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Electoral reform

The people have spoken. Or as some might say they have shouted or even screamed. But the question, the nagging question remains about whether the extraordinary majority of seats in Parliament attained by the National Party can really be said to represent that indefinable entity that Rousseau invented, the General Will. Since this editorial is being written on the day after the election it will use the election night figures which are adequate for the purpose even though the final result might differ by a percentage point or two and even by a seat or two in the final result.

What happened to give the National Party 68 out of 97 seats in the House of Representatives? The National Party got 48.7% of the popular vote, and considerably less than that of the total electorate if the non-voters are also allowed for – eg Sir Robert Jones who said on television on election night that he did not vote because he considered he could not vote now for the Labour Party, but he could not vote against them either.

The result is absurd. Sixty-eight seats out of 97, that is 70% of the seats with only 48.7% of the votes. Our electoral system is shown up as being completely unreal to the point of becoming a farce. A system has to be found to improve it. On a true reflection of the popular vote the party make-up of the House should be something like 48 National Party Members, 35 Labour Party Members, 8 Green Party Members and 6 New Labour Party Members. That is how the electorate voted, but clearly it was not the result the electorate achieved. These figures should give cause for pause to those advocating a simple proportional representation system. It is hard to see how any coalition could be achieved in this way so as to form a reasonably effective working executive. Indeed it would be unworkable and basically unstable.

A Run-off system

There is, I would suggest, one relatively simple measure that would at least produce a more rational result, and it is one that is used in other countries, such as France, and in New Zealand between 1908 and 1913 (see the Second Ballot Act 1908). Anyone who gets 50% of the popular vote in an electorate becomes the member for that electorate. If no one gets 50% then there should be a run-off election, 7 or 10 days later, between the two highest candidates. In other words no one can be elected unless they get 50% of the votes cast. Allowing for presumed left-of-centre support for the Green Party and the New Labour Party it is probable that this would have produced a startlingly different result to the one we now have. The result of a first round might also have a balancing effect on the second round. A run-off election would achieve a working majority in Parliament and also ensure that the majority of electors would have the last word in determining who would represent them and which party would be the dominant one in the House of Representatives.

The reform suggested is simple and practical. It is not one however that the National Party is likely to favour at present for understandable reasons. There are two necessary corollaries to such a reform however, if it is ever instituted. In the first place the absurd New Zealand system of special votes being allowed to come in over the two weeks following the election should be abolished. There was a reason for it in the days of the horse and buggy. But with modern communications and transport anyone wanting to vote out of their electorate should have to vote by such a date that their votes can be in the hands of the Returning Officer *on election day itself*. Secondly only those who voted the first time should be eligible to vote in the run-off. There is no more difficulty about policing that than there is currently in checking to ensure that the same person does not vote at two different polling booths on election day.

A Second Chamber

Even those who have to cast a second vote for their second preference in a run-off should still have the chance to get a voice that they wanted in the running of the affairs of the country. A Second Chamber elected in whole or in part on a proportional representation basis would enable this to happen.

In the editorial in the last issue at [1990] NZLJ 341 an argument was put forward of the need for a Second Chamber, but with an important proviso. As was emphasised then it is a mistake to talk of the need for a Second Chamber without simultaneously considering the practical issues of membership and powers, of who should be in it and what it should do. In this editorial it is proposed to consider the question of membership, and in the December issue the subject of powers. Both questions, of membership and powers, need to be considered in terms of the New Zealand political situation and social ethos. What is done in other countries is of interest and may be of assistance, but we should be prepared to work out our own indigenous constitutional arrangements to meet our own circumstances.

It will be suggested that the powers of the Second Chamber should be real but limited. A Second Chamber that is merely a debating club is a pointless extravagance. And one that is cumbersome and has the ability to halt, (and not just delay) the process of government is not only

valueless but undesirable. But first it is necessary to consider the composition of a proposed Second Chamber.

The suggestion is that it should be elected or selected in two different ways. The first should be to provide proportional representation of the parties that do reasonably well in the first round of the electoral process as described above. The second group should be representatives of the various major interest groups in the community. Interest groups are not to be identified with pressure groups, although at some times for some purposes they may be both.

The need for the electoral system somehow to reflect the significant political groupings in the country through a system of proportional representation is obvious if there is to be a proper constitutional arrangement. It is suggested that there should be 50 or so seats in the Second Chamber to be filled on a proportional basis. There should be a minimum of the popular vote that has to be obtained on the first ballot — say 4%. Seats should be allocated on the basis of three seats for every party gaining the minimum, and one seat for every complete 2% thereafter.

On this basis the result of the 1990 General Election would mean that the party representation in the Second Chamber would be National 25, Labour 18, Green 4, and New Labour 3.

By chance that amounts to exactly 50 members. Normally however it could be expected to be one or two seats on either side of that depending on what other minor parties there were and how the votes were distributed. The purpose in giving an extra member to every party getting over the magical 4% is to ensure that the minor parties have a reasonable representation with a minimum of three members. It would also give a slight, a very slight, weighting in representation to the minor parties to ensure that their representatives would have a voice that would be heard. Just one or two members is inadequate. An alternative to ensure there is a minimum of three members for a party, is to raise the percentage required for representation to 6%; but that seems to be too high if the purpose is to get a reasonably representative Second Chamber.

The Royal Commission on the Electoral System recommended a threshold of 4%. In paragraph 2.190 of its Report this 4% threshold is justified as being low enough to provide a reasonable chance for small parties to gain representation, but being high enough to discourage the proliferation of minor or extremist groups. In Germany the minimum percentage is 5%, and in some countries it is as high as 7%. Whatever percentage is chosen will inevitably be somewhat arbitrary, but in a country of the size of New Zealand, and with our social attitudes and expectations (which comparatively speaking still have an egalitarian complexion), the lowest workable threshold would seem to be desirable. Last month at [1990] NZLJ 342 a 6% threshold was suggested, but perhaps the suggestion made in this editorial of a 4% threshold providing three members is preferable for our circumstances.

Who then is to be selected? Obviously if they are to be proportionally representative of the parties they should not be directly elected to the Second Chamber. They can be nominated by the parties themselves on a list in order of priority. This would mean that the populace at large would have no choice in the selection. This is not satisfactory.

An alternative method would be for those to become the members whom the electorate at large has expressed some confidence in, even though they might not actually have won election to the House of Representatives. As was pointed out in the previous editorial, in 1987 the unsuccessful National Party candidate for Yaldhurst got 8338 votes while the successful Labour candidates for West Coast and Wanganui got 7033 and 7007 votes respectively. In 1990, on the preliminary result, other examples are available. The losing Labour candidate for Lyttelton got 1569 votes more than the winning National candidate for Heretaunga; and the winning Labour candidate for Island Bay got 1510 fewer than the losing National candidate for Yaldhurst. Special votes will no doubt alter these figures but the point is clear. Some candidates get elected with substantially fewer votes than candidates who are not successful in winning a seat. In this sense it is not fair to say that the "losers" have been rejected by the electorate. In fact they have been strongly

The suggestion is therefore that the order of priority for selection for the Second Chamber should be determined by the order of public preference by voting strength within each party on the first ballot for those who did not obtain a seat. Among other incidental benefits under this scheme, if it had been in operation at present, a substantial number, if not all of the former Labour Cabinet Ministers who lost their seats would become Members of the Second Chamber. Their knowledge and experience would thus still be of benefit to the country although their power and influence would be reduced, both because they would be in a minority and because of the restricted powers of any Second Chamber. At earlier elections, in 1984 for instance, the same principle would have applied to some National Party Cabinet Ministers.

Another, and incidental benefit would be that standing in a marginal seat would be a worth-while activity. It is the losers in marginal seats who will be the ones to become members of the Second Chamber. They will inevitably get a higher number of votes than someone who is defeated in a safe seat for the opposing party. If Mr Luxton has a majority of 9,000 for instance, his Labour opponent is less likely to have a high number of votes by comparison with, say, Annette King who got 8405 votes and still was beaten by 636 votes. The irony for Annette King is that she had 2032 votes more than the successful Labour candidate in Manurewa. People like her who have been supported by such a large number of electors should continue to have a political career.

It can be said that the two major parties are in fact coalitions of conflicting factions held together by the attraction of sharing power. The Labour Party is a coalition of conflicting ideologies (right, left and centre); the National Party is a coalition of conflicting interests (farmers, manufacturers, and business people). Consequently the possibility and the need to effect compromises within the political system is one that already operates. Single issue pressure groups are consequently often disappointed; and the politicians get a bad name as being unprincipled when what they are doing is performing their necessary function of adjusting competing interests and convictions. Court decisions are different in that normally one party wins and one loses. For a comment on the difference in this regard between the political process and the legal process readers are referred to the editorial on "Absolutes" at [1990] NZLJ

185 with quotations from the American scholar Fred Siegel. One of these quotations reads in part:

> Democratic politics ideally revolve around the compromises needed to secure widespread consent for government actions. Representative government, which encourages citizen participation, leaves the losers in a political context with part of what they asked for or at least a feeling that their interests were considered.

It is accordingly appropriate that the machinery of the political system should reflect both ideological differences and conflicting interests. To some extent the political parties claim to represent different philosophical or ideological views — the distinction of the so-called right and left. We do not presently provide however for the major interest groups in the community to be given an active political role, and therefore imposing on them the need to achieve a wider awareness of responsibility for the general welfare.

It is suggested accordingly that the Second Chamber should be so structured that the major interest groups of the community could be directly represented. There could be endless arguments about what these groups are. However not every group can be represented and the suggestions that follow, while not entirely arbitrary, do not pretend to make everyone happy. Why lawyers, but not accountants for instance? The reason for that distinction is simply that accountancy is essentially a part of commercial activity while the law has a distinct constitutional significance. There is a difference in principle even if often the two activities of accountants and lawyers will overlap.

The people selected should serve for three terms since the electorate has now voted so strongly for three year Parliamentary terms. The individuals concerned would not be eligible for re-appointment, and consequently once appointed they would be free to exercise their judgment on particular issues as they saw fit without fear or favour. One in every three appointed would retire at the end of each Parliamentary term. The appointing body would nominate in the first instance who was to serve for only three years, who for six years and who for the full nine years. Their replacements would all of course serve for the full three terms. This would provide a substantial group of experienced members and at the same time a continuous infusion of new blood.

No interest group would have less than three members. If a member died or retired someone would be appointed for the balance of that person's term, but could not then be re-appointed. Suitable provision for pensions would need to be worked out, taking into account that any particular Parliamentary term might be shortened by the calling of a snap election, although in my own view that power should be abolished.

Organisations or groups with the power to elect or select members should be left to devise their own machinery for doing so. The system in each case should be fixed, and registered in some way, and then only be able to be amended by resolution of the Second Chamber itself. Otherwise the possible conflicts over rules and regulations within the electing groups and organisations could become very destructive. No organisation should be able to elect a member who is or has been within the previous two years an office holder or official, whether paid or honorary, of that organisation. Nor could they be so involved while members of the Second Chamber. The reason is that the individuals are being elected because of their knowledge and experience in a particular area, but once elected they will have reponsibilities to the community at large, and must not merely be puppets of outside groups. The present Parliamentary Standing Orders cover this point, although perhaps not strictly enough.

The interest groups that it seems should be represented, even if in some cases structures would have to be created, are listed below with a suggested number of seats. To get into an argument about whether there are more citizens in this group than in that group, and whether this organisation is more important than that organisation, and therefore the numbers should be different is to miss the point. All of those elected should be there not as delegates from a pressure group, but rather as people with experience in various areas that would give them a particular perspective from which to see national issues. That there has to be some weighting for say Maoris and trade unions seems obvious if those groups are not at best to feel slighted, and at worst to refuse to take part.

The suggested list is:

3 seats for farmers
3 seats for manufacturers
3 seats for commerce
9 seats for trade unions
3 seats for the legal profession
3 seats for the medical profession
9 seats for Maoris
6 seats for women
3 seats for the Universities
3 seats for arts organisations
3 seats for sports organisations

This makes a total of 48 seats that would be filled by interest groups, and thus balancing with a seat or two either way, those who would represent political parties on a proportional representation system. The total membership would therefore be about 100 members being 50 or so on a proportional representation system and 40 selected by interest groups. Once elected the Members of the Second Chamber would of course be equal and care should be taken even over such a small matter as the seating order by drawing lots each session, and having to speak from a rostrum instead of from their own place in the Chamber, to avoid divisive and unnecessarily rigid demarcation lines being drawn. Splitting into groups and factions for various purposes, particularly with the political parties being involved, is inevitable. It is not a matter there is any point in being unduly concerned about. Some individuals will go their own way, and others will club together, some will seek to do deals and others will be highly moralistic. In simple words they will be human.

This suggested composition of a Second Chamber would at the very least provide for the possibility of reflecting the community more adequately than is possible with our present first-past-the-post, single member constituencies for a uni-cameral Parliament. The electors would rightly feel that their vote was not wasted just because they did not live in a marginal electorate or only supported one of the two main parties. Politics would be enlivened and be seen to be more responsive to the main currents of thought and feeling in the community.

P J Downey

Case and Comment

Confirmatory promises and consideration

In *Williams v Roffey Bros & Nicholls (Contractors) Limited* [1990] 1 All ER 512, inter alia, the Court of Appeal found that a promise to perform an existing contractual duty (which I will call a confirmatory promise) provided consideration for a promise of extra payment by the other party to the contract. (This was not the only issue raised in the case but it is the only issue with which I wish to deal.)

The defendants were building contractors who had subcontracted carpentry work to the plaintiff for £20,000. However, the plaintiff was in financial difficulty because he had agreed to do the job for too low a price and because he had failed to supervise his workers adequately. The plaintiff had received over 80% of the subcontract price but had substantially more than 20% of the work to complete. The defendants were at risk because they were liable under a penalty clause in the main contract if work was not completed on time. Accordingly, it called a meeting with the plaintiff at which it agreed to pay an extra £10,300. This was to be paid at the rate of £575 per flat on completion. While the plaintiff continued to work and completed eight further flats, the defendants only made one further payment of £1,500. The plaintiff stopped work and brought an action claiming £10,847. The defendants asserted that its promise to pay the extra funds was unenforceable because there was no consideration to support it. The Court of Appeal disagreed.

No doubt, the defendants thought that they had a good defence based on *Stilk v Myrick* (1809) 2 Camp 317. While there has been some academic support for the idea that confirmatory promises should be contractually enforceable (in at least some circumstances), traditional contract theory had generally prevailed.

However, while the Court of Appeal accepted *Stilk v Myrick* (supra) as being good law, each member of the Court managed to find some consideration for the defendants' promise. (Glidewell and Purchas LJJ briefly adverted to the possibility that an argument based on promissory estoppel may have won the day for the plaintiff but an estoppel argument was not pressed before the Court.)

It would appear that Glidewell LJ accepted counsel's submissions for the plaintiff that the defendants derived a number of factual benefits as a result of the plaintiff's confirmatory promise. The benefits conferred were that (i) the plaintiff would not stop work in breach of the subcontract, (ii) the defendants would thus avoid the imposition of a penalty for delay under the Head Contract; and (iii) the defendants would not have to go to the trouble and expense of engaging a replacement subcontractor. In support of these propositions, Glidewell LJ referred to *Chitty on Contracts* (see now 26 ed, 1989, para 183) for the proposition that consideration may be said to move from the promisee if the promisee confers a benefit on the promisor without necessarily suffering any detriment.

Though Purchas LJ recognised that, under normal circumstances, any suggestion that a contracting party could rely on his own breach to establish consideration is "distinctly unattractive", he considered (not without hesitation) that there was a commercial advantage to both sides from a pragmatic point of view in that as a result of the defendants' promise to pay extra, the plaintiff would be able to continue its work and the defendants would not be placed in breach of the Head Contract. Purchas LJ also considered that there would be sufficient consideration if a confirmatory promisor conferred benefits on the other party even though the promisor might not suffer any detriment. (As an interesting aside, it should be noted that whilst Purchas LJ cited the passage in *Chitty* referred to above, he doubted that the case referred to by *Chitty* in support of the proposition was good authority).

Russell LJ pointed to a number of advantages which he considered were conferred on the defendants as a result of the plaintiff's confirmatory promise. In particular, the fact that the defendants would not need to employ a replacement subcontractor and to a more formal method of payment which replaced what had previously been a haphazard method of payment.

Glidewell LJ relied in particular upon the judgments of Morris and Parker LJJ in *Ward v Byham* [1956] 2 All ER 318, Hodgson and Morris LJJ in *Williams v Williams* [1957] 1 All ER 305, and Lord Scarman in *Pao On v Lau Yiu* [1979] 3 All ER 65 (PC), and stated the position as follows:

> (i) [I]f A has entered into a contract with B to do work for, or to supply goods or services to, B in return for payment by B and (ii) at some stage before A has completely performed his obligations under the contract B has reason to doubt whether A will, or will be able to, complete his side of the bargain and (iii) B thereupon promises A an additional payment in return for A's promise to perform his contractual obligations on time and (iv) as a result of giving his promise B obtains in practice a benefit, or obviates a disbenefit and (v) B's promise is not given as a result of economic duress or fraud on the part of A, then (vi) the benefit to B is capable of being consideration for B's promise, so that the promise will be legally binding.

Thus, provided some factual or practical benefit can be pointed to, a confirmatory promise may be enforceable provided that the consideration for it has not been induced by economic duress.

Glidewell LJ placed great emphasis on Lord Scarman's judgment in *Pao On v Lau Yiu*. However, it is by no means certain that Lord Scarman would have intended his comments to be applied to bipartite relationships as opposed to tripartite relationships. Lord Scarman wanted to demonstrate that where a contracting party owed an obligation to a third party, the promise to perform or the performance of that obligation for the benefit of another party could be good consideration for that other party's promise. It was in this context that Lord Scarman said that justice requires that men who have negotiated at arm's length be held to their bargains unless it can be shown that their consent was vitiated by fraud, mistake or duress.

Prior to that, Lord Scarman seemed to recognise that it may be much harder to find a legitimate consideration for the confirmatory promise in that bipartite situation. Indeed, Lord Scarman made the point that where the discharge of a duty imposed by law has been treated as valid consideration, the Courts have usually (but not invariably) found an act over and above, but consistent with, the duty imposed by law. Though Lord Scarman cited *Williams v Williams* (supra), *Ward v Byham* (supra) might be a better illustration.

In that case, the plaintiff and the defendant lived together, unmarried, for five years, during which time the plaintiff bore their child. When they terminated their relationship, the defendant promised to pay the plaintiff £1.00 per week to maintain the child provided that the child was well looked after and happy. The defendant paid this sum for some months but ceased to pay when the plaintiff married another man. The plaintiff succeeded in her claim against the defendant. Though Denning LJ considered that the plaintiff's promise to perform an existing duty (to maintain the child) was sufficient consideration for the defendant's promise, the judgments of Morris and Parker LJJ seem to be predicated on the basis that the promise by the plaintiff that the child would be well looked after and would be happy was a sufficient consideration for the defendant's promise to pay maintenance. In other words, though the plaintiff was under an existing obligation to maintain the child, she promised to do something extra, ie to make sure that the child would be *well* cared for and would be happy.

Of course, some academics and text book writers have found it difficult to reconcile *Ward v Byham* on this basis with cases like *White v Bluett* (1853) 23 LJ Ex 36 where a son's promise not to bore his father was held not to be good consideration.

Williams v Roffey is illustrative of an increasing willingness by Courts in modern times to strive to find some rationale to enforce promises where the parties clearly intended the promises to be enforceable and where there are no vitiating factors such as economic duress. In my view, this approach is to be welcomed. However, whether the Courts can satisfactorily incorporate the concept of a factual benefit into the doctrine of consideration is another matter. Irrespective of what benefits are conferred on a party by another party's confirmatory promise, the fact is that the confirmer has given nothing extra for the new promise. By confirming the original promise, the confirmer only confirms that the promisee will obtain the benefits to which the promisee was already entitled.

Further, I am not sure that the concept of a factual or practical benefit is all that helpful. It could be argued that it is a concept which could be too easily manipulated by the Courts and thus may make contract law less certain than it presently is. Further, there will surely be many situations (particularly with respect to relationships between contractors) where it will be difficult to determine whether a promise given in return for a confirmatory promise has been induced by economic duress. (Though *Williams v Roffey* might appear to be a classic case where economic duress may have been present, there is a suggestion in the case that the offer of extra payment was volunteered by the defendants' surveyor without any request or suggestion by the plaintiff.)

Nevertheless, it must be acknowledged that there is support amongst some eminent academics and textbook writers for the proposition that a confirmatory promise should be regarded as being good consideration for the other party's promise to pay or do something extra. (Amongst the modern American textbooks, refer to Corbin, *Contracts* (West Publishing Co, 23 ed, 1985) pp 245-270. See also Treitel, *The Law of Contract*, 7 ed, 1987, pp 74-75.) Further, in purely practical terms, a case can be made for the enforcement of the defendants' promise in *Williams v Roffey*. The promise was not induced by economic duress and was no doubt intended to be binding. The defendants would benefit in fact if the plaintiff was able to perform its obligations on time. It was sensible of the parties to try to come to a commercial arrangement which would enable both of them to perform their obligations (under the head contract in the case of the defendants and under the subcontract in the case of the plaintiff).

Perhaps in the context of an existing contractual relationship, it would be better to come clean and say that if one party promises to pay or do something extra in return for a confirmatory promise by the other, consideration should not be required. This suggestion is not new (see, for example, Treitel, op cit, p 75). Though heretical in terms of orthodox contractual doctrine, such a principle should not produce great uncertainty because contracting parties would know that they would be held to their further promises provided that a clear intention to be bound could be shown and that this intention was not vitiated by, for example, economic duress.

To my mind, *Williams v Roffey* is an important case. No doubt a more thorough analysis of it will be undertaken by one of the academic commentators. It is difficult to say just what approach our Courts will take to such a case particularly at appellate level. In cases like *Conlon v Ozolins* [1984] 1 NZLR 489, we have already seen that where there is a will, there can be a way.

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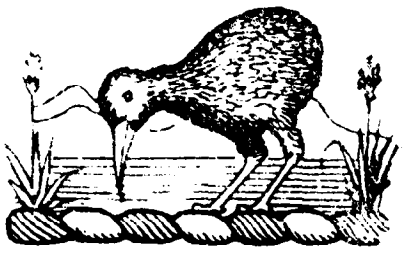
The Sign of the Kiwi

By Dr Peter Spiller, School of Law, University of Canterbury

This article considers the significance of the kiwi as a commercial symbol. It looks at two cases. The one from 1925 relates to Kiwi shoe polish and the one decided last year relates to the sale of milk. As the author points out the sign of the kiwi has continuing allure in the commercial world and the two cases indicate a change in trade practices that has occurred over the years.

Because the rounded, flightless bird popularly known as the "Kiwi" is unique to New Zealand and is highly distinctive, it has become a major national symbol of this country. It is not surprising, then, that over the past century manufacturers and traders have tried to use the name and emblem of the kiwi to further the sale of their products. This review will briefly sketch the history of the Kiwi trade mark and the competing claims thereto.

In 1885, Kempthorne Prosser and Company, a New Zealand drug company, adopted the picture of a kiwi as its trade mark for knife-polish, and later it extended this to linoleum and boot-polish. Kempthorne Prosser duly registered its trade mark, and it erected a large emblem of the Kiwi over its headquarters in Dunedin and over its branch centres throughout New Zealand. In time, the Kiwi became identified with the company's business in the minds of the country's trade and buying public. In 1903, Kiwi Polish Company, an Australian company based in Victoria, established business in boot-polish, and (as a result of the wife of one of the partners having come from Oamaru) adopted both the picture and the name Kiwi as its trade mark. Over the ensuing years, Kiwi Polish became registered proprietor of the Kiwi trade mark for boot-polish in some twenty-seven countries, embracing nearly the whole of the commercial world. During the First World War, the company's tins of Kiwi boot-polish became a popular commodity among the New Zealand and Australian soldiers (particularly in France). These developments prompted Kiwi Polish, after the War, to attempt to supplant Kempthorne Prosser as the registered proprietor in New Zealand of the Kiwi trade mark for boot-polish. The application was initially successful to the extent that Chapman J of the Wellington Supreme Court allowed concurrent registration of the trade marks of both companies. However, when the matter went on appeal, the application of the Australian company was roundly condemned by the Judges of the Court of Appeal as "quite without merit", and as an unacceptable attempt to "invade the domicil of origin of the Kiwi trade mark and to compete there with the original proprietors thereof" (*Kempthorne, Prosser, & Co v Kiwi Polish Co* [1925] NZLR 69 and 71).



Many years later, Kempthorne Prosser assigned its Kiwi trade mark to Kiwi Co-operative Dairies Limited, a company based in central and southern Taranaki. Once again, the monopoly over the Kiwi trade mark was to be threatened, though this time a company within New Zealand, and in a new and quite remarkable way. The background to the new challenge lay in the progressive deregulation of the distribution of milk which took place in the 1980s. The previous regulations had restricted the distribution of milk to specified areas and to a particular form of bottles which left no room for advertising or any other association with the particular distributor. With the lifting of these restrictions, distributors began to sell milk more widely (in particular through supermarkets) and to supply it in cardboard containers with written and other brand material.

From 1983, the Kiwi Co-operative company sold fresh white milk, in the central and southern Taranaki area, in plastic containers marked "Kiwi Supreme"; and, in much of its advertising for its dairy products, the company used both the name and the picture of the Kiwi bird. By the beginning of 1989, however, the company perceived a threat to its monopoly in the activities of a much larger company, Capital Dairy Products Limited. This company, which distributed milk widely in the lower half of the North Island, launched an imaginative campaign to distribute milk in primary schools in the Wellington and Canterbury areas. This campaign was designed to avoid the pitfalls of the old Milk in Schools scheme which had run for thirty years until the mid-1960s. In association with the firm Tetra Pak (New Zealand) Limited, it distributed milk in small cardboard cartons under the brand description "Cool Kiwi" and featuring unusual representations of the Kiwi bird. The pictures on the cartons displayed the Kiwi with a cap or riding helmet, a multi-coloured jacket, shoes and (in two of the pictures) sunglasses. The bird had wings elongated into arms and fingers, and an exaggeratedly long beak or nose. Despite the clear differences between the traditional form of the Kiwi and that presented by Capital Dairy Products and Tetra Pak, Kiwi Co-operative saw the

words and packaging as an invasion of its monopoly rights in the word and device Kiwi. It therefore applied to the Wellington High Court for an order restraining the selling and distributing of milk with the new package and design.

In their argument at the Court hearing in March 1989, counsel for Kiwi Co-operative relied upon allegations of passing off, breach of the Fair Trading Act and breach of trade mark. The presiding Judge dismissed all of these arguments. In relation to the Co-operative's claim that registration of the Kiwi trade mark created a monopoly over any use of the word Kiwi, the Judge said that the use of the Kiwi trade mark had not become so completely identified with the Co-operative's distribution of milk that the trade and the public would at once concluded that all "Kiwi milk" was that of the Co-operative. Further, the Judge held that registration of the Kiwi mark could not apply to all and every representation of the bird. He said that "while it might well apply to a representation which was in a similar silhouette form and in a clear likeness of the actual bird . . . I cannot think that it can extend to the imaginative, if not imaginary, representation of the bird in semi-human form as it is applied by the defendants in their trade". The Judge therefore concluded that Kiwi Co-operative did not have a strong case. Curiously enough, however, in the final paragraph of his judgment, the Judge granted an interim injunction until further order restraining Capital Dairy and Tetra Pak from selling, distributing or advertising milk in association with the word or caricature Kiwi except to primary schools already being supplied (*Kiwi Co-operative Dairies Limited v Capital Dairy Products Limited and Tetra Pak (New Zealand) Limited*, [1989] BCL 629). Perhaps the Judge was "playing safe". What his order certainly did was to keep the pressure on the parties to come to a negotiated agreement, and a compromise solution was indeed eventually reached.

This review of the competing use made of the sign of the Kiwi has indicated its continuing allure in the commercial world. It has also revealed a change in trade practices over the past century: the staid figure of the Kiwi bird on boot-polish tins bought by the ANZAC troops is a far cry from the flamboyant, semi-human figure on milk cartons sold at the local school tuckshop. □

Correspondence

Sir,

I read with interest your editorial "Snails and ginger beer" in the *Law Journal*, September, 1990.

In 1982, the year of the 50th Jubilee of *Donoghue v Stevenson*, Robert Chambers and I, who were both then teaching Torts here at Auckland, arranged an Academic Lunch to celebrate the event. Unfortunately we were not able to have the celebration on 26 May (the date of the House of Lords decision), but we held it a few weeks later. We thought that this would coincide with the anniversary of the date of the arrival of the report in New Zealand.

As part of the Celebration we organised a kind of Mini-Mastermind Competition, to find out who amongst the guests had the greatest knowledge about the case and its background. This involved the two of us in considerable detective work. I cannot now recall all of our sources of information; one useful source was Robert Heuston's article: *"Donoghue v Stevenson* in Retrospect" (1957) 20 MLR 1. This article was written to commemorate the 25th anniversary of the decision. Incidently Heuston claims that the action was settled for £100.00 not £200 (as quoted from Justice Taylor). Lord Atkin came from a well-known Cork family, whilst Lords Thankerton and Macmillan were both Scottish Law Lords; thus the three were referred to as the "Celtic fringe".

Lord Macmillan gave some of the background to the decision in his autobiography: *A Man of Law's Tale*, including the fact that he had to decide whether to agree with Lords Atkin and Thankerton, or whether to agree with Lords Tomlin and Buckmaster. The outcome we all know. Both Lords Buckmaster and Tomlin were eminent commercial lawyers, and for that reason supported the privity of contract doctrine. Lord Atkin was himself a respected commercial lawyer, having been a member of Lord Justice Scrutton's Chambers. Lord Atkin himself apparently agonised over the decision, and I recall that his daughter wrote that he discussed the decision with his family, and told them that he was intending to apply the Parable of the Good Samaritan to the facts of the case.

In 1988 whilst visiting the Faculty of Law at Edinburgh University, I asked John Blackie, Senior Lecturer in Law and Tort Historian, with whom I was staying, why the case would have been taken as far as the House of Lords. John Blackie told me that at that time in Scotland there was a convention that all firms of solicitors would take one case a year *pro bono* as a public service. Thus Mrs Donoghue's solicitors, W G Leechman & Co of Glasgow and Edinburgh, were performing a public service. In fact they were not a firm that was heavily involved in litigation. John told me too that Francis Minchella, the owner of the Wellmeadow Cafe where Mrs Donoghue drank the ginger beer, was one of a fairly sizeable group of Italian immigrants who specialised in making ice-cream. Presumably the ice cream that Mrs Donoghue ate with the fateful ginger beer was Francis Minchella's own make.

In Scotland the outcome of the case must have been regarded as important since no less an advocate than W G Normand, the Solicitor-General for Scotland appeared for Stevenson, the respondent. Indeed there had been two slightly earlier cases prior to the first instance hearing of *Donoghue v Stevenson*.

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The New Zealand Bill of Rights and Censorship

By W K Hastings, Senior Lecturer in Law, Victoria University of Wellington

The Bill of Rights Act 1990 has been criticised by some commentators as lacking teeth. However when it comes before the Courts it will have to be given legal force of some sort by the Judges who will be called on to apply it. The generality of its terms, despite the apparent restrictions in its application, may well allow for some rather interesting and even revolutionary decisions in terms of previous legal principles. In this article the author looks at one specific area, that of censorship. The announcement of proposed new censorship legislation does not affect the argument advanced by Mr Hastings, who sees the new Act as having very limited application to censorship legislation. It remains to be seen what the ingenuity of Counsel and the timidity or foolhardiness of (depending on one's reaction to the end result) the Courts will produce.

Can the New Zealand Bill of Rights Act 1990 be used to challenge decisions of the Indecent Publications Tribunal, the Chief Film Censor and the Video Recordings Authority? The Bill of Rights purports to "affirm" a freedom of expression in s 14. The Bill of Rights also permits this freedom to be limited in s 5. My assessment of the success with which the Bill of Rights can be used to challenge censorship decisions is based on an analysis of the reasoning of Canadian decisions which interpret parallel provisions of the Canadian Charter of Rights and Freedoms. I must emphasise that this article is written in somewhat terse fashion because of the sudden speed with which the legislation moved through its final stages in Parliament[1] Nevertheless, it was felt that the untested, but great, potential of its provisions required comment. I must also emphasise that the views expressed in this article are my own and should not be taken as representative of the Indecent Publications Tribunal, the Video Recordings Authority, or any other individual member of those bodies.

Procedural difficulties

The Bill of Rights[2] does not create a cause of action. It does not state how the rights and freedoms which it affirms in s 2 are to be enforced. It does not even say whether they may be enforced in the Courts except by implication in s 4. Section 7 requires the Attorney-General to notify the House of any inconsistency between proposed legislation and any of the rights and freedoms contained in the Bill of Rights. Section 4 prohibits the Courts from deciding that any provision of an "enactment" (not defined in the Acts Interpretation Act 1924) is "impliedly repealed or revoked" or "in any way invalid or ineffective" or from deciding not to apply any provision of an enactment, "by reason only that the provision is inconsistent with any provision of this Bill of Rights". The Bill of Rights therefore cannot be used by the Courts to strike down legislation. Parliament is free to ignore the Attorney-General's certificate, and the Courts must give effect to legislation which is inconsistent with the Bill of Rights.

The Bill of Rights does however apply to acts done by "the legislative, executive or judicial branches of the government of New Zealand" (s 3(a)) and to acts done by "any person or body in the performance of any public function, power, or duty conferred or imposed on that person or body by or pursuant to law" (s 3(b)). Decisions of the three main censorship bodies to classify and

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These are reported as *Mullen v A G Barr & Co Ltd* [1929] SC 461, and involved two small children drinking ginger beer which was said to be contaminated by a mouse. The defendant had been held not to be liable. In the Court of Session in *Donoghue v Stevenson*, the Lord Justice-Clerk had followed the decision in *Mullen v Barr*. Lord Hunter, however, dissented on the ground that in *Mullen v Barr* negligence had never been proved. Had negligence been proved, however, he implied that he would have found that the manufacturer did indeed owe the consumer a duty of care. The appeal to the House of Lords was regarded as an appeal from *Mullen v Barr*. In a sense the House of Lords followed Lord Hunter's approach.

It would be interesting to know whether the decision attracted interest when the report arrived in New Zealand. I wonder whether any of your readers have any information on this point. It must have been received with some interest in Australia, as four years later *Donoghue v Stevenson* was followed by the Privy Council in *Grant v Australian Knitting Mills Ltd* [1936] AC 85 (underpants causing dermatitis).

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censor can easily be called "acts done" by bodies in the performance of a public function. Each body exercises powers and has duties imposed "pursuant to law" by the statute which creates it. There is consequently little doubt that the Bill of Rights applies to decisions of the Indecent Publications Tribunal, the Chief Film Censor and the Video Recordings Authority.

If the Bill of Rights creates no cause of action, and does not permit Courts to strike down legislation, it seems that the best way to use it is by way of an application for judicial review of a decision of one of these bodies, citing inconsistency of a censorship decision[3] with s 14. This is anticipated in s 27(2) which states that

> Every person whose rights, obligations, or interests protected or recognised by law have been affected by a determination of any tribunal or other public authority has the right to apply, in accordance with law, for judicial review of that determination.

Section 3 of the Judicature Amendment Act 1972 defines "statutory power" as a "power or right conferred by or under any Act". Compare this with a "power . . . conferred . . . by or pursuant to law" in s 3 of the Bill of Rights. A "Statutory power of decision" is defined as a "power or right conferred by or under any Act . . . to make a decision . . . prescribing or affecting — (a) The rights . . . of any person". The Indecent Publications Act 1963, the Films Act 1983 and the Video Recordings Act 1987 all confer powers on their respective bodies to make decisions which affect a right, the freedom of expression, contained in the Bill of Rights. If it has done anything, the Bill of Rights has made it easier to bring an application for the review of an exercise of a statutory power of decision because the rights referred to in s 3 of the Judicature Amendment Act 1972 are now written down.

Substantive issues

Is an application for the review of a censorship decision invoking a violation of the freedom of expression likely to succeed? It is here that the Canadian decisions will be particularly helpful. A New Zealand Court will have to construe the freedom of expression in s 14 along with s 5 which permits justified limitations of the freedom. This requires first of all an assessment of whether the freedom of expression has been violated, not by one of the three Acts, but by a censorship decision made by a body exercising its powers under one of the three Acts. If, and only if, the freedom of expression has been violated by a censorship decision, the next step will be to examine whether the violation is saved by s 5, which states in terms identical (except for the opening clause) with the Canadian Charter that:

> Subject to section 4 of this Bill of Rights, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

The second stage of the assessment requires a threefold examination: is the freedom of expression subject to a "reasonable" limitation; is the limitation "prescribed by law" and can the limitation be "demonstrably justified in a free and democratic society"?

Section 5 is made subject to s 4. A consequence of this is that while the "limits" referred to in s 5 may well have otherwise included statutory limits (as well as limits which take the form of decisions made under a statute), a Court will have to find either that a statutory limit is unjustified but that it cannot overturn it because of s 4, or that all statutory limits are by definition justified. The former interpretation is preferred for two reasons. First, s 4 concerns the power of a Court to "hold" and to "decline". It is a procedural provision, distinct from the substantive test for justified limitations set out in s 5. To make a substantive provision of a statute subject to a procedural one is not to limit the substantive provision, but is merely to limit what a Court can do with the substantive decision it has come to. Second, to argue, as I have just done, that a Court cannot overturn legislation, but that it can warn or "flag" legislation as being an unjustified limitation, is consistent with the scheme of the Bill of Rights in the sense that it matches the function of the Attorney-General with respect to Bills. While Courts are powerless to *overturn* legislation inconsistent with the Bill of Rights, they are certainly able to *decide* in an obiter dictum that legislation is inconsistent. The main thrust of the Bill of Rights is, however, to control the acts of government rather than existing Acts of Parliament.

1 What is a "freedom of expression"?

Section 14 defines the freedom of expression in the following terms:

> Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

The International Covenant can of course be used to interpret the Bill of Rights because the Bill of Rights is said in its preamble to "affirm New Zealand's commitment to the International Covenant on Civil and Political Rights". Section 2(b) of the Canadian Charter of Rights and Freedoms states it more simply:

> Everyone has the following fundamental freedoms:
> . . .
> (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

The freedom of expression as stated in the Bill of Rights and the Covenant includes the right to receive information in any form. Although the New Zealand censorship Acts are divided according to the medium by which information is conveyed, the subject matter of the Acts is "information", "opinion" and "expression" all of which are covered by the freedom of expression in s 14. The Canadian provision is less explicit, but the Ontario High Court said in *Re Ontario Film and Video Appreciation Society and Ontario Board of Censors* (1983) 41 OR (2d) 583 at 590 that "[i]t is clear to us that all forms of expression, whether they be oral, written, pictorial, sculpture, music, dance or film, are equally protected by the

Charter." Books, magazines, films and video recordings as defined in the three censorship Acts are on this basis protected by s 14 of the Bill of Rights. Censorship decisions therefore *prima facie* violate s 14.

2 *Can a censorship decision be a justifiable limitation of the freedom of expression?*

Assuming, as is fairly likely, that a Court finds the freedom of expression has been *prima facie* violated by a censorship decision, the next step is to determine whether the violation is demonstrably justifiable in terms of s 5 quoted above. Section 1 of the Canadian Charter is identical to the operative part of s 5 of the Bill of Rights. Article 19(3) of the Covenant states that:

> The exercise of the right provided for in paragraph 2 of this Article [the freedom of expression] carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
> (a) For respect of the rights or reputations of others;
> (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

The European Convention for the Protection of Human Rights and Fundamental Freedoms contains no less than ten limitations on the freedom of expression. Indeed, a limitation based on "morals" is common to the European and American Conventions and the International Covenant. The freedom of expression has never been construed to protect information which is contrary to public morals, or in the words of the standard New Zealand test, "injurious to the public good". On the other hand, the Ontario Court of Appeal in *Re Information Retailers Association of Metropolitan Toronto Inc and Municipality of Metropolitan Toronto* (1985) 52 OR (2d) 449 stated at 468 that

> Non-obscene "adult books and magazines", no matter how tasteless or tawdry they may be, are entitled to no less protection than other forms of expression; the constitutional guarantee extends not only to that which is pleasing, but also to that which to many may be aesthetically distasteful or morally offensive; it is indeed often true that "one man's vulgarity is another's lyric".

(A) Can a censorship decision be a "reasonable" limitation?

In *Re Ontario Film*, the applicant challenged decisions of the Ontario Board of Censors with respect to four films submitted to it for approval. One decision in particular is relevant here, that relating to the Board's rejection of the film *Amerika* for reasons "having to do with the explicit portrayal of certain sexual activity" (at 587). The Board made its decision under s 3(2)(a) of the Theatres Act RSO 1980 c 498, which simply gave the Board power "to censor any film". All films had to be submitted to the Board "for approval" before being exhibited in the province. The Act contained absolutely no criteria to be taken into account by the Board in making its decision. On appeal ((1983) 45 OR (2d) 80) the Ontario Court of Appeal held that

> The subsection [s 3(2)] allows for the complete denial or prohibition of the freedom of expression in this particular area and sets no limits on the Ontario Board of Censors. It clearly sets no limit, reasonable or otherwise, on which argument can be mounted that it falls within the saving words of s 1 of the Charter: "subject only to such reasonable limits prescribed by law".

The decision to reject *Amerika* was overturned because the provision of the statute under which it was taken was struck down.

Similarly, in *Re Information Retailers*, a municipality attempted to restrict physical and visual access by children to adult magazines on sale in stores. In addition to magazines, the by-law was drafted to include books and other material "which appeals to or is designed to appeal to erotic or sexual appetites or inclinations" (at 458). The Court of Appeal lauded the intention but held that the by-law violated the freedom of expression:

> The question then becomes one of determining whether the steps taken by this municipal council have in fact been kept within the bounds required by the situation so as not to impinge on the protected freedom to a degree greater than is necessary to achieve the legitimate governmental interest. This by-law, in my opinion, fails that test. Rather than being narrowly tailored to further the objective legitimately sought to be advanced, the by-law defines its coverage in terms so wide as to sweep within its ambit material which is not necessary to further the desired objective. (at 469).

A censorship decision in New Zealand therefore is likely to be a "reasonable limitation" on the freedom of expression if it can be shown that it implements the legitimate governmental interest in restricting and censoring material injurious to the public good in a manner that impairs as little as possible the freedom of expression. In other words the decision must not be overbroad or in terms so vague that its operation would extend beyond what is necessary to attain the desired purpose.

(B) Can a censorship decision be "prescribed by law"?

Obviously yes, as all censorship decisions in New Zealand are made under a statutory power. Nevertheless, in Ontario where legislation can be struck down by the Courts if it violates the Canadian Charter, the provision in the Ontario Theatres Act which gave the Ontario Censor Board the power simply to "censor" was held to violate the freedom of expression because it was not a reasonable limit prescribed by law. The informal guidelines issued by the Censor Board and used to ban the film *Amerika* were held in *Re Ontario Film* to

> have no legislative or legal force of any kind. Hence, since they do not qualify as law, they cannot be

> employed so as to justify any limitation on expression, pursuant to s 1 [the equivalent of our s 5] of the Charter. (at 592).

This does not bode well for the Indecent Publications Tribunal's "tripartite test". That test was stated in *Re Penthouse US Volume 14 Nos 5, 6 & 7* (Decision 1054/83) in the following terms:

> In summary, the Tribunal indicated that issues were likely to be classified as indecent if, in addition to their normal content, they contained pictorial scenes including the following:
>
> 1 Scenarios involving more than two models, and in which sex and violence and intimacy and/or deviant aspects of sex are depicted among the models;
> 2 Multiple model scenes which depict lesbian acts;
> 3 Heterosexual scenarios in which there is a high degree of intimacy (eg fellatio or cunnilingus or intercourse) depicted in the couple's actions.

The test is a Tribunal-made test; it does not appear in the statute. It was intended to assist distributors and Customs in deciding the likely classification of future publications. It does not bind the Tribunal. Any censorship decision which invokes the tripartite test alone is unlikely to be a reasonable limitation "prescribed by law" simply because the tripartite test is not law. It would be equivalent to the Ontario Censor Board's *Amerika* decision. And it could also be challenged for ignoring the statutory criteria prescribed in s 11 of the Indecent Publications Act 1963. If however a censorship decision invoked the statutory criteria which appear in the three censorship Acts, with or without invoking the tripartite test or similar guideline, there is no doubt that the decision could be characterised as a reasonable limitation prescribed by law. Further, the fact that all three censorship Acts contain explicit criteria which the bodies must take into account when reaching a censorship decision means that the statutes themselves are, unlike the Ontario Theatres Act, immune from a finding that they are inconsistent with the Bill of Rights. So censorship decisions based upon statutory criteria, and the statutory criteria themselves, are unlikely to run into any Bill of Rights-sourced grief.

(C) Can a censorship decision be demonstrably justified in a free and democratic society?

Many states which most people would characterise as "free and democratic societies" have some prior censorship of film, video recordings and printed publications: see eg *Report of the Committee on Obscenity and Film Censorship*, UK Cmnd 7772 (1979). Most of the treaties which enshrine the freedom of expression exempt from that freedom obscene, immoral or indecent material. Even the first amendment to the American Constitution has consistently been held not to cover obscene material: see eg *Sanders v Georgia* (1975) 216 SE 2d 838, aff'd 424 US 931, concerning the film *Deep Throat*. The New Zealand statutes make it even easier to argue that they are consistent with the freedom of expression because of their detailed criteria by which censorship decisions must be made, and in the case of the Indecent Publications Tribunal, because some of its members are chosen for their expertise in the law, literature and education. Censorship decisions per se are demonstrably justifiable in a free and democratic society. Censorship decisions based on expert opinion and which consider statutory criteria are even more so.

Conclusion

One extremely remote scenario must be mentioned briefly. If, contrary to what has been said above, a Court does overturn a censorship decision because it violates the Bill of Rights, regard will have to be had to whether a series of decisions of this sort will achieve through the back door what the Bill of Rights in s 4 seeks to prevent through the front: an effective striking down of legislation by making censorship bodies unable to function under their statutes. This scenario depends on two events: that a series of censorship decisions are overturned, and that the relevant body continues to ignore advice from the overturning Court. It is therefore very unlikely to occur.

To conclude, while a New Zealand Court will not be able to strike down provisions of the Indecent Publications Act 1963, the Films Act 1983 or the Video Recordings Act 1987, neither will it be able to hold that they are unjustified limitations on the freedom of expression in terms of s 5 (with the possible exception of s 11(3) of the Indecent Publications Act 1963[4]). The same can be said of censorship decisions taken under those statutes. As long as a decision is concerned with conditionally or unconditionally indecent material, relies on statutory criteria, and is no wider than is necessary to achieve its objective of regulating or banning the indecent material concerned, it will be extremely difficult if not impossible to challenge it on the basis of an alleged violation of the freedom of expression contained in the Bill of Rights. □

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1 On my count, the Bill of Rights becomes effective 25 September 1990.

2 Although s 1 describes the short title as the New Zealand Bill of Rights Act 1990, it is referred to as "this Bill of Rights" everywhere else in the Act.

3 By "censorship decision" I mean a decision made by the Indecent Publications Tribunal under s 10 (classifications) of the Indecent Publications Act 1963; by the Chief Film Censor under s 15 (classifications) and s 16 (excisions) of the Films Act 1983; and by the Video Recordings Authority under s 18 (classifications) and s 24 (excisions) of the Video Recordings Act 1987.

4 Section 11(3) states that "When the Tribunal decides that any picture-story book likely to be read by children is indecent in the hands of children under a specified age that picture-story book shall be deemed to be indecent in the hands of all persons." Like the Municipality of Metropolitan Toronto by-law found to overshoot its purpose of keeping magazines out of children's reach in *Re Information Retailers*, this provision could well be found to be too broad to be a "reasonable limit" on the freedom of expression.

All men are equal as all pennies are equal because they are stamped with the image of their Sovereign Maker.

G K Chesterton

Child sexual abuse (II): Obtaining accurate testimony from child victims

By Nicola J Taylor, David C Geddis and R Mark Henaghan

This series of three articles has been written by people trained in the disciplines of medicine, social work and law. It focuses on criminal offences where evidence of sexual abuse is the crucial issue. In the first article, a broad overview of the topic was provided. The second article deals with ways in which accurate testimony can be obtained from child victims. Finally, the law reforms which came into effect on 1 January 1990 are addressed and an evaluation made of their impact.

Introduction

Research has demonstrated that children who are victims of sexual abuse are able to provide accurate testimony.[1] A number of factors influence whether or not this potential is realised. In this paper we discuss these factors. We begin however with a critical examination of the basic issue of competence as it applies to child witnesses and a brief overview of the general question of reliability.

Competence — Is a child able to testify?

In New Zealand, the Oaths and Declarations Act states that child witnesses under the age of 12 years do not have to take an oath before giving evidence.[2]

In practice, whether or not a child is deemed competent to give evidence is decided by the Court. To reach that decision an assessment is made of two issues. The first — does the child understand the importance of telling the truth and the second — can the child convey his or her evidence in a manner that can be understood.

Despite the fact that the present legal position in New Zealand is more enlightened than in some other jurisdictions, some confusion can still be perceived with respect to both these issues.

When an adult takes an oath or an affirmation there is no exploration of their understanding of "truth" nor of their real acceptance of the duty of speaking that "truth". However, every day in our Courts, findings are made that certain witnesses are not "credible" or "reliable" or are "unfortunately mistaken" — descriptions often euphemistically used for "lying their heads off". We are not aware of any evidence that demonstrates a correlation between age and honesty. Therefore when the Court explores a child's understanding of the duty of speaking the truth it cannot be with the naive belief that a certain level of understanding will guarantee that the truth will be spoken.

The question of competency does arise with respect to the second matter — can the child's evidence be conveyed to the Court in a manner that can be understood? For this to happen the child must first be able to recall the occurrence about which he or she will testify and second, communicate that information to others. However, the child is not the only subject of the question. The issue must be addressed as to whether or not the Court is competent to elicit the information that the child does possess. This process can be enhanced or inhibited by a variety of factors (which are discussed later in this paper).

It is our view that the competency test serves no useful function and should be abandoned. The weight to place on the child's testimony would be determined by the trier of fact.

Some commentators have confused the issue of whether or not a child understands the importance of telling the truth with whether or not they can separate fact from fiction.[3] In other words, they would argue that if there is doubt in this regard, then how can one even know that a child realises what the "truth" is, let alone the importance of ensuring that it is spoken.

We fail to see how this point can be clarified by an exploration of their understanding of the somewhat abstract concept of the duty to speak the truth. We are not aware of any factual basis to an assumption that if a child is unable to demonstrate an understanding of the duty to speak "the truth", he or she is unlikely to accurately recount past events.

Indeed under the present process, it is possible that children could be deemed "incompetent" to testify because of a failure to demonstrate an "adequate" understanding of the duty to speak the truth when they are quite capable of giving a factually accurate account of the relevant events to which they were a witness.

Thus we would contend that an exploration of the child's understanding of truth is not pertinent to the issue of the child's ability to separate fact from fantasy. This is not an issue of competency, it is an issue of reliability.

Reliability — Can a child be believed?

While there is a widespread belief that children are not as credible as adults there is no evidence to suggest a child victim is a less reliable witness than any other with respect to events of personal significance. (See Goodman et al, fn 1.) Children have in fact been undervalued as witnesses.

Some of the responsibility for this rests with those who through ignorance do not know how best to elicit the information the child does possess. A lack of understanding of relevant aspects of child development can result in not only incomplete information but lead to incorrect inferences being drawn from what children of different ages can or cannot say, or do or do not say. These points deserve illustration. Some types of objective information cannot be accurately provided by young children eg judgments concerning standard units of measurement — how old the person was? how tall the person was? how much the person weighed? what time it was? how often an event occurred? — although they are able to distinguish few from many, night from day, and breakfast time from supper time. Questions that require abstract inferences about such issues as people's motivations may also be difficult for children.[4]

Young children are extremely literal in their answers to questions. This can sometimes lead to situations in which adults think the child is being self-contradictory when he or she is simply being concrete. Those involved in the judicial process need to be alert to such child-adult misunderstandings. In the following case example, a five-year-old child, on direct examination, told the jury about her father putting his penis in her mouth.[5] On cross-examination by the father's lawyer, the following exchange took place:

Lawyer:	And then you said you put your mouth on his penis?
Child:	No.
Lawyer:	You didn't say that?
Child:	No.
Lawyer:	Did you ever put your mouth on his penis?
Child:	No.
Lawyer:	Well, why did you tell your mother that your dad put his penis in your mouth?
Child:	My brother told me to.

At this point, it looked as if the child had completely recanted her earlier testimony and had only fabricated the story because her brother told her to. However, the lawyer for the prosecution recognised the problem and clarified the situation.

Lawyer:	Jennie, you said that you didn't put your mouth on daddy's penis. Is that right?
Child:	Yes.
Lawyer:	Did daddy put his penis in your mouth?
Child:	Yes.
Lawyer:	Did you tell your mom?
Child:	Yes.
Lawyer:	What made you decide to tell?
Child:	My brother and I talked about it, and he said I better tell or dad would just keep doing it.

While cross-examination is an integral part of the legal process, young children do not always respond well to direct questioning and cannot readily produce accurate answers to out-of-context questions. However their limitations in these areas should not be used as an excuse to lessen their involvement in the criminal justice system. Rather the onus should be on lawyers and Judges to utilise methods which circumvent these limitations and elicit the most complete and accurate information possible from the child.

Doubts about children as witnesses also arise from adults' outdated perceptions of the inaccuracies of children's memories; their suggestibility and their inability to separate fact from fantasy. Fortunately considerable information now exists with which to challenge the oversimplified stereotypes perpetuated about children.

Memory

It is commonly assumed that a child's memory is worse than that of an adult. However recent studies — in particular those undertaken by Professor Gail Goodman — have demonstrated that this assumption, in certain vital areas, is incorrect.

The ability to remember

The development of the ability to organise memories and to generate visual images that facilitate recall occurs between ages 5 and 10; very young children therefore have not fully acquired this skill. In addition young children have accumulated fewer life experiences on which to flag memories. (See Johnson et al, fn 3.) While these comments apply in general it should be noted that the significance of the event on which the memory is based is very pertinent.[6] So despite these two developmental impediments, in certain circumstances, such as the painful experience of rape, even very young children can have vivid recall.

Duration of memory

In general, children can recall events for just as long as adults, and children as young as age six are able to remember a sequence of events accurately. (See Johnson et al, fn 3.) In spite of this ability, as time passes children become increasingly reluctant to review disagreeable material (indicating the necessity for an expeditious investigation and Court appearance).

Errors in children's memories

Children's errors tend to be errors of omission rather than commission. That is, while children often recall less than adults do, what they do recall is no less accurate. For example, laboratory studies indicate that, when asked open-ended questions, such as "What happened?" (with respect to an event that occurred some days or weeks before) young children tend to say relatively little and their reports are not always completely coherent, but low error rates indicate that their reports are seldom wrong.[7] These findings have also been confirmed by comparing children's allegations with the confessions of perpetrators.[8]

Children's recall of detail

While children can be reasonably accurate when answering open-ended and objective questions, they do have difficulty remembering certain types of information. Children, like adults, may have difficulty answering questions about peripheral detail, for example, what they ate for lunch the day of the assault and what colour the walls of the room were. However it should be noted that in some instances children may provide details which an adult would have overlooked. Sometimes very young children manage to remember interesting items that older children and adults miss completely because older

individuals automatically screen out many items as irrelevant. These are usually events which are irrelevant to some ongoing activity, but which are potentially relevant in Court. (See Johnson et al, fn 3.)

While children can usually order simple, familiar events quite well they may have difficulty ordering more complex, less familiar ones. Misorderings do not, however, imply that the rest of the report is inaccurate. A child, for example, may misorder the sequence of events or be unable to recall the exact dates of events but still correctly report the incident(s) that he or she experienced. (See Goodman et al, fn 7.)

Effect of stress on memory

Every individual responds differently to stress. The amount of stress associated with the whole process of events from the assault(s) itself/themselves to the Courtroom appearance will vary from case to case. Bearing in mind these variables the abilities and willingness of some children to retrieve information from memory will be adversely affected. (See Goodman et al, fn 1.) Some of the more obvious stress factors include: the degree of intimidation used to attempt to silence the child; the attempts of defence lawyers to discredit the child at deposition hearings; the threatening presence in Court of the accused. Obviously, in the interests of justice, these adverse effects should be minimised.

Suggestibility

Our review of the literature and our experiences do not support a blanket statement that children are highly suggestible about events of personal significance such as sexual abuse; on the other hand, under certain circumstances both children and adults are open to suggestion.[9]

It is generally held that children are readily influenced by questions of a leading nature eg. "He took your pants off, didn't he?" However, recent research demonstrates that children as young as four years of age are far more resistant to such suggestive questioning than formerly believed. (See Goodman et al, fn 3.) This is particularly so when the suggestions concern actions associated with abuse. Where the questions refer to central events and actions that lie within the child's understanding, then suggestive questioning is likely to be rejected.[10] However younger children do seem more vulnerable if the questions concern peripheral detail superfluous to the main action and actors (eg the colour of the walls; what they ate for lunch). (See Goodman et al, fn 7.)

In comparing children with adults – if an event is understandable, interesting and/or personally significant and if their memory for it is still equally strong – age differences in suggestibility may not be found. If a suggestion is attempted through the subtle use of language, or if well-developed knowledge structures are required to comprehend the suggestion, then children may actually be less easily influenced than adults. Whether children are more or less suggestible than adults depends on the interaction of age with a variety of other factors.[11, 12]

Just as adults have been shown to be more suggestible when responding to someone whom they perceive to be in authority over them, so children can be particularly suggestible when they are asked leading questions by an authoritative adult. In addition some children, in seeking to please adults, will provide the answers the adult seems to wish. Again, this suggestibility applies more to peripheral events or to events that might have occurred but actually did not.

Fact/Fantasy

Because of a child's rich imagination, adults have frequently been deluded into concluding that a child's allegation of sexual abuse must be a product of that fertile mind. To some extent this conclusion may be founded in the adults' desire to avoid facing the reality of the abuse and instead confine it to the realms of fantasy.

Reinforcement for this position can be gained by pointing to times when a child mistakes a dream for a real event or becomes so absorbed in play that the boundaries between make-believe and reality dissolve. Most adults have direct experience of children's apparent belief in imaginary companions. Added to these informal anecdotes are the more systematic observations, speculations and theories of psychiatrists and developmental psychologists – many examples of children's confusion between fantasy and reality have been described by Freud, Piaget and others. It must be pointed out though that adults too sometimes confuse fact and fantasy. As yet there is very little information on conparisons between children and adults. Whether children generally have more difficulty than adults in distinguishing between memories for actually experienced events and the products of their imaginations and thoughts is a question that is only now receiving attention.

It is of vital importance to appreciate that the issue that has preoccupied so many – the extent to which children are able to distinguish their own thoughts from their own actions – is actually irrelevant to their testimony concerning their own sexual victimisation. In such circumstances children have to distinguish their own thoughts from another's actions. (See Johnson et al, fn 3.)

At least by the age of six children seem to be generally capable of making this discrimination. However we still do not know the stage by which children are able to separate what they saw someone else do from what they only imagined that person doing – a finer distinction and one that is often relevant to legal testimony. (See Johnson et al, fn 3.)

False allegations

It is clear that it is impossible to state definitely that false allegations are never made. Not so many years ago most, if not all, allegations were considered false. That presumption was clearly wrong.

However "deliberate" false allegations can occur with respect to child sexual abuse just as they do for any crime. It is important to keep in mind that there is no evidence that they occur with any frequency.

Those occasions when they do arise usually involve:

1 An older (often a teenager) sexually aware child.
2 A parent making the allegations on behalf of a child for some ulterior motive.

Clumsy questioning by an inexperienced interviewer in circumstances that heighten the possibility of "suggestibility" can

result in "innocent" false allegations arising. The false allegation is not the responsibility of the child because the child's perception of the situation has been distorted or misinterpreted by the inexperienced interviewer.

Requisite knowledge plays a particularly important role in assessing the truth of children's statements. A child is less likely than an adult to possess the knowledge or cognitive ability to construct a believable false statement. For example, although young children know that sex differences exist, most know little about sexuality and reproduction. Young children would be unlikely, therefore, to be able to make up a detailed account of a sexual incident and sustain it under skilled scrutiny unless it had actually occurred.[13]

Any review of these issues would be incomplete without noting a gap in existing knowledge. Some young children regularly observe adult sexual activity or are exposed to graphic pornographic video material. Whether or not this can provoke an allegation is unknown and the extent to which it does or does not provide substance to influence a child's story is not clear.[14]

Factors that inhibit or assist accurate testimony

Given our knowledge of children and the special features pertinent to their role as witnesses a number of factors can be identified which inhibit or assist the obtaining of complete and accurate reports from child sexual abuse victims. These operate at various stages along the path from disclosure to the child's appearance in Court.

A particularly crucial factor concerns the attitude of adults towards the child's allegations. Disbelief may lead to no further action being taken from a very early stage. In other cases, family members may place the child under pressure to retract her story. It is clear that the support of a trusted adult greatly facilitates the child's ability to provide a true account of the abuse suffered.

Other relevant factors include:

The skill of the adult eliciting the information

(i) Interview processes leading up to Court

The most common reason for obtaining unreliable information from child victims is bad interviewing. Guidelines relating to the setting and manner in which the initial investigative and subsequent therapeutic interviews should be conducted with child victims are contained in a paper produced by the National Advisory Committee on the Prevention of Child Abuse.[15]

It is necessary for those talking with child victims — be they investigators, therapists, lawyers or Judges — to have a thorough understanding of essential features of child development. Those lacking such skills are likely to ignore, misunderstand or misinterpret children's attempts to provide them with crucial details.

Counterproductive interviewing can also occur when the interviewer holds a strong preconceived impression of what happened to the child. This may lead to the phrasing of highly suggestive questions and a lack of receptiveness to relevant information that does not fit into the interviewer's preconceived version.

Because some children say so little in response to questioning, adults become tempted to ask suggestive questions of them in order to obtain more information. (See Goodman et al, fn 7.) This can cause problems and risk confusing a child, thereby obtaining false information.

Thus if a trained investigator does not conduct the initial interview, an inaccurate and incomplete account may result. The accuracies may remain undetected and may be perpetuated throughout the investigation and trial.

(ii) Interview processes in Court

In many cases of child sexual abuse the child's story is the central evidence offered. Therefore the decision of the Court will be heavily influenced by how well the child's testimony is delivered and how it withstands cross-examination.

During cross-examination child victims will have their credibility attacked. This attack may not be as overt as that levied on an adult, but tactics used by lawyers to discredit children can include:

inappropriate language in relation to the child's age eg the use of double negatives, "big" words and difficult sentence constructions.

use of leading questions to confuse the child and to demonstrate suggestibility.

questions about irrelevant, peripheral details, or about the specific order of events that occurred many months ago.

highlighting their inability to provide some types of objective information eg judgments concerning standard units of measurement.

The Judge has an important role to ensure that the trial is conducted fairly. At times this may require him to rule whether or not the cross-examination is appropriate given the age and developmental level of the child. The understanding of the Court would be even further enhanced by increased use of expert witnesses to place the child's experience and understanding in a more general context.

The child's use of supporting materials

Because of their developmental level, limited coping skills, or fear of reprisal, many young children are either unable or unwilling to verbally describe their experiences of sexual abuse. While the memories of adults can be more easily facilitated through verbal prompts, a child may respond better to concrete retrieval cues. A variety of props can be used during interviews to assist children to report events accurately to a level that may exceed their purely verbal abilities. These tools include:

anatomical dolls;
"dramatic play" props such as puppets, dolls' houses, telephones and;
materials that promote personal expression such as play dough, paints, crayons, pens.

Though the use of such props young children are often able to demonstrate their experience of abuse directly, or provide indirect evidence of the abuse through their play, drawings or writings.

Obviously any interpretation of a child's behaviour with such props must be in the light of information

on the behaviour of children who have not been sexually abused. While this cautionary note is applicable to any of the props mentioned it is of particular relevance to the use of anatomical dolls. The parameters of normal exploratory and play behaviours with these dolls by young children who have not been sexually abused are unknown.

Nevertheless anatomical dolls can be an effective tool for facilitating a meaningful exchange with children about their sexual knowledge and experience. However the dolls, or other props for that matter, are not magical. Using them in sexual abuse investigations does not ensure disclosure nor provide a guaranteed method of obtaining the truth. The effectiveness of any tool is contingent upon the skill of the user. The interviewer's skill and experience in using such props are of vital importance because of the serious legal, psychological and social consequences of decisions based upon such evidence. Not only is the way in which such information is obtained of importance but the interpretations based upon the findings are critical.

Recent research has highlighted both these issues.[16] It has been pointed out that it is not known what effects (if any) a number of variables have on the sort of information that is obtained. These variables include: (1) the child's previous sexual exposure and sexual knowledge; (2) the gender of the interviewer; (3) the gender of the child; (4) the types of instructions used when presenting the dolls; (5) the familiarity of the child with the interviewer and the interview setting; (6) the presence or absence of the interviewer in the room while the child explores the dolls; (7) the prior physical or medical experiences of the child such as use of suppositories or genital examinations; and (8) the impact of the features of the dolls (a variety of dolls are available and there is no uniformity of features).

With regard to the interpretation of the findings, professional groups and indeed even the individuals within them do differ in the conclusions they draw from the same observed activity with the dolls. (See Boat et al, fn 16.)

It has been suggested that anatomical dolls can interfere with children's accuracy. This derives largely from Freudian theory and its implicit notion that children are sexual beings and prone to sexual fantasies. It is held therefore that the inclusion of body parts, such as genitals on the dolls, could foster such fantasies, particularly when a child is being asked about sexual matters. The theory has also been advanced that false reports could arise when a child, on being questioned about an event it witnessed or experienced, has its suggestibility heightened by the presence of the visual cues provided by the anatomical dolls. However research findings indicate that the use of anatomical dolls in and of itself does not lead to false reports of abuse even under conditions of suggestive questioning![17] The dolls are being shown to be a promising, though still controversial, technique for assisting young children with limited verbal skills to relate, in a clear and convincing manner, what happened to them.

The number of interviews of the child victim

It is not uncommon for child victims of sexual abuse to be interviewed numerous times during their involvement in the legal process. Some children come to resent the repeated interviewing and refuse to discuss the abuse again. Some even recant their initial disclosures.

If a child has to repeat his/her story many times, the testimony may take on the quality of a rehearsed and memorised "script". In Court, attempts may be made to use the script-like nature of the testimony to discredit the child.

While it may be necessary to interview a child more than once – either to obtain a disclosure or to answer further questions that arise as the case progresses – the number of interviews should be kept to a minimum. There are several ways in which this can be achieved:

by having highly skilled staff undertake the interviews;

joint Police/Department of Social Welfare investigations;

use of audio and video tape technology.

The delay in proceedings (including the effects of therapy)

As time passes, both adults and children may begin to have difficulty with the recall of events. The fact that children may not testify until months or years after they were abused increases the chances that they will have forgotten part of what occurred. It is known that, at least in several circumstances, children are less likely than adults to fill memory gaps with inferred information. (See Johnson et al, fn 3.) Thus, a child's testimony may appear less coherent, even if it is in fact, more accurate than an adult's.

During this time the child in effect remains "on call" and the wait may be punctuated by a series of adjournments. These can have a detrimental effect since a child may come to Court emotionally prepared to testify, only to be told that the case has been adjourned and that she will not take the stand until a later date. Such events can occur several times. By the time of the actual appearance the child may be so traumatised by this process that her testimony and credibility may suffer. In such circumstances some children have been known to refuse to testify. A child may also withdraw from the process through a desire to put behind her the abuse and the resulting legal experiences.

The shadow of the impending Court appearance may inhibit the child's effective participation in therapy. The need for the child to remain a "good" witness throughout this period can conflict with the child's needs to overcome the emotional trauma of the abuse. The therapeutic process is not assisted when the child has to continually retain specific details about the abuse so that these can be recalled some months later when the trial commences. It is extremely difficult to involve a child in constructive therapy while a case remains unresolved.

Finally, it appears children develop a variety of coping strategies to deal with the abuse they have experienced![18,19] Some "act out", become delinquent, do poorly at school or develop emotional disturbances. These behaviours may all be brought out in the Courtroom and used to discredit the child. Some children cope by denying that the abuse occurred, while others withdraw emotionally from the event and appear uninvolved or numb. In this latter case the child victim may testify without showing any of the emotional reactions the

trier of fact might expect, thereby leading to doubt being cast on her credibility.

To overcome this trials involving child witnesses should be afforded priority within the criminal justice system and any requests for adjournments should be considered in the light of their possible impact on both the child and the quality of the evidence to be adduced.

The Court environment

(i) The Courtroom

The Court setting is an alien environment for any person unfamiliar with it and as such can be very intimidating. Courts are designed with adults in mind, so that the witness box and other furniture do not easily accommodate children. Testifying in such an environment can increase the child's feelings of being small and helpless. Some children have difficulty appreciating that it is not them who are on trial. Even though they may be explained in advance, where trial is in the High Court, the wigs and robes of the legal parties involved, along with the formality of the proceedings, may be off-putting for the child.

A child victim can feel very isolated in the Courtroom since many of those present will be unfamiliar to them. Being physically separated from known and trusted adults can add extra stress.

While hopefully the child is already familiar with the prosecuting lawyer, the young witness's conversation with that person now takes place in a context that can be both bewildering and frightening. During direct examination, the defence lawyer may object to some of the questions, adding to an already strained atmosphere.

We strongly endorse current practice to close Courtrooms to the public during the victim's testimony, to allow the close proximity of a support person and to prohibit the publication of identifying information in child sexual abuse cases. These practices all help to overcome stresses associated with children's appearances in Court. With respect to the publication of identifying information we believe this practice should become a standard procedure unless specifically ordered otherwise by the Judge.

Young children who must testify could be better prepared by visiting the Courtroom, by meeting the Judge if possible, and by having the procedures explained in understandable terms.

(ii) Presence of the defendant

For children, fear of the defendant's presence in the Courtroom is frequently mentioned as one of the most traumatic aspects of the criminal justice system. Historically, looking the defendant in the eye as one accuses him or her of a crime was held to be an acid test of the truth. But when the accuser is a child, this confrontation may offer a convenient means of intimidating the witness, resulting in serious, damaging effects on the child's testimony. This may be especially so in intrafamilial child sexual abuse cases. The interests of justice are not served when victims are unable to effectively give their evidence due to the close physical proximity of the accused.

Unobtrusive, ad hoc measures have been used in some New Zealand Courts to shield child victims from direct eye contact with defendants. Some lawyers use their own bodies to block the victim's view of the defendant during the direct examination. Others simply instruct children to look elsewhere while they testify – especially to look at a supportive family member or friend. Some children are encouraged to tell the Judge if the defendant is "making faces". Such measures may not completely eradicate the fear of the defendant's presence in Court but at least they impart a small sense of control in an otherwise overpowering situation.

A more specific measure, was the use of a screen placed between the child witness and the accused in the High Court during 1988. It is pleasing to note that recent legislative amendments have built on this by enabling the child victim's evidence to be given via videotape, closed circuit television or behind a screen or one-way glass. (Evidence Amendment Act (No 104) 1989.) All child witnesses appearing in Court should have the right to avoid the stress and potential intimidation that can arise from direct eye contact with the defendant.

(iii) The surroundings of the Court

Another aspect regarding a child's fear of seeing the defendant also needs to be taken into account. If the accused is allowed bail he could be waiting in the same area of the Court as the child, immediately prior to the commencement of the proceedings. There are no facilities in the immediate surroundings of our Courtrooms that have been designed with children in mind. Given the ever increasing prosecution rate for sexual offences against children this is an obvious omission that should be addressed.

Should a child testify?

Most existing information about children's reactions to Court involvement is anecdotal and descriptive. Despite the lack of hard data, the majority view (of professionals, families and victims alike) is that Court involvement does retraumatise children. However it is also maintained that the criminal justice process is not necessarily traumatic and may even be cathartic for some child victims:

1 Children, like adults, often have strong feelings regarding their victimisation and want the offender to be punished for his wrongdoing. Court proceedings are the only way that the victim can legally seek retribution against the perpetrator;

2 Older children in particular often have a strong sense of social responsibility and will choose to proceed with prosecution (even though it may be stressful) in the belief that they are helping to protect other children from being victimised;

3 In many instances, Court proceedings also serve to enhance the child's sense of personal vindication – others are treating the child's victimisation as a serious matter; are tangibly expressing their trust and faith in the child's story. Not all of the information on the question – Should a child testify? – is based solely on opinion. The earliest studies – undertaken in the USA in the 1960s – tended to show that child sex victims who were involved in judicial proceedings

suffered more deleterious effects and psychological harm than children who did not go to Court.[20, 21] However these studies had methodological flaws and so caution must be exercised with respect to their findings. Gibbens and Prince's study had a biased sample – the cases which went to Court were more serious than the ones which did not. Therefore the greater disturbance experienced by the children who testified might have resulted from non-Court factors. The later research undertaken by De Francis did not include a comparison group. This makes it difficult to determine how much of the children's disturbance was caused by the assault as opposed to testifying in Court. (See Goodman et al, fn 8.) Fortunately more extensive research is now underway in the United States and Scotland.[22, 23, 24] While such research is clearly essential, it is important to remember that the findings do not necessarily argue for limiting children's Court appearances. In contrast, they may more justifiably argue for changes in Court proceedings concerning children, so that those elements of the judicial process that create undue stress can be minimised.

Conclusion

It is clear that children have traditionally been undervalued as witnesses. Recent research has demonstrated that with respect to events of personal significance, such as sexual abuse, even young children are able to provide accurate testimony. This process is greatly enhanced if the adults involved, in both the investigative and judicial processes, take the child victim's age, stage of development and special role as a witness into account □

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Recent Admissions

Barristers and Solicitors

Ambler S E	Christchurch	27 September 1990
Anderson P F	Wellington	13 July 1990
Bolt F C W	Wellington	3 August 1990
Bremer P H	Wellington	3 August 1990
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Callender J M	Wellington	3 August 1990
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Heron M R	Wellington	3 August 1990
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Lim H M	Wellington	3 August 1990
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Paterson H M	Wellington	13 July 1990
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Rijkse M V	Wellington	13 July 1990
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Scabb C N	Wellington	13 July 1990
Scott L N	Wellington	13 July 1990
Sharma P P	Wellington	13 July 1990

Ninth Commonwealth Law Conference April 1990

Contract: Recent Developments

Mr Donald Dugdale

I am your chairman for this session. It can be but rarely in New Zealand we have had gathered together on the one platform academic contract lawyers of such distinction as the three gentlemen you see before you today: Professor Brian Coote, I suppose first made his international name with his monograph on exemption clauses, and we in New Zealand are extraordinarily fortunate that with the world at his feet, as it were, Professor Coote chose to make his career in his native land. We are also extremely fortunate in New Zealand that for 20 years, until in this country law reform was brought to a halt with the establishment of the Law Commission, Professor Coote made his services available to the Contracts and Commercial Law Reform Committee. Brian Coote is not, I suppose, a prolific writer, but every word, every syllable he writes has the sense when you read it that it has been weighed, that it is the product of a profound wisdom. He is the author of a most limpid prose, and everything he writes is read with respect and fascination throughout the Common Law world.

Our next speaker is Dr F M B Reynolds and he is equally well-known as the Editor of the *Law Quarterly Review*, Editor of *Bowstead* and *Benjamin* and of *Chitty*. He has done law reform work as a consultant to the English Law Commission.

Professor Waddams is a Professor of Law at the University of Toronto. His book on the Canadian Law of Contracts is a sure guide to those of us with a need to try and make our way through and study developments in Contract Law in that particular country. He is the author of a book on damages. He, too, has acted as a Consultant to the Ontario Law Reform Commission, which is a highly respected Law Reform body. He also has a slightly eccentric, perhaps, interest outside the mainstream of his principal academic preoccupations an interest in Dr Lushington, the famous 19th century English Admiralty Judge.

Now the published title of today's session, or at least of Professor Coote's paper, is some sub-editor's rather jazzed up version – the name of his paper, carefully selected by Professor Coote, is Contract: New Forms of Obligation.

As I understand the position, Dr Reynolds takes a view broadly in agreement with, but not identical to, that of Professor Coote. Professor Waddams takes a stand rather further away from Brian Coote's, but perhaps he is corrupted by influences from south of the border. You should not assume that we are concerned with some sort of donnish disputation of taxonomic matters of no real practical importance, and I hope and believe that the speakers, in developing their arguments, will make it clear just why it matters who is right on the particular issue that is the subject matter that we are discussing this morning.

Professor Coote

It is good to have been invited to prepare a paper for this session and to speak to such a distinguished audience. It is also a special pleasure for me to be sharing the platform with Dr Reynolds and Professor Waddams under the chairmanship of Donald Dugdale, and in Donald's case, not merely because of the 29 years we both served on the Contracts and Commercial Law Reform Committee.

Could I just clarify what I and my fellow speakers think that this session is about? What we were asked to do was to prepare for a session called Contract: New Forms of Obligation and it is that, rather than the paper, which appears under that rubric. So all of us are going to address ourselves to contracts – are they new forms of obligation?

In the past, when I have shared a platform with either of the other two speakers, it has been for the purpose of introducing them to the audience. In a sense, my function is not so very different today. This session is concerned with recent developments of the boundaries of contract, and I undersand it is primarily with those developments that the other two speakers will be dealing. But it is of potential importance to be able to determine whether developments at the boundaries of contract are within those boundaries, or outside them. I say that because if they are identified as contracts, that will attract to them all the rules and concepts which make up the Law of Contract. If that identification were wrongly made, it would be bad for the new developments, and ultimately bad for contract itself. My concern, therefore, by way of introduction to the session, is with the question of what contracts are in the first place. What is it, if anything, which distinguishes them from other kinds of legal relations?

Two or three years ago, I wrote a lengthy two-part article on this topic under the title "The Essence of Contract" which was published in the first volume of *Contract Law*. And here could I put in a plug for that journal. It's published in Sydney by Butterworths, Australia, but it has an international editorial board, and is intended to deal with contract topics of international interest. So far as I know, it is the only periodical in the common law world exclusively devoted to contract law, and I commend it to you. At this point, if I had the facilities, I would play you an appropriate jingle, doubtless with the full approbation of his Excellency, the Governor-General.

To get back to my article, it was far too long to be reproduced in the Conference papers, but copies have been made available at this session for those who might be interested. And if you haven't already got one, they can be uplifted at the door as you leave.

The paper which appears under my name in the Conference papers with the title "What is a Contract?"

is a distilled version of the essence of contract. But it, too, is too long for me to read to you this morning. So what you are going to get now is a further distillation, distilled, I suspect, to the point where all that is left is mountain moonshine. As it is, all I can do in the time available is to make a series of assertions.

There are real difficulties in deciding just what distinguishes contract from other relationships, and they seem to have been of pretty long standing. The evidence for that lies in the traditional definitions of contract and the traditional contract theories. Common law definitions of contract have been in terms of agreements or of promises which the law will enforce.

But not all contracts are agreements. Some forms of deed, for example, are not agreements, and not all agreements are contracts. Similarly, not all the promises the law enforces have been regarded as being contracts.

When we come to the contract theories, we run into similar problems. Thus, the will theory says contracts are to be enforced as expressions of the human will. That may appear to explain many features of the law of contract. But on the one hand, not all expressions of the human will are contracts, and on the other, while contracts may approximate to the actual will of the party, such things as the postal rule, the rule in *Smith v Hughes*, and the use of the standard forms all show that contracts do not depend for their existence on being actual expressions of the individual will.

Next the bargain theory, that is that all contracts are bargains under which each party pays for the promises of the other. It derives from the consideration requirement of the common law and would deny the status of contract, not only to at least some deeds within the common law system, but also to at least some relations who recognise this contract in continental European systems which have no doctrine of consideration.

Thirdly, the promise theory that contracts are or should be enforced just because they are promises was revived in a book published as recently as 1981. But again, not only does the common law enforce some promises it does not regard as contracts, fortunately for ordinary mortals, neither does either legal system enforce every promise. Life would be intolerable if it were attempted to do so.

The other two traditional theories of contract are closely related to each other: one which goes back at least to Adam Smith in the 18th century says that contracts exist to protect reasonable expectations. The other bases contract liability on reliance by the promisee. Neither can be said to isolate the distinguishing marks of a contract.

Contracts can exist, despite an absence of expectation on the part of the promisee, and the very essence of a bilateral contract is that it should bind the parties immediately on formation well before either party can have acted in reliance on it.

Now doubtless all these theories contain elements of the truth about contracts. But they fail to isolate what distinguishes a contract from other relationships, because, for that purpose at least, all of them generalise from too narrow a base. They tend to be based on particular elements of contract, on particular types of contract, on aspects of contract peculiar to particular legal systems, or on the reactions of, or the effects on, one of the parties, the promisee.

Clearing the decks

For my own part, I do believe all contracts share a common feature which distinguishes them from other legal relationships. But before that feature can be identified, we need to do a little clearing of the decks. The first point is that if we want to distil the essence of what constitutes a contract, we have to distinguish between those features which are primary and universal, and those which are found in some legal systems but not in others and which therefore can only be secondary. If that is done, the consideration and seal requirements of the common law are seen clearly to be only secondary. Our contracts could still be contracts, even if consideration and seal were to be abolished altogether.

Secondly, we need to distinguish the characteristic marks of a contract from the purposes which the law of contract seeks to serve. Those purposes may vary from one system to another, and from one time to another, or even from one type of contract to another, and they may be few or many. They may also help to determine the form and the characteristics they may have in particular legal systems at particular times in their history. But no particular purpose of the Law of Contract is necessarily universal or essential.

Finally, we need to see contract in the round, and to recognise that its main function is not to penalise the promisor by imposing sanctions on him or her, but rather is to confer advantages on the promisor. There is an analogy here with bailment. Bailments tend so often to be thought of merely as imposing obligations on the Bailee, whereas the principal function and purpose is to transfer rights of possession to the Bailee. The obligations and the sanctions are merely the price of acquiring those rights to possession, and are subsidiary to them. If that were appreciated, gratuitous bailments might be seen to raise rather fewer problems of consideration.

In the same way, contracts are often thought of merely as imposing obligations and sanctions on the promisor in favour of the promisee. Paradoxical though it may seem, the reality is the obligations and the sanctions which reinforce them are there for the benefit of the promisor. The contracting party may have any number of motives for entering into a contract, but his or her purpose in so doing is always to become obliged in law, because that step is necessary to the achievement of some wider objective. And I will be returning to that point.

The element of promise

The next point is that once all the secondary characteristics of contracts have been stripped away, the one feature remaining in the contracts of every jurisdiction is that all of them contain some element of promise. But here we have to be careful we know what we mean by promise. A not uncommon view is that promises are merely emphatic statements of intention, and that in consequence, they can refer only to the future actions of the promisor. Again, the reality is different. A promise is more than a statement of intention.

What distinguishes a promise is that by promising, a promisor puts him or herself under an obligation.

Now that obligation may be to do something, or it may be that something was true or is true. The power to make a promise is a facility provided by society to enable the promisor to put himself or herself under obligation. Or, to use a word with long associations in the common law of contract, to enable the promisor to assume an obligation.

We are now very close to what I believe to be the distinguishing mark of the contract. All contracts involve promises, but not all promises are contracts. Where does the difference lie? In my view, it all turns on what the promisor assumes. Every promise involves the assumption of some obligation. In the ordinary case, that obligation will be a moral one, or a social one or perhaps exceptionally nowadays, a religious one, and each of those obligations will carry an equivalent moral, social or religious sanction. What marks out a contractual promise is that in addition to any obligations, the promisor assumes legal contractual obligations. In other words, contracts are a facility by which society enables legal contractual obligations to be assumed.

In both my article and my paper, I draw support for that conclusion from the fact that it very neatly solves a problem which has puzzled contract lawyers for more than 100 years — the so called secret paradox of the consideration for an executory bilateral contract. It also shows that an executory bilateral contract in common law, the consideration which each party provides is the assumption of legal contractual obligations which each makes to the other. Unfortunately, there is simply no time to take you through that, even though it is central to my article, my paper and my argument. However, if one can accept the contracts or promises by which legal contractual obligations are assumed, several consequences follow for the law of contract of which I can mention only a few.

Methods and limits

The first is that a principal function of the law of contract is to indicate which ways of making a promise the law recognises as being effective methods for assuming legal contractual obligations, Historically, a whole host of mechanisms have been used to distinguish contractual promises from non-contractual ones. For example, blowing out candles, the mingling of blood, the eating of dinners, the exchange of hostages, the use of particular forms of words, to name only a few. At common law, the identifying mark happens, for historical reasons, to be the use of deeds under seal and the exchange of consideration. In part, then, the law of contract is the law of recognition.

The second consequence is that while the assumption of legal contractual obligations has to be the act of the promisor and contractual obligation is something assumed by the parties rather than at least for the most part something imposed on them, it is the role of the law of contract to lay down the limits within which the extent to which an assumption of legal contractual obligation is possible. To prescribe the price for the contract facility, which the promisor must pay, such as, for example, subjection to implied-by-law terms, and to determine the nature and the extent of the sanctions for breach of the obligations assumed. It follows that if a contract is to be formed, the species of obligation an intending party must assume is a legal contractual obligation. At least until recently, the *Hedley Byrne* tort has been seen to turn on an assumption of responsibility, but the presence of that assumption does not mean that a contract comes into existence. Responsibility assumed is not a legal contractual one. Both the obligation and the action found in tort, not in contract.

Similarly, in my view, it is not strictly true to say that a contract is a promise which the law will enforce. There are situations, both in tort and in equity, where the law will lend some measure of enforcement but the enforcement flows not from there having been a breach of contract, but from want of care in the case of tort, and from grounds of conscience in the case of equity.

Consideration

A third consequence of contracts being assumptions of legal contractual obligation concerns the role of consideration in the common law of contract. I said that consideration is the secondary characteristic. In our law, it serves in tandem with intention to contract to denote a type of promise the law recognises as effective to the creation of a contract. I have also said that this means the consideration could be dispensed with, but of course some other means would have to be substituted by which the law marked contractual promises for non-contractual ones.

For myself, though, I think the abolition of consideration would be a great mistake, I do not think that need prevent the creation of new and additional forms of contract. I do not see the recent developments in tort and equity as serving that purpose, because they are not means by which legal contractual obligation can be assumed. On the other hand, a recent development which I do think could be seen as the creation of a new and additional form of contract is the recent decision in the *Trident General Insurance* case. There, the High Court of Australia, by a majority, held that an insurer's promise to indemnify a third party could be enforced against it by the third party. That, it seems to me, could mean that the law in Australia now recognises a new additional means by which it is possible to assume legal contractual obligations in a particular situation.

Whether that is something the High Court of Australia ought to have done, of course, raises a completely different set of issues.

A final point about consideration is that on the approach I am putting forward, consideration is really a great deal more flexible than many have allowed. If I am right that the considerations which the parties offer each other in a bilateral contract are the reciprocal assumptions of contractual obligations, it would follow that anything can be consideration if it constitutes an effective assumption. When bilateral contracts fail through lack of consideration, it will not be on economic grounds, but simply because the apparent contractual promises made by one or both of the parties were ineffective assumptions, because they were illegal, or void, or were too vague or uncertain to be enforced.

To sum up, I believe that all contracts in every age share a

common feature. All of them are assumptions of legal contractual obligation achieved by methods which the law of the time and at the place of the contract recognises as effective for that purpose. Every other feature of the contract is secondary, and could therefore be dispensed with, though whether those speeches ought to be dispensed with in particular cases may be a quite different matter. I believe this conclusion makes contract potentially much more flexible than some common law commentators have allowed. I believe it also shows that the doctrine of consideration, to, is rather more flexible than in some quarters has been allowed.

On the other hand, if contracts are assumptions of legal contractual obligation, the developments with which Dr Reynolds deals in his paper are not contracts, however much they may resemble them. As his paper makes clear, that is his view also.

Finally, I have to add that my conclusions about what constitutes a contract have been reached by the application of old-time formalist reasoning. I am well aware that a great many common law scholars would approach the subject very differently. To my mind, what is remarkable about the views of the three speakers who share this platform this morning is not that those views differ in some particulars, but rather that they are, in some respects, fairly similar. I find that encouraging, and I am grateful for it, just as I am grateful to you, Mr Chairman, and to this audience for putting up with such an abstract, conceptual, theoretical, formalist discourse as this has been.

Dr F M B Reynolds

I would like to try and speak to my paper in a way that does not simply summarise its contents, but rather restates them in a slightly different way, though I do not know whether I should be successful in this enterprise, and I apologise in advance if I needlessly repeat what Professor Coote or I have already said, or if I add obscurity to obscurity from the paper to this discourse.

The problem towards which this session is directed is in some respects one of high theory, but is in others one of – as Mr Dugdale said – great practicality, since it affects the future development of contract law, which in one way or another controls, whether directly or indirectly, much of our commercial intercourse.

The problem can be put in this way. Until fairly recently, the books from which students learned the law of contract and which practitioners consulted, expounded, or were easily taken as expounding, the relevant law in a fairly uncritical way without reference to its purpose or boundaries, or without *much* reference to its purpose of boundaries. It was, in general, assumed the law of contract existed to carry out the intentions of parties who, by a sort of article of faith in the law, had to have freedom of contract. The law of contract was regarded as having well settled limitations – liabilities voluntarily undertaken. Neither contracts, nor variation of contract, were in general binding without consideration. Third parties could not sue. There was no remedy for non-disclosure in negotiations or in general during the contract. There was little relief in circumstances where one party was in an inferior bargaining position to the other. Terms not stated were not easily implied. There was no relief against the unfair operation of contract terms, and so forth.

I do not myself accept this stark account was ever correct, though some of the earlier textbook writers and teachers may, perhaps, rightly be criticised for allowing readers and students to take away the impression that it was. In fact, no legal system can ever have been able to require a genuine agreement for contractual liability – one party could escape too easily. Some measure of objectivity must also have been relevant.

Consideration

The notion of consideration has always been the subject of development. The English Court of Appeal developed it in a slightly surprising way as recently as December of last year – a case called *Williams v Roffey Brothers* referred to in my paper. The idea that the third party cannot sue in a contract is not inevitable – it is a matter of choice. In this I may, perhaps disagree in some measure with Professor Coote. The English Courts probably made the wrong choice in *Tweedle v Atkinson* in the 1860s when the new Court of Appeal took the right one in *Lawrence v Fox* about the same time. The trend can be reversed by a further choice, though it may be open to argument whether, when it is well entrenched, this reversal should occur by statute, as here in New Zealand, or by case law, as seems to be happening in Australia.

The equitable doctrines which provide relief have a long history. Statutory control of unfair contract terms in England goes back to the days of the building of canals and railways, and statutory implied terms to the industrial revolution. The mechanisms have been there – the willingness to use them has varied.

Remedies and new theories

Two sets of fairly recent developments have given rise to problems, leading to the result that much of the supposed traditional framework of contract has been doubted. First, a number of cases have indicated that remedies may be required in situations where the law of contract, narrowly stated, may not easily grant them.

Remedies on the fringe of contract, near contracts – I refer in my paper to some examples. In some cases, ways of granting such remedies whether by way of tort, restitution or estoppel have been devised. In others, failures by the Courts to devise them has indicated possible deficiencies in the law which have been used as a sign of general inadequacy in the law of contract.

Secondly, there has been a great surge of theoretical interest, at any rate among academics, in the basis of contract law. In particular, in the notion that instead of merely implementing supposed desiderata of freedom of contract, the law must rather exercise its controlling role of adjusting in equalities and procuring fair results in two and three party and similar relationships. This combination of the practical and the theoretical, new cases and dissatisfaction with old theories, has led to a view that the existing doctrines of contract are inadequate for the regulation of the commercial and related disputes of today. And even that the whole

notion of contract itself as at present understood is inadequate and unacceptable. One version would then say that we should move ahead by reference to a general notion of obligation, which is not shackled by the traditional sub-categories of contract, nor possibly by those of tort or restitution.

Assumption of obligations

As I understand Professor Coote's paper, he attacks the issues from the point of view of the theory problem, basic theory is out of date, and seeks to show that an exceptional basic theory of contractual obligation can be detected which provides a proper framework for the category of contract, and also accommodates the development to which I refer above, and permits further ones.

The notion which he puts forward – which I state with the temerity appropriate to one person seeking to formulate another's views – is that the contract is part of the law which accommodates commercially related intercourse between persons by providing facilities for the assumption of obligations. Since the law does this, the law can set limits on when it does so, as by requiring consideration or seal, and so excluding gratuitous promises, by giving relief in the cases of mistakes, duress, undue influence, frustration and so forth. There is, however, nothing sacrosanct about these limits. The law can vary them as it wishes, by abolishing consideration, allowing third parties to sue, varying the relief given, and so forth.

The existence of such limits on the facility provided by the law does not raise any crucial obstacles to the acceptance of the general purpose of the contract as providing for the assuming of obligations to others. As I say in my paper, I am in general agreement with Professor Coote's view, and so, I think, would be far more people than he perhaps suspects. I venture to draw attention in my paper at the beginning to some points which I think emerge – there are four points from Professor Coote's own paper. Two of these, which I shall not expand on, relate to the dangers of trying to derive theories from definition of contract or, alternatively, from preconceived and rather limited views as to the purpose of the contract.

Extreme views

My last, or fourth, point, relates to the dangers of finding an extreme version of one theory inadequate, and proceeding then to an extreme view of a contrasting theory. All of these show the difficulty of oversimplified application of theory. I will say no more about them, but I would like to say a little more about my third point arising out of Professor Coote's paper as to consideration. I suggest that far too much attention has been devoted by theorists to the doctrine of consideration. It is part of the common law of contract which, unlike Romanistic law – and this is an important distinction – emerged from tort, to oversimplify. Modified, it served and serves as a test to the enforceability of contract and variations, and the effects of making gratuitous contracts has the effect of making gratuitous contracts and variations unenforceable. It may or may not be a good test for this, and is capable of modification. Its removal, whether for formation of contract, as in the draft contract code which was produced as one of the English Law Commission's first efforts drafted by Mr Harvey McGregor, QC, but subsequently abandoned, or merely for variation as the new reform of Commercial Code Section 22091 would not affect the general notion of contract in the slightest.

Distinction between general aim and distribution

In a famous essay on punishment, Professor H L A Hart dealt with the difficulty of reconciling the various theories of the purpose of criminal punishment. Of course, no single one can explain all the phenomena surrounding the notion. What he suggested was distinguishing between general aim and distribution. The general aim of punishment – let's say deterrence – may be displaced in distribution – the allocation of punishment – in particular cases by other considerations such as the moral value of proportionality, of punishment to offence and guilt, with the possibility of reformative treatment, and so forth.

So in contract, the general aim of contract law can be expressed as to provide facilities for the assumption of obligation. But in distributing or applying this, the law can take some persons who did not intend to make it to assume obligations, into account and hold the marble on the basis that it looks as if they did, though not, I would add in my view, as against the person who is actually aware that no such assumption was intended – this is quite a crucial point.

The law can also, in applying the general aim, fill gaps. It can provide and extend various remedies for an equal bargaining situation, duress and mistake and so forth. It can decide on the remedies for an equal bargaining situation, duress and mistake and so forth. It can decide on the remedies it thinks appropriate – whether specific performance should be the basic remedy, or whether damages for expectation of loss in lieu – that is to say, the profit that would have been made or cost of doing the work and so forth – should be granted.

Or even whether the contract breaker's profit should be disgorged. Whether there should be a duty to mitigate damages. Our present law on a lot of these is more or less accidental. The present rules do not result inevitably from any theory. They can be changed, as indeed they are being changed – examples occur in both Australia and this country. But this does not invalidate the category of contract. I submit that there is a heading of contract as a branch of law dealing by way of general notions, with obligations voluntarily assumed between parties, however much this aim is modified in application. I am willing to confess, like Professor Coote, to being a formalist – even a conceptualist – in the sense, I think, that the reasoning used in dispute resolution is more manageable, more comprehensible, and more helpful to those advising parties in dispute, and most importantly, more convincing to those over whom an exercise is control, which is in the end coercive, if it is kept in understandable channels.

Categories of obligation

In my view, the different categories of obligation, of contract, tort and restitution, have great value so long as we do not let them dominate us and realise that there are grey areas requiring perceptive analysis. These

categories come from Roman law, and with some reservation about restitution, are getting on for 2000 years old. In saying this, I invite ridicule by way of the argument within the space age we should not be governed by notions applicable in a different society operating in vastly different conditions a very long time ago. But the very survival of these categories in this day – one of which, restitution is not itself yet properly worked out – may show that they reflect basic interrelations between human beings.

If you throw all the cards up in the air, they may well, in the end, come down in much the same way. To suggest abandoning the categories and developing techniques within a new and vastly larger category of obligation is to abandon some lines of reasoning which have not, I suggest, yet proved effective, even if they have not always been handled imaginatively. The fact that they can be developed, modified and changed does not mean that they had and have no validity.

On this basis, in my paper I make suggestions about two actions that are deployed within, and on the edge of, contract. They are tort and estoppel. In connection with tort, I suggest that is tort action, one on the fringes of tort, may sometimes be appropriate when something is undertaken in circumstances not constituting a contract and is badly performed – as in the case of the negligent adviser on buying a car and the solicitor's negligence in holding passports and wills – examples given in my paper.

Equally, a solicitor may be liable to the beneficiary of a will – the English case of *Ross v Caunters* for misfeasance. This is tort. But does not make him liable or her liable for non-feasance, for example. Let us note for example the solicitor commissioned to draw up a will in favour of a third party who never does so at all before the testator dies as a question for contract, if a third party has been able to sue for a third party contract. I grant the distinction between misfeasance and non-feasance is a difficult one, and that in a sense all tort liability is for economic loss – a point not lost on the Romans in the third century BC. But this does not mean that the distinction of doing something badly and not doing it, or between causing economic loss and the obvious cases of destruction or damage to personal property and causing economic loss where there is no such obvious reference is meaningless.

Equitable proceedings

Estoppel is more difficult, for this brings in equity and in equitable proceedings, attention is directed not to the original undertaking of one party to the other so much as to the equities of the eventual situation presented to the Court. Although the members of the High Court of Australia in *Waltons Stores v Maher* referred to in my paper suggested, I think, that there is no difference between common law and equitable estoppel, and perhaps between estoppel in relation to formation of contracts and estoppel in relation to modification of contract – so called promissory estoppel – is simply an example of the special function of equity in modifying an unsatisfactory turn taken by case law in the late 19th century. The one that modification of contract needs consideration laid down in England in the case of *Foakes v Beer*, a case in which Lord Blackburn very nearly dissented.

Regular desirability of equable intervention leads to a conclusion that the old rules should now be abolished so that contractual modifications no longer need consideration, but are controlled only by doctrines of duress and the like. The English Court of Appeal, rightly or wrongly, have very nearly got to that conclusion in the case of *Williams v Roffey Brothers* to which I referred. This seems to me to show that estoppel is in essence in reserve, and not central doctrine, which is deployed to modify other doctrines, and there finally comes a stage, as there did in Roman law, when what was originally the modifying doctrine is received into the law as the new principle.

Estoppel is creating liability where no contract has been formed, is a different matter. I give in my paper a progression of cases from an estoppel as to the meaning of the contract made to one as to the parties to the contract made to one as to whether the laws of contract made, and finally as to whether there would be a contract made. The latter, obviously, goes furthest.

A convenient example of the latter, the last, is the decision of High Court of Australia in *Waltons Stores v Maher* where a landlord did work on premises on the assumption, on one view of the facts, that a contract would be executed, and it was not. He was granted a remedy in damages. It was not clear how damages were calculated in the case, because the matter is not referred to in the appellate proceedings, and indeed, since the case could be explained on different grounds, did not really arise in them. But as these were granted in lieu of specific performance, one might assume that they were calculated on the basis of profit lost, taking into account the expenditure that would have been incurred anyway, and the possibility of mitigation.

Like Professor Coote, I would think that the reliance interest – money thrown away – would be the appropriate compensation in such a situation in which there was not, by virtue of protective rules of law, a contract. But whereas he, and perhaps others, would regard this I think as still a contract case, I would venture to regard it as nearer to a tort case. I would classify it as a dispute regarding the duties of parties to each other in negotiation, duties which are inadequately developed in the common law, as in the two cases I cite later in my paper – *La Banque Financiere* case and *The Good Luck* case show. And here what is needed is an award of damages for reliance loss. I believe that this case would be classified in civil law countries as an example of *culpa in contrahendo* – negligence in the formation of contract.

The common law technique of contract here provides, it seems to me, a route to a solution that should in the end perhaps be likened to another interesting category, that of tort. I appreciate that in New Zealand, s 6 of the Contractual Remedies Act as in the case of *Walter v Kerr* may close off some of the possibilities which I am advocating.

Now this is not to say that I think that in no case should what I call the residuary remedy of estoppel be capable of generating compensation on an expectation basis. There are cases on improvement of and work on land where, as a last resort, conveyance of the land, or creation of interest in it, is ordered. Some are

justifiable on a restitutionary basis, but not all. Perhaps such cases will always exist as a rather muddled marginal area where only discretionary relief is possible.

There is an obvious need for tools and agencies for modifications of existing rules. My overall submission is, however, that most of the developments, however they first present themselves, will in the end slot into, or attach to existing techniques which we already have the interplay of tort and contract. And the dynamic force of equity for creating development and change does not mean that the category of contract, to which that development and change is applied, is in itself invalid, and nor are tort and restitution. Rather, all three are constantly developed and improved and Professor Coote's explanation provides a modern framework for one of these categories.

Professor Waddams

I, too, am in general agreement with Professor Coote. Definitions of legal matters are notoriously elusive. We can see so easily the deficiencies of all past attempts to define contracts in a satisfactory and exhaustive manner. To me, this suggests caution. Where is the source of our confidence that we can succeed where all our predecessors have failed. But there is room, I think, for perspectives on contract law, and a perspective is different from a definition because a perspective doesn't look all round the subject – it looks at it from one point of view. And I offer a perspective on contract law.

What does contract law do? It enables persons to buy and sell assurances about the future. When we sell our own assurances, we call this "obtaining credit" and we consider it a very useful thing to be able to do. When we buy another's assurances about the future, we think of the process as planning or ordering – words that have quite frequently been used by those seeking to describe the purposes of contract law. One cannot obtain credit unless one's own promises are creditworthy. The law of contract assures that they are. Assurances about the future are only useful for planning or ordering if they are reliable. The law of contracts makes them so, and it gives us these considerable advantages, as I would call them, by enforcing promises.

Now perhaps these advantages could be obtained by less than full enforcement – for example, by protection only of reliance on those promises when reliance was established by proof.

The suggestion made on this over 50 years ago, I think, in a well-known article by Fuller and Perdue, in an American journal, is that the only practically effective way to make promises reliable is to enforce them or to give the economic equivalent of enforcement which they call the "expectation measure of damages".

I am in agreement also with what Dr Reynolds said, referring to Professor Hart, to the effect that the underlying purpose of a legal rule is not the same thing as the rule itself. So adducing cases in which a legal rule fails to achieve its alleged purpose does not, in my opinion, show that the rule itself, or its purpose, is erroneously stated. There are, I think, many illustrations that are part of everyone's everyday experience that illustrate this phenomenon. How often do we say to ourselves: "How ironic that this rule should apply to my case. My case is not within its spirit or intentment, and yet I see that it would not be practicable to deal separately with my sort of case."

I think the matter was best put by the 19th century Admiralty and Ecclesiastical Judge, to whom Mr Dugdale referred in his introductory remarks, Dr Stephen Lushington, who said in 1849, speaking of the law of damages – in that case, the problem he was dealing with was the proper measure of compensation in case of destruction of a ship – he said: "The general rule of law is that the party receiving the injury is entitled to an indemnity for the same." But although this is the general principle of law, all Courts have found it necessary to adopt certain rules for the application of it, and it is utterly impossible, in all the various cases that may arise, that the remedy which the law may give should always be the precise amount of the loss or injury sustained. In many cases it will, of necessity, exceed – in others, fall short – of the precise amount. A study of the law of damages, in my opinion, amply bears out Dr Lushington's assertion.

Exchange and enforcement

In the brief account of, or perspective on, contract law that I offered to you a moment ago, I made two things central: and these two things are the notion of exchange, and the measure of enforcement that the law gives. The two are linked together. I have a stronger case for enforcing your promise, if I have paid for it than if I had not paid for it. The reason why I am entitled to your performance – or its economic equivalent – is that I have purchased the right to it, and to say that I have purchased, or bought, the right to performance is, more or less, to say that I have given consideration. So, to my mind, the doctrine of consideration is not entirely accidental, and not necessarily regrettable as a feature of our system of contract law. And here I would echo the phrase of Mr Tony Weir of Cambridge University, as quoted by Dr Reynolds in his paper. It is not obvious that formal categories are accidental, and if traditional, the tradition may yet be a good one, reflecting, as Dr Reynolds said, continuing understanding about the principles governing the relationship between people.

Reliance on promise

Now what about the principal topic to which we are addressing ourselves today, that is, what about cases of reliance, where there is no consideration: that is to say, reliance on a promise that has not been bargained for. Here, by hypothesis, I have not purchased the right to your performance. That is the very thing it means to say – there is no consideration for your promise. But I may have changed my position in reliance on your promise, and there are many examples of cases in which, where I change my position in reliance on your promise, everyone perceives it as very unjust that you should be able to go back on your promise without giving me some measure of compensation. Particularly, of course, this is the case where you are also enriched by my action in reliance on your promise as where you promise me land gratuitously, I build on the land. If your promise is entirely unenforceable, not only do I lose, but you gain by withdrawing from your promise, and that has always

struck the commentators and Courts as unjust and a remedy has generally been found in such cases.

Now cases of change of position on the basis of promises that have not been bargained for have been dealt with largely by the notion of estoppel. Estoppel means that one is precluded from doing something, and the notion of estoppel here is that you may be precluded for reasons of fairness from going back on something that you have asserted.

But I would suggest that estoppel is an awkward tool for this particular job. In common law fashion, it has dealt with the most common and blatant cases, and, of course, it's better to have an awkward tool that works sometimes than no tool at all. But like all tools not adapted to their purposes, it sometimes does less than we ideally would wish of it, and sometimes it does too much.

Thus, on the too little side, cases have held that estoppel can only be used defensively, and here we have the militaristic metaphors that have flourished in this field. It is a shield, and not a sword, or even, it has been said, it can be a minesweeper or a minelayer, but not a capital ship. It has been said that it cannot give rise to a right to damages; that it only applies where there is a modification of prior relationship between the parties. I think that these limitations are unduly restrictive. All of them have been doubted in recent Commonwealth cases, including recent important New Zealand cases. On the other hand, turning to the too much side, cases in which estoppel does too much, in some cases estoppel has gone beyond the protection of reliance, particularly in the cases involving interests in land.

Consider this example. You promise me land in the New Zealnd countryside as a gift. There is no consideration, there is no conveyance. I build a small bach or cabin on the land. The value of the land is $100,000, the cost of the building is $1,000. You then, or more probably in practice, the executors of your estate – which is the way these problems usually arise – having a less friendly attitude to me than you had yourself withdraw from the promise. Is any protection due to me, as a matter of justice? I would say yes, or else I suffer a loss, and you or your estate are unjustly enriched. But to what extent should I be protected. Surely $1,000 or its equivalent by other means is enough. I have not bought your land. By hypothesis I have not bought it, that is what it means to say, that there is no consideration for your promise. You have not given it to me – that is what it means to say, there is no conveyance or transfer, as required for the conveying of an interest in land. If I gain a degree of specific performance, as in some cases given, or the economic equivalent of it – that is damages in lieu of specific performance which, in my example, would be $101,000, the law is giving me the benefit of a bargain that I have not made, and enforcing a gift that you have not completed.

Another notion associated with estoppel is that it is suspensory only, and not final. That is, that strict rights can be resumed on notice. I would accept this feature of the application of estoppel in these cases, and explain it as an instance of limiting the measure of enforcement. That is, it is a way, in some circumstances, of protecting the promises's reliance, without giving full enforcement to the promise as though it were a fully bargained-for promise.

So, my conclusion is that what is needed is a principle that protects reliance on gratuitous promises. Let us discard the swords and shields and minesweepers. The principle would be available to a plaintiff. There should be no need for a prior relationship between the parties, and in appropriate cases, the plaintiff should receive a money remedy. But that remedy would be measured by the plaintiff's reliance – that is change of position – not the value of the promise. That is something very close to section 20 of the American Re-statement which, in the secondary statement, says that reliance can be protected, even though there is not consideration, but the measure of protection may be limited, as justice requires. Estoppel will then be seen as a way-station, not to be rejected but to be overtaken in typical common law fashion by the development of another theory that embraces it and puts it on a more satisfactory basis.

So fundamentally, as I said at the beginning, I consider myself in agreement with Professor Coote, contrary to what Mr Dugdale suggested in his opening remarks, though I do recognise that this is an alliance that Professor Coote may, perhaps, himself disallow. I do not favour abolition of the doctrine of consideration. On the contrary, I think that it is central to our system of law as it has developed, though recognising the influence of accident on historical developments.

There is, I think, a very important difference between promises that are enforceable to their full extent, and promises that are only enforceable to the extent of protecting the promisee's reliance. Should the latter class of case be called contracts? As I understand Professor Coote, they should not be called contracts and I will not quarrel with that conclusion, if he will allow me to add that these matters are nevertheless of vital interest to every student of contract law.

Mr Dugdale
Now, ladies and gentlemen, we have ample time for questions or discussion from members of the audience.

Justice Handley (Australia)
If I may, I would like to ask the panel a question. They may, or may not, be familiar with a New South Wales case *Sabemo v North Sydney Municipal Council* where, in a negotiating situtation leading to a contract which never eventuated, the Council got a lot of design work done by Sabemo for a Council project, and ultimately the Judge held that Sabemo had a remedy in restitutional quasi contract for expenditure thrown away in the expectation that a contract would result, where none resulted. So if I could perhaps start by asking a question of the panel, or any member of it, whether this particular development – I do not mean that case, but the same sort of development – has occurred in New Zealand, UK, Canada, and whether they have any comment about it.

Dr Reynolds
It is difficult to be specific without of course reading the case with which I am not familiar. There is an English case of a similar nature – I understand they call it the

Cleveland Bridge case – where the same sort of issues were discussed in the context of restitution. Of course, to go any further than that, you need a restitution expert. But sometimes these situations do undoubtedly raise restitutionary considerations, at any rate as some benefit is conferred by the preliminary work. If the preliminary work does not confer benefit, you then have arguments about the extent of restitution, and whether any other remedy should be allowed. This is about as far as I can go, I think without knowing any more about it.

Professor Waddams
I do not want to add anything to that.

Professor Coote
The way I understand *Sabemo*, it was always intended that this additional work should be paid for – after all, it was requested. It was to be paid for, admittedly, in a particular way by being incorporated into an eventual contract price, but since that fell through, it seems to me it follows fairly logically that it should be paid for in some other way. I personally would not exclude the possibility of an implied contract to that effect. That there always was an understanding between the parties, as I say, that it should be paid for, and that that was a conditional agreement – that it should be paid for as being part of the contract price or, failing that, it should be a reasonable amount, so that I personally would have found a solution there in contract rather than quasi contract – it was not even quasi contract, was it restitution, as the learned Judge did in the *Sabemo* case?

Adrian Hamilton (England)
I think in answer to Handley's question, there is a case called *Brewer Street Investments v Barclays Woollens* in the early 50s in the *Weekly Law Reports*. I have a notoriously bad memory, but I think there much the same facts occurred – there were negotiations and works were done, but I have an idea that it was decided on some form of implied contract. It may have been restitutionary. But on the main point, I am a purely practical lawyer, and it does seem to me that the question of binding contracts very often depends upon persuading the Judge that there should be a binding contract, and if you succeed in doing that, you get home. And in my experience, over a period of a number of years, I have sought to say that there was no intention to create contractual relations in *Edwards v Skyways*, where all the factors suggested that there wasn't, but I hardly succeeded in completing a sentence without John McGaw scoring in red lines various objections to my point. But equally, since then, I can claim a few more successes. In *The Atlantic Baron*, there was a problem of consideration, and I ultimately got home on the thinnest of considerations, although I observed that my daughter, who is now training to be a solicitor, had it as a landmark case on consideration. But I had myself so little confidence, that I advised a compromise of the appeal. But we won, and I was content to do that.

In *The Zephyr*, which I think is referred to on the appeal aspects, there were great problems of offer and acceptance in a complex reinsurance dispute, where a slip was signed by some of the reinsurers before the insurers were on the scene, but Mr Justice Hobhouse, following the *Eurymidon*, the *Satterthwaite* case from New Zealand, simply took the view that where it was clear the parties intended to be bound, he was not going to be hog-tied by matters of offer and acceptance. So we got home on that.

And finally, there's a case that I succeeded on called *Petrofina*, in [1984] Appeal Cases, where my clients were sub sub-contractors for whose benefit an insurance policy was effected. And we were held to be parties – I don't think it's thought to be a landmark case on this point – we were held to be able to enforce the contract against the insurers, preventing them from exercising rights of subrogation in reliance on a Canadian Supreme Court case.

But in all these cases, all I am really saying is that one set out first to convince the Court that the parties ought to be bound, and once one had done that, one was able to overcome – or fail to overcome, depending on which side one was on – the points of law. And with the increasing tendency of the Courts not to be tied by too narrow a definition of offer and acceptance and so forth, I think one is seeing that contracts are found more easily, as the opportunity of proving duties in tort recedes.

Dr Reynolds
Could I just say that my recollection is, and I may be wrong of course, Mr Hamilton, in the case, that at first instance Mr Justice Hobhouse would not find a contract in *The Zephyr* because the undertaking was not specific enough, and so you produce an action of tort. And it was the Court of Appeal which said that it should not be an action in tort, but should have been in contract.

Mr Hamilton
You're absolutely right on the part of the case on which you comment, but my clients were the reinsured, and from my point of view, very unfortunately, we won so completely that nobody appealed us, so I got no brief in the Court of Appeal. But there was an issue – the issue on which you comment is the extent to which the reinsurer was able to make a claim against the broker who was my client's agent, and not the agent of the reinsurer. The point that I am commenting on was that the original – the reinsurance was effected by the broker with the reinsurers by a process in which he had got some reinsureds at the same time as he was getting some reinsurers. So there was a very complicated situation in which some reinsured were only added to the slip at the time when the reinsurers were already bound, and there were objections that there was no offer and acceptance.

Now that contract, which was the one on which I am relying, was found by Mr Justice Hobhouse, and nobody appealed that, and so we went away from the Court of first instance with our money, but the brokers and the reinsurers – Mr Posgate and his allies – continue to fight on the issue which you're putting; and it is my recollection that really contract was hardly relied on in the argument, to which I wasn't a party, but that the arguments became somewhat reslanted when the matter got to the Court of Appeal and Lord Justice Mustill saw the thing in a somewhat different way to how it had been

seen during the trial. But the particular multi-party contract that I am talking about was one that Mr Justice Hobhouse found relying on the *Satterthwaite* case, and also might I mention on *Carlill and the Carbolic Smoke Ball Company* – the only time I have sought to rely on that case in 40 years of practice. but it was quite an entertaining situation.

And perhaps I should just add in the background that I had the advantage that Jack Beatson was doing a pupillage at the time with my junior. So, although I'm a practical lawyer, I had an admirable academic lawyer to keep me on the academic strait and narrow.

Professor Coote
This is a comment on the relationship between the practical and the academic lawyer's approach. The speaker says that persons are bound when they want to be bound, and that's right, I do not disagree with that. But can that be the end point of our inquiry. Isn't that just another way of saying that is what we are about in inquiring into these matters. We are not persons to be bound? They want to be bound when the promise has been bargained for, and in some other cases. But what other cases, and to what extent. That is, in a nutshell, the nature of the inquiry in which we are engaged today.

Justice Handley (Australia)
Having asked my question, I would like to now make a couple of comments. I think the consideration of request must not be overlooked in this analysis. Our speakers told us about promise and reliance without a bargain, but there is reliance pursuant or following a request, then the request provides the consideration and the reliance is bargained for. The one we learnt at Law School was that if you go to York, I will pay you £100 – a very crude example. But if, for example, in *Dillwyn v Llewelyn* the father wanted the son to build on his land so he would be near his father, and therefore able to look after him in declining years, then that request would, of course, give rise to a contract and this, of course, would explain why in that case a conveyance was ordered. I do not say they were the facts, but it's a way of looking at some of these apparently gratuitous promise cases and followed by reliance – that if an express or implied request is present, then one has a traditional contract.

Second point – contractual variations, and Francis Reynolds made the point that the Court of Appeal has got very close in England in the last few months to enforcing contractual variations, although there is no apparent fresh consideration. I would like to suggest, perhaps, that these cases can be looked at in terms of, in some cases, a fresh consideration being present. We owe to Lord Diplock the view that some contractual duties are primary – that is, a promise or an actual performance, if that was what the contract called for as opposed to an executory promise – but if those promises are broken, then a secondary right or duty arises in normal cases to pay damages. It is idle to suggest that the secondary right is as beneficial in all cases as the primary right.

Most of us would prefer performance to damages for breach, and hence, maybe variations can be looked on, in some cases at all events, as an exchange or as adding to the contract, not a fresh executory promise where perhaps there is a true variation, but a performance which is going to attracting the price or the payment for the price and undoubtedly, one can see there would be a benefit in many many cases if the other party receives the original performance instead of having to go away, merely with the secondary right to damages. And perhaps one or more of the commentators would care to comment on that.

Finally, if I may, very briefly, there's a case pending in the High Court of Australia which I told Francis Reynolds about last night. It arises out of a voyage of disaster many years ago. The Commonwealth made a solemn public promise some years ago that it would not plead the Statute of Limitations against any survivors who were injured or widows of sailors who died. Then some of these people brought actions for damages and the Commonwealth pleaded, would you believe, the Statute of Limitations. The question is, there being an estoppel, perhaps a promissory estoppel, do the injured victims or their descendants recover costs thrown away or the verdict they would have received? The High Court is thinking about that.

Professor Coote
If I may briefly take the three points that were made. First, about unilateral contracts. I think it is true – it has often been said that many cases that in American jurisdictions would be dealt with as protection of reliance under section 90 or its equivalent, may be categorised in Commonwealth jurisdictions as unilateral contracts – that is often used as a technique, I agree, to protect reliance.

On the case of modification of contracts, I agree again with the questioner that actual performance is of more value than an enforceable promise to perform and actual performance, when rendered, may be of value and I would agree with the conclusion that he suggests: that modification should be enforced where such actual value is received in the absence of some reasons such as economic duress that would weigh against enforcement.

And on the third case, the case of the limitation period, without having much thought to the case, although I did also hear it mentioned last night, my inclination would be that if the promise is made after the limitation period is already expired, there is not a clear change of position – there is not a loss of the action. Any change of position on the part of the plaintiffs, so my initial inclination would be that the measure of the damages should be the costs only that had been wasted, and not the value of the right in action itself.

Richard Lord (England)
I was particularly interested in Dr Reynolds' approach whereby he suggested that in a *Zephyr* type situation, whether a liability arose in contract or tort depended on whether there was non-feasance or misfeasance, and I would be interested if he, or any of the panel, could clarify the difference. One example that comes to mind and puzzles me is if one had, for example, a driver of a car at a junction, and he says to his passenger: "I'm going to look to the right, you look to the left, will you let me know if anything's coming?".

The passenger says "Yes". In fact, he does not perform that promise. The driver pulls out, there is something coming, there is a collision. I would have thought that if that case came before the English Court, it would be decided on the basis of the tortious liability, but Dr Reynolds' theory would perhaps to be a contractual obligation. I wonder what the answer to that particular problem would be.

Dr Reynolds
I would need more time to formulate the reasons for my answer, but I would have thought it was also an action in tort. I would have thought that this is a case of something done badly, as in the phraseology of Lord Justice Mustill, and that people do not make contracts to get observations made on the instance, inside a car at a road junction. But when the person actually assumes to do this and does it badly – even though, I suppose you could say, you could in one sense say it is a non-feasance and that seems to be a case for a tort action. But I would like very much longer time to put my reasons in writing.

Donald Harris (England)
I would like to ask a simple question. How do we know that our law of contract is really serving the needs of the community? If we look around the common law world, we can see that there have been a large number of legislative interventions to protect the interests of the consumers. The inference must be that the legislatures think that the law of contract does not properly serve the interests of consumers. What about the interests of business men? Have we got any assurance that the proposals that we are now considering are really going to serve what the business world wants? Don't we need to follow what happened in the early development to the common law that the Judges did try to find out what the merchant wanted, and the custom of merchants was then reflected in the law. I fear that we may, as lawyers, be trying to develop the law, without trying to find out what are the real needs of the business community.

And if I can give one illustration, we have recently conducted a study of the distribution of cars – the relationship between car manufacturers and car dealers – and we found that although contracts were signed, they were then put in the bottom drawer. There was a general arrangement that all disputes would be compromised without the benefit of lawyers – no-one ever referred disputes to the Courts – and it did suggest that they were running their business without any reliance at all on the law of contract as understood by lawyers.

Mr Dugdale
If I may desert my Chairman's role for a moment – doesn't your question really lead to the next question of who should change the law? Should it really be the Judges, or should it be the statutory law reformers who are equipped in the way the Judges are not to find out what the merchants want? What do you think, Brian?

Professor Coote
I would actually like to ask Mr Harris a question. Did he and his inquirers ask the respondents why they bothered to sign a contract?

Mr Harris
I do not know but they felt that there had to be some basis for that relationship between them; but they did not need the formal law of contract to police the relationship.

Professor Coote
Well, that doesn't really explain, does it, why they entered into a contract in the first place?

Unidentified
I would like to make a couple of very brief comments, if I may. first, I think the contrast between legislative reform and judicial reform of the law is a little too starkly stated. The Judges do change the law, and when there is legislative reform, it often moves in the same direction as Judges were moving in in any event, and so I don't think there is quite such a stark contrast as was suggested there.

As to the attitude of the business world to a reform of the law my only observation is that business persons, when consulted, are utterly opposed to any change whatsoever.

Dr Reynolds
Mr Harris and I have this sort of conversation most years in our remedy seminar at Oxford, of which the next is next Tuesday, for which I shall be back, and he won't.

I was puzzled by one thing he said. He said whatever this was that a proposal before us satisfied the needs of business persons. I wasn't quite clear what the proposals before us, to which he refers, were.

Mr Harris
What the proposals are, they're on the fringes of the law of contract. All we need is a remedy to protect the reliance interest. That's the sort of thing on which I would hope business men would have used.

Steven Dukeson (Auckland)
I just wanted to pick up this trend of thought that we are on at the moment and ask the panel what they think of this point. That perhaps it is a little bit difficult to realistically talk about contracts serving the need of the community, because the business men, or business people, are fickle. I think all practising lawyers are well aware that business people want it both ways. To being with a handshake, a nod of the head, no complications. If you go that way and something goes wrong, then it's a question of the lawyer not performing his functions properly. What use is the law of contracts, and so on. And I do not think there is a practical lawyer here who would disagree with that comment, that that is what the businessman is on about, and I think it is very difficult to talk about contract law on these high planes, if realistically serving particularly the business community. It seems to me it is a lofty standard – it is more like one of the Ten Commandments which the business community really has to deal with – it either dips its toes in the waters and takes the benefits and the disadvantages of contract law, or it ignores contract law, either at its advantage or disadvantage, depending on the circumstances.

Mr Dugdale
Thank you very much for your attendance, ladies and gentlemen. I am sure you will all agree that we have had the profound, erudite and stimulating discussion on this topic that we would have expected from the calibre of the panel, and I would ask you to show your appreciation to them in the ordinary way. □

Maori rights and two radical writers: review and response

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

This is a review article of recent publications by Dr David Williams and Ms Jane Kelsey on Maori issues, more particularly relating to the Treaty of Waitangi. While expressing a welcome to the work of the two writers, as radical advocates, each in their different way, for Maori claims, Professor Brookfield suggests that there is more to be said for the historical legal treatment of Maori issues than these two writers allow.

I Introduction

To adapt words of Dr David Williams[1] one of the legal writers discussed below, whether customary aboriginal rights are justiciable has been among the most controversial issues of New Zealand legal history. Associated with it is another, and (he would agree) a greater, such issue: that of the proper place of the Treaty of Waitangi in the country's Constitution. The importance of both is, obviously, of our own times as of our history. Both have been the subject of recent legal writing, some of it influential: in particular, Paul McHugh, following the lead given in the early 'seventies by John Hookey,[2] has helped to re-establish the common law doctrine of customary aboriginal rights in New Zealand law in a series of notable articles,[3] upon which (through counsel's argument) Williamson J much relied when he upheld Maori fishing rights in *Te Weehi v Regional Fisheries Officer* [1986] 1 NZLR 680.

Other recent legal writers in the area share the comparatively orthodox approach of Drs Hookey and McHugh in writing about Maori rights and the Treaty in particular.[4] Others still, in particular Dr Williams and Ms Jane Kelsey, write on the same matters in strongly radical vein (though not all the former's work is to be so described). The two last-named are our special concern here but before I turn to them it may be useful to recall a little more fully the recent developments in these areas of the law and some relevant background.

In *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur Rep (NS) SC 72 Prendergast CJ and Richmond J had effectively denied the existence of a common law doctrine of aboriginal customary rights or title, despite its earlier recognition in *R v Symonds* (1847) NZPCC 387 and (obiter) in *Re "The Lundon and Whitaker Claims Act, 1871"* (1872) NZ 2 CA 41. Judges after that, until *Te Weehi's* case, had been largely content, without full inquiry or examination, to accept that Prendergast CJ and Richmond J were correct in their denial and that in New Zealand law aboriginal rights existed only if given statutory force, as today in the Maori Affairs Act 1953. Now, in the light of a great mass of United State and Commonwealth authority (recently very fully examined and expounded by Kent McNeil in *Common Law Aboriginal Title* (1989), the line of New Zealand cases beginning with *Wi Parata* increasingly appears to be wrong. The question has yet to reach the New Zealand Court of Appeal but if or when it does it is likely (one may predict) that the doctrine will be substantially recognised. (See *Te Runanga o Muriwhenua & Others v Attorney-General*, Court of Appeal, 22 February 1990.)

In the cognate matter of the Treaty of Waitangi the influence of *Wi Parata* had again been negative, the cession provisions of art 1 of the Treaty being described by the Judges in that case (at 78) as a "simple nullity". Later Judges did not go so far but applied to the Treaty the orthodox doctrine, that even valid treaties do not become part of municipal law except as given effect by statute; orthodoxy which the Privy Council unsurprisingly affirmed in *Te Heuheu Tukino v Aotea District Maori Land Board* [1941] NZLR 590. But, if orthodoxy left ample room for the Court of Appeal in *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 ("the SOE case") to give force to the statutory recognition of the principles of the Treaty in s 9 of the State Owned Enterprises Act 1986 (so as to prevent the Crown from acting in breach of those principles), the extent of the Court's doing so and the dicta of the Judges alike showed that the influence of the *Wi Parata* judgment was spent.[5]

Consistent with the lead that has come to be given by the Court of Appeal and in spirit in accord with *Te Weehi's* case, there has also been High Court authority showing the same trend towards recognition of Maori rights, most notably in the judgment of Chilwell J in *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188. There His Honour, describing the Treaty as having "a status perceivable, whether or not enforceable, in law" (at 206) and "part of the fabric of New Zealand society" (at 210), held the principles of the Treaty may in a proper case be taken into account in the interpretation even of legislation making no reference to the Treaty.

The Courts have then laboured in this area of the law as have, to some

extent under judicial guidance and judicial correction respectively, the Waitangi Tribunal with its special functions and jurisdiction under the Treaty of Waitangi Act 1975 and the Planning Tribunal[6]. So, to repeat, have legal writers from Dr Hookey (as the morning star of this particular reformation) onwards. But praise and acceptance of the fruits of these labours have not been universal, criticism having come notably from the legal left wing. (I put aside the government criticism of the Courts, express and implied, which has also been notable in its own way if not extraordinary).

Here both Dr Williams and Ms Kelsey have contributed prominently to the issues of the Treaty and of Maori rights by way of radical criticism, not only on occasion of Courts and tribunals, but also of what can conveniently be called the "liberal" line of academic writing that begins with Dr Hookey. At the outset I have an interest to declare: both, though in very different ways, have criticised (either expressly or by clear implication) my own work in the fields under discussion. The present article is then not only a critique of theirs but a reply (Part II: Dr Williams; Part III: Ms Kelsey). It will also seek to advance the matters in controversy with them in light of the principle of revolutionary legitimacy (Part IV) and especially of recent cases exemplifying that principle (Part V).

By way of further brief introduction: both writers are strongly influenced by the Critical Legal Studies ("CLS") movement, a loose association of radical legal scholars who follow the Realists of the earlier part of the century in shaking the foundations of more traditional legal thought and study. Typically those of the new movement combine disbelief in the objectivity of legal reasoning, with (in a prominent CLS scholar's words) "a committed Left political stance and perspective".[7] A non-follower (who however acknowledges the CLS sublety to which any brief summary cannot do justice) writes, fairly enough, that the movement

> . . . attacks the legitimacy of the legal system as a whole, defining legal reason as little more than the rationalization of the preferences of those in power. The Critical scholars thus deny the determinacy of legal reasoning, as well as the distinction between legal reason and political dialogue. (Harvie Wilkinson, "The Role of Reason in the Rule of Law" 56 Univ Chicago L Rev 779 at 795 (1989).)

Law is then in effect simply a part of politics and legal decisions are political decisions. Much of it neo-Marxist,[8] CLS work is not for that reason the less valuable, at least as a goad and stimulus to those intellectually at ease in the profession or in academia. Williams and Kelsey use CLS insights in the context of Maori rights. Both writers are introduced here not only for my own need to reply to them but because their work, disturbing as it may be to some, is worth the attention even (or especially) of the black letter traditionalist.

II Williams: *Symonds*, colonial Judges and Treaty-driven rights

In 1989 Dr Williams contributed an essay ("Te Tiriti o Waitangi – Unique Relationship between Crown and Tangata Whenua?") in *Waitangi* (1989)[9] 64 (cited as "TW"), following it with another ("British colonial treaty policies: a perspective") in *Honouring the Treaty*[10] 46 ("HT") and a conference paper, "*The Queen v Symonds* Revisited" (1989) 19 VUWL Rev 385 (*SR*). A main purpose of these writings is to show that the judicial lack of sympathy for the Treaty rights of aboriginal peoples, so evident in the *Wi Parata* case, was general throughout the British Empire and, in effect, only to be expected from the "[n]ineteenth century judges appointed by the settler government in New Zealand" (HT at 54). But, on the one hand presenting a general indictment of colonial Judges in regard to such treaties (and in other legal matters as well: TW), on the other Dr Williams is also concerned to show that Judges who have upheld a doctrine of Maori customary rights at common law deserve no plaudits for getting things "right" ("*SR*"). They are legally no more correct than Judges who, like Prendergast CJ and Richmond J, denied that there is any such doctrine. Here Williams is presenting the new CLS orthodoxy pointed to above: there *are* no legally correct judicial determinations of issues; only ethical or political choices which a Judge makes on the malleable material before the Court. In what follows, I shall deal, mainly, with his views of colonial judicial behaviour and then with his reconsideration of *R v Symonds* and in part with his criticism of my own statement that the Judges in that case got the law "right" whereas those in *Wi Parata* (and the line of their successors until *Te Weehi*) got it "wrong".

First, though, I register a mild protest. Dr Williams on occasion talks past writers he criticises, paying less than full attention to what they say. "Modern legal scholars", he remarks (1989), "tend to be squeamish about such a transparent moulding of legal doctrine [in the rejection by Prendergast CJ and Richmond J of common law aboriginal title] to suit the convenience of colonial capitalism . . ." (TW at 87). Perhaps some so tend; though (as one likely referred to) I had myself felt able to say, unsqueamishly (1985) ("The New Zealand Constitution . . .", fn 4, at 8):

> . . . one must accept that the colonial legal system was inevitably part of the means by which the paramount force of the British Crown was exerted in this country. This was inevitable, as it was wherever the British Empire extended its bounds. We have to see behind the rhetoric of the rule of law employed in a typical colonial context, the extension of imperial power. But then, as it seems to me, something like this process is likely to have occurred whenever one people has attempted to extend its power over another; and often it has happened without the limitations on arbitrary power implicit in the notion of the rule of law.

The *Wi Parata* judgment no doubt in the short term served imperialist and capitalist ends much better than the doctrine of aboriginal title which it rejected. There is some useful common ground with Dr Williams in the first three sentences just quoted which he must have overlooked; though I would draw attention to the fourth sentence also, pointing as it does to a main theme of the present article.

Dr Williams' case against the colonial Judges, almost wholly damning, at least on the evidence he presents is overstated. As his case

might in some respects, if it were properly made out, be a strong one, the overstatement is disturbing.

Colonial Judges and indigenous peoples

I take first his treatment of the issue which mainly concerns him, that the colonial[11] Judges did not give legal effect to the imperial treaties with indigenous peoples. Here he wishes to show that the "failure" which began in New Zealand with the judgments of Martin CJ and H S Chapman J in *R v Symonds* is parallelled by like failures on the part of Judges elsewhere in the British Empire, in the African protectorates in particular. There appears to be much in some of the African material which he presents (TW at 65-70), especially in the Kenyan Masai lands case, which goes well beyond the issue of such failure and to be indefensible. (See also Ghai and McAuslan, *Public Law and Political Change in Kenya* (1970) 20 et seq.) But, on the issue itself, that the protectorate Judges did not constrain the Crown within the terms of the treaties it had made with the indigenous peoples, his judgment seems unbalanced. The territories, being protectorates and not colonies, *were* outside the dominions of the Crown. H F Morris, whose cogent criticisms Dr Williams fairly cites, allows that –

> . . . the judiciary were faced with an intractable problem, in trying to solve which neither precedent nor statute was of much avail, the detailed administration of territories which remained outside the Crown's dominions being a concept which neither the framers of the Foreign Jurisdiction Acts nor the judges of the greater part of the nineteenth century or earlier could have envisaged. (In Morris and Read, *Indirect Rule and the Search for Justice* (1972) 41 at 59.)

The Judges' solution, "to abandon any attempt to delimit the bounds of the executive's authority in these spheres", was, as Morris then says, "unheroic". but in view of the general principle that the Sovereign is in the performance of treaties (as in foreign affairs generally) beyond the control of her own Courts;[12] the failure was not surprising; indeed, in my view, the surprise would have been if the Foreign Jurisdiction Acts had been authoritatively interpreted to constrain the Crown's exercise of its powers in a foreign country within the terms of the relevant treaty. In any event, whatever the strength of Dr Williams' case, it should not have the Empire-wide embellishment he affords it in a seemingly doubtful and tendentious passage. After quoting s 4 of the Foreign Jurisdiction Act 1890 (UK), which empowered any Court in the Crown's dominions or held under its authority to obtain a binding determination from a Secretary of State "as to the existence or extent of any jurisdiction of Her Majesty in a foreign country" [ie, including a protectorate but not a colony], Dr Williams comments (TW at 66: emphasis added):

> It should be noted that this example of the subservience of the colonial judiciary to decisions of the executive on matters of disputed law was *cheerfully* [sic] *relied upon throughout the Empire on many occasions.*

But of s 4 Sir Kenneth Roberts-Wray, long and eminently experienced in imperial legal matters, wrote in *Commonwealth and Colonial Law* (1966) that "[f]ew questions have been addressed to the Colonial Secretary under this section, at any rate in reported cases" (at 188). Where Roberts-Wray is thus guarded some evidence or authority for Dr Williams' statement would be welcome. One wonders also how s 4 could have been relied on in respect of the colonies (in the strict sense) that made up much of the Empire.

New Zealand of course was not a protectorate but a colony. In any event the Treaty was an Act of State[13] and, since the United Kingdom Parliament did not at the founding of the colony or later incorporate it as a whole into New Zealand law, one cannot criticise the Judges for not treating it as if it were so incorporated. This of course is an aspect of the orthodox view against which Dr Williams necessarily contends. I take it to be his view that the British Judges, whether in colonies or protectorates, should have recognised and given effect to the treaties the Crown had made with indigenous peoples of the respective territories in which the Judges sat. If one puts aside entirely the later authorities and considers the matter as it would have appeared to Martin CJ and Chapman J in *R v Symonds* if such a course had been urged upon them in argument, the answer is surely clear: whatever the terms of the Treaty of Waitangi, they sat as the Queen's Judges in a territory in which her sovereignty had been proclaimed. Hence (pace some CLS theorists) they were bound, as their successors have been, by doctrinal and institutional constraints to give effect to that sovereignty and especially when it was manifested in Acts of Parliament. Further, since New Zealand was a colony and not a protectorate, arguments based on the Foreign Jurisdiction Acts that the Crown's jurisdiction in this country was limited by the Treaty could not even be urged in a New Zealand Court.

In pressing his case against the colonial judiciary beyond their not giving effect to the relevant treaties, Dr Williams remarks (HT at 50):

> The "rule of law" that was the birthright of British subjects did not necessarily extend significant protection to indigenous populations in British-ruled territories.

Later in the same essay (at 54):

> Judges in colonial territories are noted for decisions upholding the claims of imperial overlords against colonised peoples. "Commonsense" judicial decisions tended to smooth the path of colonial exploitation.

These statements certainly derive some support from the cited case *R v Crewe (Earl) ex parte Sekgome* [1910] 2 KB 576 where, in habeas corpus proceedings, the Judges upheld as valid a governor's proclamation authorising Sekgome's detention in the Bechuanaland protectorate (now Botswana). But that is what they did; they did not (as a reader of Dr Williams' text might infer) hold that the writ of habeas corpus would not run in the protectorate. Two of the Judges thought it would; which is what the English Court of Appeal finally held to be the position in colonial type protectorates (where

the measure of internal sovereignty exercised by the Crown made the territory indistinguishable from a colony) in *Ex parte Mwenya* [1960] 1 QB 241. Is there evidence that in colonies where the writ certainly did run, either the English or the local Courts[14] wrongfully refused it to indigenous applicants, applying the judicial "double standards" expressed in *Sekgome*? and also evidence of other injustice than that, if the second of the statements can be supported for the generality it appears to be? There may of course be much such evidence; all one asks is that Dr Williams, even in a popular article (HT), refers us to more of it than he does. Instead, short (one might guess) of enough damning evidence against the New Zealand colonial Judges that goes beyond the *Wi Parata* material, he brings in the admittedly draconian and deplorable anti-Maori legislation of the 1860s, 70s and 80s, which in itself is irrelevant in an indictment of the judiciary.[15]

R v Symonds reconsidered

Dr Williams' reconsideration of the case is premised by a declaration of faith, or rather of lack of it (*SR* at 388):

> With David Kairys [in *The Politics of Law*, fn 7, 3] I would reject the notion that there is a distinctly legal mode of reasoning which provides us with "correct" outcomes to litigated issues.

A little earlier, introducing the controversy as to whether or not aboriginal rights are justiciable (ie, whether the common law doctrine exists), he writes (*SR* at 386; emphasis added):

> One *persuasive view* has been that these rights are at best some species of moral obligation binding, if at all, only upon the honour of the Crown.

He then quotes Prendergast CJ in *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur Rep (NS) SC 72, 78:

> But in the case of primitive barbarians, the supreme executive Government must acquit itself, as best it may, of its obligations to respect native proprietary rights, and of necessity must be the sole arbiter of its own justice. Its acts in this particular cannot be examined or called in question by any tribunal, because there exist no known principles whereon a regular adjudication can be based.

Then, after a detailed and helpful account of *R v Symonds* and its background, he adverts to his doubts about legal "correctness" (at 398-399):

> [Referring by example to *Donoghue v Stevenson* [1932] AC 562] I have yet to be convinced that the speeches of Lords Atkin and MacMillan are "correct" whilst the convincing reasoning of Lord Buckmaster somehow "misunderstood the law". I am likewise unconvinced by Professor Brookfield's assertions that "eminent Judges from Sir James Prendergast to Sir Alfred North . . . did indeed get it wrong" whilst the *Symond's* Judges "got it right" [Brookfield, "*The New Zealand Constitution* . . .", fn 4, at 10]. Rather, . . . there were a number of threads in the common law . . . which could and indeed have led eminent Judges to arrive at different conclusions from an assessment of the same core of legal material.

Struck by the implied comparison between the "persuasive view" of the Judges in *Wi Parata* and the "convincing reasoning" of the principal dissenter in *Donoghue*, one turns, eagerly, to re-read the former case in search of an overlooked, buckmasterly, exposition of precedent. But it is not there. *R v Symonds* is purportedly followed; but it is in fact followed only in so far as, in *Wi Parata* as in *Symonds*, the Treaty was not recognised as part of New Zealand law (and of course the Judges in *Wi Parata* took the further step of pronouncing its cession provisions to be null). On the point of aboriginal title the cases are so far apart that a recent Canadian writer (Lester, "Aboriginal Land Rights . . ." (1988) 13 Queens LJ (No 3) 132 at 138) has stated that *Wi Parata* "overruled" *Symonds* (though of course it could not do that anyway). The Judges of the Court of Appeal in *Re "The Lundon and Whitaker Claims Act, 1871"* (1872) NZ 2 CA 41 expressed themselves in accordance with *Symonds* when they said (at 49; emphasis added):

> The Crown is bound, both *by the common law* of England and by its own solemn engagements, to a full recognition of Native proprietary title. Whatever the extent of that right by established Native custom appears to be, the Crown is bound to respect it.

The force of this dictum was apparently ignored or overlooked by the Judges in *Wi Parata* who, regarding "native proprietary rights" as morally but not legally binding on the Crown, simply reverted in effect to a version of an early view which, described euphemistically in H S Chapman J's words in *R v Symonds* (NZPCC at 392), "attached little weight to the Native title". This they did without explanation, purporting to follow *R v Symonds* when in fact they were, in the matter of customary aboriginal title, generally differing from it. The only slight strength in their reasoning here lies in the effort to show that their conclusion was consistent with New Zealand legislation; but even that failed on the reference in s 4 of the Native Rights Act 1865 to the "Ancient Custom and Usage of the Maori people", the existence of which as a "body of customary law" Prendergast and Richmond (at 79) simply denied.

Their reasoning is in sum scarcely "persuasive". Elsewhere Dr Williams' remarks (TW at 87) that "no doubt the colonial judiciary in the late nineteenth century did 'misunderstand', deliberately or otherwise, the doctrine of aboriginal title". Indeed; but, if he thinks so, his description of the views of the Judges in *Wi Parata* as "persuasive" is the more puzzling.

In fact Dr Williams goes outside the *Wi Parata* judgment to show (*SR* at 399) "the potential for diverging lines of legal reasoning" which could lead to it. Far from showing this "easily" as he says, he does not really show it at all, in a discussion which ranges, at least by reference, through Blackstone, Lord Mansfield's judgment in *Campbell v Hall* (1774) Lofft 655 (98 ER 848), *Cooper v Stuart* (1889) 14 App Cas 286, and the controversial

Australian case *Milirrpum v Nabalco Pty* (1971) 17 Fed LR 141 in which Blackburn J held against the common law doctrine of aboriginal title. First, with respect, Dr Williams misstates the decision in *Campbell v Hall* which was not, as he says (*SR* at 400), "that the King had no power, without the concurrence of a legislative body, to alter the old or introduce new laws in a ceded country". The Crown had precisely that power in conquered or ceded colonies but was held, in *Campbell v Hall*, to have lost it in Grenada through having established a constitution for a representative assembly in that (conquered) colony. Secondly, there is the puzzling passage in Blackstone which Dr Williams quotes (*SR* at 402) and which states (with what implications for New Zealand is not made clear) that the American plantations were to be classed as conquered or ceded, instead of, as one would expect, as settled colonies to which the settlers brought the common law. The explanation of the passage, suggested by Gareth Jones, is that

> [Blackstone's] writings on the colonies were dictated by prejudice. His statement that the American colonies were conquered enabled him to conclude that the King in Council could change the laws of the colonies and levy taxes under the Great Seal . . . . (Jones (ed), *The Sovereignty of the Law: Selections from Blackstone's Commentaries on the Laws of England* (1973) li (on 1 *Comm* 107-108).)

– those being things which the common law, received in settled colonies, did not allow.

But all that is merely to chase two troublesome if lively hares which Dr Williams has started. If there were any doubts that the common law was received in New Zealand *as if* it were a settled colony, those doubts were certainly removed by the English Laws Act 1858[16] which fixed the reception at 14 January 1840. Whether the common law as so received included a doctrine of aboriginal title is not a question answered by Blackstone; though it is proper to give some weight to his silence on the matter, as Blackburn J, rejecting any common law doctrine of aboriginal title, does in the *Milirrpum* case (at 206-207). Nor was the question decided in *Campbell v Hall* where, as Blackburn J notes (at 207) the matter was not in issue. Nor was it decided in *Cooper v Stuart* (which held New South Wales to be a settled colony) and Blackburn J in *Milirrpum* (see 242-245) does not say that it was. (There is the possibility, anyway, that the doctrine applied to every British colony whether (i) ceded or conquered or (ii) settled; as Brian Slattery ((1987) 66 Can Bar Rev 727 at 736 et seq) has suggested in the North American context.)

Nevertheless, although Dr Williams scarcely establishes any basis for the divergent view accepted by the Court in *Wi Parata*, and in substance accepted by the New Zealand Courts until *Te Weehi's* case, such a view, poorly made out or not, has been judicially accepted on occasion. One comes back (i) to his argument that legal reasoning does not (anyway) produce "correct" results and (ii) to his emphatic attempt in "*Symonds* Revisited" to put that case "into its own time, place and circumstances" (*SR* at 402).

I take the second matter first. Dr Williams' historical examination of *Symonds*, especially on the pre-emption matter, is interesting and valuable. It was indeed a case of (*SR* at 390) "*Pakeha v Pakeha*". But one is left questioning in the end how far forward his examination takes us in the matter of aboriginal title. That only Pakeha were directly involved in the case has point if we are meant to infer that Martin and Chapman, faced with a case in which Maori customary title came directly before them (eg, in an action to evict Maori from land held by them under customary title), would somehow reason their way out of giving a decision in favour of the defendants, based on that title. What ground is there to suggest such an outcome?[17]

Further, Dr Williams draws attention (*SR* at 395) to Chapman J's applying the Australian Waste Lands Act 1842 (UK) to the land in question as "waste lands of the Crown" as if this somehow confounds those who "uphold the *Symonds* case as an affirmation of Maori rights". But the very passage Dr Williams quotes indicates that Chapman J's recognition of customary Maori title was in no way lessened by his construing s 5 of that Act (in force in New Zealand at the relevant time) to apply to land in which that title had not been extinguished, as "waste lands" of the Crown *in respect of the Crown's interest therein*. That, obedient to Parliament, he applied the section to regulate the Crown's disposal of *its* interest is scarcely surprising and would in no way prejudice the Maori customary title. Good as he is in other respects in placing *Symonds* in its historical context, Williams fails to do that with the Judges themselves. Apparently he expects that, by way of enforcing the Treaty, they should, in a proclaimed Crown colony, have denied the basic land law doctrine (the only one available to them) of the Crown's paramount title to land and even (is it suggested?) assumed power to review Acts of Parliament. Against the history of the relationships of the Crown's Judges with the Crown and with the Crown in Parliament respectively, the expectation is extravagant indeed.

Finally, the matter of the "correctness" of legal reasoning. I differ from Dr Williams on this but for the sake of argument I accept his Critical Legal Studies stance on the matter and in particular the statement of the leading CLS scholar Duncan Kennedy that "[t]here is never a 'correct legal solution' that is other than the correct ethical and political solution to that legal problem". (Quoted by Price, fn 7, at 276). If that is so, it is ethically and politically better for a Judge to recognise aboriginal customary rights and title as binding on the Crown at common law than to do the opposite as did the Judges in *Wi Parata* and their successors in the line of authority that followed. In that sense if no other I would maintain that "eminent Judges from Sir James Prendergast to Sir Alfred North" did indeed get it "wrong", whereas the *Symonds'* Judges got it right. That of course will not satisfy Dr Williams, in whose view (one infers) the common law as a whole is anyway a monocultural imposition, so that (TW at 89) only the acceptance by the Courts of "Treaty-driven legal arguments" (at least in the absence of basic constitutional reform entrenching the Treaty) would be a politically satisfactory solution to the problems

of Maori rights. In contending for such a solution he does, I think, build too much on the notable judgment of Chilwell J in *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188. The orthodox doctrine that the Treaty is not enforceable in the New Zealand legal system except by way of statute, laid down by the Privy Council in *Te Heuheu Tukino v Aotea District Maori Land Board* [1941] NZLR 590, is likely to remain beyond all but the comparatively minor (but still not negligible) modification that the *Huakina* approach will permit. But that of course is merely to predict how what Dr Williams sees as purely political choices will be made by the Judges. Time will show.

The work under review, despite a degree of tendentiousness, provides a useful introduction, in the New Zealand context, to the radical approach of the CLS school. It has also the virtue (in contrast to some aspects of that next to be considered) of being presented well within the conventions of scholarly debate. That helps to make some progress possible in the matters in issue.

III Kelsey: Honour, ideology, and the dual nation

In the case of Jane Kelsey, the other writer principally considered here, debate and comment are more difficult, for reasons that will appear. First, though, a tribute is due to the energy, zeal and verve with which she presents her case in *A Question of Honour? Labour and the Treaty 1984-1989* (1990) ("the book") against a government both bent on economic and structural reforms to give effect to "Rogernomics" and also committed to honouring the Treaty of Waitangi. Ms Kelsey has exploited apparent contradictions in these policies ruthlessly and has in doing so employed the Official Information Act to seemingly devastating effect. How fairly she has treated the politicians and officials acting in the public dramas she describes may be another matter and is beyond comment here. The first page of the preface warns us that "[m]y approach does not purport to be objective. No writing on this (or any other) subject can be". Within the leeway so disarmingly claimed, there are in fact more signs of attempted objectivity than one might expect. The book is an extended (if in some respects very detailed) political tract, apparently intended to prompt to action as much as or more than to careful reflection. But then that is what Ms Kelsey may think political ends and the difficult times demand. (Perhaps owing to the need for sesquicentennial haste, there is, infuriatingly for any careful reader, no bibliography and no index). Despite faults, the book is a challenging and important contribution to the controversies of the day and valuably unsettling to any too complacent acceptance of the virtues of the present constitutional order.

Ms Kelsey's other recent writings introduced here (which share that same general and laudable characteristic) are (i) her essay " 'Rogernomics' and the Treaty" in *Honouring the Treaty* (1989) (see fn 10) 126, (ii) " 'Rogernomics' and the Treaty of Waitangi – an Irresolvable Contradiction?" (1989) 7 Law in Context 66 (cited as "RTW") and (iii) most recently, her paper "The Treaty of Waitangi and Maori Independence – Future Directions" (1990) 9th Commonwealth Law Conference Papers 249 (cited as "Commonwealth Conference paper" or "CCp"). Of these (i) is intended for a general readership, (ii) provides some references to the writings of others including those she criticises and (iii), though still very challenging, is apparently toned down a little in comparison with the other writings, perhaps for the sake of its professional audience. Comment is confined here mostly to (ii) and (iii), with incidental reference to some earlier writing.

Ms Kelsey has much to say about Courts and lawyers but little that is very good. Part of her polemic is directed against liberal academic colleagues whose writings Dr Williams also criticises. I mildly grumbled above that he is a little apt to talk past opponents: Ms Kelsey also does that but a lot more loudly, along with scornfully dismissing them and members of the profession practising in the Treaty issues area as, for the most part, culturally arrogant and (it appears) in some cases of perhaps doubtful integrity (the book at 236; RTW at 69-70). On those aspects of her work debate and comment are unnecessary and nothing is offered here.

One must turn to the legal merits of her work. The general reader of the book gets, despite Ms Kelsey's evident partisanship, a concise and not entirely unfair account of some important aspects of the judgments in the SOE case ([1987] 1 NZLR 641) and other cases. Here and there the Courts come in for praise: clearly Ms Kelsey has enjoyed the publicly rehearsed differences between the then Prime Minister and the President of the Court of Appeal over the principles of the Treaty and the checks the Courts have imposed on the government's "corporatisation" schemes. Williamson J's decision in *Te Weehi's* case [1986] 1 NZLR 680 is described (the book, at 214) as "brave".

However, what was bravely done in 1986 has become humdrum stuff when done in 1987. Greig J's following of *Te Weehi* in his interim *Muriwhenua* and *Ngai Tahu* judgments[18] is simply "straightforward" (the book at 220); and His Honour, on the basis of *Te Weehi* and the material as to early Muriwhenua fisheries already placed before the Waitangi Tribunal, had, she says of the *Muriwhenua* case (RTW at 82), "little choice" but to grant the injunction sought to impede the Crown's proposed Quota Management System. Some of Ms Kelsey's treatment of Greig J's judgments reads strangely (the book, at 221):

> [Greig J] initially refused to extend the order beyond Muriwhenua [ie, the parties before him who had sufficiently established their case], and only extended its scope once other tribes had brought evidence showing Maori commercial fishing extended over the entire coastline. Again, it was a small victory for Maori in that it delayed government's proposed breaches of the Treaty. But there was no major concession beyond what the evidence and legal argument required . . . .

How else, one might wonder, could the Judge have conceivably dealt with the matter? The likely (CLS type) answer, that he made "contestable" political choices when confining the order in the ways described, would surely need some explanation, more especially as, in Ms Kelsey's view, he had "little" choice but to grant the interim order.

The passage just quoted may be compared with others of greater general importance, in which Ms Kelsey treats basic constitutional propositions as if they were somehow problematic. She warns us in the preface to the book (at i) that, "[u]nlike many Pakeha legal academics", she does "not assume without question the legitimacy of our existing constitutional structures". At least by implication she criticises also the failure of Judges to question that legitimacy. Having examined the judicial record in the SOE case and the other cases in which Treaty issues have arisen and Maori have won victories that fall well short of enforcing Maori rights as she sees them, she explains the Courts' role as one of resolving the dilemma in which the government found itself through its economic policy on the one hand and its "treaty rhetoric" (the book at 236) on the other. The dilemma is described also (idem) as existing at "the structural level between the power of Pakeha capital sourced in British sovereignty and the claim of Maori to te tino rangatiratanga".

The Courts resolved the dilemma, she says, "without undermining the essential legitimacy and stability of the state" (ibid at 237; CCp at 252). But it is "too simplistic to imply that the Courts merely applied biased rules which predetermined a Crown win or that they deliberately intervened to extricate government from a dicey [sic] situation" (the book at 236). On the contrary (at 237) they gave decisions which "played havoc with elements of government's economic policy and fiscal planning" and for the time being checked the government in its policies, making the Judges unpopular with the politicians. The Courts however have an important part in the process by which, in the neo-Marxist terms[19] at least implicit in Ms Kelsey's discussion, the hegemony of Pakeha (and essentially anti-Maori) capitalist forces is maintained; and they play that part by according limited victories to Maori claims but in the end leaving government policies free to operate in denial of the autonomy and independence – te tino rangatiratanga – reserved to Maori by article 2 of the Treaty.

Consistently with this, the Courts, notably in the SOE case, have in her view "reined in" the Waitangi Tribunal and compelled it by implicit threats of judicial review to abandon what Ms Kelsey sees as the radical challenge to the established order in the Tribunal's earlier reports.

Commenting on the past, she writes (the book at 211-212):

> The Courts had consistently enforced settler government laws which sought to dispossess Maori of their resources, suppress Maori resistance, repress Maori culture and spirituality and denigrate Maori values from 1840 to the present day.[20] At times they contributed their own creative solutions. [The cases cited are discussed below.]

In Ms Kelsey's view New Zealand is a basically unjust society, the injustices being not only those of Pakeha capitalism (which government free market policies necessarily aggravate) but, closely associated therewith and predominant, those of Maori denied their rights under article 2. A 1989 opinion poll led her to conclude that "Maori could not secure justice under the Treaty in a system of party politics based on Pakeha majority rule" (the book at 244). Her solution is in effect one of revolutionary change that will establish te tino rangatiratanga – "Maori independence, autonomy, self-determination, sovereignty" ((CCp) at 255) so that there will be "co-existing constitutional entities within one nation". The legal profession specifically has the task of "address[ing]" the deep questions of constitutional reform involved either "beginning that process ourselves, or facing the prospect of being forced to do so" (idem). The revolution, one infers, is likely to come anyway and will do so impelled by at least the threat of violence if not by peaceful means.

Further comment

1 *A right to rebel?*

It must be a measure of the deep seriousness with which Ms Kelsey regards Treaty issues that she in effect suggests (without advocating its exercise) a right of rebellion for Maori, to correct the perceived failure of the capitalist Pakeha state to deliver te tino rangatiratanga to them. The right of rebellion if exercised poses problems of legitimacy and of the relation of law to revolution which are referred to further in Part IV.

2 *The State undermined?*

However one sees the Courts' role in the Treaty and other Maori rights issues, the statement that it has been performed "without undermining the essential legitimacy and stability of the state" is extraordinary in that it implies that the outcome might conceivably have been otherwise. Of course Ms Kelsey does not really think that: the whole purpose of applying her neo-Marxist analysis to the Courts' decisions and their effects is to show that the actual outcome (of not undermining) was inevitable. But an obvious comment is that, in *any* human society where there are Courts, these must always be part of the machinery of government, a fact which always qualifies to a greater or less extent their independence of other – ie, the executive and the legislative – organs of government (where powers are thus so separated); and at least to the extent that, though constraining each within whatever legal limits are applicable in the particular system, they generally will not "undermine" the legitimacy of those organs or of the state. In some states they may perforce be the active collaborators of a government little limited by law, the dominant ideology (of left or right wing) giving them only a dependent and instrumentalist role. Where they have, to whatever degree, an independent role as in the New Zealand legal system, they will still not "undermine" the legitimacy of the state, eg, by holding that the Crown did not acquire sovereignty in New Zealand. Nobody should suppose that they might. Ms Kelsey's ideological labouring of the obvious can only puzzle some at least of her general readers.

3 *Ideology and legal details*

Ms Kelsey writes, perhaps intending to be complimentary, of the Judges in the SOE case as "even deviat[ing] from their designated constitutional role" (the book at 237) in ordering the government to negotiate with Maori; but, not complimentarily, of them as "quite likely . . . unable to grasp" the distinction between the Crown (with which the Treaty was

entered into) and "the current government", which is said to have been made in the affidavits before them (ibid at 218). (The same distinction is made at 9 in the conveying of Sir James Henare's account of tradition: "[t]he Treaty was between two sovereign peoples of great mana — te iwi Maori and the British Crown — not the settler government").

These comments lead one to expect accuracy and care on her own part in dealing, even in a book for the general reader, with constitutional and legal detail. But one is too often disappointed. Sir James Henare is quoted on the New Zealand Constitution Act 1852 (UK) (the book at 11) in terms that, with great respect to his memory, are very puzzling; and which Ms Kelsey does not clarify. There is some casual terminology in a few, inaccurate, Anglocentric references to the "English state" or "English Queen" and, more seriously, in the use of the necessarily oft-repeated word "government" to mean usually the executive alone but sometimes perhaps it and the legislature together. This ambiguity makes uncertain whom Ms Kelsey identifies as having (in orthodox doctrine) power to extinguish Maori customary rights ("[the] government": book at 214 and 221). The uncertainty is not entirely removed in the Commonwealth Conference paper where, addressing herself to a professional audience, she refers cryptically (at 256, n 34) to the "Crown right to extinguish aboriginal title". Now whether fishing (and other aboriginal) rights can be extinguished under the prerogative, or whether (in accordance now with the great weight of authority)[21] legislation is needed, is legally and practically important. One would not wish to suggest that Ms Kelsey is "quite likely unable to grasp" the distinction. But obviously she must regard it as irrelevant to the large political ends she pursues.

Similarly perhaps as to the distinction between the "Crown", with which the Treaty was made, and the "settler government" (with which it was not), to which in furtherance of those ends she forcefully draws attention. The obvious consequences of the distinction are that the "current government" (as successor to the latter) is not bound by the Treaty, so that redress must be sought in London — which would be fruitless of course. But the modern doctrine of the plurality of the Crown ensures that, subject to the *Te Heuheu Tukino* principle and all other complications, the Crown in right of New Zealand ("the current government") is, and the Crown in right of the United Kingdom is no longer, bound by the Treaty (*R v Secretary of State ex parte Indian Association of Alberta* [1982] QB 892). Ms Kelsey must have thought this, despite its practical importance, too legalistic to explain even by the briefest reference, and hurries on.

Ideological purposes are evident (the book at 92-93) in the way she treats Cooke P's statement in the SOE case ([1987] 1 NZLR at 668) that "[i]f the judiciary has been able to play a role to some extent creative, that is because the legislature has given the opportunity". What most are likely to see as a nice reminder to the government that, if it did not like the decision, it had (through its control of the legislature) ultimately only itself to blame, is turned by Ms Kelsey into "applau[se for] the mutual enlightenment of the courts and government" and presumably is for her further indicative of the ideological subservience of the former to the latter.

All this is by no means to impugn entirely Ms Kelsey's handling of legal material in the writings reviewed. However, the reader who admires her great skill in dealing with and organising masses of facts could wish that ideological concerns and purposes, or perhaps sesquicentennial haste to publish, did not at times appear to affect so heavily her treatment and exposition of the law.

4 *The Courts, "settler government" legislation, and "creative [judicial] solutions"*

It may be suggested that the colonial predecessors of the present New Zealand Courts should have declined to give effect to the draconian legislation with which settler governments furthered the destruction of Maori society; but if they had done that they would have claimed and exercised a power of judicial review over legislation which, whatever limits on parliamentary power may yet be established or restored (see Cooke P's celebrated dicta of recent years),[22] was inconceivable at the time.

Where the New Zealand Courts could be reproached, apart from the degree of neglect and misunderstanding (until 1986) of the common law doctrine of aboriginal rights, *might* otherwise be in the record of their work done within the limits allowed them by their duty of obedience to the legislature. There, also, Ms Kelsey thinks, there *is* a case against them (the book at 212) in "[a]t times . . . contribut[ing] their own creative solutions". Of what is not stated; but the general reader will be left with the impression that when necessary the Courts backed up a tyrannous legislature by manipulating the law against Maori. I briefly dealt with the cases she cites but, for the most part, far from sufficiently explains.

In *Goodall v Te Kooti* (1890) 9 NZLR 26 the respondent was held rightly bound over to keep the peace for taking part in an unlawful assembly, unlawful because, in the judgments of the Court of Appeal, the likely violence of the assembly of Gisborne settlers in reaction to Te Kooti's assembly (of himself and his followers) rendered the latter unlawful. Irish authorities were approved and followed and the general principle, that conduct lawful in itself may become unlawful because of its feared effect on others, has been applied directly or indirectly in other areas of the law of public order since as well as before *Te Kooti*. (See the many obstruction cases such as *Burton v Power* [1940] NZLR 305 and *Minto v Police* [1987] 1 NZLR 374.) One may strongly disagree with that principle (and, indeed, in the law of unlawful assembly, it has probably been negated by the proviso added in 1973 to s 86(1)(b) of the Crimes Act 1961). There is little doubt that the Judges hearing the case strongly disliked Te Kooti but the argument that the law was manipulated against him by a "constructive solution" because of who he was is barely supportable. (A similar "solution" to that complained of was applied against Salvation Army members in *McGill v Garbutt* (1886) NZLR 5 SC 73 by Richmond J, who sat in *Goodall v Te Kooti*.)

In *Rua's* case (1916) there is

something to support Ms Kelsey's view, in the heaviness of the two and a half years' sentence for resisting arrest which F R Chapman J imposed on the prophet and the unjudicial remarks he made at sentencing. There are also the difficult questions of the verdict that Rua was "morally guilty" (only?) and whether or not Chapman J obtained clarification from the jury that a guilty verdict was intended. The matter has been carefully dealt with, so far apparently as the historical evidence can take it, by the historian Judith Binney in *Mihaia* (1979) at 124-128, to which Ms Kelsey does not refer here. Instead she gives the reference *R v Rua* (1916) 18 GLR 658. That takes one to the report of seemingly impeccable rulings made by Chapman J during the trial, which were substantially in the defendant's favour and struck out or reduced several of the counts against him. That report is no evidence whatever of unfairness or of whatever impropriety Ms Kelsey means by "constructive solution". On the other hand Judith Binney's conclusion that Chapman J's impartiality deserted him at the end of the trial appears to be correct.

Raglan Golf Club v Raglan County Council (1980), in which Bisson J validated under the Illegal Contracts Act 1970 an invalid lease of land claimed by Maori (made to the Golf Club in breach of the Land Settlement Promotion and Land Acquisition Act 1952), is correctly cited by Ms Kelsey as unreported. It is however the subject of a useful note in [1980] NZ Recent Law 334. Even the reader who presses on to the judgment itself will find little if anything to support Ms Kelsey's view, so baldly indicated, that Maori interests were somehow sacrificed unfairly to the principles of sanctity of contract. The Club was an innocent party outside the dispute between Maori and the Crown. Bisson J's words (ibid at 337) anticipated the Waitangi Tribunal's recognition (see Part IV below) of the general principle that the removal of one injustice should not create another. The judgment is in essential part an exercise in practical reasonableness, worth considering on its merits. If Ms Kelsey wishes to establish her view she must surely examine the case and analyse it much more rigorously.

No doubt one should include also, from elsewhere in the book (at 15 and 273 (n 14)), cases referred to as "contemptuously dismiss[ing] the treaty as a nullity or as not binding on the Crown unless recognised by it in colonial statute". The list of cases cited begins, very fairly, with *Wi Parata* in which what Dr Hookey identified nearly 20 years ago as "ethnic chauvinism" on the part of the Judges comes out clearly and deplorably enough. From the other cases, one must conclude that, in Ms Kelsey's view, to refer to the Treaty in terms of the orthodox doctrine is ipso facto to dismiss it "contemptuously" (however neutral or even sympathetic the language used); as well as, presumably, to employ yet again a "constructive solution".

But what does Ms Kelsey mean by that phrase? Some kind of manipulation of the law no doubt, as suggested above; but a more precise answer is perhaps to be found in an earlier (1985) essay[23] in which, citing *Rua's* case (this time the reference is to Judith Binney's account) as a "classic instance", she refers to "[i] the overt partiality of the [Pakeha] Judges, (ii) their Eurocentric values and priorities, [iii] their eagerness to bend legal principles to provide the desired outcome . . .". At least to make out [i] and [iii] in that formidable indictment, or even to support a general charge of "constructive solutions" not so specifically explained, would require far more rigorous legal-historical research and analysis of the cases than has so far been presented to us by Ms Kelsey.

One may note that Moana Jackson, who shows convincingly enough that "[i]t is the clear perception of many Maori people that the [criminal justice] system is institutionally racist" states (fn 17, 114; emphasis added) that

> Unfortunately the justice system itself has been unwilling to entertain the possibility that it may function in this way [ie, in a racially discriminatory manner], *and little research has been done to establish whether in fact it does so operate or not.*

The emphasised words may have some application to the historical side of the matter, including that of the legal system in general. However, historical research has been done in some relevant areas and, as will be seen below, it by no means entirely supports the thin case Ms Kelsey presents.

5 *The rule of law and the Maori*

The notion of the rule of law is described by the Marxist historian, E P Thompson, as an "unqualified good"[24] in acting as a brake and limitation on the exercise of the arbitrary power. Not all Marxists accept the "unqualified" in that phrase: Ms Kelsey for her part barely allows the rule of law, in the colonial or ex-colonial context, as a good at all.

She rightly points out its vulnerability, "in its narrow positivist sense" to legislation. Sweepingly and wrongly saying that in New Zealand the phrase is "almost invariably invoked in [that] sense", she also says that "[e]ven adopting the broader concept" (applicable to Parliament itself) "would not . . . address Maori concerns" (CCp at 256, n 56). Generally the rule of law is "structurally incapable of delivering substantive justice to the colonised" (ibid at 254).

On the last point, in New Zealand, she would of course be right if she were to mean that only basic constitutional, or at least legislative, reforms, can give radical effect to the Treaty (though even then such reform would take place within the rule of law). But she is wrong in suggesting that there have been no substantive benefits to Maori from the rule of law.

One may quote the historian Alan Ward whose strongly critical account, of the part played by the law (especially through confiscatory and other draconian legislation) in depriving Maori of land and mana, is qualified somewhat:

> The rule of British law in general involved a respect for individual life probably greater than old Maori society had known, and few Maori seemed to regret the passing of infanticide, the casual killing of secondary wives by chiefs displeased with them, or the repeated obligation to engage in blood feud often precipitated by their own "wild men". (*A*

Show of Justice (1974), 222. Cf op cit, 170.)

And James Belich, in his impressive and on the whole laudatory account of the Maori achievements of de facto autonomous government in the King Country and other areas including the area of the Ngapuhi in the North, says, with general significance in the words I have emphasised:

> Between 1866 and 1888, without successful interference from the government, Ngapuhi hapu indulged in at least five feuds, with the loss of a score of lives — *a salutary reminder of the unattractive side of Maori autonomy, which also included customary killings for sorcery and adultery.* (Belich, *The New Zealand Wars and the Victorian Interpretation of Racial Conflict* (1986), 308.)

Ward's careful comment and Belich's reference to what happened to areas of Maori autonomy in the partial absence of the rule of law give one some confidence in maintaining, with E P Thompson, that the rule of law is itself a "good", even an "unqualified" one, at least in braking or checking arbitrary power whether — in New Zealand — of Maori chief or (admittedly and obviously less effectively) of colonial government. (Both passages suggest too that it was an unqualified good in ending the wilder manifestations of utu). That of course is by no means to defend the colonial attack on Maori communal institutions and values well able to be accommodated within the rule of law. But it is to assert that the general protection of individual life, Maori or Pakeha, afforded by the rule of law, *is* part of substantive justice. What else is it?

6 *What was ceded to the Crown? What was reserved to Maori?*

Ms Kelsey says of the Maori version of article 1 of the Treaty (CCp at 249: emphasis added):

> The Crown was granted the limited power of kawanatanga — in this context clearly seen by Maori as a subordinate power aimed *primarily* at achieving law and order amongst Pakeha settlers, thereby protecting Maori rangatiratanga.

Professor Sir Hugh Kawharu is quoted thus by the Waitangi Tribunal in its Kaituna report:

> . . .[w]hat the chiefs imagined they were ceding was that part of their mana and rangatiratanga that hitherto had enabled them to make war, exact retribution, consume or enslave their vanquished enemies and generally exercise power over life and death. (*Finding of the Waitangi Tribunal on the Kaituna Claim* (Wai-4 November 1984), 18.)

If Ms Kelsey agrees with Sir Hugh, she presumably classes the arbitrary chiefly powers he refers to as a "secondary" matter, which clearly they are not. But whether these powers were given up by cession or whether they were simply lost through the establishment of the rule of law that attended the successful assertion of colonial power, or (as is likely) partly one and partly the other, seems unimportant today. In any case, if it is impossible to reconcile the sovereignty ceded to Queen Victoria in the English version of article 1 with te tino rangatiratanga reserved to Maori by article 2, it is not easy either to reconcile with the latter the kawanatanga ceded in article 1 of the Maori version. (See Brookfield, "Sovereignty . . . and the Tribunal", fn 4 at 296-298.) In Sir Hugh's view the ceding of kawanatanga *did* mean a lessening of rangatiratanga. In all these difficult matters, it is possible to identify some common ground with radical critics such as Ms Kelsey and Dr Williams: the Crown in establishing and giving effect to its sovereignty in New Zealand took more than kawanatanga and left Maori with a further diminished rangatiratanga.

It is true that the Waitangi Tribunal had, in statements much criticised by Ms Kelsey (eg, RTW at 84-86), expressed the view that the sovereignty of the Crown was founded on consensus, that "cession of sovereignty . . . is implicit from surrounding circumstances". (*Report of the Waitangi Tribunal on the Orakei Claim* (Wai-8, 1987), 149.) With respect, the case may be rather that the consensus to which the Tribunal refers was not reached until later; or, if it was not fully reached, was supplemented by Maori acquiescence in the successful assertion of imperial and colonial power that ultimately extended to the geographical areas of Maori autonomy described by Belich.

IV The revolutionary principle

That brings us to a question to which neither Ms Kelsey nor Dr Williams may have sufficiently attended: how far has the present constitutional order been legitimated by the passage of time and (to put the matter as generally as possible) the things that have happened since 1840? The Waitangi Tribunal is certainly aware that a legitimating process is at work. Upholding the Muriwhenua fisheries claim under article 2 of the Treaty, the Tribunal nevertheless said:

> A new agreement or arrangement is now essential in our view. Rightly or wrongly, new circumstances now apply and a number of conflicting private interests, honestly obtained, must be weighed in the balance. It is out of keeping with the spirit of the Treaty, this Tribunal has earlier said, that the resolution of one injustice should be seen to create another. (*Muriwhenua Report* (1988), fn 18 , xxi, s 61.)

It is scarcely necessary to point out that a radical comment on that passage, "Yes but, in accordance with the Treaty, negotiations for the new agreement must be on Maori terms", would miss the point altogether. If such a comment were right, no injustice would be done if the Maori negotiators were to concede nothing in modification of what they argued to be strict Treaty rights.

One should I think see the Tribunal as in reality recognising that the Treaty has been affected by the Crown's revolutionary action in succesfully, and with some validation by passage of time, taking more than the kawanatanga ceded by article 1; with the resultant lessening of the rangatiratanga reserved by article 2. That would be to invoke the general

principle of revolutionary legitimacy ("the revolutionary principle") which I have suggested elsewhere has applied in the establishment of the New Zealand constitutional order. (See Brookfield, "The New Zealand Constitution . . .", fn 4, at 4, 8, 14. Professor Richard Mulgan has supported this approach in his *Maori, Pakeha and Democracy* (1989) 51-56 ("*De facto* becomes *de jure*").)

The Treaty, unsigned by some chiefs and never given substantial constitutional effect, only partly legitimates that order. The revolutionary principle partly and by no means entirely makes up the deficiency so that, on the one hand, a constitutional order has been established that is in fact not (I suggest) so grossly oppressive as to justify rebellion. On the other, in so far as Treaty breaches and Maori grievances generally can be properly remedied, for example, through some prompt giving of effect to recommendations of the Waitangi Tribunal and through reforms of the criminal justice system, they ought to be and must be. Those few sentences lead to many practical questions of reasonableness that cannot be pursued here. However, major objections from two quite differing viewpoints must be answered.

Why, it might be asked by an intransigent Pakeha, should the Treaty not be treated as entirely annulled by the passage of time and the happenings of the last 150 years?

One may answer that, to a no doubt disputable extent, the Treaty *can* still be honoured. To speak very generally, the legal system brought by the colonists included not only a principle of recognition of aboriginal rights but, even though of much qualified effect, a principle that treaties are to be kept (*pacta sunt servanda*). To discard those principles would scarcely be consistent with the integrity of the system.

A radical critic might make a double objection. First, is not the revolutionary principle, so far as applied to legitimate in substantial part the present constitutional and legal order, invoked cynically or naively (according to the objector's taste) to excuse Pakeha from restoring to Maori the dominance said to be reserved by article 2?

Here I think the answer lies in the correct understanding of that principle. It may be stated more widely as the principle of legitimation by the effective assertion of power, a principle common *in some form* to both the common law and the Maori customary legal order and also in the relationship of either order to other legal orders. Thus (to discuss the principle but briefly):— The effective assertion of power manifested in seizure of land is in some form a source of title both at common law and under Maori custom.[25] When a constitutional or legal order replaces another, through a revolutionary effective assertion of power, the same principle operates supra constitutionally.[26] Thus the successful invasion of the Chatham Islands in 1835-1836 by Ngati Tama and Ngati Mutunga colonists from Taranaki led to the supersession of the Moriori customary order (in which seizure or conquest was not a source of title to land) and the establishment by revolution of the Maori customary order in place of it. But that in turn was superseded, entirely by revolution, by the British colonial legal order established in the Chathams after the Islands were formally included in New Zealand by Letters Patent, of 4 April 1842, redefining the colony's boundaries. (See the Proclamation of the Officer Administering the Government, New Zealand Government Gazette, v 2, no 45 (2 November, 1842).) Michael King in his *Moriori: a People Rediscovered* (1989) deals, in detail (at 123 et seq, 140-141), with the then Native Land Court's determination (in 1870 and 1885) of conflicting Maori and Moriori claims to the Chathams largely in favour of Maori, on the ground of tribal conquest. King points out (at 66,132) that by Maori custom that would have been correct but that by Moriori custom it was not. Nevertheless, of course, the same result (I comment) would be obtained if the Land Court were seen as giving effect to the revolutionary supersession of the Moriori customary order by that brought by the successful mainland invaders of the 1830s.

Without the Moriori as so to speak the original parties — the tangata whenua — the same revolutionary supersession of the Maori order by that of the British colonial competitor occurred in mainland New Zealand and (if the question is raised) has been effective long enough to legitimate the latter, to the extent suggested above. (All this is not intended to provide comfort for the Pakeha poser of the first objection above, who, in accordance with the once popular acceptance of the myth of original "Moriori" occupation of mainland New Zealand, might argue that Ngati Tama and Ngati Mutunga treatment of Moriori on the Chathams, which included both killing and enslavement, was such that Maori could not complain if the Treaty of Waitangi and all Maori customary rights were to be simply ignored or abolished by Pakeha "conquerors". The answers to that are short. The invasion of the Chathams of 1835-36 was not by the Maori people as a whole but by two particular iwi. Slavery, though unlawful by English common law (*Somerset v Stewart* (1772) Lofft 1; 98 ER 499), had existed in the Empire and been abolished there too recently (1833) to accord to the British very much superiority to Maori on that score. And, to repeat the answer already given, the imperial and colonial order brought, with its effective assertion of power, qualifying principles that cannot with integrity be discarded.)

The radical's second objection makes (I have heard it made) a comparison with Ireland. Why, if the several centuries of the English (then British) ascendancy were insufficient to extinguish the legitimacy of the Irish claim to independence, should a mere century and a half be sufficient to extinguish Maori claims under article 2 of full autonomy or sovereignty?

At the risk of over-simplification one may reply that the Irish claims of independence rested, in part, as in the many similar cases of modern states that were once, British colonies, on "geographical coherence". Professor Tony Honoré in "The Right to Rebel" (1988) 8 Oxf JLS 34, writes (at 44-45):

> A group which (i) consciously possesses a certain degree of separateness from its rulers or neighbours as regards language, culture, religion, ethnicity, history, topography and social mores, and in addition (ii) is geographically coherent, sufficiently numerous, economically viable and in

> general has the capacity to assume the responsibilities of a member of the international community, satisfies the paradigm [of the unit in which the right to self-determination inheres]. Often only some of these criteria will be satisfied. Both the degree of separateness of the group and its capacity to form a viable sovereign state are to some extent matters of degree on which judgments may properly differ.

Except in Ulster where the position was complicated by the Protestant plantations of the 17th century, the Irish claim rested on a combination of all or most of the factors mentioned by Honoré (factors strongly resistant to the passage of time); as – and he gives the example – would a claim to Scottish independence today.

In the case of Aotearoa-New Zealand the apparently essential element of geographical coherence has come to be lacking since the areas of Maori autonomy ceased to exist by early this century. Perhaps in implicit acknowledgment of this and of the insufficiency of numbers of Maori in the country as a whole, the case Ms Kelsey states for "Maori independence, autonomy, self-determination, sovereignty" (CCp at 255) results in a claim, not for a Maori controlled and dominated Aotearoa, but for –

> political, legal and economic reform which recognises the independent sovereignty of the tangata whenua – not through a dependent or interdependent [sic] nationhood subordinate to the Pakeha state but as co-existing constitutional entities [sic] within one nation.

But, whatever was the position in 1840, it is far from clear today that there is in fact anything like a sufficient basis upon which, even were there a revolutionary overthrow of the present state, to construct the dual Maori-Pakeha state Ms Kelsey envisages.

One might add that it is difficult to see how the necessary constitutional machinery could be designed without complicated exercises in the legalism Ms Kelsey is apt to excoriate as alien to Maori.

Yet to design that machinery, whether voluntarily or under the revolutionary compulsion Ms Kelsey contingently predicts at the end of the Commonwealth Conference paper, would in itself be a largely neutral task: neutral in the sense that, however difficult, it could be carried out by constitutional drafters following adequate instructions (though needing also cool heads if the pistols of revolutionaries are pointed at them). But the claim itself, to Maori sovereignty as a constitutional entity "co-existing" with Pakeha sovereignty "within one nation" (conveniently called the "the dual nation claim"), is obviously and generally controversial. The opinion on it of a constitutional writer may be of no special value; except to suggest (as I do in the next paragraph) the principles one should take into account, in trying to solve the problem of the proper place of the Treaty and of Maori rights in the Constitution and the legal system generally, and in assessing any solution such as that proposed in the dual nation claim.

The principles would include the principle that treaties are to be kept (*pacta sunt servanda*) upon which Ms Kelsey (and Dr Williams) chiefly rely. Other principles, particularly those of (i) the recognition of customary rights of the Maori as the indigenous people (apart from the Treaty), (ii) the successful revolutionary assertion of power, and (iii) majoritarian democracy, have all to be taken into account also, in assesing the legitimacy of the present constitutional order against which the dual nation claim is urged. Again, to put my own view, the present order is deficient, and its legitimacy therefore incomplete, in the degree of recognition it affords to the Treaty; but that deficiency would (if proper account is taken of principles (ii) and (iii) be rightly remedied by Maori acquiring a degree of autonomy far less than that proposed by Ms Kelsey. Her own case allows for principles (ii) and (iii) by allotting to the Pakeha state a place as a co-existing entity with the Maori in the dual nation. But that allowance results from a weighing of all the relevant principles that is surely unrealistic and unreasonable. The present New Zealand state – the organised community – is not likely to consent or to submit to its division into a dual state or nation of co-existing entities.

There remains the possibility, if it really exists, that the present state may, after all, be compelled by threatened or actual revolution to accept that division. Such a change, like the revolutionary assertion of imperial power that began in 1840, could be legitimated by the passage of time and its continued effectiveness (that is, by the revolutionary principle), if indeed it could last and be effective. At present the case for the dual nation claim in the Commonwealth Conference paper rests upon a surely erroneous weighing of the applicable principles, bolstered by Ms Kelsey's invoking of the social distress seen to be caused by government freemarket policies, in which distress very many Pakeha share as well as Maori. Whether the combination would sufficiently support or justify the revolution which she apparently contemplates (without advocating) and from which only Maori would appear to benefit, is surely questionable. Elsewhere (RTW at 91), she contemplates somewhat differently the establishment, through effective (revolutionary?) political action at least of radical Pakeha women and Pakeha workers, of a "counter hegemony" that would replace the hegemony of "Pakeha capital"; but she leaves in question whether Maori would wish to participate in such an alliance. If they did, presumably the counter hegemony would be a dual one. All this is beyond further comment here except to remark, first, that in Ms Kelsey's new dual nation the rule of law would need to have a part in checking the power of the new hegemony or hegemonies of whatever precise nature or description. And, secondly and somewhat obviously, that the alternative to any attempted or predicted revolution is to continue to accept the present constitutional order as containing within it the means to redress grievances, of Maori especially (in the present context; but also of Pakeha).

V Kelsen. Cases (*Kohu; Coe; Walker*).

There are some significant decisions of the Courts in this area of

constitutional fundamentals to which the present controversies belong. Where governments in or after a revolution compete for judicial recognition, a modern Court may, contrary to the older constitutionalist view, properly decide the issue one way or the other by applying appropriate principles of effectiveness (ie, of the effective assertion of power) and necessity and, according to some authorities, other principles such as that of popular acceptance. The Court's decision, that is, is not prescribed by the legal order to which the Court belongs, to be in favour of the government of that order. (see fn 26) But where there is no revolutionary competitor for judicial recognition, that government, though circumscribed by the relevant constitutional limits (which are necessarily those of the order to which both the government and the Court belong), is normally entitled to and must receive the continued recognition of the Court. There is, after all, no alternative government with any claim to effectiveness to receive that recognition.

A few recent cases illustrate this, in direct challenges by aboriginal people to the jurisdiction of the Courts. I put aside cases where there is simply a reliance by a defendant on the Treaty of Waitangi and take three (two of them Australian) where the validity of the whole constitutional or legal order, in its application to an aboriginal party, is brought into question.

In the most recent, *Kohu v Police* (1989) 5 CRNZ 194, Anderson J had to consider applications for leave to appeal to the Court of Appeal of certain Maori defendants, originally convicted of contempt in the District Court. Their case in effect was that, being descended from Maori who or whose iwi or hapu were not signatory to the Treaty of Waitangi, they were therefore not subject to the Summary Proceedings Act 1957 under s 206 of which they had been convicted. In the absence of any Letters Patent under s 71 of the (now repealed) New Zealand Constitution Act 1852 (UK) that might have exempted the defendants from the relevant part of the 1957 Act, Anderson J declined leave to appeal, since the Court of Appeal, bound like the High Court (and of course all New Zealand Courts) "to uphold the general legislation of New Zealand", could not determine the issue raised by the applicants otherwise than against them. The authority of the Courts and the validity of the Act of 1957 alike flowed from the empowering of the then General Assembly by s 53 of the United Kingdom Act of 1852.

The denial of leave to appeal in *Kohu's* case may be compared with the denial by the High Court of Australia in *Coe v Commonwealth* (1979) 24 ALR 118 of an aboriginal plaintiff's application to amend his statement of claim to include (among other things) material disputing the British Crown's, and now the Commonwealth's, claim to sovereignty over Australia in the face of a like claim by the aboriginal people.

Jacobs J explained thus the reason for rejecting such an amendment (at 132; emphasis added).

> These are not matters of municipal law but of the law of nations and are not cognizable in a court exercising jurisdiction under that sovereignty which is sought to be challenged. As such, *they are embarrassing* and cannot be allowed.

The technical embarrassment to which Jacobs J refers is, of course, that of a Court's being posed a constitutional question of so elementary a nature that only one answer is legally possible. The same kind of embarrassment faced Anderson J in *Kohu* and, also recently, the Queensland Court of Criminal Appeal in *R v Walker* [1989] 2 Qd R 79. Commenting on *Walker*, in reliance on a somewhat unsatisfactory case note (Malbon, "The Walker Case" (1989) 2/37 Aboriginal Law Bulletin 14), Dr Williams writes (*SR* at 401) that Denis Walker "put the . . . Court on the spot in arguing that Australian courts have no jurisdiction to deal with sovereign Aboriginal peoples". He (Williams) has discerned "more than a hint of Kelsen's so called 'pure theory' in the Court's response" as reported in the case note.

Reference to the full report shows that the Court, no doubt technically embarrassed but scarcely "put on the spot", dealt with Mr Walker's appeal very much more adequately than it was given credit for either in Dr Williams' source or in his own somewhat cursory comment. Walker, one of the Nunukel people of Stradbroke Island (part of Queensland), had been convicted in the District Court of damaging property. A ground of his appeal was that Captain Cook, in claiming possession of the east coast of Australia for George III in 1770, had exceeded his intructions so far as Stradbroke Island was concerned by not obtaining the consent of the Nunukel people who had their own government and system of laws. Hence Mr Walker challenged the law-making authority of the State of Queensland over Stradbroke Island and the jurisdiction of the District Court.

In the inevitable dismissal of the appeal[27] McPherson J held that Cook's alleged exceeding of his instructions had been ratified by the Crown's subsequent "occupying, settling, and generally asserting and exercising powers of government over the continent" (at 81) but, also, went beyond the assertion of the State's authority to consider and explain why the District Court had no alternative but to apply the State's criminal law to Denis Walker. Correctly, it is suggested, in contrast to Jacobs J, McPherson J (at 83) did not treat the matter as one of International Law. Sir William Wade's dictum that the Courts' recognition of the law-making authority of the legislature is "the ultimate *political* fact upon which the whole system of legislation hangs",[28] is cited (at 83). Kelsen (by way of R W M Dias) is also cited: the norms of the Queensland legal order are, in Kelsen's terms, "by and large effective" so that (the *grundnorm* being presupposed) the legal order is (on his view) valid. (Kelsen, *Pure Theory of Law* (2d ed 1960; translated Knight, 1967), 212, cited by Dias, "Legal Politics: Norms behind the *Grundnorm*" [1968] CLJ 233 at 237.)

McPherson J's own comment (at 83-84):

> Whether a legal order is effective depends in turn upon a mixture of history, politics and general experience, of which courts may be conscious but into the details of which they do not delve as relevant adjudicative facts.

After referring to Wade's view that at a successful revolution Courts in recognising it simply transfer their

allegiance to the new order, His Honour continues (at 84):

> Professor Dias, on the other [hand] reminds us that elements of durability and morality enter, or ought to enter, into the question of the efficacy of the legal order and the processes followed by courts in deciding whether or not to recognise a new legal order. On this view what is sometimes called "legitimacy" as well as efficacy has a place in the processes of recognition.
>
> If notions of the foregoing kind are invoked, it may be said that the Nunukel legal system was at some unspecified time after 1788 overthrown by a revolution which introduced a new legal order for Stradbroke Island. The appellant obviously contests the legitimacy of that event, but the efficacy and durability of the regime, which displaced it and which now prevails, is not open to question.

R v Walker surely goes far to support the view that the basis of the New Zealand legal and constitutional order is in part revolutionary, that in New Zealand (as in Queensland) a successful revolutionary assertion of power has been sufficiently legitimated for the Courts to do their work and apply generally the laws of the constitutional order of which they are part. (After all, neither in New Zealand nor in Queensland is there an effective competing constitutional order or system of government to claim the Court's allegiance). For Ms Kelsey of course this is only to demonstrate again the subservient role of the Courts in "legitimating" what is seen as an unjust system. But the revolutionary principle operates impartially and would serve also the new revolutionary hegemonies that she contemplates in a dual nation of Aotearoa-New Zealand.

VI Augustine. Justice. Conclusion.

McPherson J's mentions of Kelsen and of the "morality" of the legal order recall to mind that jurist's (disapproving) quotation of St Augustine: "Set justice aside then, and what are kingdoms but fair thievish purchases? because what are thieves' purchases but little kingdoms?"[29] Kelsen for the purpose of his positivist Pure Theory of Law did set questions of justice aside as irrelevant to the basis of the legal order because he saw justice as a relative and subjective value.[30] Whether or not holding such a view, one does have to accept that in fact what justice requires between Maori and Pakeha is in most serious dispute, only to be solved by agreement and accommodation within one nation. In this Andrew Sharp's very recent and important work, *Justice and the Maori* (1990), like that of Richard Mulgan in *Maori, Pakeha and Democracy* (1989), provides essential counsel and guidance. Although the theoretical sovereignty of the State and (constitutionally) of Parliament is expressed in a practical reality, also in practice it must, because there are applicable other relevant principles than that of the successful assertion of power, abate to give effect to agreement and accommodation still far from fully realised. (Thus, one of the first steps in that accommodation, Parliament's creation and empowering of the Waitangi Tribunal by the Treaty of Waitangi Act 1975 and its amendments, should on no account be abandoned or weakened).

In the meantime, until such fuller realisation, it is well that Maori claims have their radical advocates such as the two writers considered in this article. The writings of each should command attention and respect, more obviously in Dr Williams' case since it is necessary in Ms Kelsey's to penetrate beyond the often counter-productive polemic of much of her work. In both cases (but especially that of Ms Kelsey who is the more sweeping and condemnatory and much less concerned with legal analysis) I am left querying some of the treatment of legal issues, historic and recent, in Maori-Pakeha and related matters. The record of enacted law, as the inevitable instrument of imperialism in New Zealand and in giving effect to the revolutionary replacement of the Maori customary order, is admittedly bad enough, especially in the anti-Maori legislation operating well into this century. The record of the Courts themselves also appears far from beyond criticism, in particular that marshalled comprehensively and on the whole fairly by the Hookey-McHugh school in the matter of customary Maori title. There is also Dr Williams' partly published research in the related area of the conversion of that title into the categories of the common law. (See fn 15.) But there is much more for the legal historian to do, by way of rigorous research and public argument and exposition, before any comprehensive account of the historical role and functioning of the Courts in relation to Maori is possible. Already enough appears to have been done, notably by non-lawyer historians, to indicate that vague or general condemnations such a those in some of the writing reviewed here are unjustified, if it were only in that the rule of law — E P Thompson's "unqualified good" — brought to Maori better protection of the individual life and has in accordance with its nature curbed arbitrary power in Aotearoa-New Zealand as elsewhere.

There is something then to set firmly in the balance against the part played by law as the inevitable instrument of imperialism. That said, one may welcome the vigorous challenges Dr Williams and Ms Kelsey bring to traditional opinions and attitudes. □

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1 See 19 VUWL Rev (fuller citation in Part II below) at 386.

2 "*Milirrpum and the Maoris* . . ." (1973) 3 Otago L Rev 63 and "The Gove Land Rights' Case . . ." (1972) 5 Fed L Rev 85.

3 See eg those cited in [1986] 1 NZLR at 691-692 and also McHugh, "Constitutional Theory and Maori Claims" in *Waitangi : Maori and Pakeha Perspectives of the Treaty of Waitangi*" (1989 ed Kawharu) 25 (the book being cited hereafter as "*Waitangi* (1989)" and "The Role of Law in Maori Claims" [1990] NZLJ 16.

4 See eg: Brookfield, (i) "The New Zealand Constitution : the search for legitimacy" in *Waitangi* (1989) 1 (in substance the revised text of an inaugural lecture given in September, 1985) and (ii) "Sovereignty: the Treaty, the Courts and the Tribunal" [1989] NZ Recent Law Review 292; Hackshaw, "Nineteenth Century Notions of Aboriginal Title" in *Waitangi* (1989) 92; Kingsbury, "The Treaty of Waitangi : some international law aspects" in *Waitangi* (1989) 121 (which deals also with relevant modern developments in the claims of indigenous peoples, ibid at 139-143); Boast, "Treaty Rights or Aboriginal Rights?" [1990] NZLJ 32: and, most recently, Keith, "The Treaty of Waitangi in the Courts" (1990) 14 NZULR 37; Durie and Orr, "The Role of the

Waitangi Tribunal . . .", ibid, 62; Frame, "A State Servant Looks at the Treaty", ibid, 82.

5 Cf *New Zealand Maori Council v Attorney-General* [1989] 2 NZLR 142; *Tainui Maori Trust Board v Attorney-General* [1989] 2 NZLR 513; and *Environmental Defence Society v Mangonui County Council* [1989] 3 NZLR 257 (approving *Royal Forest and Bird Protection Society v Habgood* (1987) 12 NZTPA 76).

6 See (i) Temm, *The Waitangi Tribunal* (1990); and, most recently, for the developing jurisprudence of the Tribunal, Sharp, *Justice and the Maori* (1990) chs 7, 8 & 9, and Durie and Orr, fn 4 above: and (ii) Sheppard, "Provision for Maori Culture in New Zealand Planning Law" (1990) 9th Commonwealth Law Conference Papers 149.

7 See Hunt, "The Theory of Critical Legal Studies" (1986) 6 Oxf JLS 1. See also (in the steadily growing body of CLS work), eg. *The Politics of Law : a Progressive Critique* (1982 ed Kairys); the Critical Legal Studies Symposium in 36 Stanford L Rev 1 (1984); Hunt, "Critical Legal Studies : a Bibliography" (1984) 47 MLR 369; Frug, "A Critical Theory of Law" (1989) 1 Legal Education Rev 43; Gordon, "Critical Legal Studies as a Teaching Method", ibid, 59.
For criticism and further references see, eg, Finnis, "On 'The Critical Legal Studies Movement' " in *Oxford Essays in Jurisprudence* (1987, Third Series, ed Eekelaar and Bell) 145; Price, "Taking Rights Cynically . . ." [1989] CLJ 271.

8 Influence of the work of the Italian Communist leader Antonio Gramsci (1891-1937) appears to be strong and especially evident in the writings of Ms Kelsey. On Gramsci and for references to his work see, eg, Collins, *Marxism and Law* (1982) 50, Mouffe (ed), *Gramsci and Marxist Theory* (1979) and Greer, "Antonio Gramsci and 'Legal Hegemony' " in *The Politics of Law*, fn 7, above, 304.

9 Fn 3 above. This essay followed closely on his scholarly and useful "The Foundation of Colonial Rule in New Zealand" (1988) 13 NZULR 34, with which rather than with the writings reviewed here may be grouped his very recently published "The Constitutional Status of the Treaty of Waitangi : an Historical Perspective" (1990) 14 NZULR 9. The present review, already long, has not been extended to cover the last-mentioned, which must await later, separate, comment.

10 *Honouring the Treaty : an Introduction for Pakeha to the Treaty of Waitangi* (1989 ed Yensen, Hague and McCreanor).

11 "Colonial" may be used conveniently to apply to judges both in colonies in the strict sense and in protectorates. As to the colony/protectorate distinction in the present context, see further McHugh, "Constitutional Theory . . .", fn 3, above at 51.

12 *Rustomjee v R* (1876) 2 QBD 69, 74 (cited by Lord Denning MR in *Blackburn v Attorney-General* [1971] 1 WLR 1037 at 1039; [1971] 2 All ER 1380 at 1382).

13 See eg Hood Phillips and Jackson, *Constitutional and Administrative Law* (7th ed 1987), 278-279, 285-286.

14 See the Habeas Corpus Act 1862 (UK) and Hood Phillips and Jackson, op cit, 511.

15 Dr Williams does not make specific use here of his own previously partly published research, which extends to the record of the courts in the process under statute by which Maori customary (communal) title was converted into individual common law title. This research appears to leave (i) possible question marks over some of the work of the higher courts but (ii) very heavy ones indeed over that of a few nineteenth century Native Land Court judges. At least as to (i) the material does not carry much further Dr Williams' generally condemnatory case against the colonial judges. But fuller argument and publication are awaited. For the present, see his "The Recognition of 'Native Custom' in Tanganyika and New Zealand – Legal Pluralism or Monocultural Imposition?" in *Legal Pluralism* (1985 ed Sack and Minchin) 139 and his doctoral thesis, *The Use of Law in the Process of Colonization* (1983), ch 3 (University of Dar es Salaam; copy available in the University of Auckland Law Library).

16 See latterly English Laws Act 1908, s 2, now repealed but continued in effect by Imperial Laws Application Act 1988, s 5.

17 Certainly none in the case of Sir William Martin whose well known extra-judicial "questioning of colonial policy" relating to Maori recently received the tribute of Moana Jackson in his report *The Maori and the Criminal Justice System : a New Perspective: He Whaipaanga Hou . . .* (Part II) (Dept of Justice, 1988), 141. (Cf Dr Williams' own mention of this aspect of Martin's work: TW at 80). H S Chapman J had been "in the avant-garde of liberalism in Canada and England" (*Portrait of a Profession* (1969) ed Cooke), 48. If no clear relevant inference can be drawn from that, or from the recent much fuller account of the Judge in Spiller, (1989) 19 VUWL Rev 267, there is certainly nothing whatever in the tone of his judgment in *Symonds* to support the suggestion – quite the contrary.

18 *New Zealand Maori Council and Runanga o Muriwhenua v Attorney-General* (1987) and *Ngai Tahu Maori Trust Board v Attorney-General* (1987). (Both judgments are printed in Appendix 5 to *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim* (Wai-22, 1988) ("*Muriwhenua Report*").

19 The influence appears to be especially that of Gramsci. See fn 8 above.

20 The long list of statutes cited begins with the New Zealand Settlements Act 1863 and ends by including (somewhat extraordinarily) the Maori Language Act 1987.

21 See Williamson J's acceptance of Canadian and United States authority on the point in *Te Weehi's* case, [1986] 1 NZLR at 691; and (for other references) Brookfield, "The New Zealand Constitution . . .", fn 4 above at 21, n 51.

22 The cases include *Brader v Minister of Transport* [1981] 1 NZLR 73 at 78; *New Zealand Drivers Association v New Zealand Road Carriers* [1982] 1 NZLR 374 at 390; *Taylor v New Zealand Poultry Board* [1984] 1 NZLR 394 at 398. See Caldwell, [1984] NZLJ 357; Joseph, [1987] NZLJ 102; Joseph and Walker, (1987) 7 Oxf JLS 155 at 155-156; and, for recent non-committal mention of the dicta, *Union Steamship Co of Australia v King* (1988) 166 CLR 1 at 10.

23 Kelsey, "Decolonization in the 'First World' " (1985) 5 Windsor Yearbook of Access to Justice 102 at 109. (This condemnation is made to relate to "those [earlier] cases of Maori resistance which were actually brought to court" but includes "[m]ore recent trials where defences were based on Maori sovereignty and rejection of British [sic] courts": id.) Cf Ms Kelsey's "Legal Imperialism and the Colonization of Aotearoa" in *Tauiwi : Racism and Ethnicity in New Zealand* (1984 ed Spoonley and others) 20. Neither of these earlier essays (any more than the writings principally reviewed here) shows that the necessary basic, careful, research has been done to support her general condemnation of the Courts.

24 *Whigs and Hunters* (1975), 267. The book is a study of aspects of the use of law as a weapon of class domination in eighteenth century England.

25 That is, the principle in its most basic form is not "culturally specific". The common law/Maori custom comparison is not pressed too closely, since a common law title to land acquired by seizure may require to be perfected (as against the disseised or dispossessed) by the lapse of time under rules of limitation (for which see now the Limitation Act 1950, s 7); whereas in Maori custom there was obviously no precisely corresponding requirement (though there was a rule about loss of rights through failure to [maintain possession by] keep[ing] one's fires burning on one's people's land (title being communal). Generally see Kawharu, *Maori Land Tenure* (1977), 55-57.

26 For recent discussion and further references, see Brookfield, "The Fiji Revolutions of 1987" [1988] NZLJ 250 at 253-256.

27 According to the case note, special leave to appeal was refused by the High Court of Australia on the ground that the issues the appellant wished to raise had not been fully argued before the Court of Criminal Appeal.

28 Wade, "The Basis of Legal Sovereignty" [1955] CLJ 177 at 188. (The emphasis is Wade's).

29 Augustine, *City of God* iv, 4, quoted Kelsen, op cit, 48. See further, Brookfield, "The New Zealand Constitution . . ." fn 4 above, at 14.

30 As to Kelsen's view and possible inconsistency therein, see Bjarup, "Kelsen's Theory of Law and Philosophy of Justice" in *Essays on Kelsen* (1986 ed Tur and Twining) 273 and Pettit, "Kelsen on Justice . . ." in the same work, 305.