> If we disregard technicalities in this case and seek to apply principle and common sense, there are a number of other parts of the existing law of hearsay susceptible of similar treatment.

This comment applies equally to the judgment in *Baker*. It is far from clear how much of a limitation is offered by the phrase "[a]t least in a case such as the present". No criteria are offered for determining when this common-sense approach is to be adopted and when a Court is to revert to the more traditional approach of attempting to stick various labels on the evidence, some of which are tickets of admissibility and some of which are not.

Those who follow Bentham in believing that "rules capable of rendering right decisions more secure are what the nature of the thing denies" and that "to the establishment of rules by which misdecision is rendered more probable than it would otherwise be, the nature of man is prone" can only

applaud the demise of the hearsay rule. It is questionable, however, whether in *Baker* it has been given a considered and decent burial. If the hearsay rule is to go there are some problems to be faced. One of these is the question of third party confessions which have to be kept out to prevent manipulation of the legal system by organised criminal gangs. Another is the relationship of the hearsay rule with the so-called "right to silence". It would obviously be intolerable for the accused to have his story told through the lips of others without personally appearing in the witness box.

What is not required is another committee which claims to be engaging in a radical overhaul of the law and ends up producing a scheme as complex and unsatisfactory as the present law (as the New South Wales Law Reform Commission has done). What is required is a clear direction from the legislators that the approach outlined by Cooke P in this case is to be adopted followed by a comprehensive examination of the implications. The aim should be, as Bentham advocated 160 years ago, to provide lower Court Judges not with rules which restrain the will, but with instructions to assist understanding.

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Customary Maori fishing rights

— *Ministry of Agriculture and Fisheries v Pono Hakaria & Tony Scott* (unreported, 19 May 1989, District Court at Levin, CRN 8031003482-3.)

The recent decision of the *Ministry of Agriculture and Fisheries v Pono Hakaria & Tony Scott* (unreported, 19 May 1989, District Court at Levin, CRN 8031003482-3, merely applies the decision in *Te Weehi v Regional Fisheries Officer* [1986] 1 NZLR 681, although it does narrow the scope of "Maori fishing rights" under s 88(2) of the Fisheries Act 1983 by further requiring that customary fishing rights be exercised consistently with Maori protocol to fall within the section's exemption. Thus, the recent announcement in the *Dominion* that the Ministry of Agriculture and Fisheries will appeal against this decision in the High Court on the basis that it "would be seen as an invitation for any Maori to take toheroa from the beach, endangering the shellfish" fails to understand the narrowing impact of this decision on the Maori right to take such shellfish under s 88(2). (The *Dominion*, Wellington, Wednesday 21 June 1989, p 3) Furthermore, the *Evening Post's* claim (Wellington, Thursday 8 May 1989, p 3) that Hakaria and Scott "created history by having their charges of illegally taking toheroa dismissed under Treaty of Waitangi terms," is inflated since Judge B D Inglis QC actually dismissed the case because "the defendants' taking of the toheroa . . . was lawful under s 88(2) of the Fisheries Act," (*Hakaria & Scott*, p 12) just as in *Te Weehi*.

A. Dismissal of charges under the Treaty of Waitangi

Judge B D Inglis QC's statement at p 5 that s 88(2) is "a clear expression of Parliament's intention to honour the Crown's promise, given by the Treaty, to preserve at the least traditional or customary fishing rights of a kind exercised at the time of the Treaty by the Maori people" merely states the purpose for which s 88(2) of the Fisheries Act was created and has no legal impact; defendants or claimants can still only rely on the Treaty protection of their rights to the extent that it is incorporated into s 88(2). Furthermore, Judge B D Inglis QC's reference to the Treaty of Waitangi is not useful for defining the scope of the term "Maori fishing right" since he merely states that Treaty rights are wider than those protected under s 88(2).

Thus the utility of Judge B D Inglis QC's statement that s 88(2) incorporates the Treaty obligation to preserve at least customary fishing rights, is to support the Waitangi Tribunal's view in *Muriwhenua* Wai-22, 1988 at p 209 that

> [t]he authorities cited . . . do not in fact support the view that Treaty rights are synonymous with rights at colonial law, and *Simon v The Queen* (1985) 24 DLR (4th) 390, is authority for the proposition that they are not;

that Treaty rights are wider than customary fishing rights. In contrast, Williamson J implies at p 686 in *Te Weehi* that the rights protected by the Treaty are only customary rights or those arising "by the traditional possession and use enjoyed by Maori tribes prior to 1840".

B. The scope of "Maori fishing rights"

The real point of difference between *Te Weehi* and *Hakaria & Scott* is on the scope of "Maori fishing rights." Williamson J states in *Te Weehi* that Maori fishing rights can be established by customary usage by the defendant's tribe, or a tribe related to the defendant by ancestral ties if adequate permission was granted (and can thus exist independently of the tribe owning the land adjoining the foreshore). The shellfish must also be taken for personal use. In *Hakaria & Scott*, Judge B D Inglis QC further required that, having proved the existence of a Maori fishing right over that area and that the shellfish were taken for personal use, the defendants must also show that they are "exercising their customary fishing rights according to the customary protocol required when those rights are exercised and for a purpose recognised by custom and tradition as proper and appropriate". (*Hakaria & Scott*, p 12) This further limits the scope of the term "Maori fishing rights".

Facts

The two defendants were found with 21 toheroa by the Fisheries inspector on the Waitarere Beach (at a point somewhere between the Manawatu River mouth and the Waitarere Beach vehicle entrance). One of the defendants is of the Ngati Raukawa while the other has been adopted into the Ngati Raukawa due to his genealogical ties. They were charged under reg 22 of the Fisheries (Amateur Fishing) Regulations 1986 which absolutely prohibits "[t]he taking, possession, or disturbing of toheroa." The defendants argued that they harvested the toheroa in their exercise of their customary Maori fishing rights. The regulations were made under the Fisheries Act 1983, and s 88(2) of that Act states that "[n]othing in this Act shall affect any Maori fishing rights".

Judge B D Inglis QC found that

the taking of toheroa plainly comes within customary Maori fishing rights and that the Ngati Raukawa have exercised customary fishing rights, including the right to take shellfish, on this part of the Waitarere Beach for generations. Furthermore, he found that the defendants exercised these rights in a manner, and for a purpose, consistent with Maori protocol. Thus the defendants were exempted from liability under s 88(2) of the Fisheries Act 1983.

Application of Te Weehi's case

In *Te Weehi's* case, Williamson J found that the Ngai Tahu had a customary fishing right to collect shellfish on Motunau Beach by reason of traditional use, despite their loss of ownership of the foreshore adjoining the beach, and that they could transmute this right to take shellfish for personal food supply to a person in a different tribe if there was a history of genealogical ties between that tribe and the Ngai Tahu people.

Consistent with the rules of precedent, Judge B D Inglis QC applied the High Court decision of *Te Weehi* and found that the defendants' tribe, Ngati Raukawa, had a customary Maori fishing right to the particular area of the Waitarere Beach, even though "there is no proof of ownership either of the beach itself or the adjoining coastal land" by the Ngati Raukawa, and the toheroa were taken from "Crown or public land." Furthermore, the Judge stated that "I do not think that a customary and traditional right to harvest shellfish on a particular stretch of beach can be seen as diminished or lost simply because there is an unresolved land claim by another tribe." (*Hakaria & Scott*, p 6) Thus the Ngati Raukawa's customary fishing rights were unaffected by the Muaupoko tribe's claim of land rights over Waitarere Beach.

Instead, Maori fishing rights in a particular area are established by the exercise of such rights for generations, as a matter of custom and usage. And this right extends to all those in the tribe, and those, like the second defendant in this case, whose actual tribal connections lie elsewhere but who are linked to the Ngati Raukawa by genealogy and have been accepted into the tribe.

The defendants' exercise of their fishing right

Judge B D Inglis QC then elaborated in greater detail what Williamson J in *Te Weehi* stated merely as the customary right "to collect a meal of shellfish from land over which no proprietary right was ever claimed". (*Te Weehi*, p 690) Having established that Ngati Raukawa did have a Maori fishing right, Judge B D Inglis QC stated at p 7 that:

> The remaining question is this. A customary or traditional Maori fishing right cannot be seen in isolation from the protocol and other customary requirements in exercising it. The right and its exercise must be seen from a Maori perspective. . . . The question is whether the defendants exercised their undoubted rights in a manner that was appropriate and acceptable in custom and tradition.

This question will be answered affirmatively if "the defendants, in taking the toheroa were exercising their customary Maori fishing rights according to the customary protocol required when those rights are exercised and for a purpose recognised by custom and tradition as proper and appropriate." (*Hakaria & Scott*, p 12)

The Judge stated at p 7 that there is no doubt "that taking toheroa for sale in hotels cannot possibly be regarded as exercising a traditional or customary Maori fishing right and cannot be protected under s 88(2) [since] [n]either the Treaty nor s 88(2) gives any Maori person the right to abuse custom, tradition or protocol". Furthermore, even if the toheroa were not collected for sale, but for personal use, they must be taken for a traditional event, and not an unusual event outside Maori tradition and custom. (*Hakaria & Scott*, p 10)

The defendants had taken the toheroa for the meeting of two families they had organised for a significant purpose on a marae at Bulls. Although the meeting was in recognition of an extraordinary state of affairs, the Judge found at p 7 that "the occasion was one which required, if not demanded, a special gesture of hospitality and which was well within customary and traditional parameters".

Furthermore, the defendants exercised their customary fishing rights consistently with the Maori protocol required when those rights are exercised.

> [T]hey consulted a kaumatua, who approved the enterprise, and who went with them to the beach to harvest the toheroa. . . . The kaumatua led them in the necessary karakia and incantations as they collected the 21 toheroa. (*Hakaria & Scott*, p 8)

In establishing all these matters relating to the existence and traditional exercise of customary right, the evidence of kaumatua and Maori experts was crucial. And Judge B D Inglis QC stressed at p 6 that in determining whether a person was an expert witness in Maori lore, "the presence or absence of formal European qualifications is irrelevant".

Finally, the Judge stressed the need to dispel ignorance about Maori fishing rights and their great cultural significance to Maori people if there is to be the mutual understanding and trust required for the partnership created by the Treaty to work.

> Surely there must come a day when every New Zealander will know and understand what rights were preserved for the Maori people by the Treaty; when matters special to the Maori people will be appreciated and understood; when quite basic things like the right to shellfish, guaranteed by the Treaty, will not have to be explained and proved in a New Zealand Court almost as if they were strange and foreign to New Zealand life. (*Hakaria & Scott*, p 11)

Hakaria & Scott is thus a helpful elaboration of the ratio established in *Te Weehi's* case of what is a "Maori fishing right" within s 88(2) of the Fisheries Act 1983, but Judge B D Inglis QC's statement in the *Evening Post* that "a little piece of history was being made" is overstated. (Wellington, Thursday 8 May 1989, p 3)

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The Crimes Bill 1989: A Judge's Response

By the Right Hon Sir Robin Cooke KBE, PhD, President of the Court of Appeal

This article is a lecture given by Sir Robin Cooke as part of a series at Victoria University of Wellington in June 1989 on the Crimes Bill that has recently been introduced into Parliament. It is understood that all the papers being given in the series will eventually be published. Sir Robin, in this article, takes a critical look at aspects of the Bill, and questions whether the Bill in its present form is a sensible development, particularly when compared with the proposed Criminal Code for England which has just been published with a commentary. Sir Robin notes that the English Draft Code, prepared by the Law Commission, is radically different, indeed massively different from the New Zealand Bill.

The invitation to speak in this series of lectures has been accepted because on a measure as important as the new Crimes Bill I think that the holder for the time being of the office of President of the Court of Appeal should be prepared to contribute what he or she reasonably can. It is, however, a response to an invitation, not an attempt to thrust forward any views or to shape public or professional opinion. Except when otherwise indicated the views are purely personal.

Judicial interpretation and application

I can give one indication otherwise at once. If Parliament enacts the Bill in its present or some revised form, all the members of the Court of Appeal, indeed I am sure all the Judges in New Zealand, will do their best to interpret and apply it in their day-to-day work, in accordance with its true intent so far as that can be ascertained and with its spirit so far as there is no real intent on the part of Parliament. Whatever may have been the approach in some past periods, I hope that no one at the present day has any doubt on that score. Subject only to fundamental constitutional considerations not raised by the present Bill, what Parliament ordains it is the duty of the Courts to implement with full loyalty, indeed with constructive loyalty.

Whether the Bill is a wise project at this stage and in its present form is quite another matter. Any views that I indicate on that matter do not derogate from what I have said already.

The Minister is to be congratulated on the idealism, drive and enthusiasm that have led to his promotion of this Bill. His departmental officers and parliamentary counsel concerned in the drafting are to be congratulated on their prolonged and in some respects creative work. In about the last three years there would appear to have been not less than six versions of the Bill and there is no reason to suppose that new drafts would not continue to evolve just as often if the Bill were deferred for another three years. Undoubtedly it is an enormous task.

Historical codes

Since 1893 New Zealand has had a code of criminal law based essentially on the Draft Code proposed by the English Royal Commissioners in 1879 but amended from time to time as the need for improvements has been seen, consolidated in 1908, consolidated and amended in 1961. Examples of changes introduced in recent times under this approach are well known to criminal lawyers. For instance the 1961 Act changed the provisions about insanity so as to exclude in New Zealand the decision of the English Court of Criminal Appeal in *R v Windle* [1952] 2 QB 836 that, in the requirement that to establish insanity the accused must be shown incapable of knowing that his act or omission was wrong, the word "wrong" is used in the sense simply of contrary to law. The New Zealand change led to what now seems a difficult judgment of the Court of Appeal in 1966 in *R v MacMillan* [1966] NZLR 616 to the effect (on one interpretation) that a paranoid killer is not guilty on the ground of insanity if he knows that everyone else would think his act morally wrong but regards himself as not bound by ordinary moral law. The explanatory note to the present Bill suggests that the Bill endorses the *MacMillan* approach, but as I will show later appears to go further. *MacMillan* is roundly criticised in *Adams on Criminal Law* (2 ed (1971) para 418).

Another change made in 1961 was to rewrite the section on provocation. That resulted in the equally diffficult judgment in *R v McGregor* [1962] NZLR 1069, the difficulty in this instance arising not from the actual decision – for it was obviously a case where the accused had not lost self-control through provocation – but from obiter dicta on the "characteristics" of the accused to be attributed to the notional ordinary person in the accused's shoes: observations no less trenchantly criticised by Sir Francis Adams, (2 ed paras 1264-9). I must admit to failing to see any good reason for the Court's suggestion

it is not enough to constitute a characteristic that the offender should merely in some general way be mentally deficient or weak-minded.

Those two changes were probably the main ones made by the legislature in 1961 so far as there was any attempt then to redefine the substantive law of crimes. Perhaps the Court of Appeal of the 1980s is not the Court of Appeal of the 1960s as regards readiness to depart from the ordinary and natural meaning of statutory language. Perhaps the same will continue to apply as the composition of the Court alters. But, pessimistically the consequences of such limited legislative changes as were made in 1961 might be seen as a portent of what could happen if the much more wholesale changes proposed in the present Bill were enacted.

Amendments concerning particular problems

Over the years other specific changes have been more successful. The ones that come most readily to mind have been introduced not as part of any general rewriting, but by amending Acts addressed to particular problems and preceded by a degree of attention concentrated on particular problems. For example there was the 1980 amendment greatly simplifying the law of self-defence, a change suggested and indeed virtually entreated by the Judges. (*R v Kerr* [1976] 1 NZLR 335, 344) The laws as to sexual offences were rewritten in 1985 to reflect modern social thinking, though the present Bill proposes to rewrite them once more – not apparently with many changes of substance but mainly to reflect a gender neutral approach. The Bill contains some provisions which tackle rather obliquely the scourge of AIDS; but that is a big and complex subject in itself, perhaps best dealt with more directly in specific legislative amendment. Another example in quite recent years of specific-subject amendments is the introduction in 1979 of a code of provisions about personal privacy and listening devices. Corresponding provisions were made in the Misuse of Drugs legislation at the same time; I shall return to that point.

Perhaps the clearest example of a single issue which, however controversial, was the result of full and mature consideration was the re-abolition in 1961 of the death penalty for murder. This is now to be extended to treason and such a proposal is clearcut enough to justify inclusion in a much more general Bill. Clearcut proposals naturally tend to dominate in parliamentary debate. It may be that this one is not only clearcut but even not now very controversial. To say the least, it must be doubtful whether any of the other major changes proposed in this Bill are in the same category. There are numbers of lawyers in the House of Representatives. How many of them, let alone the non-lawyer majority, would be both able to explain in practical terms and convince of the need for most of the new provisions?

The New Zealand tradition has been one of necessary and limited amendments to a basic code. We have had the benefits of codification for many years. The basic code with amendments as required from time to time has proved sound and workable. Some judicial exegesis has been necessary and there have been some mistakes, but they have been corrected by later decisions or parliamentary amendment. Throughout the code has remained a solid and familiar working platform for Judges and practitioners.

Question of recodification

The issue now is whether there should be a root-and-branch recodification. The Bill does not merely revise the law as did the 1961 Act. It is far more than an overhaul. In the words of the explanatory note, it "rewrites the law relating to crimes". The issue is not codification, but recodification – and to a major extent recodification in a radically different way. Indeed one could go further and say that it is neither codification nor recodification: it is novel legislation. Certainly it should not automatically be condemned on that account. Progress, or what seems at the time to be progress, has to be made. Rather it is the sweep of this proposed legislation that is worrying, because of its complexity and unpredictable results.

In Parts I to XV of the Bill (the Parts about procedure can be disregarded for present purposes) there is hardly a section in which the existing statutory provisions have not been altered in some way. Many of the alterations are, or at least seem at first sight to be, merely in arrangement or language (for example changes from "which" to "that", "notwithstanding" to "even though", "flight" to "escape" and so on, reflecting arguable simplification or the style preferred by the drafter rather than any pressing need for change) but at the other end of the scale there are quantum leaps. Thus murder and manslaughter are abolished, as is wounding with intent to cause grievous bodily harm. The Bill moves partly, though only partly, towards the theory that potential rather than actual harm should be a criterion of criminal liability. Terms such as "act", "omission", "knowledge", "involuntary", are defined for the first time, in rather abstract language and with results which would remain to be tested. If such definitions turned out to be of any practical importance, they would certainly complicate the Judge's task in directing a jury and the jury's task in understanding and applying the directions. Of course it might turn out that the definitions were of little or no practical importance, but if so it has to be asked what is their point. The administration of the criminal law in New Zealand has gone on well enough without them for nearly a hundred years.

There are also changes, on their face far-reaching, in Part XIV dealing with crimes involving property. It will not be possible to deal with them in this lecture, for want of adequate time either to consider or to explain within the scope of a single lecture of this kind any views that consideration might produce.

Criminal law reality

Let the subject-matter of all this be remembered. We are concerned with brutal, horrifying and wicked deeds or, if they do not deserve to be so described, at least deeds which are so repugnant to the generally accepted standards of the community that they are condemned as criminal and considered to warrant

imprisonment. The field is not that of fine legalistic draftsmanship. It is law for the criminal, the victim and the general public. Suggestions for changes in it should have regard first to whether the existing law has proved defective in the broad rules of behaviour that it has laid down.

Theoretical reformulations have their own fascination and may look well on paper. Their true significance and value has to be assessed in the light of their practical effect on the raw material: namely, conduct so unacceptable as to be labelled criminal. Essentially criminal law must aim at identifying conduct in that category, and at deterring persons from it by penalties. Denunciation and retribution have a part to play as well. These are commonplace thoughts but they are still true.

By and large the existing law of crimes seems to serve those purposes reasonably. As far as I know, there has been no demand in any section of the community, including the legal profession and the police, for a wholesale recasting of our existing law. People especially concerned about law and order do not seem to complain of much that they regard as unsatisfactory in the content of the present code. It is failure to comply with and enforce the law that alarms them, not the substance of the law.

New trends in criminal activity

Since the last general revision of the Crimes Act in 1961 there have been probably four particularly disturbing trends in the incidence of crime. They have been the growth of the drug trade; the increased depravity of sexual crimes – rape seems more and more to be accompanied by other acts of defilement and degradation; the coming to light of unsuspectedly widespread, almost unbelievably widespread, sexual abuse of children; and the increase in crimes of violence, linked partly but certainly not solely with the rise of gangs (though one must be careful not to suggest that all gang activities are criminal). There it seems relevant to ask whether the Bill contains anything that may improve the law bearing on these problems.

Cases of dealing in hard drugs are very high on the list of major crimes that come before the Courts. They rank with murder and manslaughter in that life imprisonment can be and has been imposed. (*R v Beri* [1987] 1 NZLR 46) I think that the longest finite terms of imprisonment imposed in New Zealand have been for heroin dealing. (In *R v Prast* [1982] 1 NZLR 56 the effective sentence was nearly 18 years.) One would have thought that if there were to be an attempt to produce a modern code of criminal law the provisions about drug crimes would figure very prominently in it. But they are left out of the Bill. They remain in an untidy and confusing series of separate Acts. The discreditable state of the statute book can be put right by a reprint or a separate consolidation, but in 1989 a general Crimes Act which ignores drug crimes could hardly be said to reflect reality. These comments are not directed solely to the authors of the New Zealand Bill; there seems to be a widespread tendency for codifiers and reformers of the criminal law to shut their eyes to the modern significance of drug crimes.

It is also incongruous that the Crimes Act and the Misuse of Drugs Act should both contain provisions about interception of private communications by listening devices. The provisions are partly almost identical and partly interlocking. The legislation is needlessly complicated and is clearly ripe for revision, but the Bill does not attempt this.

Sexual cases

Apart from much rearrangement and rewording the Bill appears to propose few if any significant changes in the law of sexual crimes, including the sexual abuse of children. One perhaps worthy of mention is that sexual intercourse with a child under 20 living as a member of the family is no longer to be confined to girl victims, though the term used is "intercourse" and not "connection". No serious criticism could be made of Part XI of the Bill (headed Crimes Against Sexual Integrity). The question here is rather whether it is really necessary to rewrite so soon the legislation of 1985. I have already commented on the provisions capable of applying to some AIDS infection cases.

Of the four trends since 1961 the one in relation to which the Bill does propose major changes is violent crime. The changes represent a mixture of competing theories and, possibly, political imperatives. They will necessarily in one sense set back the judicial development of the law, in that the Courts will have to start again from scratch rather than continuing to build on the existing and on the whole reasonably well understood code. The question is whether they are nevertheless worthwhile. I turn to that question.

Violent Crime

Murder

In proposing the abolition of murder as a distinct crime the Bill accords with the 1976 report of the former Criminal Law Reform Committee on Culpable Homicide. The detailed provisions of the Bill, though, differ considerably from the Committee's recommendations. For instance the change recommended by the Committee in s 167 of the Crimes Act 1961, which defines the main four cases in which culpable homicide is murder, was the replacement of the word "murder" by "unlawful killing". The Committee recommended a maximum rather than a mandatory life sentence for unlawful killing and the Bill would provide the same for the more limited categories of offences of "culpable homicide" which it defines.

The Committee's main reason for doing away with murder was that they regarded the definition of provocation, whereby the crime is reduced to manslaughter, as unsatisfactory and the very existence of that special and partial defence as anomalous. But they thought that life sentences should continue to be imposed in "the worst of cases". Moreover they said that they expected that one who kills without provocation and receives a long sentence for unlawful killing would still in common parlance be called a murderer. As to that it may be remarked that, in a Bill which aims at simple and popular language and a contemporary rewriting of the whole law, it is rather odd to start with a name for one of the gravest of all crimes which is not expected to be used in common parlance.

The Committee was a strong one. No Judge of the time was a member. Its members were R C Savage QC (Chairman); Associate Professor B

J Brown; Professor I D Campbell; W V Gazley; Inspector R McLennan; P G S Penlington; K L Sandford; P B Temm QC; D A S Ward; Patricia Webb; J C Pike (Secretary). One differs from them with hesitation, but fortified by the later opinion of a committee no less strong, the English Criminal Law Revision Committee, who said in their 1980 report (Offences against the Person, Cmnd 7844, para 15):

> Before considering the present law of murder and deciding what change, if any, to recommend we asked ourselves this basic question: what should be the attitude of the law towards this crime? Should it continue to be regarded, as it has been since the beginnings of our law, as a crime standing out from all others? In our opinion it should. In modern English usage the word "murderer" expresses the revulsion which ordinary people feel for anyone who deliberately kills another human being. The phrase "the sanctity of life" is not a cliche. For many it has its foundations in religion — and not only in the Christian religion. The present is not, in our opinion, a time for change in this respect. It is true that the law might be easier to explain to juries if conduct which is now regarded as murder became merely one of the forms of a more general offence of unlawful homicide. In *Hyam v DPP* Lord Kilbrandon said at page 98: "There does not appear to be any good reason why the crimes of murder and manslaughter should not both be abolished, and the single crime of unlawful homicide substituted; one case will differ from another in gravity, and that can be taken care of by variation of sentences downwards from life imprisonment". In our Working Paper we invited attention to what Lord Kilbrandon said. The Law Commission alone shared his opinion. As far as we have been able to judge from the memoranda submitted to us the public generally wants murder to be retained as a separate offence. If we were to propose the abolition of the separate crime of murder and its incorporation in a wider offence of unlawful homicide, many people would certainly find it hard to appreciate that the proposal was not meant to weaken the law and would be likely to think that the law no longer regarded the intentional taking of another's life as being especially grave. We recommend that murder should continue to be a separate crime.

The members of that Committee were Lord Justice Lawton (Chairman); Lord Justice Waller; Professor Sir Rupert Cross; Judge Francis; Audrey Frisby; John Hagan QC; Sir Thomas Hetherington QC; J Hampden Inskip QC; Sir Kenneth Jones QC; Judge Lowry; Charles McCullough QC; Sir David Napley; William Scott; Sir Norman Skelhorn QC; Professor J C Smith QC; Professor Glanville Williams QC. Comparisons would be invidious but the English Committee have an edge in numbers.

It is also in point to quote quite extensively from the speech of Lord Hailsham of St Marylebone L C in *R v Cunningham*:[1]

> . . . I view with a certain degree of scepticism the opinion expressed in *Reg v Hyam* [1975] AC 55, 90-93 that the age of our ancestors was so much more violent than our own that we can afford to take a different view of "concepts of what is right and what is wrong that command general acceptance in contemporary society". In the weeks preceding that in which this appeal came before your Lordships both the Pope and the President of the United States have been shot in cold blood, a circuit judge has been slain, a police officer has given evidence of a deliberate shooting of himself which has confined him to a wheeled chair for life, five soldiers have been blown up on a country road by a mine containing over a thousand pounds of high explosive, the pillion passenger has been torn from the back of a motor bicycle and stabbed to death by total strangers apparently because he was white, and another youth stabbed, perhaps because he was black, petrol bombs and anti-personnel weapons have been thrown in the streets of London and Belfast at the bodies of the security forces, and the press has carried reports that our own Sovereign moves about the streets of her own country protected by bodyguards armed with automatic weapons. If I moved a few months back I could cite the siege of the Iranian embassy and other terrorist sieges where hostages have been taken by armed men, the shooting in the streets of London of foreign refugees at the hand of their political opponents, and many other acts of lawlessness, violence and cruelty. I doubt whether what seemed clear in 1974, when the *Hyam* appeal was heard, would have seemed so obvious seven years later in 1981. Like "public policy," "concepts of what is right and what is wrong that command general acceptance in contemporary society" are difficult horses for the judiciary to ride, and, where possible, are arguably best left to the legislature to decide. It must be added that the legislature has been relatively slow to act. Commission after commission, committee after committee have reported both before and after Sir James Stephen's draft Bill was stillborn after examination by a Victorian select committee of the House of Commons in 1874. Few of the recommendations of these successive inquiries have exactly coincided with one another, and fewer still have reached the statute book. One cannot but feel sympathy with Lord Kilbrandon's plea (*Reg v Hyam* [1975] AC 55, 98) for a single, and simplified, law of homicide expecially since the death penalty for murder has been abolished. But I venture to think that the problem involves difficulties more serious than is supposed. Few civilised countries have identical laws on the subject of homicide or apply them in the same way. To name only two broad issues of policy, are we to follow section 5 of the Homicide Act 1957 and categorise certain classes of murder in which the prohibited act is arbitrarily judged to be worse than in others? The fate of section 5 after the abolition of the death penalty, and its history before that, do not encourage

> emulation. Or, are we to follow Lord Kilbrandon's inclination and create a single offence of homicide and recognise that homicides are infinitely variable in heinousness, and that their heinousness depends very largely on their motivation, with the result that the judge should have absolute discretion to impose whatever sentence he considers just from a conditional discharge to life imprisonment? I can see both difficulty and danger in this for the judiciary. After conviction of the new offence of homicide, unaided by any precise jury verdict as to the exact facts found or any guidance from the legislature as to the appropriate penalty. I doubt whether in practice they would relish the responsibility with greater enthusiasm than that with which Parliament would be eager to entrust them.

The issue is social and moral as much as legal. The view of any individual Judge, even Lord Hailsham, is entitled to no more weight than that of any other citizen. I can only add that my own view happens to be that it should remain open to a jury, having heard the evidence, to condemn a crime as so heinous as to cry out for the name of murder; and that any problems resulting from acknowledging that the law must so provide should be accepted and met as best as possible.

Problem of provocation

The New Zealand Committee were engrossed with provocation and no one pretends that it is an easy subject. Nevertheless latterly the Courts have been gradually escaping from the sway of the obiter dicta in *McGregor*. The approach has become to recognise that, in stipulating expressly that whether there is any evidence of provocation is a question of law, the Act is meant to do no more than impose some reasonable check to ensure that claims of provocation without any real weight are not submitted to a jury: see *R v Anderson* [1965] NZLR 29.

Further, a liberal breadth is being given to the characteristics of the offender that may be taken into account. It is stressed that the Judge must not usurp the jury's role of deciding how a person with those characteristics might have reacted: see *R v Nepia* [1983] NZLR 754. Racial and personal characteristics such as a tendency to brood quite often arise in these cases. It has been accepted that they may be taken into account on sufficient evidence: see *R v Tai* [1976] 1 NZLR 102 and *R v Taaka* [1982] 2 NZLR 198. This month the Court of Appeal in dealing with a sentence appeal has not questioned that paranoia may be a characteristic entitling a jury to find manslaughter rather than murder *R v Aston*, (unreported, CA 390/88; judgment 17 May 1989).

Occasionally, in the eyes of some, juries may accept a provocation defence too lightly, but that is their prerogative. Moreover it is wholly consistent with confining the stigma of murder to the worst of killings. It is the very gravity of murder that justifies singling it out from the generality of offences, where provocation bears on penalty only. I am not aware that any Judge now serving complains that summing up on provocation is too hard. Nor do I know of any case where a jury has rejected a provocation defence unreasonably. Indeed, speaking more generally, if there have been in New Zealand any cases of wrong or unduly harsh convictions of murder, they have been very rare and the royal prerogative of mercy is always available. This is not of course an assertion that there have been no wrong convictions for murder.

A mandatory sentence

Whether, subject to the prerogative, life imprisonment should remain the mandatory sentence for murder is a wholly different issue. It should not be confused with the issue of the retention of murder as a crime. In principle there is no objection to discretionary sentencing for murder, though experience might show that sentences other than life should be exceptional. Populist agitation would be a factor to be reckoned with in making such a change, but of course the same applies still more to the Bill as it now stands, since it does not even recognise murder.

What the Bill recognises as culpable homicide appears to correspond up to a point with the present statutory definition of murder, although one cannot be dogmatic about that as the wording and arrangement are different. Ingenious and able counsel practise in the criminal field — see for example *R v Wickliffe* [1987] 1 NZLR 55 and *R v McKeown* [1984] 1 NZLR 630 — and even if those counsel are too sophisticiated to take such points there will be others ready to argue that Parliament should be deemed not to alter the words without altering the meaning. But what is apparently a deliberate change in substance is the dropping of s 167(d). By that paragraph it is murder

> If the offender for any unlawful object does an act that he knows to be likely to cause death, and thereby kills any person, though he may have desired that his object should be effected without hurting anyone.

Among several recent cases in which that provision has been applied is *R v Piri and Carter* [1987] 1 NZLR 66. The accused, desirous of terrifying a girl into disclosing what had happened to some money, took her to remote bush country, tied her to a tree and left her there overnight, alone and exposed to the elements, in cold and windy weather. The jury would have been entitled to infer that she was naked to the waist and gagged. She died, although the accused would have preferred her to live to confess. The jury found them guilty of murder under (d) and the Court of Appeal thought the verdict a proper one. I still think so. The same verdict could have been reached under paragraph (b) —which in effect the Bill would appear to retain — but that was a less natural approach to the facts and was discouraged by the trial Judge.

That case is an example of the advantage accruing in New Zealand from the recognition by our code that there are cases deserving to be ranked as murder although it could not be said that the accused intended to kill or cause grievous bodily harm, which in recent times the House of Lords have held to be essential at English common law. (*R v Cunningham* [1982] AC 566; *R v Hancock and Shankland* [1986] AC 455.) The 1879 Commissioners in England gave as an example of murder the case of

> a man who, intending for some object of his own to stop the

> passage of a railway train, contrives an explosion of gunpowder or dynamite under the engine, hoping indeed that death may not be caused, but determined to effect his purpose whether it is so caused or not. (The full passage is quoted in *R v Piri* [1987] 1 NZLR at 79-82.)

Those were virtually the facts of the 1986 House of Lords case *R v Shankland* (supra), where in the end however the accused were convicted of manslaughter only, as the trial Judge had not told the jury that the probability of a consequence was only relevant because it threw light on whether the accused intended that consequence. It is a field where our Stephen code stands up very well by comparison with latter-day English case law and also, in my opinion, by comparison with the new Bill.

Manslaughter

Under the Bill manslaughter disappears as well as murder. If the accused kills in circumstances that, roughly speaking, would not amount to murder under s 167(a) or (b) of the present Crimes Act, the main alternative will apparently be a conviction for "endangering" under clause 130 of the Bill. While I admit to being a conservative lawyer, this does seem strange and strained. Whether the general public will adjust to it may be doubted. The concept of criminal liability according to risk rather than result calls for further mention shortly, but it should be noted here that if Parliament is to be consistent in this policy it will presumably be necessary to amend radically s 55 of the Transport Act 1962, as to causing bodily injury or death through reckless or dangerous driving. So too as to careless use causing bodily injury or death, at present covered by s 56.

Fault without result

The idea governing some clauses of the Bill, that criminal liability should not be graded according to consequences, reflects the report in 1976 of the New Zealand Criminal Law Reform Committee, who found Sir James Fitzjames Stephen's arguments to the contrary "medieval" and "unattractive". But the authors of the leading academic textbook on English criminal law, Smith and Hogan (5 ed (1983) 31), take a different view:

> On utilitarian grounds . . . it is probably undesirable to turn the whole criminal law into "conduct crimes". The needs of deterrence are probably adequately served in most cases by "result crimes"; and the criminal law should be extended only where a clear need is established.

Note that the Bill not only extends the criminal law to conduct without consequence: it also replaces some result crimes by conduct crimes. It must be questionable whether the conduct approach is so plainly preferable that the New Zealand Parliament should now embark on it in a major way.

A major way it is in the Bill. Manslaughter; wounding, maiming, disfiguring or causing grievous bodily harm with intent to cause grievous bodily harm; doing such things with intent to injure or reckless disregard; injuring with intent to cause grievous bodily harm — all these and sundry other offences are to be replaced by provisions focusing on the accused's intent or reckless disregard or heedlessness, provisions to apply whether or not the act or omission results in death or injury to any other person. The Bill does not state whether or not the consequences should be treated as relevant to penalty. I am unsure what the exponents of the underlying theories would say about that.

There appears to be a mixture of theories underlying these proposals, as there was in the Committee's report. One theory is that moral blameworthiness should be the test, another is that an act or omission should be punishable by reference only to its inherent danger. (Committee's report, paras 45 and 48.) On either view the actual results do not matter. We are in fairly profound philosophical and social seas. May we be getting out of our depth?

One theoretical reflection that may be ventured is that blameworthiness per se or inherent danger, if espoused, should logically be espoused wholeheartedly. Not merely murder but even culpable homicide should be abolished, leaving the accused to be condemned according simply to whether or not he or she meant to kill or recklessly endanger life. Such ideas are fascinating in the grove of academe where I have the privilege of presently speaking, but they are asking a lot of Parliament and the Judges, to say nothing of the general public.

Aggravated violence

A spectacular example of the inconsistency of theories in the Bill is the addition of cl 148, creating liability for 20 years (sc imprisonment) for every person who, by any act or series of acts of exceptionally serious violence or exceptionally serious cruelty, intentionally or recklessly *causes serious bodily harm to any other person.*

Although political considerations may account for the appearance of this clause, I have no criticism of it. It is sensible and timely. But it seems quite at odds with the philosophy represented earlier in the Bill by the clauses doing away with wounding with intent to cause grievous bodily harm and other crimes in that class and replacing them all, as the explanatory note says, with provisions which will apply whether or not death or harm results from the offender's conduct.

It is ironic that the official summary sheet, issued to outline the main features of the Bill and to invite submissions, features the new offence of aggravated violence as the very first of the advertised changes included in the Bill. If it turns out to have a deterrent effect it will indeed be an important change and a notable step forward. What it may also be thought to bring out is a lack of realism in some of the approaches adopted elsewhere in the Bill, approaches having more to do with the conception and main thrust of the Bill than the added clause about aggravated violence.

Insanity

Like some of the other matters already touched on, the clause about insanity will be the subject of more expert and detailed consideration by specialists later in this series of lectures. But I must say something about it because, unless restrictively interpreted, it could revolutionise criminal trials. The clause uses the terms "a mental defect or a mental disorder" instead

of the "natural imbecility or disease of the mind" of the present Crimes Act. That and other verbal changes may be, as the explanatory note says, merely a simplified version of the present section. In their reports and evidence at trials psychiatrists do often distinguish between mental disorders and personality disorders. To a lay person it is not clear whether the line is hard and fast. One wonders for instance where to put the kind of depression defined in *The Concise Oxford Dictionary* as "state of morbidly excessive melancholy, mood of hopelessness and feelings of inadequacy, often with physical symptoms". Presumably, however, any attempt to define insanity must present virtually insuperable problems. We can only go on in a largely pragmatic way.

Of greater concern is the provision in the Bill that a person suffering from a mental defect or disorder is not criminally responsible if thereby incapable "of attributing to the act or omission the character that the community would commonly attribute to the act or omission". This seems to go further than *MacMillan* (supra), even on the Adams interpretation of that case, which I will assume to be the correct interpretation although the headnote and Garrow and Caldwell summarise the judgment more conservatively (in *Criminal Law in New Zealand*, 6 ed (1981) 45).

In the judgment of the Court delivered by Sir Alexander Turner in *MacMillan* the discussion is, as required by the present Crimes Act, in terms of the incapacity of the accused to know that his actions were morally wrong, having regard to the commonly accepted standards of right and wrong. At any rate as analysed in Adams, the issue was whether an accused who knew that everyone else would regard his act as morally wrong could nevertheless plead insanity successfully. To ask whether a person knows that an act is morally wrong according to the commonly accepted standards is a difficult enough question, as *MacMillan* demonstrates. To ask whether a person is incapable of attributing to it *the character* that the community would commonly attribute to it seems to be to ask an even more difficult question. The clause discards any reference to wrongness, moral or otherwise. If enacted it could produce a continuing field day by psychiatrists. Perhaps that is the intention.

Defining concepts

Part II of the Bill contains a series of other new definitions of concepts. Having already commented that these could complicate criminal trials, I now add the thought that it might be better to see how the other Commonwealth countries fare with their own proposed definitions (as proposals for definition are certainly now fashionable) before embarking on an experiment for which there seems to be no pressing need. The process of taking bits of proposals here and there and adding some refinements must have hazards.

In a 1987 address to the Criminal Bar Association in Auckland the Minister justified the experiment in part by noting that the English Courts had struggled with some pivotal terms in a line of cases. Very fairly he added ". . . it must be said that our own Courts have not encountered the same problems". I believe that this is also acknowledged by those concerned in drafting the Bill. Possibly we have been relatively free of such problems because we have had a sound code to work from. At all events the drafter of the explanatory note to the Bill seems to have been rather hard put to it to find New Zealand cases to justify this new area of legislation.

Thus in justification of cl 19 as to "involuntary acts" the introductory note cites *Kilbride v Lake* [1962] NZLR 590 as authority for a cardinal principle of the criminal law. That was a decision by a single Judge of the High Court of a simple case. Someone without the defendant's authority removed the warrant of fitness from the windscreen of the defendant's car while it was parked in a street. The defendant was charged in substance with permitting the vehicle to be on a road without a warrant of fitness carried on it. Clearly he permitted no such thing and there would be no difficulty in acquitting him on ordinary mens rea principles. See for instance *Millar v Ministry of Transport* [1986] 1 NZLR 660. The judgment does include an interesting theoretical excursus, citing textbooks and other writings but no cases. It is criticised in *Adams on Criminal Law*, (op cit 352) as advancing a proposition based on "no authority, and which can only lead to confusion". Garrow and Caldwell do not mention *Kilbride v Lake* and I do not recollect in 13 years of hearing criminal appeals being called upon to consider the case.[2] One must respectfully query whether it is a repository of a fundamental.

Definition of reckless

So too as to "recklessness". The introductory note to the Bill seems to suggest that there is a problem in New Zealand since the decision of the House of Lords in *R v Caldwell* [1982] AC 341, the note citing in this regard *R v Harney* [1987] 2 NZLR 576 and *R v Howe* [1982] 1 NZLR 618. In *Harney* the Court of Appeal expressly decided that in the murder section (s 167) reckless bears the "pre-Caldwell" meaning of foresight of consequences that could well happen, together with an intention to continue the course of conduct regardless of the risk. The Court said that we inclined to the view (the point not having to be decided) that, subject to the requirements of particular contexts, recklessly has usually been understood in this sense in New Zealand. That was perhaps an over-cautious judicial observation; but it has to be remembered that no general definition, including any definition in the Crimes Bill itself, applies where the context otherwise requires.

The reference to *Howe* could be a little misleading. That was not a case where the term "reckless" in a statute had to be interpreted. It was a case of a riot outside Eden Park at the end of the 1981 Springbok tour. The rioters were charged with damaging a Crown vehicle; they had overturned an unmarked police car. Section 90 of the 1961 Act provided among other sweeping provisions that it was an offence for rioters to damage

> Any . . . vehicle . . . used in any undertaking carried on by the Crown or any public body or any local authority, or used in the farming of land or in the carrying on of any trade, manufacture or business.

In that very wide context the Court thought it not plausible that Parliament would have meant an individual rioter's guilt to turn on whether or not he gave conscious thought to the purpose for which a given car might be used. Such was the context in which reference was made in *Howe* to *Caldwell*. I now regret having added that reference, even though the *Howe* judgment emphasised that it was because of the particular subject-matter of the New Zealand section that the House of Lords case was helpful.

The judgment in *Howe* could have been written without *Caldwell*. The view taken by the Court of the likely intention of Parliament tends to be confirmed by the amendment made soon afterwards. The section now provides, and in substance still provides in the Bill, simply that

> Everyone is liable to imprisonment for a term not exceeding seven years who, being a member of a riot, unlawfully damages any property.

Thought by the defendant to the ownership or use of the property is of course irrelevant under this provision and surely there can be little doubt that this was so even when the section had some limit as to vehicles.

I have no particular objection to "recklessness" and "heedlessness" being defined by statute, but the definitions in cls 22 and 23 are patently complicated and the need for them doubtful to say the least. The definition of "negligence" in cl 24 is simple enough (in short "a very serious deviation from the standard of care expected of a reasonable person") but surely it would be more straightforward to speak in the relevant offence-creating sections simply of gross or very serious negligence.

The English proposals

Copies have come to hand of two formidable volumes ordered by the House of Commons to be printed on 17 April 1989. They consist of the Law Commission's proposed Criminal Code for England and Wales and a commentary on their Draft Bill. They have been laid before Parliament by the Lord Chancellor, not introduced as a Bill.

It has been impossible in the time available to check how far these volumes include changes from proposals published earlier, but one feature that stands out from a New Zealand point of view is that the English Draft Code is radically different from the New Zealand Bill – it may be no exaggeration to say massively different. Let us take a few cardinal examples.

The English Draft Code retains both murder and manslaughter and provides mandatory life imprisonment for murder except that in the case of an offender under 18 there will be detention as determined by the Secretary of State.

There is a provocation defence to murder very similar to the provision now in force in New Zealand, albeit more simply expressed. The Draft Code also provides for a verdict of manslaughter if the accused was suffering from "such mental abnormality as is a substantial enough reason" to reduce the offence from murder to manslaughter. Mental abnormality is defined for the purposes of that provision as

> . . . mental illness, arrested or incomplete development of mind, psychopathic disorder, and any other disorder or disability of mind, except intoxication.

There is also a more general provision for a mental disorder verdict if the defendant is proved to have committed an offence but it is proved on the balance of probabilities that he was at the time suffering from severe mental illness or severe mental handicap – terms which are elaborately defined.

Abstract definitions

The English Code has the same characteristics as the New Zealand Bill in essaying abstract definitions of concepts. But the metaphysics bear little resemblance. How far they differ in substance would require intense analysis. I read as illustrations clauses 18(a) and (b) and cl 23:

> 18. For the purposes of this Act and of any offence other than a pre-Code offence as defined in section 6 (to which section 2(3) applies) a person acts –
> (a) 'knowingly' with respect to a circumstance not only when he is aware that it exists or will exist, but also when he avoids taking steps that might confirm his belief that it exists or will exist;
> (b) 'intentionally' with respect to –
> (i) a circumstance when he hopes or knows that it exists or will exist:
> (ii) a result when he acts either in order to bring it about or being aware that it will occur in the ordinary course of events;
>
> . . .
>
> 23 Where it is an an offence to be at fault in causing a result, a person who lacks the fault required when he does an act that causes or may cause the result nevertheless commits the offence if –
> (a) he becomes aware that he has done the act and that the result has occurred and may continue, or may occur; and
> (b) with the fault required, he fails to do what he can reasonably be expected to do that might prevent the result continuing or occurring; and
> (c) the result continues or occurs.

The English Report and Code are described as the culmination of many years' work by the Commission. What the years have culminated in is sophisticated, perhaps in the extreme. It is a state-of-the-art product. Whether it is better or worse than the New Zealand Bill, who would dare to say? The New Zealand Bill can claim its own sophistication and forward-looking character. The point is that it is so different that one can hardly have confidence that the New Zealand proposals will work better or that we cannot learn from what has been done and will or may happen in England. Few, I suspect, would accuse me of adhering slavishly to English legal thinking, but I respectfully query whether we are acting sensibly in setting off on such a divergent course after much less travail and much less wide and deep consideration than they have gone through.

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Preserving historic buildings

By Rodney P Hide of the Centre for Resource Management, University of Canterbury and Lincoln College

This article questions the validity of three assumptions concerning the preservation of historic buildings. It argues that in this area, despite the common view, legislation is not necessary, the government has no part to play and that historic places belong to us all and not just the legal owners.

Introduction

In its 1987 election manifesto the present government pledged to review the Historic Places Act 1980, and to consider incentive options to encourage preservation. To this end the Department of Conservation in December produced a document titled *Historic Places Legislation Review*. The document sought the help of interested parties, and asked nearly 200 questions. Answers were required by 17 March 1989.

The questions asked were profuse rather than profound. It was not asked whether legislation is needed, whether government should have anything to do with preserving historic buildings, or whether preservation should rely upon the taking of property rights from private landowners. Answers to these questions were assumed rather than sought. The then Minister of Conservation, the Hon H E Clark, wrote in the preface that the aim of the review is "to improve our heritage legislation in order to provide the best protection for our historic places". The Minister's message is clear: legislation is necessary, government has a part to play, and historic places belong to us all. This article challenges these three premises.

Present legislation

The precursor of the 1980 Act was the Historic Places Act 1954. This Act established the National Historic Places Trust. Its functions in summary are: (a) to foster interest in places and things of historic interest, (b) to record historic places, and (c) to maintain and preserve historic places. Under the 1954 Act the Trust could acquire land and buildings, but it could not act to preserve or maintain historic places on any private land without the consent of the owner.

The 1980 Act changed that. The Trust got the power to classify buildings into four classes (*A, B, C* and *D*) according to their historical significance or architectural quality. Under s 36, the Trust can, subject to Ministerial consent, issue protection notices on buildings it has classified as *A* or *B*. These notices declare the building and all or part of its associated land to be protected. The building cannot then be demolished, altered, or extended without the Trust's consent. Historic buildings can thus prevent their owners from using their property as they intend, thereby creating an incentive to demolish historic buildings before a protection notice can be issued. Section 36 is counterproductive.

Historic buildings can also prove a direct cost to their owners. Under s 41 the Trust can present the owner with a repairs notice requiring that he repair his building as specified. If he does not, the Trust can undertake the work and recover costs from him. Private property

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A reasonable alternative

Probably enough has been said to indicate that I regard some features of the Bill as dangerous or undesirable or unnecessary. That does not mean that a valuable overhaul and revision of the Crimes Act cannot be achieved at this stage. It is mainly the more theoretical and uncertain departures from the existing law that concern me, such as the truly ambivalent changes affecting murder, manslaughter and grave wounding; and the open-ended insanity clause. The omission of drug crimes is contrary to principle. It may well be that the new property offence provisions are an improvement. The new field of computer crimes obviously needs attention. So I am far from either condemning the Bill in its entirety or suggesting that a revised general Crimes Act, including some provisions to deal with sufficiently studied new subjects, is not appropriate. Rather I am expressing quite large reservations about the merits of some major features of the Bill in its present form. But that will come as no surprise to the Minister or his advisers. Their initiative remains undoubted and respected. We have been assured that nothing is set in concrete, so it is only a question of altering the mix. □

1 [1982] AC 566, 579-81. Lord Wilberforce, Lord Simon of Glaisdale, Lord Edmund-Davies and Lord Bridge of Harwich all agreed with the Lord Chancellor's speech.

2 There was some discussion of it in *Tifaga v Department of Labour* [1980] 2 NZLR 235.

owners can thus be compelled not only to keep their buildings for the benefit of others but also to maintain them at their own expense.

The Trust does not have it all its own way, however. Owners must be given three months' notice and the opportunity to make a submission before their buildings are classified. They may also object to a protection notice, and subsequently appeal the Trust's decision in respect of their objection at the Planning Tribunal. They can thus have their say.

Moreover, owners issued with a protection notice can put their property on the market. If they can then convince the Planning Tribunal that they cannot sell it at the price they would have got if it had not been subject to a protection notice, the Trust under s 125C of the Town and Country Planning Act 1977 may be given the choice of either withdrawing the protection notice or taking the property under the Public Works Act 1981.

The Review

The Trust in its 1987-88 Annual Report says it wants a simpler classification system. It considers the present statutory mechanisms (introduced in 1980) outdated and cumbersome. The Trust also wants a more immediate ability to gain interim protection for all classified buildings.

The Trust also wants incentives to be established to make it financially attractive for owners to keep and conserve heritage buildings. These incentives would presumably be in the form of tax concessions so adding indirectly to government costs. The Trust also notes that its income of over $3 million is too small to allow it to fulfil its statutory functions. Notwithstanding a membership of over 20,000, most of the Trust's income already comes from government. The Trust wants more.

The *Historic Places Legislation Review* produced by the Department of Conservation does little to allay one's fears. The first chapter considers broadening the definition of things to be protected to include not only those that are historic, but those that have aesthetic, scientific or social significance, or other special value for future generations as well as the present community. It is difficult to imagine what would not come within the ambit of such definition.

Chapter two considers protection mechanisms and procedures. The *Review* recognises a need for rapid protection of buildings, and considers extension of that power to non-classified buildings.

> A clear case exists for a rapid means of imposing protection where an historic place is threatened but lacks formal protection. Such interim protection could operate either where the place has not yet been assessed for classification, or where classification or protection procedures are in train, but cannot be completed in time to meet the threat. (p 17)

The preceding page notes that:

> There may also be a case for requiring the body or person demolishing or destroying an historic place, to make a monetary contribution to a heritage conservation fund. The fund could be held by the Trust or the local authority as appropriate. Contributions to the fund would be based on the principle that anyone benefiting from being allowed to destroy a heritage item should compensate the community by contributing to the conservation of the remaining heritage.

Those permitted to demolish their own buildings may yet have to pay for the privilege.

Chapter three considers the part played by government in preservation. In contention is not whether government should play any part at all but the respective functions of central and local government. Section 36 of the Town and Country Planning Act 1977 gives councils the power to provide for the preservation or conservation of buildings, objects, and areas of architectural, historic, scientific or other interest, or of visual appeal. Under this section councils can effect controls on historic places so duplicating work of central government and the Trust.

Chapter four considers incentives and compensation. As regards incentives, the *Review* favours grants over tax concessions as the former can be more accurately directed. The signs regarding compensation are ominous:

> What are the advantages and disadvantages to all parties of restricting compensation to only those situations where the landowner is prevented from using the property for any purpose other than the existing one? In this instance, compensation of lost development potential associated with those uses permitted under the district scheme would not be provided. (p 30)

Private property rights may yet be restricted to existing uses.

Chapter five canvasses Maori issues. The obvious question of whether what Maori people value is protected best by government or by Maori people themselves is not asked.

Chapter six, the final chapter, considers administrative structures. The main worry is the overlap between the new Department of Conservation and the Trust. Spread amongst local authorities, the Trust, and the Department of Conservation, the protection of historic places is administratively very untidy.

Tidying up administrative arrangements, and strengthening powers to take property, appear the major preoccupations of the present review.

Options for reform

The many questions asked in the *Historic Places Legislation Review* obscure the heart of the matter. Preserving historic buildings has a cost. At the very least, the land upon which the preserved building rests has an alternative use, and preservation means forgoing the return that this alternative land use can provide. The questions that immediately arise are who should decide that the cost of preservation should be incurred, and upon whom should that cost fall.

There are three basic options. The first is that some agent of government, such as the Trust, decides which buildings are to be preserved, and the cost falls on the present landowner. The second is that some agent of government decides, but the cost is dispersed over all taxpayers. The third is that the landowner himself decides, and those wanting to preserve a

privately-owned building must negotiate with its owner.

The first two options involve coercion. The landowner is forced by law to preserve what is his, and the costs of preservation are either carried by himself or by taxpayers generally. Even if the agent of government buys the property from the landowner, there is still coercion, as taxpayers who pay for the property have no effective choice in the matter. Coercion as a basis for preserving historic buildings is a very poor thing, and giving some group the power to compel others to pay for preservation does not seem a particularly good arrangement.

The other option is to have only private trusts and private citizens deciding whether or not privately-owned buildings are to be preserved. This would avoid the need for coercion. It would also mean that those deciding to preserve a building, whether they be the present owner or some private trust, would confront the cost of preservation. The present owner himself must forgo the option of alternative land use or the trust must recognise this cost in its negotiations with him. In the process the preservation of buildings would be seen as a positive option, rather than as a negative one, and historic buildings perceived by their owners as assets, not liabilities. Having one's buildings declared as historic by others would be to one's advantage, not disadvantage.

The preservation of historical buildings should be organised privately, and there should be no special legislation, no government involvement, and certainly no power to take property.

Objections

The proposal that the preservation of historical processes should be privately organised is likely to raise many objections. Some of these objections can be foreseen.

But too few buildings will be preserved

Those objecting that too few buildings will be preserved presume to know how many buildings should be preserved. They do not. Although preserving historic buildings is a good thing, not every building having some history should be preserved. Some should be preserved, some should not. That much is known. What is not known is just how many buildings should be preserved. The problem then is not how to achieve a known result but to determine a process by which the result can be discovered and achieved. At issue is whether a process involving the Trust, the Minister, local authorities, and the Planning Tribunal, none of whom confront the costs of the decisions they make on behalf of others, is a better process than one which has private citizens confronting the costs and making their own decisions.

But private people will provide insufficient funds

There are two aspects to the objection that private citizens will provide insufficient funds. The first is that people will be unwilling to pay to have historic buildings preserved. But if they are unwilling to pay for preservation, why should they be coerced through either taxes or protection notices? The second aspect is that people may be too poor to set aside money for preservation. That being so, the question remains: why then coerce them to pay? Those advocating strengthened legislation are also in danger here of inconsistency. Their justification for strengthened legislation is that there is considerable public interest in the preservation of historic places. That being so, the public should be willing to pay to have their interest advanced, if they are not willing to pay those advocating strengthened legislation must be mistaken in their assessment of the extent of public interest.

Why should only some pay, when the entire community benefits?

The current preoccupation with user-pays leads to the obvious objection that everyone benefits from preserving historic buildings and so everyone should contribute. This objection assumes that the benefits of other potential land uses are more narrowly conferred. Consider, however, a site upon which a historic building rests. A developer may wish to knock the building down to make way for a hospital or shopping complex. Conceivably more people could benefit from the hospital or shopping complex than the historic building. Compelling the developer to preserve the building would be to the entire community's disadvantage, even though they themselves may not realise it. Alleged benefits to others is no justification for compelling others to pay.

Who speaks for the future?

Private transactions only take into account the preferences of those people already existing. It might be argued that preferences of people yet to be born should be considered. However, people should not be compelled to provide for future people by those who think they know best, and besides, political processes pay much less heed to future consequences than do private ones.

What about obstinate developers?

There may be obstinate developers eager to knock their historic buildings down heedless of the generous offers of private citizens to buy their buildings and preserve them. The developer might not be willing to sell his property at any price. If that is the case, we should not resort to police power; we should sigh philosophically and conclude this to be the price of living in a free society.

The power to take property is seldom used

It might be argued that the power to prevent private property owners from demolishing their buildings is so seldom used that it should not be a worry. Whether it is used or not is not the point; in contention is whether that power should exist in statute at all. Besides, the power to have property taken gives the Trust a considerable advantage in getting private property owners to negotiate, so much so that it may seldom have to exercise that power formally.

Conclusion

In the present review of Historic Places Legislation the following questions should be considered: Why is legislation is needed? Why should government be involved? Why should government have the power to take rights from private landowners? That is to say, it should be asked whether the responsibility for preserving historic buildings should lie with private citizens, or whether that responsibility should be directed elsewhere. □

Violent offending and the Crimes Bill 1989: A criticism

By Charles Cato, QC, of Auckland

The author notes that radical changes are proposed in relation to violence, and in particular the merging of murder and manslaughter. Mr Cato is also concerned about preserving the present law whereby the issue of provocation is one for determination in each particular case by the jury. The question of provocation is also discussed by Sir Robin Cooke in his article on the new Crimes Bill [1989] NZLJ 235. He emphasises that the criminal law is of fundamental importance in our society, and that there is no area of law that raises more difficult issues of law, practice and philosophy.

The proposals contained in the Crimes Bill in relation to violence are radical. In this comment, criticism is principally directed at the proposal to replace the time-honoured description of intentional killing as murder, with the euphemism "culpable homicide" (cls 122-129), the proposal that the issue of provocation be taken from the jury and be a factor relevant only on sentence (cl 128), the proposal that the crime of manslaughter be replaced with crimes of endangering life (cls 130-132) and finally the proposal that a crime of aggravated violence be included carrying a maximum sentence of 20 years (cl 148). Having said this, there is one major reform which is well overdue and welcome and that is the abolition of the mandatory life sentence for murder (cl 123). This does not, howevcer, mean the issue of sentencing for culpable homicide will be free from difficulty, a point that will be considered later in this comment.

This Bill is a very important and far reaching document. It is of concern that there has been so little debate on aspects of the Bill, particularly those relating to violence. Further, it is of concern that so little time has been given for submissions to be made to the Select Committee which has indicated a deadline for submissions as being 12 June 1989, little more than a month after the Bill was introduced into the House. A Bill of this importance should not be hastily enacted into law, and nor should the issue of crime descend into one of party politics. It should be the product of a lengthy period of mature reflection.

No degrees of murder

What is also of concern is that some of the comments attributable to leading members of the legal profession suggest that the proposals have been entirely misconceived. There are no degrees of murder, as one senior barrister is reported as saying. Murder and manslaughter are not incorporated into the concept of unlawful homicide either. The crime of manslaughter has been abolished.

The most significant change (the writer deliberately refrains from describing it as a reform) is that contained in cl 122 of the Bill relating to culpable homicide, which provides in subcl 1

> Every person commits culpable homicide who directly or indirectly causes the death of any other person.
> (a) By an unlawful act that constitutes an offence or;
> (b) By an omission without lawful excuse to perform or observe any legal duty or;
> (c) By such an act and such an omission. . . meaning to cause that other person's death, or to cause to that other person any bodily injury knowing it to be likely to cause death.

It is further provided in subcl 122(3) that

> every person commits culpable homicide who, for any unlawful object, does an act knowing it likely to cause death or serious bodily harm to any other person and death results.

There are certain extended categories of culpable homicide. A person who causes another any threats or fear of violence, or by deception to do an act that causes that other's death, meaning to cause that other person any bodily injury likely to cause death, is liable under cl 122 for conviction for unlawful homicide. A person who means to cause the death of any person or bodily injury likely to cause death but by mistake or accident causes death to another is liable also under cl 122(4). Finally, a person who intends to kill or inflict bodily injury to a child and causes such injury that results after the birth is complete in the death of the child is liable to conviction for unlawful homicide under cl 122(5). The maximum penalty for culpable homicide under cl 123 is liability to imprisonment for life. It is proposed to consider the culpable homicide provisions after consideration of the

abolition of the mandatory sentence of life imprisonment. Life imprisonment remains as a maximum sentence only upon conviction for culpable homicide.

Abolition of the mandatory sentence of life imprisonment

Taking the abolition of the mandatory life sentence first, this is undoubtedly an important and an enlightened reform. The Minister is to be congratulated for having the courage to introduce this reform at a time when the public ire is directed vehemently against violent offenders. It is a reform long overdue. It is trite to say that there are many different situations involving murder and some are far more heinous than others. Many murders are in the context of family violence, for example, and may be attributable to violent reactions, largely free of premeditation.

The vast majority of those convicted of murder are persons unlikely to re-offend. It was unsatisfactory that a life sentence was inevitably imposed on conviction, and it is true that the spectre of the mandatory life sentence, like the gibbet in former days, may have influenced juries to return manslaughter verdicts, in cases where the circumstances pointed more strongly to murder. It was particularly unfair also, in cases involving common enterprise that a party to murder would be inevitably given the same sentence as the principal, although the degree of culpability could be much less.

Abolition of the mandatory life sentence will avoid injustice. However, it should not be thought that the task of those having to sentence will be easy. Today, Judges are often criticised, very often unfairly, by unenlightened, reactionary politicians who one suspects may have little else to contribute to gain the public or the media's attention. The public are constantly reminded by the media of violent offending and comments and criticism of sentences are common.

There are strong and active persons in the community who represent victims' interests and who are particularly critical of what they regard as sentences that unduly favour the offender. Again, much of this comment is enthusiastic, rather than enlightened. There is a strong retributivist sentiment in the community, and this has been reflected also in the Court of Appeal where in very recent years a significant number of successful applications by the Solicitor-General for increases in sentences have been entertained. It is also a factor which has impressed Parliament sufficiently to abrogate parole in cases of serious violence under s 93(2A) of the Criminal Justice Amendment Act 1985, which it is submitted is a reaction to public opinion, rather than enlightened reform. It is anticipated that where the crime is one of intentional killing, the Judges will come under even closer pressure and scrutiny to impose lengthy sentences.

Level of finite sentence?

Professor Orchard in a comment on the recommendation of the Criminal Law Reform Committee in its 1976 Report on Homicide that the mandatory life sentence be abolished, makes the point that we do not know what level of finite sentence can be expected in cases of what might be regarded as a hard case, but one short of life imprisonment (Orchard [1977] NZLJ 411 at 413).

It would be useful if there had been some discussion or consideration of this issue. It is an issue which no doubt, in the not too distant future, the Court of Appeal will be forced to face. There is also the problem of recall. That is one of the principal advantages of the life sentence, although in practice not many offenders are recalled. However, it is to be noted that the Criminal Law Reform Committee in 1976 advocated that there should be a right of recall for anybody sentenced to a period of more than two years for unlawful homicide. There is no equivalent provision in the Bill, and perhaps rightly so. A Judge however, under cl 343 has the power to order that in cases of culpable homicide the offender not be eligible for Parole Board consideration until he serves a sentence not longer than two-thirds of the term of the sentence, or 10 years, whichever is less.

In other cases, unless the Secretary for Justice applies to the Parole Board under cl 345 of the Bill for a direction that the offender serve the full term, an offender will be eligible for parole in half the finite term (if sentenced to a period under 14 years (cl 344) and seven years if over 14 years (cl 344). Curiously, a person committed of endangering or other crime of violence (including sexual violation) will not be eligible for parole if sentenced to a period greater than two years (although the normal remission period under s 80 Criminal Justice Act, 1980 will still apply).

Indeed the restrictions on eligibility for parole contained in s 93(2A) of the Criminal Justice Act 1985, (repeated in cl 345) which mean the most violent offenders cannot expect parole after one half of a sentence, may be short-sighted. Not only does it remove the incentive to reform in part (although remission will still be available of one-third under s 80 Criminal Justice Act 1985), but also after any lengthy sentence of imprisonment it is important to ensure that there is a relatively lengthy period of control or supervision of an offender released into the community.

Further, rendering greater numbers of prisoners inelegible for parole after serving half a sentence is likely to considerably increase the long term serving prison population. This is so particularly when one takes into account the manifest approach towards longer sentences seemingly endorsed by the Court of Appeal. These are factors which should be considered in any thorough review of the criminal law. The provisions relating to ineligibility for parole for violent offenders would seem to be an immediate reaction to public opinion. They are not, however, as has been said, provisions which are likely to advance the cause of criminal justice in any true sense.

Sentencing tariff and period of imprisonment

Accordingly, the Bill envisages that Judges will have a leading role in determining not only the tariff but the period an offender must remain in prison before being eligible for parole when convicted of culpable homicide. It remains to be seen what approach the Judiciary will take; whether life sentences will be commonly imposed in more serious cases; the length of finite sentences; and whether non parole directions will be common.

It is to be anticipated that in

practice life sentences will be reserved for the very worst cases where in the interests of justice an indeterminate sentence is required, particularly because the offender is a person whose personal characteristics render him a continuing and indefinite potential threat to society. In other cases of what one might describe as culpable homicide without mitigating circumstances, it may not be uncommon for sentences to be in the vicinity of 14-16 years, judging by the level imposed for the more serious levels of drug offending. See *R v Curtis* [1980] 1 NZLR 406.

It is to be noted that one member of the Criminal Law Revision Committee in 1976 indicated a preference for an approach which would presumptively justify the life sentence unless there were present circumstances that merited a finite sentence. Although it remains to be seen what approach the Judges will take, one thing is likely and that is in those cases where there are few mitigating circumstances, offenders will not be able to expect much solace or enjoyment from the abolition of the life sentence. In practice, such leniency as is afforded will be directed at those offenders where there are clearly mitigating circumstances or those involved in joint enterprise cases where there is room for differentiation in penalty. In itself that this will be so, justifies the abolition of the mandatory life sentence for deliberate or intentional killing.

The proposal to abolish murder in preference to culpable homicide

The proposal to substitute culpable homicide for murder was also a recommendation of the Criminal Law Revision Committee in its 1976 Report on "Culpable Homicide". In order to understand why the Committee formulated this recommendation it is necessary to know a little of the background. The Committee was first concerned with the defence of provocation. In the Report is contained a working paper on Provocation in which various proposals for reform were advanced. As a result of difficulties with reform of provocation, it would appear as a result of a suggestion of the Minister at the time, the Honourable Martin Finlay QC, it was suggested that the Committee look more widely at the concept of murder itself. As a result, rather than attempt to effect reform of the provocation defence, the committee considered that it was preferable to abolish it altogether, instead allowing the Judge on sentence to take provocation into account. This meant of course that the mandatory life sentence had to be abolished. Further, in the view of the Committee, it meant that the term "murder", for crimes of intentional killing, had to be abolished. It was felt by the Committee that it would be wrong for cases of murder to come within the category of crime described as murder. Hence the euphemism, culpable homicide.

It is submitted that there are very real objections to the proposal to substitute the description culpable homicide for murder. Murder is as old as our civilisation. It is a description which may have some deterrent or denunciatory value. Certainly, it is the writer's experience of persons charged with murder, that it is not only the life imprisonment aspect of conviction they wish to avoid, it is also the label or stigma of being known as a murderer. At a time when there has been a significant increase in violent offending and cases involving unlawful homicide, it must be seriously questioned whether it is at all wise to introduce the euphemism culpable homicide for the crime of deliberate killing. One also must ask is it fair if provocation is to be abolished as a defence, that a person who would otherwise be convicted of manslaughter should be classified as committing the same crime, culpable homicide, as a sadistic and brutal killer, the only difference being one of sentence?

Indeed, it would appear that the Committee were somewhat diffident also about the change. The view was expressed:

> That it was to be expected that one who kills without provocation and receives a long sentence for unlawful homicide will still, in common parlance, be called a murderer. (Report at p 4).

More recently, one of the members of the Committee, Professor Bernard Brown of the University of Auckland in a stimulating paper on Provocation for the Legal Research Foundation, has said:

> There is no good reason why "murder" should not be preserved (and extended by the inclusion of provoked manslaughter) to do the work proposed for the achromatic "unlawful killing". ("Movement and Markers" – Legal Research Foundation (1984) at p 49).

Yet, that was not the view of the Committee. If provocation was to go, so did murder have to be replaced by culpable homicide.

Abolition of the provocation defence

Is there a strong case for the abolition of the defence of provocation as a jury issue? It is submitted that there is not. Indeed, the opinion is advanced here that an issue such as provocation to a charge of murder or culpable homicide should not reside with a Judge, but should remain with the jury. A Judge will, of course, still be at liberty where a defence has not been fully made out, to sentence upon a conviction for murder according to factors considered nonetheless mitigating if the mandatory life sentence is abolished.

It is interesting to know that the Report on Culpable Homicide mentions there were some Judges who, in response to the Criminal Law Review Committee's Working Paper, expressed the view that they had no particular difficulty with the concept. Indeed, one suspects that criticism of the provocation rule is more the product of refined intellectual analysis by academic lawyers; and may tend to ignore the fact that juries can and probably do, take a far more broad view of the defence and manage fairly successfully to do justice according to the overall merits of the case. There is, of course, merit in the argument that the hypothetical man sits somewhat uneasily with subjectivist theories of responsibility and occasionally the Court of Appeal has had to order a new trial where wrongly, provocation was not left to the jury. *R v Taaka* [1982] 2 NZLR 198 is such a case.

But neither before 1976 nor afterwards, is there a substantial

body of evidence or cases to justify the view that the law relating to unlawful homicide has been greatly disadvantaged by the defence of provocation. Rather, it is submitted there is a very good case for the jury to be entrusted with this issue, rather than a Judge. A jury in a criminal trial is the usual arbiter on issues of credibility and it may be argued that a jury is better placed on the basis of shared common experience to judge matters involving community standards than an individual Judge sitting alone. In this regard, it is vital that provocation, which is essentially an appeal for merciful consideration, is a jury decision, because it is in this way that the community's view can be expressed in regard to anti-social behaviour of such significance. In short, it is the writer's view that the jury have an important and fundamental role to play in cases of this kind.

It is true that Judges are faced with arguments relating to provocation in other cases of violent crime by way only of mitigation of sentence. In those lesser cases it would seem it is not provocation that is defined in our Crimes Act that is in issue, but any mitigating factors in the nature of provocation that affect self-control which may be considered. It is not, in any case, an adequate answer for its abolition as a jury issue in homicide cases that provocation is unavailable as a defence in lesser cases. Provocation to murder only reduces the crime to manslaughter. Provocation in homicide cases for obvious policy reasons, has never been seen in the same light as self-defence although in some cases it has a common origin (as where provocative conduct in an affray is involved).

Murder is different however; not only because it carried with it in former times the potential of execution, or in latter years, the mandatory life sentence, but also because associated with conviction for the crime of intentionally killing another comes an enormous social stigma that is not present in lesser cases involving violence. The advantage of retaining the defence of provocation as a jury issue is that it constitutes an indication by the community, represented by the jury, that in the jury's view a person should be partially excused for his actions.

Lengthy sentences

For reasons given above, in relation to the life sentence, the judiciary is likely to come under considerable pressure from society to deliver lengthy sentences in cases of culpable homicide. There is a risk that matters advanced as provocation will not be given adequate consideration by some Judges. One can also predict that sentences will not be even-handed since some Judges will inevitably be more disposed to provocation where it is advanced, than others. Some Judges in temperament and understanding are simply less charitable than others. That is about the first lesson any young defence lawyer learns.

Nor is there any evidence that Judges by their training and experience are any better qualified than the average member of the jury and certainly not when the jury collectively is considered, to determine issues of credibility and judge on matters such as proportion, the loss of self-control, or the standard of what could be expected of a reasonable person in the circumstances that the offender found himself in.

Further, if provocation is relevant only on sentence, is provocation to be an undefined and open ended concept unlike provocation which is defined in the Act? In all probability, it is a wider concept but although it may be anticipated that evidence may in some cases be led on such an issue on sentence, it is rather less likely to be explored in as much detail as it is today when advanced as a jury issue.

Jury system

Indeed, one of the great foundations of our criminal justice system is the jury. Along with the presumption of innocence, the privilege against self-incrimination, and the right to confront and test evidence, the jury has played a significant role in our adversary system of criminal justice. It may be fashionable today, to question these principles, but in any move to abolish or modify them it should not be overlooked that they have played an important and fundamental role in achieving a balance between the citizen and the state. For this reason, given that the issues that provocation raises do involve community standards, albeit that it is tailored, in some circumstances to the individual characteristics of the offenders, it is right that the jury judges on the issue of whether an intentional killing is sufficiently excusable in the eyes of the community to merit a more lenient verdict. When a jury, so finds that is the best indication or justification, a Judge has to sentence mercifully and a Judge cannot be criticised for doing so. Indeed, in general, it is submitted moves to eliminate the jury from consideration of issues involving responsibility in the criminal law are to be discouraged.

Curiously, the Bill provides in cl 124, in relation to a crime that was formerly infanticide, that the jury is to return a verdict of culpable homicide with mitigating circumstances if the jury considers that a woman was so mentally disturbed through childbirth that she killed her child under the age of 10. If convicted, the maximum sentence is three years. Yet the crime of infanticide, or in terms of the Bill culpable homicide with mitigating circumstances, is no more than a merciful defence to murder. It is little more than a form of diminished responsibility. So also is provocation, albeit that it is an impediment relating to the power of self-control that is involved, rather than any issue of mental incapacity. It may be argued, therefore, if it is considered sufficiently important for a jury to consider the issue of whether mitigating circumstances exist in the circumstances of a child killing by a mother, then so the jury should be entrusted with the defence of provocation. Indeed, it may be argued that even if the term murder is replaced with the euphemism culpable homicide, the jury should still be entrusted with provocation. Accordingly, a verdict could be given of culpable homicide with mitigating circumstances by reason of provocation.

The failure to provide for a defence of diminished responsibility or mercy killing

It is disappointing that no defence of diminished responsibility or a defence based on mercy killing has been incorporated into the Bill. Juries have been known to render manslaughter verdicts in cases where the only justification can be that the

killing was effected in order to eliminate suffering. Similarly with diminished responsibility. Juries may have it suggested to them that the accused lacked intent for reasons that he was suffering from some incapacity of the mind (mental disassociation is a term sometimes used by psychiatrists) so as not to be able to form an intent.

The defence of diminished responsibility which in England has been a medical defence in cases of murder since it was introduced there in 1957, provides, in s 2(1) Homicide Act 1957:

> Where a person kills or is a party to a killing of another, he shall not be convicted of murder if he was suffering from such abnormality of mind (whether arising from a condition or arrested or retarded development of mind or any inherent causes or induced by disease or injury as substantially impaired his mental responsibility for his acts and omission in doing or being a party to the killing.

The defence which had long been available in Scotland as part of Judge-made law was passed in order to supplement and render available a further medical defence because the defence of insanity based on McNaghten which is substantially repeated in cl 28 of the Bill, was considered inadequate. Although Professor Williams criticised the formula in so far as it talks of "substantially impairing mental responsibility" which he describes as "an embarrassing scientific formula" he did further add that the defence has "in a sense worked" and "indeed it has highly beneficial results". Perhaps for much the same reasons as have been advanced here in relation to juries and provocation; Professor Williams has said that psychiatrists in England and Wales have not expressed much open discontent with the formula. "When their sympathies are engaged they will adapt themselves to any legal formula." Williams, *Textbook of Criminal Law*, 1983, at p 686.

It is true that the Bill in cl 28 envisages what could be regarded as a more flexible and less archaic definition of insanity than existed under s 23 of the Crimes Act 1961. For the terms "natural imbecility or disease of the mind" are substituted "mental defect or disorder" which more appropriately reflects medical criteria. (See Williams, pp 643-644).

Be that as it may, given that diminished responsibility is so often pleaded in homicide cases in England, rather than McNaghten insanity and has been, it would seem, beneficial and well received, then the defence should be available for jury consideration in this country when an accused's mental processes are so impaired that he cannot, whilst falling short of being held insane, be held fully responsible in law for an intentional killing. If convicted of manslaughter on such a plea, a jury should have the jurisdiction, where appropriate, to order that a person be detained in psychiatric or hospital care as a restricted or special patient.

In England, it would seem that diminished responsibility has been involved successfully in mercy killing cases (see Williams, p 694). Favourable verdicts have been returned here in cases where the facts did not come readily within any of the recognised defences. Rather than invite the jury to return a verdict of manslaughter on such grounds, it might be thought that a defence of mercy killing should be expressly provided for in the Bill. Such a defence could be raised if the killing was carried out to relieve extreme suffering in the victim, and for humanitarian reasons.

Abolition of the crime of manslaughter

There are some lawyers who may be labouring under the misapprehension that murder and manslaughter have now been incorporated into the one category of culpable homicide. That is not the case. Manslaughter cases have now been incorporated within various categories of crimes which involve the proposition that the offender has acted either deliberately or been reckless in a way which endangers life. Those categories consist of endangering with intent to cause serious bodily harm (cl 130); endangering with intent to facilitate crime (cl 131); and endangering with intent to injure (cl 132). The maximum sentence for endangering with intent to cause serious bodily harm is 14 years; the second which incorporates the old crime of constructive murder contained in s 168 Crimes Act 1961, a sentence of 14 years and the last category a sentence of five years. There is a further provision contained in cl 132(2) whereby negligent acts or omission likely to cause injury carry a sentence of two years' imprisonment. This last provision goes further than the Criminal Law Revision Committee would have appeared to advocate in its 1976 Report, where it was considered inappropriate to render a person liable to criminal penalty for actions or omissions that fall short of gross negligence. These provisions apply in an appropriate case whether or not death results.

It should be noted that with the exception of the clause relating to negligent acts or omissions, the new provisions were taken from the 1976 Report. Further, cls 130 and 132 replace the existing crimes of wounding with intent under s 188 and of injuring with intent under s 189. These provisions have been extensively considered by Professor Orchard in his comment on the Report published in [1977] NZLJ 447. Various points of criticism were made by Professor Orchard which it is not proposed to repeat here. The principal criticism that is advanced here is that the changes are unnecessary and do little if anything to enhance the criminal law. The existing crimes of intentionally wounding and injuring with intent are adequate to reflect intentional injury of various kinds. Non-intentional but unlawful killing of another is adequately reflected in the age-old crime of manslaughter.

Indeed, it is unsatisfactory that there has been an assimilation of crimes involving deliberate intent or a specific degree of foresight with crimes which reflect reckless omissions.

Intoxication

As to intoxication and unlawful killing, one has to search diligently through the Bill until one comes to cl 269(3). There, it is provided that if an accused is acquitted of culpable homicide on the grounds of intoxication, the jury is directed to find the person guilty of an offence relating to endangering under cls 130 or 132. This is of course the position today. A person acquitted of a murder because of

intoxication is guilty of manslaughter. *R v Grice* [1975] 1 NZLR 76. (See Walker, "Intoxication at the Crossroads" [1977] NZLJ 201. Be that as it may, it is difficult to see that a person who is so drunk that he is acquitted of culpable homicide, fits easily into the more serious category of endangering which requires at least knowledge that an act or omission is likely to cause serious bodily harm. Certainly, the change does little, if anything, to enhance the existing law. It is also unclear whether such a person would come within the lesser category of endangering based on reckless or heedless activity. Indeed, it is arguable that if the Government is to persist with these changes, there should be a new crime of causing death or bodily injury while under the influence of self-induced intoxication from alcohol or drugs. Such a provision could more usefully be included in cl 29 relating to intoxication, rather than hidden away in the body of the legislation in s 269(3).

Further, in the complex area of common enterprise cases where a killing follows, as in the case of *R v Tompkins (No 2)* [1985] NZLR 283, the law is now clear. Where group activity involves liability under s 66(2) Crimes Act 1961, there is room for differing verdicts of murder, manslaughter, or acquittal depending on the degree of foresight of murder or a killing. It is unclear how the Crown is expected to proceed under the Bill in a case where parties to homicide are involved. Presumably, the Crown will indict with crimes of endangering being alternatives to crimes of culpable homicide. If so, this is no improvement on the existing law. Rather, it is likely to lead to more difficulty for Judges, and more confusion for juries as they grapple with cls 130 or 132.

Finally, on this point, if the crime of endangering is to be regarded as a substitute for manslaughter, it should be questioned whether the possibility of an indeterminate life sentence should be reserved for those very exceptional cases where the characteristics of the offender would render him a likely continuing menace to society and one that could not safely be released without supervision and the prospect of recall.

Aggravated violence

Of great concern must be cl 148 of the Bill, which contemplates sentences of up to 20 years for acts of exceptional violence or cruelty with leave of the Solicitor-General. This provision which was not a recommendation of the Committee in its 1976 Report on Culpable Homicide, seems to be aimed essentially at sexual violation and aggravated robbery. As such, it is entirely unnecessary because there is already room with the maximum sentence of 14 years in each case for the quality of the offending to be reflected in condign punishment. Indeed, this proposal can only be regarded as an unsubtle quid pro quo for the public acceptance of the abolition of the mandatory life sentence for murder, and murder as the recognised legal description of the crime of intentional killing. In the present climate it would not be seen as appropriate for an already unpopular government to be subject to criticism that it is soft on crime. Indeed, Professor Brown in his paper on "Provocation" has said "removal of the mandatory life penalty (indeed of murder itself) would invite loud opposition from the social conservative element". ("Movements and Markers in Criminal Policy" — Legal Research Foundation, p 48).

Economies associated with the changes to the law relating to culpable homicide

Professor Brown also said of the changes envisaged by the 1976 Report, and in particular the abolition of the provocation defence:

> The major attraction of the Report to a government intent on public sector economics could well be a substantial saving in court and legal aid costs. Lengthy depositions, and lengthy trials (sometimes centred on weak factual and palliative defences) in numerous cases would be replaced, on the defendant's election for the guilty plea, with a day or so of adversarial argument over the appropriate sentence. Put money in thy purse, Roderigo.

It is unlikely, however, with respect, that the changes relating to culpable homicide will significantly reduce trials. They will obviously eliminate trials where the sole issue is provocation; but in other cases there is unlikely to be a significant increase in guilty pleas, particularly when it is understood that the crime of culpable homicide is not simply an amalgamation of murder and manslaughter. It is still to be anticipated that there will be defences advanced based on identity, intent, ("de facto" diminished responsibility), temporary or permanent insanity, intoxication, automatism and self defence, or a combination. Indeed, the cases where provocation is pleaded as an isolated or single issue are unlikely to form a very significant number of cases of murder. And in cases where provocation is a sole issue, trials are unlikely to be lengthy. Rather, lengthy and expensive trials are those involving more than one party to a killing where provocation is less likely to feature.

Other features of the Bill

It would be wrong to suggest that all aspects of the Bill merit criticism. Abolition of the mandatory life sentence as has been argued, is welcome and long overdue although difficulty in its practical application is to be anticipated as Judges are forced to wrestle in uncharted waters with tariffs and long finite sentences. The modification of the insanity rule contained in cl 28 with the abolition of the concept of disease of the mind and the substitution of mental defect or disorder as has been also argued, constitutes an advance. Further, extended definitions given of defences of necessity (cl 30) and duress (cl 31) are welcome, even though they are unlikely to play a significant role. The decision to increase the age of criminal responsibility to 12 is probably an improvement on the existing law. Abolition of capital punishment for treason removes the last vestige of this barbaric sentence. The provisions contained in cls 133 and 134 in relation to suicide and suicide pacts, although the subject of some division in the 1976 Report on Culpable Homicide, appear to be reasonable reforms.

Of some concern however, is the decision to abolish the year and a day rule contained in s 163 Crimes Act, 1961 which limits the Crown's

right to prosecute for crimes where a homicide is involved. True, this was arbitrary; but nevertheless one must have some limitation on exposing a person indefinitely to prosecution for culpable homicide if only because there is a risk of injustice, the greater the period between an incident and trial as witnesses became unavailable or recollection dims. In so far as cl 113 lays down medical criteria for determining death as being an irreversible cessation of all that person's brain stem functions, with either prolonged absence of spontaneous circulatory and respiratory functions, or other means recognised "by the ordinary standards of current medical practice", this may serve to assist in cases where the victim, although not physically dead, is in a coma. But there may be other cases where a person is not brain dead but takes a period greater than year to die from injuries, where it might be thought unfair to prosecute for murder, or culpable homicide.

Nor is a jury likely to be able to distinguish between fine print in such terms as reckless and heedless, as defined in cls 22 and 23 of the Bill. Indeed, far from having to distinguish as the Bill appears to contemplate, between pre-*Caldwell* (1982) AC 341 recklessness and post-*Caldwell* recklessness, which include not only deliberate risk taking but also failure to give any thought to an obvious and serious risk, it is submitted that liability should only be imposed for recklessness in the sense of a deliberate risk taking.

A subjectivist theory of responsibility must seriously question punishment based on heedless action in the sense defined, although this is an approach recommended in the proposed Criminal Code in England. In this regard, it is to be noted that generally speaking New Zealand Courts have eschewed post-*Caldwell* recklessness. See *R v Harney* [1987] BCL 1343; *R v Howe* [1982] 1 NZLR 618. The distinction is of some importance in relation to endangering under cl 132 of the Bill which provides that a person may face a maximum of five years for heedlessly doing an act or omitting without lawful excuse to perform or observe any legal duty, which is likely to cause injury to any other person or to endanger the safety or health of any other person.

Other provisions

Many of the provisions of the Bill, such as those relating to procedure, are consolidating provisions only, but there are some major and necessary changes in the law relating to new computer crimes for example, set out in cls 199 to 201. A very wide notice of extortion embodying any threat (rather than merely a threat to disclose sexual or criminal) conduct is contained in cl 189. This may give rise to difficulty. There is a saving provision however, whereby if the threat is reasonable and proper in the circumstances, it is defensible.

The penalty for theft (including misappropriation or failure to account) is reduced from seven to five years. One must question whether this is appropriate in view of the absence of business morality so evident in recent times in the New Zealand commercial community. Indeed, it must be asked whether in principle it is right that such a rigorous distinction is drawn between crimes of violence and crimes relating to property as is embodied in sentencing practice under s 5 and s 12 of the Criminal Justice Act 1985, and in the provisions relating to ineligibility for parole under s 93(2A) Criminal Justice Act 1985 (repeated in cl 344 of the Bill) which means that most violent offenders sentenced to a period of greater than two years do not have the prospect of release on parole after serving half a sentence, as do property offenders.

In this regard it may be argued that an offender who steals investors' funds inflicts much greater damage and distress on a wider section of the community than an offender who commits an isolated offence involving violence. Yet an offender who is found guilty of misappropriation under cl 180 of the Bill will be eligible to parole within two and a half years assuming a maximum sentence of five years is imposed. It is interesting to compare this sentence with the maximum for blackmail which is 14 years. Because it usually involves a breach of trust, the law should allow for greater punishment in more serious cases of misappropriation than is provided for in the Bill.

Further, with all the profits and losses made on the stock exchange, should there be penalties provided for insider trading, not only computer fraud? Even though enforcement may be difficult in some cases, the risk of apprehension, particularly if the offending involves a significant period of imprisonment, is likely to act as some deterrent to the less scrupulous.

Sexual offending

In the area of child or sexual offending within the family, is there a case for referring less serious acts of indecency to the Family Court, where counselling and other means of therapeutic treatment can be explored for the betterment of all? There seems little point, for example, in imposing custodial sentences on some offenders, which in many cases will only make matters worse. This is an area of topical concern at the present time which merits some consideration in any Criminal Code.

Finally, in relation to identification parades, consideration should be given to requiring a suspect, where reasonable cause is satisfied, to enter an identification parade. The present law which allows a suspect a choice has led to the police holding informal identification parades which are much less satisfactory. In the United States a suspect may be required to submit to identification procedures of this kind. The privilege of self-incrimination is no objection. In this regard also consideration should be given in any review of the criminal law and procedures, to the provision of adequate procedures for the taking of bodily samples which will be so important with DNA testing. There must, of course, be adequate safeguards for the citizen and it may well be that compelling suspects to enter identification parades, give voice samples, or bodily samples, should not be undertaken except upon judicial order and proof of reasonable cause.

Conclusion

Indeed, in conclusion, it must be emphasised that the criminal law is of fundamental importance in our society. There is no area of law that

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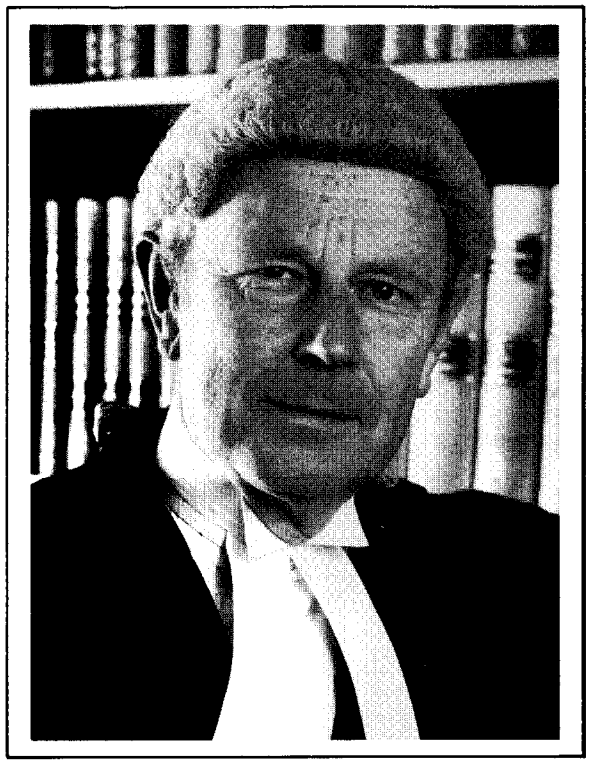
Judicial Appointment: Court of Appeal

Hon Mr Justice Hardie Boys



On the retirement of Mr Justice McMullin at the end of April Mr Justice Hardie Boys was appointed a permanent member of the Court of Appeal from 1 May 1989. He had been appointed to the High Court Bench on 21 April 1980.

His Honour is a Wellingtonian. He was born on 6 October 1931, being the elder son of Reginald Hardie Boys who himself later became a Judge. He was educated at Hataitai school and then Wellington College. He has a double degree BA, LLB from Victoria University College (as it was when he graduated). In 1954 he was Senior Scholar in Law.

After graduating and admission to the Bar, he was in practice in Wellington until his elevation to the Bench. He became a partner in what was originally his father's firm and was later known as Scott Hardie Boys and Morrison.

The Judge took an active interest in Law Society affairs. He was on the Council of the Wellington District Law Society and became President in 1979. He also served on the Council of the New Zealand Law Society and was an Executive member for a brief period in 1980, before his High Court appointment, he was Treasurer of the New Zealand Law Society. He served on the Legal Aid Board of which he was Chairman from 1978 to 1980.

Outside the law the Judge has been involved in various capacities in the Methodist and Anglican Churches. He was a member of the Boys Brigade and became Wellington President and New Zealand Vice-President. He is presently Honorary New Zealand Vice-President of the organisation. The Judge has also served on the Boards of Management and Trustees of Samuel Marsden Collegiate School and the executive of the Independent Schools Association. He was also for a time, a Councillor of the Automobile Association, Wellington.

The Judge's recreational pursuits include an interest in art and music, gardening, swimming and the outdoors. The Judge was married on 2 February 1957 to Edith Mary, daughter of Dr and Mrs J F Zohrab of Wellington. They have a family of two daughters and two sons. □

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raises more difficult issues, of law, practice, and philosophy. Until recently, it has been difficult to obtain information as to the contents of this Bill. Now that it is before Parliament, a considerable period of time should be allowed for submissions and debate before it is passed into law. If in regard to homicide, the proposals of the Criminal Law Review Committee in 1976 were so enlightened, then it is wrong that successive Ministers of Justice have ignored them. Yet, with the exception of the mandatory life sentence, the argument is advanced here that the principal recommendations, namely abolition of provocation as a jury issue, the abolition of the crimes of murder and manslaughter and the substitution of crimes of unlawful homicide and endangering are unnecessary and unwise. It is to be hoped that this comment may stimulate much needed debate on these important issues before this Bill is enacted into law. □

The impact of New Zealand law in Hong Kong

By David Plunkett and Gerard McCoy of Hong Kong

The two authors are both former New Zealand practitioners. They are now qualified and practising in Hong Kong as a Solicitor and a Barrister respectively. Their article considers those decisions of the Hong Kong Courts in which New Zealand cases have been referred to or adopted in principle. The article also looks at statutory influences.

The substantive law of Hong Kong and its common law legal system, like that of New Zealand, was inherited from the colonising power, Great Britain. Coincidentally it occurred at virtually the same time in history. (The island of Hong Kong was ceded to Great Britain in 1842 as the spoils of the First Opium War; New Zealand was ceded to British sovereignty in 1840 under the Treaty of Waitangi.) The similarities do not end there; both enjoy the rare and somewhat dubious distinction of recognising foreign statutory law as part of their own domestic law (certain early British laws) and both still retain the same foreign Court as the ultimate appellate tribunal (the Judicial Committee of the Privy Council). Much of the legislation of Great Britain has in the past been laboriously copied and the bulk of each jurisdiction's case law has derived from English authorities.

Profession not fused

One distinction is that the legal profession in Hong Kong, unlike New Zealand, is not fused. A more remarkable distinction between the legal heritage of the two is the eclectic nature of the source of case law in Hong Kong, as compared with those of New Zealand. From the authors' research of reported Hong Kong cases, authorities have been cited from England and Wales, Scotland, Northern Ireland, the Irish Republic, Australia, New Zealand, Canada, South Africa, the United States, India, Sri Lanka, Singapore, Malaysia, Papua New Guinea, Zimbabwe, Kenya, Nigeria, East Africa, Jamaica, Guyana and Aden.

Authorities from outside Hong Kong and the United Kingdom are regularly cited. The explanation for this feature of Hong Kong law is not hard to ascertain; it no doubt reflects the diverse international backgrounds of the legal profession and judiciary here, the majority of whom are not Hong Kong born, and who are accordingly familiar with and receptive to foreign authorities.

This may be contrasted with the New Zealand predilection for local and English authorities, though Australian authorities are also popular and are accorded respectful consideration. The citation of authorities from other jurisdictions is exceptional. This is perhaps more of a commentary on New Zealand counsel than the judiciary, as the authorities considered in judgments are largely a function of the industry of counsel.

Leaving aside British statutes and English common law, the major contributors to Hong Kong legislation and case law are Australia and New Zealand. In this article, we review some of the principal contributions New Zealand has made to the development of the law in Hong Kong.

The Common Law

The respect accorded New Zealand jurists by the local judiciary is evident not only from their use of New Zealand authorities but also from the fact that New Zealand Judges are to be invited to sit on Hong Kong's Court of Final Appeal which is to be established in 1992 to replace the Judicial Committee of the Privy Council as the ultimate appellate Court.[1]

The frequent use of New Zealand authorities is no doubt also due to the large numbers of New Zealanders at the Bar, in the solicitors' profession and in the Attorney-General's Chambers. Kiwis are also well represented on the bench. Notable New Zealand personalities to have made major contributions to the local scene include former acting Chief Justice Sir Trevor Gould, who retired from the Hong Kong bench in 1958 to become a Justice of Appeal in East Africa[2] and Maurice Heenan QC who was Attorney-General from 1961 until 1966. New Zealanders presently sit at all levels of the judiciary; the Honourable Ross Penlington, a Justice of Appeal, is from Christchurch and the Honourable Terry Ryan, a recently appointed puisne Judge, is from Upper Hutt. New Zealanders are also well represented in the District Court and in the Magistrate's Court. Finally, the present Crown Solicitor, Peter Allan, is from Christchurch and the current Dean of Law at Hong Kong University, Peter Rhodes, is also a Kiwi.

The use of authorities from any jurisdiction must also depend on the availability of reported judgments from that jurisdiction. In this respect, New Zealand authorities made their mark quickly following their availability. The first citation of a New Zealand decision in a reported judgment occurred in 1964 (*R v Yuen Shun-yuk* [1964] DCLR 289 which followed *R v Horry* [1952] NZLR 111) the same year the *New Zealand Law Report* series appeared on the shelves of the Supreme Court library. The series was obtained by the library of the Attorney-General's Chambers the

following year.

The statistics are interesting. According to the authors' analysis of reported Hong Kong decisions (Court of Appeal, High Court and District Court) New Zealand civil authorities are considerably more popular than criminal ones. We have identified 58 citations of New Zealand judgments in civil cases since 1964 and 29 in criminal cases.[3] The most popular New Zealand Judge proved to be Sir Owen Woodhouse. Sir Owen and Sir Robin Cooke have also delivered the advice of the Privy Council in reported Hong Kong appeals. (*Lau Ho-wah v Yau Chi-biu* [1987] HKLR 1061, an employees compensation case, and *Chan Wing-siu v R* [1985] 1 AC 168 concerning murder respectively.) The civil areas of law covered are wide and many cases are in those areas where New Zealand jurisprudence has asserted its independence and made a significant contribution to the development of the common law, such as administrative law and the tort of negligence.

The most oft-cited New Zealand case, not surprisingly given that Hong Kong is one of the world's leading banking centres, is *National Bank of New Zealand v Walpole* [1975] 2 NZLR 7. The case concerned the banker/customer relationship in relation to forged cheques. Relying on very early English authority Richmond J summarised the law in the following passage from his judgment which is the most cited quotation from any New Zealand case and was quoted with approval by Lord Scarman delivering the advice of the Privy Council in *Tai Hing Cotton Mill v Liu Chong Hing Bank* [1987] HKLR 1041:

> I know of no sufficient reason why we should not retain, in New Zealand, the principle so clearly laid down by the House of Lords that the only type of negligence on the part of a customer which will remove from the banker the risk of paying on a forged cheque is negligence in or immediately connected with the drawing of the cheque itself.

The *Walpole* case, prior to the decision of the Hong Kong Court of Appeal in *Tai Hing Cotton*, had been followed at first instance in Hong Kong in a number of cases including *Tai Hing* itself. (*Asien-Pazifik Merchant Finance v Shanghai Commercial Bank* [1982] HKLR 273; *Lam Yin-fei v Hang Lung Bank* [1982] HKLR 215.) While the Court of Appeal in *Tai Hing Cotton* had doubted the correctness of *Walpole*, it has unequivocally been restored as part of Hong Kong law by the decision of the Privy Council in that case which reversed the decision of the Appeal Court.

New Zealand authorities adopted and applied

In at least three instances, New Zealand authorities have been preferred to contrary Privy Council or English authorities. The first was the decision of the former Full Court in *Attorney General v Tsang Kwok-kuen* [1971] HKLR 266 which concerned, inter alia, whether the failure to comply with the principles of natural justice rendered a decision void or voidable. The Solicitor-General had argued, relying on the majority judgment of the Privy Council in *Durayappah v Fernando* [1967] 2 AC 337 that the decision was only voidable in the instant case. The Full Court however noted the "considerable adverse criticism" of that judgment by Speight J in *Denton v Auckland City* [1969] NZLR 256 and the comment in the *Annual Survey of Commonwealth Law 1969* welcoming the decision of Speight J, (*Denton* has since been overruled by the New Zealand Court of Appeal in *Love v Porirua City Council* [1984] 2 NZLR 308 to complete the full circle). While not expressly deciding the point, Pickering J in the *Tsang* case concluded his judgment on this issue by quoting the Solicitor-General referring to "the privilege of the Privy Council to be wrong but binding".

The second case identified by the authors was the decision in *Yau Fook Hong v Man Cheong Construction* [1981] HKLR 60. One of the issues was whether an employer could terminate a contractor's building contract and order the contractor off the site. Fuad J (now Fuad J A) was faced with the competing decisions of Megarry J in *Hounslow Council v Twickenham Garden* [1971] 1 Ch 233 and Mahon J in *Mayfield Holdings v Moana Reef* [1973] 1 NZLR 309. Megarry J had held that while the contractor had only a licence to occupy the site and not an interest there was an implied negative obligation on the employer not to revoke any licence except in accordance with the contract. Thus a Court would not assist an employer to remove the contractor from the site. In *Yau Fook*, it had been argued by counsel, relying on the later case of *Mayfield Holdings*, which had expressly considered and not followed *Hounslow*, that the contractor had a mere licence not subject to any such implied negative covenant and that the contractor therefore had no right to remain on the site once his contract was terminated and his only remedy was in damages. Fuad J noted the criticism of *Hounslow* in a number of texts and in an article in the Hong Kong Law Journal which strongly favoured the decision of Mahon J. (Litton & Chang "No Man's Land: Disputed Possession of Building Sites" (1975) 5 HKLJ 192.) While not expressly resolving the conflict, Fuad J concluded that in his opinion a Hong Kong Court might well decide not to follow *Hounslow* on this point in favour of *Mayfield Holdings*.

And the third case, also where a New Zealand authority was preferred to an English authority on the same point was the judgment of the former Chief Justice, Sir Denys Roberts, in *Mak Yuk-kiu v Tin Shing Auto Radio* [1981] HKLR 77. The case concerned a claim by dependants for damages under the Fatal Accidents Ordinance arising out of a motor accident. The difficulty facing the Court was that the deceased was a practising fortune-teller and maintained his family from his practice. The Judge found that income from fortune-teling was derived from an illegal activity and was therefore faced with determining whether a claim could be made on the basis of illegal earnings. The defendant had relied on the English case of *Burns v Edman* [1970] 2 QB 541 which had ruled that a claim by dependants under the Fatal Accidents Act for deprivation of support flowing from criminal offences was not maintainable.

The plaintiffs relied on the New Zealand decisions (at first instance and in the Court of Appeal) of *Le*

Bagge v Buses [1958] NZLR 630 which had been considered, and distinguished, in the later English case. The facts of *Le Bagge* were somewhat pedestrian compared with *Mak's* case. The deceased milk vendor had personally operated his business seven days each week, the seventh consecutive day being a breach of the Transport Licensing Regulations of 1950. It was held that the jury did not need to deduct the illegal earnings on the seventh day from the compensation to be assessed, as the widow's cause of action under the Act was separate from any right of the deceased and therefore unaffected by any illegality. Roberts C J followed the New Zealand case and held that the Ordinance created a separate cause of action which was not necessarily tainted with the illegality which affected the deceased, the claim therefore being maintainable.

Legislation

As well as Judge-made law New Zealand has also made a valuable contribution, particularly in very recent years, to legislation.

However, the impact of New Zealand legislation was felt in the earliest colonial days of Hong Kong. In 1844, the Legislative Council passed the Supreme Court Ordinance which had been drafted by Chief Justice J W Hulme who had been sent a copy of a similar law recently passed in New Zealand. Unfortunately, he did not follow this model closely enough and the Queen disallowed the Ordinance on the advice of the Colonial Office after it had been passed by the Legislative Council and assented to by the Governor though the disallowance was suspended for three months so that a new Supreme Court Ordinance could be passed.[4] Interestingly enough, New Zealand's first attempt at drafting a Supreme Court Ordinance suffered the same fate.[5]

Perhaps the most important contribution New Zealand has made to Hong Kong statutory law is s 19 of the Interpretation and General Clauses Ordinance 1986 (Cap 1) which regulates the interpretation of all Hong Kong ordinances. Section 19 reads:

> An Ordinance shall be deemed to be remedial and shall receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Ordinance according to its true intent, meaning and spirit.

Readers will instantly recognise this as a refinement of s 5(j) Acts Interpretation Act 1924. The provision made its first appearance in Hong Kong law in 1966, and was imported from New Zealand[6], having no counterpart in British legislation. The Attorney-General at the time, whose Chambers would have drafted the Bill, was New Zealander Maurice Heenan QC. It undoubtedly had common law origins though there is doubt as to which rule or rules it is declaratory of.[7]

Despite its importance, there are relatively few Hong Kong cases which have considered the meaning of this s 19, and there is certainly no comprehensive treatment of it unlike in New Zealand where it has generated much more case law. It has been described by a former vice-President of the Hong Kong Court of Appeal as "notorious" (Huggins VP in *Hui Lok v Commissioner ICAC* [1981] HKLR 478, 480).

Meaning of "fair"

In one of the few reported cases to have considered it, the Hong Kong Court of Appeal followed the decision of Wilson J in *Union Motors v Motor Spirits Licensing Authority* [1964] NZLR 146 as to the meaning of the word "fair", construing it to mean fairness in the interpretation and not the result of the interpretation. (*Mohan Mirchandani v R* [1977] HKLR 523.) The *Union Motors* case was also cited in *Pedron v Chan Suk-chu* [1980] DCLR 65 and *Attorney General v Aoki Contruction* [1981] HKLR 635.

Fittingly, we leave the final word on the significance of this New Zealand contribution to Hong Kong

Hong Kong practice

LAWYERS in Hong Kong are an affluent breed. They live in expensive flats; wear genuine "designer" watches (lesser mortals in the colony wear fakes); and drive luxury cars. Might all this be changed by a little competition?

Probably not – but lawyers are unwilling to take the risk. The Hong Kong government recently released a "consultative document" proposing that foreign law firms be allowed to set up in Hong Kong and hire local lawyers. *Pari passu*, as lawyers might say, local firms could hire foreigners. According to the government, this will "strengthen Hong Kong's position as a major international, financial and commercial centre".

Hong Kong's Law Society objects. It argues that foreign lawyers – anyone not qualified in Hong Kong or Britain will be tempted to advise on Hong Kong law despite being ignorant of it. The society also claims that prices will rise because foreign firms will offer big salaries to attract local lawyers and then pass the cost on to the consumer. This will make it hard to recruit more Chinese lawyers to government service before the colony's transfer to China in 1997.

The government replies by noting that, since 1971, foreign law firms have been allowed to operate in Hong Kong to advise on foreign law. There are now 25 such firms and 130 foreign lawyers. True, the new rules would allow them to hire local lawyers to advise on Hong Kong law – but under the disciplinary powers of the Law Society. Strict rules on the number of local partners needed to practise locally would stop foreign firms hiding behind local figureheads.

With luck the government believes all this can be made law by the autumn. If so it will be a victory not just for competition but also for three years of lobbying by American law firms, such as Coudert Brothers, which are operating in Hong Kong but cannot advise on Hong Kong law. The victory, however, may be Pyrrhic: soaring office rents in the colony are beginning to drive away the international business the government's proposals are meant to attract.

The Economist
13 May 1989

law to District Court Judge Cruden, a New Zealander, who has held that Hong Kong Courts:

> are not permitted to adopt a strict or literal interpretation of legislation. It is true that in many common law countries a Court may select from wide, varying and often conflicting canons of construction, before deciding which canon of construction to adopt and apply. While the freedom to adopt such a wide approach may give a Court an enviable flexibility, in Hong Kong Courts have to approach legislation within the [straitjacket] of section 19 . . . (in *Hsia Jone-shu v Allied International* (1981) VDCt, CJA No 7787 of 1980 as reported in Wesley-Smith supra r 12).

Hong Kong's Money Lenders Ordinance 1980 owes its form to a number of jurisdictions since its provisions were largely taken from relevant English, Australian and New Zealand legislation. (*Allcock* "The Money Lenders Ordinance" (1981) 11 HKLJ 293.) A New Zealand contribution, with no equivalent in the other jurisdictions, is a provision giving the Court a discretion to declare an agreement enforceable notwithstanding that it does not comply with certain prescribed formalities.

Section 18(3) of the Hong Kong Ordinance reads:

> Notwithstanding subsection (1), if the Court before which the enforceability of any agreement or security comes in question is satisfied that in all the circumstances it would be inequitable that any such agreement or security which does not comply with this section should be held not to be enforceable, the Court may declare that such agreement or security is enforceable to such extent and subject to such modifications or exceptions as the Court may order.

This provision comes from s 55 of New Zealand's Statutes Amendment Act 1936 which reads:

> Notwithstanding the provisions of section 7 or section 8 of the Moneylenders Amendment Act 1933, the Court, if it is satisfied that in the circumstances it would be inequitable that any moneylending transaction or contract for the repayment by a borrower of money lent to him to which either of these sections applies should be held illegal or unenforceable, as the case may be, may declare that such transaction is legal or that such contract is enforceable.

The provision has come before the Hong Kong Courts only once in a reported case. In *Brother's Company v Ah Pak Transportation* [1986] HKLR 821 Mayo J followed a line of New Zealand cases which had formulated the principles governing the exercise of the Court's discretion. The cases referred to were *Ross Cole Investment v New Fashions* [1958] NZLR 55, *Marac Finance v Virtue* [1982] 1 NZLR 586, *Adams v Paul's Properties* [1965] NZLR 161, *Birch v Shaw* [1963] NZLR 927 and *Combined Taxis v Slobbe* [1972] NZLR 354. In particular, Mayo J adopted what he described as the "very sensible" and "correct" approach of Woodhouse J in the *Adams* case and his elucidation of the matters to be weighed by the Court in the exercise of its discretion.

Ombudsman precedent

Another piece of Hong Kong legislation which owes much to its New Zealand predecessor is the very recently enacted Commissioner for Administrative Complaints Ordinance 1988, an office better known as the Ombudsman in New Zealand. The explanatory memorandum to the Bill expressly states that its provisions are derived from the New Zealand Parliamentary Commissioner (Ombudsman) Act 1962[8] and the United Kingdom Parliamentary Commissioner Act 1967.

The similarities in the New Zealand and Hong Kong legislation are apparent from any comparison of the two. It seems to the authors appropriate that the statutory framework of the office in Hong Kong should be based on that in the first Commonwealth jurisdiction to have such an office, namely New Zealand, albeit that it took Hong Kong 26 years to do so.

It would be somewhat tedious to list all the Hong Kong legislative provisions based on the skills of New Zealand drafters, but the authors are aware of many others.

Conclusion

We commenced by contrasting the diverse sources of Hong Kong case law with the New Zealand predilection for New Zealand and English authorities, and perhaps also those of our trans-Tasman neighbours.

New Zealand is one country to have made a notable contribution to the laws of Hong Kong. The converse is certainly not true, as the authors are aware of only a few reported New Zealand cases which have considered Hong Kong judgments.

Hong Kong law has been enriched by the prior elucidation of principles of law from many jurisdictions other than England. With the increasing availability, even in New Zealand, of materials and case law from other jurisdictions, it is suggested that New Zealand counsel could look further afield.

The entire territory of Hong Kong, which is no bigger than Lake Taupo, generates bizarre factual situations and an uncompromising blend of public and private law with a strong international theme. The *Hong Kong Law Reports*, especially since 1976 when a permanent Court of Appeal was established, would provide solicitors and counsel with either a criminal or a commercial or financial practice with an international flavour with a wealth of useful authority.

It is perhaps ironic that it took a Hong Kong appeal to the Privy Council in 1987[9] to be the first case in which an unreported New Zealand decision and an article in the *New Zealand Law Journal* were cited in the reported argument! □

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1 As part of the arrangements for the transfer of sovereignty from Great Britain to China in 1997, the right of appeal to the Privy Council is to be abolished. According to media reports, the new Chief Justice of Hong Kong, Sir T L Yang, who is incidentally the first Chinese to hold the office, is shortly to travel to England, Australia and New Zealand to discuss each country's potential provision of Judges for this Court.

2 The then Chief Justice of Kenya and President of the East African Court of Appeal was Sir Ronald Sinclair, another New Zealander.

3 Including *Attorney General v Yeung Sun-shun* [1987] HKLR 987 where the Court

continued on p 264

Self-defence in New Zealand

By W J Brookbanks, Faculty of Law, University of Auckland

Self-defence is a question that can often arise in cases involving charges of violence. This article examines the statutory provisions and the case law relating to this defence. It is noted that, of its nature, self-defence will usually relate to a situation where the accused will have had to make critical decisions in extreme circumstances.

Introduction

Self-defence is a statutory defence[1] in New Zealand which confers justification on a person who uses reasonable force (including fatal force) to defend himself or some other person against a perceived unlawful assault.[2] The statute provides:

> Everyone is justified in using, in the defence of himself or another, such force as in the circumstances as he believes them to be, it is reasonable to use.

Section 48 enacts, in identical wording, the recommendation of the Criminal Law Reform Committee in a Report delivered to the Minister of Justice in November 1979. (*Report on Self Defence*, Wellington 1979) The Report had recommended the enactment of a "simple comprehensive provision" that would require "no abstruse legal thought and no set words or formula to explain it". (ibid, at 8)

Essentially, the law existing prior to the 1980 amendment had proved very difficult to administer because of the complicated statutory rules requiring a distinction to be made between provoked and unprovoked assaults. There was an inherent difficulty in any set of facts in deciding who started the particular incident. In addition it was felt that Judges, faced with the varying statutory tests had an extremely difficult task explaining the defence simply to juries.[3] These difficulties have now been largely overcome by the new s 48 which, for the most part, in terms of intelligibility is an excellent model.

However, the emerging caselaw on s 48 would seem to suggest that a new set of issues may have arisen representing a challenge to the construction of the new provision. They concern the nature of the belief in the circumstances justifying force and the determination of when force is reasonable according to the accused's perception of the factual situation; and point to a possible danger that Courts may lean towards an overly subjectivist approach to the section. The cases also seem to suggest that the Courts may be favouring a "stand fast" as opposed to a "human rights" approach to self-defence with the effective elimination of the common law duty of retreat.[4] The purpose of this discussion will be to examine these issues in the light of recent cases with a view to determining whether the new provision is operating in a manner consistent with the aims of the legislature.

I Legislative intent

In introducing the Crimes Amendment Bill, it was the intention of the government of the day to simplify the law on self-defence by abolishing the distinction between provoked and unprovoked assaults and by making it clear that the defence will be applied to the circumstances as the accused believed them to be. (*New Zealand Parliamentary Debates* Vol 432, 2294 (1 August 1980) Hon J K McLay) It was observed that it would be for the jury in every case to decide whether the accused is to be believed; and that the more unreasonable his belief, the less likely his acquittal.[5] However, a suggested consequence of the new provision was that it may give juries much wider latitude than they enjoyed under the previous law. (*New Zealand Parliamentary Debates*, Vol 432, 2295 (1 August 1980) Hon G Palmer) It was suggested that juries faced with unusual fact situations (eg cases involving mantraps or spring-guns) might be amendable to being persuaded that the use of force was reasonable in the circumstances, and that a Judge might have difficulty in issuing an instruction that the jury could not arrive at that conclusion. (ibid) At the same time it was suggested that while there was public concern about the increase of violence in the community, the new s 438 allowed for greater use of violent conduct in self-defence than was permitted under the then existing law. (*New Zealand Parliamentary Debates*, Vol 434, 4525 (29 October 1980) Hon G Palmer) This important observation, however, seems to have passed without further comment even though it expresses one of the most serious concerns about the new provision.

II The elements of self-defence

Basic Questions

It is suggested that when a defence of self-defence is pleaded the basic question for the jury is: did the accused intend only to defend himself, or did he use the occasion

for the purpose of inflicting harm on someone else?[6] It follows that a negative answer to the question, in the sense of an admission by the accused that he intended to use the occasion to effect revenge will necessarily be fatal to the defence.[7] However, an intent to kill will not necessarily destroy the defence where the accused believed that he could not otherwise preserve himself and the force used was reasonable in the circumstances as he believed them to be. (See *R v Desveaux* (1985) 51 CR (3d) 173, 178)

A more difficult question is, if the circumstances justified the use of force, according to the defendant's belief, was the force used more than was necessary for the purpose of self-defence? This question goes to the heart of the self-defence issue.

It requires an examination of two separate elements within the statutory definition namely:

(1) The nature of the belief in circumstances justifying force.
(2) The nature of the force that may be reasonable granted the circumstances believed to exist.

(i) Belief in Circumstances justifying force

A cardinal principle underlying criminal responsibility is that moral obligation is determined not by the actual facts but by the actor's opinion regarding them.[8] This principle undoubtedly undergirds the statutory defence of self-defence in New Zealand.[9] In *R v Tuialli* (High Court, Auckland, 20 February 1987 (AP 310/86) Greig J) involving an appeal against conviction on a charge of assaulting a police constable, the Court held that because s 48 now requires the consideration of the subjective view of the defendant in the circumstances as he believes them to be, it must now be open to a defendant to show that he has an honest even if unreasonable, belief in the circumstances which still justify his conduct in self-defence. Thus self-defence would be available to a defendant even where there was no "actual objective threat". The Court of Appeal has given implicit approval to this approach in *R v Terewi* (1985) 1 CRNZ 623, where it was held that the term force in the context of s 48 includes not only the use of physical power but a threat to use physical power. Terewi, while in his own home, threatened to shoot two police officers whom he mistakenly thought were patrons from an hotel where he had been drinking who had come to cause trouble.

Although the point concerning the defendant's mistaken belief in a non-existent factual situation is not actually addressed by the Court, it is implicitly accepted that such a belief is not necessarily fatal to a claim of self-defence. *Terewi* was itself considered in *Tuli v Police* (1987) 2 CRNZ 638, where Williamson J held that the threatened use of a crowbar in circumstances where the appellant was concerned for his safety and that of another person, being done in self-defence was not an offence involving violence for the purposes of s 202A Crimes Act 1961. His Honour held that the District Court Judge was wrong not to have considered the circumstances applying, in the perception of the appellant, at the time the crowbar was held, and rejected the finding that the appellant carried an onus to satisfy the Court that the action he took was reasonable in the circumstances. It is clear from the caselaw and as a matter of general principle that the law provides maximum latitude for mistakes without affecting justifiability, when it allows a person to estimate the necessity for self-protective force in the circumstances as he believes them to be at the time. (See Gross, fn 6, 180.) However, granted the accused's subjective beliefs about the factual situation, the force used must be reasonable if conduct in self-defence is to be excused. What force, then, is reasonable in self-defence?

(ii) Reasonable force

If a jury is satisfied that the force used by the accused was excessive, the plea of self-defence will fail. However, as McGechan J observed in *Jenkins v Police* (1986) 2 CRNZ 196, 199 extreme circumstances may demand extreme remedies, and the requirement to use force in self-defence will usually be determined by what the actor believes to be necessary, rather than other objective criteria which might suggest that a necessitous situation has arisen.[10] Generally, the use of deadly force must meet special conditions if it is to be justified. Normally, death, serious bodily injury, kidnapping or sexual violation must be anticipated by the actor when he/she resorts to such extreme measures to protect himself. (See Gross, fn 6, 179.) However, whether there is a positive duty upon a defendant to retreat or attempt to do so, before using fatal force must now be doubted. Yet where a threat does not involve a present danger retreat or some other method may be an appropriate means of avoiding the future danger. (*R v Terewi* (1985) 1 CRNZ, 623, 625)

But, in the absence of reasonable alternatives to the use of deadly force, such force may be both appropriate and justifiable as a matter of necessity. While it is now the law that a person may only use reasonably necessary force for the purpose of self-defence, one Judge has observed that seriousness, in terms of anticipated injury is often a matter in the eye of the beholder, (*Jenkins v Police* (1986) 2 CRNZ, 198) and it may be argued that a person cannot be blamed who, in an intuitive response to threatened violence, uses a degree of force that would have been unacceptable if there had been opportunity for cool reflection and careful deliberation.

In *Jenkins v Police* (supra) throwing a milk bottle at the feet of pursuing assailants was a reasonable response to the fear of further serious assault: "It was perhaps a desperate situation and I do not see it in these particular circumstances as being unreasonable. (at 199.)[11] However, it is not difficult to appreciate the justification for self-defence in such circumstances where the force used was relatively inconsequential in relation to the threats of injury perceived by the victims of the attack.

In *Deans v Police* (unreported, High Court, Christchurch, 5 March 1987, AP 7/87, Holland J) it was held that the appellant's "pushing off" of an hotel bouncer with the result that the complainant fell through a window in the hotel, may have been no more than a reasonable response to an unlawful assault. The Court does concede, however, that if the appellant had pushed the complainant deliberately through the window, intending him to go through, then it may well be that the force used was beyond what

was reasonable.

The use of a wooden baton in an attempt to disable the victim who had been bullying and hurting the accused's daughter, was held in *R v B* (unreported, High Court, Auckland, 20 May 1987, T51/87, Smellie J) to be a reasonable use of force in defence of another despite the fact that the deceased received a severe head injury from which he died. The Court held in ordering the accused's discharge on a motion under s 347 Crimes Act 1961, that "actions are not to be weighed too finely or nicely". The deceased had a thin skull and the applicant was asthmatic and in bad health. The Court concluded that the conduct had to be judged by the circumstances that existed at the time. Allowing that actions are not to be weighed "too finely or nicely", (language clearly reminiscent of the dictum of Lord Morris in *R v Palmer*[12]) it seems that a situation of extremity may obviate any requirement for a careful balancing of the mode of response against the potential threat to the life or health of the aggressor. So where the accused was in a situation of real disadvantage, being physically handicapped and unable to retreat as was the case in *King v Police* (unreported, High Court, Dunedin, 5 August 1987, AP 11/87, Quillam J), the Court was ready to find that he was "under no obligation to choose with care the way in which he should react". There the appellant, a 17-year-old youth whose left arm was in plaster had, while seated, been grabbed by the throat by the complainant. In response he had struck the complainant in the face with a beer glass he had been holding in his free hand. The District Court Judge was not prepared to accept that the striking with the glass was justifiable and took the view that other courses were available to the appellant such as pushing the complainant away or moving out of his reach. However, Quillam J considered that self-defence was not eliminated from the evidence and ought to have been considered.

If, as it appears, s 48 gives a defendant much greater latitude in determining when and whether force is necessary in response to physical aggression or its threatened use, the question then arises as to in whose eyes must the force be deemed reasonable — the defendant or the reasonable man? — ie is the test of reasonableness of the force used essentially a subjective test with an objective element to be determined by the defendant in the context of the facts as he believes them to be or is it a purely objective test to be determined by the trier of fact?

(iii) Who determines the reasonableness of force

Section 48 requires the use of "such force as in the circumstances as [the defendant] believes them to be it is reasonable to use". At the present time in New Zealand there is a conflict of judicial authority as to in whose evaluation the force must be reasonable. The provision does not make it clear as to whether it is the accused who must believe the force to be reasonable or whether the force used must be reasonable in the eyes of other people.

The difficulty appears to centre around a passage in the recent Court of Appeal decision in *R v Robinson* (1987) 2 CRNZ 632 where McMullin J said: ". . . to act in self-defence is to act within the law if one uses such force *as one believes to be reasonable* in the circumstances as one believes them to be" (at p 7).

The statement in italics does not accurately represent the statutory wording of s 48 and seems to imply that the evaluation of what is reasonable force may be made by the defendant. Such an interpretation would appear to represent a significant departure from the traditional way in which an objective standard in penal legislation is regarded. Normally there would be no doubt that the existence of words requiring proof of reasonableness implies an external standard of liability whereby a person may be presumed to have known or intended to do something under circumstances where *any normal person* could be said to have acted intentionally. (Hall, *General Principles of Criminal Law*, 2 ed, p 155)

It represents the application of a standard of liability external to what the accused may have actually known or intended. So to impute to a defendant the right to determine what is reasonable would seem to undermine the very purpose of an objective test of liability.

Nevertheless, the test of subjective belief in reasonable force was applied in *Tuli v Police*, (1987) 2 CRNZ 638, a decision of the High Court, where Williamson J, cited the now controversial dictum of McMullin J in *Robinson*. The consequences of such a line of interpretation if accepted are disturbing. Granted that it is now open to a defendant to show that he has an honest even if unreasonable belief in the circumstances which justify his conduct in self-defence (See *Tuialli v Police* unreported, High Court, Auckland, 20 February 1987 (AP 310/86) Greig J) the interpretation of s 48 contended for would mean that a defendant could unreasonably believe that the force he used to repel an assault was reasonable and yet be justified.

However, such an approach to s 48 is unwarranted and in the writer's view is inconsistent with the purpose of the legislation. Furthermore, not all Judges agree with the proffered interpretation. In *R v Murray* (unreported, High Court, Wellington, 21 October 1987, T20/87) an oral ruling in a prosecution for murder, Eichelbaum J was invited by defence counsel, relying on the *Robinson* dictum, to decide the issue of reasonable force on a subjective basis. In rejecting this argument, which His Honour suggested was attributable to a "slip of language" in the way the matter had originally been expressed, Eichelbaum J stated:

> It would be a startling, not to say dangerous proposition that the assessment of reasonable force was left subjectively to each individual accused. I propose to adhere to the view which so far as I am aware has consistently been followed by Judges of this Court in directing juries on s 48 namely that while the circumstances are to be taken as those perceived by the accused, the question of the reasonableness of the force used has to be determined on the basis that it is for the jury to make an assessment, *on an objective footing*, of what is reasonable in the particular circumstances which it decides the accused believed to exist (at p 4).

This analysis is, it is submitted, preferable to that contended for by counsel in *Murray's* case and is

consistent with the approach suggested by the Criminal Law Reform Committee. (*Report on Self Defence*, p 9) The Committee said:

> . . . the jury having determined what the accused believed the circumstances to be, must decide whether the force used was no more than was necessary having regard to those circumstances. *That is a matter for the jury to decide and does not depend upon what the accused thought was necessary. It is an independent assessment to be made by the jury.* (ibid, p 9. Emphasis added.)

The matter may now be regarded as settled following the decision of the Court of Appeal in *R v Ranger*.[13] In a judgment delivered by Cooke P, the Court made the following statement concerning the interpretation of s 48.

> The first part of that section poses a subjective question and, when the accused herself explicitly testified that she believed the circumstances to be that he was going to kill her and her children, it would be a strong step for a Judge to say that that claim was so implausible that no reasonable jury could accept it. And once it is accepted that a reasonable jury could at least entertain a reasonable doubt about the state of mind of the accused, then that becomes material under the second and objective limb of the section, which requires consideration of whether the force used was reasonable in the circumstances *as the accused believed them to be*. If this accused did really think that the lives of herself and her son were in peril because the deceased. . . . might attempt to shoot them with a rifle near at hand, then it would be going too far, we think, to say that the jury could not entertain a reasonable doubt as to whether a pre-emptive strike with a knife would be reasonable force in all the circumstances.

It is submitted that this passage correctly states the test to be applied under s 48 and makes it clear that the question of the reasonableness of the force used is a matter to be determined by the tribunal of fact in the light of the accused's actual beliefs regarding the circumstances in which force is used.

The Emergence of a Stand fast Ethic

While it may be generally accepted that a threat which does not involve a present danger can normally be answered by retreating or some other method of avoiding the future danger (*R v Terewi* (1985) 1 CRNZ 623, 625), retreat is no longer a legal requirement of justifiable self-defence. At most it is an evidential matter for the jury to consider when considering the reasonableness of the defendant's conduct. (*R v Howe* (1958) 100 CLR 448 at 463, cited in *R v Fraser* (1980) 19 CR (3d) 193, 203) An exemplary jury direction would include a statement that ease of escape is only one of the matters which the jury has to consider when coming to the conclusion whether or not the actions of the appellant were reasonable in the circumstances. (*R v Whyte* [1987] 3 All ER 416, 419) While there is no rule of law that a person attacked is bound to run away if he can, to stand and fight may be to use unreasonable force if the only reasonable course is to retreat. (Smith & Hogan, *Criminal Law*, 6ed, p 244) In *Dixon v Police* (unreported, High Court, Palmerston North, 13 February 1986, AP 5/80, Jeffries J, noted in *NZ Recent Law* 233) retreat was held not to be a reasonable course. The appellant, while standing in the doorway of his house, was confronted by the complainant swinging a heavy electric flex at him. After he had swung at the appellant twice, the latter struck the complainant with a knife with which he had armed himself inflicting an injury requiring 13 stitches. Jeffries J held that the appellant did believe he was acting in defence of himself and was justified in using force.

> He was faced with a situation where the person had a weapon and was in an aggressive, hostile mood, and before he delivered his blow one had been cast at him although. . . . it did not hit him.

This finding, however, seems to beg the question as to whether the confrontation and defensive attack might not have been avoided altogether by the simple expedient of withdrawing from the threshold and closing the door. The possibility is not discussed in the judgment.

In *Jenkins v Police* (1986) 2 CRNZ 196 the throwing of a milk bottle at the feet of the assailants in circumstances in which the appellant was actually advancing while attempting to relieve his girlfriend from a frightening situation, was held to be "the reasonable and . . . only thing open to him". The appellant's actions, forced the retreat of the assailants. (at 199) Similarly in *King v Police* retreat was not required although it was evidently an option that was available to the defendant.

To stand fast may, it seems, in some cases justify the use of very violent measures to defend against a perceived unlawful assault. Such was the case in *R v Osten* (unreported, High Court, Wellington, 27 October 1987, Tho 17/87, Quilliam J) where the accused had been charged under the Crimes Act with assaulting a police officer. In the course of what the accused believed to be an unlawful detention by the police he punched one officer in the face and in the course of an ensuing struggle, struck the same officer in the face several times with a ball point pen, inflicting injuries, before being subdued and handcuffed. The Court accepted a submission on behalf of the accused that at the time of the alleged assault the detectives were not acting lawfully in the execution of their duty and could therefore defend his actions on the basis of self-defence, defence of moveable property against a trespasser (s 52 Crimes Act 1961) and the common law right to resist unlawful detention and false imprisonment preserved by s 20 of the Crimes Act.[14] Quilliam J concluded that having regard to the fact that the situation from which the danger arose originated from the accused's reaction to unlawful actions by the police officer, he should not be too harshly judged in what he did. The Court held that the force used by the accused was not unreasonable, in all the circumstances. On one view this is a surprising result particularly granted the nature of the injuries inflicted and tends to confirm the observation of Dr Palmer that the new s 48 allows for a greater use of

violent conduct in self-defence than was previously permitted. (432 *NZ Parliamentary Debates*, 2295) Furthermore, it may seem to encourage defendants who believe that they have been unlawfully detained or arrested to use force in resisting the mistakenly wrongful procedure whether or not the arrest is lawful. However, mistaken belief that an arrest is unlawful will generally be held to be irrelevant and the fact that an accused mistakenly defends himself against a legitimate police action, may be characterised as a mistake of penal law, and no defence to a criminal charge. (See s 25 Crimes Act 1961 and see also *Tuialli v Police*, supra 8-9.) Where a constable is acting lawfully in the execution of his duty the actions of a defendant will not be justified whatever their belief might be, whether reasonably grounded or not, and whether mistaken or not. (*R v Fennell* [1971] 1 QB 428; *Albert v Lavin* [1982] AC 546)

Nevertheless, as the decision in *Osten* illustrates, this principle does not derogate from a defendant's right to defend himself against unlawful police or other official actions and, it seems, to use serious violence in the process![15]

Conclusion

Self-defence, by its nature, dictates that a person who purports to act under its shield may be required to make critical decisions in situations of extremity. Human analysis and perception in such situations is often flawed and mistakes are made. According to one commentator the most frequent situation of the recognised defence of mistake of fact concerns apparently necessary self-defence. (Hall, *General Principles of Criminal Law*, at 364) It is appropriate, therefore that any codification of the self-defence doctrine should make due allowance for this fact. However, whereas mistakes are a uniquely human and common response to events in the real world, the law cannot for social policy reasons allow an individual's subjective and mistaken perception of a factual situation to be substituted for what that situation is in fact without any qualification, where the lives or health of other persons may be jeopardised by such mistake. Hence the legal requirement that force used in self-defence be reasonable according to the circumstances believed by the accused to exist. It follows that not the accused, but the ordinary, prudent person in his shoes should decide whether his response to a perceived threat is reasonable or not. Yet at present the law appears uncertain as to whether it can assent to such a proposition.

Nevertheless, the requirement for reasonableness attaching to the force used in self-defence is an important safeguard of the individual's right to freedom from unwarranted assault in a context where there is always danger that a person may strike first and ask questions later. Similarly, the implicit encouragement by the Courts of a stand fast ethic may ultimately mean that personal violence is sometimes justified when, in reality, it was never called for. □

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1 See 48 Crimes Act 1961 as amended by s 2(1) Crimes Amendment Act 1980 Clause 41 of the Crimes Bill re-enacts without substantive amendment the existing s 48.

2 In England the term private defence is used to denote the permissible use of reasonable force for the defence of the person. It is a general defence which is still regulated by the common law.

3 "We feel sure that many juries must find the varying tests and distinctions laid down by s 48(1), s 48(2) and s 49 quite incomprehensible. . . ." *R v Kerr* [1976] 1 NZLR 335, 344 per Richmond J.

4 The "human rights" approach aims at the maximum protection for every life, the minimisation of violence and the suppression of private warfare whereas the "stand fast" approach aims at maximising protection for the rights and liberties of the law abiding citizen. See Ashworth, "Self defence and the Right to Life" [1975] CLJ 282, 290.

5 The confident view was expressed that although the new test was simple and essentially subjective, there was no doubt that only when the defence was justified by the facts would it be allowed past a jury. *NZPD* Vol 434, 4525 (29 Oct 1980) 2nd reading Hon J K McLay.

6 *Report on Self-defence*, 1979 9. "Protection against the use of unlawful force by such other person on the present occasion must be the purpose". Gross, *A Theory of Criminal Justice* OUP New York, 1979, 178.

7 *R v Driscoll* (1841) C & M 214. cf "If the defendant is proved to have been attacking or retaliating or revenging himself, then he was not truly acting in self-defence". *R v Bird* (1985) 18 Cr App R 110, 114.

8 J Hall, *General Principles of Criminal Law*, 2 ed 1960, p 363. But cf *R v O'Grady* [1987] 3 WLR 321. Held, as far as self-defence was concerned reliance could not be placed on a mistake of fact induced by involuntary intoxication.

9 "The general principle in the criminal law is that liability should depend upon what the accused believed, and not on what the hypothetical reasonable man would have believed in the same circumstances". *NZPD*, Vol 432, 2294 (1 Aug 1980) Hon J K McLay.

10 Eg a defendant being told by a third party that he is about to be grievously assaulted by an assailant not then visible to him.

11 cf *R v Houlahan* (unreported, Court of Appeal, 13 April 1987 (CA 301/86) McMullin J, Somers J, Bisson J, where the Court held that striking the complainant with a wooden batten and a knife to repel alleged homosexual attacks went "far beyond" the use of reasonable force.

12 [1971] AC 814; [1971] 1 All ER 1077. "If there has been attack so that defence is reasonably necessary it will be recognised that a person defending himself cannot weigh to a nicety the exact measure of his necessary defensive action". Ibid; 832; 1088.

13 Unreported Court of Appeal, 2 Nov 1988 (CA 140/88). The judgment also re-affirms the proposition in *R v Tavete* (1987) 2 CRNZ 579 to the effect that even where counsel has expressly disavowed self-defence in the course of a trial, the defence should be put to the jury where there is a credible narrative which might lead a jury to entertain a reasonable possibility of self-defence.

14 The Court considered *Kenlin v Gardiner* [1967] 2 QB 510, 519, and *Williams v Police* [1981] 1 NZLR 108, 111, which are authority for the proposition that where a person is unlawfully detained the use of reasonable force is justified in self-defence.

15 See also *Beaton v Police* unreported, High Court, Invercargill. 27 May 1988 (AP 14/88) Holland J held that the appellant's raising a baseball bat above his head to force the departure of police officers from his house, when they did not have "reasonable cause to believe. . ." (s 317(1) Crimes Act) was justified as reasonable force by way of self-defence to unlawful assault by police officer.

Correction

Owing to a transcription error, the name of the firm in which Mr Justice Fraser had been a partner in Invercargill was wrongly given at [1989] NZLJ 205 as Hanan Harper & Co. The correct name of the firm, as readers will have realised is Hanan Arthur & Co. Any embarrassment to the Judge or the partners is very much regretted.

Alternate directors

By G Williams, Lecturer in Law, University of Auckland

This article suggests there is real value for a company in having alternate directors. The question then would be if alternates are acting, should they make their own decisions or merely act as agent for the directors appointing him or her. The author recommends that this question of alternate directors be considered in the forthcoming revision of company legislation.

It is sometimes advantageous for a company to provide for the appointment of alternate directors, for example, to comply with the quorum requirements in the absence of regular directors. The subject of alternate directors is one on which there exists little guidance either in the form of case law or statutory provision, Table A in the Third Schedule to the Companies Act 1955 being mute on the subject. Since a company is not entitled to have alternate directors unless the articles so provide, it is left to those drafting the articles of the company to make the necessary provision.

A common form of such an article is found in the Australian Companies Act 1981[1] Regulation 72 of Table A in the Third Schedule to the Act reads as follows:

72 (1) A director may, with the approval of the other directors, appoint a person (whether a member of the company or not) to be an alternate director in his place during such period as he thinks fit.

(2) An alternate director is entitled to notice of meetings of the directors and, if the appointor is not present at such a meeting, is entitled to attend and vote in his stead.

(3) An alternate director may exercise any powers that the appointor may exercise and the exercise of any such power by the alternate director shall be deemed to be the exercise of the power of the appointor.

(4) An alternate director is not required to have any share qualifications.

(5) The appointment of an alternate director may be terminated at any time by the appointor notwithstanding that the period of the appointment of the alternate director has not expired, and terminates in any event if the appointor vacates office as a director.

(6) An appointment, or the termination of an appointment, of an alternate director shall be effected by a notice in writing signed by the director who makes or made the appointment and served on the company.

Unfortunately this form of article makes it unclear whether the alternate director is merely an agent of his appointor or a director in his or her own right.

In *Markwell Brothers Pty Ltd v C P N Diesels Pty Ltd* (1983) 7 ACLR 425, it was suggested that unless the articles of association otherwise provide, an alternate director is in the eyes of the law, in the same position as any ordinary director. (at 425 and 433) If this conclusion is correct it would follow that the alternate director must be a director in his own right.

Agent or principal?

The importance of establishing whether an alternate director is acting as an agent of his appointor or independently in his own right is illustrated by the circumstance where the articles of association disqualify the regular director from voting on a matter in which he is interested. In such instances is the alternate appointee likewise disqualified from voting, even though he has no interest in the matter? This question was one of the matters for determination in the recently reported Australian decision *Anaray Pty Ltd v Sydney Futures Exchange Ltd* (1988) 6 ACLC 271. Here a challenge was made against a resolution passed by the board of directors of the Exchange. The articles of association of the company contained several provisions prohibiting directors from voting on matters in which they possessed an interest. The directors' meeting in question was attended by seven directors, five of whom were prohibited from voting. Of the two remaining directors, both of whom voted in favour of the resolution, one was an alternate director for a director who would have himself been disqualified from voting on the resolution. One of the arguments put forward challenging the validity of the resolution was that the alternate director was acting only as agent of the appointing director and was thus bound by the prohibition imposed upon his appointor.

The Court rejected this argument and considered that the alternate director was not precluded from voting, on the grounds that unless the articles provided otherwise, the alternate director was a director in his own right. It is submitted that such a conclusion is a commercially sensible one, but the case raises the issue whether this area of law should be regulated by statutory provision.

Need for statutory recognition

The Law Commission in its Company Law discussion paper (para 182 at p 51) asked whether there is a need for statutory recognition of the position of the alternate director, either in the Act itself or in the Table of articles accompanying the Act. One would suggest that there is clearly such a need.

Some guidance on this matter can be found in the Companies Act 1985 (UK). There the accompanying regulations to the Act (The Companies (Tables A-F)

Regulations 1985) provide in Table A, articles 65-69, provisions governing alternate directors. Of particular interest is article 69 which reads:

> Save as otherwise provided in the articles, an alternate director shall be deemed for all purposes to be a director and shall alone be responsible for his own acts and defaults and he shall not be deemed to be the agent of the director appointing him.[2]

It is to be hoped that the forthcoming revision of company legislation includes similar provisions. □

Refer also to the South African Companies Act, No 61 of 1973, Schedule 1, Table A, articles 57-58. Articles 65-68 read as follows:

(65) Any director (other than an alternate director) may appoint any other director, or any other person approved by resolution of the directors and willing to act, to be an alternate director and may remove from office an alternate director so appointed by him.

(66) An alternate director shall be entitled to receive notice of all meetings of directors and of all meetings of committees of directors of which his appointor is a member, to attend and vote at any such meeting at which the director appointing him is not personally present, and generally to perform all the functions of his appointor as a director in his absence but shall not be entitled to receive any remuneration from the company for his services as an alternate director. But it shall not be necessary to give notice of such a meeting to an alternate director who is absent from the United Kingdom.

(67) An alternate director shall cease to be an alternate director if his appointor ceases to be a director; but, if a director retires by rotation or otherwise but is re-appointed or deemed to have been re-appointed at the meeting at which he retires, any appointment of an alternate director made by him which was in force immediately prior to his retirement shall continue after his re-appointment.

(68) Any appointment or removal of an alternate director shall be by notice to the company signed by the director making or revoking the appointment or in any other manner approved by the directors.

Motor Vehicle Securities — A Correction

In my article "Motor Vehicle Securities: The Quagmire Deepens" [1989] NZLJ 211, I said (at p 215) that a mortgage or charge granted by a company in respect of a motor vehicle which is not registered under the Companies Act 1955 will be void under s 103 against the liquidator and any creditor of the company, regardless of whether it is registered under the Motor Vehicle Securities Act. This statement overlooked that s 103 does not avoid charges that are registrable under any other Act; see, eg, *Re Universal Management Ltd* [1983] NZLR 462. Since mortgages and charges (other than floating charges) in respect of motor vehicles are registrable under the Motor Vehicle Securities Act, the above exception to avoidance under s 103 seems to apply. The general position therefore is as follows. First, company mortgages and charges in respect of motor vehicles will continue to be registrable under the Companies Act but only floating charges will be avoided for non-registration. Secondly, since the priority rules in Part III of the Motor Vehicle Securities Act do not apply to competing company mortgages and charges (s 45) priority between such securities will be governed by ordinary rules of common law and equity; broadly speaking, the first in time of creation prevails except that an equitable interest is liable to be defeated by a later legal interest taken for value and without notice. Thirdly, registration under the Companies Act may nevertheless affect the outcome of a priority dispute since such registration gives constructive notice (Motor Vehicle Securities Act, s 61). The quagmire is even deeper than I had imagined!

D W McLauchlan

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of Appeal followed the judgment of Richardson J in the then unreported case of *R v Johnston* CA 49/86 concerning the offence of conspiracy (now reported in [1986] 2 CRNZ 289).

4 Miners "Disallowance and the Administrative Review of Hong Kong Legislation by the Colonial Office 1844-1947" (1988) 18 HKLJ 218. The Colonial Office found 13 objections including giving the Court jurisdiction over British subjects in China and authorising the Court to punish Chinese offenders according to the laws of China.

5 New Zealand's first Supreme Court Ordinance, passed by the Legislative Council in December 1841 was disallowed by the Queen on the advice on the Colonial Office, eight objections having been noted by the Secretary of State. The disallowance was to become effective three months after receipt of the despatch, which reached the seat of Government in September 1843 (the facsimile was then unknown and despatches between Great Britain and New Zealand took a minimum of four months from the Secretary of State's desk to that of the Governor). A new Supreme Court Ordinance was enacted in New Zealand in January 1844. This met the defects of the old one, though New Zealand did not quite get it right as the Governor was advised by the Colonial Office to "propose to the local Legislature the repeal of clauses 6 and 7 of the Ordinance as the indispensable condition of the confirmation of it by Her Majesty"; see Cornford "The Administration of Justice in New Zealand" 4 NZULR 120.

6 Wesley-Smith "Literal or Liberal? The Notorious Section 19" (1982) 12 HKLJ 203. While this provision's genesis is attributed to New Zealand, it apparently originated in Canada. Section 5(j), which first appeared in New Zealand in 1888, was taken from the Canada Revised Acts 1886 C1; see Burrows "The Cardinal Rule of Statutory Interpretation in New Zealand" 3 NZULR 253.

7 Wesley-Smith idem pp 203-204 and the cases cited therein. According to Professor Burrows, the most commonly held view in New Zealand is that the section is a statutory enactment of the common law "mischief" rule; see Burrows supra n 12.

8 The reference to the old Act is surprising given that it was superseded in 1975.

9 *Attorney-General of Hong Kong v Yip Kai-foon* [1988] AC 642, 645D, 647B citing *Devereaux v Police* unreported, 11 July, 1967 Macarthur J and Sir Francis Adams "Recent Possession" [1967] NZLJ 495-497 respectively.