

# WAIKATO LAW REVIEW

TAUMAUURI

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## CO-EDITORS' IN CHIEF INTRODUCTION

We are delighted to present the 2011 edition of the Waikato Law Review; a particularly special edition. The Review is proud to introduce its Editorial Advisory Board, which comprises national and international academics, legal experts and members of the judiciary of stellar reputation and expertise. We are very grateful for the support of the Board. The Review is also pleased to introduce the new Editorial team, comprising Editors for New Zealand Jurisprudence; Book Reviews; Maori/Indigenous Submissions; Student Submissions; and welcoming for the first time the support and assistance of Student Editors.

In light of the Review's particular special publication, we are proud to present sterling submissions from members of Parliament and the judiciary, academia, as well as established and emerging legal scholars.

Of particular note, the prestigious Harkness Henry lecture, traditionally the Review's lead article, was delivered by the Chief Justice, The Hon Dame Sian Elias. This lecture was very well received and whilst not only being memorable for its thought provoking content and excellent delivery, it was also memorable because it is the first occasion that a speaker from a previous year has returned to give the lecture; Te Piringa and the Review are especially grateful and honoured that the Chief Justice returned to mark the twentieth lecture sponsored by Harkness Henry.

The articles and reviews that comprise this year's edition present a range of views that are as diverse as they are critical and stimulating. The Māori title of the Waikato Law Review, Taumauri, means "to think with care and caution, to deliberate on matters constructively and analytically"; this title expresses perfectly the values and goals of the Review. We believe that this edition explores and expands the boundaries of law and legal studies to develop a further understanding of the contexts within which the law operates and evolves.

We would like to express our thanks to all the contributors and reviewers for making this edition special in so many ways.

This edition would not have been possible without the tireless contribution and professional expertise of Janine Pickering, and without the support of Amanda Colmer from A2Z Design. We also extend our thanks to Ingrid Leersynder and Erika Roberson for their valuable editing and formatting assistance.

Juliet Chevalier-Watts and Kate Diesfeld  
Co-Editors in Chief



# THE HARKNESS HENRY LECTURE

## FUNDAMENTALS: A CONSTITUTIONAL CONVERSATION

BY CHIEF JUSTICE SIAN ELIAS\*

It is more than 20 years since Sir Robin Cooke, then President of the Court of Appeal, explored elements of the New Zealand constitution in his paper “Fundamentals”.<sup>1</sup> At the time he wrote, the constitutional moment which might have led to an entrenched Bill of Rights, enforced by judicial review of legislation and beyond Parliamentary encroachment, was slipping away. The compromise eventually enacted as the New Zealand Bill of Rights Act 1990 seemed the more likely outcome.

This evening, I thought I might revisit some of the themes touched on by the President. With 21 years experience of the New Zealand Bill of Rights Act and other significant legislative reforms which can properly be regarded as “constitutional”, it seems time to take stock. There are other reasons to get our thinking in order. Persistent unease about the nature of our constitutional arrangements keeps the idea of change stirring. The Cabinet has now set up a Constitutional Advisory Panel to undertake a review and to gauge whether there is support for reform.<sup>2</sup> Reform issues identified are electoral representation (including Māori representation), the place of the Treaty of Waitangi in the constitutional order, whether we should have a written constitution, and whether the scope of the New Zealand Bill of Rights Act should be expanded (perhaps to include property rights).<sup>3</sup> A final report is to be produced by 2013.

Whether or not the review leads to major reform, the exercise will be of benefit if it proposes steps to make the existing constitution more intelligible and accessible and suggests better ways to protect its values. If even that is too ambitious, shining a light on what we have is worthwhile in itself, so opaque and misunderstood is our constitution. So it is to be welcomed that one of the purposes of the review is to “stimulate public debate and awareness of New Zealand’s constitutional arrangements”.<sup>4</sup> The constitution is too important to be left to lawyers to tiptoe around.

The constitution we have is not easily explained. Although it is partly captured in some major statutes, it is largely a common law construct. As such it is a subject in constant motion.<sup>5</sup> A snapshot at any one time is not only difficult to obtain and contestable in itself but quickly becomes misleading. The conventions that make the constitution work are habits of behaviour that can be lost through non-observance. Stephen Sedley once said about the British constitution that if we ask what the governing principles of the arrangements are and how their legitimacy is derived “we

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\* Chief Justice of New Zealand.

1 Sir Robin Cooke “Fundamentals” [1988] NZLJ 158.

2 New Zealand Government “Constitutional Advisory Panel Named” (press release, 4 August 2011).

3 Annex to the Cabinet Office Minute “Consideration of Constitutional Issues: Constitutional Advisory Panel” (18 April 2011) CAB (11) M 16/17 at [11].

4 Cabinet Office Minute “Consideration of Constitutional Issues” (8 December 2010) CAB (10) M 44/3 at [4.1].

5 Bagehot described the subject as “in constant change”: Walter Bagehot “Introduction to the Second Edition” in *The English Constitution* (2nd ed, Oxford University Press, London, 1872).

find ourselves listening to the sound of silence”.<sup>6</sup> That is equally true of the New Zealand constitution today. Indeed, it is more true of the New Zealand constitution than it remains true of the United Kingdom constitution under the discipline of Europe and following devolution to Scotland and Wales.

In 2004, Parliament set up a Constitutional Arrangements Committee to review our existing constitutional arrangements. It conducted what it described as a “stocktaking exercise”,<sup>7</sup> after which it concluded that “[no problems] are so apparent or urgent that they compel change now or attract the consensus required for significant reform”.<sup>8</sup> Indeed, the Committee expressed the view that “public dissatisfaction with our current arrangements is generally more chronic than acute”.<sup>9</sup> That verdict suggests acknowledgement of grumbling dissatisfaction, not amounting to a popular will for change.

It is not my wish to suggest we need constitutional reform. It does seem to me, however, that a pervasive sense of unease about our constitutional arrangements is not a good position for any country to be in. What I think that condition suggests is that we are not really sure what our constitution is and unable to assess its strengths against values we have hardly had to confront. There are real risks for any society in which there is such confusion as we have about what is fundamental. It puts our institutions of government under great strain when there is conflict between them or at times of social stress if they march to a beat no one else hears.

There are risks in constitutional reform. A troubling question raised by some is whether the “soft” form of judicial review for human rights values introduced with the New Zealand Bill of Rights Act (by which the courts under s 4 must apply legislation which is inconsistent with the Act) has left us with the worst of all worlds: a view that human rights are the responsibility of the courts. That is said to have led to two further consequences: erosion of the former conventions of parliamentary observance of human rights and perhaps respect for the decisions of the courts; and timidity on the part of the courts in protecting human rights. Professor Janet McLean has recently suggested that, whereas before the Bill of Rights Act, “Parliament limited itself”, we are now in danger of adopting what she calls “a s 4 [Bill of Rights] anti-constitutionalism” by which Parliament is liberated to do whatever it wants in relation to human rights. “That”, she says, “was never our constitutional tradition”.<sup>10</sup> Sir Geoffrey Palmer, the architect of the Bill of Rights Act, has recently said that the Supreme Court needs to “step up” on the subject of human rights, suggesting that what he sees as the tactical reticence of the courts to get into conflict with the political branches of government is destructive of human rights.<sup>11</sup> It is difficult to judge whether these fears are well-founded. Perhaps, however, it is time to question how realistic it is to leave it to judges to resolve how the rights and freedoms contained in the Act are to be fitted within the wider constitu-

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6 Stephen Sedley “The sound of silence: constitutional law without a constitution” in *Ashes and Sparks: Essays on Law and Justice* (Cambridge University Press, Cambridge, 2011) 64 at 64.

7 Constitutional Arrangements Committee *Inquiry to review New Zealand’s existing constitutional arrangements* (August 2005) at [14].

8 *Ibid.*, at [6].

9 *Ibid.*

10 Professor Janet McLean “Bills of Rights and Constitutional Conventions” (Victoria University, Wellington, 30 August 2011).

11 Geoffrey Palmer “The Bill of Rights after Twenty-one Years: The New Zealand Constitutional Caravan Moves on?” (Victoria University, Wellington, 29 August 2011).

tional framework for which there is no democratically-conferred roadmap comparable to the Bill of Rights Act, but only the standard of a “free and democratic society”.<sup>12</sup>

A common law constitution is like a cat’s-cradle. You cannot pull a string here and not expect movement there. So I think we need to take seriously the suggestions of close observers of our constitution like Professor McLean and Sir Geoffrey Palmer that legislation such as the Bill of Rights Act may have had unintended consequences in the wider constitutional arrangements. My principal suggestion in what follows is that if weaknesses have been exposed, the reasons may be less to do with the structure and responsibilities of the institutions and their relationships with each other than with the lack of agreement on and commitment to shared constitutional values in New Zealand society. Sir Geoffrey Palmer has described the principles and values of the Bill of Rights Act as a brake on the “only real political ideology that endures in New Zealand over time”: pragmatism.<sup>13</sup> Now pragmatism may be a perfectly sound political instinct and guide, but it is not a constitutional value. So I think we need to pay closer attention to the values we regard as fundamental to the constitution. Despite the risks of constitutional reform, I want to question whether we can continue to leave matters to drift. Without more political and wider social engagement with constitution-building and constitution-maintenance we may be setting up conditions which are ultimately destructive of constitutional values and institutions.

## I. A LITTLE HISTORY

We have been down this track of constitutional re-examination before and always to date without stimulating any real public enthusiasm either for change or for our existing arrangements. That is not surprising perhaps when we remember that there was no particular enthusiasm in New Zealand for independence, when it was first dangled before us in the Statute of Westminster.<sup>14</sup> It took over 15 years for us to adopt the Statute of Westminster<sup>15</sup> – well after the other Dominions had embraced it and not until we had been brought to a realisation that we were becoming a nuisance in clinging to the apron strings. John Beaglehole’s verdict on us in the 1950s was that “New Zealanders have little talent or desire for abstract constitutional thought”.<sup>16</sup>

In 1961, the Constitutional Society, made up of many eminent men of the day, presented a petition with a draft Constitution to Parliament for consideration.<sup>17</sup> The Public Petitions Committee of the House declined to make any recommendations on it.<sup>18</sup> The Society kept at it and in 1963 secured the appointment of a Select Committee to consider its petitions for a written constitution and the establishment of a second chamber. When the Minister of Justice, Mr Hanan introduced a Bill of Rights, in fulfilment of an election commitment, it was referred to the same Committee for consideration.<sup>19</sup> In July 1964, the Committee decided not to recommend action on any of the

12 New Zealand Bill of Rights Act 1990, s 5.

13 Geoffrey Palmer “The Bill of Rights after Twenty-one Years: The New Zealand Constitutional Caravan Moves on?”, above n 11.

14 Statute of Westminster 1931 (UK) 22 & 23 Geo V c 4.

15 With the enactment of the Statute of Westminster Adoption Act 1947.

16 JC Beaglehole “The Development of New Zealand Nationality” (1954) 2 *Journal of World History* 106 at 115, as cited in Harshan Kumarasingham *Onward with Executive Power: Lessons from New Zealand 1947–57* (Institute of Policy Studies, Wellington, 2010) at 11.

17 Public Petitions Committee “Report of Public Petitions M to Z Committee 1961” [1961] IV AJHR I2A at 4–23.

18 *Ibid*, I2 at 3.

19 (15 August 1963) 336 NZPD 1199.

proposed measures – a Bill of Rights, the reinstatement of a second chamber, and the adoption of a written constitution.<sup>20</sup> Professor Northey noted in 1965 that the Committee on Constitutional Reform was “probably right in concluding that public interest in this sort of issue is not strong or increasing”:<sup>21</sup>

There is little prospect of any change being effected even in relation to the outmoded provisions of the Constitution Act 1852 and the instruments relating to the office of Governor-General. New Zealanders took only a small part in the development of responsible self-government; in 1947 they showed no awareness of having finally achieved this goal. It would be unrealistic to expect them to devote time and energy to uprooting the remaining vestiges of colonialism or to making innovations that have the appearance of being unnecessary.

It is a measure of the casualness about our constitution that until the 1986 Constitution Act, our principal written source was the New Zealand Constitution Act 1852, a statute of the Imperial Parliament. It was enacted to give New Zealand limited representative democracy only. Anyone reading it, at least before late 20th Century amendments, would understandably have had the impression that the Governor-General had real powers, that statutes could be disallowed by the Queen and that the Governor-General could set up Māori districts governed by Māori law. It is no wonder that those of us brought up before the late 1980s would have struggled to explain our constitution. Even so, the 1986 Constitution Bill which replaced it and was therefore, by any standard, important constitutional reform, attracted only eight submissions.

If we are not interested in reform, it does not seem to be because of pride in our existing arrangements and their history. We seem to have short memories of our constitutional history. Until 1947, or arguably even later (with the repeal of the reference to “peace, order, and good government” in the conferral of legislative authority in 1973<sup>22</sup>), our legislature had limited powers. The doctrine of parliamentary sovereignty had no application to it; the courts could and occasionally did strike down legislation. (Sir Owen Dixon indeed has queried whether it is accurate to describe any of the Dominions as gaining legislatures which are sovereign by virtue of independence from the Imperial Parliament,<sup>23</sup> but as I have already found that is an argument that generates more heat than is helpful, I do not enlarge on it here). It is worth remembering also that our original form of representative government enabled a form of federation both in the arrangements for provincial government and in the space left for self-government within Māori Districts. These earlier limitations on Parliament and forms of devolution suggest that we should not be too quick to dismiss contemporary calls for similar modern constitutional adaptations as contrary to our history and traditions. They were not unthinkable in the past.

The Constitution Act 1986, which replaced the 1852 Constitution Act, rather prosaically sets out the working parts of the constitution – the Parliament, the executive and the judiciary – and simply says flatly that they continue to have the powers they had at the coming into force of the Act. The Constitution Act 1986 is part only of the statutory contribution to the New Zealand constitution. And the statutory contribution is part only of the constitution. The statutory bits of the

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20 Constitutional Reform Committee “Report of the Constitutional Committee 1964 on the Petition of JB Donald and Others and on the New Zealand Bill of Rights” [1964] III AJHR 114.

21 JF Northey “The New Zealand Constitution” in JF Northey (ed) *The AG Davis Essays in Law* (Butterworths, London, 1965) 149 at 179.

22 New Zealand Constitution Amendment Act 1973, s 2.

23 See Sir Owen Dixon “The Common Law as an Ultimate Constitutional Foundation” in Sir Owen Dixon *Jesting Pilate* (2nd ed, William S Hein & Co Inc, New York, 1997).

constitution are to be found scattered through a number of important statutes: some (like Magna Carta) of great antiquity, others (like the New Zealand Bill of Rights Act or the Official Information Act 1982), comparatively recent. The Electoral Acts stand in a special category because they establish the conditions of democratic government and have long been subject to supermajority requirements for amendment as a result.

In 2003 we set up a court of final appeal, the Supreme Court, to replace the Privy Council. In a break from our usual reticence about constitutional fundamentals, the Supreme Court Act 2003 provides “Nothing in this Act affects New Zealand’s continuing commitment to the rule of law and the sovereignty of Parliament”.<sup>24</sup>

Although perhaps you could be excused for not thinking immediately of the Supreme Court Act as the place to look for a statement of the fundamental principles of our constitution, this statement is as forthcoming as it gets to date. Section 3 of the Supreme Court Act describes the twin poles around which our constitution seems now to revolve. The sovereignty of Parliament is shadowed by the rule of law.

I am not sure that it is widely understood that our system is based upon parliamentary rather than executive government. In practice, the executive promotes the legislation and is usually able to get it enacted. The executive, headed by the Prime Minister, is the face of Government. That does not detract from the constitutional position that, apart from the shrinking prerogative powers of the Crown, the executive in our legal system has no independent authority, as it has under the Constitution of the United States. It must identify a statutory or prerogative authority for everything it does (apart from powers necessarily incidental to its lawful functions).

It is the constitutional responsibility of the courts to hold the executive within its lawful powers. Professor Trevor Allan is right to point out that the perception may be different. He thinks it a central problem for modern public law that the executive is widely seen as an “independent source of policy formulation and governance, reflecting its own views of the public interest”.<sup>25</sup>

The foundational constitutional elements remain Parliament and the courts, as in the New Zealand Supreme Court Act the twin constitutional doctrines of parliamentary sovereignty and the rule of law suggest. The executive is answerable to both and must observe the limits set by Parliament and the interpretation of what those limits are by the courts. If, however, the executive is popularly thought to have independent constitutive powers, then the courts in holding the executive within the law may be seen as thwarting executive will instead of insisting on observance of Parliament’s will as expressed in legislation. This twists the constitutional position.

It is in my experience quite common to encounter New Zealanders who do not think we have a constitution at all because we have no single constitutive document. That is quite wrong, if understandable. The constitution is principally common law, so is to be found in all the sources of law, including the decisions of the courts and custom. Because the constitution evolves, description of its common law elements may turn on predictions of what the courts will do. The writings of political philosophers have been highly influential, but their dogma remains to be tested in application. These are not easy concepts to grasp, much less explain. The written elements of the constitution are in small part composed of statutes, such as those I have mentioned. They also include arrangements such as those to be found in the Standing Orders of the House of Representatives,

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24 Supreme Court Act 2003, s 3(2).

25 TRS Allan “Doctrine and Theory in Administrative Law: An Elusive Quest for the Limits of Jurisdiction” [2003] Public Law 429 at 433.

in the Cabinet Manual governing the operation of the executive, and in the rules which control access to the courts. These measures can and do change, often informally and below the radar. We may not be vigilant enough to see changes to these arrangements as impacting on the constitution and deserving of close scrutiny and public process. I want to come on to say something about the special vulnerabilities to the courts in such changes, but for present purposes, my point is that we have a number of written sources of constitutional rules.

It would be possible to draw these texts – or at least references to them – into a single constitutional document. There are, however, a number of risks in attempting such an exercise. First, there is the risk of under-inclusion, excluding texts of constitutional importance. Secondly, there is the risk of introducing too much rigidity and impeding needed evolution. We may need to be more vigilant to recognise when change to the Standing Orders of Parliament, or to the Cabinet Manual, or to the Rules of Court impact upon fundamental constitutional values. That is to prompt awareness and care in changes. It is not an argument for removing parliamentary or Cabinet or court control over change into a constitutional process. Thirdly, there is some real virtue in not having a single constitutional text. It means we are spared searching for the original intent of the framers, a form of ancestor-worship we see tearing the United States Supreme Court apart and which can be a dead hand on living societies. More importantly, no written text can capture the constitution. As Australia, the United States, Canada and all countries with written constitutions have found, values immanent in the constitution have to be treated as implicit in order to make the text work. Such values are behind the constitutional conventions, the habits of institutional behaviour, that are essential to constitutional observance. It is a mistake to see a constitution as a system of rules. Constitutional observance depends on a constitutional culture built on shared principles.

Such principles cannot be left to be worked out on the hop, if the need arises. We run real risks if as a society we are indifferent to the values which are fundamental. There are risks in reform if we do not have an understanding of the role of institutions like the judiciary or the police in a system of democratic government. It is not always easy to appreciate that proposals which seem quite innocent or efficient or pragmatic may trample on basic principle. Yet there are real risks too in letting matters drift. In a common law constitution, that leaves exposition of the constitution in the lap of the courts. Is this good enough?

I want to explore three particular potential vulnerabilities arising from the obscurity of the constitution: to the rule of law; to human rights; and to sensible engagement on the place of the Treaty of Waitangi in the constitutional order. These illustrate risks to constitutional values. In particular, they risk the role of the courts in fulfilling their constitutional responsibilities.

## II. THE RULE OF LAW

In the British constitutional system we have inherited, the constitution used to be the entire body of law, institutions and customs that comprised the Commonwealth.<sup>26</sup> That is no longer the sense in which we refer to the “constitution”, perhaps because of the influence of the United States Constitution and others patterned on it. The original understanding and our constitutional history mean, however, that some of the more significant principles on which the constitution is based remain judge-made principles of the common law. Common law constitutional principles include the rule of recognition of the pre-eminent law-making authority of Parliament and the denial of any dispensing power in the executive (an achievement of the common law later captured

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26 Martin Loughlin *The Idea of Public Law* (Oxford University Press, Oxford, 2003) at 120.

in the 1688 Bill of Rights). Like the common law more generally, a common law constitution is a developing system the sources of which are to be found in legislation, custom, precedent and agreement.<sup>27</sup>

Sometimes the obligation to say what the law is brings the judiciary into collision with the executive. It is often overlooked that a principal virtue of the supervisory jurisdiction of the courts over executive action is to provide authoritative vindication for what has been done, stilling controversy. While from time to time some heat may be generated in decisions of the courts which displease the executive, this function is the constitutional responsibility of the courts under the rule of law.

In some cases however, often entailing application of legislation enacted to give effect to international obligations, the appropriateness of what Parliament has done may be the subject of judicial comment. The most obvious example is under the New Zealand Bill of Rights Act where it is sometimes necessary to consider whether a measure enacted by Parliament, or adopted by the executive by regulations, is a justifiable limitation of rights in a free and democratic society under s 5 of the Act.

If the New Zealand constitution is in part to be seen in the law of the land, it is difficult for judges to avoid describing the constitution through cases when required to do so. I am not one who thinks that our constitution is deficient because the courts do not disallow statutes of Parliament as unconstitutional but it is worth remembering that judicial review arose in the United States because Chief Justice Marshall famously pointed out that it is the role of the judges to say what the law is.<sup>28</sup> Saying what the law is remains the responsibility of judges even if the formal omnipotence of Parliament is respected. It is their responsibility under an unwritten constitution as it would be under a written constitution. Those who fear empowering judges miss the point. The choice is not conferral of such responsibility, which already exists as an aspect of the rule of law. It is whether we provide judges with values to apply to which we have all committed in a political process (as has been done for human rights in the Bill of Rights Act) or whether we leave it to them to discover such values for themselves.

In his “Fundamentals” paper, Sir Robin Cooke expressed the view that the constitution is built on “two complementary and lawfully unalterable principles: the operation of a democratic legislature and the operation of independent courts”.<sup>29</sup> If either of these two planks were significantly undermined, “whether by legislation or otherwise”, he thought it would be the responsibility of the judges to say so.<sup>30</sup> What is more, he considered that honesty compelled the admission that “the concept of a free democracy must carry with it *some* limitation on legislative power” by rights and freedoms implicit in the concept of a free democracy.<sup>31</sup> Working out the rights and duties that are “truly fundamental” is, he claimed, “ultimately an inescapable judicial responsibility”.<sup>32</sup> It is not, however, *solely* a judicial responsibility.

The suggestion that there remain fundamental values which are beyond the reach of Parliament remains controversial. My concern in this paper is not to speculate about what the courts would or could do faced with legislation that undermined the democratic legitimacy of Parliament

27 PJ Fitzgerald (ed) *Salmond on Jurisprudence* (12th ed, Sweet & Maxwell Limited, London, 1966) at 112-114.

28 *Marbury v Madison* 5 US 137 (1803) at 177.

29 Sir Robin Cooke “Fundamentals”, above n 1, at 164.

30 *Ibid.*

31 *Ibid.*

32 *Ibid.*, at 164-165.

or the independence of the courts. Even to state these propositions is to demonstrate that such action would never consciously be taken by a democratic Parliament – it offends against our deepest constitutional sense. My point, rather, is to ask why it is not desirable to make this position plain and recognise unmistakably that it is law observed by Parliament not as a matter of grace but as a matter of obligation undertaken formally.

Taking as an example the constitutional fundamental of access to independent courts, there are three reasons why the idea of constitutional recognition should not perhaps be dismissed out of hand, even though direct threat to this value is hard to imagine. The first is that laws and practices may chip away at both access to the courts and their independence without any conscious design. The heightened constitutional vigilance that comes with authoritative statement may well be best policy. The second is that, if there is agreement that access to independent courts is a necessary constitutional good, there seems no good reason to exclude wide public participation in commitment to it through formal process. Over the long haul, a constitution has to have the allegiance of the society it binds together. The third reason, allied to the second, is that I wonder whether it is appropriate to leave so much to the courts in development of the common law constitution. Experience with the Bill of Rights Act (a matter I go on to discuss in what follows) may suggest that the constitution is a work best shared and that the authority of the courts is fragile when so isolated. It may well be the case that, as one senior English judge put it, the courts must speak for the constitution.<sup>33</sup> It is, however, necessary for someone to be listening. The constitution needs wider commitment.

I think there are signs that the courts are isolated and aspects of their independence precarious. Court resources are within the responsibility of executive government. Regulations prescribe the terms on which citizens have access to the courts. Court fees are within executive control. These are matters which should be subject to more public discussion than has been the case, perhaps because they are not popularly seen as touching on the constitutional principle of access to the courts. One of my colleagues has asked in a previous Harkness Henry lecture, not entirely in jest, whether we would regard with similar equanimity the imposition of fees to have access to a member of Parliament or a responsible Minister.<sup>34</sup> Judges and lawyers may get the point. If the wider community does not, however, it is no jesting matter at all.

The New Zealand Constitution Act 1986 makes separate provision for the legislative, executive and judicial branches of government.<sup>35</sup> It is not my claim that the judicial branch is other than the junior and the least powerful of the working parts of the constitution. In its work, however, it is subject to the direction of Parliament only through legislation. It is not subject to the control of the executive at all. This separation is better understood in constitutional arrangements where each branch has direct authority conferred by the constitution. In New Zealand the practical independence of the judiciary from other sources of state power is fragile. Judges have security of tenure and salary and can be removed from office only by Parliament.<sup>36</sup> They are however dependent for court support upon the Ministry of Justice, a significant policy department with direct interest in much litigation. The executive, more generally, is the principal litigant in the courts.

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33 Stephen Sedley, above n 6, at 72.

34 The Hon Justice John Priestley “Chipping Away at the Judicial Arm?” (2009) 17 Wai L Rev 1 at 14.

35 Part 2 (ss 6-9C) of the Constitution Act 1986 deals with the executive. Part 3 (ss 10-22) concerns the legislature. Part 4 (ss 23-24) touches on the judiciary.

36 *Ibid*, ss 23-24.

International statements of basic principles for judicial independence adopted both by the United Nations General Assembly<sup>37</sup> and by the Commonwealth<sup>38</sup> recognise that judicial independence has an institutional dimension. The Supreme Court of Canada has held that administrative independence in the organisation of judicial work and the support necessary to achieve it are aspects of such independence.<sup>39</sup> In the United States, Canada, the United Kingdom and Australia, considerable operational autonomy is given to judges. The United Kingdom Supreme Court, recently removed from the House of Lords, has its own budget, a Registrar answerable to the Court, staff answerable to the Registrar and separate IT support. The courts of England and Wales are now supported by a court service answerable to the judges.

In 1995 in New Zealand, the former Chief Justice succeeded in having the administration of the courts administered by a stand-alone department separated out from the Ministry of Justice. Although the Department for Courts was ultimately answerable to a Minister for Courts and not the judges, it nevertheless set up a loose partnership between the department and the judiciary in the administration of the courts. That step was seen by Sir Thomas Eichelbaum as an intermediate one on the way to greater judicial responsibility. In fact, only a few years later, in a decision in which the judiciary was not asked for its views, the Department for Courts was folded back into the Ministry for Justice.

Judicial support staff are Ministry employees. The Registrars of the courts are managers employed by the Ministry although nominally responsible to the judges for their registry functions. The judges have no effective say in the allocation of the budget for courts and have had little influence in the priorities set by the Ministry. It seems to be assumed that the administration of the courts (including the administration of judges) is an executive function and that judicial independence is sufficiently preserved if individual judges are not directed how to decide particular cases.

Decisions affecting court performance are largely outside judicial control. The technology we use for internal communication and in preparation of our judgments is part of the Ministry system. Proposals to share court information with other government agencies (police, corrections, legal aid, public defenders) are put forward for reasons entirely sensible from the perspective of the executive, but often without thought for the independence of the courts and their role as a distinct branch of government. At present there is talk of co-location of courts, police, and corrections in “justice precincts”. Ownership of a number of courthouses in the country has been transferred in Treaty settlements negotiated by the executive. Control of court processes through rules or regulations is seen in some reform proposals to offer opportunities for the executive to achieve desired outcomes: reduction of the prison population; movement of cases out of the system (through settlements or guilty pleas); case management to reduce costs and promote efficiency; diversion of cases to less costly forums. These may well be appropriate ends and may be achieved by means which do not breach fundamental values. If, however, we value the independence of the courts and access to them as constitutional goods, it is hard not to be uneasy that the boundaries between executive and judicial responsibility are often not directly confronted. Recognition that there are constitutional values here which underpin the rule of law would provide a platform for more principled attention.

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37 *United Nations Basic Principles on the Independence of the Judiciary*, endorsed in GA Res 40/32 and 40/146 (1985).

38 *Commonwealth Principles on the Accountability of and the Relationship Between the Three Branches of Government, as agreed by Law Ministers and endorsed by the Commonwealth Heads of Government Meeting* (Abuja, 2003) at IV.

39 *Valente v The Queen* [1985] 2 SCR 673 at [47]-[52].

### III. HUMAN RIGHTS

In New Zealand then we have had legislative expression of fundamental rights and freedoms since 1990. In an early case on the Act, Cooke P said that the Act was intended to run throughout the whole fabric of New Zealand law.<sup>40</sup> He may have been ahead of his time in this, as in other things. Although he stressed that the Act “does not merely repeat the old law”,<sup>41</sup> the more generally held view has been that the Act was intended to reflect existing law and to be “evolutionary”.<sup>42</sup> It may be that this concern to fit the new Act within the existing law was a strategic response to the political controversies which attended its adoption as Sir Geoffrey Palmer has speculated.<sup>43</sup> The legislation as enacted is a statutory Bill of Rights, not fundamental law. Under it, the courts are obliged to give effect to legislation which cannot be interpreted in conformity with the rights and freedoms contained in the Bill of Rights Act.<sup>44</sup>

Despite his preference for an entrenched Bill of Rights, Sir Robin Cooke in his “Fundamentals” paper expressed optimism that a non-entrenched statement of rights might prove almost as effective.<sup>45</sup> It would be launched, he thought, into a culture of human rights brought about by the International Covenant on Civil and Political Rights<sup>46</sup> and the European Convention on Human Rights.<sup>47</sup> Does such a culture yet exist in New Zealand society? Twenty years is not a long time for a cultural shift and the New Zealand Bill of Rights Act is a bigger shift in the legal culture than followed the adoption in Canada of the Charter of Rights and Freedoms. In the United Kingdom, the Human Rights Act 1998 arrived in a legal culture that had been adapting for many years to the authority of Europe and the values in the European Convention on Human Rights.

Yet I think it is clear that the enactment of the legislation has had a transformative effect on public administration and the administration of justice. Its success is not principally to be gauged from reading court decisions. It has permeated the processes of power as appears from the Cabinet Manual down. Huge effort has been applied to observance of the Bill of Rights Act by public servants and Parliament. It has changed how government works. The exercise of the coercive powers of the state against individuals is increasingly subject to disclosed standards. I do not see that there is danger of descent into a “tick the box” formality because there has also been a revolution in what has been required of those exercising public power by way of reasons. This shift may have been prompted by the working of the Official Information Act,<sup>48</sup> but it also meets the methodology of proportionality imported with Bill of Rights supervision, and a climate of justification which has transformed public power.

In the courts, it is striking that some of the more difficult questions relating to the New Zealand Bill of Rights Act are only just emerging more than 20 years after its enactment. Some are

40 *R v Goodwin* [1993] 2 NZLR 153 (CA) at 156.

41 *R v Te Kira* [1993] 3 NZLR 257 (CA) at 262.

42 *R v Jefferies* [1994] 1 NZLR 290 (CA) at 299 per Richardson.

43 Geoffrey Palmer “The Bill of Rights after Twenty-one Years: The New Zealand Constitutional Caravan Moves on?”, above n 11.

44 New Zealand Bill of Rights Act 1990, s 6.

45 Sir Robin Cooke “Fundamentals”, above n 1, at 159.

46 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976). New Zealand acceded to the First Optional Protocol to the International Covenant on 26 May 1989.

47 Which was challenging orthodoxies of English law inherited by New Zealand.

48 Which requires good reasons to exist for withholding official information following request: Official Information Act 1982, s 18.

prompted by examples that have arisen in other jurisdictions. We are now plugged into an international community in which the New Zealand statutory Bill of Rights model is no longer unique. Some of the solutions we adopted when we thought we were unique and when we were sensitive to charges of judicial over-reaching are being rejected in other jurisdictions. We have also come to understand that, except in the requirement of loyalty to legislation, judicial consideration of human rights does not differ greatly in countries in which such standards constitute fundamental law. We are now being stretched by the developing case law in the United Kingdom. Unlike the early New Zealand diet of drunken drivers and petty criminals, the courts of the United Kingdom have been pitch-forked into applying human rights in the most contentious cases of the day, those concerned with the threat of terrorism. Although in New Zealand human rights adjudication has not been conducted against such high public anxiety, it has become clear that our methods need to be kept under review. We need to engage with the values behind human rights and to understand how they fit within the domestic constitutional and international legal orders. We may need to reconsider our approach to precedent in such cases.<sup>49</sup>

Although the New Zealand Bill of Rights Act is a New Zealand statute and to be interpreted in the light of New Zealand conditions, the differences over time between jurisdictions may be less important than the common derivation. Our Act is after all enacted to bring our domestic laws more closely into line with the International Covenant on Civil and Political Rights.<sup>50</sup> The ideas thrown up through engagement with the underlying values contained in the Covenant and in the other international instruments it draws on cannot help but affect the development of our legal thinking. It can be expected, too, that the work of international agencies such as the United Nations Human Rights Committee will provide encouragement towards commonality. It would be bold to suppose that legal cultural differences will not shift under such external influences.

The record to date is that the Act has had a profound effect on both government administration and the work of the courts. We should expect that to continue. Even if (as Sir Geoffrey Palmer suggests) the courts have been a little cautious,<sup>51</sup> we should expect them to keep in touch generally with the case law in other comparable jurisdictions.

What then about the wider aspirations held for the Bill of Rights Act on its enactment? One of the hopes of those who promoted the New Zealand Bill of Rights Act was that it would become part of the political and social discourse as well as a source of vindication through the courts. It was to be a “set of navigation lights” for legislators.<sup>52</sup> It was also to be an accessible statement of shared values which would raise public consciousness about constitutional fundamentals and the level of civil discourse about such values. There is reason to be optimistic that such a culture is developing and that the principal contribution of the courts may be in explaining the application of rights in context. Sir Geoffrey Palmer has described the Act as a parliamentary bill of rights, which relies principally upon the processes of government rather than court decisions for the pro-

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49 A similar point was made by Cooke P in the early years of the New Zealand Bill of Rights Act 1990: see *Ministry of Transport v Noort* [1992] 3 NZLR 260 (CA) at 270; *Simpson v Attorney-General* [1994] 3 NZLR 667 (CA) [*Baigent's case*] at 676.

50 New Zealand Bill of Rights Act 1990, long title.

51 Geoffrey Palmer “The Bill of Rights after Twenty-one Years: The New Zealand Constitutional Caravan Moves on?”, above n 11.

52 Geoffrey Palmer “A Bill of Rights for New Zealand: A White Paper” [1984-1985] 1 AJHR A6 at 6.

tection of human rights.<sup>53</sup> It seems to me that even in jurisdictions where judicial review is available for legislative breaches of rights, the role of the courts in protecting rights may similarly be less important than the culture of government to which the decisions of courts contribute.

One of the reforms in the Act of which much was expected was the parliamentary scrutiny for human rights breaches. It is in connection with the success of this aspect of the Act that Janet McLean has expressed some doubt and which requires some additional comment.

Consistently with the responsibilities imposed upon the legislative branch, the Act provides that the Attorney-General is obliged to bring to the attention of the House of Representatives any provision in a Bill that “appears to be inconsistent with any of the rights and freedoms contained in this Bill of Rights”.<sup>54</sup> New Zealand’s experience to date with the s 7 obligation appears mixed. Initial expectations were that the vetting procedure and reporting to Parliament would contribute significantly to the creation of “a rights culture that [is] sufficiently robust to protect rights”.<sup>55</sup> Since 2003, the Attorney-General has adopted the practice of publishing the legal advice relied upon in making s 7 reports. I am not sure to what extent this has led to wider public awareness of the human rights issues but it is a development to be highly commended.

As at May 2011 there had been 27 negative s 7 reports in respect of government Bills. Professor McLean has expressed alarm about this. She emphasises that in the case of all 27 negative reports the Government was prepared to proceed with a Bill which “it openly acknowledged as limiting protected rights unreasonably in a way that *could not be justified*”.<sup>56</sup> In few cases of adverse report did the House debate the report. McLean contrasts this record with that in the United Kingdom since enactment of Human Rights Act 1998 where there have been only two negative reports. They led to heightened Parliamentary scrutiny, led by the Joint Committee on Human Rights (a reform that Lord Lester of Herne Hill urged unsuccessfully on New Zealand<sup>57</sup>) and more substantial justification of the preferred approach. What is more, in the United Kingdom declarations of incompatibility by the courts are treated very seriously indeed. In every such case, the Government has given an undertaking to repair the constitutional defect.

McLean suggests that “something is amiss” in New Zealand. Her concern is less with the record of non-compliance with human rights than with “absence of a systematic process of parliamentary justification”. If s 7 reports are not being taken sufficiently seriously in the political process she wonders about “corrosive flow on effects” and the risk of “bad habits”, especially in criminal law where an adverse report she fears is treated almost as a badge of honour. If adverse Attorney-General’s reports are not taken seriously, she thinks we should be concerned about what will happen to formal declarations by courts that legislation is incompatible with the Bill of Rights Act. If court declarations too are shrugged off, then McLean thinks that what is at risk is the constitutional tradition that declarations of the courts will be obeyed. It is in this connection that she speculates that a perverse consequence of the experience with the Bill of Rights Act may be that

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53 Geoffrey Palmer “Foreword” in Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (Lexis Nexis NZ Ltd, Wellington, 2005) at v.

54 New Zealand Bill of Rights Act 1990, s 7.

55 Janet L Hiebert “Rights-Vetting in New Zealand and Canada: Similar Idea, Different Outcomes” (2005) 3 NZJPIL 63 at 65.

56 Janet McLean, above n 10.

57 See Anthony Lester “Parliamentary Scrutiny of Legislation under the Human Rights Act 1998” (2002) 33 VUWLR 1.

Parliament is no longer observing the constitutional conventions by which it “limited itself” but is acting on “a kind of ‘s 4 ... anti-constitutionalism’”.<sup>58</sup>

It is worrying if an astute observer of the New Zealand constitution sees that a consequence of enhanced judicial responsibility for protection of rights may be a shrugging of parliamentary responsibility, undermining previous constitutional convention. I am not sure that this pessimistic and tentative assessment is accurate. I would like to think that it is not. It may suggest, however, that we need to take care that we do not set up a view, contrary to s 3 of the Bill of Rights Act, that human rights are the responsibility of the courts alone. Perhaps it is time to think again about the recommendation of Lord Lester that we would benefit from a Human Rights Committee of Parliament to keep a close watch on legislation which impacts on fundamental rights and freedoms. Such a Committee might even with advantage take on a wider responsibility to scrutinise measures which impact upon constitutional values.

Apart from the response to adverse s 7 reports which is the concern of Professor McLean, perhaps it is time to question a procedure followed since 2001 which excuses report to Parliament where there is a legal opinion that a right is properly limited because the limitation is demonstrably justified in a free and democratic society. The procedure (which may not sit particularly well with the wording of s 7 which requires report where a provision in a Bill “*appears to be inconsistent with any of the rights and freedoms contained in this Bill of Rights*”) follows a recommendation of the Legislation Advisory Committee and is consistent with the judgment of the Supreme Court in *R v Hansen*<sup>59</sup> that the Act protects only rights not justifiably limited. Legal opinion as to what is a justified limitation in a free and democratic society may, however, be highly contestable. What is justified in a free and democratic society is an assessment one would have thought the House of Representatives was well qualified – perhaps best qualified – to consider. More importantly, I wonder whether preferring legal opinion to parliamentary judgment is calculated to promote legislative responsibility for human rights or constitutional values. As McLean reminds us, New Zealand is one of the very few jurisdictions to hold out against strong judicial review.<sup>60</sup> In such a constitutional setting, we need more political responsibility for human rights, not less.

James Madison’s vision of the separation of powers was of distinct but connected constitutional authority.<sup>61</sup> If this is right, as I think it is, the roles of all those who have primary responsibility for the observance of human rights are interconnected. The legislature, having legislated for human rights, sets the limitations that are justifiable in a free and democratic society. The executive exercises its discretions in carrying out legislation within the boundaries set by Parliament. The courts patrol the boundaries and grant remedies for breach of rights. All have responsibility to illuminate the discharge of their responsibilities where human rights are affected. The courts are obliged to give reasons. Increasingly justification by the executive is critical for the demonstration of rationality and to counter claims of arbitrariness. Perhaps Parliament needs to participate more directly in this culture of justification in discharging its responsibilities, as through a Select Committee with responsibility for reporting to Parliament on compliance with human rights.

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58 Janet McLean, above n 10.

59 *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1.

60 Citing Harvard Professor Mark Tushnet “How Different are Waldron’s and Fallon’s Core Cases for and against Judicial Review” (2010) 30 Oxford J Legal Stud 49 at 69.

61 James Madison “The Federalist No 51: The Structure of the Government Must Furnish the Proper Checks and Balances Between the Different Departments” in Alexander Hamilton, James Madison, and John Jay *The Federalist* (Harvard University Press, Cambridge, 1961).

As I have tried to indicate, it is an inadequate view of a statement of rights to regard it as principally directed to the courts or to regard the courts as the principal mechanism for vindicating rights. Ultimately, whether human rights are observed depends upon whether they are valued and understood by the wider community. All three branches of government have responsibilities to bring that about.

#### IV. THE TREATY OF WAITANGI

The Treaty of Waitangi Act in 1975 appeared a very modest statute, but it has been transformative of New Zealand society. The work of the tribunal set up under it to make recommendations to the government about how to meet its responsibilities under the Treaty provided a bridge in understanding and brought the Treaty out of the legal dustbin into which it had been relegated in the 1860s. We have come a long way very fast.

In 1968 when I studied constitutional law, the Treaty of Waitangi was not mentioned. In a collection of essays published a few years earlier the Professor of Public Law at Auckland University, Jack Northey, in a significant essay on “The New Zealand Constitution” omitted the Treaty altogether.<sup>62</sup> In my 1970 dissertation on constitutional law and whether we should have a Bill of Rights, the Treaty of Waitangi was not referred to.

Only a few international lawyers, such as Sir Kenneth Keith (now on the International Court of Justice), were interested in treaties. In the same collection of essays in which the essay by Professor Northey appeared in 1965, Sir Kenneth expressed the tentative view that the Treaty of Waitangi might be enforced as a contract.<sup>63</sup> I doubt whether any of his contemporaries in 1965 were thinking of such things. Indeed the Treaty had been famously described as a legal nullity in the New Zealand domestic courts in 1877,<sup>64</sup> a result eventually (but not without some hesitations along the way) acquiesced in by the Privy Council when it confirmed that, as an international treaty, the Treaty of Waitangi had no force in domestic law.<sup>65</sup>

Sir Kenneth questioned that apparent orthodoxy at least in its application to treaties of cession which otherwise effectively become unenforceable because the ceding party loses standing in international law.<sup>66</sup> More recently, Antony Anghie has suggested that the way positivist dogma repudiated the treaties by which colonialism was undertaken is an embarrassment to international law.<sup>67</sup> These ideas have yet to be considered in New Zealand law.

Before we recoil from suggestions that the Treaty of Waitangi might be part of New Zealand constitutional law, we should remember not only the work of such scholars as Sir Kenneth Keith but also some of the arguments made at the beginning of New Zealand. In the 1840s and early 1850s there was considerable support for the view that the Treaty of Waitangi was a foundation of New Zealand law and able to be applied by the domestic courts. James Busby, who had as much

62 JF Northey “The New Zealand Constitution” in JF Northey (ed) *The AG Davis Essays in Law* (Butterworths, London, 1965) 149-179.

63 KJ Keith “International Law and New Zealand Municipal Law” in JF Northey (ed) *The AG Davis Essays in Law* (Butterworths, London, 1965) 130 at 146-148.

64 *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur (NS) 72 at 78.

65 *Te Heuheu Tukino v Aotea District Maori Land Board* [1941] NZLR 590 (PC) at 596-597.

66 KJ Keith “International Law and New Zealand Municipal Law”, above n 63 at 148.

67 Antony Anghie *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press, Cambridge, 2005).

to do with drafting the Treaty as anyone, staunchly maintained that it was equivalent to the 1706 Treaty of Union between England and Scotland and was foundation law in New Zealand.<sup>68</sup> Editorial writers of the day supported his claims which were, unfortunately, never resolved authoritatively by the Privy Council as was attempted.<sup>69</sup>

The moral authority of law and the virtue of government were acknowledged in the speeches at Waitangi. Perhaps never has any country been formed with such optimism, with such conscious constitutive purpose, and without the spur of oppression or war. Our country was formed by consent, in faith, and with courage. With such beginnings, it is incomprehensible that the Treaty should be seen to be an impediment to constitutional development.

Sir Robin Cooke said of the Treaty that “a nation cannot cast adrift from its own foundations”.<sup>70</sup> He also said, whatever constitutional status the Treaty has, can only remain.<sup>71</sup> It would be good to think that the Treaty, far from being an impediment to achieving greater clarity in our constitutional arrangements, is, rather, an important source of the values that bind us and set us apart from others. Professor Quentin-Baxter, a distinguished New Zealand constitutional lawyer, said in this vein, that if New Zealand does have a future as an independent nation it is because these islands “were a meeting-place of two great races” and that, even in the worst of times that followed, their dealings together have always had a “certain grandeur”.<sup>72</sup>

A constitution needs values, such as those of justice spoken of at Waitangi. It needs to look to speak to the future with optimism, as the leap of faith taken in that beautiful setting did. It needs to bind us together and set us apart from other nations, as the Treaty accomplished. It needs to be grand – as what was done at Waitangi was grand.

## V. CONCLUSION

On more than one occasion when wrestling with questions about our constitution, I have thought about the English Cabinet Minister lost in a fog on Exmoor. Eventually, after stumbling around for some time, he came across a local and asked which way he should go to get to London. The local stared. “If I was going there”, he said, “I wouldn’t start from here”.

Well, we have to start from here. Here is where we are. It is a good place to start from if we recognise the history behind us and the principles we can draw from our heritage to keep the constitution dynamic and responsive to the changing needs of New Zealand society.

In difficult times, such as we have experienced over the last year, we need to remember that we are a community with shared values. A constitution expresses those shared values as law. A constitution underpins the rule of law, under which all have security. Aristotle believed that law was “the principal and most perfect branch of ethics”.<sup>73</sup> A constitution is the most ethical branch of law. In the journey ahead of us as a country, we have some choices to make. In the end, what

68 Ned Fletcher and the Rt Hon Dame Sian Elias “A Collusive Suit to ‘confound the rights of property through the length and breadth of the colony’”: *Busby v White* (1859), (2010) 41 VUWLR 563 at 583.

69 *Ibid.*, at 599.

70 *Te Runanga o Wharekauri Rekohu Inc v Attorney-General* [1993] 2 NZLR 301 (CA) at 308-309.

71 *Ibid.*, at 309.

72 RQ Quentin-Baxter “Themes of Constitutional Development: The Need for a Favourable Climate of Discussion” [1984] NZLJ 203 at 207.

73 As cited in William Blackstone *Commentaries on the Laws of England: Book the First* (Dawsons of Pall Mall, London, 1966) at 27.

will define us is the sharing of common values. Whether we build on what we share and move forward together or whether we fracture along fault lines of difference is the question. How we answer it may be the defining point for us as a nation. If we do not have common values – public values which set us apart as a nation – then it is hard to see why we would resist the Federation next door. Its Constitution, as my Australian friends like to remind me, was drafted to include New Zealand, should we wish to join up. Given the emigration rate, including among Māori, this is a question we have to confront. So it is time for a conversation about our own constitution: the responsibilities and limits of its working parts; the rule of law; human rights; and the Treaty of Waitangi; the public values that make us our own nation still.

# THE EVOLUTION FROM FORM TO SUBSTANCE IN TAX LAW: THE DEMISE OF THE DYSFUNCTIONAL “METWAND”

BY E W THOMAS\*

“... timber trees cannot be felled with the stroke of a goose quill.”<sup>1</sup>

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\* Distinguished Visiting Fellow at the Law School at the University of Auckland. The author wishes to thank Luke Facer and Autumn Grogan, who assisted in 2005, and Ben Prewett, who assisted in 2010, for their outstanding research. The article is based on a paper given on 30 October 2010 to the 2010 Tax Conference held by the New Zealand Institute of Chartered Accountants.

1 *Liford’s Case* (1614) 11 Co Rep 46b at 50a; 77 ER 1206 at 1214.

## I. INTRODUCTION

In my six years on the Court of Appeal I delivered five dissenting judgments in taxation appeals. Each judgment favoured the Commissioner of Inland Revenue.

This outcome did not, of course, indicate a bias towards the tax collector any more than the majority judgments to which I dissented indicated a bias in favour of the taxpayer. The divergence is simply due to the fact I adopted a different approach from the President, Sir Ivor Richardson, and the majority he commanded on that Court.

The common theme of these judgments was my rejection of the doctrine of form over substance. In *Peters v Davison*,<sup>2</sup> I referred to what has happened in practice with the over-zealous application of the form over substance doctrine by various corporate taxpayers and their tax advisers. The doctrine, I claimed, had spawned a culture in certain sections of the community and the specialist tax advice industry dedicated to extreme legalism in the interpretation and application of the income tax legislation.

In *Wattie v Commissioner of Inland Revenue*,<sup>3</sup> I was critical of the so called doctrine of economic equivalence. I also suggested that the “sham or genuine, no halfway house” rule could not withstand scrutiny.<sup>4</sup> In *Colonial Mutual Life Assurance Society Ltd v Commissioner of Inland Revenue*,<sup>5</sup> I confirmed that the doctrine is an extremely flexible and portable concept all too often invoked to exclude recognition of the substance of a transaction or even avoid a rigorous analysis of the legal arrangement actually entered into. Finally, in *Commissioner of Inland Revenue v Bank of New Zealand Investments Ltd* I challenged the form over substance doctrine at some length.<sup>6</sup>

In 2005 I completed the draft of an article entitled: “Form Over Substance in Tax Law: The Dysfunctional Metwand”. The use of the word “metwand” was, of course, a reference to Lord Tomlin’s dedicated use of that word in the phrase “the golden and streight metwand of the law” in *Inland Revenue Commissioner v Duke of Westminster*.<sup>7</sup> Shortly afterwards, the *Ben Nevis* case began its determined path through the court hierarchy. The facts in that case clearly raised the question of the tension between form and substance. As a relatively recently retired Judge of the Court of Appeal, and an even more recently retired Acting Judge of the Supreme Court, I thought it possibly inappropriate to submit the article for publication. For that reason, the article languished in the bottom draw of my desk or, more accurately, among the “documents” on my computer. It was revisited temporarily to include a section on the morality of tax avoidance inspired by the excellent paper by Zoë Prebble and John Prebble, “The Morality of Tax Avoidance.”<sup>8</sup>

With the passage of time, and because the Supreme Court has now spoken authoritatively on the question of tax avoidance in *Ben Nevis Forestry Ventures and Ors v Commissioner of Inland Revenue*<sup>9</sup> and *Glenharrow Holdings Ltd v Commissioner of Inland Revenue*,<sup>10</sup> and the further fact

2 *Peters v Davison* [1999] 2 NZLR 164 at 201. (A separate judgment).

3 *Wattie v Commissioner of Inland Revenue* (1997) 18 NZTC 13297 at 13, 311.

4 *Ibid*, at 13, 310–13, 311.

5 *Colonial Mutual Life Assurance Society Ltd v Commissioner of Inland Revenue* (2000) 19 NZTC 15614 at [125].

6 *Commissioner of Inland Revenue v Bank of New Zealand Investments Ltd* [2002] 1 NZLR 450 at 467 *et seq*. The fifth case in which I dissented, not mentioned above, is *Auckland Harbour Board v Commissioner of Inland Revenue* (1999) 19 NZTC 15433.

7 *Inland Revenue Commissioner v Duke of Westminster* [1936] AC 1.

8 “The Morality of Tax Avoidance” (2010) 43 Creighton Law Review 693.

9 *Ben Nevis Forestry Ventures and Ors v Commissioner of Inland Revenue* [2009] 2 NZLR 289.

10 *Glenharrow Holdings Ltd v Commissioner of Inland Revenue* [2009] 2 NZLR 359.

that the principles set out in those decisions have been applied in subsequent cases, my hesitancy has evaporated. I therefore propose to set out my original thinking relating to the doctrine of form over substance in tax law and then assess the impact and implications of the Supreme Court's decisions on that doctrine. This framework is appropriate as it is impossible to assess the significance of those decisions without a full appreciation of the regime which they replace.

I take the view that *Ben Nevis* and *Glenharrow* represent a marked, although not entirely overt, departure from the form over substance doctrine. Although I conclude that the Court still has further to go in order to achieve a tax law which is logical and coherent and which provides tax advisers with a greater measure of certainty than is presently the case.

## II. THE BASIC PRINCIPLE

The basic principle that has motivated my thinking was clearly, and I would like to think succinctly, spelt out in *Peters v Davison*:<sup>11</sup>

The objective of the Income Tax Act is to collect tax on income. Income is derived from the substance of a transaction, not its form. It is therefore necessary to have regard to the substance of a transaction and not just the form in which it is fabricated to determine the true income and the tax which is payable on that income. For either the tax authorities or the Courts to do otherwise is to thwart the objective of the Act.

This rejection of the form over substance doctrine is part of a wider judicial philosophy or approach – the rejection of formalism or formalistic thinking in judicial adjudication.<sup>12</sup>

In endeavouring to reconstruct legal formalism in 1988, Professor Weinrib observed that in the last two centuries formalism has been killed again and again, but has always refused to stay dead. The great bulk of legal scholarship, however, asserts that its death is irreversible.<sup>13</sup> That assertion is no doubt correct but, even though officially dead, it exerts a cadaverous influence from the grave. Formalism, or formalistic thinking, is very much evident in practice and at times exhibits a coercive influence on judicial thinking.

Formalism, of course, does not have the same meaning to everyone, but although the term may be used in different ways, the notion that it represents decision making according to rule or doctrine is common to its usage. “Rule” in this context implies the language of rule formulation; “doctrine” dictates that the literal mandate of the rule is to be preferred. Formalistic thinking precedes the unquestioning acceptance and application of rules to particular cases and sustains legal doctrines, however unsound or illogical they may be.

Tax law billets formalistic thinking more than any other area of the law. The crippling example of this penchant or fetish for formalism is the form over substance doctrine. It is an open acknowledgement that form will dictate the nature of a transaction and so, if necessary, subvert the true substance of the transaction.

This approach on my part brought me into conflict, albeit friendly conflict, with Sir Ivor Richardson, the doyen of tax lawyers and a lawyer and judge who has exerted a dominant influence

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11 Above n 2, at 201.

12 See EW Thomas, *The Judicial Process: Realism, Pragmatism, Practical Reasoning and Principles* (Cambridge University Press, 2005) at Chapter 3.

13 *Ibid*, at 56.

on the content and direction of tax law in this country for more than three decades.<sup>14</sup> It is this divergence in our viewpoints, and not any lack of respect for one of this country's foremost jurists, which accounts for the five dissenting judgments mentioned above.

### III. MORALITY AND TAX AVOIDANCE

In *Commissioner of Inland Revenue v Bank of New Zealand Investments Ltd*<sup>15</sup> I dealt with the "morality" of tax avoidance in broad terms; it distorts the tax base, undermines the integrity of the tax system and is inequitable as between taxpayers. The language is the prosaic language of judges sensitive to the unfairness of tax avoidance. A more philosophical exercise is avoided.

Such an exercise, however, is not irrelevant to the question of tax avoidance and should not be evaded by the commentator. In this regard, I am fortunate to have had the advantage of reading the outstanding contribution by Zoë Prebble and John Prebble to which I have already referred. The authors examine the morality of tax evasion and tax avoidance in considerable depth.<sup>16</sup> It is not possible to reproduce Zoë and John Prebbles' paper in full or repeat all the arguments advanced in it. For the purpose of this article, it will suffice to briefly summarise the salient points or, at least, the salient points that I wish to endorse.

- (1) Tax evasion and tax avoidance are not economically dissimilar. They are each undertaken in pursuit of the same broad aim, that is to minimise or avoid tax liability. They are motivated by the same desire and have the same economic consequences. Tax evasion is, of course, illegal while tax avoidance is not necessarily illegal per se. Tax avoidance does not require a finding of fraud. Nor is it ordinarily subject to criminal punishment. Hence, the difference between evasion and avoidance can be seen as essentially a matter of law and not of relevant fact.<sup>17</sup> Indeed, as the authors point out, tax avoidance can often comprise a more involved and substantial mental element in that the "detailed planning of a tax avoidance scheme suggests a mind deeply engaged in the enterprise of minimizing taxes."<sup>18</sup>
- (2) The authors systematically refute a number of assumptions that attach to the question of the morality of tax avoidance. The first is the assumption that taxpayers are morally entitled to their pre-tax incomes and that taxation is an unjustified governmental invasion of an individual's private property rights. There is nothing, however, in the notion that individuals possess such a right, even invoking Lockian concepts, to ordain that private property rights confer any such entitlement. As the authors point out, a legal system cannot exist without a government

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14 Sir Ivor Richardson was a recognised tax law expert when in practice, and the leading counsel in taxation matters when Crown Counsel with the Crown Law Office from 1963-1966. He was the Chairman of the Committee of Inquiry into Inflation Accounting in 1975-1977. He prepared income tax codes for Mauritius and Western Samoa, which were enacted in 1974, and the estate and gift duties legislation of Western Samoa, which was enacted in 1978. Sir Ivor has published books on *The Estate and Gift Duties Act, 1968* (1969), *Tax Free Fringe Benefits* (with RL Congreve, 1975), and *Adams and Richardson's Law of Estate and Gift Duty* (with RL Congreve, 5th ed, 1978). In 1993-1994 Sir Ivor undertook an Organisational Review of the Inland Revenue Department. He was a member of the Court of Appeal from 1977 and the President of the Court from 1996 until he retired in 2002.

15 Above n 6, at 471-473.

16 Above n 8. See also William B Barker "The Ideology of Tax Avoidance" (2009) 40 *Loyola University Chicago Law Journal* at 229.

17 *Ibid*, at 727.

18 *Ibid*, at 722.

and a government depends on taxation. Consequently, it is “meaningless” to speak of a prima facie property right to one’s pre-tax income.<sup>19</sup>

I would go further than the authors. The notion that there is a moral entitlement to one’s pre tax income is nothing more than a prejudice inherent in an ideological commitment to an untrammelled free market and so-called “small government”. Once it is acknowledged that government is essential, as must be the case, the question is how far governmental activity and expenditure should extend and, in the absence of the prejudice I have referred to above, it cannot be sensibly argued that any sort of moral sanction requires governmental expenditure to be minimal. Small government is at best a political or economic preference; it is not a moral imperative.

(3) Another assumption that cannot withstand scrutiny is that tax avoidance is not harmful. Tax avoidance is not victimless. As Zoe and John Prebble point out, the lack of individually identifiable victims is not the same thing as a lack of victims altogether. Nor is it correct that sufficiently diffuse harm is the same as a total absence of harm. Furthermore, while the harm which results from an individual’s failure to comply with his or her tax liability may be so diluted as to be negligible, if everyone refused to comply the negligible harm would amount to a “very great harm”.<sup>20</sup>

The assumption that tax avoidance is not harmful must yield to a more realistic view. It results in a misallocation of resources. Taxpayers spend time and money devising tax avoidance schemes and this expenditure of effort represents a dead weight loss to the economy. While the taxpayer may obtain a tax benefit he or she is not undertaking any actual beneficial activity.<sup>21</sup> In fact, the more prevalent the tax avoidance, the greater the need to increase the tax rates and raise additional taxes. In the result almost everyone is worse off.<sup>22</sup>

As the authors also proceed to point out, tax avoidance not only depletes the government’s revenue but also undermines a government’s progressivity policies. In practice, it has substantially negative distributional consequences simply because not all taxpayers are able or willing to devise or take advantage of tax avoidance schemes. Generally, the authors claim, it is the more wealthy taxpayers, or those with a more sophisticated knowledge of tax law, who are in a position to take advantage of tax avoidance opportunities.<sup>23</sup>

Furthermore, tax avoidance risks undermining public confidence in the tax system. The authors remark on the vicious circle that eventuates: as confidence in the system falters members of the public become less likely to comply voluntarily with the tax laws.<sup>24</sup>

I am in total agreement with the authors. The notion that tax avoidance is not harmful is basically an anarchical assertion which is demonstrably untrue. Far from providing a moral foundation for tax avoidance, the harm tax avoidance causes confirms that it is essentially immoral. Further, I would hesitate to admit that a system which is demonstrably inequitable can ever be said to be moral.

(4) The authors rightly contend that tax avoidance cannot be considered moral on the basis that tax avoidance is “legal”. To this end they refute the notion that tax avoidance must be categorised as either “mala prohibita”, that is, a prohibited evil, or “mala in se”, that is, an evil in

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19 Ibid, at 721.

20 Ibid, at 725.

21 Ibid.

22 Ibid.

23 Ibid, at 726.

24 Ibid.

itself, by demonstrating that the concepts are not mutually exclusive or exhaustive. They correctly assert that:<sup>25</sup>

People who say that tax avoidance is not immoral seem to rely on a false dichotomy: it is not correct to say that unless a wrong is immoral entirely independently of all law, its content must be morally neutral and that its sole claim to moral weight must be derived from a general obligation to obey the law.

There is ample logical space between these two paradigms for the imposition of a moral duty independent of a general obligation to obey the law.

The authors identify this moral duty as something like a duty “to contribute to one’s cooperative society”.<sup>26</sup> Taxation law gives shape to this moral duty by defining the measure of taxes on the forms of income that a taxpayer must pay. Viewed this way, tax evasion is morally wrong, not only because it is illegal, but also because, within our legal and societal context, “our broad moral obligation to contribute to the collective has taken the specific shape of a duty to pay our taxes”.<sup>27</sup> Tax evasion is thus a wrong in a “deep sense” and therefore morally wrong by virtue of its content as well as its legal status. Being economically similar, tax avoidance is also morally wrong.

While not dissenting from the authors’ analysis I can, for myself, reach the same conclusion by a shorter route. Society is inherently interdependent and interactive.<sup>28</sup> It cannot function without the governmental apparatus to regulate that interdependence and interaction. All citizens participate in that necessary governmental apparatus and obtain a greater or lesser benefit from its operation. That participation and benefit give rise to a general duty to contribute taxes to maintain that apparatus. Irrespective of the law, therefore, this duty can be properly perceived as a moral duty resting on citizens in an inherently interdependent and interactive society. It follows that to breach that duty, either by avoiding a tax liability by evasion or avoidance, is to commit an immoral act.

These arguments are appealing, not only because they debunk much of the sophistry and semantics attaching to the distinction between tax evasion and tax avoidance, but also because they make it that much more difficult to resist an argument that tax evasion is immoral but tax avoidance is not. It becomes even more difficult to support a positive argument that citizens enjoy a moral entitlement to avoid tax.

I am fully conscious that rejecting the assumption that tax avoidance is a “moral entitlement” and otherwise not seriously harmful and replacing those assumptions with a positive assertion that tax avoidance is immoral will not sit comfortably with many corporate taxpayers and lawyers and accountants engaged in the tax advice industry. So be it.<sup>29</sup> Conduct which is immoral cannot be sanctioned simply to accommodate the sensitivities of the generally more wealthy taxpayers and their tax advisers. Rather, the appropriate response is to stop short of endorsing arrangements which alter the incidence of tax to an extent that the purpose or effect of the tax avoidance cannot be said to be merely incidental.

In directing the courts to adopt an approach which enables decisions to be made in individual cases through a process of statutory construction which focuses objectively on features of the arrangement in issue, the majority in *Ben Nevis* expressly enjoin judges not to be “distracted by in-

25 Ibid, at 731.

26 Ibid, at 736.

27 Ibid, at 737.

28 Thomas, *The Judicial Process*, above n 12, at 371-373.

29 The question whether the concept of tax avoidance could be jettisoned from the statutory regime and be replaced by a dichotomy of tax liability and tax evasion is a question for another day.

tuitive subjective impressions of the morality of what taxation advisers have set up.”<sup>30</sup> The phrase leaves open the question whether objective impressions of the morality of tax avoidance are permissible. Although one might prefer to omit the word “impressions”, objectivity is a primary judicial trait. Together with impartiality, it is the rationale underlying judicial independence. Judges do not commonly advert to their intuitive impression, subjective or objective, of the morality of the subject-matter in issue, although, of course, from time to time overt reference may be made to the “merits” of a case. Nor, however, is it common to read an express appellate exhortation not to be influenced by the morality of the subject-matter. While much of the law may reflect a moral precept, the courts remain outwardly morally neutral.

One can accept that the intuitive subjective impressions of the morality of tax arrangements should not distract the judge from the legal task at hand. If, however, the arrangement is capable of an “objective” impression of its morality, the argument against it being set to one side does not seem so compelling. The exhortation then becomes close to telling the courts not to be distracted by the merits, an exhortation that must fall on the sword of reality.

I suspect that the majority’s perception of the need for this caution reflects the thinking of the past and one or more of the features identified by Zoë and John Prebble. There is no greater, or lesser, need for the courts not to be distracted by impressions of the morality of the subject matter when considering a tax case than when considering a claim that a benefit has been obtained illegally, or that a promoter has obtained funding from investors without adhering to the rules, or that a party has exploited another party in entering into or in carrying out a contract, or in any number of other claims that come before the courts. Just as the courts finally declined to adopt a different approach to the interpretation of statutes so, too, they must decline to set tax law apart as some sort of legal eunuch.

I wish to make it clear, however, that these observations have been invoked, or provoked, by the majority’s unexpected exhortation. In dealing with the morality of tax avoidance I am not to be taken as suggesting that judges should incorporate their impressions, objective or subjective, of the morality of the arrangement in question into their judgments, much less enter upon a philosophical discourse on the subject. They need go no further than indicate the value judgment on which their decision is based in pursuit of the need for transparency in judicial adjudication.<sup>31</sup> Rather, my purpose in adverting to the subject has simply been to negate the notion that tax avoidance is not immoral or that it warrants special or separate treatment or consideration on that account.

Tax avoidance is deserving of opprobrium and, in determining that a taxpayer’s arrangement has crossed the line and become tax avoidance, judges will and should be conscious that they are making a decision that carries that opprobrium with it. Tax advisers discussing an arrangement with their clients need to be aware that this opprobrium may attach to their advice if it crosses that line.

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30 Above n 9, at [102].

31 Thomas, *The Judicial Process*, above n 12, at 306-307, 349-350 and 352-353.

#### IV. FORM OVER SUBSTANCE

In ascertaining what is meant by “form over substance”, it is convenient to start with Sir Ivor Richardson’s dicta (as Richardson J) in *Re Securitibank Ltd (No 2) Ltd*<sup>32</sup> in 1978. The transactions in question had the same economic effect as a loan but that effect had been achieved by selling instruments at a discount. Richardson J said:<sup>33</sup>

It is well settled that, where documents have been drawn to define the relationship of persons involved in a business operation, the true nature of the transaction can only be ascertained by careful consideration of the legal arrangements actually entered into and carried out (*Helby v Mathews* [1895] AC 471; *Inland Revenue Commissioners v Duke of Westminster* [1936] AC 1; *Commissioners of Inland Revenue v Wesleyan & General Assurance Society* (1946) 30 TC 11). As Lord Tomlin said in the *Duke of Westminster* case:

‘...the **substance** is that which results from the legal rights and obligations of the parties ascertained upon ordinary legal principles...’

It is the **legal character** of the transaction which is decisive, not the overall economic consequences to the parties. (*Commissioner of Inland Revenue v Europa Oil (NZ) Ltd* [1971] NZLR 641, 648-649; [1971] AC 760, 771-772; *Europa Oil (NZ) Ltd v Commissioner of Inland Revenue* [1976] 1 NZLR 546, 553; [1976] 1 WLR 464, 472).’ (Emphasis added).

We see here in embryonic form the confusion of thought that was to permeate much of the courts’ thinking in examining transactions in revenue cases over the next 30 years. The initial quest is stated to be the ascertainment of the “true nature or substance” of the transaction. But how is this “true nature” to be ascertained? Richardson J’s answer was to treat the legal arrangements entered into as being “decisive”. Consequently, in his view, the substance of the transaction in *Re Securitibank (No 2) Ltd*<sup>34</sup> was not whether it was a loan or not but the transaction which resulted from the legal form which had been adopted. It is the legal character and not the overall economic consequences to the parties which is decisive. Economic equivalence, along with economic reality, is forsworn.<sup>35</sup>

Sir Ivor Richardson had, of course, done no more than apply Lord Tomlin’s dictum in the *Duke of Westminster* case.<sup>36</sup> However it is not generally appreciated that the Law Lord’s dictum enjoys a less than respectable legal pedigree. Prior to that case it had been accepted that regard should be had to the substance of a transaction and not merely its form. Indeed, the submission of counsel for the Commissioners in the *Duke of Westminster* case went no further than contending that the “substance of the transaction is to be regarded, and not merely the form”.<sup>37</sup>

Thus, in *Helby v Mathews*<sup>38</sup> Lord Hershell LC observed:

It is said that the substance of the transaction evidenced by the agreement must be looked at, and not its mere words. I quite agree.

32 *Re Securitibank Ltd (No 2) Ltd* [1978] 2 NZLR 136. It is to be noted that *Re Securitibank Ltd (No 2)* was a case involving the construction of bills of exchange.

33 *Ibid.*, at 167.

34 *Ibid.*, at 167-168.

35 See also *Commissioner of Inland Revenue v Europa Oil (NZ) Ltd (No 1)* [1971] NZLR 641.

36 Above n 7.

37 *Ibid.*, at 6.

38 *Helby v Mathews* [1895] AC 471 at 475.

In *Attorney-General v Worrall*<sup>39</sup> Lopes LJ stated:

It is clear that in deciding questions of this kind [acceptance of a covenant in satisfaction of a mortgage debt] we have to look at the substance of the transaction...

In *St Louis Breweries Ltd v Apthorpe*<sup>40</sup> Willis J said:

...in matters of this kind, especially in Revenue matters, it seems to me that one ought to look at the substance, and not merely at matters of machinery and form...

Lord Halsbury LC then said in *Secretary of State in Council of India v Scoble*:<sup>41</sup>

Still, looking at the whole nature and substance of the transaction (and it is agreed on all sides that we must look at the nature of the transaction and not be bound by the mere use of the words), this is not the case of a purchase of an annuity;

Lord Atkinson in *Lethbridge v Attorney-General*<sup>42</sup> confirmed:

It has been many times decided that in dealing with questions arising on the Finance Act of 1894 and the Succession Duty Acts regard should be had to the substance of the transactions on which these questions turn rather than to the forms of conveyancing which the parties to them may have adopted to carry out their objects.

Pollock MR, just over a decade before the *Duke of Westminster* case, also stated in *Back v Daniels*:<sup>43</sup>

The agreement ...in form confers a tenancy upon the Respondents ... The terms of the agreement do not conclude the matter; it is necessary to have regard to the substance of it.

In the *Duke of Westminster* case Lord Tomlin set out to reject a perceived “misunderstanding” in revenue cases to the effect that the courts could ignore the “legal character” of a transaction and have regard to “the substance of the matter”. He indicated his commitment to this view, as well as to diehard formalism, in the following passage:<sup>44</sup>

The sooner this misunderstanding is dispelled, and the supposed doctrine given its quietus, the better it will be for all concerned, for the doctrine seems to involve substituting ‘the incertain [sic] and crooked cord of discretion’ for ‘the golden and streight metwand of the law’.

Apart from a general reference to “revenue cases”, Lord Tomlin referred to only two of the five cases cited by counsel for the Revenue Commissioners in argument, and he reinterpreted their effect. Lord Hershell’s statement in *Helby v Mathews* was somewhat tenuously claimed to be saying no more than that the substance of a transaction embodied in a written instrument is to be found by construing the document as a whole.<sup>45</sup> The reader is invited to refer back to Lord Hershell’s statement. Lord Halsbury also would have been surprised to learn that, in *Secretary of State in Council of India v Scoble*, he had simply been giving utterance to the indisputable rule

39 *Attorney-General v Worrall* [1895] 1 QB 99 at 105.

40 *St Louis Breweries Ltd v Apthorpe* (1898) 79 LT 551; 28 Digest 29149; 4 Tax Case 111.

41 *Secretary of State in Council of India v Scoble* [1903] AC 299 at 302.

42 *Lethbridge v Attorney-General* [1907] AC 19 at 26-27. See also *Earl Howe v Inland Revenue Commissioners* [1919] 2 KB 336, where the Court of Appeal had regard to the fact that the insurance premiums in dispute were not in the nature of income payments, which would have permitted a deduction, even though that was the structure of the documentation.

43 *Back v Daniels* [1925] 1 KB 526 at 536.

44 Above n 7, at 19.

45 *Ibid.*, at 20.

that surrounding circumstances must be regarded in construing a document. Again, it will suffice for the reader to refer back to Lord Halsbury's dictum.

Formalism encourages a form of judicial delusion and even, at times, it must be said, a lack of intellectual rigour or honesty. Although no doubt unintended, for Lord Tomlin was playing the formalistic game, these features are evident in his review and dismissal of the earlier case law. He was not dispelling a "misunderstanding" at all, but rather reversing the established law, and his review of the case law is incomplete. As demonstrated above, those cases which Lord Tomlin mentions are dealt with summarily and superficially. He purports to "explain" what the Judges meant in those cases when they clearly did not mean what he attributed to them. Reference to what they actually said belies his "explanation". Most significantly, reference to the facts and the findings in those cases confirms beyond serious argument that the courts had previously had regard to the substance of the transactions in issue.

Added to these shortcomings is the doubt that has been cast on the validity of the reasoning in the *Duke of Westminster* case by Lord Roskill in *Furniss (Inspector of Taxes) v Dawson*,<sup>46</sup> and Lord Steyn and Lord Cooke in *Inland Revenue Commissioners v McGuckian*.<sup>47</sup> These cases are touched upon below.

It is unfortunate, therefore, that Lord Tomlin's dictum has been reiterated with such unquestioning approval without closer examination and analysis. Lord Tomlin uttered his famous pronouncement at a time when legal formalism was on the ascendancy in the United Kingdom. The canonical status conferred on the Law Lord's dictum without any attempt to assess the strength of his limited analysis of the previous case law reflected the lingering influence of formalism 40 odd years on.

Above all, the suitability of Lord Tomlin's dictum to a jurisdiction having a general anti-avoidance provision in the statute governing tax law was required. Unlike this country, England did not have, and still does not have, a general anti-avoidance provision. Some positive effort had to be made to reconcile Lord Tomlin's dictum with a tax regime in which a general tax anti-avoidance provision is an "essential pillar of the tax system",<sup>48</sup> although no such effort was made. The failure or oversight is of gargantuan proportions. It is clear from the language of the majority of the Law Lords (Lord Atkins dissented) that, if the Revenue Commissioners had to hand and been able to rely upon a general anti-avoidance provision, their Lordships in the majority would have been hard pressed to reach the conclusion they did.

If these inquiries had been undertaken it may have been possible to avoid the form over substance doctrine taking hold, but take hold it did. Although the wording may vary, Sir Ivor Richardson's endorsement of Lord Tomlin's dictum, or the form over substance formulation which resulted, has been repeated many times over. For example, in *New Zealand Investment Bank Ltd v Euro-National Corporation Ltd*,<sup>49</sup> Richardson J repeated the essence of the doctrine:

...the true nature of a transaction can only be ascertained by careful consideration of the legal arrangements actually entered into and carried out. It is not to be determined by an assessment of the broad substance of the transaction measured by the overall economic consequences to the participants. The forms adopted cannot be dismissed as mere machinery for effecting other purposes. At common law there is no

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46 *Furniss (Inspector of Taxes) v Dawson* [1984] AC 474 at 515.

47 *Inland Revenue Commissioners v McGuckian* [1997] 3 All ER 817.

48 See below under the heading: "'Bite the Bullet' — and Do What Parliament Asked".

49 *New Zealand Investment Bank Ltd v Euro-National Corporation Ltd* [1992] 3 NZLR 528 at 539.

half-way house between sham and characterisation of the transaction according to the true nature of the legal arrangements actually entered into and carried out.

It will be noted that the formulation which had been adopted in *Re Securitibank Ltd (No 2)*<sup>50</sup> has undergone a subtle variation. The reference to the “true nature and substance” of the transaction has become a reference to the “true nature” of the transaction. The word “substance” has seemingly disappeared into the ethos. This divergence in the use of the English language is evident by reference to my dicta in the *Bank of New Zealand Investments* case<sup>51</sup> where I hold firm to the view that, whatever approach is adopted in respect of specific tax sections, a general anti-avoidance provision requires the courts to examine the substance of the transaction. I then state: “Semantics aside, this question can only be answered by reference to the true nature of the transaction”,<sup>52</sup> and the “true nature” of the transaction can only be determined by having regard to its actual or economic reality.

## V. SOME ILLOGICAL THINKING

One of the most unsatisfactory features of formalistic thinking is that it distorts logical thought. Complacent with its self-proclaimed internal coherence, it nurtures a perverse logic and neglects the rigour which ordinary reasoning would bring to the subject. Three examples of this deficiency in respect of the form over substance doctrine may be touched upon.

I have already adverted to the first. How can one sensibly speak of the “true nature” of a transaction without meaning the actual substance of the transaction? Form cannot dictate substance. The “true nature”, that is, the substance, of a transaction cannot change simply because the legal form of the transaction changes.

Take a straightforward example. A makes a gift to B, but the gift is presented in the form of an annuity. What is the “true nature” of the transaction: a gift or annuity? What, then, must be the formalists’ formula: a gift in the form of an annuity is an annuity?<sup>53</sup>

It is a bit like the proverbial wolf dressed as a sheep; those with a form over substance bent would say that, as it looks like a sheep and has documents saying it is a sheep, it must be a sheep, but the more astute ones among us know, of course, that in reality it is a wolf.

A moment’s reflection along these lines is enough to confirm that the form over substance doctrine as enunciated in the past is plainly wanting in rigorous thinking.

The second logical deficiency in the form over substance doctrine is that it thwarts the key question. If the transaction is contrary to a specific requirement of the Act, no question of tax avoidance arises. The taxpayer will be liable for the disputed tax. If, however, the legal form of the transaction complies with the technical requirements of the Act in accordance with this doctrine the transaction will not amount to tax avoidance because its true nature will have been

50 Above n 32.

51 Above n 6, at [113].

52 Ibid.

53 In seeking to defend and extol Sir Ivor Richardson’s thinking, David Simcock conflates legal form with substance. Indeed, he introduces the notion of three concepts: legal form, legal substance and economic substance in “A Banned Substance: Form and Substance in the Judgments of Sir Ivor Richardson – A Clarity of Vision” (2002) 8 NZJT&P 209, esp. 210, n 4. Consequently, Simcock would presumably say that the “legal substance” of a gift in the form of an annuity is an annuity – which ignores the actual substance! The claim equates “legal substance” with “legal form” and otherwise bastardises the true meaning of the word “substance”. Simcock’s reasoning illustrates the lengths to which it is necessary to go in order to try to make analytical sense of the form over substance doctrine.

ordained by its legal form. The circularity of the reasoning is plain to see. If the form of the transaction is “legal” it will not amount to tax avoidance because its “true nature” will be “legal”.

In the third place, irrespective that the legal form of a transaction is said to be decisive, the tests introduced to determine whether or not the transaction amounts to tax avoidance necessitate an examination of the substance of the arrangement. How can the courts determine whether a transaction has a “business purpose”, apart from the purpose of gaining a tax advantage, without examining the substance of the transaction? Or, how can the courts know whether the transaction is “genuine” or “artificial” or “contrived” or a “pretence”, to coin words having regular currency, without regard to its substance? How can the courts have regard to the economic reality in terms of the test in the *Challenge Corporation Ltd v Commissioner of Inland Revenue* case<sup>54</sup> without having regard to the true character or economic consequences of the transaction? How can the courts determine that certain steps in a transaction are fiscally ineffective and to be disregarded in terms of the principle in *WT Ramsay Ltd v Inland Revenue Commissioners*<sup>55</sup> without a full understanding of the substance of the transaction?

The courts require these questions to be asked. Yet, if the “true nature” of the transaction is to be determined by the legal form, they serve no discernable purpose. In insisting on form over substance, and then applying these various tests, the courts have been playing word games. Once recourse is had to the actual substance of a transaction, it is spurious to revert to the notion that the legal form must be “decisive” in determining the true nature of the transaction.

A fourth distortion of logical thought is apparent in the formulation and application of the “sham or nothing” classification. While purporting to exempt this classification from anti-avoidance provisions where the legislature has mandated a broader or different test, adherents of the concept nevertheless effectively import it into their test for anti-avoidance when insisting that the legal form of the transaction is decisive. If the legal form is decisive, it is difficult to see how a transaction in a legal form could be a sham, short of being shown to be tax evasion.<sup>56</sup>

## VI. RAMSAY AND OTHER MORE ENLIGHTENED CASES

Notwithstanding the absence of a general anti-avoidance provision in the United Kingdom, dicta can be found in that jurisdiction supporting a more realistic appraisal of the transaction in question than that generally adopted in this country prior to *Ben Nevis* and *Glenharrow*. *WT Ramsay Ltd v Inland Revenue Commissioners*,<sup>57</sup> *Inland Revenue Commissioners v Burmah Oil Co Ltd*,<sup>58</sup> *Furniss*

<sup>54</sup> *Challenge Corporation Ltd v Commissioner of Inland Revenue* [1987] 1 AC 155; [1986] NZLR 513 from 555.

<sup>55</sup> *WT Ramsay Ltd v Inland Revenue Commissioners* [1982] AC 300.

<sup>56</sup> The sham doctrine could usefully disappear from the tax lexicon. If a transaction is a sham because the documents do not reflect the true intention or true contract of the parties, and they obtain a reduction in the tax payable, it is tax evasion. The notion that such a situation could exist in the absence of fraudulent intent on the part of the parties is highly improbable. If such a situation did arise so as to excuse the parties from tax evasion, the transaction could appropriately be treated as tax avoidance in that it changes the ordinary incidence of tax. Little purpose is therefore served by differentiating the sham transaction from tax avoidance in the first place. While a bogus transaction may be theoretically isolated as a sham, there is in truth a marginal distinction to be drawn between a sham and a pretence. Indeed, to exclude the application of the word “sham” from tax avoidance arrangements, such as the scheme in *Ben Nevis*, is an affront to the ordinary meaning of the word. It would be preferable to drop the separate treatment of the so-called sham and simply treat it as a variety of tax avoidance or, if fraudulent intent is present, as tax evasion.

<sup>57</sup> Above n 55.

<sup>58</sup> *Furniss (Inspector of Taxes) v Dawson* [1982] STC 30.

(*Inspector of Taxes*) v *Dawson*<sup>59</sup> and *Inland Revenue Commissioners v McGuckian*<sup>60</sup> are notable departures from the legalistic approach which has otherwise been preferred.<sup>61</sup>

In *Ramsay* and *Burmah Oil* the taxpayers sought an allowance by including in the transaction a series of self-cancelling transactions, thus creating a “loss”. In substance, because the transactions were self-cancelling, the loss was not a “real” loss, and the transaction could not therefore be condoned. The reasoning is not unlike that adopted by the Privy Council in the *Challenge* case.<sup>62</sup> The taxpayer in that case did not in reality incur the requisite expenditure which would have justified the allowance. As has been pointed out, each of these cases can be explained on the basis that there is a significant divergence between the legal form of the transaction and its actual or economic reality.<sup>63</sup> In a real sense, the taxpayers in these cases were hiding behind a legal form which did not accord with the economic reality or substance of the transactions.

This subterfuge was recognised, in particular by Lord Steyn and Lord Cooke, in *Inland Revenue Commissioners v McGuckian*.<sup>64</sup> Lord Steyn traced the shift away from a literalist approach to statutory interpretation to the purposive methods of construction which had taken place over the previous 30 years, but, he said, under the influence of the “narrow *Duke of Westminster* doctrine, tax law remained remarkably resistant to the new non-formalist methods of interpretation. Tax law was by and large left behind as some island of literal interpretation.”<sup>65</sup> Lord Steyn pointed out that the combination of two features, the literal interpretation of tax statutes and the “formalistic” insistence on examining steps in a composite scheme separately, had allowed tax avoidance schemes to flourish to the detriment of the general body of tax payers.<sup>66</sup>

In language as apposite as it is appealing, Lord Steyn rued the fact that the courts appeared to be relegated to the role of spectators concentrating on the individual moves in a highly skilled game. The courts, he suggested, were mesmerised by the moves in this game, and paid no regard to the strategy of the participants or the end result. “The courts”, he added, “become habituated to the narrow view of their role”.<sup>67</sup> *Ramsay* is perceived as the “intellectual breakthrough” on both fronts.

Lord Steyn acknowledged that Lord Tomlin’s observations in the *Duke of Westminster* case still point to a material consideration, namely, the general liberty of the citizen to arrange his affairs as he thinks fit.<sup>68</sup> He added, however, that those observations have ceased to be “canonical as

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59 Above n 46.

60 Above n 47.

61 Michael D’Ascenzo “Substance versus Form: the ATO Approach: 1” (paper presented to the 13th National Convention of the Taxation Institute of Australia, March 1997) states without qualification that the English courts have retreated from a strict application of the *Duke of Westminster* doctrine following the House of Lord’s decision in *Ramsay* in 1982 at 296.

62 Above n 54.

63 Nabil F Orow “Towards a Conceptually Coherent Theory of Tax Avoidance – Part 2” (1995) 1 NZJTL&P 307. In this excellent article, Orow undertakes a comprehensive examination of the elements which constitute tax avoidance. Admirably, he concludes that Parliament’s intent or purpose must be conclusive of the legitimacy or otherwise of transactions that seek and obtain a fiscal benefit.

64 Above n 47.

65 *Ibid*, at 824.

66 *Ibid*.

67 *Ibid*.

68 *Ibid*, at 825.

to the consequence of a tax avoidance scheme".<sup>69</sup> Lord Steyn then emphasised the importance of giving effect to the intention of Parliament and concluded:

In asserting the power to examine the substance of a composite transaction the House of Lords [in *Ramsay*] was simply rejecting formalism in fiscal matters and choosing a more realistic legal analysis. Given the reasoning underlying the new approach it is wrong to regard the decisions of the House of Lords since the *Ramsay* case as necessarily marking the limit of the law on tax avoidance schemes.<sup>70</sup>

Lord Cooke expressly endorsed the approach put forward by Lord Steyn, including the barely veiled invitation to develop the law in a more realistic fashion. The approach in *Ramsay*, he pointed out, did not depend on general anti-avoidance provisions such as those found in Australasia. One must go back to the discernable intent of the taxing Act. Following Lord Roskill's example in *Furniss's* case,<sup>71</sup> Lord Cooke refrained from speculating whether a sharper focus on the concept of "wages" in the light of the purpose and circumstances of the case would have led to a different result in the *Duke of Westminster* case.<sup>72</sup> Clearly, both Law Lords intended to cast doubt on the validity of the reasoning in that case. Lord Cooke then reiterated the message in their Lordship's speeches in *Furniss* to the effect that "the journey's end may not yet have been found".<sup>73</sup>

Certainly, strong support for the thesis I am pursuing can be found in cases such as *Ramsay*, *Burmah Oil*, *Furniss*, and *McGuckian*, but they have not been mentioned with the intention of obtaining that benediction. Rather, my immediate purpose is to acknowledge that form over substance has not invariably prevailed and that, if the judicial will is there, the basis already exists in the case law to subvert the form over substance doctrine within the bounds of accepted judicial discipline. No revolution in orthodox methodology is required, for example, to take up the suggestion in *Furniss* and *McGuckian*, and overtly extend the principle in *Ramsay* to a single or unified transaction.

## VII. "BITE THE BULLET" AND DO WHAT PARLIAMENT ASKED

With the establishment of the Supreme Court as our final appellate court, the opportunity exists to put the perverse thinking of the past behind us and positively proclaim that substance, and not form, will be the decisive factor in ascertaining the tax legality of transactions.

I emphasise that this suggestion does not mean that the legal form of a transaction is irrelevant. On the contrary, the inquiry will not be complete without a full understanding of the rights and obligations created by the legal documentation. Both form and substance are to be examined. The point is that it is the substance of the transaction, and not its legal form, which will be decisive. In short, the transaction will be void against the Commissioner if, in actual or economic substance, it amounts to tax avoidance. In such circumstances, the transaction will not be saved from the reach of the Inland Revenue Department by reason of its legal form.

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69 Ibid. Lord Diplock had already observed in the *Burmah Oil* case that Lord Tomlin's dicta tells us little or nothing as to what method of ordering one's affairs will be recognised by the courts as effective to lessen the tax that would otherwise be payable. Above n 58, at 32-33.

70 Above n 47, at 825.

71 Above n 46, at 515.

72 Above n 47, at 830.

73 Ibid.

It may well be that the bedrock principle that I spelt out in *Peters v Davison* is simplistic,<sup>74</sup> but it is not intended to provide a precise formula for the tax collector or the taxpayer. Rather, it seeks to encapsulate two basic points: the first is trite, that is, that it is the objective of the Act to collect tax on income; the second is that income is derived from the substance of a transaction, not its form, and it is only the substance of a transaction which will reveal the true income. It is for both the Commissioner and the courts to give effect to this fundamental objective of the legislation.

The need to resort to Parliament's intent is particularly marked in respect of this country's long-standing commitment to a general anti-avoidance provision. I traversed this subject in the *Bank of New Zealand Investments* case.<sup>75</sup> The provision nullifies against the Commissioner any arrangement to the extent that it has the purpose or effect of tax avoidance, unless that purpose or effect is merely incidental. I will not repeat at length what I said in the judgment. Four propositions will suffice to summarise the gist of my observations.

- (1) The section (then s 99) was enacted to promote Parliament's perception of what is required in the public interest. A general anti-avoidance provision was also thought to be necessary to supplement specific anti-avoidance provisions in the tax legislation, or, more pointedly, the technical or drafting limitations in those provisions.
- (2) Tax avoidance diminishes and distorts the tax base and undermines the integrity of the tax system of this country.
- (3) The courts' approach to the interpretation of our successive anti-avoidance sections has been unacceptably negative.<sup>76</sup> They have rejected a broad application of the section and over-burdened it with a morass of glosses, concepts, distinctions and doctrines which Parliament did not contemplate.
- (4) Parliament intended its general anti-avoidance provision to be fully effective. It was described by Woodhouse P as "obviously a central pillar of the income tax legislation".<sup>77</sup> The same description was repeated by Richardson P 16 years later in the *Bank of New Zealand Investments* case. Section 99, he stated, is "an essential pillar of the tax system".<sup>78</sup> The approach of the two judges, however, is markedly different.<sup>79</sup> Only Richardson P then subjected that essential pillar to a formulation in which legal form is decisive over the actual substance of a transaction.

It is surely incongruent to downgrade an "essential pillar of the tax system" in such a manner. Lord Hoffmann's description of s 99 as a "long stop" when speaking for the Privy Council in *Commissioner of Inland Revenue v Auckland Harbour Board*<sup>80</sup> has been roundly assailed. Blanchard J has pointed out<sup>81</sup> that this dictum appears to be in conflict with the views expressed by the High Court of Australia in *John v Federal Commissioner of Taxation*<sup>82</sup> and the Supreme Court of Canada in *Stuart Investments Ltd v The Queen*.<sup>83</sup> The tax statutes in both Australia and Canada contain general anti-avoidance provisions.

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74 Above n 2.

75 Above n 6, esp. [63]–[90].

76 *Ibid.*, see the cases referred to at [84].

77 Above n 54, at 532.

78 Above n 6, at [39].

79 *Ibid.*, for Woodhouse J's approach, see the *Bank of New Zealand Investments* case at [85]–[88].

80 *Commissioner of Inland Revenue v Auckland Harbour Board* [1986] 2 NZLR 513 (CA) at 532.

81 *The Bank of New Zealand Investments*, above n 6, at 499.

82 *John v Federal Commissioner of Taxation* (1989) 166 CLR 417.

83 *Stuart Investments Ltd v The Queen* (1984) 10 DLR (4th) 1.

It is true that our successive general anti-avoidance provisions have been repeatedly described as the core bulwark against tax avoidance in this country and the central means of protecting the integrity of our tax system.<sup>84</sup> If substance is to be decisive over form, however, it should also be decisive in the interpretation of the specific tax provisions. Once the arrangement is analysed in the light of the specific tax provisions regard to its substance will determine whether it amounts to tax avoidance or not. In many cases reference to the anti-avoidance provision may be concomitant only and in that sense the anti-avoidance provision could conceivably be described as a “long stop” or, perhaps, a “back stop”, but the better view would be to regard the general anti-avoidance provision and the specific tax provisions as complementary. Neither is overbearing and both require regard to be had to the substance of the transaction and for that substance to be decisive.

This is not to say that, in the overall scheme of the Act, the general anti-avoidance provision does not have a central role. Its directive infuses the whole of the statute. The significance and function of the general anti-avoidance provision was spelt out in Parliament at the time s 99 of the 1976 Act was enacted. Dr AM Finlay, then Minister of Justice, claimed in the House that the section was “one of the most enlightened and beneficial pieces of legislation in the statute book”. He pointed out that, if everyone paid the tax Parliament intended, there would be two important and widely welcomed results. One would be that the tax burden would be more equitably shared resulting in a significant lightening of the burden for what he called the ordinary taxpayer. The second would be that the country’s tax legislation would be enormously simplified. He expressed the hope that the proclivity to avoid tax in this country would be minimised.<sup>85</sup>

The Minister referred with approval to the judgment of Woodhouse J in *Elmiger v Commissioner of Inland Revenue*.<sup>86</sup> The distinguished Judge’s judgment was also referred to in debate by the Hon Michael Connolly<sup>87</sup> and Mr Frank O’Flynn QC.<sup>88</sup> In his judgment, Woodhouse J approached the subject of tax avoidance with refreshing realism. He made the following points:

- (1) The ingenious legal devices that are contrived to enable individual taxpayers to minimise or avoid their tax liabilities were often, not merely sterile or unproductive in themselves, but had social consequences which were contrary to the public interest.<sup>89</sup>
- (2) It is not surprising that, having regard to the fact the legislature is usually several steps behind the ever-developing arrangements worked out by experts on behalf of their taxpayer clients, the legislature should attempt to anticipate the manoeuvres of some taxpayers to obtain tax advantages denied generally to the same class of taxpayer and enact a general anti-avoidance provision. Nor could it be thought “unfair to those affected” that the method adopted by the legislature should be “...the method of general proscription”.<sup>90</sup>
- (3) Transactions are caught by the anti-avoidance provisions if there is associated with them the additional purpose or effect of tax relief in the sense contemplated by the section pursued as a

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84 See eg Report to the Treasurer and Minister of Revenue by a Committee of Experts on Tax Compliance, December 1998 at [2.53] [2.58] and [2.120] [2.122]. See also Consultative Committee on Taxation of Income from Capital, *The Core Provisions of the Income Tax Act 1976*, Discussion Paper, September 1990 at [1.3].

85 Debate on the Land and Income Tax Bill (No 2), Hansard, 393 New Zealand Parliamentary Debates 1974 at 4191-4192.

86 *Elmiger v Commissioner of Inland Revenue* [1966] NZLR 683.

87 Above n 85, at 4228.

88 *Ibid*, at 4239.

89 Above n 86, at 686-687.

90 *Ibid*.

goal in itself and not arising as a natural incident of some other purpose. If this is not the case, “appropriate legal window-dressing” could still be devised to defeat the general object of the section.<sup>91</sup>

It bears repeating that Woodhouse J’s judgment was the judgment expressly referred to in Parliament prior to the re-enactment of the general anti-avoidance provision in the 1976 Act. The approach adopted by Sir Ivor Richardson in *Re Securitybank Ltd (No 2)*, a bare two years after that Act had been passed, is clearly at odds with the tenor of this judgment and its unqualified endorsement by Parliament. Richardson J did not refer to *Elmiger’s* case in *Re Securitybank Ltd (No 2)*, but Woodhouse J also delivered a judgment in that case and it is plain that he did not resile from what he said in *Elmiger*. Having asked what more parties could do to give legal effect to their transaction when they have succeeded in every respect in matching their mutual intentions and purpose with the documentation and form that is used, he said:

Of course it is possible for a statutory provision to declare something to be what otherwise it is not; and in that regard I have mentioned the Income Tax Acts. In that context Parliament has decided that the otherwise legally effective transactions of taxpayers are to be ignored by the Commissioner if the object was the avoidance of tax by altering its incidence.<sup>92</sup>

## VIII. AND THE COMMISSIONER OF INLAND REVENUE?

In highlighting the need for a new substantive approach, my focus has been on the courts, but it would be amiss to ignore the criticism levelled at the Commissioner of Inland Revenue.

The Committee of Experts responsible for the Tax Compliance Report 1998 recorded that it was not so much deficiencies in the anti-avoidance provisions, as the Commissioner’s past understanding and application of those provisions that is the problem.<sup>93</sup> The Committee believed that, in order to preserve the integrity of the tax system, a far greater degree of “robustness” in the administration of the anti-avoidance provisions is required. “The tax system”, it concluded, “needs to be robust if it is to cope”.<sup>94</sup>

The Committee of Experts’ view that the problem rested with the Commissioner was echoed in the Report of the Commission of Inquiry into Certain Matters Relating to Taxation.<sup>95</sup> The Department of Inland Revenue, the Commission said, had adopted a “conservative interpretation” of the general anti-avoidance provisions on the tax issue and the “weaknesses exposed in the wine-box deals is not the legislation itself ... but the use of it by the Commissioner”.<sup>96</sup>

To my mind, however, these criticisms are largely misplaced. While the Commissioner may have too readily acquiesced in the application of the form over substance doctrine and been unduly conservative in his utilisation of the general anti-avoidance provisions, the courts must bear the primary responsibility for this default. What point is there in the Commissioner seeking to be more robust in enforcing the provisions if the courts do not vest them with the objective and scope that Parliament intended? Put another way, why should the Commissioner be proactive in invoking

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91 *Ibid.*, at 694.

92 Above n 32, at 165.

93 Above n 84, at [13.47].

94 *Ibid.*, at [13.5].

95 Ronald Davison Commission of Inquiry into *Certain Matters Relating to Taxation* (Report of the Wine-Box Inquiry, 1997).

96 *Ibid.*, at 3:1:50.

ing the anti-avoidance provisions if the prevalent judicial approach will render that proactivity futile? What good is there in the Commissioner challenging the legality of tax transactions on the basis of their actual substance if the courts treat their legal form as decisive?

Hence, I believe that it is the judicial approach which has prevailed, and not any perceived lack of robustness by the Commissioner; that is to be condemned.

## IX. THE COST TO THE COUNTRY

The approach epitomised in the form over substance doctrine has created a climate in which the tax avoidance industry has flourished.

Secure in the knowledge that legal form will have primacy over the substance of the transaction, taxpayers, or their advisers, have been encouraged to develop arrangements which will manifest a “true nature” based in the documentation and not the economic reality of the transaction. Even if the arrangement is challenged, the taxpayers and their advisers have been comforted by the further knowledge that the issue will be beset by all the glosses, concepts, distinctions and doctrines that have developed to give force to this formalistic preserve. These judicial artefacts have been exploited and have created a commercial environment in New Zealand in which tax avoidance has been a significant feature. The tax avoidance industry has thrived on such concepts as form over substance, “economic equivalence”, the “sham or nothing” classification, “legal substance” (as distinct from the actual substance), the “choice principle”, and the like.

The cost to the country has been enormous. In the *Bank of New Zealand Investments* case I sought to provide some rough estimation of the loss of tax revenue as a result of this judicial approach.<sup>97</sup> It is impossible to be even remotely precise, but there is no doubt that over time the cost to this country, including the dead-weight loss, has run into billions of dollars. I do not, of course, suggest that the entire cost to the revenue of tax avoidance in this country is attributable to the courts’ misguided commitment to the form over substance doctrine. Some degree of tax avoidance is inevitable, whatever the system or approach adopted.<sup>98</sup>

Nonetheless, as I conclude in the *Bank of New Zealand Investments* case,<sup>99</sup> the calculation of a more precise figure, or the inability to calculate a more precise figure, is neither here nor there when it is incontrovertible that over time the cost of tax avoidance, as distinct from tax evasion, amounts to billions of dollars and represents a sizable percentage relative to this country’s gross national product.

Nor is the cost of sustained judicial support for the form over substance doctrine to be measured in purely fiscal terms. The public perception of this judicial cossetting on the public’s confidence in the administration of justice is also significant. Members of the public realise that there is something amiss with the law when they read about tax driven schemes in which the taxpayer’s profits are in whole, or in large part, due to a complex scheme that has little or no apparent commercial utility, or which lack commercial viability apart from the tax saving involved, or which are so complicated in form as to defy commercial rationalisation, or which are seemingly brazen in their defiance of Parliament’s contemplated objectives, or the like. Judicial imprimatur of schemes of this kind tend to bring the law into disrepute and imperil respect for the courts that

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97 Above n 6, at [70]-[72].

98 Ibid, at [72].

99 Ibid, at [71].

administer it. Only the misplaced “mystique” of the law, or the low level of public awareness, prevents this harsh verdict being more widespread.

## X. THE KING IS DEAD - LONG LIVE THE KING

The judicial tendency, even where it is appreciated that a doctrine is defective, is to seek to modify it without abandoning it. It is better, it is thought, to reinterpret the doctrine rather than subvert it. Lord Hoffmann fell foul of this tendency in *MacNiven (Inspector of Taxes) v Westmoreland Investments Ltd* in 2001.<sup>100</sup>

Lord Hoffmann perceived that, if the various discrete transactions in making up a scheme are genuine, their Lordships in *Ramsay* could not collapse them into a composite self-cancelling transaction without it appearing that they had been guilty of ignoring the legal position and looking at the substance of the matter.<sup>101</sup> In an endeavour to reconcile *Ramsay* with the *Duke of Westminster's* case, therefore, Lord Hoffmann was able to perceive an ambiguity in Lord Tomlin's statement that the courts cannot ignore the “legal position” and have regard to “the substance of the matter”. He sought to draw a distinction between tax imposed by reference to a “legal concept” and tax imposed by reference to a “commercial concept”. In the latter case, to have regard to the “business substance” of the matter, he argued, is not to ignore the legal position but to give effect to it.

I at once stated in the *Bank of New Zealand Investments* case decided shortly afterwards that this attempt to reconcile Lord Tomlin's dictum with what their Lordships decided in *Ramsay* teeters on the brink of casuistry.<sup>102</sup> In holding in *Ramsay* that any steps in a related series of transactions for the purpose of avoiding tax could be disregarded by the Commissioner and the related transaction viewed as a whole, the House of Lords were necessarily having regard to the substance of the transaction contrary to Lord Tomlin's injunction.

At the same time, I expressed my dissatisfaction with Lord Hoffmann's distinction between a tax imposed by reference to a “legal concept” and a tax imposed by reference to a “commercial concept”, and his conclusion that to have regard to the “business substance” was not to ignore the legal position but to give effect to it. I suggested that the distinction was unclear, flawed and would cause confusion.

Confirmation was not long in coming. In *DTE Financial Services Ltd v Wilson (Inspector of Taxes)*<sup>103</sup> counsel on one side argued that the word “payment” in the context of PAYE legislation was a “legalistic” concept. Opposing counsel, however, contended that it was a “commercial” concept. The Court found in favour of the Revenue holding that, for the purpose of the PAYE system, “payment” ordinarily means actual payment, that is, a transfer of cash or its equivalent. This sensible appreciation of what the payment actually is was reached without reference to the argument whether it was a “legal” or a “commercial” concept.

The distinction forged by Lord Hoffmann next fell for review in *Barclays Mercantile Business Finance Ltd v Mawson*,<sup>104</sup> a decision of the United Kingdom Court of Appeal. Peter Gibson LJ found the dichotomy difficult to apply. Carnworth LJ experienced the same difficulty and gratui-

100 *MacNiven (Inspector of Taxes) v Westmoreland Investments Ltd* [2003] 1 AC 311.

101 *Ibid.*, at [38] and [39].

102 *Above n 6*, at [105]-[112].

103 *DTE Financial Services Ltd v Wilson (Inspector of Taxes)* [2001] EWCA Civ 455; [2001] STC 777.

104 *Barclays Mercantile Business Finance Ltd v Mawson* [2002] EWCA Civ 1853; [2003] STC 66.

tously recorded that the difficulty had been shared by counsel on both sides. Finally, the Court of Final Appeal in Hong Kong became seized of the issue in *Collector of Stamp Revenue v Arrowtown Assets* in 2004.<sup>105</sup> It will suffice to summarise Lord Millett's direct observations. He held, first, the dichotomy was difficult to understand; secondly, Lord Hoffmann could not have really meant what he appeared to say; and, thirdly, if he did, then his dichotomy was not the law of Hong Kong!

Lord Hoffmann was routed, and he was routed simply because he tried to reinterpret Lord Tomlin's dictum rather than disapprove of it. How much more amenable it would have been if Lord Hoffmann had sought to re-establish the authority of the cases decided before Lord Tomlin reversed their effect in the *Duke of Westminster* case. It would have been even more amenable to acknowledge that the House of Lords had, indeed, broken away from the form over substance doctrine and to have sought to justify that development.

## IX. AND UNCERTAINTY?

The justification for the form over substance doctrine is said to be the need for certainty, especially the need for certainty in commercial transactions. Certainty is peddled by tax lawyers and specialist tax advisers as a mantra. Fear of creating uncertainty by changing the law becomes a bogey, but it is again a bogey endorsed and promulgated by the judiciary. In *Re Securitibank Ltd (No 2)*,<sup>106</sup> for example, Richardson J claimed that an approach which would subvert the dominance of legal form in ascertaining the "true nature" of a transaction would create undesirable uncertainty in our law. He continued:<sup>107</sup>

Commercial men are surely entitled to order their affairs to achieve the legal and lawful results which they intend. If they deliberately enter into a genuine commercial transaction intended to operate according to its tenor, what they ask of the law is the assurance, the certainty that their intentions will be recognised.

However this begs the question – or begs a number of questions. What are the "results" which these commercial men intend? Is the transaction a "genuine" commercial transaction? Is the transaction "intended to operate according to its tenor"? What are the parties' "intentions"? Do commercial men expect "the assurance, the certainty" that their intentions will be recognised, even if their intentions are to avoid tax or the avoidance of tax is the effect of their transaction?

No one would dispute that a genuine commercial transaction should be recognised as legitimate, but, equally, a transaction which is in substance tax avoidance should not be recognised as legitimate. Pietistic statements of the kind just referred to add nothing to the debate. They convey the impression that what commercial men and women are seeking is the assurance and certainty that, if they can devise an anti-avoidance transaction in a legitimate legal form, then their intention, whatever it may be, or the purpose and effect of the transaction, whatever it may be, should be recognised as legitimate.

I am not, of course, denigrating certainty as a goal. Obviously, as much certainty as it is possible to achieve is desirable. It is the unrealistic expectation of an unachievable level of certainty that is the problem. The law is inherently uncertain, and taxpayers, no less than other members of the community, must cope with that uncertainty.<sup>108</sup>

<sup>105</sup> *Collector of Stamp Revenue v Arrowtown Assets* [2004] 1 HKLRD 77.

<sup>106</sup> Above n 32.

<sup>107</sup> *Ibid*, at 173.

<sup>108</sup> See Thomas, *The Judicial Process*, above n 12, Chapters 5 and 6.

Geoffrey Lehmann has correctly observed that the belief that taxation law can and should be certain is a “chimera”.<sup>109</sup> No provision (or judicial doctrine) will ever enable taxpayers to predict with absolute certainty that a proposed arrangement involving a tax saving will or will not constitute tax avoidance. Most commercial arrangements are undoubtedly legitimate, any tax saving being incidental, but at the margin no bright line can be drawn between a valid commercial scheme and tax avoidance. It has become unproductive to hanker after a level of precision and certainty which can never be realised.

Take our simple example again. If the courts hold that a gift presented as an annuity is not tax avoidance, the community can be relatively confident that other gifts presented as annuities will not be held void as against the Commissioner. Although, equally, if the courts were to hold that a gift presented as an annuity remains a gift for tax purposes, the law would provide the certainty of knowing that a gift presented as an annuity would be treated as a gift.

Moreover, it needs to be appreciated that an attempt to provide greater precision merely means that the boundary between “tax planning” and tax avoidance simply moves. It moves from, say, an assessment whether the transaction in substance provides for the taxpayer a saving from the natural burden of taxation which is generally denied to the same class of taxpayer, that is, where the transaction has the purpose or effect of tax relief pursued as a goal in itself and not arising as a natural incident of some other purpose, to an assessment whether the transaction falls within the scope of one of the glosses, concepts and distinctions which are presently ordained.<sup>110</sup>

Consequently, uncertainty will remain between what is permissible and what is impermissible under any criteria or test. Two points, however, are to be noted. First, futile disputation arising out of the artificiality of the form over substance doctrine will necessarily be reduced and the consequential uncertainty that goes with it correspondingly diminished. In other words, making the substance of the transaction decisive will serve to avoid much arcane argument directed at one or other of the intrinsically problematic glosses, concepts and distinctions which the form over substance doctrine has engendered.

Secondly, would-be tax avoiders lose the inbuilt advantage of the uncertainty created by the form over substance doctrine. With that doctrine the boundary has been drawn almost at the extreme, and certainly in favour of would-be tax avoiders. They are able to take advantage of this uncertainty testing the limits of “legal form” knowing that, if and when challenged, the courts will in all likelihood look to the legal form of the transaction and that the legal form will be decisive. With the abandonment of the doctrine of form over substance a greater number of transactions than at present would be caught by the anti-avoidance provisions and the balance would move in favour of the general taxpayer. That is as it should be. The inevitable uncertainty which exists at the boundary should work to the advantage of the public interest as desired by Parliament.

A related fear which is often voiced by legal experts in tax law is that the lack of precision which would allegedly result from the abandonment of the form over substance doctrine will operate to deter legitimate commercial transactions. It is a claim which, as Lord Templeman stated in the *Challenge* case, “...requires serious but sceptical consideration”.<sup>111</sup> Once the claim is given that serious but sceptical consideration, it at once appears exaggerated.

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109 Richard E Krever (ed) “Judicial and Statutory Restrictions on Tax Avoidance” in *Australian Taxation: Principles and Practice* (Melbourne, Longman Cheshire, 1987) at 296.

110 Transaction costs are almost certainly increased in this case.

111 Above n 54, at 167.

A realistic tax law in which the substance of a transaction is decisive in determining its purpose and effect could, in fact, promote certainty in commercial transactions. Commercial men and women would know to focus on the commercial purpose of the transaction and to be hesitant about allowing their transaction to become diverted, or converted, into a device to avoid tax. They would have little difficulty in appreciating what is the true substance of their transaction. One is drawn unwillingly to the thought that the underlying concern of those who fear legitimate transactions will be deterred is that transactions which may presently be undertaken would be unlikely to be acceptable under a regime in which the substance of the transaction is decisive.

I considered the reasons why the claim that a more realistic approach will lead to uncertainty is untenable in the *Bank of New Zealand Investments* case.<sup>112</sup> Again, it will suffice to summarise what I said.

- (1) As just pointed out, the boundary between “tax planning” and tax avoidance shifts from one form of assessment in line with the legislation to another form of assessment burdened by the present superfluity of glosses, concepts and distinctions. Commercial decision making is still affected, but at a different point.
- (2) There is something awkward about the argument that “legitimate” commercial transactions will be deterred when the question under inquiry is what transactions are legitimate.
- (3) Finally, it is not correct that an approach in which substance is predominant over legal form would create a climate detrimental to commercial activity and growth. It has not done so in the United States where the doctrine of form over substance has no currency. Commerce remains vigorous.<sup>113</sup> Of course, business people will wish to reduce the incidence of tax, but few are incapable of knowing whether a proposed transaction has a commercial objective or economic function or is being pursued to gain a tax advantage. It is advice that the latter is permissible if presented in a form which legally “conveys” a commercial purpose that creates the difficulties.

The lack of reality in dealing with the question of certainty is typically part of formalistic thinking. It is evident in any number of tax cases, but two may be selected for attention. In both cases the task will be to first confirm that the decisions exemplify the form over substance approach before then examining whether they facilitate certainty and predictability in the law.

#### A. *Wattie v Commissioner of Inland Revenue*

The issue in *Wattie v Commissioner of Inland Revenue*<sup>114</sup> was whether an inducement payment paid by a landlord to a tenant to enter into a lease was capital or revenue for tax purposes in the hands of the tenant. The rent fixed in the lease was well in excess of the market rent and, in substance, the inducement payment offset the inflated rent. The majority of the Court of Appeal (I dissented) held that the payment was on capital account, and their decision was unanimously upheld by the Privy Council. The Board assimilated the inducement payment with a premium paid by a tenant to a landlord to obtain a lease (which is on capital account) and therefore held that the inducement payment was capital (a “negative premium”).

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112 Above n 6, at 476-478.

113 United States’ Courts can look behind the form of a transaction to determine its substance for tax purposes. See *Commissioner v Coart Holding Co* 324 US 331 334 (1945); *Gregory v Helvering* 293 US 465 469-470 (1935); and *Shoenberg v Commissioner* 77 F2d 446 449 (CA8) cert denied 296 US 586 (1935).

114 Above n 3; [1999] 1 NZLR 529 (PC).

The same issue came before the Supreme Court of Canada after the Court of Appeal's decision but before the hearing of the appeal in the Privy Council. The Supreme Court of Canada in *Ikea Ltd v The Queen*<sup>115</sup> unanimously reached the opposite conclusion to the majority in the Court of Appeal and to the Privy Council. The Supreme Court declined to ignore the fact that the inducement payment bore directly on the annual rent to be paid and held that it was therefore on revenue account. Its decision was perfunctorily dismissed by the Privy Council with these words:

Their Lordships would wish to make no comment upon the decision of the Supreme Court of Canada in the *Ikea* case...save to observe that the Canadian Courts appear to have adopted a different approach from that of the Courts of New Zealand and the United Kingdom, and of Their Lordships' Board.<sup>116</sup>

This peremptory observation is, the reader might think, an imperious way to deal with the considered reasoning of a senior appellate Court in a current decision, but, perhaps, the Board was wise not to have spelt out the different approach? To have done so would have required the Board to acknowledge that New Zealand and the United Kingdom adhere to a more formalistic approach than the Canadian Court. It is difficult to imagine that their Lordships' justification for their approach could have sounded anything other than outdated and weak.

For completeness, it may also be mentioned that the High Court of Australia was subsequently called upon to rule on the same issue in *Federal Commissioner of Taxation v Montgomery*.<sup>117</sup> A majority of the High Court<sup>118</sup> held that the inducement payment in issue was assessable income in the hands of the taxpayer.

The High Court's decision contains a crushing refutation of the notion of a "negative premium".<sup>119</sup> The majority reject the assertion of a congruence or symmetry between a payment by a lessee to obtain the advantage of a lease and an amount received by the lessee in agreeing to take a lease and, therefore, held that it was wrong to assume that it did. As this exact congruence or symmetry between the capital or revenue character of a sum as a receipt and its character as expenditure cannot be maintained, the notion that it is a "negative premium" is not sustainable. The Privy Council looked to the form of the payment and the form of the receipt; the majority in the High Court looked to the "character" of the payment and the "character" of the receipt, and readily distinguished the two.

The reasoning of the Privy Council and the majority in the Court of Appeal in *Wattie's* case is intractably formalistic. The transaction is in the form of an inducement payment and the fact that the rent is inflated to offset the payment is effectively disregarded. This flawed reasoning is set out in the judgment of Blanchard J writing for the majority in the Court of Appeal:

In economic terms that sum [the inducement payment] obviously had rental equivalence and could be looked upon as a rental subsidy. But it is well established that economic equivalence is not the determinant of the characterisation of a payment for tax purposes.<sup>120</sup>

Then:

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115 *Ikea Ltd v The Queen* [1998] 1 SCR 196. The Federal Court of Appeal in this case thought that the issue so clear cut that it did not call on the Commissioner's counsel to respond to the submission advanced on behalf of the taxpayer and delivered an oral judgment!

116 Above n 114, at 539.

117 *Federal Commissioner of Taxation v Montgomery* (1999) 164 ALR 435.

118 Gaudron, Gummow, Kirby and Hayne JJ.

119 Above n 117, at [95].

120 Above n 3, at 13.

We have concluded that the appellants are right to characterise the cash inducement sum as a negative premium. That is a capital item in the same way as in *McKenzies*' the payment by a lessee to obtain surrender of its lease was a capital item. It is the mirror image. This lessor was asking Coopers & Lybrand to relieve it of untenanted premises by taking a burdensome lease. In *McKenzie* it was the lessee asking the lessor to relieve it of its unwanted lease by accepting a surrender and consequently untenanted premises.<sup>121</sup>

With respect to this learned Judge, this statement is indefensible. The payment in *Wattie* is not the "mirror image" of the payment moving from the tenant to the landlord in *McKenzie*.<sup>122</sup> The untenanted premises may have become burdensome to the landlord in *Wattie*, but that is beside the point; the issue is whether the inducement payment was capital or revenue in the hands of the tenant. The lease was not in substance burdensome to the tenant once the fact the inflated rent was offset by the inducement payment is taken into account. The lease in *McKenzie*, on the other hand, had become burdensome (which is why the tenant was prepared to pay a premium to be rid of the lease). For this reason, the payment in *McKenzie* can properly be described as a premium, that is, a payment made in consideration of the landlord accepting a surrender of the lease.

The same can be said for the analogy adopted by the Privy Council; a payment by a prospective tenant to a prospective landlord seeking a lease. In such cases the premium provides consideration for the grant of the lease. To describe the payment in *Wattie* as a "negative premium", that is, the converse of a premium paid by the tenant, however, is to again succumb to form. Whereas the premium paid by a tenant to a landlord provides consideration, that is, a quid pro quo, for the grant of the lease, an inducement payment paid by the landlord to the tenant where the rent is inflated and the payment amortised in the rent over the period of the lease provides no consideration. Other than on paper, there is no quid pro quo. The economic advantage to the tenant is to be found in the saving in tax otherwise payable.

How, then, does the Privy Council's decision (and the Court of Appeal's) in *Wattie* promote greater certainty and predictability in the law? How does it avoid deterring commercial men and women from entering into legitimate transactions? It does neither.

The decision in *Wattie* rules that transactions involving inducement payments made by a landlord to a tenant are not void as against the Commissioner, but so, too, if the decision had been to the opposite effect it would have been clarified that transactions in which such inducement payments are offset by an inflated rent are void as against the Commissioner. The law is no less certain and predictable in Canada and Australia because the senior appellate courts in those countries have seen fit to favour the substance of the transaction. Nor would commercial men and women be deterred from entering into genuine commercial transactions; they would simply be required to accept that transactions of the kind in issue in *Wattie* are not legitimate.

### B. *Commissioner of Inland Revenue v Bank of New Zealand Investments Ltd*

Finally, regard may be had to the *Bank of New Zealand Investments* case.<sup>123</sup> The majority's judgment in this case need not be examined in detail as their reasoning has been rejected by the Privy Council in *Peterson v Commissioner of Inland Revenue*.<sup>124</sup> Speaking for the majority,<sup>125</sup> Lord Mil-

121 Ibid, at 13, 305.

122 *Commissioner of Inland Revenue v McKenzie (NZ) Ltd* [1988] 2 NZLR 736.

123 Above n 6.

124 *Peterson v Commissioner of Inland Revenue* [2006] NZLR 433 at [33]-[34]; (2005) 22 NZTC 19 098 at [33-34].

125 Lord Millett, Baroness Hale of Richmond and Lord Brown of Eaton-under-Heywood.

lett said that their Lordships did not consider an “arrangement” for the purposes of s 99 requires a consensus or meeting of minds. The taxpayer need not be a party to “the arrangement” or, indeed, be privy to its details. The majority of their Lordships expressly preferred the reasoning in my dissenting judgment.<sup>126</sup> The pertinent paragraphs were endorsed by the minority.<sup>127</sup>

The crucial question in the *Bank of New Zealand Investments* case was whether a series of transactions fell within the definition of “arrangement” in s 99 having regard to the fact (as found at first instance) that Bank of New Zealand Investments Ltd was not involved in or aware of the exact nature or details of the transactions to be undertaken by the promoter of the scheme, Capital Markets Ltd. The majority in the Court of Appeal held that the transactions could be divided into “upstream” and “downstream” transactions and that the latter transactions could be disregarded when determining the tax legitimacy of the “upstream” transactions. In form the “upstream” transactions comprised a standard commercial redeemable preference share arrangement which entitled Bank of New Zealand Investments Ltd’s parent, the Bank of New Zealand, to a deduction in terms of the Act. The “downstream” transactions in which the tax avoidance was alleged to have occurred formed no part of that arrangement. By virtue of this reasoning, the majority were able to claim that the “purpose and effect” of the transaction was not tax avoidance.

The substance of the arrangement is set out in a diagram in my dissenting judgment.<sup>128</sup> The aims of the transaction were, first, to allow Bank of New Zealand Investments Ltd to raise funds in such a way that the interest it paid on those funds was deductible and, secondly, to convert the assessable income stream generated by the investment of those funds into exempt income. It was that part of the arrangement designed to give effect to the latter objective that the Commissioner claimed amounted to tax avoidance.

Overall, the arrangement resulted in a tax saving which was shared by the parties. Without this tax advantage, the transaction would not have been commercially viable. Indeed, it would have been pointless. In substance, the effect of the arrangement was undeniably the avoidance of tax.<sup>129</sup>

Again it may be asked how the decision of the majority assisted the aim of certainty and predictability and would deter “genuine” commercial transactions. Knowledge that a transaction cannot be artificially divided into “upstream” and “downstream” transactions to avoid tax, it might be thought, would add greater certainty to the law than would a law that permitted such a problematic distinction. Moreover, is it to be assumed that the law in the United Kingdom is now less certain

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126 Above, n 124 at [33] and [34].

127 Lord Bingham of Cornhill and Lord Scott of Foscote, at 460.

128 Above n 6, at 491.

129 Some entertain a residual concern relating to those investors who invest monies with, say, a bank or managed fund expecting a commercial return on their investment without thought of a tax saving, unaware that the bank, or its subsidiary, or the managed fund is in fact practising tax avoidance or indulging in transactions which may be challenged on the ground that they constitute tax avoidance. It can be argued that their investment is commercially viable irrespective of any tax saving. Investors in this category can be distinguished from the investors in the *Bank of New Zealand Investments* case in that they have not invested their monies for the purpose of securing or participating in a tax saving, but this is to introduce immediately a gloss or distinction. It is preferable to expect investors to be sufficiently astute and diligent in knowing the fate of their monies and the general nature of the investment made on their behalf so as to preclude them from pleading their ignorance. Furthermore, if the format spelt out by Blanchard J in *Glenharrow* is to be followed, the purpose and effect of an arrangement is to be determined “objectively”. Thus, the subjective knowledge of the taxpayer cannot be relevant to the “effect” of the arrangement, and the “purpose” follows from that effect.

than in New Zealand because the House of Lords have declined to accept and apply the majority's reasoning in this case?

Nor would commercial men and women be deterred from entering into genuine commercial transactions if the Court of Appeal had interpreted s 99 so as to preclude tax avoiding transactions being dis severed from the legally sound transactions when they are part of the same arrangement. The boundary between what is acceptable and what is not acceptable would simply be shifted. What commercial men and women would be deterred from doing, of course, would be entering into any arrangement in the knowledge that they would benefit from a tax saving, the exact nature or details of which are unknown to them, when the purpose and effect of the overall arrangement is tax avoidance. The balance may have swung against the would-be tax avoider, but that does not make the law less certain.

## XII. A SHIFT IN THINKING

In overtly shifting the regime from one of form over substance to one of substance over form the Supreme Court could usefully confront a number of basic questions. Why have the courts for so long evinced such a deep-rooted hostility to repeated anti-avoidance provisions? Why, notwithstanding their general commitment to the principle of parliamentary supremacy, have judges been willing to frustrate Parliament's intent?

Then, why, a bare two years after Parliament re-enacted s 99 and, in the process endorsed *Elmiger v Commissioner of Inland Revenue*,<sup>130</sup> did the courts adopt a doctrine overtly at odds with Parliament's objective? Why was Lord Tomlin's dictum in the *Duke of Westminster* case accepted in New Zealand without closer examination of the relevance, utility and applicability of the dictum to this country? Why was the doctrine of form over substance never subjected to the rigour of logical thought? In what way does the doctrine, with all the glosses, concepts and distinctions which it engenders, really serve the goals of certainty and predictability? How pragmatic is it to persevere with a doctrine that must attract all these glosses, concepts and distinctions in order to survive? How is it that the most vigorous free market and industrial economy in the world, the United States, has been able to administer its tax laws without detriment to commerce in the absence of a form over substance doctrine or any mutation of it?

The decision of the majority of the Privy Council in the *Peterson* case<sup>131</sup> should not daunt the Supreme Court from adopting the course I advocate. That case involved the taxpayer's claims for depreciation in respect of two films: "The Lie of the Land" and "Utu".<sup>132</sup> Investors were induced to invest in the films by the prospect of being able to deduct the entire cost of their investment over a two year period and the fact that part of the funding for the film would be provided by way of a non-recourse loan; the borrowers were under no liability to repay the capital or interest, the lender's right to repayment coming out of the profits of the film. The majority in the Privy Council held that non-recourse funding is a common commercial practice and that the investors had incurred the full cost of making the films even though the loans were made for a period of a few days only. The minority held that the non-recourse loan was nothing more than a device to produce a higher capital sum to be depreciated and, therefore, a higher depreciation claim. The loans

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130 Above n 86.

131 Above n 124.

132 The facts are succinctly summarised by Andrew Beck in *Tax Avoidance – The Peterson Debacle* (New Zealand Tax Planning Report No 2, 2005 CCH New Zealand Ltd).

were not required for the making of the films as the production costs had been inflated by the producers in order to justify the need for the loans. There was no commercial reason for this device. Simply put, the inflation of the costs was the means of qualifying for a higher tax deduction than would otherwise have been available.<sup>133</sup>

One recoils from asserting that a judgment of senior appellate judges is substandard, and I so recoil, but the judgment is undoubtedly open to criticism, and it has received that criticism.<sup>134</sup> It is, perhaps, not surprising that, of the eleven Judges who considered the case, only three determined that the transaction in issue was not tax avoidance, but, of course, they were the three that counted.<sup>135</sup> Nor is it surprising that the Law Lords who dissented were unusually forceful in expressing their hostility to the majority's reasoning.<sup>136</sup>

Now is not the time, however, to parade in detail the deficiencies in the majority's judgment; they made mistakes of fact and seem not to have fully comprehended the transactions in issue; they resurrected the distinction between "tax mitigation" and "tax avoidance" in the even less satisfactory form of "tax advantage" and "tax avoidance"; their reference to "economic advantage" is irritatingly incomplete; they failed or were unable to point to the loss or expenditure which would entitle the taxpayer to the allowance in question in terms of the formula in *Challenge*; they were inconsistent in rejecting the majority's judgment in the *Bank of New Zealand Investments* case and then seemingly treating the investor's transaction as a separate transaction from that of the promoter of the scheme and the non-recourse lender; and, most importantly, they sanctioned an arrangement which was plainly outside Parliament's objective in enacting a provision designed to encourage investment in films, and on which the taxpayer relied.

For present purposes, I wish only to emphasise the debacle which results when judges endeavour to work within the existing judge-made framework. The reasoning of the majority in *Peterson's* case is dogged by a determination to make the legal form of the arrangement prevail and an equally determined reluctance to go to its substance. How much better it would have been to find that the *Bank of New Zealand Investments* case was wrongly decided and, looking at the arrangement as a whole, conclude that, in substance and economic reality, the scheme was outside Parliament's contemplation in enacting the depreciation provisions in issue. As Andrew Beck has stated, by no stretch of the imagination could it be argued that the legislature intended to condone the inflation of a purchase price so as to produce a higher depreciation claim.<sup>137</sup> It is a paradigm case of tax avoidance.

Apart from seeking to re-establish that the substance of a transaction is decisive, it would be imprudent to seek to formulate a more universal principle or response to tax avoidance disputes. Certainly, with substance being decisive, a number of the present glosses, concepts and distinc-

133 *Peterson's* case, above n 124, at [91].

134 Above n 132. For criticism in the opposite direction, see Geoff Harley, "Peterson – a Review of the Facts" (New Zealand Tax Planning Report No 5 2005 CCH New Zealand Ltd).

135 There is no magic in the numbers game. In *Wattie v Commissioner of Inland Revenue* (above n 3), for example, of the total of 31 judges in New Zealand (including the Privy Council), Canada and Australia, who considered the issue, a majority of one held that the inducement payment was on revenue account, but excluding the judges in the New Zealand jurisdiction, the majority is substantial; 14 to 6.

136 The writer knows of only one other issue where their Lordships have been so forceful in expressing their distaste for the contending views which have divided them. See the death penalty cases in the Privy Council: *Boyce v The Queen* [2004] UKPC 32; [2004] 3 WLR 786; and *Mathew v State of Trinidad and Tobago* [2004] UKPC; [2004] 3 WLR 812. See also, EW Thomas "The Privy Council and the Death Penalty" (2005) 121 LQR 175.

137 Beck, above n 132, at 13.

tions can be expected to fall by the wayside. Such concepts as “economic equivalence”, the “sham or nothing” classification and the “choice” principle would, at least, require re-examination as to their relevance and validity. I imagine that what will evolve will be a more fluid approach to questions of tax avoidance in which different transactions will attract a different emphasis: the artificiality of the transaction in one, the lack of commercial viability apart from the tax saving involved in a second, the demonstrable pretence in a third, the contrived complexity of the arrangement in a fourth, the exploitation of a loophole in a fifth, the cabalistic use of a tax haven in a sixth, the unaccountable utilisation of back to back agreements in a seventh, the existence of secrecy in the next, and so on.

Each of these features would, however, serve to explain the Court’s thinking as to why the transaction amounted to tax avoidance rather than encapsulate a legal principle. Such features would be fact-driven and particular to the specific transaction. As Woodhouse P said in the *Challenge* case, each case raises a question of fact and degree to be decided on a case by case basis.<sup>138</sup>

The one overriding feature that should command the unreserved allegiance of the Supreme Court is to give effect to Parliament’s intent. The wording of s BG1 does not require a gloss; the section itself provides the principle to be applied by the courts.

There are two aspects in which I would reiterate that respect for the supremacy of Parliament should be acknowledged and implemented.

The first is to do what Parliament has intended since that institution enacted a general anti-avoidance provision in 1878.<sup>139</sup> The general anti-avoidance provision has been undermined by a perverse judicial approach for far too long. The judiciary must make a conscious effort to subvert its own predisposition as to the requirements of certainty and the needs of the commercial community and accept Parliament’s perception of what is required in the public interest. The general anti-avoidance provision is a broad statutory injunction to render void as against the Commissioner those transactions in which the taxpayer seeks to take advantage of ordinary legal purposes to obtain relief from the natural burden of taxation denied generally to the same class of taxpayer. Simply stated, Parliament’s intent, as well as the wording it has used to convey its intent, cannot now embrace even the remnants of the form over substance doctrine.

The second respect in which the intention of Parliament should be expressly recognised as dominant arises in examining the transaction itself. Invariably, the legislation on which the taxpayer relies will be directed at a particular class or particular circumstances and purport to possess a legislative objective or reflect a legislative policy. That class or those circumstances should be present and the transaction should fall within that objective or policy before being countenanced as a legitimate transaction for tax purposes.<sup>140</sup> If, having regard to its substance, the arrangement amounts to tax avoidance it cannot fall within that objective or policy. Parliament cannot be presumed to have suspended its strong anti-avoidance policy, as evidenced by the general anti-avoidance provision, when directing its legislative attention to a particular class or particular circumstances.

As Nabil Orow states, tax avoidance is the obtaining of an unintended fiscal relief or advantage and that perception requires the focus to be on the law “maker” rather than the law “breaker”.<sup>141</sup>

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138 Above n 54, at 534.

139 Land Tax Act 1878, s 62.

140 See my comments on the Majority’s decision in *Peterson v Commissioner of Inland Revenue* above.

141 Orow, above n 63, at 339-340.

In other words, the emphasis should shift from what the taxpayer has done, or omitted to do, to the question of what Parliament intended in enacting the legislation on which the taxpayer relies. Literal or technical compliance should be of no or little avail to taxpayers unless they can bring themselves within the scope and purpose of the legislation which is relied upon to give their transaction legitimacy. That question can only be sensibly addressed by having regard to the substance of the transaction and making that substance decisive.

If it is accepted that legal form, while relevant, should no longer be decisive and attention is redirected to the actual or economic substance of a transaction, the incoherency and inconsistencies ascendant in the present law and the courts' decisions will disappear or, at least, diminish; the aims of certainty and predictability will be enhanced by the firm knowledge that the courts will look beyond the legal form to the substance of a transaction; the issues and argument will benefit from being redirected from the present glosses, concepts, and distinctions associated with tax avoidance to the substance of the transactions; the existing inbuilt advantage conferred on would-be tax avoiders will be removed; the tax base will be significantly enhanced; and the tax system of this country will be immeasurably more equitable.

## PART 2

### XIII. AND NOW *BEN NEVIS*

The scheme in issue in *Ben Nevis* was undoubtedly tax avoidance. It was a scheme devised by promoters and marketed to investors with the express purpose of reducing the ordinary incidence of tax, and it certainly had that effect. The fact such a blatant scheme could be promoted in the first place and then defended with vigour up to the Supreme Court demonstrates how far the form over substance doctrine had become embedded in tax law. The scheme depended on form routing substance.

Irrespective of the past approach the appellants were doomed to fail and it is not surprising that they failed at every level in the court hierarchy. Indeed, it was not a hard case. Any other result than that found by the Courts would have made a mockery of the general anti-avoidance provision and Parliament's intention that the provision be implemented by the courts. Consequently, the facts of *Ben Nevis* provided the Supreme Court with the opportunity to bury the form over substance doctrine once and for all, but the Court, and certainly the majority, stopped short of doing so.

Nevertheless, the doctrine suffered a severe setback. The reality is that, when examining the promoters' scheme for the purpose of determining whether it amounted to tax avoidance, the Court looked to its substance. In this exercise the Court's rejection of form and regard to the economic or fiscal reality of the scheme was complete. It would appear, however, that the doctrine, or traces of the doctrine, linger in the majority's finding that, notwithstanding that the scheme constituted tax avoidance, it complied with the specific provisions on which the promoters relied.

It would be remiss, however, to go further without adverting to the considerable advances made in *Ben Nevis* and *Glenharrow*. Tipping J's treatment of the legislative history and case law in his judgment for the Court in *Ben Nevis* is impressive and Blanchard J's articulation of the reasons why the transaction in *Glenharrow* fell foul of the general anti-avoidance provision in the Goods and Services Tax Act 1985 provides a model for the commercial analysis of the reality of a transaction. The gains made in moving towards a more sensible and stable tax avoidance regime in these judgments should not be ignored.

- (1) The assertion is now secure that, in applying the general anti-avoidance provision, the courts are to have regard to the substance of the arrangement. While not spelt out in so many words the substance will be decisive.<sup>142</sup> This departure from the previous law loses none of its force by being articulated without the Court expressly overruling any previous cases. In particular, it would have assisted clarification if Richardson J's approach in the *Challenge* case<sup>143</sup> and the decision of the majority in the Privy Council in *Peterson v Commissioner of Inland Revenue*<sup>144</sup> had been openly disapproved. Making the substance of an arrangement decisive for the purposes of s BG1, but not for the purposes of the specific tax provisions, results in an incongruity upon which I will touch below.
- (2) In looking to the substance of an arrangement for the purposes of s BG1, the courts' capacity to have regard to a range of factors is limited only by their relevance.<sup>145</sup> The courts are not limited to purely legal considerations. This endorsement of a realistic approach based on the facts of the particular case is to be welcomed. It mirrors my prediction set out above that a more fluid approach to the question of tax avoidance will evolve in which different transactions will attract a different emphasis. As I have already claimed, the general principle applicable to all tax avoidance disputes is contained in the general anti-avoidance provision, and it seems to have been accepted by the Court that it would be imprudent to seek to implant a judicial version of the principle on the wording and ambit of that provision.
- (3) The fact that tax avoidance can be found in individual steps or in a combination of steps in an arrangement is affirmed.<sup>146</sup> The Court could not sensibly hold otherwise having regard to the express wording of the definition of "arrangement" in s BG1. As I will suggest below, this affirmation could have been usefully associated with an endorsement of the *Ramsay* principle.
- (4) *Elmiger's* case, on which I have placed so much emphasis above, is reinstated as an important and influential judgment.<sup>147</sup> Woodhouse J's approach in that case is reinforced by the favourable treatment accorded to his judgment in the *Challenge* case.<sup>148</sup> At the same time, the approach of Richardson J in that case is, in effect, if not in so many words, disapproved. This disapproval is inherent in the Court's rejection of the notion that the scope of the general anti-avoidance provision is to be read down so that it does not operate on arrangements which comply with particular specific tax provisions. The "scheme and purpose" of the legislation does not require the general anti-avoidance provision to be subjugated to the special concession provisions.<sup>149</sup>
- (5) The Court in *Ben Nevis* acknowledges that the case law has become encumbered by "considerations and tests" that are not specified in the legislation.<sup>150</sup> It urges the courts to keep the

142 See *Ben Nevis*, above n 9, [107], [108] and [109] and *Glenharrow*, above n 10, at [40], [47] and [49].

143 See above under the heading "Form Over Substance".

144 Above n 124. I agree with Michael Littlewood "The Supreme Court and Tax Avoidance" (2009) NZLJ at 151 and 155, that the tone of the judgments in *Ben Nevis*, and I would add *Glenharrow*, seem much less tolerant of aggressive tax planning than the majority in *Peterson's* case. For the reasons I have indicated above, it is difficult to believe that the Supreme Court would have found, as the majority in *Peterson's* case did, that the arrangement in issue was tax mitigation and not tax avoidance.

145 See *Ben Nevis*, above n 9, at [108] and [109].

146 *Ibid*, at [105].

147 *Ibid*, at [75].

148 *Ibid*, at [84].

149 *Ibid*, at [89].

150 *Ibid*, at [13].

“judicial glosses and elaborations” on the statutory language to a minimum.<sup>151</sup> This exhortation reflects my own disparagement of the “glosses, concepts and distinctions” which have beset tax law.

- (6) It is also fair to claim that the purposive approach to the interpretation of tax legislation is confirmed, although, perhaps, a little hesitantly. The majority state that the English decisions provide helpful insights to the extent that they have adopted a more purposive approach to the interpretation of tax legislation.<sup>152</sup> Three of the cases referred to above, *Furniss (Inspector of Taxes) v Dawson*, *Inland Revenue Commissioner v McGuckian* and *MacNiven v Westmoreland Investments Ltd*, are cited in support.<sup>153</sup> Although the scheme and purpose approach of the Privy Council is approbated,<sup>154</sup> the Court is careful to point out that this approach does not require the courts to focus on the specific provisions in isolation of wider considerations. It is noted, however, that the absence of a general anti-avoidance provision in England requires care in applying English cases. I agree that this care is warranted generally, but do not apprehend that the Court intends that the required care should diminish the value of the purposive approach to the interpretation of the tax statute.
- (7) The breadth of the “choice” principle inspired by the *Duke of Westminster* case has been curtailed. Tax beneficial choices are now constrained by the fact that the choices made in utilising tax incentives conferred in specific provisions are proscribed by the general anti-avoidance provision.<sup>155</sup>
- (8) Observations in both *Ben Nevis* and *Glenharrow* indicate a much more realistic attitude to the question of certainty in tax law than has been the case in the past. In commenting on the argument that the tax legislation should be interpreted in a way which gives taxpayers reasonable certainty in tax planning, the majority in *Ben Nevis* observe that Parliament has left the general anti-avoidance provision deliberately general. The courts, they state, should not strive to provide greater certainty than Parliament has chosen to provide.<sup>156</sup> In *Glenharrow* Blanchard J, speaking for the Court, stated that uncertainty is inherent where transactions having artificial features are combined with advantageous tax consequences not contemplated by the scheme or purpose of the Act. There will, he said, inevitably be uncertainty wherever a taxing statute contains a general anti-avoidance provision intended to deal with and counteract artificial tax favourable transactions.<sup>157</sup>

The Court’s acceptance of the reality that uncertainty is inherent in the application of the general anti-avoidance provision is gratifying and should go some way towards muting the tax advice industry’s unrealistic expectations. The majority’s reasoning, however, turns on the perception that Parliament, in enacting and re-enacting the general anti-avoidance provision, must be taken to have intended a measure of uncertainty. While this reasoning is correct in itself, it is incomplete. As indicated above, a greater level of certainty – of less uncertainty – can be achieved if it is accepted that the substance of a transaction is decisive. The commercial community will know to focus on the commercial purpose of the transaction and be cau-

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151 *Ibid.*, at [104].

152 *Ibid.*, at [110].

153 Above, n 46, 47 and 100, and *Ben Nevis*, above n 9, at [110].

154 See *Ben Nevis*, above n 9, at [98] and [99].

155 *Ibid.*, at [111].

156 *Ibid.*, at [112].

157 *Glenharrow*, above n 10, at [48].

tious about allowing the transaction to become diverted, or converted, into a device to avoid tax.

As it would be naïve to suggest that business people do not or will not appreciate the true substance of their transaction, making the substance of the arrangement decisive will lend itself to greater certainty in that the variety of “choices” proffered by tax advisers will have to be closely screened by those who will be liable for the consequences of any tax avoidance.<sup>158</sup> In other words, greater certainty will arise from the fact that transactions will be driven by commercial considerations and the tax advantage of a particular course only accepted as viable if it is truly incidental to the arrangement.

- (9) The Court in both *Ben Nevis* and *Glenharrow* confirm that courts are to disregard the subjective purpose of the parties in applying general anti-avoidance provisions. In construing the meaning of the words “the purpose and effect” of an arrangement, the majority in *Ben Nevis* are content to adopt the finding of the Privy Council in *Newton v Commissioner of Taxation of the Commonwealth of Australia*.<sup>159</sup> In short, the word “purpose” means the end in view and not the motive, and “effect” means the end accomplished and achieved. Read as a whole the phrase denotes concerted action to the end of avoiding tax.<sup>160</sup>

Blanchard J deals with the issue at greater length in *Glenharrow*. His observations are extremely helpful in establishing that the courts are to ask what “objectively” is the purpose of the arrangement and that question in turn requires an examination of the effect of the arrangement. The courts will necessarily consider what effect the arrangement has had, what it has achieved, and work backwards from that effect to determine what objectively the arrangement must be taken to have had as its purpose. A general anti-avoidance provision, therefore, is concerned, not with the purpose “of the parties”, but with the purpose “of the arrangement”.<sup>161</sup>

I regard this statement of Blanchard J as being of considerable importance. If one is to work backwards from the effect of the arrangement, it is difficult to see how much of the sophisticated arguments advanced on behalf of taxpayers to support the legal form of an arrangement can be plausibly mounted. It is difficult to accept, for example, that the majority of the Privy Council in *Peterson’s* case<sup>162</sup> could have sustained their opinion if they had worked backwards from the effect of the scheme in that case. In practical terms Blanchard J’s proposed format may prove to be one of the most influential factors in the move from form over substance to substance over form.

In any event, the approach adopted in both decisions undoubtedly requires the courts to have regard to the substance of the arrangement and to then discern from the findings in that regard “the purpose and effect” of the arrangement. No lesser course of inquiry is now permissible.

Once again a caveat is required. I do not apprehend that anything the Court has said in either of the judgments precludes courts from taking into account the intention of the parties where that intention is to avoid the incidence of tax. It would be a strange outcome if, where the evidence establishes that the parties intended to avoid tax, the courts had to disregard that evidence. Rather, as

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158 Over zealous tax advisers who expose their clients to the severe consequences of tax avoidance can no longer be assured that they are beyond the reach of legal liability.

159 *Newton v Commissioner of Taxation of the Commonwealth of Australia* [1958] AC 450.

160 *Ben Nevis*, above n 9, at [73].

161 *Glenharrow*, above n 10, at [35]-[39].

162 Above n 124.

the minority say in *Ben Nevis*, while motive is not determinative, it may be evidence which sheds light on a purpose of tax avoidance and so is not wholly irrelevant.<sup>163</sup>

#### XIV. BUT TRACES OF FORM OVER SUBSTANCE LINGER

I admit to being troubled by the reasoning of the majority. It seems to perpetuate unnecessarily the traces of the past regime when, in order for a transaction which complied in form with the specific tax provisions of the Act to be immune from the reach of the general anti-avoidance provision, the specific provision had to override the general anti-avoidance provision. The minority avoids this pitfall by holding that the specific tax provisions and the general anti-avoidance provision are not in potential conflict and do not therefore require reconciliation. I agree with this perception, but while it is essential to have regard to the specific tax provisions in issue, I do not accept that it is necessary to embark upon the two stage process as also apparently endorsed by the minority.<sup>164</sup>

Once it is accepted, as the majority effectively do, that for the purposes of s BG1 the substance of an arrangement is decisive, it is incongruent to perceive the relationship between the specific tax provisions and the general anti-avoidance provision as being in conflict or potential conflict. The substance of the arrangement is the same in both cases. If the arrangement constitutes tax avoidance it cannot be said to be authorised by the specific tax provisions. To hold otherwise would be to attribute to Parliament an intention when enacting the specific tax provisions to authorise tax avoidance on the part of the taxpayers providing they adhere to the “legal structures and obligations the parties have created” purportedly pursuant to the specific provisions.<sup>165</sup> As already pointed out, there can be no such legislative presumption. Yet, but for the general anti-avoidance provision this would be the result of the majority’s reasoning in respect of the approach to be taken to arrangements purportedly made pursuant to the specific provisions.

Consequently, the perception that there is a conflict or potential conflict between the specific tax provisions and the general anti-avoidance provision can be seen as a “hangover” from the past when the form of an arrangement was held to have satisfied the scheme and purpose test and would then override the general anti-avoidance provision. With the move to make the substance of the arrangement decisive the need to reconcile the conflicting or apparently conflicting specific and general provisions does not now arise. Neither the specific tax provisions nor the general anti-avoidance provision condone tax avoidance.

Another way of making this point is to focus on what the majority actually said. If the language is not inconsistent it is certainly awkward. On the one hand, the majority sets out to give appropriate effect to both the specific tax provisions and the general anti-avoidance provision by proclaiming that they are to work “in tandem” with neither to be regarded as “overriding” the other.<sup>166</sup> On the other hand, a specific tax provision is to be construed as having regard to its “ordinary meaning”,<sup>167</sup> the “legal structures and obligations the parties have created”, and without

163 *Ben Nevis*, above n 9, at [8].

164 See [2] and [3]. Further, while legal, commercial or accounting terminology may differ and the appropriate terminology to adopt may turn on the context of the provision, the minority’s distinction between “legal substance” and “commercial substance” is unfortunate. The distinction is illusory. It has shades of Lord Hoffmann’s attempt to distinguish “legal concepts” from “commercial concepts” in *MacNiven’s* case, and one can only hope that it suffers the same ignominious ending. See above under the heading “The King is Dead; Long Live the King”.

165 *Ibid.*, at [47].

166 *Ibid.*, at [103].

167 *Ibid.*, at [103] and [106].

conducting an analysis in terms of its economic substance and consequences.<sup>168</sup> Adopting this approach the arrangement may be within the scope of the specific tax provisions, but it may then fall foul of the general anti-avoidance provision. If this is the case the provisions have not worked “in tandem”. The general anti-avoidance provision is in fact “overriding” the specific tax provisions. Oddly, the “tandem” has handle bars at both ends pointing in different directions.

The majority spell out the basis of their approach in paragraph [103] when they purport to draw a sharp distinction between the purpose of specific tax provisions and the purpose of the general anti-avoidance provision. Of course, the purposes differ. The distinction, however, provides a false basis for a finding that the purpose of a specific provision can be determined having regard to its ordinary meaning (and the legal structures and obligations the parties have created without regard to its economic substance and consequences) and the two step format which is then endorsed. In short, neither the purpose of the specific tax provisions nor the purpose of the general anti-avoidance provision embraces tax avoidance.

Courts will, of course, have full regard to the purpose, and policy, contemplated by Parliament in enacting a specific provision. That analysis will be inevitable in order to assess the merit of the taxpayer’s claimed justification for the arrangement. Drawing a distinction between the purpose of the specific tax provisions and the purpose of the general anti-avoidance provision, however, is artificial without recognition or effect being given to the basic precept that the specific tax provisions do not authorise tax avoidance. How can it be said, for instance, that an arrangement conforms with the purpose of a specific tax provision, as intended by Parliament, when that purpose does not and cannot encompass tax avoidance? In adhering to a substance over form approach, therefore, the purpose, and policy, of specific tax provisions will not be neglected if the courts focus on the inevitable question whether the arrangement constitutes tax avoidance without the diversion inherent in the two step process. A unified approach not only serves Parliament’s intent, but also is both realistic and sensible.

In so far, therefore, as neither the special tax provisions nor the general anti-avoidance provision authorise tax avoidance, the primary exercise, while not disregarding the legal structure and obligations, is to analyse the arrangement having regard to its economic substance and consequences. As the substance of the arrangement is the same whether the courts are considering the application of the specific tax provisions or the general anti-avoidance provision, a finding that the arrangement amounts to tax avoidance will mean both that the arrangement was not authorised under the specific tax provisions and that it is void under the general anti-avoidance provision. This will be so even though the utilisation of the specific tax provision relates to only a single step in the arrangement and may seem innocuous in itself. Parliament has neither condoned nor authorised the specific provision’s use as part of a larger or more complex scheme which amounts to tax avoidance.

I would reiterate that the majority’s error does not so much lie in requiring the courts to have regard to the legal structures and obligations which the parties have created as in the fact they require courts to reach a finding that, but for the general anti-avoidance provision, the arrangement falls within the specific provisions of the Act. It would, of course, remain legitimate for a taxpayer to pursue a tax benefit specifically provided for in the Act, but only up to the point that the arrangement alters the incidence of tax so as to constitute tax avoidance. A finding that the arrangement is within the scope of the specific tax provisions is not necessary for the essential inquiry.

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168 *Ibid.*, at [47].

As already said, that essential inquiry is to determine whether there is an arrangement and, if so, the substance and scope of the arrangement. As the legal structure and obligations the parties have created will be taken into account in that inquiry the courts can move straight to the question whether the arrangement constitutes tax avoidance. The resulting finding will serve the purpose of both the specific tax provisions and the general anti-avoidance provision.

It goes without saying that, if a court holds that no tax avoidance is involved, there may be a residual question as to whether the arrangement satisfies the particular requirements of the specific provision, but that inquiry, proceeding on the basis that tax avoidance is not involved, will be much more narrowly focused. Furthermore, this more limited inquiry will benefit from the fact it is not proceeding under the shadow of the wider question of tax avoidance.

I do not doubt that it will be argued that this approach renders the general anti-avoidance provision redundant and that Parliament cannot have intended to enact a redundant provision. This again, however, is to hark back to the notion, appropriate in the era of form over substance, that there is a conflict or potential conflict between specific tax provisions and the general anti-avoidance provision which requires reconciliation. This dichotomy becomes futile once it is accepted, as logically it must be, that the substance of an arrangement is the same for the purposes of the specific tax provisions and the general anti-avoidance provision. The specific tax provisions and the general anti-avoidance provisions can truly ride in tandem; the two seats and the handle bar pointing in the same direction.

The general anti-avoidance provision otherwise serves Parliament's intention in a number of respects. Firstly, it ensures that the question of tax avoidance has primacy in the interpretation and application of the tax legislation. Secondly, it provides a composite definition of tax avoidance evidencing Parliament's underlying policy relating to the imposition and collection of taxation in this country. Thirdly, it will, or should, notwithstanding the best efforts of the draftspersons, forestall or counter technical or drafting limitations in the specific tax provisions. Fourthly, if, as I believe, the ingenuity of tax advisers is boundless, its presence is necessary to repel or deter the unforeseen and unpredictable products of that boundless ingenuity. Fifthly, the general anti-avoidance provision will, or should, at the same time preclude unproductive argument directed at the form of the arrangement. Finally, of course, s BG1 provides the remedies where tax avoidance is found to exist.

I deliberately exclude from the above reasons why the general anti-avoidance is not redundant, the situation contemplated by the minority in *Ben Nevis* whereby a claim may fall within the meaning of a specific tax provision, purposively interpreted, and yet be part of an arrangement which constitutes tax avoidance under the general anti-avoidance provision. The general anti-avoidance provision is not necessary for that purpose as the utilisation of a specific tax provision as a step in an arrangement which amounts to tax avoidance is an illegitimate use of that provision. The particular claim under the specific tax provision has no point outside or apart from the arrangement. It is again to regress to the habit of thought engendered by the doctrine of form over substance, as well as being unrealistic, to try to vest the claim with a separate identity or life of its own. There may, perhaps, be cases where the claim under the specific tax provision can be severed from the overall arrangement and still serve some valid purpose contemplated by Parliament, but any such case, if it should arise, can be identified and dealt with accordingly.

I believe that an approach which rules the substance of a transaction decisive for both the special specific tax provisions and the general anti-avoidance provision will make the application of tax law more certain than the formula adopted by the majority in *Ben Nevis*. A number of learned

commentators writing about *Ben Nevis* (or *Glenharrow*) admit to finding the reasoning or application of the decisions uncertain.<sup>169</sup>

I have attended two tax conferences and one tax seminar since those decisions were given and it is not an overstatement to say that the tax advice industry is in disarray. Indeed, at the first conference almost every tax expert who spoke claimed that *Ben Nevis* and *Glenharrow* had not changed the law, or had not significantly changed the law, and this claim clearly reflected the belief (perhaps parented by wishful thinking) of the tax specialists in the audience. I detected some shift in thinking at the later seminar and conference, but not much, and that shift was due more to the way in which *Ben Nevis* had been applied in later cases than to *Ben Nevis* itself.

By and large, it seems that tax advisers still feel secure in approaching the specific tax provisions as they have in the past but are now haunted by the prospect that what was or is an apparently permissible scheme may be held to be impermissible under s BG1. As one commentator observed at the seminar, the only change *Ben Nevis* has made to his practice is that, having implemented the arrangement based on the specific tax provisions, he takes the precaution of advising his clients that he cannot guarantee that it will not be held void under s BG1. As I have sought to stress, greater certainty will ensue if tax advisers know that, in addition to attending to its legal form, they have to confront the substance of the transaction and assess it for its implications in terms of tax avoidance.

## XV. CASES APPLYING *BEN NEVIS*

The four significant tax avoidance cases which have followed *Ben Nevis* and *Glenharrow* involved schemes which previously would, or would arguably, have been regarded as legitimate under the specific tax provisions on which they relied. As to be expected, the courts followed the two step format laid down in *Ben Nevis*. Without question, the decisions reflect the change in the law and advance the premise that the substance of the arrangement is decisive. Yet the same outcomes could have been achieved more effectively and coherently if, having analysed the arrangement in the context of the specific tax provisions, the courts had moved direct to the question of tax avoidance without making a finding as to the legitimacy of the arrangement under the specific provisions.

### A. *The Bank Cases*

The first two cases that may be touched upon are *Bank of New Zealand Investments Ltd and Ors v The Commissioner of Inland Revenue*<sup>170</sup> and *Westpac Banking Corporation v The Commissioner of Inland Revenue*.<sup>171</sup> Both cases involved an essentially similar arrangement made up of complex structured finance transactions with overseas counterparties. Wild J in the *Bank of New Zealand Investments* case and Harrison J in the *Westpac* case held that the transactions in question were entered into for the primary purpose of avoiding tax and amounted to tax avoidance for the pur-

169 See eg, Michael Littlewood, "The Supreme Court and Tax Avoidance" (2009) NZLJ 151 at 155; Marl Keating, "Supreme Court Lays Down Tax Avoidance for First Time" [2009] No 1 Tax Planning Reports; Craig Elliffe and Mark Keating, "Tax Avoidance - Still Waiting For Godot?" (2009) 23 NZULR 368; Craig Elliffe and Jess Cameron, "The Test for Tax Avoidance in New Zealand: A Judicial Sea Change" (2010) 16 NZBLQ 440; and Eugene Trombitas "The Conceptual Approach to Tax Avoidance in the 21st Century" (2009) 15 NZJLT 352.

170 *Bank of New Zealand Investments Ltd and Ors v The Commissioner of Inland Revenue* (2009) 24 NZTC 23 at 582.

171 *Westpac Banking Corporation v The Commissioner of Inland Revenue* (2009) 24 NZTC 23 at 834.

poses of s BG1. Both Judges immersed themselves in the complex nature of the transactions and approached the steps in the *Ben Nevis* formula with a thorough grasp of the specific tax provisions and the detail and workings of the arrangement. From that platform, and with the factual position firmly resolved, both Judges could have immediately addressed the question whether the transactions amounted to tax avoidance.

Inconveniently for the majority's two step formula, however, Wild J and Harrison J reached different conclusions as to the validity of the arrangement in relation to the application of the specific tax provisions.<sup>172</sup> While rejecting one of the Bank's arguments, Wild J held that the guarantee procurement fee which the Bank paid the subsidiary of the counterparty, ostensibly for the subsidiary's services in procuring a guarantee from its "highly-rated" parent, was expenditure under Part EH of the Act and was therefore deductible. For his part, Harrison J held that the guarantee procurement fee was not within the scope of the specific provision and was therefore not deductible. In the result, Harrison J's judgment is the more coherent of the two.

The different conclusions demonstrate a problem in ruling on the validity of the transaction under the specific tax provisions when the arrangement is void for tax avoidance. Differing judicial guidance has been given to the tax advice industry as to the application of the specific provisions in other circumstances which might not amount to tax avoidance under s BG1. The point is that, once it has been found that the arrangement amounts to tax avoidance, the findings as to the legitimacy of the arrangement under the specific tax provisions became largely academic. In a real sense, the Judges were asked to resolve a question which their subsequent conclusion rendered hypothetical.

### B. *Commissioner of Inland Revenue v Penny and Hooper*

In *Commissioner of Inland Revenue v Penny and Hooper*<sup>173</sup> the arrangement in issue was the commonplace structure whereby the professional practice of the taxpayers is conducted through a company which is owned by their family trusts. Dividends are then distributed to members of the taxpayer's family. The taxpayer receives a salary from the company as consideration for his or her services. In *Penny and Hooper* the salary received by the taxpayers, orthopedic surgeons, was well below a commercially realistic salary. A majority in the Court of Appeal, Hammond and Randerson JJ, (with Ellen France J dissenting) reversed the decision of MacKenzie J at first instance. All Judges accepted that the structure adopted by the taxpayers was a legitimate legal structure in itself. They differed on whether the structure as constituted, including the commercially unrealistic salary, amounted to tax avoidance under s BG1.

In holding that the arrangement amounted to tax avoidance, Hammond and Randerson JJ took into account a wide array of factors. Randerson J's judgment is particularly helpful for its comprehensive analysis of the arrangement, and Hammond J's judgment is valuable for the references to the American case law. Critical to their judgments was the fact that the salaries were fixed at an artificially low level far removed from economic or commercial reality. In the result, the structure was void as against the Commissioner. Randerson J pithily summarised the gist of the case; incorporation became the vehicle by which the taxpayers obtained the benefit of a lower company

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172 This difference is highlighted in an article by Mike Lennard "A Tale of Two Banks" (2009) Taxation Today No 24 at 1.

173 *Commissioner of Inland Revenue v Penny and Hooper* [2010] 3 NZLR 360.

tax rate while still enjoying the full benefit of the income for themselves personally and their families.<sup>174</sup>

Both Hammond and Randerson JJ explained that not all such structures will be impermissible. Each case will depend on the extent of the element of artificiality, contrivance or pretence. Marginal cases are unlikely to be challenged, but it perhaps needs to be clarified that the change in structure from a sole trader to a company was not a critical element leading to the majority's conclusion that the arrangement in issue amounted to tax avoidance.<sup>175</sup> The critical feature was the structure itself.

The fact that the identification of an unlawful structure may turn on drawing a line between an acceptable salary and a commercially unrealistic salary may not appeal to those accustomed to undue literalism in tax law. However tax law is not exempt from Oliver Wendall Holmes' adage: "[W]here to draw the line ... is the question in pretty much everything worth arguing in the law."<sup>176</sup> Woodhouse P was expressing much the same sentiment in the *Challenge Corporation* case, cited with apparent approval by the majority in *Ben Nevis*, when he said that the qualifying wording and ambit of the general anti-avoidance provision is a question of fact and degree in each case.<sup>177</sup> That perception accords with the reality. The basic question whether a tax arrangement is tax avoidance is more often than not a question of where to draw the line. Tax law cannot lay preemptive claim to bright lines.

It may be noted, yet again, that it would have been more coherent for the Court to have been permitted to examine the substance of the arrangement in the context of the specific tax provisions and at once address the question whether it amounted to tax avoidance. Only if the arrangement did not amount to tax avoidance would its compliance with the specific provisions need to be addressed, and that question could then be more effectively dealt with in the knowledge that tax avoidance was not involved.

As at the time of writing, leave to appeal to the Supreme Court has been granted to the taxpayers in *Penny and Hooper*. A different approach or perception to that adopted in the judgments of the courts below is available and will no doubt be considered by the Court. Hence, one or two observations as to how the substance over form approach could apply to the facts of that case may not be misplaced. Unlike the time when I first wrote the body of this article, the date of my retirement has long since past and my influence is limited to such logic and common sense as my words, advertently or inadvertently, may import.

It is not difficult to anticipate that counsel for the taxpayers in similar cases will seek to argue that the salary paid to their taxpayer client is "commercially realistic" and for that reason the arrangement in issue is not tax avoidance. So, too, tax advisers when setting up such schemes will examine that question with their clients in an effort to determine at what point it can be plausibly claimed that the salary is not a pretence. Much consideration will be given to the question as to where the line can be drawn before the arrangement will attract the ire of the Commissioner or the condemnation of the courts if proceedings should follow. Based on the judgments in *Penny and Hooper* tax advisers may reasonably expect a margin or allowance in their clients' favour.

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174 At [118].

175 See Keith Kendall "Tax Avoidance after *Penny*" (2010) NZLJ 245 at 246.

176 *Irwin v Gabit* 268 US 161 and 168 [1925].

177 Above n 138.

Such an outcome focusing on the question whether the salary is or is not commercially realistic is unfortunate in that it does not fully embrace the substance of the arrangement. Certainly, the level at which the salary has been set will be a critical feature, but the “purpose or effect” of the arrangement emerges from the scheme as a whole. The salary may be within an acceptable range but a tax saving or tax advantage may still be obtained by the taxpayer as a result of the overall structure of the scheme.<sup>178</sup> In other words, the tax advantage to the taxpayer is unlikely to be able to be assessed by reference to the salary alone. The taxpayer will also, as in *Penny and Hooper*, have retained control or effective control over the income earned from the practice and enjoy the benefit of the income of the company (or trusts) for him or herself and their families. Tax avoidance remains a significant purpose and effect of the arrangement.

In this context, it is helpful to refer to the decision of the Privy Council in *Peate v Commissioner of Taxation of Commonwealth of Australia*.<sup>179</sup> Michael Littlewood has pointed out that the decision was not mentioned in any of the judgments, either at first instance or on appeal, in *Penny and Hooper*.<sup>180</sup> The arrangement in *Peate*'s case, however, was not dissimilar to the arrangement in *Penny and Hooper*.

In *Peate*'s case the taxpayers were doctors. Seven of them practiced in a partnership. They dissolved the partnership and replaced it with a series of agreements. Under these agreements: first, a company (“Westbank”) was incorporated with the doctors as directors; secondly, a “family” company was formed for each doctor's family with the doctor agreeing to serve the family company as a “medical practitioner” in the business carried on by Westbank at a salary; thirdly, the shares in the family companies were held by trustees on settlement for the doctors' children and wives; and, fourthly, Westbank entered into separate agreements with each of the family companies and each of the doctors to the effect that each family company would, for a fee, arrange for the doctors to serve Westbank as a medical practitioner.

In an opinion delivered by Viscount Dilhorne, the Privy Council held that the arrangement had the purpose and effect of avoiding liability for tax and therefore amounted to tax avoidance. Lord Donovan agreed with this finding, but delivered a dissenting judgment contending that the section in issue failed to provide a remedy.

It is of interest that the judgments do not disclose the level of salary paid to the doctors. Prior to the adoption of the scheme, the doctors received 14 per cent of the net profits of the partnership. Under the scheme to which that percentage adhered, the doctors received by way of service fees or dividends the same percentage of the net profits of Westbank to which they had been entitled under the partnership.<sup>181</sup> The shares in that company were also allotted to each of the family companies in the same proportion.

Notwithstanding that the doctors adhered to the percentage of net profits available under the partnership, however, their Lordships held that tax had been avoided on the difference between the salary the taxpayer and his wife as directors of the family company agreed he should receive

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178 Experience rather than, or bolstered by, cynicism suggests that tax advisers of a literalist frame of mind will fix, or recommend, a salary at a realistic level and obtain the tax saving by increasing the service fees or dividends, or both, or by introducing some other modification designed to reduce the income paid to the taxpayer by the company or trust.

179 *Peate v Commissioner of Taxation of Commonwealth of Australia* [1967] AC 308.

180 “*Penny and Hooper and Stare Decisis*” (Publication pending).

181 Following the withdrawal of one of the doctors, the percentage changed slightly but the change does not have bearing on the principle in issue.

and the amount received each year by the family company from Westbank in service fees and dividends. This difference was ascertained by, in effect, disregarding the scheme and treating the fees paid to Westbank and the family companies as fees paid to the doctor. In essence, the effect of the arrangement was to reduce the tax liability of the taxpayer in respect of the provision of the same medical services.

In my view, while it is to be expected that the courts will have regard to the features of the arrangement which point to tax avoidance, such as the commercial reality of the salary, it is important not to neglect the substance of the arrangement. In *Penny and Hooper* the purpose and effect of the arrangement was to reduce the incidence of the tax payable by the taxpayers in respect of the services they provided as orthopedic surgeons. A reduction in the ordinary incidence of tax payable by them clearly occurred. That was the effect of the arrangement, and working backwards from that effect, must be taken to have been its purpose. Nor could the purpose and effect be said to be merely incidental. Consequently, irrespective whether the salary was commercially realistic or not, the fact the taxpayers obtained an overall tax advantage means that they should not be able to maintain the arrangement as against the Commissioner, certainly in the absence of some other compelling reason as to why the arrangement was adopted. Cutting to the quick, the taxpayers' income was what the patients paid for the medical services less expenses.

I would emphasise that I am not saying the extent of the tax saving is immaterial. It may well be that the fact the tax saving in a particular case is minimal may support the taxpayer's claim that the arrangement was made for a legitimate purpose and that the tax saving is merely incidental to that purpose. However where, as a result of the arrangement the taxpayer pays less tax for the professional services he or she renders than if they had remained unincorporated or had not created a trust, this claim may be difficult for the taxpayer to establish.

### C. *Krukziener v Commissioner of Inland Revenue*

A more recent case is *Krukziener v Commissioner of Inland Revenue*,<sup>182</sup> a well crafted judgment of Courtney J. The structure which Mr Krukziener, a property developer, employed to carry on his business was one which is commonly adopted to isolate the creditor risks associated with individual projects to protect the developer's group should the particular development fail. Mr Krukziener did not receive a salary. His financial return was to be by way of a distribution of profits from successful projects. Pending such distributions, Mr Krukziener's living expenses were met from advances made to him from the current accounts of other entities in his group, usually through the payment of his personal credit card debts.<sup>183</sup>

Although these advances were recorded as loans, no agreement had been made for their repayment. Nor was there any evidence of any demand for payment having been made. The funds advanced remained outstanding. From 1977 onwards, however, repayments were made to Mr Krukziener from a non-taxable capital distribution following the sale of a property owned by one of the group. Courtney J did not focus so much on the practice in the property industry whereby developers draw on the expected future profits of a project as the way in which the practice was implemented in this case. The learned Judge noted, in particular, that the current account advances

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<sup>182</sup> *Krukziener v Commissioner of Inland Revenue* HC AK CIV 2010-404-000728.

<sup>183</sup> *Ibid.*, at [10].

were repaid only when non-taxable distributions became available.<sup>184</sup> She therefore concluded that the arrangement had a more than a merely incidental purpose or effect of avoiding tax.

What is significant about this judgment is that, under the heading: “Was there an arrangement?”,<sup>185</sup> Courtney J effectively traversed the substance of the arrangement in the context of the specific tax provisions in point and identified the features in the arrangement which constituted tax avoidance. Although the learned Judge then proceeded to apply the formula laid down in *Ben Nevis* to the arrangement she had analysed, the critical work had been done. The elements constituting tax avoidance had been identified in the Judge’s careful analysis of the arrangement. Her subsequent application of the two step approach in *Ben Nevis* largely consists of her particular responses to counsels’ submissions and a reiteration of the elements of the arrangement already shown to be tax avoidance.

I would suggest that a fair reading of the above cases leaves one with the impression that the essential inquiry undertaken by the courts has been into the features and intricacies of the arrangement in issue and that the findings made in that regard have directed the finding of tax avoidance. To some extent, the foray into the legitimacy of the arrangement in terms of the first step in *Ben Nevis* has the appearance of a deviation. There must be a real risk in future cases that the legitimacy of the arrangement under the specific provisions will be assumed, perhaps unconsciously, in order for the courts to grapple with the inevitable question of tax avoidance. With that risk may come the further risk that the courts’ conclusion in relation to the interpretation and application of the specific provisions may in other circumstances provide taxpayers and their tax advisers with a literal interpretation of the specific provisions which is not warranted and which may lead to needless litigation. As Michael Littlewood has pointed out, the application of the formula in *Ben Nevis* may actually facilitate tax avoidance.<sup>186</sup>

## XVI. THE JOURNEY’S END?

For the reasons traversed above I consider that, when a suitable case arises, the Supreme Court should take the opportunity to review and reconsider the approach to be adopted by the courts in cases where the Commissioner alleges tax avoidance. *Ben Nevis* need not be regarded as the last word. The fact that the Court divided three to two in respect of the approach to be adopted is reason enough for the Court to revisit the issue. It can do so having regard to the way in which the two step formula in *Ben Nevis* has been applied in later cases and its impact on the tax advice industry. If this review is undertaken the matters which the Court might usefully consider can be shortly listed.

(1) The Court could give full effect to Parliament’s intent by expressly proclaiming that the substance of an arrangement is to be decisive whenever the question of tax avoidance is in issue. It should be clarified that the era when form prevailed over substance is at an end in respect of both the general anti-avoidance provision and the specific tax provisions.

It is my belief that a clear statement to this effect will do more to increase the level of certainty in the application of tax law than any other statement by the Court. It will require the commercial community and tax advisers to confront the substance of a proposed arrangement and reject it if the tax saving is not genuinely incidental to its commercial objective and ra-

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184 Ibid, at [23] and [24].

185 Ibid, at [5]-[27].

186 Michael Littlewood, above n 169, at 155.

tionale. The ingenuity of tax advisers to devise schemes in the guise of tax planning which are in substance tax avoidance arrangements will not disappear entirely, but the climate and scope for them to do so will be much more limited than at present. Certainly, schemes devised by promoters and marketed to investors as in *Ben Nevis* will, or should, wane and ultimately wither away.

- (2) The Court should expressly confirm that the purposive approach applies to the tax statute, including specific tax provisions. In particular, the observations of Lord Steyn and Lord Cooke in *Inland Revenue Commissioners v McGuckian*,<sup>187</sup> referred to above, are too persuasive to be relegated to a footnote in any reappraisal of our tax law.
- (3) The decision of the majority in the Privy Council in *Peterson's* case<sup>188</sup> should be expressly disapproved. As argued above, the judgment of the majority in that case is not sound and leaving it unscathed conveys a mixed message to the tax advice industry. It is plainly incompatible with the greater aggression to tax avoidance evident in *Ben Nevis* and *Glenharrow*. The express rejection of the reasoning of the majority of the Privy Council in *Peterson's* case will make it clear to tax advisers that they cannot now rely on the approach adopted by the majority in interpreting and applying specific tax provisions.
- (4) Although England does not have a statutory general anti-avoidance provision and the cases must be approached with care, as discussed above, the principle formulated in *Ramsay* could be usefully incorporated in our tax law. As intimated by the minority in *Ben Nevis*, it is compatible with our statutory regime. Endorsing the principle would leave no doubt that substance over form applied to specific tax provisions. As many schemes rely on more than one specific tax provision, it is important that the courts be enjoined to consider the arrangement as a whole when considering their validity under the specific provisions and not just pursuant to the general anti-avoidance section.
- (5) Subject to the above exceptions which are in line with the Court's approach, the Court could usefully indicate that earlier cases upholding arrangements based on their form, as distinct from their substance, are no longer authoritative.
- (6) Contrary to settled law, dicta in *Peterson's* case suggest that the onus of proof where tax avoidance is in issue rests on the Commissioner. This suggestion is not consistent with the Court's decisions in *Ben Nevis* and *Glenharrow*. It is for the taxpayer to establish that there is no arrangement, if that be the case, or, if there is an arrangement, that the purpose and effect of the arrangement is not tax avoidance.
- (7) Finally, the Court could revise the two stage formula laid down by the majority in *Ben Nevis*. It could be made clear that a thorough examination of the specific tax provisions, including their purpose and the legislative policy behind them, is required in order to determine the nature and scope of the arrangement in issue. Once that exercise has been completed the courts should address the question whether the arrangement amounts to tax avoidance. No finding would be required at this stage as to whether the scheme complies with the specific tax provisions. A finding of tax avoidance would mean that the arrangement contravened both the specific tax provisions and the general anti-avoidance provision.

As acknowledged above, if it were found that the arrangement did not amount to tax avoidance the question would still remain as to whether it complied with the specific tax provisions

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187 Above n 47.

188 Above n 124.

on which the taxpayer relied. The focus of this question, or the exercise in resolving that question, however, would be much narrower and would benefit from being divorced from the prospect that, irrespective of any apparent compliance, it may nevertheless prove to be outside the intent of the provision.

*Ben Nevis* and *Glenharrow* represent a positive advance in the move towards a more coherent, predictable and equitable tax system, but as Lord Cooke observed at an earlier time in *Inland Revenue Commissioners v McGuckian*, "... the journey's end may not yet have been found".<sup>189</sup> That journey's end, I believe, will be found when the doctrine of form over substance is firmly rejected and it is made clear that the substance of an arrangement is decisive, not only in determining whether an arrangement is void under the general anti-avoidance provision, but also in determining the legitimacy of an arrangement under the specific tax provisions that abound in our monumental tax statute.

## XVII. ADDENDUM

At the time the above article was submitted for publication, leave to appeal to the Supreme Court had been granted to the taxpayers in *Penny and Hooper*. The Court delivered its decision on 24 August 2011.<sup>190</sup> Not unexpectedly, the taxpayers' appeal was dismissed in a unanimous decision delivered by Blanchard J.

The Court does not expressly state that, in determining whether an arrangement amounts to tax avoidance, substance is to prevail over form, but there can be little doubt that this is the effect of the decision. Irrespective of the form it may take, the structure will be void against the Commissioner unless the tax advantage is merely incidental to the purpose and effect of the structure.<sup>191</sup>

First, the Court examined the substance of the structure which the taxpayers had adopted and concluded that there was no legitimate reason for the artificially low salary and that, as a result, the predominant purpose of the structure was the avoidance of tax. The Court was not immobilised by the form of the structure.

It is true that the Court was content to focus on the artificially low salary rather than the structure as a whole. As I point out (footnote 178) a realistic salary could be paid and, yet, the arrangement could still have the purpose and effect of altering the incidence of tax. It is disappointing that the Court has not seen fit to close off the possibility of variations in the structure designed to obtain an impermissible tax saving.

Secondly, the Court unreservedly endorses the decision of the Privy Council in *Peate's* case. Indeed, Blanchard J includes no less than seven quotations from the judgments in the High Court of Australia. Both the Privy Council and the High Court make no bones about addressing the substance of the similar arrangement in that case.

Blanchard J appears to suggest that the structure in issue in *Peate's* case also centred on an artificially low salary.<sup>192</sup> Such a suggestion, if intended, would be incorrect. Neither the Judges in the Privy Council nor the High Court comment adversely on the level of the salaries paid to the doctors. The key point is that, while the "family" company (Raleigh) received by way of service fees or dividends the same percentage of the net profits as the taxpayer had been entitled to when

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189 Above n 73.

190 *Penny v Commissioner of Inland Revenue* [2011] NZSC 95.

191 At [47] and [49].

192 At [39] to [46].

in partnership, the taxpayer had the ability as the governing director of that company to depress his own salary.<sup>193</sup> The essential purpose of the structure was to divert income away from the participating doctors to or for the benefit of their families to the end that a substantial part of the tax otherwise payable would be avoided. Avoidance was determined by calculating the tax that would have been payable by the doctors operating in partnership as against the tax paid by the various entities under the structure.

Nevertheless, the Court has unequivocally endorsed the approach in *Peate's* case, and it would be imprudent to assume that the Court will not have regard to the overall tax saving obtained by the adoption of the structure as well as any particular individual feature of the structure, such as the salary level, if it has the effect of altering the ordinary incidence of taxation.

Thirdly, the fact substance is decisive over form is evident in the arguments the Court rejected. In finding for the taxpayers at first instance, MacKenzie J essentially followed the form over substance approach. His reasoning was endorsed by Ellen France J in a dissenting judgment in the Court of Appeal. This approach is disavowed. Similarly, Blanchard J systematically rejects the arguments put forward by Mr Harley for the taxpayers. The taxpayers could not have had a more committed and articulate counsel to run the tired arguments of the form over substance era, but rejected they are. Mr Harley's submission, for example, that the prescription in the Act of the categories of taxpayers as individuals, companies, trusts and so forth, with some special anti-avoidance rules for related-party transactions, leaves no room for the operation of s BG1 is firmly dismissed.<sup>194</sup>

While it cannot yet be said that the Court in *Penny and Hooper* has reached the "journey's end", it is certainly a sizable step along the way.

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193 At 468, per Kitto J and 473, per Taylor J.

194 At [45].

# LIBERTY AND JUSTICE IN THE FACE OF TERRORIST THREATS TO SOCIETY

BY SIR DAVID BARAGWANATH\*<sup>1</sup>

## I. MODERN TERRORISM

A French friend wrote to me:

I think terrorism already won a battle by reducing our freedom, our easy travelling, our going anywhere we wished to go [as] thirty years ago – not to mention the safety costs wherever we fly that we must bear.

This topic touches the debate whether the dark shadow cast across the world by the events of 11 September 2001 was deepened by the reactions to it, including the events at Guantánamo Bay and so-called “extraordinary rendition”.<sup>2</sup>

HE Charles Swindells as United States Ambassador to New Zealand, argued that the response by the United States was inevitable.<sup>3</sup> The power of the President in this sphere derives from his authority as Commander in Chief of the Armed Forces and his responsibility to execute the laws

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1 The original analysis was prepared for an address to alumni at the University of Auckland on 4 March 2006. This version draws on the experience of the United Nations Fourth Regional Workshop for Police Officers, Prosecutors and Judges in South Asia on Effectively Countering Terrorism held in Thimphu, Bhutan 24-26 May 2011.

2 There are also allegations of torture such as those made in *America's Disappeared: Secret Imprisonment, Detainees and the 'War on Terror'* Rachel Meeropol (ed) (Seven Stories Press, New York, 2005). Torture is prohibited by article 7 of the International Covenant on Civil and Political Rights, by the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment and by international law. As to what torture is and how different states have responded to their obligations under the Torture Convention, see the *Final Report of the Advisory Council of Jurists Asia Pacific Forum of National Human Rights Instruments* “Reference on Torture” (December 2005).

3 “Of course, we will never forget the victims of September the 11th. With those attacks, the terrorists and their supporters, who so despicably distorted the peaceful message of Islam, declared war on the United States and the entire Western world. In retrospect, the tragedy of that day was the culmination of a series of earlier attacks, including the bombing of United States embassies from Beirut to Nairobi, the first bombing of the World Trade Center, and the attack on the USS Cole. Our response to each of these attacks was not sufficient to dissuade the next, and we paid a terrible price.

On September 11, the world changed. For the past 20 months, as President Bush clearly stated: the war against terror has been proceeding according to a simple set of principles:

Any person involved in committing or planning terrorist attacks against the American people becomes an enemy of our country, and a target of American justice. Any person, organization, or government that supports, protects, or harbors terrorists is complicit in the murder of the innocent, and equally guilty of terrorist crimes.

Any outlaw regime that has ties to terrorist groups and seeks or possesses weapons of mass destruction is a grave danger to the civilized world – and will be confronted.”

(Address to Victoria University Diplomats Series, 8 October 2003).

of the nation.<sup>4</sup> The justification claimed for “rendition” is described by Silvia Borelli in an international law study “Enforcing International Law Norms Against Terrorism”:<sup>5</sup>

Extradition treaties and other conventional methods of international co-operation have often proven ineffective in the fight against international terrorism. Thus... in cases where the authorities of the requesting State have reasons to believe that extradition will be refused, States sometimes avail themselves of unorthodox methods to gain custody of fugitives.

The US in the past has resorted to forcible abduction abroad in order to gain custody of criminals, including terrorists. In June 1995, President Clinton signed a Presidential Decision Directive on the subject of “US Policy on Counterterrorism”, which provided ‘If we do not receive adequate cooperation from a state that harbours a terrorist whose extradition we are seeking, we shall take appropriate measures to induce cooperation. Return of suspects by force may be effected without the cooperation of the host government’.

The opposing argument is stated passionately by Salmon Rushdie. He called “extraordinary rendition” “the ugliest phrase to enter the English language last year”.<sup>6</sup> He describes “extraordinary” as an “ordinary enough adjective but its sense is being stretched to include more sinister meanings that your dictionary will not provide: secret... and extrajudicial...” He adds “As for “rendition” you will not find “to kidnap and covertly deliver for interrogation to an undisclosed address in an unspecified country where torture is permitted”.

The legal position is stated by Borelli: “From the perspective of inter-State relations, the practice of trans-national abduction represents a clear violation of customary principle of territorial sovereignty.”<sup>7</sup>

Nevertheless:<sup>8</sup>

*In the absence of protest from another State*, once an individual is brought within the jurisdiction, even if he was apprehended by irregular means (including forcible abduction), he may be tried in the apprehended State.

However that doctrine, traditionally expressed in the phrase *male captus bene detentus*:<sup>9</sup>

has been challenged for two different but inter-related reasons. First, domestic courts are abandoning their attitude of deference towards the actions of the Executive in cases where such action imply a violation of the international obligations of their State... Thus, if a State violates its international obligations, for instance that of respecting the territorial Sovereignty of other States by forcibly abducting a suspected criminal for trial, it is incumbent upon domestic courts to ensure that the violating ceases. Secondly, with the development of international human rights law, the issue of forcible abduction can be framed in ways other than the traditional issue of inter-state responsibility.

Forcible abduction is not expressly prohibited by any human rights treaty or customary rule. Nevertheless, the kidnapping of an individual implies *per se* the violation of several fundamental rights protected by international law. For instance, concerns like the preservation of the security of the individual, condemnation of arbitrary arrest and detention, the respect of the right to fair trial may be interpreted to preclude State-sponsored kidnapping. Thus, forcible abduction may constitute human rights violation sub-

4 United States Constitution article II.

5 Silvia Borelli “The Rendition of Terrorist Suspects to the United States” in Andrea Bianchi (ed) *Enforcing International Law Norms Against Terrorism* (Hart Publishing, Oxford, 2004) at 351.

6 *Sydney Morning Herald*, (Australia, 10 January 2006).

7 See Borelli, above n 5, at 352.

8 *Ibid*, at 353, citing *Attorney-General of the Government of Israel v Eichmann* (District Court of Jerusalem (1961), 33 ILR 5, affirmed Supreme Court of Israel (1962) 36 ILR 277).

9 “Although the seizure was wrongful nevertheless the detention is valid”: at 357.

ject of indication by the victims before the domestic courts of the abducting state, independently from any protest of the territorial state... The Human Rights Committee has held in several decisions that forcible abduction for the purpose of criminal prosecution represents a violation of the individual rights protected by the international covenant in civil and political rights. The Committee has constructed an international prohibition of forcible abduction into the context of human rights protection, framing the issue is one concerning the violation of individual rights and not of inter-state obligations, to the extent that collusion or consent of the State from whose territory the person abducted is irrelevant.

So in *R v Horseferry Road Magistrates Court ex parte Bennett*<sup>10</sup> the applicant for habeas corpus, a New Zealander, succeeded in his claim that his kidnapping from South Africa to face criminal trial in England was unlawful if the police prosecuting or other executive authorities have been a knowing party to the abduction.<sup>11</sup>

The difference of approach between English law, following New Zealand authority, and the practice of rendition is at first sight acute. However should the *Horseferry Road* case, which concerned simple dishonesty over acquiring a helicopter, be applied to an Eichmann?

There is need to stand back.

## II. PERSPECTIVE

The 20th century had accustomed society to the torment of national and international war; human rights abuse within a state had reached its zenith under Mao, Stalin, Hitler, Pol Pot and others. Also terrorism in various forms had existed before the term entered the English language in 1795 with reference to Jacobinism in France. Grave risk is no novelty to New Zealanders. The war generation coped with the invasion threat of 1942 that was averted by the Battle of the Coral Sea and Midway. It was followed by the Cold War and particularly the Cuba/Berlin nuclear crisis, but warfare between states, even on such massive scale, was subject to certain constraints under the dual forces of the international Law of War and the Realpolitik of Mutually Assured Destruction.

Modern terrorism is another thing. First, rather than involving identifiable national blocs, it is largely faceless. Second, the use of modern means of communication including aircraft and the cell phone as actual weapons of destruction, as in New York, Washington, Madrid and London, and the cross-border reach of terrorism as in Bali, has renewed the kind of fears that were thought to have receded in 1989 with the removal of the fear of Soviet intercontinental ballistic missiles. Third, despite rhetoric about “war on terror”, the events of 9/11 simply do not fit into either familiar category, of war, traditionally between states; and of crime, that is merely domestic.<sup>12</sup> So it is both understandable and appropriate that governments throughout the world have reacted vehemently to what has rightly been seen as a novel threat requiring novel responses.

However that raises in turn questions of what are the proper limits of response and how are they to be maintained. What are we doing, and should we be doing, in response to one genus of violence, terrorism, in a world where another, torture, has become a regular news feature as has

10 *R v Horseferry Road Magistrates Court ex parte Bennett* [1994] 1 AC 43.

11 Alan Jones and Anand Doobay *On Extradition and Mutual Assistance* (Sweet & Maxwell, Andover, 2005) at 93-101.

12 See Jennifer Elsea “Terrorism and the Law of War: Trying Terrorists as War Criminals before Military Commissions” Congressional Research Service, The Library of Congress, Order Code RL31191 11 December 2001. “Dissuasion Nucléaire: M Chirac Sévèrement Critique en Allemagne”.

renewed state interest in the ultimate form of violence, nuclear weapons?<sup>13</sup> What is happening to the rule of law?

### III. PRINCIPLE

It is as well to start with principle. David Hume stated:<sup>14</sup>

In all governments, there is a perpetual intestine struggle, open or secret, between Authority and Liberty; and neither of them can ever absolutely prevail in the contest. A great sacrifice of liberty must necessarily be made in every government; yet even the authority, which confines liberty, can never, and perhaps ought never, in any constitution, to become quite entire and uncontrollable [sic].

Professor Taggart's *Province of Administrative Law*<sup>15</sup> confirms that "...the state's night-watchman functions – *war* and the *administration of justice* – [remain] primary and essential..."

Whatever the reason, people behave badly; we can no more do without protections against terrorism than dispense with our army, our police, our insurance policy and the lock on our front door. However, how to reconcile the state function of responding to terrorism with the public interest in liberty presents formidable challenges.

### IV. SOME EXAMPLES

#### A. *England*

It is illuminating, and troubling, to observe what is happening in the states with which we identify most closely. I begin with England, via a brief deviation to Switzerland.

In an address at another University in May 2003, I mentioned a holograph manuscript which an old Swiss friend had lent to me of the laws of the Swiss canton of Valais from 1597 to 1773. At an early point under "Article 2 – of the duty of judges" it states:

7 A judge who is minded to employ torture must examine seriously the physical strength or weakness of the offender and therefore make use of more or less powerful torture in proportion to the needs of the occasion and in conformity with the law and the opinions of academic writers.

13 Jacques Chirac "Protéger Nos Intérêts Vitaux" *Le Monde* (France, 20 Janvier 2006) at 20. For international criticism see: "Dissuasion Nucléaire: M Chirac Sévèrement Critiqué en Allemagne" *Le Monde* (France 21 Janvier 2006) at 10.

14 Steven M Cahn (ed) "Of the Origin of Government" (1777) in *Classics of Modern Political Theory* (Oxford University Press, Oxford, 1997) at 517. John Stuart Mill added, following Toqueville in "Democracy in America":

The "people" who exercise the power are not always the same people with those over whom it is exercised; and the "self-government" spoken of is not the government of each by himself, but of each by all the rest. The will of the people, moreover, practically means the will of the most numerous or the most active *part* of the people; the majority, or those who succeed in making themselves accepted as the majority; the people, consequently *may* desire to oppress a part of their number; and precautions are as much needed against this as against any other abuse of power. The limitation, therefore, of the power of government over individual loses none of its importance when the holders of power are regularly accountable to the community, that is, to the strongest party therein. This view of things, recommending itself equally to the intelligence of thinkers and to the inclination of those important classes in European society to whose real or supposed interests democracy is adverse, has had no difficulty in establishing itself; and in political speculations "the tyranny of the majority" is now generally included among the evils against which society requires to be on its guard.

Mary Warnock (ed) *Utilitarianism and On Liberty* (Blackwell Publishing, Oxford, 2008).

15 John Allison *Theoretical and Institutional Underpinnings of a Separate Administrative Law* (Hart Publishing, Oxford, 1997) at 80.

My reference was directed to the fact, which seemed odd, that the common law of England and New Zealand had only just begun to use the concept of proportionality in a systematic way. It did not occur to me that fifteen months later judges in the very home of constitutionalism would be endorsing not the use of proportionality but the admission of evidence obtained by torture. Yet such was the decision of two greatly respected members of the Court of Appeal of England in *A v Home Secretary*.<sup>16</sup> That this should be permitted, for the first time since the abolition of Star Chamber in 1640, is the starkest evidence of the effects of 9/11.

### B. *The United States of America*

It was of course the United States navy and naval aviators who fought and won the Battle of the Coral Sea and Midway. New Zealanders remain grateful and retain close bonds of friendship; such jurists as Benjamin Cardozo and Ruth Bader Ginsburg are among those most admired in this country as setting the standards for the rule of law. Yet in the United States we have the evidence of Guantánamo Bay, termed by a former Lord Chief Justice in a judgment a legal “black hole” in which the applicant was arbitrarily detained;<sup>17</sup> of abuse of detainees; and of the claims of “rendition”. In his “*Chain of Command*”,<sup>18</sup> the Pulitzer Prize-winning journalist Seymour Hersh correctly wrote:

International law prohibits the rendition, or forced return of any person, no matter what his status or suspected crime, to a foreign locale where he would be at risk of torture or mistreatment.

He reported that:<sup>19</sup>

On December 18, 2001, American operatives participated in what amounted to the kidnapping of two Egyptians, Ahmed Agiza and Muhammed al-Zery, who had sought asylum in Sweden. The Egyptians, believed by American intelligence to be linked to Islamic militant groups, were abruptly seized in the late afternoon and flown out of Sweden a few hours later on a US government –leased Gulfstream private jet to Cairo, where they underwent extensive, and brutal, interrogation...

Once in Egypt, Agiza and Zery have reported through Swedish diplomats, family members and attorneys, they were subjected to repeated torture by electrical shocks distributed to electrodes that were attached to the most sensitive parts of their bodies.

There have since been many similar allegations of “rendition” for such purposes.<sup>20</sup>

<sup>16</sup> *A v Home Secretary* [2005] 1 Wai L Rev at 414.

<sup>17</sup> *R (ex parte Abbasi) v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1598 6 November 2002 at [64]. On 16 February 2006 Collins J gave leave for three British residents to seek a court order requiring the Home Secretary to petition for their release. He observed that the United States’ idea of what constitutes torture “is not the same as ours and doesn’t appear to coincide with that of most civilised countries”: *Weekend Herald* (New Zealand, 18 February 2006) at B9.

<sup>18</sup> Seymour Hersh *Chain of Command* (HarperCollins, New York, 2005) at 55.

<sup>19</sup> *Ibid.*, at 53-4.

<sup>20</sup> “La Suisse Aurait la Preuve de Prisons de la CIA en Roumanie” *Le Monde* (France, 10 Janvier 2006) at 5; “CIA Le Scandale qui Embarras l’Europe; de Prisons Poloniases Vraiment Très Discrètes” *Polityka* (Varsovie) *Courier International* (France, 15-21 December 2005) at 16; “Que Savait-on Vraiment à Berlin?” *Die Zeit* (Hambourg), *ibid.*, at 7.

### C. Australia

Even in our closest friend Australia, with which we literally share certain parts of our legal system,<sup>21</sup> there is some evidence of departure from normal standards. In *Al-Kated v Godwin*<sup>22</sup> the appellant, a stateless person, had arrived in Australia without a visa. He was taken into immigration detention and applied for a visa. His application failed. He wrote to the Minister asking to be removed. Removal did not take place, not through any fault of his or of the Australian authorities, but because necessary international co-operation could not be obtained. The High Court held, over the dissent of three of the four senior members including the Chief Justice, that the Migration Act 1958 authorises and requires the indefinite detention of a non-citizen even if his request that he be removed from the country cannot be given effect in the foreseeable future. There was no suggestion that if given bail pending removal he would commit any criminal offence. So whereas an actual offender would have the assurance of release after a finite sentence, for such non-offenders the law in Australia at the moment is simply “no bail; stay in prison indefinitely”.<sup>23</sup>

### D. Countervailing Trends

As will appear, there are countervailing trends. In England the House of Lords has responded to the torture issue. The United States Supreme Court has already overruled decisions of lower courts that they lacked jurisdiction to review events at Guantánamo Bay.<sup>24</sup> In the original presentation of this paper I expressed confidence that the Court that decided *Marbury v Madison*,<sup>25</sup> striking down even statutes that infringe the United States Constitution, would endorse the simple precept now adopted by the common law that, wherever executive authority is exercised, even the formerly unassailable Royal prerogatives, there the writ of the courts will run to review its legality.<sup>26</sup> I do not doubt that in Australia in light of the English and New Zealand jurisprudence, to which I will refer, the minority judgments of the High Court will ultimately prevail.

## V. “THE WORLD TURNED UPSIDE DOWN”

So the question must be asked: are things so bad that we can no longer afford to maintain the basic decencies that we have treated as the mark of our very civilisation? There is certainly deep cause for concern. In a review cited on the cover of Philip Bobbit’s *The Shield of Achilles*<sup>27</sup> Lord Patten states that “We are all about to have our view of the world turned upside down by this book”. Bobbit’s thesis is that:

21 See (New Zealand) Commerce Act 1986 and (Australia Federal) Trade Practices Act 1974 giving the courts of each state jurisdiction over cases in the other. It is hoped and expected that stage II Closer Economic Relations will further extend mutual co-operation.

22 *Al-Kated v Godwin* (2004) 219 CLR 562.

23 Compare *Chief Executive of the Department of Labour v Yadegary* [2008] NZCA 295.

24 *Boumediene v Bush* 553 US 723 (2008).

25 *Marbury v Madison* (1803) 5 US 137.

26 See Philip Joseph *Constitutional and Administrative Law in New Zealand* (2nd ed, ThomsonReuters, Wellington, 2001) at 17.6.2. Cf the European concept of *espace juridique* discussed by Philip Leach in “The British Military in Iraq – the Applicability of the *Espace Juridique* Doctrine under the European Conventions on Human Rights” [2005] Public Law 448.

27 Philip Bobbit *The Shield of Achilles: War, Peace, and the Course of History* (Alfred A Knopf, New York, 2002).

We are entering a period... when very small numbers of persons, operating with the enormous power of modern computers, biogenics, air transport, and even small nuclear weapons, can deal lethal blows to any society. Because the origin of these attacks can be effectively disguised, the fundamental bases of the State will change... today a question confronts the constitutional order. It is whether and how states can continue to exist with ever more ubiquitous and powerful technologies that can alter or destroy our entire environment. These technologies include weapons of mass destruction and biogenic and cybernetic techniques. The legal institutions of the triumphant parliamentary states [he is referring to what he calls "the long war" from 1914 to the fall of the Berlin wall in 1990] are committed to the protection of individual rights and civil liberties. To protect these institutions in the face of these new challenges will require a strategic ingenuity that would tax the gifts of the historic innovators [ever since Thycidides].

It is of interest to see what has happened at home.

## VI. NEW ZEALAND'S TERRORISM LAW AND POLICY

### A. *Detention and Bail*

Just ten days after the events of 11 September the New Zealand Immigration Service introduced a policy following which, as Glazebrook J observed in her judgment in the Court of Appeal in the *Refugee Council*<sup>28</sup> case, the rate of detention of refugee status claimants was increased from five per cent to 94 per cent. Although terrorist suspects have always had the right under the Immigration Act 1987 to apply for bail,<sup>29</sup> it was held that there is no jurisdiction to grant bail in such cases to refugee status claimants,<sup>30</sup> but on 17 June 2002 Parliament made explicit the right of a refugee status applicant to apply for bail.<sup>31</sup>

The final development on the bail front was *Zaoui v Attorney-General*.<sup>32</sup> The Supreme Court rejected the Crown's submission that there is no right to apply for bail in cases under Part 4A of the Immigration Act which concerns "special procedures in cases involving security concerns" and granted Mr Zaoui bail.

### B. *Deportation and Other Measures to Deal with Terrorism*

Sections 72 and 73 of the Immigration Act empower the Minister to certify that the continued presence in New Zealand of any named person constitutes a threat to national security and to order the deportation from New Zealand of suspected terrorists.

The Part 4A provisions which have affected Mr Zaoui were enacted in 1999. They provide for the issue by the New Zealand Security Intelligence Service of a certificate that a person is a security risk or a threat to national security and for review of such certificate by the Inspector-General, who must be a retired High Court judge. The Court of Appeal held that despite an ouster clause

28 *Attorney-General v Refugee Council of New Zealand* [2003] 2 NZLR 577 at 655.

29 Immigration Act 1987, s 79(2)(b)(ii).

30 As Judge of first instance in the *Refugee Council* case [2002] NZAR 717 at 769, convention prevents me from commenting on my decisions and on the judgment of a plurality of the Court of Appeal that I had been wrong to hold *inter alia* that refugee status claimants were entitled to apply for bail.

31 Immigration Amendment Act 2002, s 9.

32 *Zaoui v Attorney-General* [2005] 1 NZLR 577.

there is a right of judicial review of the preliminary decision of the Inspector-General.<sup>33</sup> That decision has been substantially upheld by the Supreme Court.<sup>34</sup>

On 17 June 2002 Parliament further strengthened the power of the New Zealand authorities to deal effectively with crimes with transnational aspects.<sup>35</sup>

Soon afterwards it enacted the Terrorism Suppression Act 2002 which empowered the Prime Minister to designate a person or organisation as a terrorist entity and creating an offence punishable by 14 years imprisonment for participating in such group. Importantly, the statute as enacted maintained the jurisdiction of the High Court to subject any such designation to judicial review.

In the light of what has happened elsewhere it is notable that a clause in the Bill as introduced into the House<sup>36</sup> would have excluded judicial review. However it was sensibly recognised that the judicial power of review of executive authority is essential, notwithstanding the sensitivity of the subject-matter, and when the Foreign Affairs, Defence and Trade Select Committee reported back on 27 May 2002, that clause was removed.<sup>37</sup> It is comforting, having learned of the difficulties in other jurisdictions,<sup>38</sup> to discern what balanced and proportionate decisions have been reached by the New Zealand Parliament after fervent and sometimes heated debate of these acutely difficult and important issues.

## VII. ENGLAND

In England too, a proportionate approach has been taken by its highest court. In an earlier phase of *A's* case, *A v Secretary of State for the Home Department*<sup>39</sup> which did not involve torture, the Home Secretary had issued certificates that the nine appellants, all non-British nationals, were suspected of being terrorists. Although a similar number of British nationals presented similar risks, none had been detained. Two of the appellants elected to leave the country; one was transferred to Broadmoor Hospital as mentally ill; one was released on strict bail conditions; another's certificate was revoked. None had been criminally charged nor was any criminal trial in prospect. All challenged the lawfulness of their detention.

The House of Lords held that the choice of an immigration measure to address the security problem the United Kingdom faced was unlawful. Since other measures were regarded as sufficient to deal with the activities of British nationals it was hard to see why a similar regime should not suffice for non-nationals so that they had to be detained, and the fact that two detainees had secured release by leaving for another country was hard to reconcile with a belief in their capacity to inflict serious injury to the people and interests of the United Kingdom. There was no authority

33 *Zaoui v Attorney-General (No 2)* [2005] 1 NZLR 690.

34 *Attorney-General v Zaoui* [2005] NZSC 38.

35 Crimes Amendment Act 2002; Extradition Amendment Act 2002.

36 Terrorism (Bombing and Financing) Bill 2002, clause 17O.

37 By clause 17LA.

38 For comment on events in England see André le Sueur "Three Strikes and It's Out? The UK Government's Strategy to Oust Judicial Review From Immigration and Asylum Decision-Making" [2004] Public Law 225. Following heavy debate in the Commons and a critical report by the Joint Committee on Human Rights of the House of Lords and the House of Commons s 103A of the Asylum and Immigration (Treatment of Claimants etc) Act 2004 now admits a single claim judicial review to be made within narrow time constraints but with judicial power to extend time where an application "could not reasonably practicably" have been made within time.

39 *A v Secretary of State for the Home Department* [2005] 2 AC 68. It is admirably discussed by Lady Justice Arden "Human Rights in the Age of Terrorism" (2006) 121 LQR 604.

to support the proposition that, in times of emergency, a state may lawfully discriminate against foreign nationals by detaining them, yet not detaining those of its own nationals who posed the same threat.<sup>40</sup>

Of the greatest importance, in *A v Home Secretary (No 2)*<sup>41</sup> on appeal from the Court of Appeal's torture decision, a nine-member bench of the House of Lords reversed the Court of Appeal's judgment. In the wake of the latest London bombings, in a memorable decision, the Law Lords reasserted the rule stated by Sir John Fortescue in the 1460s, affirmed by Sir Edward Coke in 1644 and admired by Voltaire in 1766 – that evidence obtained by torture will not be admitted in an English court.

### VIII. WHERE SHOULD NEW ZEALAND HEAD?

It is not however enough simply to leave it at that. We now have our own final court; it is for New Zealanders to decide what our policy will be, and while ultimate policy-making is a matter for Parliament, it is entitled to the views of others in the community.

No context provides a greater challenge than this. It takes each of us well beyond our comfort zone because it transcends any individual competence, but it is too critical to be ignored as just too hard. My present views result from reading and talking with friends and colleagues in New Zealand and Europe and reflecting on what the law and lawyers can contribute, including identification of one's own prejudices and the assessment of evidence. They are inevitably partial and provisional. My attempt to respond to the invitation to address this topic should be seen simply as a sprat, whose function is to be attacked and demolished by larger fish. I am cheered by the prospect of their being devoured in turn by still larger fish higher up the food chain.

### IX. MY THESIS IS FOUR-FOLD

#### A. *The Problem Cannot be Left to Governments Alone*

While the role of State governments is vital, the responses cannot simply be left to them. There is also needed the informed and active contribution of the wider community, both internationally and locally, organisationally and individually. Among the leaders must be the intellectuals who work in, or are graduates of, its universities.<sup>42</sup> The newly established Oxford Internet Institute has argued<sup>43</sup> that the Internet contains means of renewing the democratic ideal, whose different forms

40 The decision was discussed by Justice Ginsburg in [2005] CLJ 575 at 584.

41 *A v Home Secretary (No 2)* [2006] 2 AC 221.

42 Fifteen years ago the statute law of New Zealand was changed to provide:

- (1) that academic freedom and the autonomy of universities are to be preserved and enhanced;
- (2) that academic freedom includes the freedom of academic staff and students, within the law, to question and test received wisdom, to put forward new ideas and to state controversial or unpopular opinions;
- (3) that universities are primarily concerned with more advanced learning, the principal aim being to develop intellectual independence;
- (4) they accept a role as critic and conscience of society.

Those responsibilities must apply equally to the alumni who have added worldly experience to the privilege of university training.

43 OII Forum Discussion Paper No 4 "A New Agenda for Democracy" (January 2005).

seen in Switzerland's referenda and current proposals for systematic education<sup>44</sup> and communication with the community can enrich the systems we have inherited from an earlier age.<sup>45</sup> As world citizens New Zealanders are as much concerned with securing the right answers as anyone else<sup>46</sup> and are as well positioned to do so, but we need to create means to engage.

### B. *There is a Need to Demystify "Terrorism"*

"Terrorism" is only too real, but it needs to be demystified by being stripped of its status as an unspecific sinister abstraction. Instead its particular manifestations must be examined closely so that both its actual components and their causes can be identified.

### C. *Need to Identify and Deal with the People*

The next point is to identify effectively the humans whose conduct constitutes the acts of terrorism. It is of course necessary to provide against those whom I will call "Category B": the bombers, as in other disaster scenarios, the managers of out of control nuclear reactors and the flight crew in an aviation disaster, who, like the mules who import drugs appear to carry immediate responsibility. Certainly the law must respond effectively to them. The British, for instance, have sought to deal with them by what are called "control orders" made under the Prevention of Terrorism Act 2005, which empowers the imposition of stringent conditions analogous to strict terms of bail. However much more important are those others "Category A", who are responsible for the policy (or lack of it) that has caused or simply permitted the conduct of their Category B subordinates. So long as they are effective there will be a continuing supply of Category B personnel. Modern thinking on disaster avoidance, such as the work by the Nobel physicist Georges Charpak and others in *De Chernobyl en Chernobyls*,<sup>47</sup> points to the need to get to the ultimate controlling minds. How can they be changed?

### D. *History Shows General Ability for Redemption*

The answer to that can be found in the history of violence across the continuum from full scale war down to current youth offending. It is reflected in the Oxford Dictionary's entries for "terrorism". Beginning with France in 1795, the terrorist activities included occurrences in Ireland in 1861 and 1958, Algeria in 1963 and South Africa in 1973. Each gives pause for thought. The social reasons for the French Revolution<sup>48</sup> are well known and led to, even if they did not justify, the Terror;

44 OII Forum Discussion Paper No 2 "Innovative pathways to the next level of e-learning"; OII Research Report No 2 "Towards institutional infrastructures for e-science"; OII Research Report No 4 "Towards a cyberinfrastructure for enhanced scientific collaboration: providing 'soft' foundations may be the hardest part".

45 Consider the proposal of the English aviator and writer Derek Dempster, brought up in the international city of Tangier in Morocco, who drew on his experience with Moorish, Dutch, French, Spanish and American classmates who were Catholic, Protestant, Jewish, Muslim and Orthodox among others for an imaginative proposal to internationalise the land containing the most holy shrines of Israel, Christendom and Islam – the Wailing Wall, the Church of the Nativity, the Dome of the Rock and Al Aqsa mosque "Is the world's end nigh?" 5 August 2002.

46 During World War II "[p]roportionately, New Zealand's losses were significantly more than those suffered by the United Kingdom and twice those of Australia": John Crawford (ed) *Kia Kaha: New Zealand in the Second World War* (Oxford University Press, New York, 2002) at 3.

47 George Charpak and others from *Chernobyl to Chernobyls* (Odile, Jacobs, Paris, 2005). More accessible is Victor Bignell and Joyce Fortune *Understanding Systems Failures* (Manchester University Press, Manchester, 1984).

48 Adolph Thiers *Révolution Française* (Bureau de Publications Illustrées, Paris, 1839).

Pitt<sup>49</sup> and Gladstone<sup>50</sup> understood the need to stop the abuse of the Irish that led to the excesses of the Irish Republican Army; the French are currently repenting of the abuses in Algeria;<sup>51</sup> and Mandela's reasons for joining the leadership of the African National Congress are now tolerably understood. Incentives to violence disappear only when the fundamental value of human dignity is accorded to the enemy, as at the Treaty of Westphalia of 1648 which recognised both the nation state and the right of religious freedom<sup>52</sup> and in the case of Te Kooti;<sup>53</sup> as in Malaya during the period of confrontation;<sup>54</sup> as in Northern Ireland when after some 300 years of angst the British finally changed their policy so as to see hearts and minds as their true target; as, I am told, in parts of Iraq where troops who had served in Northern Ireland brought that experience to bear.

I share the opinion memorably expressed by Archbishop Tutu:<sup>55</sup> that while there may be some in the world who are irredeemably bad, they are a tiny minority.<sup>56</sup> Like the domestic criminal law, our institutions dealing with terrorism should be aimed predominantly at prevention and rehabilitation rather than punishment; undue punishment tends to intensify the problem it seeks to prevent. As the Constitutional Court of South Africa showed in the death penalty case,<sup>57</sup> mere force or threat of force is not sufficient by itself to prevent violence.<sup>58</sup> It must never be forgotten that respect for others' dignity is fundamental to all forms of human relations – from those between parent and child to those of states over nuclear ambition.

In criminal sentencing following any crime of violence there is an understandable desire and, to a degree, justifiable need for punishment. Although judicial experience teaches that to over-sentence a violent offender may place at risk further victims because a disproportionate sentence is unfair and will breed resentment and brutality. Where the law is reasonably seen as unjust respect for the rule of law is destroyed.

## X. THE RESPONSES

Since metaphors can distract attention from reality, rather than referring to “the war on terror” I prefer to speak of the dual policy of defending against aggression and improving relations. Each is essential.

Mutuality of respect must, in my view, be the primary goal to be sought, even though there may, en route to it, be need for subsidiary, and vital, interim goals including self-defence and (within limits that this is not the occasion to discuss) defence of others. That may sometimes re-

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49 William Hague *William Pitt the Younger* (Harper Perennial, London, 2005).

50 Roy Jenkins *Gladstone* (Papermac, Basingstoke, 1995) at 276, 279-284, 347, 393, 443-4, 536-8 and 565.

51 The 2006 Paris riots, like the London bombings, appear closely associated with failure of those societies to fully embrace their immigrants.

52 Norman Davies *A History of Europe* (Oxford University Press, New York, 1996) at 565.

53 Judith Binney *Redemption Songs* (Auckland University Press/Bridget Williams Books, Auckland, 1995).

54 Scilla Elworthy and Gabrielle Rifkind *Making Terrorism History* (Rider, London, 2006).

55 “Pour une Justice Réparatrice et Guérissuseuse” *Le Monde* (France, 23 Janvier 2006) at 16.

56 See Baragwanath “Ngati Kia Puawai” (Address to New Zealand Police Management Development Conference Nelson, 8-10 November 2005)” and the account of a celebrated reformed bank robber in “Bernard Stiegler un Philosophe Interactif” *Le Monde* (France, 4 Janvier 2006) at 17.

57 *State v Makwanyane* [1995] 1 LRC 269.

58 The argument is powerfully developed by in the context of United States military power in Stephen Walt “Nous Devrons ce que la Puissance Américaine Peut et Ne Peut Par Faire” *Le Monde* (France, 22-3 Janvier 2006) at 13.

quire powerful responses to threats, but excessive zeal for the subsidiary can be inconsistent with and so risk endangering the primary goal.

Certainly there is need for careful preparation of defences. In a formidable Research Paper “Terrorism and the Law in Australia: Legislation, Commentary and Constraints”<sup>59</sup> prepared for the Australian Parliament, Nathan Hancock identifies the phenomenon of terrorism, so unfamiliar in Australia until Bali and the immediate response required: to work (as New Zealand has done) with other United Nations members to create a seamless international network of laws dealing with surveillance and intelligence, prevention of means of offending (including the formation and activities of criminal groups, controlling migration, dealing with laundered money) by suitable laws, institutions and methods including international co-operation.

Yet there are necessary limits to what civilised communities may sensibly and responsibly do. There is force in Paul Buchanan’s argument that terrorism should be dealt with under the ordinary laws of the land,<sup>60</sup> provided one adds “as far as reasonably practicable”. An astute submission on the Anti-Terrorism Bill (No 2) 2005 signed by Professor George Williams, Dr Andrew Lynch and Dr Ben Saul of the Faculty of Law at the University of New South Wales on 10 November 2005 argued:<sup>61</sup>

Individuals should not be detained beyond an initial short period except as a result of a finding of guilt by a [court] or as part of the judicial process (such as being held in custody pending a bail hearing). Detention is only justifiable as part of a fair and independent judicial process resulting from allegations of criminal conduct or where it serves a legitimate protective function and existing powers are insufficient.

Political realities must be faced. As with criminal sentencing, so in the present sphere with a triennial election cycle a long view is impossible for elected representatives unless it is actively and publicly supported by others with the privilege of education (which may come in many forms) and experience.

That includes the media who face their own challenge of balancing the competing human propensities – for delight in scandal and sensation, yet endorsing what is good and right.<sup>62</sup>

Public perception is of great importance. The reasons for Mandela’s changed reputation, from terrorist to virtual saint, are not that he changed but that society and others’ perception did. For similar reasons the Māori Wars have become the Land Wars. In some cases there has been both need for and actuality of change – usually on both sides; the Irish Republic Army is perhaps a case in point. Like delinquent children and, for that matter, the rest of us, those who do, or come to, feel themselves to be respected behave respectably.

In his *A Brief History of Neoliberalism*<sup>63</sup> David Harvey presented the challenge of filling the moral void left by the selfish excesses of the post-Reagan political philosophy. The urgency of

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59 Nathan Hancock “Terrorism and the Law in Australia: Legislation, Commentary and Constraints” (paper prepared for Australian Parliament, March 2002).

60 Paul Buchanan “Law Change a Recipe for Abuse of Power” *New Zealand Herald* (New Zealand, 18 November 2005).

61 “News” (2005) University of New South Wales Faculty of Law Gilbert + Tobin Centre of Public Law <[http://www.gtcentre.unsw.edu.au/news/docs/submission\\_AntiTerrorismBill.pdf](http://www.gtcentre.unsw.edu.au/news/docs/submission_AntiTerrorismBill.pdf)> at 15.

62 A related tension was noted by Mill: “...we compare the strange respect of mankind for liberty, with their strange want of respect for it...” “On Liberty” (fn 1) at 242.

63 David Harvey *A Brief History of Neoliberalism* (Oxford University Press, New York, 2005).

the need has been learned by leading American academics, including the Dean of the Yale Law School,<sup>64</sup> but is largely ignored.

We have been this way before. Adam Smith's lucid and compelling *Wealth of Nations*<sup>65</sup> has been the intellectual force behind virtually the entire theory and practice of market politics, but too many of his economic disciples have overlooked both its context<sup>66</sup> and thus the theme of his *The Theory of Moral Sentiments*<sup>67</sup> which is needed to balance it. There he wrote:<sup>68</sup>

Th[e] disposition to admire, and almost to worship, the rich and the powerful, and to despise, or at least, to neglect persons of poor and mean condition... is... the great and most universal cause of the corruption of society.

Sometimes an institution can properly intervene. In *R (Limbuela) v Secretary of State for the Home Department*<sup>69</sup> the House of Lords, yet again, intervened to impose minimum standards of decency in the treatment of persons in the United Kingdom. They held in that case that executive policies of refusing work permits, food and accommodation to asylum seekers whose application was made late infringed Article 3 of the European Convention on Human Rights. Requiring them to live rough and to beg constituted treatment that was in law "inhuman and degrading". Lord Bingham cited Shakespeare's *Sir Thomas More*: "your mountainous inhumanity". Relief was granted.

That Court appreciated that society must care for its disadvantaged, even those who are only temporary visitors. The response of the asylum seekers and their compatriots to the sensitivity of the highest Court can be imagined.

64 See Anthony Kronman "The Value of Moral Philosophy" (1997) 111 Harvard Law Review 1751 and Nussbaum "Flawed Findings: the Philosophical Critique" (1997) 64 Chicago Law Review 1197.

65 Edwin Cannan (ed) Adam Smith *An Inquiry into the Nature and Cause of the Wealth of Nations* (University of Chicago Press, Chicago, 1976).

66 See Adam Nicholson *Men of Honour: Trafalgar and the Making of the English Hero* (Harper Collins, New York, 2005) at 250-251:

The 18<sup>th</sup> Century in England saw man's existence as essentially social...As William Hutton, the free commercial thinker and bookseller in Birmingham, wrote in 1781:

For the intercourse occasioned by traffic gives a man a view of the world and of himself; removed the narrow limits that confine his judgment; removes his prejudices; and polishes his manners. Civility and humanity are ever the companions of trade; the man of trade is a man of liberal sentiment; a barbarous and commercial people is a contradiction.

These are, of course, the ideas on which Adam Smith drew. Sociability, never more than when in the service of commerce, was goodness. Virtue was no lonely thing, as it had been for the puritan. It was a full and generous humanity, an acceptance of the human reality of other people and a duty of benevolence among men.

67 DD Rahael and AL Macfie (eds) Adam Smith *The Theory of Moral Sentiments* (Indianapolis, United States, 1984).

68 At 72, he continued:

That utility is one of the principal sources of beauty has been observed by every body, who has considered with any attention what constitutes the nature of beauty...(p209).

Nothing could have greater utility, and therefore beauty, than Smith's theory of the market, but he went on to add:

But that this fitness, this happy contrivance of any production of art, should be more valued, than the very end for which it was intended; and that the very end for which it was intended;

(at 210)...has not, so far as I know, been taken notice of by any body...wealth and greatness are mere trinkets of frivolous utility, no more adapted for procuring ease of body and of mind than the tweezer-cases of the lover of toys (at 212).

69 *R (Limbuela) v Secretary of State for the Home Department* [2005] UKHL66; [2006] 1 AC 396.

The need for those within the New Zealand legal system to strive to increase public confidence in it is painfully clear from statistics produced by Sir Thomas Thorp in a recent paper,<sup>70</sup> showing that Māori and Pacific Islanders are disproportionately reluctant to seek redress for miscarriage of justice.

There are however obvious limits on what we are able to achieve. They are seen in one tragic case where the plaintiff, healthy in England where AIDS drugs were available, was removed to an African state where they were not and where she would die within months<sup>71</sup> and in another refugee test case about minimum standards of living.<sup>72</sup> Each shows the impossibility of imposing, by judicial usurpation of executive responsibility for immigration policy, the lifting of foreign standards to meet our own. However just because we cannot do everything affords no excuse for doing nothing.

All of us, politicians, public servants, academics, members of the business community, even lawyers and judges, can contribute to the process of doing what we can. In earlier addresses I have proposed initiatives in relation to education of the disadvantaged<sup>73</sup> and in respect of so-called “Māori crime”.<sup>74</sup> In each instance where the underlying causes have been identified and responded to with imagination and persistence there has been evidence of remarkable transformation. It is to be hoped that similar transformations may eventuate in relation to terrorism.

Sir John Keegan has written authoritatively on what is a vital element of any war. In *Intelligence in War...from Napoleon to Al Qaeda* he states: “[t]he challenge to the West’s intelligence services is to find a way into the fundamentalist mind and to overcome it from within.”<sup>75</sup>

While it would be naïve to suggest any single or simple answer to the turmoil in Iraq, part of the answer may be provided by Bernard Lewis (whom the Wall Street Journal calls “the world’s foremost Islamic scholar”). He has written that: “...the Islamic dispensation does indeed bring a message of equality. Not only does Islam not endorse...systems of social differentiation; it explicitly and resolutely rejects them.”<sup>76</sup>

He also speaks of how: “...new ideas of freedom and participation, inspired by English practice and French theory, gradually found their way into the Middle East.”<sup>77</sup> He adds that:

...at the beginning of the Nineteenth Century a poor man of humble origin had a better chance of attaining to wealth, power and dignity in the Islamic lands than in any of the states of Christian Europe.

The rise of systemic selfishness in the West has tended to swing the pendulum back in that direction. With her insight as the first female Law Lord, Baroness Hale, has emphasised:<sup>78</sup>

Democracy is founded on the principle that each individual has equal value. Treating some as automatically less valuable than others not only causes them pain and distress but also violates their dignity as human beings.

70 Sir Thomas Thorp “Miscarriages of Justice” (Legal Research Foundation, 2006).

71 *N v Secretary of State for the Home Department* [2005] 2 AC 296.

72 *Januzi v Secretary of State for the Home Department* [2006] UKHL 5 15 February 2006.

73 David Baragwanath “The Right to Education: Guarding the Guardians” (ANZELA Annual Conference “Innovation and Internationalisation: Pushing the Boundaries of Education Law”, Wellington, New Zealand, 23 September 2004).

74 Baragwanath “Overview: the Treaty and the Police”, above n 56.

75 Sir John Keegan *Intelligence in War...from Napoleon to Al Qaeda* (Key Porter Books, New York, 2003) at 365.

76 Bernard Lewis *What Went Wrong? Western Impact and Middle Eastern Response* (Oxford University Press, Phoenix, 2002) at 91.

77 *Ibid*, at 62.

78 Baroness Hale “The Quest for Equal Treatment” [2005] Public Law 571 at 578.

I believe that something of what was said in an address to the police may be pertinent:<sup>79</sup>

A recently republished essay – ‘Ignoring poverty as an art form’<sup>80</sup> – records the wilful refusal of Western communities to face the reality of different forms of poverty and its consequences...

This is a theme that in today’s forms of neo-liberal laissez-faire we ignore at our peril. It is often assumed that the welfare state has removed poverty. But that is to ignore the many forms it can take.

My personal view is that, unless we weaken it by causing or acquiescing in conduct inconsistent with its basic tenets, the true strength of democracy, being the people who compose the democratic state, will carry us and others through this present difficult phase. It is after all because of the basic decency of the American people and their legal system, which includes the Freedom of Information Act and a careful balance of powers, that we are able to learn about the renditions and other conduct performed in their name.

However, the plight of the poor of New Orleans reminds us of the warning of Toqueville<sup>81</sup> after his 1830s visit to that great country, in the phrase echoed by Hume, about the tyranny of the majority, of which hardwired selfishness may be seen as a current symptom. The parable of Nelson Mandela is surely that our failure to discern others’ sensibilities and respond to their needs is an outstanding factor contributing to the existence and development of terrorism.

In his “An Intimate History of Humanity”<sup>82</sup> Theodore Zeldin of St Anthony’s College, Oxford, writes:<sup>83</sup>

One of the most important promises of democracy is that it will provide respect for everybody...[But] democracies have still not found a way to eliminate the gradations of disrespect caused by money, education and appearance.

So it was to religion that individuals most frequently turned in search of the respect they yearned for. All the world’s great churches agreed that every human being, however humble, had a spiritual dignity. The exactions of rules, the insults of employers and the humiliations of daily life seemed less intolerable when they touched the outer self, leaving intact the consolations of inner convictions. And when religion did not suffice, other creeds, like stoicism, socialism, liberalism and feminism, reinforced the defences of human dignity. The major changes in history have resulted less from revolutions displacing kings, than from individuals ignoring kings and giving their allegiance to spiritual values instead. That is still happening. The prophesy that the twenty-first century will be a religious one...does not mean that politicians are replaced by priests, but that people switch off from the mundane pressures which they cannot control. Instead they turn their energy to their private lives: sometimes that leads them to be selfish, but sometimes they react to the animosities of the big world by seeking more nurture, more generosity, more mutual respect.

Zeldin refers to fundamentalism in the West; the resolution of Pennsylvania School Board about how schools should teach Darwin’s theory of evolution, discussed by Judge Jones in *Kitzmiller v Dover Area School*,<sup>84</sup> provides an example.

79 Baragwanath, above n 56.

80 John Kenneth Galbraith “L’Art d’Ignorer les Pauvres” (2005) *Le Monde Diplomatique* October at 6. The technique goes back to Roman times and in Victorian era became an art form which we have relearned.

81 Alexandre de Toqueville *Democracy in America* (Everyman Library, 1835) at 259.

82 Theodore Zeldin *An Intimate History of Humanity* (Harper Collins, New York, 1994). See also Samuel Huntingdon *The Clash of Civilisations and the Remaking of World Order* (Simon & Schuster, New York, 1996).

83 *Ibid*, at 142.

84 *Kitzmiller v Dover Area School* United States District Court for the Middle District of Pennsylvania 400 F Supp 2d 707 Docket No 04cv2688.

In New Zealand we have the advantage of relative detachment from the atrocities that cause passion to overtake cool analysis. Cutting through the complexities of history, and psychology, putting aside the anguish and inevitable outrage of anything to do with terrorism, it is my view that the evidence points to a single dominant conclusion. It is that, having taken all proportionate measures against attack, we are best able to avert terrorist threats and to safeguard our own liberty by according justice and dignity to others by whatever means are open to us. That, by contrast with the use of legal techniques to take advantage of others, is the true expression of the rule of law.

That is not to suggest that such result is simply achieved. Rather it is only by broadening and deepening the debate, to examine what we are doing and failing to do, that we can contribute to change of attitudes and from that to change of results.

The friend with whom I began this paper concluded his letter to me:

Terrorism might be also about the right of the individual to oppose a so-called “democratic” majority – as the one which elected Hitler as the new Reich Chancellor.

Perhaps the solution is “dynamic”, never clearly defined, walking at all times on the cutting edge, in a never-ending debate, in an extreme caution for any decision which might hamper human rights – and desperately try, at each occurrence, to separate the “noble” or “just” cause from the sadistic acts of the many sick butchers the humanity always nurtured, whatever their cultural, political orientation or social class belonging.

Dealing with the poverty or lack of justice will indeed reduce terrorism, but will it eliminate the sickness of the human minds? I doubt it. And not to forget the soul crunching alternative, which one of my friends once faced in Algeria: what to do, when you arrest the man whom you know he just set a time bomb – how to ask him where is the bomb, knowing that respecting this man is to bind innocents to death? Terrible debates between those who must protect the human rights and those who collect the human debris after a bombing. Philosophy seems to be easier in the serenity of a quiet office, but anger or revenge were never good advisers.

As the celebrated philosopher and sometime New Zealander, Sir Karl Popper, observed: “... progress rests with us, with our efforts, with the clarity of our conception of our ends, and with the realism of their choice.”<sup>85</sup>

To respond in a practical way to Sir Karl Popper’s challenge, my friend’s “terrible debates” must include every thinking person.<sup>86</sup>

It was recently my privilege to take part in the United Nations Fourth Regional Workshop for Police Officers, Prosecutors and Judges in South Asia on Effectively Countering Terrorism Conference held in Thimphu, Bhutan and attended by representatives of eight South Asian states.

The first day of the Conference was notable for the illumination provided by the Judges’ long experience and first-hand understanding of the scourge of terrorism which has gravely afflicted the societies of a number of them, some of whom have experienced and are still exposed to its

85 Sir Karl Popper *The Open Society and its Enemies* (Volume 2, Routledge, New York, 1999) at 280. Sir Karl Popper added a footnote:

By the ‘realism’ of the choice of our ends I mean that we should choose ends which can be realised within a reasonable space of time, and that we should avoid distant and vague Utopian ideals, unless they determine more immediate aims which are worthy in themselves.

86 Unsung examples of personal initiatives which have had notable consequences include in Dunedin the caring for Columbo Plan students who are now leaders of Asian opinion and in Oxford the intervention by a distinguished academic to befriend a student from North Korea who is now close to the President. The current significance and potential for good of such human relations are obvious.

horrors. Their pain did not however deflect them from the consensus view that the courts must achieve adherence to the best standards of human rights as well as high levels of professional competence.

There was unanimity that winning the hearts and minds of those at risk of committing terrorist acts is the major goal from which there must be no distraction. Acting and being seen to act independently and justly is itself a material step on the way to attaining that goal.

It was noted that the events of 11 September 2001 brought home to the rest of the world realities that been long experienced by certain of the states represented. Resolution 1373 and the establishment of the United Nations Counter-Terrorism Committee Executive Directorate (CTED) have been heartening, injecting vision and energy into counter-terrorism.

The exchange of experiences under Chatham House terms was appreciated by the judges and a learning experience for all. While there must be no distraction from the classic judicial tenet of judging according to one's own judgment and conscience, finding means to continue and develop judicial communication would be of value. Cross-border judicial co-operation must be enhanced if the administration of justice is to keep pace with the rapid development of global terrorism.

Within the limits of strict compliance with the separation of powers the judges can contribute to the raising of police and prosecution standards by example of excellence and, where appropriate, drawing attention both to shortcomings and to potential means of improvement.

Equally, judges must always strive to lift their own standards to the international state of the art. Sound innovation, compatible with classic judging, was the subject of various initiatives designed to do better justice. They included involvement of victims in the determination of whether a criminal case should be dismissed for lack of evidence, and use of habeas corpus, with the government as respondent, in cases of missing persons, with the effect of a mandamus against the police to discharge the state's obligation to protect the citizen (compare *Calvin's Case*).<sup>87</sup>

There was further discussed the tension between freedom of expression, which has allowed the press to vindicate justice in a variety of circumstances, and the protection of due process from media abuse.

The need for cross-border responses to funding of terrorism was emphasised in several state contributions. So too was the law, as to which the 16 February 2011 "Interlocutory Decision on the Applicable Law: Terrorism" of the Appeals Chamber of the Special Tribunal for Lebanon<sup>88</sup> contains the most substantial discussion.

Of particular topical interest was the Bhutan phrase "let truth be supported by justice". It is exemplified by the principle applied by the law of Bhutan and applicable to counter-terrorism cases. Guided by United Nations policy but based on the Constitution of Bhutan it sees the rule of law as extending to social, economic and cultural values and operating sensitively: how does this law or policy impact on society? Does it promote happiness, not only of the people of Bhutan but, in accordance with the vision of the Fourth King, that of others? It emphasises common values and a

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87 *Calvin's Case* (1608) 7 Coke's Reports 1a; 77 English Reports 377 which held that a Scot born in Edinburgh was entitled to apply for relief to the King's Courts in London. It asserted the right of both citizens and friendly aliens within the state to protection by the Crown, stating that fundamental principle to be reciprocal to their duty of loyalty to the Crown.

88 Available on its website which may be searched as "Special Tribunal for Lebanon homepage" (see "Documentation").

deep sharing of concern for others. In this way not only is domestic law improved but a platform is created for enhancing international goodwill.<sup>89</sup>

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89 Such concern for others coincides with the policy of the Final Court of Hong Kong in *B v The Commissioner of the Independent Commission Against Corruption* FACC No 6 of 2009 decided on 28 January 2010 that the Court rejected a submission that Hong Kong's anti-corruption legislation should be construed to apply to the bribery in Hong Kong only of local officials and not of foreign officials, stating per Bokhary PJ:

21...Such a course makes a positive and important contribution to the worldwide struggle against corruption, an endeavour inherently and highly dependent on cross-border co-operation. Acting co-operatively, each jurisdiction properly protects itself from the scourge of corruption and other serious criminal activity.

# THE ARCHITECTURE OF ELECTIONS IN NEW ZEALAND: A GOVERNOR-GENERAL'S PERSPECTIVE

BY RT HON SIR ANAND SATYANAND, GNZM, QSO\*

## I. INTRODUCTION

I begin by greeting everyone in the languages of the realm of New Zealand, in English, Māori, Cook Island Māori, Niuean, Tokelauan and New Zealand Sign Language. Greetings, Kia Ora, Kia Orana, Fakalofa Lahi Atu, Taloha Ni and as it is the morning (Sign).

I then specifically greet you: Rt Hon Jim Bolger, Chancellor of the University of Waikato; Professor Roy Crawford, Vice-Chancellor; Professor Bradford Morse, Dean of Te Piringa – Faculty of Law; Distinguished Guests otherwise; Ladies and Gentlemen. Thank you for the invitation to give this public lecture for the Faculty of Law.

Before beginning, I want to welcome you, Professor Morse, in your new role as Dean of University of Waikato's Faculty of Law. With your previous experience at the University of Ottawa in Canada and your considerable scholarship in indigenous law in Canada, you bring to New Zealand a valuable perspective on our country, on particular issues relating to Māoridom.<sup>1</sup> I wish you well in your role.

You join the University at a time when it has come of age – and is celebrating the 20<sup>th</sup> anniversary of the establishment of the Faculty. You will find that the University and this Faculty has a strong and rewarding connection with the Waikato-Tainui iwi.

I understand the Faculty's Māori name, Te Piringa, was provided by the late Arikinui Dame Te Atairangikaahu, the then Māori Queen. Translated as “the coming together of people”, it links the Faculty to the manawhenua of Waikato-Tainui. Dame Te Ata's ancestor, the first Māori King, Pōtatau Te Wherowhero, predicted the need to know more of the law to benefit the people.<sup>2</sup>

With that in mind and within this audience, I have chosen to speak on “The Architecture of Elections in New Zealand—A Governor-General's Perspective”. I have been granted a unique insight over my five-year term, and now will endeavour to describe my understanding of the Governor-General's unique role in the triennial cycle that starts with a living and breathing Parliament, traverses the processes of legislating and governing through to its dissolution, an election, the formation of a government, and again to a living, breathing Parliament.

This topic, and to focus on the role of Governor-General, might surprise some people. After all, elections are about voting for and electing Members of Parliament. Elections, after all, are not the preserve of one, but of many. As the New Zealand Elections website points out:<sup>3</sup>

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\* Governor General of New Zealand, Public Lecture 22 March 2011, Te Piringa – Faculty of Law.

1 “New Dean has big plans for University of Waikato Law School” (2009) University of Waikato, Waikato News <[www.waikato.ac.nz/news/archive.shtml?article=1101](http://www.waikato.ac.nz/news/archive.shtml?article=1101)>.

2 “New name for Faculty” Te Piringa – Faculty of Law (2010) <[www.waikato.ac.nz/law/faculty/te\\_piringa](http://www.waikato.ac.nz/law/faculty/te_piringa)>.

3 “General Topics” Elections New Zealand <[www.elections.org.nz/elections/concepts/](http://www.elections.org.nz/elections/concepts/)>.

Individual voters are the core of representative democracy because, together, they choose those who will make decisions for all.

What is the role of an appointed Governor-General? Those with more of an interest in constitutional matters might also ask why as Governor-General I would not simply talk about government formation and the use of the Governor-General's reserve powers in appointing a Prime Minister.

These are fair points. Governors-General are indeed appointed and, by convention, do not vote whilst in office, although like all New Zealanders they are required to be on the electoral roll, and appointment of a new government is certainly a central duty of any Governor-General. However, as I have learned over these past few years, and hope to show today, the Governor-General's role, as the Sovereign's representative, continues throughout the electoral cycle in sometimes surprising ways. It can be expressed that the Governor-General is embedded deep within the DNA of New Zealand's electoral system.

The Governor-General's role is often hidden or forgotten; many things are obscured in this area. For example the phrases "Parliament", "Member of Parliament", "House of Representatives", and, less commonly, "Member of the House of the Representatives" can be used interchangeably.

## II. CENTRAL ROLE OF GOVERNOR-GENERAL

In our constitutional arrangements, the term, "Parliament", has a specific meaning that does not necessarily fit with everyday usage. Section 14 (1) of the Constitution Act 1986 states that "There shall be a Parliament of New Zealand, which shall consist of the Sovereign in right of New Zealand and the House of Representatives".

Every volume of Hansard, the journal of Parliamentary debates, records that Parliament, as New Zealand's supreme legislative power, consists of the House of Representatives and the Governor-General. Likewise, the Act<sup>4</sup> also emphasises the lineage of the House as the same body which was established by the 1852 New Zealand Constitution Act of the Parliament of the United Kingdom.

Most legislative power is centred in the House, but that does not mean the Sovereign, or her representative, does not play any role. As the life of each Parliament proceeds, there is constant connection between Parliament House and Government House as each piece of legislation comes to receive Royal Assent. In my experience, unless requested, this usually occurs without ceremony at Government House in Auckland or Wellington.

In practice this is played out by receipt of a Bill, which has been certified by the Clerk of the House as having been examined and of having been passed by a majority in the House, along with advice from the Attorney-General, stating that there are no reasons why Royal Assent should be withheld, and formal advice from the Prime Minister requesting that the Royal Assent should be granted.

By constitutional convention, the Sovereign and the Governor-General as her representative, acts on the advice of Ministers of the Crown. For all legislation that I have been asked to assent to by signing, I have scanned the text and have occasionally sought additional clarification. I have taken a similar approach to signing Regulations at Executive Council. My view is that I should be able to express to a 13 year old essentially what I have signed and the reasons for it. As can be imagined, this calls for an active but detached role, and the exercise of careful judgment to identify

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4 Constitution Act 1986, s 10.

any risk to the Sovereign or the nation and yet to give due respect to the integrity of the process by which legislation and regulations have been created.

No British Monarch has refused to give the Royal Assent since Queen Anne declined to sign a Bill that would have established a Scottish militia in 1708.<sup>5</sup> Nor have New Zealand's Governors-General ever refused assent.<sup>6</sup>

During the life of this present Parliament, assent has been given to a law that makes significant changes to the administration of elections and referenda in New Zealand. The Electoral (Administration) Amendment Act 2010 amended the Electoral Act 1993, by establishing a new Electoral Commission, which took over the responsibilities of the previous Commission and the Chief Electoral Officer. The aim of this initiative is to remove duplication and to enhance administration of New Zealand's electoral processes.

### III. ELECTORAL (ADMINISTRATION) AMENDMENT ACT 2010

As Governor-General for four and a half years, I must now admit that I have lost count of the numbers of laws to which I have given assent since the first, the Coroners Act, which received Royal Assent on 29 August 2006. The Electoral (Administration) Amendment Act is one law of which I have no memory of giving assent—for the simple fact that I did not sign it!

The law received Royal Assent in the morning of 21 May last year when I was on an aircraft to Christchurch returning, via Darwin, from a State Visit to Singapore and Timor-Leste. Normally, such legislation would have been signed by the Chief Justice Rt Hon Dame Sian Elias, who would be serving as Administrator of the Government.

As Dame Sian was also overseas at the time, in accordance with the Letters Patent that establish the Office of Governor-General, the next most senior member of the judiciary, Supreme Court Judge Rt Hon Sir Peter Blanchard, was serving as Administrator and he signed it into law. I understand that there was some discussion in the Office of the Clerk of the House to ensure that it was signed before the wheels of the aeroplane touched the ground!

The Governor-General's role, however, does not end there with assent to law. Another key role is appointment of specific office holders as is set out in legislation. For example, the Electoral Commission is an independent Crown entity tasked with important electoral responsibilities. Underscoring that independence, the Act says that it must be directed, not by the Minister, but by an Electoral Commissioner to be appointed by the Governor-General on the recommendation of the House. This is one of a small group, the Ombudsmen, the Auditor-General and the Parliamentary Commissioner for the Environment, for example, who are not appointed on the advice of Ministers alone, but which call for a resolution of the House beforehand.

Documents for the appointment of people to official positions will generally include the candidates' curricula vitae, and reasons in support of the appointments. It was therefore a pleasure to appoint in August last year, Hon Sir Hugh Williams QC, a recently retired High Court Judge, as Chair of the Commission and Robert Peden as Chief Electoral Officer and member of the Com-

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5 Philip Joseph *Constitutional and Administrative Law in New Zealand* (3rd ed, Thomson Reuters, Wellington) at 221.

6 *Ibid.*, at 309-310.

mission Board. I had received advice from the Minister of Justice that the House had recommended their appointment.<sup>7</sup>

The Act states that the Electoral Commission's objective is to:<sup>8</sup>

Administer the electoral system impartially, efficiently, effectively, and in a way that—(a) facilitates participation in parliamentary democracy; and (b) promotes understanding of the electoral system and associated matters; and (c) maintains confidence in the administration of the electoral system.

It will be, as Hon Simon Power, Minister of Justice said:<sup>9</sup>

a one-stop shop for all parliamentary electoral matters including services to electors, voters, political parties, candidates, Parliament, the media, overseas electoral agencies, and international institutions.

As a result of the impending 2011 general election, I am advised it was decided not to transfer the work immediately of the Chief Registrar of Electors in enrolling voters, although legislation to bring that into effect is currently before the Justice and Electoral Select Committee.<sup>10</sup>

However, the Commission will be kept busy enough dealing with requests for registration of political parties and their logos,<sup>11</sup> managing the election itself, including the provision of public information, applications for parliamentary election programmes under the Broadcasting Act 1989,<sup>12</sup> and then reporting to Parliament after the event on the conduct of the election and recommending any legislative or procedural changes.<sup>13</sup>

#### IV. REPRESENTATION COMMISSION

These are not the only key officials appointed by the Governor-General, who play a central role in New Zealand's electoral architecture. The members of the Representation Commission are also directly or indirectly appointed by the Governor-General, either on the advice of Ministers or the nomination of the House and confirmed by the relevant Minister.<sup>14</sup> The Representation Commission, which is administratively supported by the Electoral Commission, has the responsibility of drawing New Zealand's electoral boundaries for the general and Māori electorates.

The members of the Representation Commission are the Surveyor-General, the Government Statistician, the Chief Electoral Officer, the Chair of the Local Government Commission, and the Chief Executive of Te Puni Kokiri, who are all appointed on advice from Ministers, and the Government and Opposition representatives, who are appointed by the Governor-General on a recommendation from the House confirmed by advice from the relevant Minister.<sup>15</sup>

7 Hon Simon Power (Minister of Justice) "Appointments – Electoral Commission" (2010) New Zealand Parliament <[www.parliament.nz/en-NZ/PB/Debates/Debates/f/7/3/49HansD\\_20100818\\_00001235-Appointments-Electoral-Commission.htm](http://www.parliament.nz/en-NZ/PB/Debates/Debates/f/7/3/49HansD_20100818_00001235-Appointments-Electoral-Commission.htm)>.

8 Electoral (Administration) Amendment Act (2010), s 4c.

9 Simon Power "New Electoral Commission Up and Running Today" (2010) Beehive.govt.nz <[www.beehive.govt.nz/release/new-electoral-commission-and-running-today](http://www.beehive.govt.nz/release/new-electoral-commission-and-running-today)>.

10 Electoral (Administration) Amendment Bill (No 2).

11 Electoral Act 1993, part 4.

12 Broadcasting Act 1989, part 6.

13 Electoral Act 1993, s 8.

14 Surveyor-General, Government Statistician, Chair of the Local Government Commission, CEO of Te Puni Kokiri (appointed on advice from Ministers) and the Government and Opposition representatives (appointed on a recommendation from the House).

15 Electoral Act 1993, part 3, s 28.

Unlike other jurisdictions where electoral boundaries are decided by the legislature with occasional claims of gerrymandering, in New Zealand the Commission's decisions, after taking submissions from the public, are final.<sup>16</sup> This innovative step of establishing an independent body to make what are politically sensitive decisions was adopted by New Zealand in 1887 and later adopted as a model in Australia and Canada.<sup>17</sup>

The Representation Commission undertakes its work after each Census is undertaken by Statistics New Zealand under the Statistics Act 1975.<sup>18</sup> As will be known, Statistics Minister Hon Maurice Williamson decided to cancel this year's Census because of the Christchurch earthquake.<sup>19</sup> Interestingly, while I signed the proclamation authorising the Census, and have signed a revocation, the process cannot be so easily undone. As the Statistics Act requires the Census to occur every five years<sup>20</sup> after 1976, the law will need to be amended to delay the Census to another year.

## V. CALLING OF ELECTIONS

A key time in an electoral cycle is the announcement of the polling date. Unless the Prime Minister calls an early election, an election will be held about three years after the last one. However the choice of the specific date is a decision for the Prime Minister alone, within parameters set in the Electoral Act 1993 and s 17 of the Constitution Act 1986, which establishes three year parliamentary terms.

The power to decide when the election will occur obviously carries with it significant power and its use has occasionally provoked controversy both here and in other Commonwealth Realms. In the United Kingdom, for example, there is a proposal to move towards fixed terms, which would circumscribe the Prime Minister's power in this regard.

In New Zealand, in this year at least, there will be no such controversy because the Prime Minister, Rt Hon John Key, in February this year<sup>21</sup> announced that the election would be held on 26 November. Mr Key called me beforehand to outline his intentions.

## VI. DISSOLVING PARLIAMENT

The next step is the dissolution of Parliament and the putting in place of legal machinery for an election to be held. In early October, the Cabinet Office will prepare a proclamation dissolving the existing Parliament and another summoning its successor.

It may seem strange that one Prime Minister, who may not win re-election, should tell his or her successor when the House will reconvene. In reality, the summons date is nominal and does not commit the new Parliament to meeting on the day stipulated.

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16 Reviewing Electorates – Frequently Asked Questions <[www.elections.org.nz/elections/electorates/rep-comm-faqs.html](http://www.elections.org.nz/elections/electorates/rep-comm-faqs.html)>.

17 The Royal Commission on the Electoral System (1986) at 133. <[www.elections.org.nz/voting/mmp/royal-commission-report-1986.html](http://www.elections.org.nz/voting/mmp/royal-commission-report-1986.html)>.

18 Statistics Act 1975.

19 Maurice Williamson "Decision on 2011 Census" (2011) Beehive.govt.nz <[www.beehive.govt.nz/release/decision-2011-census](http://www.beehive.govt.nz/release/decision-2011-census)>.

20 Statistics Act 1975, s 23(1).

21 2 February 2011.

However, this long-standing practice of summoning at this stage recognises Parliament's constitutional continuity under the Constitution Act 1986. In other words, Members of Parliament may come and go, but the Governor-General and the House are always in existence.

The Governor-General then signs the two proclamations, dissolving and recalling Parliament,<sup>22</sup> which are counter-signed by the Prime Minister. In addition a document authorising the public reading of the dissolution proclamation is signed. In mid-to-late October, a person authorised by the Governor-General will read publicly the proclamation before the Clerk of the House and two witnesses. In New Zealand, the proclamation is usually read by the New Zealand Herald of Arms Extraordinary, the current holder of that office being Phillip O'Shea.

The significance of the proclamation dissolving Parliament is well outlined by former Clerk of the House and now Ombudsman, David McGee QC, in his book, *Parliamentary Practice in New Zealand* where he says:<sup>23</sup>

The Governor-General brings the life of Parliament to an end by issuing a proclamation dissolving it. The dissolution of Parliament is a legal power possessed by the Governor-General, although constitutionally the Governor-General exercises this, like the other legal powers of the office, on the advice of the Prime Minister. A proclamation dissolving Parliament generates a course of events which leads to the holding of a general election.

## VII. WRIT DAY AND CONDUCT OF ELECTION

The next building block in New Zealand's electoral architecture is Writ Day, when the Governor-General signs the Writ authorising the Chief Electoral Officer to hold a general election. In the mechanical language that is the hallmark of the Electoral Act 1993 and I might add a number of New Zealand's laws of constitutional significance, it states:<sup>24</sup>

Whenever Parliament is dissolved or expires, the Governor-General must, not later than 7 days after the dissolution or expiration, issue a writ in form 3 to the Electoral Commission requiring the Electoral Commission to make all necessary arrangements for the conduct of a general election.

The Governor-General's signing of the Writ, which is counter-signed by the Minister of Justice, is a public event to which media are invited to attend. As the final election results are later to be appended to the back of the Writ, it is a surprisingly large piece of paper!

Before the 2008 election, this ceremony, which was the last event at Government House Wellington before the closure for a major conservation project, was also an opportunity to encourage all New Zealanders to enrol and to vote. In particular, I emphasised how cherished and important the right to vote was and I quoted suffragette, Kate Sheppard, who had once said: "Do not think your single vote does not matter much. The rain that refreshes the parched ground is made up of single drops".<sup>25</sup>

The election campaign proceeds and by convention the Governor-General keeps a low profile, avoiding events that might in any way be seen as having any political or controversial aspect.

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22 Constitution Act 1986, s 18.

23 David McGee *Parliamentary Practice in New Zealand* (3rd ed, Dunmore Publishing Limited, Wellington, 2005) at Chapter 9.

24 Electoral Act 1993, s 125.

25 Kate Sheppard, as quoted in David McGill (ed) *The Reed Book of New Zealand Quotations* (Reed Publishing, Auckland, 2004) at 222.

### VIII. FORMATION OF GOVERNMENT

Soon after election night, negotiations to form the new Government begin in earnest. The Governor-General plays no role in these negotiations because they are inherently political rather than constitutional matters as I will outline shortly.

In going on to appoint a Prime Minister after an election, the Governor-General uses what are called “reserve powers”. These powers have been defined as the Governor-General exercising independent judgment to appoint or dismiss a Prime Minister, to refuse a request for dissolution or to force dissolution, or to refuse assent to legislation,<sup>26</sup> although there is some dispute about the last.

New Zealand constitutional law academic Professor Philip Joseph, of the University of Canterbury, has however called the term “reserve powers” a “misnomer”. As he notes:<sup>27</sup>

While these powers are exercised only in extremity, they are all aspects of the Governor-General's ordinary legal powers delegated by the Letters Patent, or re-enacted under the Constitution Act 1986. [These] situations are distinguished, not by an additional or exceptional power, but by the rejection or lack of ministerial advice.

Apart from the appointment of a Prime Minister, which inherently involves the use of this power, no New Zealand Governor-General has had to exercise any of the other reserve powers to intervene in the day-to-day politics of the moment. There have, of course, been incidents in other Commonwealth Realms where these powers have been used, including in 1975 in Australia when Sir John Kerr dismissed Gough Whitlam as Prime Minister.

Although it is an exercise of a reserve power, the Prime Minister's appointment is based on established principle. While some predicted the change to MMP might result in greater involvement by the Governor-General, that has not come to pass. The reason is that while the voting system has changed, the respective roles of the Governor-General and the leaders of the political parties in Parliament have remained the same. Recent election results in Canada, India, Australia, and in very recent times in the mother of all Parliaments, the United Kingdom, have shown that minority or coalition governments can also occur in nations that do not use proportional voting systems. This was often the case in New Zealand from 1912 through to 1935.

By convention, the Governor-General will always appoint as Prime Minister the person who has been identified through the government formation process as the person who will lead the party, or group of parties, that appears to be able to command the confidence of the House of Representatives.

The Governor-General expects that there will be clear and public statements that a political agreement has been reached, and that a government can be formed that will have the support of the new House. In appointing the Prime Minister, the Governor-General will abide by the outcome of the political process.

As government formation is a political matter, the speed with which a government will be formed will depend not on any intervention by the Governor-General, but by the pace at which the politicians are able to reach an agreement. Nor is it the Governor-General's role to “anoint” anyone, whether they are the incumbent prime minister or the leader of any other political party, to be the heir-apparent. The person who emerges from the negotiations as the leader is a political

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<sup>26</sup> Philip Joseph *Constitutional and Administrative Law in New Zealand* (3rd ed, Thomson Reuters, Wellington) at 697.

<sup>27</sup> *Ibid.*

decision for politicians to decide. To become involved in either of these two ways, would threaten the neutrality and non-partisan nature of the Office of Governor-General.

As government formation is a political decision, it is also up to the politicians to decide with whom they want to negotiate and there are many examples from throughout the world where Prime Ministers have come from parties other than the largest one in the legislature.<sup>28</sup> Parties that say before an election that they will support another after the election may well face different choices once the election results are clear. Negotiations have to occur and political agreements have to be reached.

These agreements are often announced in a public ceremony, with the symbolic shaking of hands and the signing of agreements, and provide the Governor-General—and the New Zealand public—with evidence that is both “public” and “clear”. After the last election, Mr Key was quickly able to obtain the necessary confidence and supply agreements that ensured he could command a majority in the House.

On that basis, I was able, on 19 November 2008, to appoint him as an Executive Councillor and sign his warrant of appointment.<sup>29</sup> With Mr Key as Prime Minister, and once again being in the position of having an adviser on the discharge of my constitutional powers, he then recommended whom I should also appoint as Executive Councillors, that is Ministers of the Crown, thus completing his ministry.<sup>30</sup>

The Executive Council, which is constituted by the Letters Patent,<sup>31</sup> is the highest formal instrument of Government. It is the institution through which the Government collectively and formally advises the Governor-General.<sup>32</sup> Apart from Acts of Parliament, Orders in Council (Regulations) are the main method by which the Government implements decisions that require the force of law.<sup>33</sup>

The ceremony of swearing in the Government can occur before the Writs confirming who will be elected as members of Parliament have been returned. However, the Constitution Act<sup>34</sup> says a person who stood for election, maybe appointed as a member of the Council or as a Minister, on the condition that they will vacate the office if not confirmed as an MP within 40 days of their appointment as an Executive Councillor.

## IX. FORMATION OF NEW PARLIAMENT

It is important to note too that this is not the end of the Governor-General’s role. With a new Prime Minister in place, under the Constitution Act the Cabinet Office prepares a new proclamation proroguing Parliament from the nominal date set before the election to that set by the new Government.<sup>35</sup> As with the earlier proclamations, it is signed by the Governor-General, again on the advice of the Prime Minister.

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28 *Ibid.*, at 705.

29 Cabinet Office Cabinet Manual 2008 at [1.22].

30 *Ibid.*

31 Letters Patent Constituting the Office of Governor-General of New Zealand, s 7.

32 Above n 29, at [1.18].

33 *Ibid.*, at [1.20].

34 Constitution Act 1986, s 6.

35 *Ibid.*, s 18.

David McGee, writing in *Parliamentary Practice in New Zealand*, underscored the significance of this proclamation when he noted that:<sup>36</sup>

The summoning of Parliament effectively breathes life into the House of Representatives which, although still in existence between Parliaments, can meet and transact business only while Parliament is in session. Because the House of Representatives is the working element of Parliament, the summoning of Parliament is really the calling of the House of Representatives into working mode.

At this stage, members of Parliament, having won their seats, either by winning a constituency seat or a seat from a party list, have yet to be sworn in. As well, through not having a Speaker, the House lacks a leader.

## X. COMMISSION OPENING

On the advice of the newly appointed Prime Minister, the Governor-General signs Letters Patent authorising Royal Commissioners to attend the House of Representatives. At what is known as the Commission Opening of Parliament, the Commissioners, the Chief Justice as Chief Commissioner, and two other Judges,<sup>37</sup> tell the House of Representatives the date and time at which they are to meet for the State Opening, which is usually the following day. It is one of the few times, as David McGee notes, “when both elements of Parliament, the Crown and the House of Representatives, come together to discharge their duties”.<sup>38</sup>

## XI. APPOINTMENT OF SPEAKER

However, the Commissioners tell the members that before the State Opening may occur, they should choose a Speaker who should present him or herself to the Governor-General later that day. The Commissioners then withdraw and the Clerk of the House administers the oath or affirmation to the new parliamentarians, who in turn elect a Speaker.

After that step, the Speaker-Elect, along with the Clerk of the House, Deputy Clerk and the Serjeant-at-Arms, carrying the Mace in the crook of the arm, presents himself or herself to the Governor-General at Government House. The Speaker-Elect informs the Governor-General of the House's choice and asks for confirmation of that choice. As soon as the Governor-General confirms the House's choice of Speaker, the Serjeant-at-Arms raises the Mace, which is the symbol of the authority of the House, to the shoulder.<sup>39</sup>

In time honoured tradition, newly elected Speakers usually show some resistance, at least initially, to their election. The role of Speaker is one with a colourful past that stretches back, not only into New Zealand's history, but as well to 14th Century England, where the “Speaker” was chosen to be the one who spoke for the House and to represent the House to the Crown. The Speaker often had to deliver news which the Monarch might not want to hear. Some never made it back to Parliament alive and hence the reluctance! No fewer than seven Speakers are recorded as having been executed!

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36 David McGee, above n 23.

37 In 2008, the Royal Commissioners were Chief Justice Dame Sian Elias, Hon Justice William Young, President of the Court of Appeal, and Hon Anthony Randerson, Chief High Court Judge.

38 David McGee, above n 23, at Chapter 12.

39 *Ibid.*

The relationship was aptly summarised by Speaker William Lenthall in 1642 when King Charles I, with an armed guard, entered the House of Commons in order to arrest five Members of Parliament for treason. Lenthall refused to give their whereabouts, famously saying: “I have neither eyes to see, nor tongue to speak in this place, save as the House doth direct me.”<sup>40</sup> No Sovereign has set foot in the House of Commons Chamber ever since.

## XII. STATE OPENING OF PARLIAMENT

It is for that reason that the formal State Opening of Parliament occurs in the House of Lords in the United Kingdom and in Legislative Council Chamber in New Zealand - the room where the abolished Upper House once assembled.

It is there that the Governor-General, as the representative of the Head of State, reads the Speech from the Throne, outlining the Government’s legislative agenda for the next three years. While the Governor-General’s speech refers to “my government,” it is a document written by the Prime Minister and in the Prime Minister’s Office.

The symbolism of the State Opening was well described by British journalist and author Robert Hardman. He said:<sup>41</sup>

The State Opening of Parliament is the moment when all the important elements of the British constitution remind each other—and the outside world—where they stand. The Monarch comes to Parliament in a fairy-tale carriage, puts on a crown and summons the elected representatives from the House of Commons to the unelected House of Lords where she announces her Government’s plans for the year ahead. But it is the elected lot, squashed in the back of the room, who have written her script. The message is very clear: Parliament derives its authority from the Queen, but the Queen abides by its democratic decisions. In other words, the Queen is in charge. The people are in control.

A New Zealand Governor-General does not wear a Crown and the Government House Jaguar is not a fairy-tale carriage but the same principles apply at the State Opening of our Parliament. In New Zealand, however, a State Opening occurs only once in the life of a Parliament and not every year as in the United Kingdom.

The House will then debate the Speech from the Throne, which is completed by a confidence vote in the new Government. This is known as the Address-in-Reply. The vote confirms the new Government’s majority. With the formalities complete, parliamentary business begins in earnest and the cycle is complete. From the end of one Parliament, the country thus once again has a living, breathing Parliament.

## XIII. CONCLUSION

In conclusion, what I have attempted to show is the central role of the Governor-General, as the Sovereign’s representative and as an integral part of our Parliament. As Governments and Members of Parliament come and go, the Sovereign, and her representative, play a continuous stabilising role: setting processes in motion; appointing people to key positions; and bringing processes to their conclusion.

40 “Parliament Brief: Officers of the House” New Zealand Parliament. <[www.parliament.nz/en-NZ/AboutParl/HowP-Works/FactSheets/c/c/9/00HOOOPubResAboutFactSheetsOfficers1-Parliament-Brief-Officers-of.htm](http://www.parliament.nz/en-NZ/AboutParl/HowP-Works/FactSheets/c/c/9/00HOOOPubResAboutFactSheetsOfficers1-Parliament-Brief-Officers-of.htm)>.

41 Robert Hardman *Monarchy: The Royal Family at Work* (Random House, London, 2007) at 173.

The Sovereign and her Governor-General can be described as the “glue” of our constitutional arrangements ensuring legitimacy in the transfer of power. My predecessor in office, Hon Dame Catherine Tizard, made this point well in a speech in 1993. Commenting on suggestions that the reserve powers should be used more widely she used a different, but equally appropriate metaphor:<sup>42</sup>

[P]ower must be transferable if it is to be democratically accountable. In turn, the legitimacy that elevates power into authority, is sustained through its proper transfer. The Governor-General is the person who gains by successfully “passing the parcel”. Only in this way can a Governor-General embody continuity and properly witness that the government is legitimate.

On that note, it seems appropriate to thank you for your courteous attention, and to close - and to do so in New Zealand's first language, by offering everyone greetings and wishing everyone good health and fortitude in your endeavours. Nō reira, tēnā koutou, tēnā koutou, kia ora, kia kaha, tēnā koutou katoa.

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42 Hon Dame Catherine Tizard “The Crown and Anchor: The Present Role of the Governor-General in New Zealand” (Turnbull Library, 1993) 26 June 1993.

# LAWYERS AND UNPOPULAR CLIENTS

BY THE HON CHRISTOPHER FINLAYSON\*

## I. INTRODUCTION

A few months ago I received a copy of the American Bar Association's litigation newsletter and was interested to read an article about recent criticism of lawyers who have worked for Guantanamo detainees. The article focussed on Liz Cheney, who is a lawyer and the daughter of former Vice President Dick Cheney. She leads a group called "Keep America Safe" which has questioned the "values" of several lawyers who represented detainees and are now working in the Obama Justice Department. She has suggested that those lawyers cannot be trusted to work for the Government.

United States Attorney-General Eric Holder delivered a forceful and accurate rebuttal of Ms Cheney's assertions. He said:<sup>1</sup>

Lawyers who accept... professional responsibility to protect the rule of law, the right to counsel, and access to our courts – even when this requires defending unpopular positions or clients – deserve... the praise and gratitude of all Americans. They also deserve respect.

He continued:

Those who reaffirm our nation's most central and enduring values do not deserve to have their own values questioned... [L]awyers who provide counsel for the unpopular are and should be treated as what they are: patriots.

Mr Holder is right. All this got me thinking that it would be a good idea to set out today what I see as an important duty of any counsel in New Zealand: the duty to be independent. Some recent media coverage of certain criminal trials in New Zealand has convinced me that there is some misunderstanding amongst the public about the role of barrister or solicitor. It is time that role was clarified.

## II. LAWYERS AND UNPOPULAR CLIENTS

Lawyers must be independent. This is stated specifically in Chapter 5 of the Lawyers Conduct and Client Care Rules. Those rules also say that a lawyer must be free from compromising influences or loyalties when providing services to his or her clients. So a lawyer's role is to serve a client rather than his or her own popularity or profile. It is about the client and his or her case, not about whether you can get into the media at every possible moment to comment on the legal issues of the day.

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\* Attorney-General for New Zealand. Minister for Arts, Culture and Heritage and Minister for Treaty of Waitangi Negotiations. Speech given at the University of Waikato Law Faculty, 7 May 2010.

1 Eric Holder "Address to the Pro Bono Institute" (Washington DC, 19 March 2010) <[www.justice.gov/ag/speeches/2010/ag-speech-100319.html](http://www.justice.gov/ag/speeches/2010/ag-speech-100319.html)>.

Lawyers serve their clients, the courts and, more broadly, the rule of law. A lawyer's independence is reflected in the fact that he or she will be available (and in some cases obligated) to represent anyone who is able to pay their fees. This is the cab rank rule.

The modern incantation of the cab rank rule in New Zealand is stated in the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008. Those say that a lawyer as a professional person must be available to the public and must not, without good cause, refuse to accept instructions from any client or prospective client for services within the reserved areas of work that are within the lawyer's fields of practice.

The New Zealand cab rank rule places a high demand on lawyers. Unlike in some other jurisdictions, it applies both to barristers and solicitors. It is not part of the American Bar Association's Model Rules of Professional Conduct, which do not require a lawyer to undertake any particular retainer. Rule 1.16(b)(3) expressly permits withdrawal from a case where the lawyer considers a client's objectives repugnant or imprudent.

In New Zealand, good cause to refuse includes:

Lack of available time;

The instructions falling outside the lawyer's normal field of practice;

Instructions that could require the lawyer to breach any professional obligation;

The unwillingness or inability of the prospective client to pay the normal fee of the lawyer.

Further, in New Zealand, a lawyer who declines instructions must give reasonable assistance to the person concerned to find another lawyer.

The existence of the cab rank rule has contributed in common law countries to a tradition of representing unpopular clients and sometimes unpopular causes. This is a tradition we must uphold. It is a tradition extending as far back as Cicero who in 56 BC gave an entertaining and successful defence of his former pupil, Marcus Caelius Rufus, against Clodia's charge of attempted murder. Cicero would often represent defendants in the courts on charges ranging from bribery to murder.

We can take the example of John Cooke, the first Solicitor-General of the English Commonwealth, who led the prosecution of King Charles. This was a prosecution rather than a defence, but I think we can say it was subsequently considered to be unpopular, at least by King Charles II. For his efforts, Cooke was convicted of regicide and hanged, drawn and quartered. Incidentally, Cooke is often credited with the creation of the cab rank rule.<sup>2</sup>

John Adams was the second President of the United States. I recommend David McCullough's biography of Adams, which is a fine piece of writing and has been instrumental in a reassessment of Adams' contribution to his country.<sup>3</sup> Adams was, among other things, a fine advocate. One of the most famous trials in which he was involved was the trial of five British soldiers accused of murder after opening fire on a crowd in Boston.

Some of you may have seen the recent HBO series called John Adams. It depicted the Boston Massacre trial at some length but, in reality, Adams' defence of the British soldiers took place quite differently.

The British soldiers' cause was an unpopular one. In fact, the soldiers had great trouble finding a lawyer to represent them. Many lawyers would not do it for fear of harming their own reputa-

2 See Geoffrey Robertson *The Tyrannicide Brief: The Story of the Man Who Sent Charles I to the Scaffold* (Pantheon, 2006).

3 David McCullough *John Adams* (Simon & Schuster, 2001).

tions, such as the public animosity towards the men. Nonetheless, in the interests of justice, and perhaps because he knew what the role of a lawyer should be, John Adams agreed to represent the men.

Adams later wrote in his diary that he only earned a very small fee:<sup>4</sup>

in the most exhausting and fatiguing causes I ever tried: for hazarding a popularity very general and very hardly earned: and for incurring a clamour and popular suspicions and prejudices, which are not yet worn out and never will be forgotten as long as history of this period is read.

He continued, however, that:<sup>5</sup>

the part I took in defence of Captain Preston and the soldiers, procured me anxiety, and obloquy enough. It was, however, one of the most gallant, generous, manly and disinterested actions of my whole life, and one of the best pieces of service I ever rendered my country.

Closer to home there are plenty of instances in New Zealand where lawyers have had to defend unpopular clients. Take PJ O'Regan, who defended Bishop Liston in his 1922 trial for sedition. Liston had given a speech at the Auckland Town Hall where he called the Easter Rising "glorious" and praised the Irish Revolution. Both Liston and O'Regan were pursued by the New Zealand Herald, despite the not guilty verdict.<sup>6</sup>

In more recent times, one can think of Wellington QC George Barton, who acted for Roy Parsons in 1970 when he applied for a writ to stop the All Blacks' tour of South Africa. Barton is the same person who acted for Fitzgerald in the landmark case against Sir Robert Muldoon and in numerous other cases where people were challenging the establishment.

Another client of Barton's was that very unpopular litigant, the Victoria University Students' Association.<sup>7</sup> In 1973, Dr Barton was the lecturer in civil procedure at Victoria University. The Government Printer refused to make copies of the old code of civil procedure (the forerunner of the High Court Rules) available, so Dr Barton commenced proceedings in the name of the VUWSA against the Government printer and sent them a writ of mandamus.

These are a few cases that come to mind. I can also think of several recent examples of criminal trials where criticism has been levelled by the media against counsel for the defendant, although I don't want to discuss them in my remarks today.

### III. THE INDEPENDENT LAWYER

The point of this historical excursus is to illustrate the point that lawyers have a duty to be independent and fearlessly represent their clients. It helps explain why Ms Cheney's attack on the Guantanamo lawyers was unprincipled, crude, and just plain wrong.

People sometimes use the term "hired gun" (and I have heard worse terms) to explain the lawyer-client relationship. The "hired gun" metaphor has been described as characterising the lawyer as entirely professionally committed to the client's cause without any moral commitment.

I was talking to a colleague in Washington last week who told me about a case where a lawyer was required to defend a man described as a Satanist – a prospect which made her slightly uncom-

4 See John Adams *Diary and Autobiography of John Adams* (LH Butterfield (ed), Harvard University Press, 1961) at 79.

5 *Ibid.*

6 A very good account of Liston's life is Nicholas Reid *James Michael Liston: A Life* (Victoria University Press, 2006).

7 *VUWSA v Government Printer* [1973] 2 NZLR 21.

fortable. As was her duty, she nonetheless represented him and was relieved to find out from him afterwards that he was not actually a Satanist but instead only a warlock.

The idea of the “hired gun” approach has been criticised as promoting the conception that lawyers are not morally responsible for their own conduct in furthering their client’s case and that, “even if they engage in deception or bullying, they are absolved from any wrongdoing provided no rules are broken”.<sup>8</sup>

I think the “hired gun” approach can be taken too far, but I think it at least serves to illustrate that a lawyer does not assume the morals or beliefs of a client when he or she agrees to represent that client. The lawyer may or may not privately share those beliefs: that is immaterial.

I think we must be extra careful not to criticise lawyers unfairly just because a case or client may be unpopular. This is not to say a case may not be untenable or that lawyers do not have a duty to the Court. Nor does it excuse a lawyer from taking care in the presentation of arguments, or from their professional obligations in respect of meritless or untenable claims.

Politicians and the courts must respect and protect the independence of lawyers as they carry out their functions. The independence of lawyers needs to be protected zealously. I have a very special responsibility to ensure that happens because I am the head of the profession.

Unfortunately, many people do not understand the responsibilities of the advocate. They cannot accept, or are ignorant of, the responsibility of the lawyer to be independent. A lawyer does not condone or endorse the actions of a client simply through representing them.

Being a lawyer is not about choosing sides. You can be on the same side as a lawyer in one case and then work with the same lawyer on a different case. You can be friends with someone and yet be opposing counsel.

Our system of law, both in theory and in practice, rests on the professionalism and independence of counsel. Everyone has the right to representation, even if they or their cases are unpopular.

Lawyering is a profession, and with that profession comes obligations. One of those obligations is to ensure the duty to be independent, impartial and available for instructions. This principle must sit of the heart of the justice system if we are to ensure access to justice for everyone.

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8 Duncan Webb *Ethics, Professional Responsibility and the Lawyer* (Butterworths, 2000) at 33.

# *BONKERS AND ORS V THE POLICE:* JUDGMENT OF ATHENA J IN THE HIGH COURT

BY E W THOMAS\*

(Introduction: In this article, which takes the form of a judgment, the author takes issue with the Supreme Court’s interpretation of s 4(1)(a) of the Summary Offences Act 1981 in *Morse v The Police*.<sup>1</sup> The Court held that the offence of behaving in an offensive manner is not complete unless the behaviour causes a disruption or disturbance to “public order”. The author argues that this interpretation is based on a restricted conception of public order. Section 4(1)(a), he contends, sets out the basic rules of social engagement in proscribing behaviour that is a serious affront to the sensibilities of citizens in their interaction with one another. Whether or not the behaviour in issue is protected by the right to freedom of expression can only be determined by balancing the value of the right as exercised in the circumstances against the rights, values and interests of the person or persons who are affected by the behaviour. The author contends that this balancing exercise is either ousted or rendered otiose by the Court’s decision. He points out the anomalies and inconsistencies which result.)

## **ATHENA J**

### *Morse v The Police*

[1] The three appellants in this appeal were convicted of behaving in an offensive manner under s 4(1)(a) of the Summary Offences Act 1981. Wiseman DCJ heard the charges in the District Court on 1 June 2011. As the circumstances of each case differ, I will deal with them separately shortly. The common factor in each appeal, however, is the contention that the appellants are entitled to be acquitted on the basis of the Supreme Court’s decision in *Morse v The Police*.

[2] Wiseman DCJ declined to follow that decision. He claimed that the members of the Court had not settled upon an agreed formulation for the test to be applied. Reading the judgments of a superior court, the Judge claimed, should not leave a judge at first instance feeling that he or she is the subject of a Rorschach experiment. I consider that this observation was uncalled for. Although the members of the Court differ as to the formulation of the test, the Court’s approach to s 4(1)(a) is clear. The Judge was bound by the doctrine of precedent to apply the Court’s interpretation - however much he may have disapproved of it.

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\* A retired Judge of the Court of Appeal, former Acting Judge of the Supreme Court and a Distinguished Visiting Fellow at the Law School at the University of Auckland. I wish to thank Bree Huntley and Kate Mills for their invaluable research and advice. I am also most grateful to Eesvan Krisnan, Aditya Basur and Justin Harder for their constructive criticism. Of course, the opinions are mine.

1 *Morse v The Police* [2011] NZSC 45.

[3] Consequently, the broad issue in each of these appeals is whether the Supreme Court's decision in *Morse* can be distinguished.

[4] The appellant in *Morse* burned a New Zealand flag as part of a protest conducted by six to nine people on Anzac Day on 25 April 2007. Over 5,000 men, women and children had gathered for the Dawn Service at the Cenotaph in Wellington to commemorate the sacrifice of the servicemen and women who had given their lives during the wars in which this country has been involved, particularly the First and Second World Wars. Ms Morse and her small group of protesters stationed themselves across the road from the Cenotaph in the grounds of the Victoria University of Wellington Law School. They are passionately opposed to the war in Afghanistan and sought to express their viewpoint in a manner designed to draw attention to the folly of that war. Ms Morse burned a flag on a pole while others blew loudly on horns to attract attention. In the still darkness of the dawn it was undoubtedly a dramatic act. It was clearly within sight and hearing of those at the Dawn Service. Some were in close proximity. A number of witnesses at the trial before Wiseman DCJ gave evidence to the effect that they were shocked at the sight of the flag being burned at a respectful and solemn commemoration of the men and women who had made the supreme sacrifice. They used terms to describe Ms Morse's action such as "really offensive" and "outrageous".

[5] Ms Morse was convicted of behaving in an offensive manner in the District Court. Her appeal to the High Court was dismissed by Miller J. An appeal to the Court of Appeal was dismissed (William Young P and Arnold J, with Glazebrook J dissenting). Ms Morse was duly granted leave to appeal to the Supreme Court and that Court unanimously allowed her appeal on 6 May 2011.

[6] As indicated, the members of the Court differ as to the wording of the test to be applied under s 4(1)(a). The offensive behaviour must cause a disruption or provoke a disruption of public order (Chief Justice),<sup>2</sup> or cause "directly or indirectly ... a disturbance of public order" (Blanchard J),<sup>3</sup> or involve "a sufficient disturbance of public order" (Tipping J),<sup>4</sup> or must sufficiently interfere with the expectations of enjoyment and tranquility and security from "unduly disruptive behavior in public places" (McGrath J),<sup>5</sup> or must "have a reasonable propensity or likelihood to dissuade others from enjoying their right to use that place whether by entering upon it or remaining upon it" (Anderson J).<sup>6</sup> Both Tipping and McGrath JJ expressly disavow the Chief Justice's notion that the disturbance includes conduct productive of disorder to the exclusion of ordinary notions of causing offence.<sup>7</sup> While the wording may differ, however, all members of the Court are at one in holding that the behaviour alleged to be offensive must cause a disruption or disturbance to "public order". Section 4(1)(a) no longer applies to protect the sensibilities of persons subject to offensive behaviour, however grossly offensive that behaviour might be. As the District Court Judge had not been cognizant of this requirement and had failed to apply it, the Court held that the charge had not been properly considered having regard to the true meaning of s 4(1)(a). The conviction was quashed.

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2 At [7], [9] and [36].

3 At [60], [62], [63] and [67].

4 At [69], [70] and [71], [72].

5 At [101] and [103].

6 At [127].

7 At [69] and [102].

[7] A theme running through the judgments is the notion that the disruption or disturbance will inhibit or interfere with the use of a public place.<sup>8</sup> It may, for example, inhibit or interfere with the use of a public place “through intimidation, bullying or the creation of alarm or unease”.<sup>9</sup> Hence, where members of the Court speak of the disruption or disturbance amounting to an “interference”, the interference is with the use of the public place and not an interference with the sensibilities of the person or persons who are affected by the expression. Certainly, McGrath and Anderson JJ introduce the word “enjoyment” but, again, the enjoyment relates to the use of the public place.<sup>10</sup> However phrased, *Morse* requires an impact on public order external to the impact on the sensibilities of the person or persons affected. For convenience, I will not repeat the different formulations of the test. It will suffice to utilise the phrases “a disruption or disturbance to public order” or “the external factor”.

[8] It can be anticipated that, with the passage of time, the interpretation of the external factor will be strained to accommodate cases where, on the facts, the defendant should clearly be subject to a criminal sanction. The law generally eschews absurdities. Should interference with the use of a public place eventually be watered down to embrace the notion that behaviour interferes with the use of a public place if the sensibilities of the person or persons affected are so wounded that they cannot enjoy its use, the basic premise of the Court that “public order” requires a disruption or disturbance will be undermined. The courts will have effectively reverted to the formula which the Court in *Morse* has rejected.<sup>11</sup>

[9] The fact I am myself strongly opposed to the wars in Iraq and Afghanistan and this country’s involvement in them, although limited, is irrelevant. My opposition to those wars forms no part of the value judgement I bring to this case. My value judgement was probably revealed in the course of a friendly exchange with Mr Smart QC, who appeared on behalf of all three appellants. Whenever referring to *Morse*, Mr Smart was prone to declaim that the right to freedom of expression included the right to offend and that the servicemen and women who had sacrificed their lives in two World Wars had died in defence of that freedom. Mr Smart’s rhetoric illustrates what happens when the right acquires an abstract force divorced from the value underlying the right as exercised in the circumstances of a particular case. I accept that protests may occur on Anzac Day as, indeed, they have in the past, and that they may be staged in proximity to Anzac services, including the Dawn Service. I also accept that there are situations and locations where the burning of the national flag is a valid form of protest even though there will always be those who will find it offensive, and I accept that the right to freedom of expression includes the “right” to offend. What I do not accept, and emphatically do not accept, is that the right includes the “right” to offend without responsibility or restraint.

[10] I appreciate, too, that an Anzac Dawn service may be seen by activists as a fitting occasion on which to stage a protest. The occasion can and has been used to protest against militarism and the glorification of war, against contemporary wars, such as the Vietnam War, against the rape and violence to which women are subjected in war, and to draw attention to other causes generally

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8 E.g., at [3], [66], [71], [110], [117] and [127].

9 At [2], per the Chief Justice.

10 McGrath J at [101] and Anderson J at [127].

11 It can also be anticipated that commentators committed to an expansive view of the right to freedom of expression will defend *Morse* on the same ground. See below, at paragraph [42].

associated with the military. Nor will the attendance of large numbers of children at the service, as is commonly the case today, necessarily deter protestors. They may well take the view that a culture benign to militarism and war is being inculcated in the children. The validity of these perceptions, of course, is not in issue in these appeals. The point is that, if the right to free expression embraces the ability to be offensive, the line has to be drawn somewhere other than at the maintenance of “public order”. Otherwise, the offensiveness will at times assume the proportions of a social ill. The right to freedom of expression, no less than any other right, must be exercised with responsibility and restraint.

[11] I also fully appreciate the frustration of protestors in attempting to obtain a full and fair report of their cause in the media. A well-constructed argument against New Zealand’s participation in the wars in Iraq and Afghanistan, for example, is unlikely to get any space or time, or any adequate space or time, in the media. It is only when a protest is accompanied by a gimmick or irregular conduct that it will attract attention, and then only as a short explanation for the more reportable gimmick or irregular conduct. While I have some sympathy for the efforts of protestors to obtain a platform for their cause, neither the inadequate media response nor the resulting frustration can justify behaviour which is grossly offensive and an affront to the reasonable sensitivities and innate dignity of one’s fellow citizens. Offensiveness unaccompanied by a disruption or disturbance cannot be elevated to an absolute right; the line must be drawn somewhere.

[12] I turn now to consider the individual appeals.

### **Bonkers v The Police**

[13] Mr Bonkers, it is fair to say, has it in for the Catholic Church. It appears that some years ago, when he was a trainee-priest, Mr Bonkers was ex-communicated from the Church and has harboured a grudge ever since. His grievance appeared to centre on what he frequently described as the hypocrisy of the Church, and that claim in turn seemed to be directed at his perception that others in the Church had not been excommunicated when their “sin” had been every bit as bad as the sexual deviation which had led to his own excommunication. It is clear that Wiseman DCJ considered Mr Bonker’s grievance personal and somewhat eccentric.

[14] Every weekday at a certain time a group of 30 to 40 nuns walk down the path, which the Judge, being a non-Wellingtonian, described as a “goat track”, from the Nunnery where they reside on to the footpath leading to the Church where they take mass. They are a joyous throng given to much innocent chatter and laughter. Mr Bonkers staged his protest on the footpath on the opposite side of the street. Being otherwise unemployed, he repeated his protest several times a week. Mr Bonkers carries a large wooden representation of the Virgin Mary ensconced in a plastic swathe obviously intended to depict a condom. He did not pretend that this representation possessed any artistic merit whatsoever and, having inspected a photograph of it, I can confirm that not even an enthusiastic art connoisseur would be minded to describe it as a piece of modern art.<sup>12</sup>

[15] Wiseman DCJ held that the nuns found the representation highly offensive. Some were deeply shocked. All were visibly distressed. They regarded the representation as an affront to their

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<sup>12</sup> No question of artistic merit arises as in *Dr Glynn Thomas v Television New Zealand* [1998] NZBC 54 (28 May 1998). Nor is there any question of the exercise of the right to religion as in *Browne v Canwest TVWorks Ltd* CIV 2006 485 1611 (31 July 2007).

devout religious sensitivities. The Judge agreed and held that Mr Bonkers' protest represented a gratuitous and insensitive insult to the nuns and their deeply and sincerely held beliefs. They could, he observed, be considered the innocent victims of Mr Bonkers' grievance. Thus, Wiseman DCJ concluded that Mr Bonkers' behaviour was offensive under s 4(1)(a), and he duly convicted him and fined him \$200.

[16] All too often during the course of argument Mr Smart referred to the word "offensive" as if it included any behaviour that might give offence to any person or persons. By adopting an apparently low threshold for the term, "offensive", Mr Smart sought to attenuate the need for s 4(1)(a) to be given a restricted interpretation in order to protect the right to freedom of expression, but I am alert to the tricks of the advocate. The word "offensive" has never been interpreted by the courts in that fashion. The threshold for offensive behaviour has always been a demanding threshold, as indicated by Blanchard J in *Brooker*<sup>13</sup> and now the majority in *Morse*,<sup>14</sup> requiring the capability of wounding feelings or arousing real anger, resentment, disgust, or outrage in the minds of a reasonable person. The importance of the right to freedom of expression is recognised in this restricted definition.

[17] Mr Smart conceded that Mr Bonkers' behaviour was "offensive" as that term has been judicially defined, but submitted that Wiseman DCJ was in error in that there was no possibility of a disruption or disturbance to "public order". He pointed out that, far from approaching a disruption or disturbance, the nuns' response had been to scurry silently past with their heads bowed or cowed. One nun could be heard to weep.

[18] I also consider that Mr Bonkers' behaviour was highly offensive. I believe that it deserves to attract the opprobrium of the criminal law, albeit at the lower end of the scale of offending. While constrained by the Supreme Court's decision in *Morse*, however, I must agree with Mr Smart that the facts do not suggest that "public order", as construed by the Court, was remotely in peril of a disruption or disturbance. Indeed, I cannot think of any other group who would be less likely to cause a breach of "public order". Nor, while the content of the message Mr Bonkers conveyed was an affront to their sensitivities, did his activity interfere with their use of the footpath as pedestrians.

[19] I note that my discussion is in line with the decision of my colleague, Bonatti J, in this Court only last month. In that case a group of six to nine persons gathered outside a school to protest at the refusal of the teachers to teach creationism. They wore white robes and white pointed hoods with slits as eyeholes and presented a fearsome appearance. They carried placards indicating that the teachers and all who resisted their cause were doomed to eternal damnation. They burned a large wooden cross. The evidence indicated that the children were "terrified", "distressed", "spooked", and "agitated" at the sight of the flaming cross. The protestors were charged with behaving in an offensive manner. They were duly convicted of that offense in the District Court. Bonatti J allowed the appeal on the basis that the children were highly unlikely to cause any disruption or disturbance and, even if they did cause a disruption or disturbance, it would be in the school grounds and not in a public place. In a carefully crafted judgment he observed that, if a protestor proposes to be offensive, it would be prudent for him or her to bear the Supreme

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13 *Brooker v The Police* [2007] NZSC 30 at [55].

14 At [64], per Blanchard J; n 99, per Tipping J; and [103] and [115], per McGrath J.

Court's judgment in *Morse* in mind and be offensive to children, the police, or persons of a pacifist, non-violent or non-aggressive persuasion, which he listed at some length. The learned judge did not include nuns in the list, but I assume that was an oversight.

[20] In similar vein, Bonatti J also observed that it would be prudent for a protester proposing to be offensive in a public place to be offensive to persons who were in an adjacent private property, although still within sight or hearing of that public place. The offensiveness could be gross in the extreme, but there would be no risk of a disruption or disturbance to "public order". Any disruption or disturbance, however intense, would take place in private.

[21] Mr Earnest QC, who appeared for the police, submitted, I thought faintly, that the Court's decision in *Morse* could be restricted to behaviour involving the burning of the national flag. The submission is untenable. A disruption or disturbance is required irrespective of the nature of the allegedly offensive expression. Consequently, the protestors across the road from the Anzac service in *Morse* could have burned an effigy of a New Zealand World War II soldier, or they could have dressed in Nazi uniforms and, with raised arms, shouted "Sieg Heil", and no offence would have been committed in the absence of the external factor. Nor would it have mattered if their cause had been despicable; for example, if the protest had been directed at proclaiming that God had the soldiers killed as punishment for society's tolerant attitude to homosexuality.<sup>15</sup>

[22] Mr Earnest also urged me to have regard to the nature of Mr Bonkers' exercise of the right to freedom of expression. It was, he said, an eccentric personal grievance and the value to be attached to it could not be equated with the value to be attached to a public protest against, say, the wars in Iraq or Afghanistan or any of the other unwinnable military ventures the West is prone to undertake. The Supreme Court has pointed out, however, that it is not prepared to enter upon the merits of a protest.<sup>16</sup> I consider that it is quite possible to give a weighting to a protest without judging the merits of the cause or grievance in issue. It is unrealistic not to make such an evaluation when balancing the particular exercise of the right to freedom of expression against the particular rights, values or interests of those persons who are adversely affected by the expression. A protest by an individual expressing a personal grievance, for example, is unlikely to warrant the same weighting as a public protest objecting to an issue of national importance.

[23] This point necessarily becomes moot, however, because the question whether a defendant's behaviour is in breach of s 4(1)(a) will ultimately turn on whether the expression causes or tends to cause a disruption or disturbance to "public order". That disruption or disturbance will not necessarily correspond with the nature of the protest or the value to be attributed to the exercise of the right to freedom of expression in the circumstances. In other words, the "public order" requirement applies equally to the personal grievance and public protest alike - and to every form of protest in between.

[24] The arbitrariness of the Court's decision in *Morse* is apparent from the anecdotal information Mr Earnest was pleased to provide me from the bar. It appears that an apparently respectable retired judge has participated in some eight or more protests both before and after his tenure on the Bench. Fortuitously, it seems, the world suspended protestable events while he was sitting as a Judge. This ostensible pillar of the establishment has now made it publicly known that, if the

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<sup>15</sup> Lest it be thought that such a factual situation is farfetched, see paragraph [66] below.

<sup>16</sup> See e.g., *Brooker v The Police* above n 13, at [22]; [2007] 3 NZLR 91, at [103]-[104].

organisers of a protest which he chooses to join propose to behave in an offensive manner, he is determined to confront his fellow protestors and cause an altercation that will most certainly disrupt and disturb “public order”. It seems unduly arbitrary that behaviour which would not be a breach of s 4(1)(a) because of the absence of any disruption or disturbance to “public order” immediately becomes a criminal offence under that subsection if, and as soon as, this worthy judicial pensioner joins the protest!

[25] Nevertheless, I am mindful of the serious point Mr Earnest was making. It only takes one person to cause a disruption or disturbance to “public order” and it is entirely fortuitous whether such a person is present at the scene of the offensive behaviour. Furthermore, the arbitrariness extends beyond the disposition of any particular person. The reaction of any group of people cannot be predicted. Ms Morse may well have caused a disruption or disturbance if members of the Mongrel Mob had been present and taken the view that her burning of the flag was an insufferable profanity.

[26] Finally, Mr Earnest argued that making the determinative factor the impact on “public order” would expose vulnerable individuals and sectors of the community to odious ethnic, racist, sexist, homophobic, xenophobic, anti-Christian, anti-Semitic, and anti-Islamic taunts providing no disruption or disturbance to “public order” results. I agree that it is difficult to see how vulnerable persons would be protected when the vulnerable receive no different or greater protection than members of the public generally so long as the requirement of a disruption or disturbance remains. I also note with approval his observation that it is incongruous that, as a result of the Court’s expansive conception of the right to freedom of expression, individuals and minorities whose fundamental human rights the Bill of Rights seeks to protect could become the potential victims of irresponsible and unrestrained taunts exercised pursuant to that right. While I agree with Mr Earnest that nuns can be regarded as vulnerable, I cannot see my way clear to vary the requirement that the behaviour must cause a disruption or disturbance.

### **Righteous v The Police**

[27] Mr Righteous was also convicted by Wiseman DCJ of behaving in an offensive manner. Mr Righteous is rabidly opposed to abortion. His sincerity is not in question. Mr Righteous, along with a small band of fellow anti-abortion proponents, positioned himself on private property adjacent to the public approach to an abortion clinic. He carried a placard bearing a large coloured depiction of a foetus. A large jagged knife penetrates the foetus. Blood drips from the wound. One word in large, bold type is scrawled across the bottom; it is “MURDERER”. The placard is held up so that it is clearly visible to the young women approaching or leaving the clinic. At the same time Mr Righteous and his supporters shout “murderer, murderer, murderer” at any young women approaching or leaving the clinic. The young women’s exposure to the placard and shouts of “murderer” are much more than fleeting.

[28] The impact on the young women was extreme. They were clearly distressed. Wiseman DCJ reported that a young woman, having had an abortion, later committed suicide. Immersed in a bath she slashed her wrists and died from loss of blood. Her counsellor and an independent psychiatrist both testified at trial that in all probability her suicide was caused by the trauma of Mr Righteous’s protest and not the abortion itself. Already in a delicate emotional state facing an abortion, the placard and repeated shouts of “murderer” had led her to become deeply depressed.

[29] Mr Righteous was charged with behaving in a disorderly manner or, in the alternative, behaving in an offensive manner. On the basis of the Chief Justice's observation in *Morse* that these two offences are two sides of the same coin,<sup>17</sup> Wiseman DCJ dismissed the disorderly conduct charge and convicted Mr Righteous of behaving in an offensive manner.

[30] Mr Smart again submitted that there was no disruption or disturbance or even the possibility of a disruption or disturbance as required by the Court in *Morse*. As he put it, the young women approaching the clinic were too preoccupied by their pending abortion and those departing too distracted to respond in a manner that would threaten a disruption or disturbance. Their use of the public approach or access to the clinic was not impeded.

[31] I pause to touch upon Mr Smart's repeated assertion made in the context of this appeal that an expansive view of the right to freedom of expression is necessary to achieve what he called a "vibrant" society. No one would dispute that differences and diversity are desirable attributes of a free and democratic society. Unchecked, however, vibrancy can shade into social anarchy. At some point the line must be drawn in the interests of social harmony and cohesion. Drawing the line to proscribe language and behaviour which is grossly offensive leaves ample scope for a community to be "vibrant". Or, to make the point the other way around, if it is necessary for the law to condone grossly offensive language and behaviour, such as the devastating behaviour to the young women visiting the clinic in this appeal, it may be healthier and better all round for society to be a little less "vibrant". As has been said, in order to have a society in which public issues can be openly and vigorously debated, it is not necessary to allow the brutalisation on innocent victims.<sup>18</sup>

[32] Mr Earnest invited me to distinguish the present case from *Morse* on the facts and apply the dicta of Blanchard J in *Brooker*. In that case Blanchard J opined that offensive behaviour is behaviour "which is liable to cause substantial offence to persons who are potentially exposed to it". The behaviour must be capable of "wounding feelings or arousing real anger, resentment, disgust or outrage in the mind of a reasonable person of the kind actually subjected to it in the circumstances in which it occurs."<sup>19</sup> No mention was made of the need to cause a disturbance and, indeed, the reference to the reasonable person as the arbiter of the offence would seem to preclude that caveat. In *Morse*, however, Blanchard J expressly resiled from his statement in *Brooker*, although the magnanimity of his *mea culpa* is somewhat obscured by his claim that he did not say what he appears to have said or, if he did say what he appears to have said, he was misunderstood. Notwithstanding that the learned Judge's formula was adopted and applied in the District Court, the High Court and the Court of Appeal in *Morse's* case, I am bound to apply the latest formulation of the test to be applied.

[33] Mr Ernest also argued that I could have regard to the young woman's suicide as a devastating after effect of Mr Righteous' protest. I cannot do so. The suicide was undertaken in the privacy of the young woman's home and cannot be said to have been disruptive of "public order". Although it must be accepted that this sad outcome was almost certainly caused by the brutal offensiveness to which she was subjected, the decision in *Morse* is binding on me. As harsh as it may seem, the young woman's suicide is to be disregarded.

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17 At [2].

18 *Synder v Phelps* (2011) 179 L Ed 2d 172, per Justice Alito at 195.

19 *Brooker* above n 13, at [55] and [114].

[34] Finally, Mr Earnest sought to take advantage of an anomaly. It was, he said, the sort of point that would appeal to a logical mind. Mr Earnest pointed out that behaviour which was offensive, but barely so, could cause a disruption or disturbance and be a breach of s 4(1)(a) whereas behaviour that was grossly offensive might not cause a disruption or disturbance and would not, therefore, be an offence under the subsection. In other words the determinative factor becomes the disruption or disturbance and not the intensity or level of the offensive behaviour. I must acknowledge that this submission is sound. Suddenly, the criminality contemplated by the subsection lies, not in the offensiveness of the defendant's behaviour, but in the likely public consequences of that behaviour whatever the degree of offensiveness involved.

[35] I agree with Mr Earnest that this point is one which will appeal to a logical mind. The point, however, has greater significance than that. It means that a person who has been less offensive and caused a disruption or disturbance will be convicted of a criminal offence whereas a person who has been more, and grossly, offensive but not caused a disruption or disturbance will not. What then has happened to the fundamental principle of justice that like should be treated alike?

### **Biggottson v The Police**

[36] Mr Biggottson was convicted by Wiseman DCJ of behaving in an offensive manner as a result of a protest he staged on the marae atea (the open space in front of the meeting house) of the Treaty Grounds at Waitangi. It is accepted that the marae atea is a publicly owned area open to the public. Mr Biggottson and his cohorts staged their protest in this area during the Dawn Service on Waitangi Day. The purpose of the protest was to protest against "Māori privilege". Standing on a platform, Mr Biggottson tore up a number of copies of the Treaty of Waitangi and then proceeded to wrap fish and chips in the shredded paper. Fellow protestors chanted "one law for all" and carried placards to the same effect.

[37] In his judgment, Wiseman DCJ recounts the experts' evidence directed at the applicable tapu. There can be no doubt that Mr Biggottson's actions in wrapping fish and chips in the torn shreds of the Treaty of Waitangi was truly offensive to Māori. His protest was culturally insensitive to a degree that most people would regard as totally unacceptable in a bicultural society. The Judge observed that Mr Biggottson intended to be offensive.

[38] Yet again, however, there is no evidence that Mr Biggottson's actions caused a disruption or disturbance. Māori in the marae were appalled, angry, resentful, disgusted and outraged but were minded to continue with the service. It appears that it might have been otherwise if the protest had taken place on the marae where a confrontation would have been inevitable, but Mr Biggottson and his fellow protestors remained on the marae atea and did not inhibit access to the marae itself.

[39] In seeking to support the conviction, Mr Earnest contended that this case introduced a factor that was not present in *Morse* or in the other appeals before me. This factor, he submitted, was the cultural dimension. In a country committed to racial harmony it is important to recognise the cultural differences between this country's two peoples and to avoid gratuitously offending the indigenous people's sensitivity and pride in their culture. To allow the appeal, Mr Earnest concluded, would be to permit behaviour which would be divisive and which would damage race relations in this shared land.

[40] I regret that I am unable to find anything in *Morse* that would permit me to accept this submission. The damage to race relations cannot be avoided in the absence of a disruption or disturbance to “public order”.

[41] Nor can I accept Mr Earnest’s submission that *Morse* can be distinguished on the basis that the appellants in all three appeals had a “captive” audience. Counsel’s submission was based on the American jurisprudence touched upon by Arnold J in the Court of Appeal<sup>20</sup> and Thomas J in respect of privacy in the home in *Brooker*.<sup>21</sup> I am sympathetic to the point. It is relevant to any balancing exercise that the right to freedom of expression is being exercised in circumstances where the person or persons affected cannot ignore or avoid the behaviour. I cannot, however, distinguish *Morse* on this ground. Just as the nuns, the women attending the abortion clinic, and Māori at the Waitangi Day Service could not ignore or avoid the behaviour of the respective appellants so, too, there was nothing those attending the Anzac Dawn Service could reasonably have done to avoid seeing Ms Morse burning the flag in the early morning darkness accompanied, as she was, by the din of the horns. The men, women and children at the service were also effectively “trapped”.

[42] Mr Earnest advanced a further argument in relation to all three appeals which I have foreshadowed in paragraphs [7] and [8] above. He focused on the theme running through the judgments in *Morse* that a disruption or disturbance will inhibit or interfere with the use of a public place and submitted that the use of the footpath by the nuns, the use of the approach to the clinic by the young women, and the use of the marae atea by the protestors had been inhibited or interfered with in each case. As convenient as it would be to accept this argument, it is not possible for me to do so. In essence, Mr Earnest seeks to merge the impact of the behaviour on the sensibilities of the persons in attendance and their consequential loss of enjoyment with the prospect of a disruption or disturbance resulting from that impact. Certainly, in some cases the intensity or level of the offensiveness will make it more likely that a disruption or disturbance will occur, but in other cases, as Mr Earnest earlier submitted,<sup>22</sup> there will be no nexus between the intensity or level of the offensiveness and the affected persons’ use of the public place. Mr Earnest’s attempt to bring the impact on the sensibilities of the persons who are affected back into the Court’s formulation through the back door must fail.

[43] I would also note that Mr Earnest quickly conceded in argument that this submission could not apply to Mr Biggotson’s appeal. Māori were not using the marae atea and their access to the marae was not impeded. Nor did Mr Earnest have an answer to the proposition that his argument could not apply in the appeals of Mr Bonkers and Mr Righteous, respectively, if the nuns had been walking on a private path from the nunnery to the Church or the young women had approached or left the clinic on a private pathway, but within sight and hearing of the protestors. No question could then arise that their use of a public place had been inhibited or interfered with.

[44] Finally, both counsel urged me to clarify, by which they implicitly meant modify, the Court’s test so as to make it easier for the constable on the beat to apply. At the time I was not particularly sympathetic to this submission as under the previous law a constable already had to

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20 *Morse v R* [2010] 2 NZLR 625 at [35].

21 At [260]-[265].

22 See above, paragraphs [34] and [35].

decide whether the reasonable person, or the reasonable person as perceived by the court, would consider the behaviour in issue offensive before making an arrest. On reflection, however, I consider that counsel's submission has considerable merit. Pursuant to the majority's judgments the constable must still seek to determine whether the behaviour is offensive as defined by the Court having regard to the standard of the reasonable person. Following *Morse*, however, he or she must carry out that exercise in the context of the Court's expansive view of the right to freedom of expression. Incongruously for the constable, if he or she has decided that the behaviour is offensive, the constable must then go on to ascertain whether there has been, or is likely to be, a disruption or disturbance to "public order". In deciding that issue he or she must determine which of the five formulations of a disruption or disturbance articulated by the Court they will adopt. They must also try and assess whether the disruption or disturbance falls short of violence or the likelihood of violence (which would be covered by s 3 of the same Act). At the same time the constable must be careful to distinguish between interference with the enjoyment of the persons who are affected by the impact of the offensive behaviour on their sensibilities and the interference with their enjoyment of the use of the public place for the purpose for which it is being used. Finally, if the right to freedom of expression is not engaged on the facts, the constable is likely to be left in a quandary as to how to apply the Court's formula at all.

### **Brooker becomes a petard**

[45] Unless the Court had been prepared to review the majority's decision in *Brooker*, its decision in *Morse* was inevitable. Having held that, to be disorderly for the purposes of s 4(1)(a), the behaviour in issue must disrupt or disturb "public order", the Court could hardly hold that the same requirement or gloss did not apply to offensive behaviour. The Court's reasoning flowed from the heading to the Part of the Act containing s 4(1) reading; "Offences Against Public Order". The offences of behaving in a disorderly manner and behaving in an offensive manner are then coupled together in the same paragraph of s 4(1) under the more specific heading; "Offensive behaviour or language". How could the requirement of a disruption or disturbance to "public order" apply to one and not the other given the Court's insistence that the subsection was directed at the maintenance of "public order"? What may have seemed like a bright idea at the time turned out not to be so bright when the Court was confronted with the charge in *Morse*.

[46] This point can be reinforced by referring to the acknowledgement by the Court that at times the offences of disorderly behaviour and offensive behaviour can and do overlap.<sup>23</sup> If, therefore, disruption or disturbance to "public order" was not made applicable to both forms of behaviour, the situation could exist where a defendant would be not guilty of disorderly behaviour but guilty of offensive behaviour at the same time on the same overlapping facts. Of course, generally speaking, facts may overlap and lead to an acquittal on one charge and a conviction on another. This case is different. The offences are coupled or linked together under the heading "Offences Against Public Order" and it is that heading which is the basis for the Court's requirement of a disruption or disturbance. Where the facts overlap, therefore, it would be an unacceptable anomaly to impose that requirement in the one case but not the other. In truth, the die was cast in *Brooker*.

[47] The fit, however, is no longer comfortable. While it may at a stretch be plausible to argue that disorderly behaviour is not disorderly unless it disrupts "public order", it is not credible to

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23 At [16] per Elias CJ.

argue that offensive behaviour is not offensive unless it causes a disturbance to “public order”.<sup>24</sup> Indeed, with the exception of the Chief Justice, the members of the Court hold that the behaviour in issue must meet the test of being “offensive”. The problem is that there is no necessary nexus between the intensity or level of the offensiveness of the behaviour and the tendency for it to cause a disruption or disturbance.<sup>25</sup>

### (1) The Chief Justice’s judgment

[48] The reasoning of the Chief Justice and the other members of the Court diverge significantly. To the Chief Justice the critical question is whether the alleged offensive behaviour causes or tends to provoke a disruption to “public order”. Other than acting as a stimulus to disorder, the offensiveness of the behaviour counts for naught. Just as in *Brooker* the right or value of Constable Croft to the privacy and seclusion of her home was irrelevant so, too, the rights, values and interests of those who gathered at the Cenotaph at dawn on Anzac Day in 2007 become irrelevant, short, that is, of a person’s interest in being free from disorder in public places. Whether or not behaviour is disruptive of “public order” is to be a matter of judgment on the facts which, in the Chief Justice’s view, does not usually give rise to a question of law at all.<sup>26</sup> The courts are to eschew balancing freedom of speech and the rights, values and interests of others present as the legislature, in enacting s 4(1)(a), has “struck the balance at preservation of public order”.<sup>27</sup>

[49] I hold firmly to the view that the question whether or not the defendant’s expression is protected by the right to freedom of expression can be only validly determined by weighing the value of the exercise of that right against the rights, values and interests of those affected by it in the circumstances of a particular case. Consequently, I cannot regard with equanimity the Chief Justice’s rejection of a balancing exercise in determining the bounds of the right to freedom of expression in the circumstances in which the right is exercised. Having regard to the legislative history of the section, the manner in which it has been interpreted by the courts in the past and implicitly sanctioned by the legislature, and the terms adopted in defining the other offences in s 4(1),<sup>28</sup> the claim that the legislature actually intended to strike the balance in the myriad of specific factual circumstances to which the subsection could apply runs the risk of seriously agitating those of a realistic persuasion. Such an approach seemingly denies the common law tradition encapsulated by Oliver Wendell Holmes’ well-known adage that “[W]here to draw the line... is the question in pretty much everything worth arguing in the law”.<sup>29</sup>

[50] To support her approach, the Chief Justice argues that the interpretation of a criminal offence should conform to the principle that the criminal law must be certain and must be capable of ascertainment in advance.<sup>30</sup> Of course, it is desirable, if not essential, that this principle be observed. The more critical question, however, is what degree of precision is acceptable or possible. Of necessity, the criminal law has had to recognise that offences cannot always be defined

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24 For a penetrating argument that disorderly and offensive behaviour are conceptually different, see Bree Huntley “A Study of Offensive Expression” (LLB (Hons) Seminar Paper, University of Auckland, 2009).

25 See above, paragraphs [34] and [35].

26 At [40].

27 At [3].

28 See below paragraphs [79] and [80].

29 *Irwin v Gavitt* 268 US 161 at 168 (1925).

30 At [12] and [13].

with perfect precision. Resort is at times had, for example, to the objective test of the reasonable person. Thus, the killing of another person in self-defence will not be murder if the force used was reasonable in the circumstances. The law must seek to be realistic, and that means accepting that the objective test provided by reference to the reasonable person provides offences of the kind in question with the requisite degree of certainty.<sup>31</sup>

[51] I reiterate that I accept evaluative concepts, such as reasonableness, should be replaced by more concrete definitions of what is illegal wherever that is possible. What I wish to emphasise, however, is that it is at times not possible to be more precise. As A P Simester and W J Brookbanks state in their seminal book, *Principles of Criminal Law*,<sup>32</sup> this principle should not be overstated. Words such as “reasonable” are not meaningless and may provide a sufficient level of guidance when used in offending at the lower end of the scale. Sometimes, the authors acknowledge, a certain level of imprecision cannot be avoided. “Realism” is required when deciding what degree of certainty is attainable.<sup>33</sup>

[52] Moreover, evaluative terms such as “offensive” provide the means by which, over the passage of time, the changing values of the community can be assimilated into a statutory provision. Current community standards are injected into the law. Thus, in this case, what the reasonable person may have considered offensive in 1907 may not be considered offensive by the reasonable person in 2007, or vice versa. The Court’s decision in *Morse* eliminates this inbuilt adaptability.

[53] More often than not, the telling response to those who urge an unrealistic approach to the use of evaluative terms is to ask them to proffer a more concrete definition. The difficulty, undoubtedly well known to statutory draftspersons, is at once manifest. Would it, for example, have advanced the matter if the draftsperson had defined offensive behaviour as behaviour that has the capability of wounding feelings or arousing real anger, resentment, disgust, or outrage? The definition would still have required the courts to determine what behaviour is capable of wounding feelings or arousing real anger, resentment, disgust or outrage. For that purpose it is virtually certain that the courts would have resorted to the reasonable person to provide a workable and objective standard by which to determine the level of offensiveness impermissible under the statute.

[54] Nor is it clear whether the Chief Justice is aware that, in eschewing the balancing exercise and casting out the previous law as to what is or is not offensive, she is exchanging the relative certainty of the objective test provided by the reasonable person for the greater uncertainty of the unknown and unpredictable reaction of the person or persons affected by the offensive expression. Further, as the Chief Justice holds that the reaction of those in attendance must be proportionate<sup>34</sup>

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31 It would seem that Parliament is more realistic in recognising that the greatest degree of precision which is acceptable or possible can turn on the criteria of reasonableness; see e.g., Crimes Act 1961, ss 52(1), 53, 55, 56(1), 59(1), 60(1) and (2), 61, 61A(1), 76(b), 86(1), 91(1), 98AA(2), 124(4)(a), 125(2), 128((2) and (3), 131B(2), 134A(1)(a), 155, 156, 150A(2), 187A(2), 202A(4), 216I(2), 216N(4), 230, 233(2), 237(2), 298A(1), 298B, 307A(1), 314D(1), 317AB(1), and 317B(7). Further, of course, the sensitive police powers of search, seizure, entry and arrest regularly turn on what is considered reasonable; see e.g., New Zealand Bill of Rights Act 1990, s 21, and Crimes Act, ss 202B(1) 224(1), 225, 312B(2)(a), 316(4) and (6), 317A(1), 317AA(1)(b) and (c), and 317B(1). Neither of these lists is exhaustive.

32 A P Simester and W J Brookbanks *Principles of Criminal Law* (3rd ed, Brookers, Wellington, 2007) at 28-29.

33 *Ibid.*, at [28].

34 At [40].

it is, and will be, uncertain whether the reaction is, or will be, proportionate and uncertain as to the point when a response which is proportionate becomes disproportionate.

[55] In essence, the Chief Justice reduces offensive behaviour to conduct productive of disorder.<sup>35</sup> On this view, “disorderly” behaviour is behaviour which disrupts or tends to disrupt “public order” and “offensive” behaviour is behaviour which tends to provoke such disruption.<sup>36</sup> Although the Chief Justice purports to be closing the gap between disorderly and offensive behaviour, the view she adopts contains a startling break. It does not provide a threshold or test for the kind or degree of behaviour that may provoke a disruption. Thus, a person’s behaviour may provoke a disruption even though there is nothing about that behaviour which is either disorderly or offensive. Largely untoward behaviour may still provoke a disruption. Moreover, the reaction of the person or persons affected may be unreasonable or disproportionate. Consequently, a hapless defendant whose behaviour may have provoked a disruption (or to have actually caused a disruption) will not be exonerated by a valid claim that the behaviour was neither “offensive” nor “disorderly”.

[56] This point can be taken further. As it cannot be assumed that all behaviour that is productive of disruption should be classified as “offensive”, acceptable behaviour which should be protected under the banner of the right to freedom of expression may be inhibited simply because it is or may tend to be productive of disorder. This shortcoming could possibly be rectified by introducing the standards of the reasonable person to determine whether the behaviour was productive of disruption, but the Chief Justice expressly rejects the attentions of this perdurable mortal.<sup>37</sup>

## (2) The majority’s judgments

[57] The overall approach of the majority is less rigid or definitional, but the reasoning is also unsound. The majority take the view that, in the first place, the behaviour must be offensive in the sense of being “capable of wounding feelings or arousing real anger, resentment, disgust or outrage in the mind of a reasonable person of the kind subjected to the behaviour”.<sup>38</sup> The balancing exercise between the freedom of expression and the value of the rights, values and interests affected is undertaken in determining what is or is not tolerable in a free and democratic society. The underlying notion is that the community, in recognition of the importance of the right to freedom of expression, can be expected to tolerate offensive behaviour up to the point where it causes a disturbance to “public order”. As to be expected, if the behaviour is not offensive in the terms quoted above, no offence is committed, even though “public order” may have been disturbed. If, however, the test is met so that the behaviour is offensive it will not amount to an offence unless it also results in a disturbance to “public order”. It may be behaviour which no reasonable person respectful of democratic values could be reasonably expected to tolerate,<sup>39</sup> but tolerate it he or she must in the absence of a disturbance to “public order”. What then has happened to the definition of “offensive” behaviour and the consequential balancing exercise? Any finding that the behaviour was offensive has been lost or overwhelmed by the question of “public order”. As a matter of

35 At [2], [7], [33], [34], [36] and [39].

36 At [36].

37 It may also be noted, as pointed out by Tipping J, that the Chief Justice’s view results in the word “offensive” having a materially different meaning from the words “offend” and “offended” in the same section. At [69].

38 See above, paragraph [16].

39 In *Morse* at [72] per Tipping J and [103] per McGrath J, and in *Brooker* at [89] per Tipping J, and [120] and [146] per McGrath J.

fact public order is either disturbed or it is not. A finding, or the inquiry preceding the finding, that the conduct in issue is offensive as judicially defined is pointless when the outcome is that it does not matter if there is no public disturbance.

[58] My Associate spotted a further flaw in the majority's reasoning. For behaviour to be disorderly it must cause a disturbance to "public order". Once that disturbance is established the alleged behaviour is disorderly. For conduct to be offensive it must also cause a disturbance to "public order", but if and when it does so it becomes disorderly behaviour. Thus, my Associate trumpeted, the Court had effectively deleted the offence of offensive behaviour from the statute book. I pointed out to my Associate that her argument assumed that any behaviour which caused a disturbance to "public order" in the sense conceived by the Court amounted to disorderly behaviour, but was forced to agree that this was not an unreasonable assumption. I have suggested to my Associate that she enroll for a law degree.

[59] I would, however, prefer a different formulation. In adhering to the "public order" test laid down in *Brooker*, the Court has conflated the two offences in s 4(1)(a) and created a mutation: the offence of behaving in a manner that causes a disruption or disturbance to public order. The Chief Justice and the majority arrive at this position by different routes, but the outcome is the same in both cases. The essential balancing exercise that would determine whether or not the offensive behaviour in issue is protected by the right to freedom of expression is eschewed altogether in the one case and, although undertaken in the other, is then rendered otiose.<sup>40</sup> In the process, s 5 of the Bill of Rights is seemingly ignored in the one case and denied an effective application in the other.

[60] As judges and lawyers we are fond of reiterating that no rights are absolute. That is a truism. It is impossible to say, however, that the right to freedom of expression is not absolute and at the same time refuse to acknowledge that the line must be drawn somewhere. The courts can only assess where that line should be drawn by carrying out an evaluation of the value underlying the right in the circumstances of the particular case and the rights, values or interests of those affected by the exercise of the right. The problem cannot be resolved by adopting a rigid or definitional approach or by carrying out the balancing exercise and then adding as a caveat a factual absolute.

### (3) Behaviour not involving the right to freedom of expression

[61] A real problem with the Court's interpretation becomes transparent when it is extended to offensive (or disorderly) behaviour which does not form part of a protest to which the right to freedom of expression naturally lends itself. Many cases have arisen, and will yet arise, in respect of behaviour that is allegedly offensive where the right to freedom of expression is not invoked or seriously in issue. Such cases may not make the law reports but they form the bulk of the cases under s 4(1)(a) which fall for determination in the District Court. Yet, the Court's interpretation in *Morse* must be applied to these cases simply because the Court has built the requirement that the behaviour must cause a disruption or disturbance to "public order" into the interpretation of the subsection. Thus, the outcome would be exactly the same if, say, in *Bonkers* case, Mr Bonker's crusade had been the promotion of devil worship, which it is to be hoped, would be regarded as devoid of any "political" content.

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<sup>40</sup> Although, of course, under the majority's formulation the defendant does have the opportunity of arguing that the behaviour was not "offensive" even though it created a disturbance.

[62] The point can be illustrated further by referring to circumstances based on the reported facts of a charge proceeding to sentencing in the Crown Court at Newcastle in the United Kingdom at the present time. An armed gunman shot an unarmed constable in the eyes, blinding him. When the constable was entering court to give evidence against the offender's accomplices at a later date, a young woman shouted "bang, bang" behind his back (and made a gesture with her fingers as if firing a gun). The constable was deeply upset. He said that he had suffered "great distress" and "felt sick to his stomach". The young woman pleaded guilty to the public order offence of causing the constable harassment and distress.

[63] While on facts such as these it is difficult to argue that the right to freedom of expression was involved or seriously in issue, particularly as the young woman was found to be showing off to a group of her friends, the Court's insistence in *Morse* that, as a matter of interpretation, the behaviour must cause a disruption or disturbance remains extant. While the point applies with deadly force to the approach of the Chief Justice in so far as any balancing exercise is ousted in its entirety, it also applies to the approach of the majority. The majority could find on such facts that no question of the right to freedom of expression arises, but that finding would be of no consequence unless there was also a disturbance to public order.

[64] It is not clear that the Court paused to consider this point. Yet, it is a critical consideration. In 2010, for example, there were 13,537 apprehensions recorded for disorderly and offensive behaviour.<sup>41</sup> It may be safely assumed that only a small fraction of that number related to behaviour where the offender could plausibly claim to have been exercising his or her right to freedom of expression. The Court's interpretation in *Morse* must be applied, however, even though the behaviour arises out of nothing more than mischievousness, drunkenness, stupidity, excess of high spirits, a desire to make trouble, a nasty bent to be offensive, or any other unworthy motivation divorced from the right to freedom of expression. The Court's exclusive focus on the perceived facts of *Morse* has led it to adopt an interpretation of s 4(1) that will apply to the great bulk of charges under that subsection which have nothing or little to do with freedom of expression.

#### (4) The long shadow of the Supreme Court of the United States

[65] Certainly, I must acknowledge that the Court's decision in *Morse* would be acclaimed by the Supreme Court of the United States. Free speech is a near-absolute right in that jurisdiction.<sup>42</sup> The right not only trumps other rights and values but also overrides concerns that fall under the rubric of social harm. The protection purportedly conferred under the First Amendment allows few exceptions. For example, neo-Nazis marching through suburbs populated by Holocaust survivors

41 Statistics New Zealand; National Annual Apprehensions for the Latest Calendar Years; <[http://www.stats.govt.nz/tools\\_and\\_services/tools/TableBuilder/recorded-crime-statistics/offences.aspx](http://www.stats.govt.nz/tools_and_services/tools/TableBuilder/recorded-crime-statistics/offences.aspx)>.

42 Notwithstanding the First Amendment, the right to freedom speech is not completely absolute. It is curbed, for example, in respect of misleading commercial advertising. See *In re RMJ* 455 US 191 (1982) at 202-203 and *Ibanez v Fla Department of Business and Professional Regulation, Board of Accountancy* 512 US 136 (1994) at 142. There is no exception per se for commercial speech. See *Bigelow v Commonwealth of Virginia* 421 US 809 (1975); *Virginia State Pharmacy Board v Virginia Citizens Consumer Council* 425 US 778 (1976); and *Central Hudson Gas & Electric Corp v Public Service Commission* 447 US 557 (1980). Obscenity has no absolute protection; see *Miller v California* 413 US 15 (1973). Nor is child pornography protected unless the child is a "virtual" child! See *New York v Ferber* 458 US 747 (1982) and *Ashcroft v Free speech Coalition* 535 US 234 (2002). It is probable that our Films, Videos and Publications Classification Act 1993 would be struck down, certainly as being too broad, in the United States, and s 61 of the Human Rights Act 1993, relating to hate speech, would certainly be struck down.

enjoy this expansive protection.<sup>43</sup> The Court has recently struck down a state law seeking to regulate the sale of violent video games to children,<sup>44</sup> and a state law regulating videos showing cruelty to animals.<sup>45</sup> It has struck down a statute seeking to regulate political speech by corporations even though a corporation of itself is incapable of having an opinion or articulating speech.<sup>46</sup> It has also struck down a campaign finance statute providing a cap on political advertising in an attempt to create a level playing field by countering the power of money favouring wealthy candidates and backers,<sup>47</sup> and so the list goes on. The social harm that this country might wish to weigh in the balance when considering reasonable limits on free speech has little or no traction in that jurisdiction. Certainly, the harm to the body politic and the harmful effect on the cohesion and stability of the community if citizens are free to be grossly offensive to one another in public places counts for naught.<sup>48</sup>

[66] A decision of the Supreme Court of the United States of particular interest in this respect is *Snyder v Phelps*.<sup>49</sup> The family of a dead soldier sued the defendant for intentional affliction of emotional distress. Members of the defendant's Church had picketed the soldier's funeral service. Signs reflected the Church's view that the United States was overly tolerant of sin and that God kills American soldiers as punishment. The Supreme Court acknowledged that the Church's choice to convey its views in conjunction with the soldiers' funeral service made the expression of those views particularly hurtful to a number of people, particularly the soldiers' parents. Indeed, it held that the applicable legal term, "emotional distress", failed to adequately capture the "incalculable grief" the picket caused. Nevertheless, the Court held that the right to free speech prevailed. The picket had been conducted peacefully and the distress which it occasioned turned on the content and viewpoint of the message conveyed "rather than any interference with the funeral itself".<sup>50</sup> It is clear from the judgment that a law prohibiting such picketing in the vicinity of a funeral service or procession would have been struck down.

[67] The factual parallel with *Morse* is uncomfortably close. Notwithstanding that Ms Morse's action in burning the flag may have been particularly hurtful to the men, women and children gathered at the Cenotaph, it is lawful unless it interferes with the use of that public place for the service. Of course, as a Judge I am lacking in imagination. Why is it, then, that when I read the Court's decision in *Morse* I can distinctly hear the lofty strains of "The Star-Spangled Banner".

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43 *National Socialist Party of America v Village of Skokie* 432 US 43 (1977).

44 *Brown v Entertainment Merchants Association* 130 S Ct 2398 (2010).

45 *United States v Stevens* 130 S Ct 1577 (2010).

46 *Citizens United v Federal Election Commission* 558 US (2010), and see *Buckley v Valeo* 424 US 1 (1976).

47 *Buckley v Valeo*, *ibid*.

48 The Supreme Court also struck down a federal law prohibiting the desecration of the flag of the United States on the ground that it offended the First Amendment right to free speech. See, *United States v Eichman* 496 US 310 (1990).

49 See above, n 18. It is to be noted, however, that the Chief Justice stipulated that the Court's opinion was limited by its particular facts. The Church's picket took place 1000 feet (over 25 meters) from the church where the funeral was held, it was conducted under police supervision, it was not unruly, and there was no shouting, profanity or violence. Only the tops of the picketers' signs were visible to Mr Snyder and he did not learn what was written on them until he saw the news broadcast later that night. These facts were seen as relevant to the Court's evaluation of "what was said, where it was said and how it was said" (at 182).

50 *Ibid*, at 184 and 186.

### *A more mature perspective*

[68] The anomalies and inconsistencies in the Court's decision in *Morse* emerge clearly enough from the above appeals and subsequent commentary, but may be briefly summarised.

- No matter how odious and repugnant the behaviour, and no matter how devastating the impact of the behaviour on the sensibilities of the person or persons affected by it, the behaviour will not be "offensive" within the meaning of s 4(1)(a) unless it causes a disruption or disturbance to "public order". The criminality of the offence lies not so much in the offensiveness of the defendant's behaviour as in the consequences of that behaviour.
- While the right to freedom of expression does not mean that language and behaviour must be inoffensive, the Court's decision effectively embraces a "right" to offend without responsibility or restraint, providing it does not cause a disruption or disturbance to "public order".
- Although a person or persons' enjoyment of a public place may be seriously impaired by an affront to his or her sensibilities, that impairment will be of no consequence unless the behaviour affects their use of that place. It must, by way of example, interfere with the use of a public space for, say, a religious or commemorative service.
- Notwithstanding that burning the national flag is a recognised form of protest, the Court's interpretation of s 4(1)(a) cannot be restricted to that particular form of protest. It must necessarily apply to all other forms of offensive behaviour, however obnoxious and repugnant that behaviour might be.<sup>51</sup>
- There is no necessary nexus between the intensity or level of the offensive behaviour and the likelihood of a disruption or disturbance to "public order". Behaviour which is barely offensive may lead to a disruption or disturbance whereas behaviour which is horribly gross may not.
- Nor is there any necessary nexus between the culpability of the offender and the likelihood of a disruption or disturbance to "public order". Genuine and well-intentioned behaviour may lead to a disruption or disturbance whereas deliberate, and even malicious, behaviour may not.
- The behaviour may be repeated many times over provided it does not cause any disruption or disturbance to "public order" on each occasion. The possibility that behaviour may eventually become offensive through sheer repetition is precluded.
- The offence of offensive behaviour is effectively removed from the statute book in that the offence will not be complete until the behaviour causes a disturbance, at which point it will almost certainly amount to disorderly behaviour.
- In substance and effect, the Court's decision conflates the offences of disorderly behaviour and offensive behaviour into one offence: the offence of behaving in a manner that causes a disruption or disturbance to "public order" (save that under the majority's formulation the behaviour must also be offensive).
- Unless such judicial qualities as logical thinking and intellectual rigour are to be discarded, the Court's interpretation requiring a disruption or disturbance must necessarily apply to the other offences in s 4(1). The subsection is then effectively emasculated.
- Whether or not offensive behaviour causes a disruption or disturbance will largely depend on the disposition of the person or persons who are affected by the behaviour. If they are of

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<sup>51</sup> See above, paragraph [21] for two odious examples of behaviour which could have been adopted by the protestors in *Morse* to attract attention to their cause.

a pacifist, non-violent or non-aggressive disposition the likelihood of a disruption or disturbance is negligible, or may be non-existent. Conversely, if they are not of that disposition the prospect of some form of disorder is higher and, in some cases, no doubt, inevitable.

- It is not clear whether the Court's interpretation would apply if people were deterred from using the public space on a future occasion. Assume for a moment, for example, that some of the people attending the Dawn Service in *Morse* had, because of their disgust at the burning of the flag, resolved not to attend the ceremony the following year. It is difficult to see how that resolve would be an interference with the use of the public area around the Cenotaph amounting to public disorder.<sup>52</sup>
- Offensive behaviour in a public place may have a marked, and even devastating, impact on a person or persons who are on private property but within sight or hearing of that public place. Nonetheless, no offence will be committed as that impact, and the consequences directly attributable to that impact, however harmful, do not occur in a public place.
- The Court's interpretation is necessarily applicable to the great bulk of charges under s 4(1) (a) where the right to freedom of expression is not invoked or seriously in issue.<sup>53</sup> The Court's expansive view of the right to freedom of expression has resulted in an unexpected advantage to the numerous offenders who do not purport to be exercising that right or who could not plausibly claim to be exercising the right.
- While it is to be hoped that the person or persons affected by offensive behaviour will remain stoically passive, the Court's interpretation provides an inbuilt incentive or motivation for such persons to intentionally cause a disruption or disturbance - or even threaten violence.
- The Court's interpretation effectively eliminates the capacity of a court to have regard to the nature of the protest, the extent of the impact of the behaviour on the sensibilities and dignity of the person or persons affected, the justification for the exercise of the right to freedom of expression, the social harm to the community arising from grossly offensive conduct, and the public policy considerations which prompted Parliament to enact the statute. In short, the balancing exercise necessary to determine where to draw the line is effectively dismantled.
- The Court's formulation fails to adequately protect vulnerable individuals and minorities from odious taunts, unless the taunt causes a disruption or disturbance to "public order".
- Notwithstanding that the Siracusa Principles expressly state that respect for social and cultural rights is part of public order, that respect will not be demonstrated unless the behaviour in question causes a disruption or disturbance.<sup>54</sup>
- The difficulties the Court's decision will cause the police who must enforce the law are manifest, particularly as the constable at the front line must determine which of the five formulations of the test he or she will apply, whether there has been a disruption or disturbance to "public order", whether that disruption or disturbance falls short of violence or the likelihood of violence, and whether the resulting interference is with the use of the public place as distinct from being an affront to the sensibilities of the person or persons affected.
- The tables are turned. If and when a court holds that the reaction of a person or persons who, being incensed, take offence was unreasonable and disproportionate to the expression, those

52 It may be that persons of a non-defiant or submissive disposition should be added to the list compiled by Bonatti J. See above, paragraphs [19] and [20].

53 See above, paragraphs [61]-[64].

54 Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights UN ESCOR 41st sess UN Doc E/CN4/1985/4 (1984).

persons, whether or not they are ever charged, will be guilty of disorderly behaviour. In some circumstances such as, for example, where the affected persons resort to violence, the opprobrium or later conviction, if any, will be justified, but in other circumstances it will be harsh, and even unfair.

- The Chief Justice's opinion that the issue under s 4(1)(a) is a question of fact and that no balancing exercise is required seemingly disowns the common law method of adjudication whereby a judge has regard to a number of different and often conflicting values, interests and considerations in arriving at a decision. To reject a balancing exercise in this area of the law, as in any other, is to turn judicial decision-making upside down and inside out.<sup>55</sup>
- The Chief Justice's claim that Parliament has itself struck the balance in the myriad of circumstances to which the section could apply is unrealistic. Parliament clearly had no such intention and has done no such thing.
- While the Chief Justice's argument that the interpretation of a criminal offence should conform to the principle that the criminal law must be certain and capable of ascertainment in advance encapsulates an important principle, the more critical question is what degree of precision is acceptable or possible. As recognised by Parliament, many offences cannot be defined with perfect precision.<sup>56</sup> An objective evaluation of such phrases as "offensive" in accordance with a criterion such as reasonableness, or the standards of the reasonable person, is at times the best the law can do.
- Further, it is, and will be, uncertain whether the reaction is, or will be, proportionate and it is, and will be, uncertain at what point a response which is proportionate becomes disproportionate.
- The Chief Justice's definition of offensive behaviour as behaviour which provokes or tends to provoke a disruption means that behaviour which falls short of being offensive as judicially defined could be brought within the reach of s 4(1)(a).
- Although defining offensive behaviour and purporting to carry out a balancing exercise the majority render that exercise otiose by adding the requirement that the behaviour must cause a disturbance. This issue is a question of fact and, if a disturbance exists as a matter of fact, any finding that the behaviour was offensive as judicially defined will be of no consequence.
- The Court's conception of "public order", on which its interpretation of s 4(1)(a) is based, is a narrow and cramped conception, but more of that anon. For the moment it will suffice to say that the Court fails to acknowledge, one, that s 4(1)(a) arguably falls within the exception to the right to freedom of expression spelt out in paragraph 3 of Article 19 of the International Covenant of Civil and Political Rights and, two, that its conception of public order is at odds with the conception of public order (or *ordre public*) specified in that paragraph.

### (1) Section 6 of the Bill of Rights

[69] This list of anomalies and inconsistencies is formidable and calls the Court's use of s 6 of the Bill of Rights into question. The section has its limits and those limits fall to be imposed by the judges. The scope of s 6 was discussed by the Court in *R v Hansen*,<sup>57</sup> principally by Tipping J. Relying heavily on Andrew Butler and Petra Butlers' excellent work, *The New Zealand Bill of*

55 E W Thomas *The Judicial Process: Realism, Pragmatism, Practical Reasoning and Principles* (Cambridge University Press, 2005), esp. at 270-272 and 330-331.

56 See above, n 31.

57 *R v Hansen* [2007] 3 NZLR 1.

*Rights: A Commentary*,<sup>58</sup> the learned Judge accepts that any meaning adopted pursuant to s 6 must be “fairly open and tenable”.<sup>59</sup> The courts, it is said, must follow a “legitimate process of construction” and not use s 6 as a “concealed legislative tool”. Lord Millett’s phrase in the *Ghaidan v Godin-Mendoza*<sup>60</sup> case, “intellectually defensible”, is quoted with approval.<sup>61</sup> As any number of my decisions illustrate, I support a robust approach to s 6, but I do not need to decide its limits in these appeals. My immediate point is that, whatever its limits, s 6 is not open-ended and any approach adopted must embrace judicial qualities such as logical thinking, intellectual rigour, reasoned argument, commonsense, and judicial discipline and restraint.

[70] Section 6 does not empower the Court to abandon these judicial qualities or any similar attributes of sound judicial reasoning. How else can the Court determine whether a possible meaning of the provision in issue is “fairly open and tenable”? I would also assert that these essential judicial qualities must include the ability to discern if and when an issue is a matter of policy which is the proper province of the people’s elected representatives. Section 6 will be brought into disrepute if the attitude of the Court is perceived to be: “We will, because we can.”

[71] If it were open to me to do so I would follow the judgments of the majority in the Court of Appeal. As I have not tired of pointing out, however, it is not open to me to do so. Nevertheless, while I must apply the Court’s decision in *Morse* it is permissible to note my protest and, in inoffensive terms, indicate the thrust of my misgivings.

## (2) The function of bills of right

[72] Bills of right are commonly perceived as charters protecting the individual who is different or the minority that is repressed in a system of majoritarian government. Such a perception, however, does not convey the full impact of bills of right or the vision of their proponents. Bills of right reflect the fundamental and enduring values of society as a whole. They comprise the basic principles by which the community wishes to interact in a representative democracy. Hence, bills of right have the capacity to be a unifying and integrating force. Carefully nurtured by the judiciary, they can be a cohesive and harmonising agent. They need not be, and should not be, the medium for division and divisiveness within the community. The consequence of this perception is that rights are to be exercised responsibly and with consideration for others.

[73] I do not suggest that the test is whether Ms Morse exercised her right to freedom of expression with proper concern and consideration for those assembled to pay their respects to the dead at the Dawn Service on Anzac Day in 2007. Rather, the test or interpretation adopted, and the necessary balancing exercise involved in applying that test, should not be immune to this wider perception of the function of a bill of rights.

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58 Andrew and Petra Butler *The New Zealand Bill of Rights: A Commentary* (LexisNexis NZ Ltd, Wellington, 2005) at [711]. See also the cases referred to by the authors in footnotes 50 to 60, at 168-169.

59 At [150].

60 *Ghaidan v Godin-Mendoza* [2004] UKHL 30.

61 At [156].

### (3) The right to dignity

[74] As Aharon Barak, the past-President of the Supreme Court of Israel, has pointed out, the right to dignity is central to all human rights.<sup>62</sup> Human dignity is the source from which all other rights are derived.<sup>63</sup> It is this dignity which unites human rights into a coherent whole. The right to freedom of assembly and freedom of association, for example, serve the same end as the right to freedom of expression in preserving conditions in which human dignity is recognised and protected. Nor is respect for human dignity restricted to jurists. Ronald Dworkin, for one, has placed human dignity at the heart of his perspectives of justice, morality and political ethics. Every person is entitled to be treated with equal concern and respect.<sup>64</sup>

[75] Dignity is a human condition; it is not just the prerogative of those who assert a right. People, more often than not good and decent people, who are affected by someone's exercise of a right also possess dignity and are entitled to be treated with the respect and consideration that dignity merits. Everyone, in other words, is entitled to be treated with equal concern and respect, and this includes the citizens who assembled at the Cenotaph in the early hours of the morning to pay their sincere respects to the servicemen and women who put their lives at risk and paid the ultimate price. The law is enhanced by its capacity for empathy. Those attending the service deserved a greater measure of empathy than the Court allowed. The impact of the burning flag cannot be measured by the external consequences alone.

[76] The enforcement of human rights, and the exercise of the power conferred on the courts under s 6 of the Bill of Rights, will only reach full maturity when the courts develop and articulate an intelligent and intelligible conception of human dignity and recognise that dignity is the right of all persons. A person's dignity matters. It is a basic value which cannot be ignored in any discourse on rights. Being fundamental, it is appropriate and sensible that the criminal law provide a sanction against behaviour that is beyond the pale and demeans both the perpetrator and the person or persons affected.

### (4) Public order

[77] It may be noted that the Court's interpretation of s 4(1)(a) is not simply a case where the Court is able to take advantage of the malleability of the language used in the statutory provision. The wording of s 4(1)(a) is plain and ambiguous. Rather, the Court utilises the heading to this Part of the Act, "Offences against Public Order", to impose a gloss on the section itself. That gloss, however, in turn depends on the Court's assertion that "public order" cannot or does not embrace a serious assault on the sensibilities of one citizen by another carried out in public.

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62 See Aharon Barak *The Judge in a Democracy* (Princeton University Press, New Jersey, 2006) at 85-88. See also Thomas J in *Brooker* above n 13, at [177]-[182].

63 The Preamble to the International Covenant on Civil and Political rights recognises that rights derive from the inherent dignity of the human person. The Preamble to the New Zealand Bill of Rights Act 1990 (paragraph (b)) recites that the Act is to affirm New Zealand's commitment to the Covenant.

64 Ronald Dworkin *Justice for Hedgehogs* (The Belknap Press of Harvard University Press, 2011). The title refers to a line by an ancient Greek poet Archilochus that the fox knows many things but the hedgehog knows only one thing. The value is the one big thing. Committed to the value underlying the label of a right, I must admit, although never prickly, to being a hedgehog.

[78] Thus, the Court’s decision is ultimately based on a restricted conception of “public order”. To the Court it means, in effect, public disorder. Certainly, the maintenance of civil and civilised standards of communication is excluded. The meaning of “public order” receives little attention from the Court. Indeed, the conception the Court adopts is not so much addressed as assumed. Had the issue been squarely addressed it may have become apparent to the Court that such a conception was incompatible with the terms of s 4(1)(a) when read in context and as a whole; that it is at odds with paragraph 3 of Article 19 of the ICCPR; that it cannot be sustained as a viable concept of public order in a civil and civilised society; that it fails to have proper regard to the justification advanced for the behaviour in question; and that it arguably intrudes upon the province of Parliament to determine that, as a matter of policy, the preservation of a minimum level of civility in the communications and behaviour of citizens in public is a desirable attribute of a free and democratic society.

#### (5) The statutory context

[79] The statutory context of s 4(1)(a) tells against the Court’s conception. The preceding section, s 3, prohibits behaviour that is “riotous, offensive, threatening, insulting or disorderly ... likely in the circumstances to cause violence against persons or property to start or continue” (emphasis added). Section 4(1) must then relate to public behaviour that falls short of violence or behaviour that is likely in the circumstances to cause violence to persons or property to start. Under the subheading; “Offensive behaviour or language”, and in addition to offensive or disorderly behaviour in s 4(1)(a); the subsection proscribes addressing words to any person intending to “threaten”, “alarm”, “insult” or “offend” that person;<sup>65</sup> using any “threatening” or “insulting” words and being reckless whether any person is “alarmed” or “insulted” by those words;<sup>66</sup> and addressing any “indecent” or “obscene” words to any person.<sup>67</sup> Subsection (3) provides that, in determining whether any words are indecent or obscene, the court is to have regard to all the circumstances, “including whether the defendant had reasonable grounds for believing that the person to whom the words were addressed, or any person by whom they might be overheard, would not be offended”.

[80] To read the language used in these provisions and conclude that not one is complete as an offence unless there is a disruption or disturbance to “public order” is plainly untenable. If s 4(1) (a) requires a finding that the external factor must be present because of the heading to this Part of the Act so, too, that factor must be present before the remaining offences in the section are complete. The heading, “Offences Against Public Order”, is the heading to s 4(1) and not just s 4(1)(a). How, for example, can the requirement of a disruption or disturbance to “public order” be sensibly grafted on to the offence of using insulting words being reckless whether any person is insulted by those words? Again, by way of example, how can the absence of a disruption or disturbance bear on the offence of addressing words to a “person intending to threaten, alarm, insult or offend that person”?

#### (6) A restricted conception of public order

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65 Subs (1)(b).

66 Subs (1)(c)(i).

67 Subs (1)(c)(ii).

[81] The most critical defect in the Court's approach, however, is its strained understanding of what constitutes public order. Public order, properly conceived, does not necessitate a disruption or disturbance, or a breach of the peace, or something in the nature of a commotion, confrontation, or outcry, or interference with a person's access or use of a public place. It can include considerations of public morality directed at preserving the orderly behaviour of one citizen to another. Section 4(1) seeks to set minimum standards of public order that can be expected of the citizenry in a civil and civilised society. The various offences created by this section and enumerated above can be regarded as the basic rules of social engagement. A breach of those minimum standards can properly attract the criminal law at the lower end of the scale. The public order element of the offences is satisfied if the offending takes place in a public place or within sight or hearing of a public place.

[82] The Court therefore errs in seeking to graft on to the provision an added element requiring the intensity of the behaviour to be such as to give rise to public disorder of some kind or other which falls short of violence or the threat of violence to persons or property, which is covered by s 3. Public order, as such, is achieved by requiring citizens to behave towards one another in public in a way which, in terms of s 4(1), is not offensive, disorderly, threatening, alarming, insulting, indecent or obscene. These requirements set the bounds and reflect the mores of a civil, civilised and free and democratic society.<sup>68</sup>

[83] The Court's quick assumption<sup>69</sup> that there must be an element of public disorder present to constitute an offence under s 4(1)(a) is all the more surprising in that the issue had already been before the Court of Appeal. In *Cortorceanu v Police*,<sup>70</sup> which is not mentioned by the Court, the Court of Appeal, comprising Cooke P and Somers and Bisson JJ, rejected counsel's submission to that effect. Delivering the judgment of the Court, Bisson J stated that the Court "could see no occasion to import the qualification or gloss" into the section. After referring to the heading "Offences Against Public Order", it held that the subsection was a specific provision to protect any person in any public place from being addressed and thereby subjected to words which were intended to threaten, alarm, insult or offend any person. Such behaviour, the Court said, could conceivably lead to a disturbance and disorderly behaviour but it declined to import that qualification into the legislation. The section, the Court concluded, is "designed to protect persons in public

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68 Parliament shared this wider perception of public order. While the heading to this part is "Offences Against Public Order", the subheading for s 3 is "Disorderly behaviour" and for s 4 "Offensive behaviour or language". The use of these subheadings makes no sense if the words "Offensive behaviour or language" mean "disorderly behaviour or language".

69 The issue was addressed by the High Court of Australia in *Coleman v Power* (2004) 220 CLR 1. Particular attention is drawn to the observations of Gleeson CJ at [9] and [10]. The Chief Justice holds that it is open to Parliament to form the view that threatening, abusive or insulting speech (the statutory language in issue) may in some circumstances constitute a serious interference with public order even though there is no intention, and no realistic possibility, that the person affected, or some other person, might respond in such a manner that a breach of the peace may occur. The learned Judge correctly observes that conduct may seriously disturb public order and affront community standards of tolerable behaviour, but by reason of the characteristics of those who engage in the behaviour, or those towards whom their conduct is aimed, or the circumstances in which the conduct occurs, there is no possibility of a forceful retaliation. His examples are telling, e.g., the mother who takes her children to play in the park and encounters threats, abuse or insults from some rowdy group is more than likely to simply leave the park.

70 *Cortorceanu v Police* CA 289/86 25 November 1987.

places from such verbal abuse and thereby to preserve public order which is the purpose of that part of the Act." (Emphasis added).<sup>71</sup>

[84] It is not suggested that the Supreme Court could not overrule this decision. At the time *Cortorceanu* was decided the Bill of Rights had not been enacted. The decision would have been easy to distinguish. That, however, is not the point. The point is that the Court of Appeal adopted a perception of public order which included the protection of persons in public places from threatening, alarming, insulting or offensive language or behaviour. The external factor urged by counsel was not seen to be necessary for the purpose of preserving public order. At the very least it obliged the Court in *Morse* to address the reasoning of *Cortorceanu* and explain its assumption that "public order" excludes the protection of persons in public places, or within sight of or hearing of a public place, from grossly offensive language and behaviour.

#### (7) The exceptions in Article 19 of the ICCPR

[85] The International Covenant on Civil and Political Rights (ICCPR) expressly recognises that the right to freedom of expression is not incompatible with this wider conception of public order. Paragraphs 2 and 3 of Article 19, read as follows:

2. Everyone shall have the right to freedom of expression; this right shall include 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.
3. The exercise of the rights provided for in paragraph 2 of this article 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. (Emphasis added).

[86] The express recognition in paragraph 3 that laws providing for public morality may be a legitimate exception to the right to freedom of expression counts against the Court's expansive view of the right and its restricted conception of public order. In the first place, a restricted conception, such as that adopted by the Court, would be inconsistent with the reference to public morality. Secondly, the reference in brackets to "*ordre public*" cannot be reconciled with a narrow conception of public order. The fact that these words appear in brackets after the words "public order" indicates that, whatever shades of difference may attach to these expressions in international law, *ordre public* is not intended to have a separate and distinct meaning from the words "public order" in paragraph 3.

[87] The term "*ordre public*" derives from French law and, while the term is difficult to translate into English, it is understood to encompass the social and economic and other values that tie a society together. It is more than the absence of public disorder. Paragraph 22 of the Siracusa Principles defines "public order (*ordre public*)" as follows:<sup>72</sup>

<sup>71</sup> At 5.

<sup>72</sup> See above, n 54. See also, Guy Goodwin-Gill "Ordre Public Considered and Developed" (1978) 94 LQR 354 at 356; UN Doc E/L 68, tabled at the Conference of Plenipotentiaries by its Executive Secretary UN Doc A/CONF 2/sr 14 July 10 at 19-20; and John P Humphrey "The International Bill of Rights: Scope and Implementation" (1976) 17 Wm & Mary L Rev 527.

The expression “public order (*ordre public*)” as used in the Covenant may be defined as the sum of rules which ensures the functioning of society or the set of fundamental principles on which a society is founded. Respect for economic, social and cultural rights is part of public order (*ordre public*).

[88] The Court’s apparent neglect of paragraph 3 of Article 19 exposes it to criticism in two respects. First, as the Bill of Rights expressly affirms the ICCPR, it is inappropriate to adopt an inflated view of the right to freedom of expression without reference to the exceptions recognised in the Covenant.<sup>73</sup> When the exceptions in paragraph 3 are addressed, it is not necessary to view s 4(1)(a) as inimical to the right to freedom of expression. Secondly, in adopting a restricted view of public order, the Court departed from the perception of “public order (*ordre public*)” contained in the Covenant. Having regard to the precipitating role of the ICCPR in the Bill of Rights the significance of this departure cannot be overstated.

[89] The Court’s perception of public order in *Morse* is in sharp contrast to a decision of the Conseil d’Etat in France in 1995.<sup>74</sup> The municipal authorities were required to enact laws to ensure, inter alia, “good order”. The mayor and police enacted an order banning dwarf throwing competitions in their municipality. A dwarf was employed as the projectile to be thrown by hopeful contestants. His employers ensured that he had proper protective clothing and that appropriate precautions were taken to protect his health. Many careers were barred to the dwarf because of his size and, as a result, he was more than willing to undertake the task. The job was a source of financial security, and even fame. Notwithstanding the dwarf’s support for the ban, however, the Conseil d’Etat upheld the order on the basis that to do otherwise would be an “affront to human dignity”. The Court repeated the sentiment: “...respect for the dignity of the human person is one of the elements of public order”.

[90] The reasoning of this internationally respected Court is pertinent in a critical respect. The decision is expressly based on the premise that respect for the dignity of the human person is a core element of public order. Public order is not confined to the external impact of the allegedly objectionable behaviour. On this basis, subjecting people who had assembled at dawn on Anzac Day to pay their solemn respects to those who have fallen in the World Wars to an act which was highly offensive in the circumstances can properly be viewed as a breach of public order.

#### (8) Justification for the use of the right

[91] Examining the underlying value of the right to freedom of expression in the particular circumstances of the case necessarily entails an examination of the justification for the exercise of the right. To give the particular exercise of the right the full panoply of the right to freedom of expression in the abstract without assessing it against the justification in the particular circumstances demonstrates a lack of intellectual rigour. The particular circumstances will, of course, bear on the justification as the courts move from the abstract to the particular. Thus, the three cases I have dealt with in this appeal should not serve to carve out an exception to the right to freedom of expression for crackpots, rabid zealots or bigots. Both the admirable and the detestable share the right. That does not mean, however, that all expression must be or should be given the same weighting. The courts are quite capable of assessing the particular exercise of the right against the justification for the exercise of that right.

<sup>73</sup> The Chief Justice refers to Article 19, but does not elaborate the significance of paragraph 3. At [37].

<sup>74</sup> CE Ass 27 October 1995 372 Case *Commune de Morsang-sur-Orge*.

[92] Justification for the exercise of the right in the particular circumstances may be the importance in a democracy of having access to information, knowledge, and a range of opinions - good and bad - based on the assumption that the truth will achieve ascendancy; it may be the notion that no government can or should exercise the coercive power of the state unless its citizens have had the opportunity to participate in or influence governmental decisions; it may be a perceived right to influence public opinion or rally others to a cause; it may be the need to draw attention to a felt injustice; it may be the desire to contribute to a vibrant and diverse society; it may be the need to channel anger or resentment into a relatively peaceful activity and so avoid violence; or it may be some other perceived justification for the behaviour in question.<sup>75</sup> It may, of course, be none of these more “noble” aims but simply mischievousness, misbehavior or a bent desire to offend.<sup>76</sup>

[93] Once the justification is examined, however, the limits of the right, that is, where the line should be drawn in the particular circumstances, should generally emerge. On some occasions the justification for it may not be engaged at all.<sup>77</sup> On other occasions, the behaviour may be disproportionate to the justification. In this way, as Dworkin puts it, the case for free speech is “self-limiting”. In *Brooker*, Thomas J had advanced the same concept but called it “self-adjusting”.<sup>78</sup> In essence, the justification is an integral part of the balancing exercise which is necessary to determine where the line should be drawn.

#### (9) A question of policy for Parliament?

[94] Judicial discipline and restraint in the application of s 6 is also required to determine whether the proposed interpretation intrudes upon a question of policy which is the proper province of the people’s elected representatives.<sup>79</sup> Section 4(1) embodies a legislative policy that has prevailed for many years based on the belief that the body politic is well served by a provision which proscribes extremely offensive behaviour by one citizen to another, recognises the importance of the right to freedom of expression but requires the right to be exercised with responsibility and restraint, sets the minimum rules of social engagement, and recognises the dignity of all people and not just those asserting their right to free speech.

75 Professor Rishworth has proffered three main bases justifying the right to freedom of expression. Briefly stated, they are (1) the marketplace of ideas theory, (2) the maintenance and support of democracy theory, and (3) the liberty theory. See Rishworth, Huscroft, Optican and Mahoney *The New Zealand Bill of Rights* (Oxford University Press, Melbourne, 2003) at 309-311. It would be straining to suggest that any one of these theories justified the burning of the national flag in close proximity to an Anzac Dawn Service.

76 See above, paragraph [64].

77 Dworkin, above at paragraph [74], above n 64, at 374.

78 *Brooker* above n 13, at [183]-[188]. The Chief Justice in *Morse* expressly rejects the notion that the subsection is self-adjusting at [16].

79 A striking example of a final appellate court trespassing into an area that is properly a question of public policy for Parliament is the decision of the High Court of Australia in *Australian Capital Television Pty Ltd v Commonwealth of Australia* (1992) 177 CLR 106. The legislature sought to reform the electoral process by limiting political expenditure on campaigns. Its intention was to create a more “level playing field” and negate or reduce the advantage of wealthy candidates and those having wealthy backers. While the exercise of the Court’s constitutional power to strike the legislation down has been accepted, the actual decision has been widely criticised. See Sir Stephen Sedley “Human Rights: a Twenty-First Century Agenda” [1995] Public Law 386 at 393-394, reprinted in *Ashes and Sparks: Essays on Law and Justice* (Cambridge University Press, Cambridge, 2011) at 348; Lord Cooke of Thorndon “The Dream of an International Common Law” in Saunders (ed) *Courts of Final Jurisdiction: the Mason Court in Australia* (1996) 138 at 140; and E W Thomas, Centennial Lecture “The Relationship of Parliament and the Courts: A Tentative Thought or Two for the New Millennium” (2000) VUWLR 5 at 28-29.

[95] The question whether a matter is properly the province of Parliament is, of course, a question on which there can be divided views. It is, however, an important question, and one which should be addressed. As Andrew and Petra Butler argue, Parliament has a “role to play in the human rights enterprise” and the decision whether to apply s 6 involves a “fine constitutional balancing act”.<sup>80</sup> In this instance, it required a deliberate decision on the part of the Court to assess the importance of the legislative policy reflected in s 4(1) against the importance of giving effect to the legislative injunction to the courts contained in s 6 to favour interpretations which serve to protect fundamental rights. The view that s 4(1)(a) represents a policy relating to public discourse and interaction which is Parliament’s province to determine is certainly tenable. Such a view, as I have already stated, would recognise that the people, through their elected representatives, have the right to opt for a society which does not in its laws condone disorderly conduct or grossly offensive behaviour on the part of its citizens in public places. Although the balance is fine, I would tend to favour this view. It might be otherwise if the arguments supporting the Court’s interpretation were stronger than is the case.

### **Conclusion**

[96] To sum up, the law may influence, but it cannot dictate, the norms or standards to be observed in the course of human interaction. It cannot, by decree, mandate behaviour that is courteous, respectful and polite or banish language that is harsh, hurtful or horrid. Nor should it essay to do so. The law can, however, prescribe minimum standards of public behaviour that set the boundaries for what is tolerable in the inevitable interaction and interplay of people within the community. It can, to adopt a phrase used by Sir Stephen Sedley, “articulate and uphold the ground rules of ethical social existence.”<sup>81</sup>

[97] Human rights are fundamental in a number of respects. They are the bedrock of a free and democratic society in protecting the oppressed individual or minority from the indifference or self-centredness of the majority. They sustain the framework and define the civil and political ends of a constitutional democracy. To some, myself included, they have the capacity to provide the rule of law with substantive content.<sup>82</sup> They can serve the task of ensuring that, “as a society, we are governed within a law which has internalized the notion of fundamental human rights”,<sup>83</sup> to which might be added, a law which has internalized the notion of the equal human dignity of all people. To yet others despairing at the excesses of Western liberal individualism and its faithful bedfellow, untrammelled capitalism, and ruing the demise of the values of social democracy and loss of social cohesion, fundamental human rights and the enforcement of those rights represent the means by which to forge a more enlightened social order. Although vested with altruism and notions of justice and equality, human rights are themselves basically egocentric and thus constitute the natural antidote to unrestrained individualism. It is thought, or hoped, that the sense of justice underlying human rights will instill a wider appreciation of social justice and a more cohesive sense of community. From whatever angle they are approached, however, fundamental

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80 *The New Zealand Bill of Rights: A Commentary*, above n 58, at 7.11.2, 169.

81 See Stephen Sedley, above n 79, “Human Rights”, at 389-391, and *Ashes and Sparks*, at 354.

82 See Tom Bingham *The Rule of Law* (Allen Lane, London, 2010) and the author, “A Personal Tribute to Tom Bingham” (2010) *NZLawyer* 148 29 October 13 at 15.

83 Sedley, above n 79, at 389-391, and *Sparks and Ashes*, at 354.

human rights as articulated and enforced by the courts are critical in the quest for a tolerant and just world.

[98] The Supreme Court's decision in *Morse* reflects the ugly side of human rights or the enforcement of human rights. It presages a law captured by the rhetoric of the right to freedom of expression without due regard to the value underlying the particular exercise of that right; a law in which, under the guise of the right to freedom of expression, the "right" to offend can be exercised without responsibility or restraint providing it does not cause a disruption or disturbance in the nature of public disorder; a law in which an impoverished amoral concept of "public order" is judicially ordained; a law in which the right to freedom of expression trumps - or tramples upon - other rights and values which are also vital properties of a free and democratic society; a law in which any number of vulnerable individuals and minorities may be exposed to uncivil, and even odious, ethnic, racist, sexist, homophobic, xenophobic, anti-Christian, anti-Semitic, and anti-Islamic taunts providing that no public disorder results; a law in which good and decent people can be used as fodder to promote a cause or protest an action for which they are not responsible and over which they have no direct control; a law which demeans the dignity of the persons adversely affected by those asserting their right to freedom of expression in a disorderly or offensive manner; a law in which the mores or standards of society are set without regard to the reasonable expectations of citizens in a free and democratic society; and a law marked by a lack of empathy for the sensibilities, feelings and emotional frailties of people who can be deeply and genuinely affronted by language and behaviour that is beyond the pale in a civil and civilised society.

[99] As much as it goes against the grain, the appeals by Mr Bonkers, Mr Righteous and Mr Biggottson are allowed. I decline to make an order for costs.

# HOW INTERNATIONAL LAW HAS INFLUENCED THE NATIONAL POLICY AND LAW RELATED TO INDIGENOUS PEOPLES IN THE ARCTIC

BY TIMO KOIVUROVA AND ADAM STEPIEN\*

## I. INTRODUCTION

There is a wide diversity of indigenous peoples in the Circumpolar Arctic. The Inuit and Saami peoples live in the area of four nation-states. There are many Indian tribes (or first nations, as they like themselves to be called in Canada) in North America as well as Metis, who trace their historical origin to joint European-Indian parentage. Nenets in Russia still conduct their semi-nomadic reindeer herding in Nenets Autonomous Okrug and Yamal Peninsula. There are different estimates of the number of indigenous peoples in the region, given that there is no widely accepted definition who counts as such people.<sup>1</sup> A rough estimate is that there are 400-500 thousand indig-

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1 There is no universally accepted definition for indigenous peoples, but perhaps the widest in use is what is known as the Cobo definition: "Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems. There is historical continuity that may consist of the continuation, for an extended period reaching into the present of one or more of the following factors: a) Occupation of ancestral lands, or at least of part of them; b) Common ancestry with the original occupants of these lands; c) Culture in general, or in specific manifestations (such as religion, living under a tribal system, membership of an indigenous community, dress, means of livelihood, lifestyle, etc.); d) Language (whether used as the only language, as mother-tongue, as the habitual means of communication at home or in the family, or as the main, preferred, habitual, general or normal language); e) Residence on certain parts of the country, or in certain regions of the world; f) Other relevant factors. On an individual basis, an indigenous person is one who belongs to these indigenous populations through self-identification as indigenous (group consciousness) and is recognised and accepted by these populations as one of its members (acceptance by the group). This preserves for these communities the sovereign right and power to decide who belongs to them, without external interference." See Study of the Problem of Discrimination Against Indigenous Populations, Sub-Commission on the Promotion and Protection of Human Rights, E/CN4/Sub2/1986/7/Add4 [379]. Noteworthy is that the UN Declaration does not even try to define indigenous peoples. See however International Labour Organisation (ILO) Convention No 169 concerning Indigenous and Tribal Peoples in Independent Countries (27 June 1989, Geneva, entered into force 5 September 1991) 72 ILO Official Bull 59 at art 1.

enous individuals comprising roughly ten per cent of the total Arctic population. Obtaining exact data for how many indigenous peoples there are in the Arctic still proves difficult.<sup>2</sup>

Indigenous peoples are mostly minorities in the Arctic. Only in Greenland and in some parts of Canada do indigenous population form a majority. As most of the Arctic is under the sovereignty and sovereign rights of eight nation-States, it is of interest to ask what kind of legal protection the original occupants of the region currently enjoy in international law, especially when many groups are transnational by nature and minorities in their home regions. It is many times more difficult to establish legal recognition and rights as well as to influence policy-making when indigenous peoples find themselves minorities even in their traditional territories and are ruled by majority decision-making. This is, of course, a more general problem that the world's indigenous peoples face, which has led them to increasingly relying on international law as the basis for their continued fight to live as distinct peoples.

This article will examine whether, and how much, the Arctic States are influenced by international law when developing their national indigenous policy and law, in particular in their Arctic regions. By Arctic States we will refer to the eight States that are members of the Arctic Council, the predominant soft-law intergovernmental forum for advancing co-operation and sustainable development in the region (among the Arctic Eight, only Iceland does not have indigenous peoples in its territory). Specific emphasis lies on examining whether there are special Arctic policy and legal measures for improving the situation of Arctic indigenous peoples and whether these are influenced by international law developments.

The article will proceed as follows. Firstly, it is important to examine the main ways that various international soft and hard law instruments regulate the relationship between the settler society and indigenous peoples. Since there are various international standards available, it will be shown in the next sections that some international instruments are relevant for some Arctic states while others are not. After this overview of the country situation, it is useful to consider how different Arctic States' national indigenous policy and law have been influenced by international standards. Finally, it is of interest to examine what it is likely to happen in the future, given that the 2007 United Nations Declaration on the Rights of Indigenous Peoples<sup>3</sup> is gaining more acceptance around the world.

## I. INTERNATIONAL STANDARDS RELEVANT FOR INDIGENOUS PEOPLES

The significance of international law for indigenous peoples has a long pedigree. It was, in effect, international law and organisations that gave birth to indigenous rights and indeed the concept of indigeness. The International Labour Organisation (the ILO), as early as 1920s, and later the United Nations (UN) system provided venues for international norm setting and conscious development of international indigenous movement. The term indigenous – having different scope and reach than laws referring to natives in particular states – was first used at an international level in

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2 Arctic Human Development Report (AHDR) (Arctic Council, Stefansson Arctic Institute, Akureyri, 2004) at 28-29.

3 United Nations Declaration of the Rights of Indigenous Peoples (General Assembly Resolution A/RES/61/295, 13 September 2007, New York).

a way that demonstrated these peoples were perceived as rights holders. Indigenous peoples have for the last 100 years resorted to international bodies and forums in their search for justice.<sup>4</sup>

It is therefore practically impossible to have fully isolated domestic indigenous policy for any nation-State nowadays that escapes any international scrutiny. Moreover, the borders between internal and external policy of States and normative frameworks to which they adhere have become blurred in the course of time.<sup>5</sup> States' human rights policies are continuously scrutinised by a web of international bodies, in particular those in the UN. There are the general mechanisms – the periodic country review by the Human Rights Council and the examination of country reports by various human rights treaty monitoring bodies – which also look into the States' indigenous policies and laws. There are also the indigenous-specific UN institutions, most prominently the Permanent Forum on Indigenous Issues (UNPFII), which is composed of an equal number of State and indigenous representatives with the Chair coming from an indigenous constituency. UNPFII supervises in general the observance of international standards related to indigenous peoples. Moreover, an important indigenous-specific UN institution that monitors the State performance regarding indigenous rights monitoring is the Special Rapporteur on the rights of Indigenous Peoples.<sup>6</sup>

Even if there are many institutions supervising the indigenous international standards by States, it is important to emphasise that there are very few hard and fast legal rules obligating the nation-States to establish exactly a certain type of status and rights for indigenous peoples living in the nation-States territory. There is a wide diversity in the history of settler/coloniser and indigenous peoples in each country, demanding different solutions for different countries and regions, as recognised in the preamble of the UN Declaration on the Rights of Indigenous Peoples.<sup>7</sup>

There are, in effect, many treaties and other international instruments that contain different ways of regulating the basic relationship between majority society and indigenous peoples, most of which are (potentially at least) applicable in the Arctic. There are five main models or ideal frames, starting from the more modest, and proceeding to more ambitious ways of according power to indigenous peoples: indigenous peoples assimilated into the mainstream population; indigenous peoples as minorities; indigenous and mainstream societies evolving in parallel; a relationship based on a historic treaty; and the most ambitious, self-determination of indigenous peoples on the basis of their relationship in mainstream society in the State.

### A. *Assimilation*

Even if the first ever international treaty focussing exclusively on indigenous peoples, the ILO Convention No 107 1957, gave a number of important rights to indigenous peoples, it had as its final goal the assimilation of indigenous groups into the mainstream society. The ideology underlying this Convention is abandoned now, but there are still some countries that adhere to this treaty and try to justify their actions on the basis of them being parties to this Convention. For instance,

4 Ronald Niezen *Origins of Indigenism: Human Rights and the Politics of Identity* (University of California Press, Ewing, 2002); Karen Engle *The Elusive Promise of Indigenous Development: Rights, Culture, Strategy* (Durham: Duke University Press, Durham, 2010).

5 Annika Bergman "Co-Constitution of Domestic and International Welfare Obligations. The Case of Sweden's Social Democratically Inspired Internationalism" (2007) *Cooperation and Conflict: Journal of the Nordic International Studies Association* 42(1) at 74.

6 See website of the Office of the United Nations High Commissioner on Human Rights, Special Rapporteur on the Rights of Indigenous Peoples <[www2.ohchr.org/english/issues/indigenous/rapporteur/](http://www2.ohchr.org/english/issues/indigenous/rapporteur/)>.

7 UN Declaration 2007, above n 3, preamble.

Bangladesh, who has an on-going armed conflict with its indigenous peoples in Chittagong Hills, still retains this legal stance.

The ILO Convention No 107 reflects well the attitudes of policy-makers to the native issue up until the 1970's in the political discourse and practices also of the Arctic states. In Norway, the first half of the 20<sup>th</sup> Century was marked by the policy of Norwegianisation (*fornorsking*), the aim of which was to create an ethnically uniform Norwegian North, comprised of loyal Norwegian citizens. At the same time, Sweden pursued policies of assimilation and segregation; the latter had been applicable to Saami reindeer herders. The system of boarding schools in Canada was aimed at transforming indigenous children into regular Canadian citizens; the 20th Century amendments of the 1876 Indian Act imposed on the indigenous communities alien governance and leadership system. In the Soviet Union, the peoples of Siberia and Russian North underwent the process of forced collectivisation. The time of political and economic transformation of the 1990s in Russia had the unfortunate effect of chaotic privatisation of reindeer herds, traditionally used resources and lands for the northern indigenous peoples, and thereby causing assimilation to yet another alien socio-economic system.<sup>8</sup>

All over the circumpolar North, indigenous peoples were expropriated of their traditionally used lands via the processes of colonisation, industrialisation, modernisation and infrastructural development, all leading to their assimilation into the mainstream society. The liberal perception of land property based on an extensive use (a view shared, for example, by Adam Smith) resulted in indigenous lands being considered as State owned. The associated colonial concept of *terra nullius* was responsible for the view that indigenous communities and nations are non-self-governing and lack viable political structures.<sup>9</sup>

### B. *Indigenous Peoples as Minorities*

Article 27 of the 1966 adopted International Covenant on Civil and Political Rights (ICCPR) provides:<sup>10</sup>

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

Given that this main universal international human rights treaty was adopted before the emergence of the international indigenous peoples' movement, it reflects in general the rights of individual members of cultural, linguistic and religious minorities. What it expects of State parties is only passive minority protection, namely that States are only required not to prevent certain phenomena, for example the indigenous peoples speaking their own language to each other. Yet, the way the Human Rights Committee has interpreted this Article shows also the interpretative power of the human rights treaty monitoring bodies. The manner in which the Human Rights Committee (HRC) has developed the way the Article 27 should be interpreted in respect of indigenous peoples is almost opposite from the way the Article is articulated. The HRC has done this via the dif-

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8 For a general overview, see Yuri Slezkine *Arctic Mirrors: Russia and the Small Peoples of the North* (Cornell University Press, Ithaca, 1994).

9 Tony Penikett *Reconciliation: First Nations Treaty Making in British Columbia* (Douglas and McIntyre, Vancouver, 2006) at 27-33.

10 International Covenant on the Civil and Political Rights (ICCPR) (16 December 1966, New York, entered into force 23 March 1976) 999 UNTS 171.

ferent ways in which it can influence how the Covenant should be interpreted, for example: concluding observations on State reports; general comments on individual provisions; and, if the State is a party to the Optional Protocol, individual views on human rights petitions from individuals (and those representing groups). With its General Comment on Article 27, the Committee opined that States are required to take active positive measures of protecting the indigenous peoples' culture, in particular to protect their traditional livelihoods.

### *C. Indigenous and Mainstream Societies Evolving in Parallel*

The only modern international convention specifically addressing the situation of indigenous peoples is the 1989 ILO Convention No 169,<sup>11</sup> which is based on the idea that indigenous society can live separate existence but in parallel to the dominant society. The Convention requires the State identify the traditional territories of indigenous peoples and to hand them back to the original occupants of the region, even if this may prove difficult in practice. It also implicitly requires States to recognise some form of self-governance for indigenous peoples.

### *D. Relationship Based on a Historic Treaty*

Treaties negotiated in the past to govern the relationship between the settlers and indigenous peoples are endorsed and supported in the UN Declaration by the preambular paragraph that recognises "...the urgent need to respect and promote the rights of indigenous peoples affirmed in treaties, agreements and other constructive arrangements with States".<sup>12</sup> A good example of such a historic treaty is the 1840 Treaty of Waitangi, which still functions as the basis for European settlers' and Māori peoples' legal relationship.<sup>13</sup> The model of treaty-making to organise the relationship between the native population and European settlers was a central feature of particularly British colonialism. Explanations for such a solution can be found in early English common law; later the 1763 Royal Proclamation declared that Indians continue to own the lands they had used and occupied.<sup>14</sup> As a result, significant numbers of treaties were concluded throughout North America in the 19th Century. Yet, the treaty making process and their subsequent application very often lead to expropriation. Hence, treaties that were originally designed as instruments of the law of nations became gradually domesticated and seen as regulating relations between the sovereign State and its aboriginal citizens/subjects.<sup>15</sup> Historical treaties and modern agreements, in particular land claim agreements, still constitute a major pillar of indigenous policies and regulatory frameworks in Canada and the United States.

### *E. Self-Determination of Indigenous Peoples*

The most ambitious approach from the viewpoint of indigenous peoples is to invoke the body of law that helped the colonised peoples of Africa and Asia to gain, via their self-determination

11 ILO Convention No 169, above n 1.

12 UN Declaration 2007, above n 3, Preamble; Penikett, above n 9, at 43-46, 111.

13 See the recent report by the James Anaya (Special Rapporteur on the Rights of Indigenous Peoples) "The Situation of Māori People in New Zealand" (A/HRC/18/XX/AddY, 2011) OHCHR <[www2.ohchr.org/english/issues/indigenous/rapporteur/docs/A.HRC.18\\_NewZealand.pdf](http://www2.ohchr.org/english/issues/indigenous/rapporteur/docs/A.HRC.18_NewZealand.pdf)>.

14 Sheryl Lightfoot "Emerging International Indigenous Rights Norms and 'Over-Compliance' in Canada and New Zealand" (2010) 62(1) Political Science at 99.

15 Niezen, above n 4, at 90-92.

guaranteed in international law, the status of independent States. Self-determination of indigenous peoples was the cornerstone principle that was the basis of the Draft UN Declaration on the Rights of Indigenous Peoples when it was adopted by the Working Group on Indigenous Populations in 1993 and the Sub-Commission on the Promotion and Protection of Human Rights in 1994.<sup>16</sup> The then main human rights body of the UN, the Human Rights Commission, established an inter-session process to finalise the Draft for a Declaration to be adopted by the UN General Assembly by the end of 2004 (which was also the end of the first UN decade of indigenous peoples).<sup>17</sup> In these direct negotiations between States and indigenous peoples, one of the main problems was that indigenous peoples were not willing to compromise on their full self-determination as expressed in Article 3 of the Draft:<sup>18</sup>

Indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Finally, in June 2006, the UN Declaration was adopted in a modified form by the new main human rights body of the UN, the Human Rights Council. Indigenous peoples had to compromise their self-determination stance to the effect that Article 4 was inserted after Article 3, making it clear that self-determination for indigenous peoples meant self-governance and autonomy in their internal and local affairs. Yet, even after this compromise, the African States, who were involved to a limited degree in the negotiations over the UN Declaration, objected to some parts of the Declaration, in particular that espousing self-determination for indigenous peoples, and blocked the progress of the Declaration in the UN. For this reason, a new Article 46 was added to the Declaration, ensuring that nothing in the Declaration threatens the territorial integrity and political unity of independent States.<sup>19</sup> Even if States and indigenous peoples were able to achieve a compromise over what self-determination means for indigenous peoples, it is also clear that this is not the last word on the matter. Both monitoring bodies of the two main universal human rights covenants, the ICCPR's Human Rights Committee and the Committee monitoring the Covenant on Economic Social and Cultural Rights, are requiring the States parties to report their policies and laws towards indigenous peoples under Common Article 1, thus implicitly signalling that well-established indigenous peoples have a right to self-determination, that is, to determine freely their political status and dispose of their natural resources.<sup>20</sup>

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16 United Nations High Commissioner for Human Rights, 1994 Draft of the UN Declaration on the Rights of Indigenous Peoples annexed to the Sub-Commission on Prevention of Discrimination and Protection of Minorities decision 1994/5, <[www.unhcr.ch/huridocda/huridoca.nsf/\(symbol\)/e.cn.4.sub.2.res.1994.45.en?opendocument](http://www.unhcr.ch/huridocda/huridoca.nsf/(symbol)/e.cn.4.sub.2.res.1994.45.en?opendocument)>.

17 International Work Group on Indigenous Affairs (IWGIA) "The Declaration on the Rights of Indigenous Peoples – A Brief History" (undated) IWGIA <[www.iwgia.org](http://www.iwgia.org)>.

18 United Nations High Commissioner for Human Rights, above n 16.

19 See Timo Koivurova "From High Hopes to Disillusionment: Indigenous Peoples' Struggle to (Re)gain Their Right to Self-Determination" (2008) 15 *International Journal on Minority and Group Rights* at 1.

20 ICCPR, above n 10; and International Covenant on the Economic, Social and Cultural Rights (16 December 1966, New York, entered into force 3 January 1976) 999 UNTS 3 at joint art 1. See the following concluding observations by the HRC where explicit references to either the concept of self-determination of peoples or article 1 can be found: Canada (UN Doc CCPR/C/79/Add105 (1999)); Mexico (UN Doc CCPR/C/79/Add109 (1999)); Norway (UN Doc CCPR/c/79/Add112 (1999)); Australia (UN Doc CCPR/CO/69/AUS (2000)); Denmark (UN Doc CCPR/CO/70/DNK (2000)); Sweden (UN Doc CCPR/CO/74/SWE (2002)); Finland (UN Doc CCPR/CO/82/FIN (2004)); USA (CCPR/C/USA/Q/3/CRP4 (2006)).

The UN Declaration expects States to at least grant indigenous peoples self-governance or autonomy in their internal and local affairs and it thus builds on the idea of two distinct but parallel societies living in the same State. Yet, it does clearly recognise that there has to be room for different solutions for different regions, as is explicitly provided in the preamble to the Declaration:

*Recognizing* that the situation of indigenous peoples varies from region to region and from country to country and that the significance of national and regional particularities and various historical and cultural backgrounds should be taken into consideration.

## II. HOW HAVE THE ARCTIC STATES IMPLEMENTED INTERNATIONAL STANDARDS?

In this section, the goal is to examine what international standards are at least potentially applicable to the Arctic States (and thus requiring them to take measures also towards their Arctic indigenous peoples). Another goal is to examine whether the Arctic indigenous peoples have resorted to human rights petitions against the Arctic States in order to improve their situation.

### A. *North America*

In North America, the prevailing common law system and the American constitutionalism limits the overall influence of international law. Therefore, domestic solutions are preferred. Both in Canada and in the United States, special Indian laws have been adopted in order to govern State-indigenous affairs, supplemented by numerous treaties and agreements with Indian and Inuit groups. Thus, the concrete regulatory frameworks differ significantly: in Alaska versus other United States states, within Alaska itself (as the example of the North Slope Borough shows),<sup>21</sup> and between Canadian Arctic regions. In both states, it is the Federal Governments (Congress in the United States and the Government in Canada) that have responsibility over indigenous affairs.

Despite the development of new international normative consensus on indigenous rights, very often Western land still uses patterns and standards to prevail over indigenous ones. The doctrine of discovery, a concept on which both North American states were founded, gradually changed the legal relationship of indigenous peoples with their lands from self-determination to “aboriginal title”.<sup>22</sup>

When the UN Declaration was adopted in the General Assembly, there were four States voting against it: Australia, Canada, New Zealand and the United States. By now all these four States have come to endorse the Declaration, testifying to the strength of the document. Canada did this in November 2010<sup>23</sup> and the United States in December 2010,<sup>24</sup> both signalling their support for the Declaration but also expressing clearly how they interpret the Declaration and that they still have reservations on certain parts of it.

21 See Gunnar Knapp and Thomas A Morehouse “Alaska’s North Slope Borough Revisited” (1991) 27(163) *Polar Record* 303.

22 “International Law as an Interpretative Force in Federal Indian Law” [Notes] (2003) 116(6) *Harv L Rev* 1751 at 1752-1753, 1765-1768.

23 “Announcement of US Support for the United Nations Declaration on the Rights of Indigenous Peoples” (2010) US Department of State <[www.state.gov/documents/Organisation/153223.pdf](http://www.state.gov/documents/Organisation/153223.pdf)>.

24 “Canada’s Statement of Support on the United Nations Declaration on the Rights of Indigenous Peoples” (2010) Indian and Northern Affairs Canada <[www.ainc-inac.gc.ca/ap/ia/dcl/stmt-eng.asp](http://www.ainc-inac.gc.ca/ap/ia/dcl/stmt-eng.asp)>.

Both the United States and Canada are also parties to the ICCPR, and Canada is a party to the International Covenant on Economic, Social and Cultural Rights (ICESCR). As stated above, the former has been interpreted by the Human Rights Committee in a very indigenous-friendly manner. The Committee requires States to undertake active measures to protect especially the indigenous peoples' traditional livelihoods under Article 27. Canada is also a party to the Optional Protocol to the ICCPR, enabling the individuals (also those who represent indigenous groups) to make individual communications against their home States after exhausting domestic remedies. Both monitoring bodies of the Covenants require States – also the United States and Canada – to report the situation of their country's indigenous peoples under Common Article 1, implicitly signalling that indigenous peoples are peoples and that they have the right to self-determination as enshrined in Article 1.

Another legally relevant instrument is the 1948 Declaration on the Rights and Duties of Man negotiated under the auspices of the Organisation of American States (OAS), which has been perceived by the Inter-American Regional Human Rights bodies (Commission and the Court) as legally binding, thus also obligating the United States and Canada.<sup>25</sup>

Yet, as Nigel Bankes has examined in the context of Canada, the aboriginal rights and policy are dealt with domestically, without regard to international human rights obligations.<sup>26</sup> This applies also to northern and Arctic indigenous peoples in Canada, those living above the 60th parallel to the west from Hudson Bay and the Nunavut, all of which are constitutional territories that derive their powers from the Federal Government in contrast to provinces, which have an extensive self-governance on the basis of the 1867 Constitution Act. In other words, the Federal Government has more extensive powers to negotiate directly with the indigenous peoples in Yukon, Northwest and Nunavut territories, and both territorial and ethnic Governments have been established for the northern indigenous peoples.

The United States also follows its own domestic indigenous policy and law and has its own specific legislation for the natives in Alaska. Alaska became the 50th state of the United States in 1959 and in 1971 the Alaska Native Claims Settlement Act (ANCSA) was enacted, which gave natives title to territory and compensation in exchange for extinguishing their inherent land claims. Alaskan natives are also required to govern and administer their possessions via regional and village corporations; forms of governance that do not match with their traditional concepts of governance. Even if there is a specific legislation for Alaska natives, the design for this legislative solution was not influenced by international human rights law but it was a national and regional model tailor-made for Alaskan natives.

In the United States, indigenous international norms meet with constraints similar to those faced by other international human rights and international law standards. The United States ratification of the ICCPR included multiple reservations, safeguarding the primacy of constitutional

25 See Douglass Cassel "Inter-American Human Rights Law, Soft and Hard" in Dinah Shelton (ed) *Commitment and Compliance: The Role of Non-binding Norms in the International Legal System* (Oxford University Press, Oxford, 2000) at 393, 397. The declaration has achieved international legal relevance through the so-called double-incorporation. First, this declaration was included in the Statute of the Commission on Human Rights in 1960 when the legal status of the Commission on Human Rights was still unclear. Secondly, an amendment incorporated the Commission on Human Rights into the OAS Charter in 1970. In this way, the declaration on human rights evolved to become legally binding and as such it has also been treated in the case-practice of the Commission and the Court of Human Rights.

26 Nigel Bankes "Land Claim Agreements in Arctic Canada in Light of International Human Rights Norms" [2010] *Yearbook of Polar Law* at 175-231.

protection and non-self-executing nature of the ICCPR. As Stanley Katz noted, Americans “are too thoroughly constitutionalists (in the American way) to make international human rights a matter of domestic jurisdiction”. He further argued that “if we are to sign on more fully to international human rights, we will have to rethink and reinvent some basic elements of our constitutional legacy”.<sup>27</sup>

There still appears to be significant opposition in the United States to adopt international human rights instruments.<sup>28</sup> The reception of customary international law in the United States’ courts has, however, much wider application than human rights treaties, and this is also the case in Canada.<sup>29</sup> Human rights treaties usually require implementing legislation to be incorporated as part of the domestic law of the United States.<sup>30</sup> Moreover, international legal norms can influence the way domestic statutes are interpreted.<sup>31</sup> Thus, there are some possibilities for having greater influence of international human rights law, including indigenous norms, on the United States and Alaskan policies in the future. In a similar vein, it is the executive branch of the Government in Canada that concludes international agreements, making it necessary to incorporate and implement treaties domestically.<sup>32</sup>

There are few petitions made by indigenous peoples in North America to the inter-American regional human rights system and the Human Rights Committee. Since Canada is a party to the Optional Protocol to the ICCPR, there have been a couple of indigenous complaints against Canada in the Human Rights Committee, most importantly in the *Lubicon Lake Band*<sup>33</sup> case, where the Band won the case against Canada. The Human Rights Committee viewed that the Albertan approved logging and hydrocarbon activities in the Band’s traditional territories breached Article 27 of the ICCPR. Even though the Band won the case against Canada, the judgment still remains unimplemented, a fact that is regularly criticised by the Committee in its Concluding Observations to Canada.

The United States is not a party to the Optional Protocol and the human rights petitions against it have been taken to the only human rights body that can deal with human rights complaints against the United States, the Inter-American Commission on Human Rights (IACHR). The only complaint by the Arctic indigenous peoples to the IACHR was developed under the auspices of the Inuit Circumpolar Council (ICC).<sup>34</sup> Eventually, the application to the IACHR was made by 67 named individuals and the President of the ICC, Sheila Watt-Cloutier, on behalf of all Inuit in Alaska and Canada. The application captured considerable attention as the Inuit accused the United States of breaching their various human rights (for example right to life and culture) by

27 Stanley N Katz “A New American Dilemma? U.S. Constitutionalism vs. International Human Rights” (2003) 58 U Miami L Rev 323 at 328-331, 344-345; “International Law as an Interpretative Force...” above n 22, at 1751-1752.

28 Jack Goldsmith “Should International Human Rights Law Trump US Domestic Law?” (2000) 1 Chicago Journal of International Law at 327.

29 Jennifer E Dalton “International Law and the Right of Indigenous Self-Determination: Should International Norms be Replicated in the Canadian Context?” (Working Paper, IIGR: Queens’ University, 2005) at 14-15.

30 Katz, above n 27, at 324-325; “International Law as an Interpretative Force...” above n 22, at 1762-1763.

31 “International Law as an Interpretative Force....” above n 22, at 1763.

32 There are, however, certain exceptions if the international norm refers to the bases of international order, for example in the case of genocide. Gib van Ert “Dubious Dualism: The Reception of International Law in Canada” (2010) 44(3) Valpraiso University Law Review at 927.

33 *Lubicon Lake Band v Canada Communication* No 167/1984 (26 March 1990) UN Doc Supp No 40 (A/45/40) at 1.

34 When the application was made to the IACHR, the ICC was abbreviation from Inuit Circumpolar Conference, a name that was changed to that of Council in 2006.

their alleged irresponsible climate policy. The petition was deemed inadmissible although a public hearing was organised by the IACHR to understand the application better.<sup>35</sup>

### B. *The Russian Federation*

From the historical perspective, the colonisation and settlement process in Russia was fairly similar to other regions of circumpolar North. For instance, the 1822 Statute of Administration of Non-Russians in Siberia declared all lands as belonging to the State; natives were granted possession rights, which had the effect of placing them under direct State protection. During Soviet times, the property of indigenous communities was collectivised and later in 1990's restructured or privatised, all which resulted in major and rapid cultural and economical changes. In the 1990s, even the existence of some indigenous groups became threatened, prompting the Government to adopt urgent measures to protect numerically small peoples of the North and Siberia in 1992. Apart from providing legal protection from emerging private and state-private commercial activities, these measures were also designed to implement the ICCPR.<sup>36</sup>

The Russian Federation studied the possibility of ratifying the ILO Convention No 169 at least until 1998 but after that there seems to have been no further effort in this respect.<sup>37</sup> Yet, Russia is a party to the main international human rights treaties, in particular those of the ICCPR (including the Optional Protocol) and the ICESCR. Ironically, it was the Soviet Union that became a party to these treaties without any real effort to implement these human rights standards in practice. Russia, as a successor State to the Soviet Union, is still bound by these treaties so there is at least a possibility to invoke their provisions. Russia is also a party to the Council of Europe Framework Convention on the Protection of National Minorities.<sup>38</sup> The monitoring body (Advisory Committee) also scrutinises the indigenous policy and law of the States parties.

Russia has not been supportive of the UN Declaration process. When the Human Rights Council voted in 2006 on the acceptance of the UN Declaration, only two members opposed its acceptance: Canada and Russia. When the UN Declaration came to a final vote in the UN General Assembly, Russia abstained from voting. In contrast to the United States and Canada that have later come to endorse the UN Declaration, Russia has not yet done so.

The Russian Federation clearly wants to retain indigenous policy and law issues under its own control. It has fairly strong, even unique, indigenous laws for small indigenous minorities in the North, Siberia and the Far East. In order to qualify as indigenous minority, the group cannot exceed 50,000 in number, a policy stance that was created previously during the Soviet era. There are also arguments that even if indigenous constitutional status and laws are strong in theory, they are fairly weak in practice, especially in the Arctic, where the country has vast hydrocarbon interests.

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35 Timo Koivurova "International Legal Avenues to Address the Plight of Victims of Climate Change: Problems and Prospects" (2007) 22(2) *J Envtl L & Litig* at 267.

36 Gail Oshrenko "Indigenous Land Rights In Russia: Is Title to Land Essential For Cultural Survival?" (2001) 13 *Geo Int'l Envtl L Rev* 695 at 715-716.

37 "Practical Implementation of Indigenous Peoples' Land Rights: A Case Study of the Russian Federation (Comparison with Certain Developments in Africa in Relation to Indigenous Peoples)" [2011] *The Yearbook of Polar Law* (forthcoming).

38 Framework Convention on the Protection of National Minorities (Council of Europe, 1 February 1995, Strasbourg) CEST 157.

The Russian constitution includes in its Article 69 guarantees for the rights of numerically small peoples in accordance with the generally accepted principles of customary international law and treaties concluded by the Russian Federation.<sup>39</sup> Hence, at least in principle, international indigenous norms, such as Article 27 of the ICCPR as it has been interpreted by the Human Rights Committee could have an influence in the Russian domestic legal system. Yet still this remains in general largely a possibility as Russia has not ratified or endorsed any of the international indigenous instruments.

Russian regulations referring to indigenous peoples are composed of the 1999 Law on the Guarantees of Rights of Indigenous Numerically Small Peoples and the 2000 Law on *obshchinas*.<sup>40</sup> The legal framework is quite advanced and reflects to a certain degree various provisions of international rights instruments. This includes, for example, designating territories for traditional natural use and providing safeguards for cultural and linguistic rights. Moreover, further regulations may be adopted by the subjects of the Federation, thus adjusting the legislation to local circumstances. However, the implementation of the existing legislation is often inadequate with local administration being usually indifferent or insensitive to issues of numerically small peoples and the indigenous organisations are often times too weak and dependent on administrative support to make a real policy difference.<sup>41</sup>

Of note is that there are no human rights petitions from indigenous peoples against Russia even though Russia is a party to the Optional Protocol to the ICCPR.

### *C. Saami Region*

As noted above, the Saami live in the territory of four nation-States: Norway, Sweden, Finland and Russia, last of which does not have any distinct Saami specific policies (and is thus not examined in this part). In the three Nordic countries, the Saami have their own Parliaments, although it is only in Norway where the Saami Parliament exercises larger self-governance powers. In addition, the three Nordic states have introduced constitutional safeguards for Saami rights and status.<sup>42</sup>

Norway was the first country in the world to ratify the ILO Convention No 169 in 1990 and also partially implemented it in the course of fifteen years with its 2005 Finnmark Act.<sup>43</sup> With this Act, the State transferred the land ownership in the northernmost municipality of Norway (Finnmark) to its residents, Kvens, Norwegians and the Saami. It is the Finnmark Estate, a body composed of three members from the county Council and three from the Saami Parliament, that

39 Constitution of the Russian Federation (12 December 1993) at art 69.

40 0 garantiyakh prav korennykh malochislennykh narodov Rossiiskoi Federatsii, [On the Guarantee of Rights of Indigenous Numerically Small Peoples of the Russian Federation], No 85 FZ, 30 April 1999 [hereinafter Russian Federation Law No 85]; Ob obshchikh printsipakh organizatsii obshchin korennykh malochislennykh narodov Severa, Sibiri i Dalnevo Vostoka Rossiiskoy Federatsii [On Common Principles of Organisation of *Obshchinas* of Indigenous Minorities of the North, Siberia and the Far East of the Russian Federation] No 104 FZ, 20 June 2000.

41 Oshrenko, above n 36, at 710-720.

42 Stortinget, Constitution of Norway (17 May 1814 with amendments as of 20 February 2007) at art 110a; Constitution of Finland (11 June 1999, 731/1999) at ss 17 and 121; Riksdagen, Constitution of Sweden, The Instrument of the Government (1 January 1975 as amended 7 December 2010, SFS 1974:152) at ch 1, art 2, ch 2, art 17.

43 See Act (Norway) of 17 June 2005 No 85 relating to legal relations and management of land and natural resources in the county of Finnmark (Finnmark Act), <[www.galdu.org/govat/doc/the\\_finnmark\\_act\\_act\\_17\\_june\\_2005\\_no\\_85.pdf](http://www.galdu.org/govat/doc/the_finnmark_act_act_17_june_2005_no_85.pdf)> Ministry of Justice and Police and the Ministry of Local Government and Regional Development (Norway) (2005) "The Finnmark Act – A Guide" [Information brochure distributed in Finnmark] Zoom Grafisk AS <[www.galdu.org/govat/doc/brochure\\_finnmark\\_act.pdf](http://www.galdu.org/govat/doc/brochure_finnmark_act.pdf)>.

governs these lands. All the residents of the county can prove their use right or immemorial usage right to a commission, which studies these in depth. The Saami Parliament is entitled to draw guidelines for non-cultivated lands in the county, which are important for their reindeer herding (the Saami, with minor exceptions, have exclusive right to conduct reindeer husbandry). Norway continues to examine the rights of the Saami under the ILO Convention No 169 in coastal areas and other counties.

It is likely that due to the progressive nature of Saami policy and law in Norway, there have not been many petitions from the Norwegian Saami to human rights bodies. During the famous Alta dam conflict, the Saami made a petition to the then European Commission on Human Rights.<sup>44</sup>

In Finland and Sweden, the situation is more challenging from the viewpoint of the Saami as compared to Norway. These states have not yet ratified the ILO Convention No 169, although they have been studying that possibility for a long time. The public discourse on the settler/Saami relationship is done mainly via whether the ILO Convention No 169 should be ratified and under what conditions. In Finland, the ICCPR has a very strong status since it has been incorporated into the Finnish legal system at the level of an Act of Parliament. In Sweden, all the other international human rights treaties other than the European Convention on Human Rights are not directly applicable, since Sweden presumes that its legal order is in compliance with international human rights treaties. Also the two Council of Europe minority treaties, the Framework Convention on the Protection of National Minorities, as well as the Charter for Minority and Regional Languages,<sup>45</sup> are legally relevant for the Saami and applicable in both countries.

Both the Finnish and Swedish Saami have been active in launching human rights petitions, although both have tapped into different legal mechanisms: Finnish Saami have relied on Article 27 of the ICCPR and the Swedish Saami on the European Court of Human Rights.<sup>46</sup> One reason for this difference is that the Saami can better rely on Article 27 in Finland than in Sweden before the Human Rights Committee. As noted above, in Finland, Article 27 is directly applicable. Perhaps even more importantly, in Sweden and Norway reindeer herding is an exclusive Saami livelihood (with some exceptions), whereas in Finland it is not. Since the Human Rights Committee has in its case-practice created criteria for protecting especially the traditional livelihoods of indigenous peoples, it is no wonder that the Finnish Saami have tried to protect their reindeer herding via making communications against Finland to the Human Rights Committee. These have not, except in one case, been successful for the Finnish Saami.<sup>47</sup> Yet, in a recent case, Article 27 was one of the factors that persuaded the Finnish Forestry Board – which administers the state-owned lands in the Saami homeland region (this region being for Saami to exercise their cultural and linguistic rights) – not to log the old growth forests that are very important for Saami reindeer herding. The

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44 Timo Koivurova “Jurisprudence of the European Court of Human Rights Regarding Indigenous Peoples: Retrospect and Prospects” (2011) 18 *International Journal on Minority and Group Rights* at 1; Johan Eriksson *Partition and Redemption: A Machiavellian Analysis of Sami and Basque Patriotism* (Umeå University, Umeå, 1997) at 99-104; Trond Thuen *Question of Equity. Norway and Saami Challenge* (Memorial University of Newfoundland, Newfoundland, 2001) at 44-46.

45 Charter for Minority and Regional Languages (Council of Europe, 5 November 1992, Strasbourg, entered into force 1 March 1998) CETS 148.

46 See Timo Koivurova, above n 44.

47 Human Rights Committee, *Anni Äärelä and Jouni Näkkäläjärvi v Finland* (Communication No 779/1997), Views adopted 24 October 2001, Report of the Human Rights Committee, Vol II UN doc A/57/40 at 117-130.

Saami in this case were again prepared to take it to the Human Rights Committee after exhausting local remedies.<sup>48</sup>

Saami villages (Saami cooperatives managing reindeer herding and resource use) in Sweden have many times resorted to the European regional human rights institutions, nowadays including only the European Court of Human Rights (ECtHR). One reason for Saami villages in Sweden to use this legal path is that they have standing before the ECtHR, which is not easy to attain with other Saami representative bodies. For example, the Finnish Saami Association, Johtti Sapmelacat, did not have standing in its case against Finland because it did not have authority over the issues about which they complained, in this case fishing, whereas Swedish Saami villages have extensive powers, especially over reindeer herding. Yet, since the ECtHR has thus far been very restrictive in acknowledging collective rights, the Saami villages have not been meritorious in their human rights petitions to the ECtHR.<sup>49</sup>

The relationship between the Nordic countries is characterised by close ties between their bureaucracies and transnational networks bringing together decision-makers and resulting in policy diffusion,<sup>50</sup> policy convergence<sup>51</sup> or even competition between States' bureaucracies towards the conduct of the most advanced and developed policy.<sup>52</sup> Moreover, the existence of the Nordic Council (an inter-parliamentary body) and the Nordic Council of Ministers, which openly aim to harmonise policies, as well as the work of various committees within the Council, induces the formal policy diffusion processes. When Norway was developing its Saami Parliament in the 1980s, it was influenced by the predecessor of the Finnish Saami Parliament that started already in 1974. The establishment of the Saami Parliament in Sweden in 1993 had the effect of inducing reform of the Finnish Saami assembly in 1995, both following closely the Norwegian example. This type of policy diffusion has had a significant impact on the way in which international norms are incorporated and applied. Both Sweden and Finland are currently looking at the experiences of the way in

48 See Saami Council "The Saami Council Applauds Historic Settlement Between Paadar Brothers and Metsähallitus in Nellim!" (press release, 24 August 2009) Saami Council <[www.saamicouncil.net/?newsid=2688&deptid=2192&languageid=4&NEWS=1](http://www.saamicouncil.net/?newsid=2688&deptid=2192&languageid=4&NEWS=1)>.

49 See Timo Koivurova, above n 44. See however, the *Handölsdalen* case, European Court of Human Rights, *Handölsdalen Sami Village and Others v Sweden* (39013/04) ECHR 30 March 2010.

50 Policy diffusion is the spreading of certain policy innovations, such as new legal measures or policy instruments, from one country to the other. The diffusion of policy innovations, such as those occurring in indigenous policy within the last decades may depend on various factors, including: the dynamics of the international system (in this case Nordic cooperation); the prominence of the state where the policy innovation originates (in the case of Nordic indigenous politics, usually Norway); domestic factors (often hindering adoption of certain policy innovations); and internal characteristics of the policy instrument to be adopted. In general, policy diffusion rests upon constructivist theories of norm dynamics. A term policy transfer is also used. See eg, Kersten Tews, Per-Olof Busch, and Helge Jorgens "The Diffusion of New Environmental Policy Instruments" (2003) 42 *Eur J Pol Res* at 572-578; Jacqui True and Michael Mintrom "Transnational Networks and Policy Diffusion: The Case of Gender Mainstreaming" (2001) 45 *International Studies Quarterly* 27 at 36.

51 Policy convergence is a more general process of a State's policies, structures and even institutions becoming increasingly similar in time – of which policy diffusion is a part. Despite the existence of various theories, concepts and an impressive body of research, especially in the field of Comparative Public Policy, the causes and mechanisms of policy convergence are still debated or unknown, and the concept itself is repeatedly contested. Convergence is to increase with the existence of strong linkages within transnational networks (such as Nordic states). See eg, Katharina Holzinger and Christoph Knill "Causes and Conditions of Cross-National Policy Convergence" (2005) 12(5) *Journal of European Public Policy* at 775.

52 See eg, similar process described in the case of Danish (and Nordic) development aid, Lars Engberg-Pedersen "The Future of the Danish Foreign Aid: The Best of the Second-Best" [2006] *Danish Foreign Policy Yearbook* 107 at 129.

which Norway is implementing its Finnmark Act as a possible model to ratify and implement the ILO Convention No 169.

There is also an interesting process to negotiate an international convention for regulation of the relations between the Saami and the three Nordic countries (thus, excluding Russia), which would constitute another step in policy diffusion and harmonisation of Nordic regulations. The attempts to create a Saami Convention date back to the mid-1980's idea proposed by the Saami Council, after which it was enthusiastically received in the Nordic Council.<sup>53</sup> An expert committee commenced its work in 2002 and this group, which had a unique composition of equal number of representatives from both the three Saami Parliaments and the three Nordic States, came up with a very innovative idea for an international convention. The Draft is very ambitious, clearly endorsing the Saami self-determination, and in general terms, giving the Saami Parliaments a status close to treaty parties. For example, ratification of a treaty and any amendments to it would require the consent of the three Saami Parliaments. If this type of convention could be negotiated, it certainly would serve as a pioneering model for regulating the relations between nation-states and transnational indigenous peoples, an issue that is relevant in the Arctic and elsewhere in the world.

Yet the road from the Draft to an actual treaty may be challenging because the Draft is very ambitious in terms of Saami status and rights. Negotiations were supposed to start at the beginning of 2008 but there were several postponements when the three States studied the implications of the Draft for their national legal systems, and the outcomes of these studies have shown that there are many difficult challenges ahead. A good example is the Finnish situation in terms of granting Saami full self-determination. The current Finnish system is typical of a unitary State, where "[t]he powers of the State in Finland are vested in the people, who are represented by the Parliament".<sup>54</sup> Finland is also divided into municipalities that enjoy a great deal of self-governance, and the land area of three municipalities (and one portion of one municipality) overlap with that of the Saami homeland where the Saami have the lowest form of self-governance, namely that over their cultural and linguistic affairs. To ratify and implement the (Draft) Nordic Saami Convention in the form as it was when the Expert Committee submitted it would require at least a partial overhaul of the Finnish constitutional system.

#### D. *Greenland (Denmark)*

After World War II, Greenland was listed as a non-self-governing territory in accordance with Chapter XI of the UN Charter. The Administering powers, in the case of Greenland Denmark, assumed the responsibilities defined in Article 73 of the Charter:<sup>55</sup>

Members of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government recognise the principle that the interests of the inhabitants of these territories are paramount, and accept as a sacred trust the obligation to promote to the utmost, within the system of international peace and security established by the present Charter, the well-being of the inhabitants of these territories, and, to this end:

[...]

53 See the whole history, Timo Koivurova "The Draft of a Nordic Saami Convention" (2007) 6 *European Yearbook of Minority Issues* at 103; Timo Koivurova "The Draft Nordic Saami Convention: Nations Working Together" (2008) 10 *Int C L Rev* at 279.

54 Constitution of Finland (11 June 1999, in force 1 March 2000, 731/1999) at s 2.1.

55 Charter of the United Nations (26 June 1945, San Francisco) 1 UNTS XVI at ch XI at 73.

B. to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions, according to the particular circumstances of each territory and its peoples and their varying stages of advancement.

Yet just before the listed non-self-governing territories started to gain their independence via exercising their right to self-determination from the mid-1950s, Denmark removed Greenland from the UN list. Denmark argued that it had organised a referendum in Greenland and that the population composed of Inuit majority wanted to join Denmark. As argued by Alfredsson, there are good reasons to suspect that the referendum was faulty in many respects and thus can be seen as invalid. For instance, only some Inuit in Greenland were consulted and even then they were not fully informed as to what was the ultimate purpose of this “referendum”.<sup>56</sup>

Denmark treated Inuit in Greenland as indigenous peoples and ratified the ILO Convention No 169 in 1996 (without introducing any changes in domestic regulations). Greenlanders were guaranteed large Home Rule in 1979 and they chose to withdraw from the then European Economic Community (EEC, predecessor of the EU) in 1985. After many years of heated debate over the status of Greenland and whether Inuit are a people with a right to self-determination, the Danish-Greenlandic Commission was established and in July 2009 the Inuit were, after a referendum, guaranteed greater autonomy as a people, who also have a right to become independent under certain conditions.

There is only one human rights petition that has been launched by Greenlandic Inuit. The Thule Tribe complained against Denmark about their forced eviction from their home region due to the 1952-1953 establishment of the United States Thule air base in the area. The case progressed through the whole Danish judiciary and eventually the Inuit complained to the ECtHR after not having all their complaints endorsed by the Danish judiciary.<sup>57</sup> In 2006, the ECtHR ruled that the infringement of the right to property cannot be taken up by the Court as the event occurred before Danish ratification of the European Convention on Human Rights;<sup>58</sup> the Convention was ratified four months after the relocation took place.<sup>59</sup>

### III. WHY DOES INTERNATIONAL LAW INFLUENCE THE DOMESTIC INDIGENOUS POLICY AND LAW IN THE ARCTIC STATES AND WHY IT DOES NOT?

It is possible to speculate on the reasons why there are so many differing ways that the Arctic States receive and endorse indigenous international standards. There seems to be clear difference between the three vast federal States and the four Nordic States as regards their receptivity of indigenous international standards. The Nordic States are known to be active in the UN system, and thereby also taking UN and international standards seriously in their national legal and political

56 Gudmundur Alfredsson “Greenland and the Law of Political Decolonization” (1982) 25 GYIL at 290.

57 *Hingitq and Others v Denmark* (18584/04) ECHR 12 January 2006.

58 Convention for the Protection of Human Rights and Fundamental Freedoms (4 November 1950, Rome, entered into force 3 September 1953) CETS 5.

59 However, Inuit affected by the relocation complained to the ECtHR regarding the amount of compensation ruled in 1990s by Danish courts, which indeed found the action interfering with the property rights of the Inuit. The Court, in turn, ruled that these complaints fall under its competence, but eventually found them ill-founded. See Aida Grgić and others “The Right to Property Under the European Convention on Human Rights. A Guide to the Implementation of the European Convention on Human Rights and its Protocols” (Human Rights Handbooks, No 10, Council of Europe, 2007) European Court of Human Rights <<http://echr.coe.int/NR/rdonlyres/97564258-437D-4FFD-A54D-2766DE255CCA/0/DG2ENHRHAND102007.pdf>>.

systems, and also in terms of indigenous standards. It can be presumed that this is one factor distinguishing the Nordic State policies from the indigenous policy and law of the three big federal States.

The internationalist approach by the Nordic States, but also to lesser extent Canada,<sup>60</sup> has the effect of making these States be more concerned about their human rights reputation, both domestically and in international fora. One can argue that the international identity of these States was very much built on their contributing to the UN system and promoting a strong international legal regime with respect for human rights. Nordic countries often view themselves as good international citizens or even moral superpowers,<sup>61</sup> and have been many times perceived also by others as State norm entrepreneurs, that is, those developing and advocating new norms and early adopters of such new norms.<sup>62</sup> The fulfilment of international obligations constitutes in this context a value in itself, as the state becomes “proud to be a forerunner of human rights” and an example for other states to follow.<sup>63</sup>

Nordic States have long cherished their alleged multilateralism, that is, placing greater weight on normative and ethical considerations in the formation and conduct of their foreign policies in contrast to real politik considerations.<sup>64</sup> This type of foreign policy has made these States more vulnerable to international pressures and the politics of embarrassment by domestic groups, *inter alia* indigenous peoples.

The Nordic States have also been among those that have contributed most to the development of international norms specific to indigenous peoples, such as the ILO Convention No 169, 2007 UN Declaration or the establishment of the UN Permanent Forum on Indigenous Issues. Correspondingly, they are expected to be diligent in implementing domestically the very same international normative frameworks they have themselves promoted.<sup>65</sup>

Furthermore, crucial experiences, such as the damming of the Alta River in northern Norway prepare political and social actors for policy changes. The permitting of construction of the Alta dam that flooded reindeer pastures of the indigenous Saami triggered the first serious political and legal fight by the Saami against the Norwegian authorities during the end of 1970s and the beginning of 1980s. The *Alta* case made the issue of indigenous rights particularly visible and created domestic pressure on the authorities.<sup>66</sup> Therefore, lack of such experience may limit the openness of a State to international norms. The difficulties connected with the ratification of the ILO Convention No 169 in Finland and Sweden, despite the pressures described above, demonstrate that domestic challenges and barriers in international law reception may prove particularly critical in the case of the norms applicable to indigenous peoples. Constraints connected with the liberal

60 Lightfoot, above n 14, at 101.

61 Bergman, above n 5, at 74-77; Peter Lawler “Janus-Faced Solidarity: Danish Internationalism Reconsidered” (2007) 42 *Coop & Conflict* 101 at 101-106; Christopher S Browning “Branding Nordicity. Models, Identity and the Decline of Exceptionalism” (2007) 42(1) *Coop & Conflict* 27 at 28-34.

62 The term norm entrepreneur originally refers to persons developing new norms, but has over time extrapolated also to groups and states. See Martha Finnmore and Kathryn Sikkink “International Norm Dynamics and Political Change” (1998) 52(4) *International Organisations* at 896-899; Christine Ingebritsen “Norm Entrepreneurs: Scandinavia’s Role in World Politics” (2002) 37(1) *Coop & Conflict* at 11.

63 Anne Julie Semb “How Norms Affect Policy – The Case of Saami Policy in Norway” (2001) *International Journal on Minority and Group Rights* 8 177 at 206-207.

64 Lawler, above n 61, at 101-102; Browning, above n 61, at 38.

65 Lawler, above n 61.

66 Semb, above n 63, at 203-206.

welfare state system, principles of equality and the legacy of colonisation and settlement process limit the ability of also Nordic States to adopt strong rights protections for the Saami.

Such constraints are much more visible in Canada and the United States, countries that were established on the basis of the doctrine of discovery. Indigenous collective rights, as they are currently shaped by the UN 2007 Declaration, challenge these notions.<sup>67</sup> For this reason, arguably, the States attempt to fit the indigenous claims into their liberal systems rather than complex indigenous rights frameworks offered by international instruments. In Canada, aboriginal self-governance is accepted and resonates with common law tradition, while the doctrine of self-determination appears to be often rejected.<sup>68</sup>

Resistance to the direct influence of international law on the domestic systems, based on common law legacy and the United States constitutionalism (discussed earlier) poses another, more general challenge to the adoption of indigenous rights instruments in North America.<sup>69</sup> As argued by constructivists, new norms need to fit into the already existing normative systems, for instance the UN Declaration needs to confront the full force of common law legacy and the United States' constitutionalism.<sup>70</sup>

Due to the normative pressures from the international community, even those States where international law has less influence than in Nordic States may find it difficult to reject altogether the influence of indigenous international standards. According to some researchers, the achievements of Canadian indigenous peoples would have been impossible without the existence of international institutional pressure, even if its influence is not direct from a legal point of view.<sup>71</sup>

Most commentators would agree that even if Canada has not internationalised its domestic indigenous policy and law, indigenous issues are handled well and are seen as part of the Canadian nation-building, which accommodates diversity of solutions. This is likely to be one more reason why Canada has followed its own path in this field of policy. The United States and the Russian Federation also prefer domestic solutions. This is probably because the treatment of various groups in a State is at the core of domestic policy and many larger States have problems with international law intervening in these core domestic policy issues. Russia's current fairly eccentric indigenous domestic policy and law (together with the diversity and number of various indigenous peoples) would seem to underline Russian problems in buying into any of the indigenous international standards available.

Even if Inuit in Greenland were long treated as indigenous people of Denmark, it seems fair to argue that Denmark's alleged illegal annexation of Greenland in 1953 would come to haunt the country sooner or later, especially because Denmark is known to respect and promote international law in its foreign policy.<sup>72</sup> Thus the situation in Greenland may be explained as a kind of prolonged decolonisation process.

Another domestic factor influencing the way in which the international norms are implemented by Arctic States is the advocacy conducted by indigenous groups themselves. Indigenous

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67 Lightfoot, above n 14, at 98-102; "International Law as an Interpretative Force...." above n 22, at 1751-1753.

68 Dalton, above n 29, at 3-5.

69 Lightfoot, above n 14, at 98-99; Katz, above n 27.

70 Finnmore and Sikkink, above n 62, at 906-909; Adam Stepien "The Influence of the Sámi and Inuit on the Danish and Norwegian Development Cooperation with the Indigenous Peoples in the Global South: Actors and Norms" [2011] *Polar Law Yearbook* (in print).

71 Dalton, above n 29, at 1.

72 Lawler, above n 61.

movements often take up the role of norm entrepreneurs,<sup>73</sup> pressing their Governments to adopt various norms, often already existing in international law. Such influence may occur through diverse channels: politics of embarrassment performed at the international level; lobbying; public awareness campaigns; persuasion; formation of coalitions with other civil society actors (for example environmental advocacy organisations, as in conflict over logging in Finnish Lapland); or legal actions before international courts and human rights bodies. It is hardly surprising that the adoption of international indigenous rights instruments, providing complex legal protection and safeguarding indigenous autonomy, is high on the agenda of indigenous organisations in their advocacy activism.

The difference in the power of influence of indigenous movements in various states is obvious when Western states are compared with Russia. Indigenous groups from North America and the Nordic States have greater resources at their disposal and stronger organisational capacity than their Russian counterparts. Moreover, they are the ones that started the international indigenous movement and therefore international indigenous instruments often reflect their particular situation (hence the accusation that international indigenous law is mainly applicable to the Western hemisphere). State funding, more favourable economic situation, well educated elites, and comparatively strong organisations in Western democracies create better conditions for indigenous peoples to claim their rights. In contrast, Russian indigenous groups often lack State funding and organisational capacity in order to facilitate international (or even national) activity. At the beginning of 1990s, when the Russian indigenous peoples' representatives took part for the first time in international indigenous meetings, their limited understanding and knowledge of international mechanisms in comparison to their counterparts from the other side of the Arctic Ocean, was evident (however, Russian indigenous capacity is gradually rising).<sup>74</sup> Thus, the lack of Russian indigenous cases in international bodies may be an outcome, inter alia, of the weakness of indigenous movement and the constraints put on the indigenous activism by the national and local administration.

In the three Nordic countries, the Saami movement began in earnest from the famous *Alta* case in Norway. This case, which was also taken to the then European Commission on Human Rights, concerned a dam built on one of the northern rivers by Norway, the construction of which had an adverse effect on Saami reindeer herding. It heralded a momentous awakening of Saami identity, which led to fight for their rights attitude not only in Norway but in other Saami areas as well. It clearly had an impact in Norway, Finland and Sweden and also influenced the way these three Nordic countries treat their Saami people, a development that was strengthened by the abovementioned process of policy convergence or policy diffusion between Nordic States.<sup>75</sup>

The impact of internal factors on the possibility for the State to incorporate and implement international norms is also clearly visible in Russia, where indigenous groups are diverse and numerous, and Arctic populations located in remote areas. This, together with federal political system and centralised Government, makes it particularly challenging for international indigenous law to be fully implemented throughout the Federation.

In order for international norms to make their way into domestic legal frameworks, it is evidently important that the international norm in question is connected to the already existing nor-

73 Finnmore and Sikkink, above n 62, at 896-900.

74 Mads Fægteborg "Reflections on the Arctic Leaders' Summit Process" (2005) Arctic Information, Saami Council <[www.saamicouncil.net/files/20051227133433.pdf](http://www.saamicouncil.net/files/20051227133433.pdf)>.

75 Eriksson, above n 44, at 99-104; Trond, above n 44, at 44-46.

mative and legal frameworks.<sup>76</sup> The importance of the adjacency of new norms to pre-existing frameworks is evident in the case of Nordic States. Since these States have relied on general international human rights instruments and mechanisms, they are also influenced by indigenous international standards as these are part and parcel of human rights law. Yet, those provisions of indigenous international law that stand in opposition to liberal, equality-based perceptions of human rights have to confront difficulties in terms of their incorporation and implementation. Therefore, cultural, language and individual rights of indigenous people are adopted fairly easily, while land and broadly understood self-determination rights encounter political and legal resistance.

#### IV. CONCLUSIONS – LIKELY DEVELOPMENTS IN THE FUTURE

It is useful to ponder two questions in this final section. First, what kind of normative developments are likely to take place in the Arctic in view of the progress (or lack of progress) of indigenous status and rights in the Arctic? Second, spurred by the UN Declaration, what are the possible developments in the Arctic States and their impact on policy on the Arctic and Northern States?

Two very important soft-law developments from the perspective of Arctic indigenous peoples are the evolution of the Arctic Council and the Barents Euro-Arctic Region. As mentioned above, the still predominant inter-governmental forum in the Arctic is the Arctic Council, having as its members all the eight Arctic States. The region's indigenous peoples have a unique status in the Council as its permanent participants, who need to be consulted before any decision is made by the Council members. Their status is higher than many non-Arctic nation-States who participate only as observers in the Council. As permanent participants, the six indigenous peoples' international organisations have been able to exert influence on the policy and science sponsored under the Arctic Council and made stronger contacts with each other. Currently, the three indigenous peoples taking part in the co-operation in the Barents Euro-Arctic Region (BEAR), consisting of co-operation between both Governmental and local level, have started to demand at least the same status in this international co-operation (taking place in the North-West Russia and Northern Fennoscandia) as the indigenous peoples enjoy in the Arctic Council as permanent participants.

A good example of how strong international policy actors Arctic indigenous peoples' organisations have become is the reaction by the Inuit Circumpolar Council and the Inuit leaders in four Arctic countries to the 2008 May Ilulissat Declaration by the five coastal States of the Arctic Ocean (Norway, Denmark, the United States, Canada and Russia). Since they were not invited to this meeting, and Ilulissat Declaration included a somewhat paternalistic vision of State-indigenous relationship,<sup>77</sup> they issued their Inuit Circumpolar Declaration on Arctic Sovereignty where they insisted that the Inuit need to be involved in this process as full partners because of their self-determination and many other internationally guaranteed human rights.

This type of status given to indigenous peoples' international organisations at the international level has served also to awaken the identity of Russian indigenous peoples, as most of them are now represented by the Russian Association of Indigenous Peoples of the North, Siberia and the Far East (RAIPON), one of the Arctic Council's permanent participants. Even if the centralisation and modernisation processes during the Putin-Medvedev era have not been amenable to internationalising indigenous law and policy, it is also the case that Russian indigenous peoples'

76 Semb, above n 63, at 179-182; Finnmore and Sikkink, above n 62, at 908.

77 Ilulissat Declaration (Ilulissat, 28 May 2008) Ocean Law <[www.oceanlaw.org/downloads/arctic/Ilulissat\\_Declaration.pdf](http://www.oceanlaw.org/downloads/arctic/Ilulissat_Declaration.pdf)>.

consciousness of their internationally guaranteed human rights has risen, which can even in the longer-term lead to human rights petitions, for instance, to the Human Rights Committee.

With respect to the legal status and rights of the Saami, there are two interesting developments: the negotiations over the Nordic Saami Convention, and whether Finland and Sweden will ratify the ILO Convention No 169. To some extent, we can foresee that even if the content of the two conventions differs in many respects, there are many similarities, making it likely that in Finland and Sweden the ratification of the ILO Convention No 169 (and implementation of the UN Declaration) and the negotiation of the Nordic Saami Convention need to be done together. The more likely outcome seems to be that Sweden and Finland could ratify the more modest standards of the ILO Convention No 169, meaning that the negotiations on the basis of the Draft Nordic Saami Convention will likely tilt towards making this Convention closer in content to the ILO Convention No 169. In the longer term, it seems difficult for Finland and Sweden not to adopt the legal standards, such as the ILO Convention No 169. This is due to the fact that both these countries receive vast amount of criticism from all international human rights and other bodies for not ratifying the ILO Convention No 169. As an example, if there is one single human rights issue undermining Finland's reputation internationally, it is the non-ratification of the ILO Convention No 169.

Greenlandic Inuit will likely establish their own independent State at some point in time. The timing of this secession from Denmark is very much connected to how quickly and effectively Greenland can exploit its vast offshore hydrocarbon deposits. The more revenues the Inuit receive, the less financial transfers they receive from Denmark, a deal, which was struck when reaching the latest compromise and the ensuing Self-Governance Act.<sup>78</sup> If and when the Inuit establish their own State, they will no longer be indigenous peoples from the international legal perspective, as they will no longer need protection of indigenous legal standards against a State. Yet, Greenlandic Inuit would probably in any case remain part of the ICC, and continue to be represented as indigenous people in the institutions of Arctic governance and on the UN level.

What about the influence of the UN Declaration opening even the United States and Canada to international standards in their indigenous domestic policy and law? Even if the UN Declaration accommodates diverse solutions, it does provide a strong status and rights for indigenous peoples and is the first truly universal normative instrument for indigenous peoples. The reason why it has already caused so many normative developments all around the globe is that it was negotiated directly between States and indigenous peoples for over twenty years. It is truly a milestone document for indigenous peoples all over the world, including Arctic indigenous peoples.

The UN Declaration was the first time that Canada and the United States explicitly and intentionally endorsed an international instrument that espouses rights for indigenous peoples.<sup>79</sup> Yet, its implementation is something different for nation-States than implementing the law of the sea or international environmental treaties. This is due to the fact that if any normative instrument implementing the UN Declaration touches the very fundamentals of the continuous nation-building,

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78 Statsministeriet, Act on Greenland Self-Government (No 473 of 12 June 2009) Statsministeriet <[www.stm.dk/multimedia/GR\\_Self-Government\\_UK.doc](http://www.stm.dk/multimedia/GR_Self-Government_UK.doc)>.

79 In addition, there is also an ongoing process within the Organisation of American States to adopt Inter-American Declaration on the Rights of Indigenous Peoples. See on the drafting process within OAS, Organisation of American States, 2011. Working Group to Prepare the Draft American Declaration on the Rights of Indigenous Peoples, Permanent Council of OAS (2011) Committee on Judicial and Political Affairs OAS <[www.oas.org/consejo/cajp/Indigenous.asp](http://www.oas.org/consejo/cajp/Indigenous.asp)>.

Hence, even if it certainly will have an effect on internationalising the indigenous domestic policy and law around the world, we should not expect any speedy implementation process. That much is clear also from the way Canada and the United States explained why they endorsed the Declaration, making it plain that it is the domestic process that is the crucial one and that they still have problems with certain parts of the Declaration.<sup>80</sup> However, it seems that in the course of time, the Canadian position that the UN Declaration does not codify customary international law will be called into question. Already many human rights treaty bodies apply many provisions of the UN Declaration that detail what these general human rights treaties require of States as regards their indigenous peoples.<sup>81</sup> Hence, in the long-term, the UN Declaration is likely to transform the indigenous policy and law of even larger federal States to be more influenced by universal human rights norms, which is also for the benefit of Arctic indigenous peoples.

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80 “Canada’s Statement of Support...,” above n 24; “Announcement of US Support...,” above n 23.

81 See Mauro Barelli “The Role of Soft Law in the International Legal System: The Case of the United Nations Declaration on the Rights of Indigenous Peoples” (2009) 58 *International and Comparative Law Quarterly* at 957; Jo M Pasqualucci “International Indigenous Land Rights: A Critique of the Jurisprudence of the Inter-American Court of Human Rights in Light of the United Nations Declaration on the Rights of Indigenous Peoples” (2009) 27 *Wis Int’l L J* at 51.

# THE FUTURE OF ENVIRONMENTAL LAW

BY DAVID J ROUND\*

I have very little to say regarding [the mountain kiwi], as I have only seen two of them, and being pushed with hunger, I ate the pair of them, [as] under the circumstances I would have eaten the last of the dodos. It is all very well for science, lifting up its hands in horror at what I once heard called gluttony, but let science tramp through the Westland bush or swamps, for two or three days without food, and find out what hunger is.<sup>1</sup>

## I. INTRODUCTION

For the last two decades environmental law courses have been popular choices for law students. The enactment of New Zealand's Resource Management Act (henceforward the RMA) in 1991 established not just an easily recognisable core of subject matter<sup>2</sup> but also, seemingly, a firm legislative and social commitment to environmental sustainability, as well as further reliable and credible evidence, if that were needed, that the subject would be useful and profitable in practice. Since then, of course, more specialised environmental law courses have come to cover many areas beyond the RMA's scope. At the University of Canterbury, for example, the core environmental law course, Natural Resource Law,<sup>3</sup> had as many as sixty or seventy students in earlier years, many of them local body personnel, public servants and even practising lawyers wanting to learn about the new legislation. Numbers later settled down to somewhere around forty or fifty, a little less than half the numbers enrolled in the most popular optional subjects such as Administrative Law, Evidence, Family Law and Company Law, but considerably more than the numbers in some specialised subjects. Following later reorganisation, Canterbury, in 2011, offered courses on the Resource Management Act, Crown environmental and conservation administration and the public interest, international environmental law and an introductory course on environmental law's

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1 Charles (Mr Explorer) Douglas, in John Pascoe (ed) *Mr Explorer Douglas* (AH and AW Reed, Wellington, 1957); Part II, Selections from the Douglas Papers at 228.

2 Drawing together, as it did, the disparate laws previously contained in many statutes, of which the most notable were the Town and Country Planning Act 1977 and the Water and Soil Conservation Act 1967.

3 The name is something of an historical accident, and should not be considered as an indication that the course took a fragmented resource-based approach and was useful chiefly as a guide to resource exploitation. "Environmental Law" was unavailable as a name because it had already been used as the name of an earlier course before the RMA's time. The earliest planning law course, "Planning Law", had covered the Town and Country Planning Act, and a later "Environmental Law" course had covered everything else. The University requires every new course to have a new name, and "Environmental Law" being therefore unavailable for the new year-long core course, the name "Natural Resource Law" was chosen. The course as taught since then, however, always covered much more than the RMA.

historical, philosophical, political and social context, as well as courses on the law of the sea and Antarctic legal studies.

Environmental law courses, as well as offering good prospects for income and career, also appeal to the nobility of heart and altruism of the young. Environmental law seems to provide a rare opportunity for lawyers to become involved in making things better. Instead of merely picking up the pieces and cleaning up other people's messes, instead of merely keeping the humdrum world turning, environmental lawyers, in the youthful imagination and sometimes even in reality, seem to be involved in the greater cause of protecting, nurturing and defending life, beauty, sanity, wise living and wild nature.

## II. THE REMARKABLE PARADOX

It is this article's thesis that neither of these reasons for studying environmental law, neither the career prospects nor the appeal to idealism, will be prominent for much longer. This is certainly a great paradox. Our age is one of great and ever increasing environmental problems. It seems all too possible that appalling environmental catastrophes may soon fall upon the world. The picture theatres show blockbusters such as *The Day After Tomorrow* and *2012* which, although they may certainly exaggerate the immediacy, rate and extent of catastrophe, nevertheless play on a very real sense of impending crisis. Global climate change, in particular, and its implications for humankind are discussed almost daily in newspapers.<sup>4</sup> More certain, more immediate and perhaps even more catastrophic will be peak oil and the gradual dwindling of the fuel on which all our civilisation now depends. Yet these dire forecasts have not yet been followed by widespread citizen action. Indeed, the proportion of citizens who still do not accept that anthropogenic climate change is occurring has actually been increasing recently. According to a report in *The Guardian* of 7 February 2010, entitled "Public Loses Faith in Climate Change After Leaked E-mail Scandal", a recent BBC poll showed that the number of climate change sceptics in the United Kingdom had risen: 25 per cent of those polled did not believe that it was occurring, an increase of eight per cent since November, and of the 75 per cent who did accept that it was occurring, one in three felt that the case had been exaggerated. Only 26 per cent of those polled thought that climate change was "established as largely manmade". Another British poll quoted showed a drop in the last year from 44 per cent to 31 per cent of public belief in anthropogenic climate change. Other polls have revealed similar trends in the United States of America.<sup>5</sup> *The Guardian* attributed this decline to recent controversy over procedures at the University of East Anglia, headquarters of climate

4 It is of the nature of global problems, of course, that national solutions to these problems are not possible. We could not suggest that New Zealand's problems, for all their seriousness and accelerating tendencies, are as bad as those in many other parts of the world, where New Zealand's present conditions would be looked upon as a vast improvement. New Zealand, acting by itself, would never be able to do anything which would make a difference (except perhaps as an example, good or bad as the case may be). Without international cooperation all is lost; yet the very scale of the problems and necessary solutions renders such cooperation very difficult to achieve.

5 "Three and a half decades ago, when the nation's key environmental laws were approved, politicians were responding to the mood of the country. Today, the situation is largely reversed. Polls show that voters regard the environment in general, and climate change in particular, as, at best, middling concerns. In a recent survey...about their priorities for Congress and the new President, "[d]ealing with global warming" ranked at the bottom of a list of twenty choices, far below "strengthening the nation's economy" and "reducing health-care costs", and even below dealing with unspecified "global trade issues"...Last month, when Gallup asked Americans whether "protection of the environment should be given priority, even at the risk of curbing economic growth", only 42 per cent said yes. This was the lowest proportion in twenty-five years..." Elizabeth Colbert "In the Air" *The New Yorker* (New York, 27 April 2009) at 18.

change research, and over several details of the 2007 “fourth assessment” report of the Intergovernmental Panel on Climate Change (the IPCC), in particular assertions regarding the melting of Himalayan glaciers, increase in disasters such as hurricanes and floods, and decline in agricultural yields in Africa. It is not impossible that a particularly cold European and American winter may also have fed scepticism, even though climate change does forecast greater extremes of climate, both hot and cold, and even though other parts of the northern hemisphere have enjoyed a milder winter than usual.<sup>6</sup> The causes of scepticism may well lie deeper, however. They lie in part in boredom; the human mind is impatient, and rapidly tires of a tragedy which may well take twenty, thirty or fifty years to manifest itself significantly.<sup>7</sup> Humanity also has a great capacity for wishful thinking and wilful blindness, especially in the face of a possibility both remote and incomprehensible, where remedial action would interfere with one’s own comforts and way of life and would also (unless that action were part of a co-ordinated comprehensive international strategy) place the actors at a self-imposed disadvantage in relation to other nations who chose to do less. Garrett Hardin’s tragedy of the commons<sup>8</sup> applies (as he observed) as much to the unregulated putting of pollutants into public resources (such as air) as it does to the taking of public resources.

Whatever the precise combination of stupidity, ignorance and wishful thinking, our breathtaking failure to face increasingly obvious facts displays a perversity almost admirable in its boldness. There is a mythic quality in our refusal even to recognise the fate prepared for us by our own hands. We are the Trojans scorning Cassandra’s warnings; the Atlanteans blind to the doom undermining the seemingly solid earth. We will perish in horror, perhaps, but magnificently.

Here is the paradox, then, that in an age of increasing environmental crisis the environment is yesterday’s issue. Climate change, which is only the most prominent of numerous current environmental issues, threatens our civilisation, perhaps even the survival of our species. At the very least we would expect to find universal concern and anxiety. We would expect a precautionary approach to be universally embraced. Even if climate change be not absolutely certain, the abundant evidence of the possibility should call forth the application of Pascal’s wager. We should live as if it were certain, for by doing so we have nothing to lose and everything to gain, or at least retain. Yet this is not the public reaction; the widespread response, even if not actually one of scepticism, is certainly very laid back. A few protestors demonstrate at Copenhagen; Greenpeace unfurls an occasional banner from a smokestack somewhere; when the survival of our civilisation, if not our whole species is at stake, we would expect rather more.

### III. NEW ZEALAND: SELF-IMAGE AND REALITY

Turn to our own country. In the late 1960s New Zealand was much exercised by the possibility that the level of Lake Manapouri, a large and beautiful lake in Fiordland National Park, might be raised as part of a scheme to generate hydro-electric power for an aluminium smelter at Tiwai Point, near Bluff. In 1970 a petition to Parliament against raising the level of the lake at-

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6 Even though any natural trend is usually marked by occasional deviations. At the time of writing much of Europe is experiencing record summer heat waves.

7 “New Zealanders are suffering from ‘green fatigue’ through constant warnings of an environmental catastrophe, a survey has found....Reader’s Digest, which commissioned the survey, spoke to an advertising executive who said ‘green’ was a ‘damaged brand’ and media saturation had led to ‘green fatigue’...” *Christchurch Press* (30 October 2009).

8 “The Tragedy of the Commons” (1968) *Science* 162 at 1243-1248.

tracted 264,907 signatures. At the time this was the largest petition ever presented to Parliament, and remained so until overtaken by another environmental petition, the Maruia Declaration, with 341,159 signatures, presented to Parliament in 1977.<sup>9</sup> After widespread agitation, a Commission of Inquiry and sundry political manoeuvres, both main political parties agreed that the lake level should not be raised.

On 26 August 2009, however, in a speech in Queenstown to the annual conference of the Australasian Institute of Mining and Metallurgy, the Hon Gerry Brownlee, the Minister of Economic Development, announced his commitment “to unlocking New Zealand’s mineral potential”, and his awareness “that one of the fundamental barriers to mineral exploration and development is access to prospective land, particularly to land administered by the Department of Conservation”. He was concerned that the Department administered land which “hosted” about 70 per cent of the country’s mineral potential. Forty per cent of that land was listed in Schedule IV of the Crown Minerals Act 1991, which includes national parks, the more precious reserves and various other areas. Section 61 (1A) of the Act requires that:

[t]he Minister of Conservation must not accept any application for...or enter into any access arrangement relating to any Crown owned mineral...in any Crown owned land...described in the Fourth Schedule.

excepting only certain activities of minimal effect. Although the Minister insisted that all that was being ordered was a “stocktake” of mineral deposits on conservation land, with public consultation scheduled to follow in 2010, and although he dismissed as “alarming nonsense” claims by the Green Party that mining was about to be allowed in national parks,<sup>10</sup> Ministry of Economic Development officials particularly requested that areas of land in Fiordland, Paparoa and Kahurangi National Parks be included in the review,<sup>11</sup> and the Prime Minister, in his speech at the opening of Parliament<sup>12</sup> in 2010, spoke of the “extraordinary economic potential in the mineral estate residing in Crown-owned land”, and predicted that “notwithstanding the public consultation process”, he expected that the Government would act on at least some of the recommendations of a discussion document which recommended changes to Schedule IV of the Crown Minerals Act. Even in March 2010 Mr Brownlee was refusing to rule out the possibility of opencast mining in national parks.<sup>13</sup>

Now if New Zealand is, as constant rhetoric assures us, a more environmentally conscious and responsible society than it was in the 1960s, before the modern environmental movement had emerged,<sup>14</sup> then it would have to be the case that public objection to a proposal, not just to raise one lake in one national park, but to consider mining in several national parks, would be far more furious and vehement now than then. Yet opinion polls in the period after Mr Brownlee’s 2009 speech showed that the Government’s popularity had actually increased. The reasons for that in-

9 Details can be found in Roger Wilson *From Manapouri to Aramoana, The Battle For New Zealand’s Environment* (Earthworks Press, Auckland, 1982) and in David Young *Our Islands Ourselves, A History of Conservation in New Zealand* (University of Otago Press, 2004). Only one petition to Parliament has attracted more signatures than the Maruia declaration; that was the petition against the Homosexual Law Reform Bill, eventually enacted in 1987. The number of signatures in that petition was hotly disputed: there were allegations of fictitious names, individuals signing more than once, the signatures of infants and so on, but even making allowances for that, the figure was somewhere around 800,000.

10 *The Press* (1 December 2009).

11 *Ecolink* Newsletter of the Environment and Conservation Organisations of New Zealand (ECO), October 2009.

12 9 February 2010.

13 Geoff Cumming “Brownlee Refuses To Rule Out Pit Mining” *New Zealand Herald* (New Zealand, 6 March 2010).

14 Many consider the Save Manapouri campaign to be the beginning of the modern New Zealand environmental movement; some argue that it was instead the last expression of an older, staid style of environmentalism, but certainly, no-one suggests that the modern environmental movement, however defined, had existed before then.

crease were not stated, and might be unrelated to the mining announcement, but it is at least clear that the announcement did the Government's popularity no immediate harm. There was some protest against the proposals, most notably in central Auckland, where on 1 May 2010 about 40,000 people marched down Queen Street in protest. After they got into their cars and drove home, however, little further sign of a campaign was seen.

Despite this somewhat underwhelming opposition, the Government's eventual decision, on 20 July 2010, was not to remove areas from Schedule IV. I suggest, however, that the general public response suggested that attitudes have changed since 1970. In a Stuff opinion poll<sup>15</sup> asking the question "Should conservation land be open to mining?", to which four replies were possible, the voting was:

|   |               |
|---|---------------|
| Yes, we have resources, let's use them        | 19.5 per cent |
| Yes, within strict environmental criteria     | 34.1 per cent |
| No, too damaging to New Zealand's green image | 7.0 per cent  |
| No, national parks are treasures              | 39.3 per cent |

One fifth of those answering, then, had no objections of any significance to mining on the conservation estate. Even with reservations, 53.6 per cent of those answering had no objection in principle to mining. Another seven per cent objected to mining on the self-interested ground that it would damage the country's image. Well less than half the population, 39.3 per cent, objected to mining on conservation lands, including national parks, in principle. These are hardly the results one would expect of an environmentally minded, conservation oriented country. They lead us to conclude that the country's environmental awareness has actually regressed since the Manapouri controversy.

Recent proposals to alter rivers significantly have not attracted more than local opposition and have not been the focus of national campaigns. Meridian Energy's Project Aqua, planned for the lower Waitaki, drew opposition from fishermen and locals but never became a national issue. Meridian eventually withdrew its proposal, but not because of environmentalists' opposition. In Marlborough a proposal by TrustPower to alter the Wairau River significantly is, at the time of writing, before the Environment Court, but again has never caught fire nationally. On the West Coast, Meridian Energy's plans to build an 85 metre high dam across the Mokihinui River, a wild river beloved of trampers, kayakers and fishermen, have been approved by the consent authorities (and are now the subject of an appeal to the Environment Court) but again, the public campaign against the dam has simply failed to excite public concern and is (at the time of writing) quite invisible.

Membership of the Royal Forest and Bird Protection Society (hereafter "Forest and Bird") could surely be considered a reasonably accurate measure of New Zealanders' environmental concern. Forest and Bird is New Zealand's oldest, largest and most reputable conservation organisation. It was founded in 1923 (originally as the Native Bird Protection Society); it enjoys royal patronage; and although it has had its doldrums, it has nevertheless always had a respectable and often excellent record of defending wild nature. A table in the Appendix shows membership of Forest and Bird since 1973. 1973 was just after the success of the campaign to save

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15 10 February 2010.

Lake Manapouri, so is about the time of the great conservation awakening.<sup>16</sup> Forest and Bird has long had numerous classes of membership, single, family, senior single, senior family, student, life, school, business and corporate. The categories have recently been altered, but still include adult, adult overseas, senior, student, group, two classes of corporate membership and the “Kiwi Conservation Club” for children. Given this variety of membership classes it is impossible to put a precise figure on exactly how many members Forest and Bird has, but a notional number of members can be obtained by taking the annual income from subscriptions, given in the annual report, and dividing it by the single adult subscription for that year. This gives a notional number of single adult member equivalents, which is the figure given in the Appendix table’s right hand column. The figures show that from 9,151 notional members in 1973 membership gradually rose to 20,632 in 1991 (whether coincidentally or not, the year the RMA was passed, and it was widely assumed that all environmental problems were over) and then declined, sometimes by two or three thousand a year, to the present day, where, despite all membership drives, the figure persistently hovers around early to mid-1970s levels. Not surprisingly, this unexpected decline had severe financial repercussions for the Society. If Forest and Bird membership may be taken as a gauge of New Zealanders’ environmental awareness and concern, then that awareness and concern has certainly declined since 1991. In those same years, 1973 to 2009, New Zealand’s population also increased by about a third. As a proportion of the country’s population, then, Forest and Bird’s decline is even greater.

#### IV. A DIFFERENT NATION

Further anecdotal evidence could be produced, and doubtless argued over, but it would surely be very surprising if environmental awareness and concern were not declining. New Zealand is a very different country from what it was in 1973. We are another generation and more away from the land. The baby-boom generation to which the author belongs may have grown up in New Zealand’s cities, but many or most of those babies still enjoyed grandparents and aunts and uncles who farmed or lived in small towns. Those babies grew up knowing holidays in the countryside and adventure in the back blocks. Tramping was a widely enjoyed recreation. The last decade’s enthusiasm for the bach has been fuelled not just by fashion and readily available credit but also by nostalgia for the once common experience of holidays by the beach or beside a river or in the bush. (The modern “bach” is of course no such thing. The building laws see to that. They must be more accurately described as “holiday houses”, and are only available to the better-off, but that is not the point here). New Zealand is now one of the most highly urbanised nations in the world, with 86 per cent of our population living in urban situations<sup>17</sup> and about one third of the entire population living in the one conglomeration of Auckland. Almost one in every five New Zealanders and New Zealand residents was not born in this country, one of the highest proportions in the world. It would be surprising indeed if people with less and less knowledge or experience of our country were to be more concerned than earlier generations that it should retain its beauty and purity. It is surely far likelier that they should be increasingly concerned about the maintenance

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16 The year is chosen, however, because it is also the year the author, his own environmental consciousness awakening, joined Forest and Bird; he has all journals and annual reports from that time onwards, but even the Macmillan Brown collection of the University of Canterbury Library lacks earlier annual reports.

17 Statistics New Zealand Urban and Rural Migration figures. “Urban areas” include main, secondary and minor urban areas.

of their own lifestyle and comforts, and be increasingly prepared to sacrifice natural treasures and assets of which they have little or no personal experience to that end.

Our forests and mountains are often likened to cathedrals and temples. It is well worn rhetoric, and New Zealand has never been a particularly spiritual nation, but the argument is that these wild places are, if anywhere is, the places where we can stand in the presence of the numinous, where we can meet God and be at one with the Universe. There is, though, another way in which these wild places resemble Europe's ancient sanctuaries. Both cathedrals and wildernesses, both types of sanctuary, are places where, out of unthinking inherited ingrained habit, we go through the motions of doing homage to past values that are increasingly incomprehensible and irrelevant. Most visitors to the Sistine Chapel and to Milford Sound, I suggest, do not do so in order to have a religious or even aesthetic experience; they go because everyone takes holidays and goes overseas to do so, because these are the places one visits, and the purpose of visiting is mostly to have one's photograph taken and to say one has been there.<sup>18</sup>

To be fair, also, there is another great difference between the New Zealand of forty years ago and our own time. The 1970s and 80s, the years of great environmental battles, when the environmental movement was truly a force with which to be reckoned, were an age when resources were still abundant. The good environmental decisions which were, eventually, reached came at no cost. Lake Manapouri was not raised, but New Zealand did not need the extra electricity which would be generated by its raising; that electricity was merely intended to feed a foreign-owned aluminium smelter. Native forests on the South Island's West Coast and in the central North Island were set aside from logging, but New Zealand did not need the timber from those forests. Indeed, the Forest Service's native logging operations ran at a loss to the taxpayer. Stopping logging actually saved the taxpayer money as well as enhancing tourism and holiday opportunities. The only people who were to suffer from a cessation of logging were officials of the New Zealand Forest Service (the Government department which then administered nearly all state-owned native forests) who cherished ambitious dreams of solving the riddles of sustainable native forest management, and a comparative handful of people in small logging towns, whom the environmental movement was probably prepared to write off for the greater good but who, it was also argued, would in the long run be better off with long term sustainable and less dangerous and unpleasant jobs in the tourism industry. The environmental activists who collected the 341,159 signatures on the Maruia Declaration did not have a difficult job. As this author knows, for he was one of those activists, ordinary New Zealanders queued to sign. The regular "Which Party Will Save the Forests?" meetings before general elections were regularly attended by hundreds of people.

Things are different now. Native forest logging is no longer an issue, but the new matters which are issues do not attract nearly as much public concern as logging did. In part that must be because every citizen asked to join in opposition to a wind farm or hydro-electric dam, for example, will have the thought at the back of his or her mind that the consequence of such opposition, if successful, may well be personal inconvenience or discomfort for him or herself. If we do not mine national parks, governments may not be able to afford to do all the things we expect them to do. The environmental movement has hitherto taken the attitude that ordinary people are likelier than politicians to be environmentally aware and concerned. By and large that has, hitherto, been the case. Most environmental movements have been movements of ordinary people fighting political apathy or opposition. I suggest, however, that that may be in the process of changing. In the

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18 The author's observation is that this is most certainly true of the Sistine Chapel.

future there is likely to be more political mileage and votes in exploiting the environment than in protecting it. The battles of the 1970s and 1980s were hard fought, but the environmental battles of the future will be much harder fought. It cannot be considered certain that the environmentalists will win. The persistent assumption of some in the movement that they will inevitably triumph may well be a fatal hubris.

Before the 2008 general election the Green Party predicted that it would just about double its vote.<sup>19</sup> Its reasoning was that the approaching and now obvious environmental and resource crises beginning to affect us would be understood by voters as proof that the Greens were indeed correct in their warnings and therefore in their solutions. Leaving aside the issues of the coherence of the Greens' programme and whether its proposed solutions would indeed be successful, such reasoning surely also suffers from a failure of logic; or perhaps it might be better put as a failure to understand human nature. In times of resource shortages and straitened circumstances many people will become less generous and concerned with the public good than they were before. They will be more determined than ever to ensure that they obtain their fair share, indeed, more than their fair share, of what resources remain. The Greens did not double their vote; their final share of the party vote was 6.72 per cent, up from just over five per cent in 2005. It must be admitted that at the time of writing their popularity hovers somewhere around eight or nine per cent, but there could well be many reasons for that besides awareness of environmental crisis, and it remains to be seen how they will do in the 2011 general election.

Recent legislation passed by the present Government can therefore be explained differently from the way in which it tends to be explained by an often socialistically inclined environmental movement. Legislation to amend the Resource Management Act,<sup>20</sup> to allow greater exploitation of Canterbury's water<sup>21</sup> and to allow mining on the conservation estate and even in national parks, is usually considered by the environmental movement to be anti-democratic and intended to assist in the aggrandisement of a few friends of the ruling political party. Just as easily, however, can we describe these laws in another way? We can say that they are the expressions of a greater more general popular will. Whereas the Resource Management Act's provisions might have enabled locals and enthusiasts to participate in public processes and perhaps, if they were wealthy and well represented enough, to thwart a proposed development, these recent changes manifest the desire of by far a greater number of people; all uninformed and ignorant inhabitants of distant cities, perhaps, but nevertheless still adult citizens with voting rights, who are simply not concerned with

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19 Jeanette Fitzsimons, campaign launch speech "Through the Eyes of a Child" (Green Party of ANZ notes, New Zealand, 6 October 2008).

20 Most recently the Resource Management (Simplifying and Streamlining) Amendment Act 2009, itself only the precursor to further changes planned for 2010 and 2011.

21 The Environment Canterbury (Temporary Commissioners and Improved Water Management) Act 2010 authorised the replacement of the Canterbury Regional Council by appointed commissioners. Special rules now apply in Canterbury concerning, inter alia, water conservation orders. Applications for water conservation orders will not be determined by the same tests as elsewhere in New Zealand. Section 50(2) of the new statute prevents the Commissioners, and any future elected regional council, from considering the purpose of orders as set out in s 199 of the main 1991 statute. Instead, more emphasis is placed on the needs of primary and secondary industry and of the community. The test which would apply to the revoking or amending of an existing water conservation order in Canterbury is also relaxed, and indeed if an application to amend an order is made then the Minister himself, without any reference to the Regional Council, may now amend it if the effect would be minor and therefore "it is unnecessary [for the regional council] to consider the application".

any possible environmental destruction, and whose determination is to see that their own way of life, prosperity and comfort are to be disturbed as little as possible.

## V. EATING THE KIWI

If it is indeed the case that the general public is becoming less interested in environmental issues and less concerned in stopping environmental abuse, then several consequences follow. As suggested above, environmental battles will be much more hard-fought and more difficult for environmentalists to win. It may well also be the case that environmentalists review their present assumption that public participation in environmental issues is always without question a good thing. Environmentalists' current love of public participation is a marriage of convenience only. If in the future a poorer public eager to have access to resources would be more inclined to argue in favour of exploitation at public hearings, the environmental movement might be more inclined to favour decision-making by wise autocrats at a distance from the demands of the mob.

Perhaps a straw in the wind is to be found in the attitude of the New Zealand Green Party to public consultation on the matter of marine reserves. On 17 May 2006 the Greens were the only party in Parliament to vote against the Marine Reserves (Consultation with Stakeholders) Amendment Bill at the time of its first reading.<sup>22</sup> Jeanette Fitzsimons, speaking on the Greens' behalf, said that she did "not believe we should put an amendment bill through the House that deals only with the question of consulting people who want to fish". She preferred that public participation be dealt with as part of the entire revision of marine reserves under the Marine Reserves Bill. A preference for systematic and thorough revision over piecemeal tinkering is not unreasonable, but in fact the purpose of the Consultation with Stakeholders Bill is, by Clause 4, not just to consult fishermen, but "to ensure early consultation in the preparation of any application for the declaration of a marine reserve, for the purpose of promoting wide community support for such an application", and the stakeholders to be consulted include sailing, tourism and recreational interests, tangata whenua, neighbouring landowners and persons associated with the area as well as fishermen. In any case, fishermen are people too. It is difficult to avoid the suspicion, at least, that the Greens' opposition is really based on their fear that any wider public consultation would be dominated by those opposed to marine reserves, in this particular place at least.

Indeed, the attitude of New Zealanders to marine reserves has always been something of a disappointment to the conservation movement. After the establishment of the Department of Conservation in 1987 and the eventual protection of most remaining native forests, the Royal Forest and Bird Protection Society adopted the establishment of marine conservation and marine reserves as a major focus. The Forest and Bird magazine, *Forest and Bird*, more than occasionally featured fish on its cover, but members actually complained.<sup>23</sup> Marine reserves have never "taken off" as a subject of concern, despite every attempt to stir members' concerns. The usual reason offered by conservation leaders for this mysterious apathy is that the sea and fish are not "sexy",<sup>24</sup> as opposed

22 At the time of writing this Bill has still not yet been passed, but is, like the new Marine Reserves Bill itself, progressing slowly through the legislative process.

23 In the February 2003 issue of *Forest and Bird*, for example, long-time member Pat Menzies wrote to the Editor to say that she is "beginning to wonder what I belong to and where the 'forest' and 'bird' segments are disappearing to. As an example, take the November magazine, Sea-Snakes and Turtles at 14-17, Sea Slugs at 24-27 and Ocean Life Crisis at 28-31".

24 A word used more than once in personal communications.

to forests and little fluffy birds of the bush, which are. It is difficult to believe this. The beach, the surf and the sand-dunes are surely charged with sex if anywhere is. They are frequently visited by many of us, are far more accessible to most than is bush, and are the setting of many memorable and important aspects of our lives. Childish play, adolescent discovery and the quieter contemplations of maturity all occur there.<sup>25</sup> Many people visit the sea regularly in order to gather food, shellfish, crayfish, sea-urchins and fish. The sea coast is at least as close to our hearts as even the bush. Far likelier explanations, surely, for New Zealanders' reluctance to embrace marine reserves would involve the lack of any perception that any marine species are actually seriously endangered, the belief that where stocks are reduced in size the reason lies not with recreational fishermen and gatherers but with commercial interests, and the simple fact that the establishment of any reserve will unquestionably come at a cost to local people, who will thenceforward be unable to use that resource at their doorstep. Locals may well agree that marine reserves are excellent in principle, if only as sources of seed stock for the rest of the coast, but nevertheless they will also firmly maintain that no marine reserve should be established just here.

However leaving aside marine matters, there is a simpler and likelier immediate future. It is simply that issues of public participation may become irrelevant as our laws develop more and more in the direction increasingly indicated by present changes. Laws reflect the interests and desires of their makers. They are seldom any better than the people who make them. Our present environmental laws have only been possible because of widespread popular environmental sympathy. As that sympathy evaporates it is inevitable that so too will the laws which could only develop in that atmosphere.

In short, environmental law itself may not be a subject with much future. Going by present indications, there will be considerably less of it around in the years to come. When times are tough we will all eat the last two mountain kiwis.

## VI. THE DISAPPOINTMENTS OF THE RESOURCEMENT MANAGEMENT ACT

Honesty must compel us to admit at this point that the Resource Management Act itself has not lived up to the high expectations which were initially held for it. The most accurate prophet of how the Act would turn out was probably John Milligan, who, just nine months after its appearance wrote that:<sup>26</sup>

...if the task of law reform in this area is seen as being that of producing some kind of reconciliation [between different and conflicting value systems], success was always going to be very difficult to achieve.

He went on to say that:

[a]lthough the new Act *appears* to differ radically from previous legislation, a close examination of the language used leads to conclusions which bear a striking similarity to those previously reached.

The pattern or scheme of the new Act was familiar; former lines of arguments and conclusions remained available, and what in the end was to count as sustainable management was a matter for people and communities. Mr Milligan thought that the new Act presented an ideal opportunity to rethink our attitudes to resources and the environment, which might (or might not) in the

25 James K Baxter is said to have remarked that the introduced tree lupin (*Lupinus arboreus*, a common plant of the sandhills behind many lovely and popular beaches) should be our national flower, because most of us were conceived under them.

26 John Milligan "The Resource Management Act - Nine Months On" [1992] NZLJ at 351.

end lead to significant changes in management, but that in the short term, at any rate, not much would change; “the system will be seen as delivering the same sorts of results as it did under the old [Town and Country Planning] Act, but with greater complexity and at greater expense”.<sup>27</sup> If the new Act did change things, then, it would be not so much because of the Act’s words, patterns and structures as simply because the making of a new statute with so much fanfare presented an opportunity, which might or might not be taken up, for people to change their way of thinking.

Many took this article to be evidence of a deplorable cynicism on Mr Milligan’s part, but readers now may consider him uncannily prophetic. Even before the 2009 Simplifying and Streamlining Amendment Act the RMA had failed to live up to its promise. Ian Williams, of the University of Otago, has written<sup>28</sup> of how s 5 (which states the Act’s sole purpose to be sustainable management) has become “fertile ground for pleaders”, and how the four sections, including s 5, of Part II of the Act, “Purpose and Principles”, are a “source of bottomless justification and conflict” which “makes the potential for conflict endemic to the other major features of the legislation”.

Sustainable management becomes a sequence of single instances, all distinguishable. The legislature might almost as well have said that sustainable management means sugar and spice and all things nice. Had that been done then at least those attempting to deal with the definition would have known that it was not to be taken seriously.

He concluded:<sup>29</sup>

[w]ithin the statutory elements practically any decision on a resource consent application will be defensible - though no doubt some or one will be more defensible than others. The consents legislation seems to bear out the claim that resource consents are decided (even in the Environment Court) through a mixture of art, science, justice and democracy.

The Act has merely moved political struggles into a judicial setting. These realistic words are no more than the natural consequence and amplification of those words of Greig J in *New Zealand Rail v Marlborough District Council*<sup>30</sup> which dismayed so many environmentalists only three years after the Act’s creation:

[Part II] of the Act expresses in ordinary words of wide meaning the overall purpose and principles of the Act. It is not, I think, a part of the Act which should be subjected to strict rules and principles of statutory construction which aim to extract a precise and unique meaning from the words used. There is a deliberate openness about the language, its meanings and its connotations which I think is intended to allow the application of policy in a general and broad way.

Part of this is not true, for much thought and discussion went into the drafting of the legislation, and many people were under the impression that in fact it did have meanings of some precision. The definition of sustainable management, in particular, was believed to speak of the famous but elusive “environmental bottom line”, the point beyond which human activity would not be allowed. To be told that the definition had an “openness” which allowed “the application of policy in a broad and general way”, essentially, that it was a platitude meaning nothing in particular, seemed to undercut and destroy the whole idea of the Act, as something which would actually put the environment first and allow human activity only if it did not breach the bottom line. Greig J could be said to have delivered the death blow to the RMA as a truly environmentally responsible statute, and yet, in retrospect, his conclusions were inevitable. The definition of sustainable man-

27 Ibid.

28 Ian Williams “The Resource Management Act – Well Meant but Hardly Done” (2000) 9 Otago LR at 673.

29 Ibid, at 692.

30 *New Zealand Rail v Marlborough District Council* (1994) 3 NZRMA 70 (HC).

agement is a platitude, a list of all good things with no guidance as to which should prevail. The word “while”, linking the first part of the definition with the three later paragraphs of longer term considerations, can be interpreted as “if” just as it can be interpreted as “at the same time” but if the Act really did intend a serious bottom line, thereby rendering impossible much current human activity, clearer guidance was needed than just one possible interpretation of a single word.

The New Zealand Parliament, however, cannot be blamed for this. Sustainability was the buzz word of the time, and, as Professor Freyfogle points out,<sup>31</sup> it is at the best of times an exceptionally vague concept, long on aspiration and short on solid meaning. How can sustainable management tell us whether it is appropriate, for example, to alter or demolish an historic nineteenth century building? The old building, if restored and cared for, would endure and serve the community, so, presumably, will its replacement. The question is a philosophical one about the preservation of historic heritage; “sustainability” only confuses the issue. How can “sustainability” tell us if a river ought to be dammed for electricity and irrigation, or a greenfield subdivision be allowed? Electricity and food must come from somewhere, and houses must be put somewhere. If not these methods of generation and agriculture, then what? There will still be life after the dam and the houses are built. Unless sustainability is to be interpreted to mean that henceforward human beings have no right at all to intrude further on natural processes, thereby forcing modern life to grind to a halt, human activity must be allowed, and then inevitably, “sustainability” becomes a mere matter of balancing good and ill, with the inevitable result, in turn, that the RMA, like its predecessor legislation, is just a procedure which, under a “balancing” approach, merely supervises the orderly degradation of natural resources.

A widely reported and undisputed study of indicators of success and failure in the Environment Court<sup>32</sup> has concluded that “difference in the number of experts was a strong influence in the outcome of a case”. Experts are expensive, and the conclusion must therefore be that if the party with the more experts wins then the party with the more money thereby has improved chances of eventually winning. The 2009 amendments have been understood by some environmentalists as marking a profound change in the RMA’s direction, and an erosion of democratic involvement in decision-making; they do not. They manifest one of the attitudes which has been inherent in the RMA since its beginning, and in their further limitation, for there were limitations before, of public involvement in RMA resource consent proposals. They serve a wider and increasingly assertive public desire for economic development and resource use. If the 2009 amendments, and further ones expected in the term of this Government, mark anything at all, it is only the point (also marked by current mining proposals) at which our official ideology of environmental concern begins to crumble visibly.

The question whether the RMA has achieved, or even promoted, sustainable management in New Zealand is not one for a lawyer to answer. The most a lawyer can do is repeat the case law on the meaning of sustainability, which is no help at all. Even assuming that some satisfactory precise definition of sustainability could be found and agreed on, to say that whether in fact, on the ground, New Zealand’s practices are sustainable is a matter on which lawyers have no expertise. That question is one of fact, not of law. To answer the question would require an examination of

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31 Eric T Freyfogle *Why Conservation Is Failing and How It Can Regain Ground* (Yale University Press, 2006) at 113-114.

32 Ong Su-Wuen “I’ve Got More Experts Than You – Experts and the Environment Court” (2001) 5 NZJEL at 261.

absolutely all RMA decisions and a thorough and detailed knowledge of their practical consequences. Such a survey has never been done and never will be.

Nevertheless, it is not difficult to find indicators suggesting that our country's lands and waters are not as healthy as they were in 1991, and continue to decline, nor is it difficult to think of RMA decisions which seem to lack farsighted wisdom. Numerous reports tell us of the declining quantity and quality of waters in lakes, rivers, streams and aquifers. The RMA seems powerless to halt the decline, and resource consents continue to be issued. Cities continue to sprawl, as do the motorways and roads which peak oil will soon render as obsolete as the suburbs they serve. Also sprawling still are dairy farms, which consume considerable and increasing quantities not only of water, artificial fertiliser and electricity, but also of fossil fuels and even of imported cattle feed. New Zealand cannot even feed its current dairy herd without importing, inter alia, about one fifth of the world's palm kernel production. In an age of increasing world population and increasing oil prices it is impossible to believe that this can be "sustained" for very long. Although s 6(a) of the RMA declares that the "preservation of the natural character of the coastal environment" and its protection from "inappropriate subdivision, use and development" is a matter of national importance, which everyone involved in the Act's administration "shall recognise and provide for", the last two decades would have seen more coastal development, subdivision and building than at any other time in New Zealand's history.

At the same time that the RMA seems powerless to stop these bad things, its expense and strangling bureaucracy seem to be successful in frustrating any number of small and imaginative projects, tiny power generation projects, local gardens, new communities and such like, which might enable us to live more lightly on the earth. In the United States of America, at any rate, it has often been remarked that food safety regulations are expensive and complicated with which to comply and often supported by big agribusiness, because they have the effect of eliminating small modest competitors. One sometimes wonders if the complexity and expense of RMA procedures and compliance have something of the same effect.

## VII. GOING AGAINST THE GRAIN

The law's gradual return to an attitude of allowing, and even encouraging, resource use would be a weakening or abandonment of what we loosely call environmental law. The more freedom there is for landowners, developers, exploiters, and those whom we might generally call by the less pejorative term resource users, the more freedom they have, it must be the case that hard won, environmentally enlightened laws are thereby weakened or removed, and as there is less environmental law there is, obviously, less scope for lawyers to act in defence of the environment or of the rights of objectors. As a field of practice, the long term prognosis for environmental law is not good.

By the same token, of course, the prognosis for an environmentally healthy and sustainable society is not good either. One can only eat one's last two mountain kiwis or one's seed corn for so long. Our future seems to be one of accelerating and increasingly desperate worldwide resource exploitation and destruction, followed, needless to say, by very hard times for society and civilisation.

It may well already be too late to change this fatal trajectory.<sup>33</sup> While there is life there is hope, however, so let us ask ourselves: what should we do? Simply making good or well meaning environmental laws is obviously not enough. In New Zealand, anyway, that method has been tried. The laws may not have been good enough, perhaps, but that is a foolish argument; the RMA was believed at the beginning, anyway, to be good, if not totally amazing, and in any case it was as good as it could be made at the time. Better laws than the ones actually achieved were impossible. The RMA has failed, in part, perhaps, because of cunning legal argument (which has done no more than to spin out the implications hidden in the Act itself); it failed in part, perhaps, because later amendments altered the Act (but again, those amendments were the will of the people); it failed in part because of the colossal and absurd bureaucracy and expense which was never foreseen by the Act's architects;<sup>34</sup> and it has failed chiefly because it runs against the entire grain of our society. The Act's requirements defy every instinct and law of private property. For all that legal philosophy may have moved on from Austin's time, our concept of property is still his very absolute one: "a right, indefinite in point of user, unrestricted in point of disposition and unlimited in point of duration, over a determinate thing".<sup>35</sup>

The chief business of our politics is now the health and proper functioning of economic activity. Economic growth is necessary not only for our livelihoods but also for our very contentment. In lives which are for most an unthinking empty round of work, television, sex and sleep, where a vapid and shallow public has no sense of purpose or spiritual meaning, what is there to do but acquire, consume and discard?

Laws which run against the grain of a society's organisation and culture are likely to fail. Laws alone are not enough. When the RMA was being framed, its general approach was criticised by some advocates of economic instruments because it perpetuated a culture of litigation and confrontation. It was occasionally suggested that with proper pricing and internalisation of environmental costs it might even be possible largely to do away with legislation, and therefore litigation, and achieve sound environmental outcomes purely by the operation of market forces in a market so carefully constructed as to put a price on absolutely everything. That was an impossible dream, and one obviously open to abuse, but at least it proposed a model of environmental management which was in harmony with the way the world was actually working. In that sense those proposals were actually more realistic than proposals to bind unwilling subjects down by laws with which they were not in harmony.

## VIII. THE DEMOCRATIC CONUNDRUM

If our woes, however, spring from the present nature of our civilisation, then we have to change the way we live. That it is difficult to do, for nearly all of us are, in a very real sense, trapped in our present lifestyles. Life without a job or any other equivalent source of income, for example, is very miserable. We have to live somewhere; even buying a modest house, even regularly paying

33 As well as a spate of books on the hard times attendant on peak oil, books have begun to appear recently, such as Clive Hamilton *Requiem For A Species* (Allen and Unwin, 2010) and Bill McKibben *Eaarth* [sic]: *Making A Life On A Tough New Planet* (Times Books, 2010) arguing that humanity's chances of avoiding catastrophic global warming and climate change are now minimal, the necessary changes by now having to be so enormous and the time we have left to make those changes being so short. Mr McKibben still feels obliged to conclude with a message of hope, but it is only after the horse has bolted.

34 One does not hear very much of the "principle of freedom", so proudly enshrined in s 9.

35 John Austin *Lectures In Jurisprudence* (3rd ed, Weidenfeld and Nicolson, London, 1869) at 208 (reprinted 1955).

rent, is expensive. It is no longer possible to disappear into remote wilds and carve out one's own life. We need firewood and wine, we need a car to get to work or school or the beach. Could we live off the land, even if we could afford to buy any? Almost certainly not. It would be possible only for the young, fit and single, well informed and well equipped. Attempts to bring up children in such a situation might well lead to their parents being scrutinised by the authorities. To be made redundant would be for many of us a major financial unpleasantness. It is very hard, therefore, to offer any immediate practical alternative. Any alternatives will arise, slowly and painfully, only when many begin to seek them, but until they arise they cannot advertise themselves, nor can they be imposed on an unwilling people. Almost by definition, environmentally sound laws end up, in one way or another, as restrictions of our pleasures. Things become more expensive or impossible. As long as they are so perceived, as restrictions on pleasure, comfort, ease and expense, they will be accepted by a population in only two circumstances: if they are accepted as necessary, and much wilful blindness is possible here, or if they are imposed by brute force, a term which we will use to cover any exercise of legally regarded authority which does not accept the public will as its necessary superior. There may not be much difference between these two options. A measure may well become necessary long before it is widely regarded as necessary, and even when so widely regarded may still face significant pockets of opposition. Measures may well have to be imposed for the common good.

Before, though, we leap to abase ourselves before the brute god of force in the service of good, let us remember that power tends to corrupt, and that once one accepts the principle of brute force acting badly for the greater good, as the force chooses to see it, one inevitably justifies the reign of tyrants and brutes.

It would be best, then, if the necessary changes were welcomed by the people, but to do this the changes must not be shunned, but embraced; perceived not as the imposition of pain, however necessary it might be, but as a liberation, an invitation to live in a joy of courage and community, a determination to do as best we all can in the future because now, as much as ever, is the time when ideals are necessary. Unless we all do our very best we shall all perish. Our only possible futures are this, a grumblingly accepted tolerable autocracy, and chaos.

In *Post-Scarcity Anarchism*, published in 1971,<sup>36</sup> Murray Bookchin was prepared to accept, at least for the sake of argument, that hierarchy and laborious institutions might perhaps have been necessary in earlier ages of scarcity. Nevertheless the new and eternal age of abundance which was then appearing under our very eyes would make all hierarchy and imposed order completely unnecessary:

The great historic splits that destroyed early organic societies, dividing man from nature and man from man, had their origins in the problems of survival, in problems that involved the mere maintenance of human existence. Material scarcity provided the historic rationale for the development of the patriarchal family, private property, class domination and the state...[O]ur position in that historic drama differs fundamentally from that of anyone in the past. We of the twentieth century are literally the heirs of human history, the legatees of man's age-old effort to free himself from drudgery and material insecurity. For the first time in the long succession of centuries, this century, and this one alone, has elevated mankind to an entirely new level of technological achievement and to an entirely new vision of the human experience.

Forty years on, how sadly the great anarchist sounds like a salesman for the next new leap forward of the American dream.

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36 Murray Bookchin *Post-Scarcity Anarchism* (Ramparts Press, Palo Alto, California, 1971) at 9.

More accurate than Murray Bookchin's easy forecast of pleasure was William J Ophuls' 1977 *Ecology and the Politics of Scarcity, The Unravelling of the American Dream*. He observed that:<sup>37</sup>

the theory of the social contract is fundamentally cornucopian: nature's abundance being endless and inexhaustible, one has only to solve the problem of achieving social harmony through a just division of the spoils. Nature is thus external to politics.

Since the age of Locke and Adam Smith, such an assumption of abundance, or at the very least of a sufficient adequacy of resources to satisfy everyone's reasonable needs, has underlain all democratic political thought.<sup>38</sup>

Locke justifies the institution of property by saying that it derives from the mixture of a man's labour with the original commons of nature. But he continually emphasises that for one man to make part of what is the common heritage of mankind his own property does not work to the disadvantage of other men. Why? Because there was still enough and as good left; and more than the yet unprovided could use.

Enough is always assumed. There can be no acceptable reason, therefore, for misery and poverty. There are enough resources for everybody, and the only issue is one of how best to share everything out so that everyone gets enough, at least.

When scarcity returns, then, it comes as a surprise to citizens accustomed to possessing an inalienable right to plenty as well as the pursuit of happiness. The consequence of exercising that liberty in a basically laissez-faire system will inevitably be the ruin of the commons. Democracy, as we understand it, cannot conceivably survive.

If our future is to be one of Scarcity rather than Post-Scarcity, misery and poverty for some, at least, must be inevitable. How is this to be justified? In the past, hierarchy and her twin sister privilege were (when not simply unthinkingly and grumblingly accepted as the inevitable nature of things) usually justified on some legitimating compound of the natural order, heavenly decree and ancient valour, but we have abolished all those as valid reasons. There is now no acceptable excuse for hierarchy. Our liberation from the reign of priests and puritans, the West's official intellectual programme since even before the French Revolution, will not accept any claim that it is God's will that some should be miserable. Nor does our natural reason tell us so. Our natural reason tells us that we are as good as the next man and just as entitled as he is to anything he wants. We believe that not just the pursuit but the capture of happiness is one of our immutable rights.

The democratic principle, then, based as it inevitably must be on an assumption of equal humanity and the right to equal treatment, was as much a necessary prerequisite for our fatal impact on the earth as the machines of greater and greater power we have been fashioning since the Industrial Revolution began. It will in the future be a severe impediment to any attempts to limit hu-

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37 William J Ophuls *Ecology and the Politics of Scarcity Revisited: The Unraveling of the American Dream* (2nd ed, W H Freeman & Co, New York, 1992) at 144.

38 Chapter 4, at 165. Locke's state of nature, as described in Chapter II, Of the State of Nature, of his *Second Treatise on Civil Government*, is a leisured and gentlemanly state where neither hunger nor want intrude, nor the ugly emotions they engender. As in Marvell's Garden:

The luscious clusters of the vine  
Upon my Mouth do crush their wine;  
The nectaren, and curious peach  
Into my hands themselves do reach;  
Stumbling on melons, as I pass,  
Insnared with Flowers, I fall on grass.

man appetites. The democratic principle has been as necessary as the destruction of the religious principle which Theodore J Roszak lamented:<sup>39</sup>

The repression of the religious sensibilities in our culture over the past few centuries have been as much an adjunct of social and economic necessity as any act of class oppression or physical exploitation; it has been as mandatory for urban-industrial development as the accumulation of capital or the inculcation of factory discipline upon the working millions...Moreover [this] secularisation of our culture has been attended by a high idealism...; it has been seen by many of our finest thinkers not only as inevitable, but as a prerequisite of freedom. The major movements for social justice...drawing on a legitimate anti-clericalism and a healthy cynicism for promises of pie-in-the-sky...have been fiercely and proudly secular in their politics. The loss of the transcendent energies in our society has been taken by few radical leaders to be a privation as great as any due to physical hardship or the violation of personal dignity. For the most part, it has not been experienced as a loss at all, but as an historical necessity to which enlightened people adapt without protest, perhaps even welcome as a positive gain in maturity.

If, as suggested above, the marriage between the environmental movement and the democratic principle is merely one of convenience, than the hard-headed earth lover might be tempted, not necessarily with cynicism, to make that terrible bargain with brute force, and justify the brute as being for the common good, as being, indeed, the will of heaven and the voice of nature as well as the triumph of the stronger in combat and cunning.

This is a dreadful choice. It may seem necessary, yet what if the brute, having achieved power, does not act with the environmental responsibility we expected? By its very definition it is in the nature of the brute to become a tyrant. The people might well desire the tyrant's overthrow, and then what a glorious reassertion of ancient squandering there would be. The Forest Laws of the Conqueror and his successors, guarding the vert and the venison, were one of the last formal repositories of an ancient and at times harsh understanding of land, animal and greenwood, but the popular tradition to this day is of them as an oppression and burden. To this day, William Rufus is remembered as he was remembered by the monks, as the king slain by an arrow in the New Forest, a punishment sent on him by God for his father's great crime in establishing that as a new royal forest. The Forest Laws go, and where are the forests now, through the branches of which a squirrel could leap from the German Ocean to the Irish Sea without its feet once touching the ground? Liberty and environmental restraint very often pull in opposite directions. That is the problem. Is there any answer to it but the resignation of desire?

## IX. THE CONTRADICTIONS OF THE EARTH CHARTER

Few readers who have got this far would disagree that we must replace our patently unsustainable ways with a new way of living. Our nations and civilisations stand in as great a peril as at any other moment in human history. In its material and psychic effects the cataclysm which threatens us will be the greatest since the fall of Rome plunged the whole world our ancestors knew into centuries of darkness. As much as in any war of the heroic past, our survival will depend on our readiness to co-operate, to undergo hardships and to sacrifice our own narrow self interests and comfort

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39 Theodore Roszak *Where the Wasteland Ends, Politics and Transcendence in Post-Industrial Society* (Doubleday & Co, New York, 1972) at xxi.

for the common good. The Earth Charter<sup>40</sup> is quite correct when it begins by declaring that “[w]e stand at a critical moment in Earth’s history, a time when humanity must choose its future...”.

Nonetheless, however correct the authors of the Earth Charter might be in proposing that we must find a new way of living, and in considering all aspects of our lives to be related, I suggest they manifest two fundamental errors. As well as “Respect and Care for the Community of Life” and “Ecological Integrity”, the Charter also calls for “Social and Economic Justice” and “Democracy, Non-Violence and Peace”. “Social and economic justice” is described as requiring, inter alia, the elimination of poverty, rights to potable water, clean air, food security, uncontaminated soil, shelter, safe sanitation, the education and resources to secure a sustainable livelihood, social security for those unable to provide for themselves, the equitable distribution of wealth, gender equality and the elimination of absolutely all forms of discrimination. “Democracy, Non-Violence and Peace” has an equally ambitious list of objectives.

The first error is to suppose that these things are remotely possible. Many more human beings, those presently poor, and indeed many of those presently rich, would indeed be happier and healthier if the world’s goods were distributed in a more equitable way. Nevertheless such redistribution is at the best of times a major political challenge, and in times of shrinking resources, as explained above, those challenges become insuperable. We live also under the shadow of world-wide economic catastrophe, and a still growing human population which is expected, at present rates of growth, to increase by about 50 per cent over the next thirty or forty years, perhaps levelling out at about nine billion humans by the middle of this century. Even if the best redistribution in the world were actually possible, it still might well not be enough to provide everyone with everything to which their human rights allegedly entitle them. The Earth Charter’s agenda is still based on the belief in at least the adequacy of the earth’s resources for all human demands. It still holds that where God sends mouths He also sends food; that somehow, the laws of nature will guarantee that morally unpalatable events just will not occur. This is nonsense. There is a fundamental contradiction between the desire for generous “social justice” and the realities of life on our increasingly crowded and ruined planet. One simply cannot have both a healthy planet and even a modestly comfortable way of life for nine billion *Homo Sapiens*. One or the other must give. To put it bluntly, the survival of the planet and of pockets of civilisation within it will only be possible at the cost of appalling human misery.

However the Earth Charter goes too far not only in its expectations of resources but also in its social vision of the future. As mentioned above, that social vision calls for social welfare, and for activist states which “recognise the ignored, protect the vulnerable, [and] serve those who suffer”, which “promote the equitable distribution of wealth”, and which strictly regulate multinational corporations and international financial organisations. There must be gender equity and the elimination of discrimination; there must be freedom of expression, opinion, peaceful assembly, association and dissent,<sup>41</sup> comprehensive strategies to prevent violent conflict and the demilitarisation of national security systems. There must be many other things, all of which we could fairly categorise as the reasonably standard mainstream liberal agenda. All of these policies are, it

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40 <[www.earthcharterinaction.org](http://www.earthcharterinaction.org)>. The mission of the Earth Charter Initiative is “to promote the transition to sustainable ways of living and a global society founded on a shared ethical frame work that includes respect and care for the community of life, ecological integrity, universal human rights, respect for diversity, economic justice, democracy and a culture of peace”.

41 However freedom of religion is, for whatever reason, nowhere mentioned.

seems, just as important to humanity's rescue as are ecological integrity and respect and care for the community of life.

Besides the practical objection that struggling humanity will have its hands full dealing with the environmental crisis, and will not have much time to spare to work on gender equity,<sup>42</sup> for example, there are other reasons why we might consider the Earth Charter's social prescriptions to be ill advised.

For the last generation the environmental movement in New Zealand has, by and large, taken the attitude that the environment is an issue above and beyond politics. All people, whatever their politics, need fresh air and clean water, healthy food, serenity and refreshment for the spirit. It could well be argued that this political neutrality has been a necessary precondition for the movement's success.<sup>43</sup> The movement has always been alive to the widespread (and, if not entirely accurate, yet not entirely baseless) suspicion that environmentalists are of their nature likely to be left of centre in their politics, and that therefore there is no point in parties of the right having wise environmental policies, because those parties will not be rewarded by environmentalists' votes. The establishment of the Green Party was therefore viewed with mixed feelings by many environmentalists, because that party by its very name announced that it was the environmental party, and yet many of its other policies were distinctly of the left. It had the effect, in fact, of undoing the environmental position of political neutrality; its very name proclaimed that if a voter were green then that voter should properly be supporting left-leaning political positions on non-environmental issues.

This same criticism may be made of the Earth Charter. Gender equity, and many other social policies listed in the Earth Charter, are not environmental issues. Indeed, even to describe those policies as ones of "social justice" might be argued to be begging the question. Certainly, if we were to identify cultures and societies which in the past have lived sustainably upon the earth, and the list we compile might well be a very long one, we would have to conclude that many of those environmentally sustainable societies did not display gender equity, the complete elimination of all forms of discrimination, cultures of tolerance, non-violence and peace, and so on. Indeed, it could be argued that very often, anyway, the societies which least display these liberal characteristics are the "indigenous" societies run along very traditional lines, but which nevertheless receive special mention and respect in the Earth Charter.<sup>44</sup> The environmental degradation of the last couple of centuries, and of the last century in particular, has occurred at precisely the same time as the development of "social justice". If anything, the two have gone hand in hand; they are certainly not natural enemies.

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42 James Howard Kunstler *World Made By Hand* (Atlantic Monthly Press, 2008) is not alone in envisaging a poorer environmentally impoverished future where old social and sexual hierarchies effortlessly reappear and re-establish themselves, virtually without anyone noticing, or at least protesting.

43 The first notable victory of the new forest conservation movement, spearheaded by NFAC (the Native Forests Action Council) arose out of the promise by the National Party that if it were successful in the 1981 election it would add South Okarito and Waikukupa State Forests to Westland National Park. It is unlikely that this promise would have been made if NFAC had joined the "Citizens for Rowling" campaign, a political coalition which was more accurately described as "Citizens Against Muldoon" (the National leader and Prime Minister).

44 Principle 12 (b) of the Charter "[a]ffirm[s] the right of indigenous peoples to their spirituality, knowledge, lands and resources and...their related practice of sustainable livelihoods". For an examination of the inherent contradictions within the worship of the indigenous, see DJ Round "UN Declaration on the Rights of Indigenous Peoples" (2009) NZLJ 392.

The Earth Charter, then, goes too far. Like the Green Party's choice of name, it attempts to hijack the environmental movement and put it to the service of an unrelated political agenda. It would be just as fair to say, though, that it does not go far enough. The Charter, in fact, fails to recognise the first rule of ecology, that everything is connected. One can never do only one thing. The Charter does not aim at any fundamental restructuring of society. It contemplates the continued existence of multinational corporations and international financial institutions; it just demands that they be regulated for the public good. There will still be nation states, which merely have to be more democratic than at present, and which must be more active than they are now in promoting human rights, community well-being and the rest. There will still be "patterns of production [and] consumption", it is just that these must operate in harmony with a world of limited resources. The Charter cannot imagine a world much different from our own, but if our world in its basic late twentieth century liberal outlines is to continue, then (everything being connected) we must continue on our present path to destruction.

## X. THE LIVING OF ETHICS

To live at peace with the earth and in harmony with all creation certainly requires or presupposes an "environmental ethic". Many theologians and scholars are drawing on ancient wisdom and the riches of philosophy in order to compose ethical rules appropriate to our time for our relationship with the physical world.

Without a doubt most of these ethical rules will be excellent. It will not be enough, however, to have ideal codes of conduct spelt out in books; ethics must be lived, and here problems arise. One problem is the defensible foundation of those ethics; our society is aggressively secular.<sup>45</sup> As Theodore Roszak was noted above as maintaining, the repression of the religious sensibilities in our culture has been as necessary as any technology or invention in enabling us to use the world as we please, because we are able so to use it only after we have come to see it as mere inert material. For two centuries and more we have been constructing a world and world view utterly physical and material, with less and less room for God, the sacredness of the natural world, the human soul and any purpose or meaning. Nearly every reformer has seen it as part of his or her aim to assist in the great project of strangling the last king with the entrails of the last priest, and now that that has been at least metaphorically achieved, we profess to be surprised and horrified to discover that our society is aggressively materialistic. We should not be surprised. Our materialism is the logical and inevitable consequence of our secularism. If life has no higher purpose, what is there left to do but to accumulate as many possessions as possible? If life has no meaning or purpose, if the universe is not a wonderful creation but a mere chance, then on what ground can we object to its destruction? The only reasons we can offer are ones of self-interest, but they may not go very far.

Moreover we live in ways which make it difficult for us to behave in an environmentally virtuous manner. It can be difficult, indeed, even to identify the virtuous path. Even the optimistic Francis Fukuyama,<sup>46</sup> seeing history come to an end as the long wagon train of mankind begins to pull into town, admitted that capitalist prosperity and democracy were best promoted by "ir-

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45 In February 2002 the then Prime Minister, Helen Clark, justified her refusal to allow grace to be said even at a state banquet where Her Majesty was present because "[t]he practice of saying grace is of little relevance in our increasingly secular society...".

46 Francis Fukuyama *The End of History and the Last Man* (Free Press, New York, 1992).

rational” beliefs from earlier stages of society. Our present global economic troubles<sup>47</sup> have come about because we have been “living beyond our means”, to use a phrase which, although once common, now has a certain old-fashioned ring to it, yet a distinct school of economic thought maintains that such living, far from being imprudent, has actually been economically necessary, and that further borrowing and consumption are needful if the economy is to be restored to health. In our industrial capitalist society we are led to believe that the satisfaction of wants by continuing consumption is not only legitimate, but positively virtuous. Where ordinary citizens receive such advice it is indeed difficult to identify the environmentally virtuous path.

Third, even if the path were clear it is difficult to follow. Unless we happen to be on holiday, most of us, generally behaving as modern people do, have little direct contact with the natural world. We live in cities. We drive cars; when do we meet nature? In the food we purchase and eat we make choices which will eventually affect agricultural practices,<sup>48</sup> we will encourage or discourage organic farming or battery hens as we buy or do not buy the products of those operations, but it may be difficult to make even that choice in an age of prepared and packaged foods. That being so, it is impossible for us to live any environmental ethic. We may approve of these ethics, but how can we apply them? They seem to be designed for other people, for farmers and foresters, miners and manufacturers, not for mere citizens in towns. As long as we continue to live in the way we do, sadly and desperately, with an emptiness that must be assuaged by material things and with the natural world out of sight beyond the horizon, we shall not even think about those fine ethical duties for long.<sup>49</sup>

Environmental sustainability, then, can only be practised in compatible cultural settings. It is only possible in societies sufficiently simple and close to the earth that humans can see and feel the consequences of their actions. It must be at one with a society’s attitudes and way of life, its values and expectations, its conceptions of life’s purpose and human duty, of the will of the gods and humanity’s place in the universe, its social structures and its land laws. In the same way we have already argued that the Resource Management Act has failed to fulfil its purpose because that purpose runs against the grain of the society in which it is set.

Our thoughts are all of a piece. A conservative or radical attitude is likely to colour all our thinking and action. Very rarely are we truly conservative in some things and truly radical in others. Conservatism must be properly understood. It is not blind opposition to all change, neither has it anything to do with aggressive individualistic free market capitalism, which is in fact almost its antithesis. Conservatism is, rather, a caution about change. It is cautious because it has a realistic understanding of human nature and its weaknesses, and of how long and slow and painful has been the growth of civilisation’s thin and fragile veneer. Civilisation, order, law, good customs: these are precious and very easily lost. The radical temperament, by contrast, is more hopeful, and

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47 A “correction”, some would say; others speak of a depression; others might describe it as a consequence.

48 In one of Wendell Berry’s most famous sayings, (found, for example, in his 1989 essay “The Pleasures of Eating”) “Eating is an agricultural act”.

49 Wendell Berry, writing of traditional agriculture in the highlands of Peru in “An Agricultural Journey in Peru”, in *The Gift of Good Land* (North Point Press, San Francisco, 1981) at 27, says that “this is probably the only kind of culture that works: thought sufficiently complex, but submerged or embodied in traditional acts. It is at least as unconscious as it is conscious, and so is available to all levels of intelligence. Two people, one highly intelligent, the other unintelligent, will work fields on the same slope, and both will farm well, keeping the ways that keep the land. You can look at a whole mountainside covered with these little farms and not see anything egregiously wasteful or stupid. Not so with us. With us, it grows harder and harder even for intelligent people to behave intelligently, and the unintelligent are condemned to a stupidity probably unknown in traditional cultures”.

less realistic, about the ability of human nature to change and build heaven on earth. The radical is therefore much readier to jettison the past. The perfect can be the enemy of the good; the solid good in the past is, to the radical, the enemy of the perfect in his imagination.

The precautionary principle is a truly conservative idea. It declares that one should hold on to the good things of the present, inherited from the past, until it is absolutely clear that replacements or alleged “improvements” will in fact be better. It is unlikely that we will embrace such a conservative principle if in most other respects our attitudes are the opposite, that we should be free to experiment with life and new ways of living. Not just radicals of the left, but most of us, have some commitment to ideas of freedom and individualism which are incompatible with proper caution. The challenge of the future is to establish societies which have caution and long abiding patterns in their very bones. Such societies must be much slower than our own. That will be a good thing, in the balance; our own present frantic pace is as bad for our own minds and bodies as it is for the earth. The future must be based on land, on families, the inheritance of the generations, and on a human scale. In one way this is an immensely difficult task, for it will mean the loss of much of a freedom we greatly treasure, but all it is, is a return to humankind’s immemorial patterns, to ways of life for which, even in our own history and civilisation, we need look no further, there are abundant precedents.

## XI. THE INTEGRATION OF ENVIRONMENTAL LAW

Here lies the true future of environmental law. It must indeed be integrated. It must be not an irritating exceptional intervention, but a natural part of things, however it is not enough that it merely be integrated with other legal processes dealing with the development of land and particular projects. It must be integrated with the whole ordering of the community; it must be so embedded in a way of life that once more, as in much of the common law’s history, it disappears completely. Sound environmentalism in the future will arise out of the work of the constitutional lawyer, the Lord of the Manor or his future equivalent, the drafter of family settlements and entails, and from the leader, the prophet and the saint.<sup>50</sup> This must be so. As long as “environmental law” is a distinct field, it will inevitably be an unwelcome interference, yet another collection of hurdles to be overcome, and what is unwelcome will sooner or later be turned out.

The Greens can be blamed for implying that environmental issues are naturally the property of the left. In fact the opposite is true: sustainable life is only possible in societies that are conservative, in the truest sense of that word. The environmental slogan that ‘we have not inherited the earth from our ancestors, we have borrowed it from our children’ is no more than the environmental aspect of Edmund Burke’s claim that we hold the whole great accomplishment of civilisation as a patrimony in moral entail, which we are obliged to pass on to our children, enriched if possible, and certainly not diminished.

We do not need more environmental laws, nor even better ones. We have tried that path. Our laws are undoubtedly better written than they were ten, twenty, thirty years ago, yet that has not made any difference. We must try another way. We need to reshape the way we live. It is we who are the problem. We are to blame, not big business, not law, not politicians. In the last resort, they do what we want. They may certainly try to persuade us to one course of action or another, as they

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50 Another necessary role may well be played by the service men and women of the Air Force and Navy and territorial forces guarding our coasts against uninvited mass immigration, if not actual armed invasion, by desperate and overwhelming humanity elsewhere.

are entitled to do, it being a free country, but at the end of the day the decisions are ours.<sup>51</sup> Some people may protest against cowardly governments who do not implement sufficient measures to combat climate change; but any Western government that did fully implement its nation's fair share of the burden of changing to prevent climate change would be overthrown by popular revolt that afternoon.

We must change the way we live, and to do that we need to reshape our minds. We already know how to live sustainably; we are just afraid to do so. It will be difficult. We are afraid we may fail; one little part of us is afraid that our sincere beliefs and warnings might not be true; we still lust after material things, and are afraid to be without them. If we were wrong, and had renounced modern comforts for nothing, we would have missed out on so much, and everyone would laugh at us...the author knows these feelings. We are afraid that we might not be happy. We lack the courage of our convictions.

However if we are not brave enough to do these things ourselves, how can we blame others for not doing them? If we are trapped in demanding social arrangements, so surely is everybody else. If we do not lead the way, who else will?

## XII. APPENDIX

### A Table showing Forest and Bird membership Figures 1973 – 2010.<sup>52</sup>

The figure in the right-hand column, the number of “notional members”, is obtained by dividing the total subscription income from the year (a figure which appears separately in the Annual Report) by the single adult subscription of that year. Slight blips occur when subscriptions are increased, but general trends are clear.

| Year | Subscription Income | Single Adult Subscription | Notional number of single Adult equivalent members |
|------|---------------------|---------------------------|--|
| 1974 | \$25,722            | \$2.50                    | 10,288   |
| 1975 | \$39,019            | \$5.00                    | 7,803  |
| 1976 | \$52,107            | \$5.00                    | 10,421   |
| 1977 | \$58,743            | \$5.00                    | 11,748   |
| 1978 | \$77,715            | \$7.00                    | 11,102   |
| 1979 | \$94,678            | \$7.00                    | 13,525   |
| 1980 | \$95,935            | \$7.00                    | 13,705   |
| 1981 | \$131,267           | \$10.00                   | 13,127   |
| 1982 | \$182,131           | \$15.00                   | 12,142   |
| 1983 | \$210,754           | \$15.00                   | 14,050   |
| 1984 | \$235,530           | \$15.00                   | 15,702   |
| 1985 | \$345,968           | \$20.00                   | 17,298   |
| 1986 | \$368,182           | \$22.00                   | 16,735   |
| 1987 | \$389,678           | \$22.00                   | 17,712   |
| 1988 | \$556,042           | \$33.00                   | 17,152   |

51 Somewhere in Eric Schlosser's *Fast Food Nation* (Houghton Mifflin, New York, 2001) the author admits freely that, in the last resort, no-one holds a gun to your head and forces you to go into a McDonald's.

52 The 2008 figures quoted here are from the 2008 Annual Report. The 2009 Annual Report gives different subscription figures for 2008; lower, in the case of general subscriptions, higher in the case of the Kiwi Conservation Club. The total difference is however only \$1,211.

At this time the Kiwi Conservation Club (KCC) was established, with its own subscription. Henceforward the dollar figure in brackets indicates additional income from KCC subscriptions, and the membership figure in brackets is the notional membership if KCC subscriptions are added in, but the figure is still divided by the single adult subscription.

| <b>Year</b> | <b>Subscription Income</b> | <b>Single Adult Subscription</b> | <b>Adult equivalent members</b> |
|-------------|----------------------------|----------------------------------|---------------------------------|
| 1989        | \$623,619 (\$27,031)       | \$38.00                          | 16,411 (17,122)                 |
| 1990        | \$684,681 (\$33,286)       | \$38.00                          | 18,018 (18,893)                 |
| 1991        | \$825,307 (\$48,943)       | \$40.00                          | 20,632 (21,856)                 |
| 1992        | \$773,344 (\$44,316)       | \$40.00                          | 19,333 (20,441)                 |
| 1993        | \$688,079 (\$34,649)       | \$40.00                          | 17,201 (18,068)                 |
| 1994        | \$634,590 (\$33,115)       | \$45.00                          | 14,102 (14,838)                 |
| 1995        | \$715,525 (\$54,772)       | \$47.00                          | 15,224 (16,389)                 |
| 1996        | \$778,859 (\$57,719)       | \$47.00                          | 16,571 (17,799)                 |
| 1997        | \$629,032 (\$48,616)       | \$47.00                          | 13,383 (14,418)                 |
| 1998        | \$585,493 (\$54,137)       | \$47.00                          | 12,457 (13,609)                 |
| 1999        | \$614,971 (\$49,092)       | \$47.00                          | 13,084 (14,129)                 |
| 2000        | \$599,076 (\$58,055)       | \$49.00                          | 12,226 (13,411)                 |
| 2001        | \$612,666 (\$60,710)       | \$49.00                          | 12,503 (13,742)                 |
| 2002        | \$564,111 (\$71,190)       | \$52.00                          | 10,848 (12,217)                 |
| 2003        | \$587,709 (\$76,950)       | \$52.00                          | 11,303 (12,782)                 |
| 2004        | \$599,736 (\$75,019)       | \$52.00                          | 11,533 (12,976)                 |
| 2005        | \$566,759 (\$79,960)       | \$52.00                          | 10,899 (12,436)                 |
| 2006        | \$507,136 (\$81,438)       | \$52.00                          | 9,756 (11,318)                  |
| 2007        | \$581,481 (\$89,139)       | \$52.00                          | 11,182 (12,897)                 |
| 2008        | \$561,850 (\$64,071)       | \$52.00                          | 10,805 (12,037)                 |
| 2009        | \$540,358 (\$75,149)       | \$57.00                          | 9,480 (10,798)                  |
| 2010        | \$584,304 (\$93,785)       | \$57.00                          | 10,250 (11,896)                 |

# THE PURPOSE OF SUBSTANTIALLY LESSENING COMPETITION: THE DIVERGENCE OF NEW ZEALAND AND AUSTRALIAN LAW

BY PAUL G SCOTT\*

## I. PART 1- INTRODUCTION

The Commerce Act 1986 is largely based upon Australia's Trade Practices Act 1974 (now called the Consumer and Competition Act 2010). This is especially so with the restrictive trade practice provisions. These are in Part 2 of the Commerce Act and Part IV of the Consumer and Competition Act. Both Acts, via s 27 in New Zealand and s 45 in Australia, proscribe contracts, arrangements and understandings that have the purpose or effect or likely effect of substantially lessening competition in a market.<sup>1</sup> In the Commerce Act's early days, New Zealand courts emphasised the efficacy of drawing on Australian authority on these provisions.<sup>2</sup> Indeed with CER New Zealand

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1 Section 27 provides:

- (1) No person shall enter into a contract or arrangement or arrive at an understanding, containing a provision that has the purpose, or has or is likely to have the effect, of substantially lessening competition in a market. (2) No person shall give effect to a provision of a contract, arrangement, or understanding that has the purpose, or has or is likely to have the effect, of substantially lessening competition in a market. (3) Subsection (2) of this section applies in respect of a contract or arrangement entered into, or an understanding arrived at, whether before or after the commencement of this Act. (4) No provision of a contract, whether made before or after the commencement of this Act, that has the purpose, or has or is likely to have the effect, of substantially lessening competition in a market is enforceable.

Section 45 relevantly provides:

(2) A corporation shall not:

- (a) Make a contract or arrangement, or arrive at an understanding if:
- (i) The proposed contract, arrangement or understanding contains an exclusionary provision; or
  - (ii) A provision of the proposed contract, arrangement or understanding has the purpose, or would have or be likely to have the effect, of substantially lessening competition; or
- (b) Give effect to a provision of a contract, arrangement or understanding, whether the contract or arrangement was made, or the understanding was arrived at, before or after the commencement of this section, if that provision:
- (i) Is an exclusionary provision; or
  - (ii) Has the purpose, or has or is likely to have the effect, of substantially lessening competition.
- (3) For the purposes of this section and section 45A, competition, in relation to a provision of a contract, arrangement or understanding or of a proposed contract, arrangement or understanding, means competition in the market in which a corporation that is a party to a contract, arrangement or understanding or would be a party to the proposed contract, arrangement or understanding, or any body corporate related to such a corporation, supplies or acquires, or is likely to supply or acquire, goods or services or would, but for the provision, supply or acquire, or be likely to supply and acquire, goods or services.

2 *Union Shipping NZ Limited v Port Nelson Limited* [1990] 2 NZLR 662 (HC) at 699-700; *Fisher and Paykel Limited v Commerce Commission* [1990] 2 NZLR 731 (HC) at 756.

courts noted it was desirable to do so.<sup>3</sup> However, with the purpose limb of s 27, ie proscribing contracts, arrangements and understandings that have the purpose of substantially lessening competition, New Zealand and Australian law has significantly diverged.

The divergence starkly occurred in the Court of Appeal's decision in *ANZCO Foods Limited v AFFCO NZ Limited*.<sup>4</sup> Subsequently as a result of an Australian Full Federal Court decision the law has widened further. In *ANZCO Foods* the majority decision of Glazebrook J has resulted in New Zealand's law going off on a different path from Australia's. In particular, the differences are as follows:

a) Whether the purpose test is objective or subjective?

In Australia the requisite purpose is subjective.<sup>5</sup> In *ANZCO Foods* Glazebrook J, following Cooke P's approach in *Tui Foods Limited v New Zealand Milk Corporation*,<sup>6</sup> held that objective purpose was preferable but that courts could take account of subjective purpose in assessing objective purpose.<sup>7</sup> In short, both objective and subjective purpose are relevant.

In *News Limited v South Sydney District Rugby League Football Club Limited*<sup>8</sup> the High Court of Australia expressly rejected the submission that both objective and subjective purpose are relevant; such an approach was impermissible.<sup>9</sup> Subjective purpose alone counts. The High Court's decision in *News Limited* was before *ANZCO Foods*. Yet, the Court of Appeal did not discuss it or even comment on how it was diverging from Australia.

b) Whether it is necessary to establish an actual or likely effect of substantially lessening competition for the purpose limb to apply, or in other words, if an apparently anticompetitive purpose could not be achieved, could there still be a breach of s 27?

#### A. New Zealand Position

In *ANZCO Foods* Glazebrook J held that a plaintiff must prove the purpose of substantially lessening competition. If it was obvious that that purpose could not be achieved if the provision were implemented then, assessed objectively, the provision could not have had that purpose.<sup>10</sup>

3 *Fisher and Paykel Limited v Commerce Commission* [1990] 2 NZLR 731 (HC) at 756.

4 *ANZCO Foods Limited v AFFCO NZ Limited* [2006] 3 NZLR 351. This case was under s 28 of the Commerce Act which provides:

- 1) No person, either on his own or on behalf of an associated person, shall-
  - (a) Require the giving of a covenant; or
  - (b) Give a covenant –

that has the purpose, or has or is likely to have the effect, of substantially lessening competition in a market.

- 2) No person, either on his own or on behalf of an associated person, shall carry out or enforce the terms of a covenant that has the purpose, or has or is likely to have the effect, of substantially lessening competition in a market.

...

- 4) No covenant, whether given before or after the commencement of this Act, that has the purpose, or has or is likely to have the effect of substantially lessening competition in a market is enforceable.

5 *News Limited v South Sydney District Rugby League Football Club Limited* (2003) 215 CLR 563.

6 *Tui Foods Limited v New Zealand Milk Corporation* (1993) 5 TCLR 406 (CA).

7 *ANZCO Foods*, above n 4, at [255].

8 *News Limited v South Sydney District Rugby League Football Club Limited* (2003) 215 CLR 563. For a discussion of Australian law see Stephen Corones *Competition Law in Australia* (5th ed, Lawbook Co, Sydney, 2010) at Chapter 6.

9 *Ibid*, at [63].

10 *ANZCO Foods*, above n 4, at [257].

William Young J dissented on this point. He held it was not necessary to establish an effect or likely effect of substantially lessening competition before the purpose limb applied. He held "... that where the purpose of a covenant is to substantially lessen competition in a market, there is no need to prove substantial anticompetitive effect or likely effect".<sup>11</sup> He further noted: "... there is no logical inconsistency between concluding that a covenant which has not been established to have had an actual or likely substantial anticompetitive effect may nonetheless be held to have had the purpose of substantially lessening competition".<sup>12</sup>

### B. Australian Position

Again, the majority has diverged from Australian law. The Full Federal Court in *Universal Music Australia Pty Limited v Australian Competition and Consumer Commission* held that a party may have the purpose of substantially lessening competition even though that purpose was impossible to achieve.<sup>13</sup> The Full Federal Court decided *Universal Music* before *ANZCO Foods*. Yet, the Court of Appeal did not refer to it on this point. Interestingly, Glazebrook J cited *Universal Music* for another point.<sup>14</sup> Subsequent to *ANZCO Foods* the Full Federal Court in *Seven Network Limited v News Limited* reaffirmed its position that a purpose of substantially lessening competition did not have to be achievable, albeit by majority.<sup>15</sup>

Thus, the New Zealand law on the purpose of substantially lessening competition has significantly diverged from Australia. Indeed, the majority forged such a different path in apparent ignorance of some of the Australian authorities. While it cites Australian cases, it omits the most recent and relevant ones.

High Court of Australia and Federal Court decisions are not binding on New Zealand courts. So the divergence in of itself is no cause for concern; New Zealand courts do not have to apply Australian courts' reasoning blindly or slavishly. New Zealand courts' reasoning may be more rigorous and preferable. However, the *ANZCO Foods* Court of Appeal should have discussed the Australian cases. Ignoring the Australian jurisprudence is surprising at the very least.

Furthermore, the Australian jurisprudence and reasoning is preferable as a matter of statutory interpretation and economic analysis. The *ANZCO Foods* decision is a wrong turn. William Young J's reasoning and decision is preferable to the majority's. In showing this, Part 2 of this article discusses why Parliament has proscribed agreements that have the purpose, effect or likely effect of substantially lessening competition in a market. It also discusses the structure of s 27. Part 3 discusses what "purpose" in s 27 means. Part 4 deals with the issue of whether purpose is objective or subjective or a mixture of both. It argues that in line with Australian authority that it is subjective. It discusses the New Zealand approach that it can be a mixture of both but it rejects this approach. Part 5 deals with the situation where it is impossible or obvious that the effect of substantially lessening competition could never occur. Is it still possible for a court to find the requisite anticompetitive purpose? In line with William Young J's view it argues it is. Part 6 offers some conclusions.

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11 Ibid, at [152].

12 Ibid, at [153].

13 *Universal Music Australia Pty Limited v Australian Competition and Consumer Commission* (2003) 131 FCR 529 at 587.

14 *ANZCO Foods*, above n 4, at [247].

15 *Seven Network Limited v News Limited* [2009] FCAFC 166.

## II. PART 2: EFFECT, LIKELY EFFECT AND PURPOSE

Sections 27 and 28 deal with agreements. Section 27 covers provisions of contracts, arrangements and understandings. Section 28 covers covenants. One of competition law's key concerns is with agreements, especially between competitors. The reason for concern is that such agreements increase the risk of anticompetitive action, expand market power, create an anticompetitive restraint not otherwise possible and surrender decision-making autonomy on matters of competitive significance.<sup>16</sup>

### A. *Why Section 27 Proscribes Purpose, Effect and Likely Effect of Substantially Lessening Competition*

Section 27 proscribes the provisions of agreements if they have the purpose or effect or likely effect of substantially lessening competition in a market. Good reasons exist for this.<sup>17</sup>

#### 1. *Effect and likely effect*

As the effect or likely effect of a provision of an agreement is to substantially lessen competition, courts will condemn it under s 27 irrespective of purpose. This is how things should be. As Sullivan notes: "It is, in the end, effects - impacts upon the competitive process - which are of social consequence."<sup>18</sup> If an agreement's effect is to substantially lessen competition then society should not tolerate it. There is no benefit in letting it endure, nor is there any harm in proscribing it.<sup>19</sup> As for likely effect, if an agreement has or had the likely effect of substantially lessening competition there is no benefit in letting it endure. That the agreement may not have blossomed into an actual market effect is irrelevant. By the time of trial the market circumstances may have changed, court action may have had a freezing effect upon the conduct.

In determining whether an agreement has the effect or likely effect of substantially lessening competition, courts weigh up the pro and anticompetitive effects. They decide on balance whether the ultimate or net effect is to lessen substantially competition.<sup>20</sup> In so doing, Australasian courts analyse effect by comparing the market with and without the provision in the agreement.<sup>21</sup> This is called "counterfactual analysis". Courts consider the future state of competition in the relevant market with and without the challenged provision in the agreement. As Glazebrook J noted in *ANZCO Foods*:<sup>22</sup>

When assessing whether there has been a substantial lessening of competition in a market, the phrase must obviously be construed as a whole. Essentially, this means that the competitive functioning of a relevant market must be assessed with and without the disputed covenant or practice.

16 Phillip Areeda *Antitrust Law* (Little, Brown and Co, Boston, 1986) at [1402(a)].

17 This discussion is based on Paul G Scott "Price Fixing and the Doctrine of Ancillary Restraints" (1999) 7 *Canterbury L Rev* 403 at 405-406.

18 Lawrence A Sullivan *Handbook of the Law of Antitrust* (West Publishing Co, St Paul, 1977) at 194.

19 Thomas Kauper "The Treatment of Cartels under the Antitrust Laws of the United States" in C-K Wang, C-J Cheng, and L Lui (eds) *International Harmonisation of Competition Laws* (Martinus Nijhoff Publishers, A D Dordrecht, The Netherlands, 1995) 75 at 78.

20 *Fisher and Paykel*, above n 3, at 740.

21 *Stirling Harbour Services Pty Limited v Bunbury Port Authority* (2000) ATPR 41-752 at 41 and 267.

22 *ANZCO Foods*, above n 4, at [245]. See also Matt Sumpter *New Zealand Competition Law and Policy* (CCH, Auckland, 2010) at 188-192.

This balancing of pro and anticompetitive effects is similar to the way United States' courts assess agreements under s 1 of the Sherman Act. This is called "rule of reason" analysis.<sup>23</sup>

## 2. Purpose

As for purpose, courts will condemn an agreement when it has a substantial purpose of substantially lessening competition. The reason is that the parties to the agreement best know what they can achieve. They know the relevant market and the conditions in it. They would not have engaged in an anticompetitive scheme unless they believed they had a high chance of success.<sup>24</sup> If the parties believe they can successfully lessen competition, courts should accept that belief. In this way purpose serves as a surrogate or predictor of effect. If the parties have an anticompetitive purpose they must believe the arrangement will have an anticompetitive effect. Sometimes an agreement will not have a likely or actual anticompetitive effect despite there being an anticompetitive purpose. Liability should still arise. A party who says there should be no liability in these circumstances is saying we tried to behave anticompetitively, but due to circumstances beyond our control, we failed.<sup>25</sup> That they were wrong is no reason to condone their behaviour. Such a party is equally as blameworthy as a party who had the same purpose and who produced an anticompetitive effect. The structure of s 27 supports the notion of condemning on purpose alone.

The three limbs of s 27 proscribe provisions in contracts, agreements and understandings which have:

- i) the purpose of substantially lessening competition in a market; or
- ii) the effect of substantially lessening competition in a market; or
- iii) the likely effect of substantially lessening competition in a market.

The limbs are disjunctive. Thus, the purpose limb of s 27 catches agreements that the effect and likely effect limbs do not and vice versa.<sup>26</sup> If this were not so and there had to be the requisite effect or likely effect, then the purpose limb would be redundant; Parliament does not legislate redundancies.<sup>27</sup> Also, it means that if courts find liability under the purpose limb they do not need to consider the effect and likely effect limbs. Whether these propositions are correct depends on the meaning of purpose in s 27.

### III. PART 3: THE MEANING OF PURPOSE UNDER SECTION 27

The meaning of purpose has been the subject of much judicial comment. In Australia the discussion flows from the Privy Council's decision in *Newton v Federal Commissioner of Taxation*.<sup>28</sup> That case dealt with s 260 of the Income Tax Assessment Act 1936. That section covered contracts, arrangements or understandings which have the purpose or effect of tax avoidance. These

23 *Standard Oil Co v United States* 221 US 1 (1911) at 60.

24 John R Allison "Ambiguous Price Fixing and the Sherman Act: Simplistic Labels or Unavoidable Analysis" (1979) 16 *Houston L Rev* 761 at 767.

25 Phillip Areeda "The Changing Contours of the Rule of Reason" (1988) 54 *Antitrust LJ* 1 at 28.

26 Oliver Black *Conceptual Foundations of Antitrust* (Cambridge University Press, Cambridge, 2005) at 115.

27 Black, above n 26, at 115; Okeoghene Odudu "Interpreting Article 81(1): Object as Subjective Intention" (2001) 26 *EL Rev* 60 at 61; *Commerce Commission v Bay of Plenty Electricity Limited* HC Wellington CIV-2001-485-917, 13 December 2007, J Clifford and Professor Richardson at [339].

28 *Newton v Federal Commissioner of Taxation* (1958) 98 CLR 1.

were void for tax purposes. The Privy Council held that: “The word ‘purpose’ means, not motive but the effect which it is sought to achieve - the end in view”.<sup>29</sup>

Australian courts interpreting s 45 have cited *Newton* for the meaning of purpose. In *News Limited*, Glesson CJ defined purpose as the end sought to be accomplished by the conduct.<sup>30</sup> The High Court of Australia in *Rural Press Limited v Australian Competition and Consumer Commission* also adopted this definition.<sup>31</sup> Federal Courts have also adopted it. In *Seven Network Limited* the Full Federal Court observed that: “The purpose will be identified by examining the end sought to be accomplished by the provision”.<sup>32</sup> It also noted that: “The purpose must be ascertained by identification of the end sought to be achieved”.<sup>33</sup> Thus, the requisite purpose is the goal, objective or end.

New Zealand courts have not discussed purpose in as much detail as Australian courts. In *Union Shipping NZ Limited v Port Nelson Limited* the High Court observed:<sup>34</sup>

The concept of anticompetitive “purpose” arises under both ss 27 and 36. Under the statutory definition in s 2(5) “purpose” is not confined to “sole purpose”. Engaging in multi-purpose conduct which includes that anticompetitive purpose, will suffice as long as that anticompetitive purpose is “substantial”. “Substantial” means “real or of substance”. Like so many mental concepts, the reference to “purpose” has its difficulties. The word is not merely “intention”. Intention to do an act, which is known will have anticompetitive consequences, in itself is not enough. “Purpose” implies object or aim. The requirement is that “the conduct producing the consequences was motivated or inspired by a wish for the occurrence of the consequences”.<sup>35</sup>

Thus, under s 27 purpose means object or aim.

#### A. Purpose is Not the Same as Motive

The last sentence from the extract from *Union Shipping* speaks of motivation. However, the authorities show that purpose is not the same thing as motive. The Privy Council distinguished between motive and purpose in *Newton*.<sup>36</sup> In the s 46 monopolisation case *Queensland Wire Industries Pty Limited v Broken Hill Proprietary Co Limited*, the High Court of Australia observed:<sup>37</sup>

If, however, the anticompetitive effects are within the defendant’s purpose, questions of morality and motive become irrelevant: ‘There is no breach of s 46 unless there has been a use of market power for one of the purposes proscribed by the section. But once it appears there has been use of market power for such a purpose, the section has been contravened and it adds nothing to consider the motives of the corporation taking advantage of the market power which it has’.

In *News Limited* Glesson CJ observed that:<sup>38</sup>

29 *Ibid.*, at 70.

30 *News Limited*, above n 5, at [18].

31 *Rural Press Limited v Australian Competition and Consumer Commission* (2003) 216 CLR 53 at [66].

32 *Seven Network Limited*, above n 15, at [852].

33 *Ibid.*, at [898].

34 *Union Shipping*, above n 2, at 707.

35 Donald and Heydon *Trade Practices Law* (Law Book Company, Sydney, 1989) at 2, 621.

36 *Newton*, above n 28, at 70.

37 *Queensland Wire Industries Pty Limited v Broken Hill Proprietary Co Limited* (1989) 167 CLR 177 at 189. Courts have tended to treat the meaning of purpose under the monopolisation provisions the same as under ss 27 and 45. This article does not discuss whether this is correct.

38 *News Limited*, above n 5, at [18].

Purpose is to be distinguished from motive. The purpose of conduct is the end sought to be accomplished by the conduct. The motive for conduct is the reason for seeking that end. The appropriate description of characterisation of the end sought to be accomplished (purpose), as distinct from the reason for seeking that end (motive), may depend upon the legislative or other context in which the task is undertaken.

Glesson CJ then gave an example from the tax avoidance field. A person who entered into a tax avoidance agreement might have had the motive to increase his disposable income so he could give more to charity. This motive was irrelevant as to whether the agreement had the purpose of avoiding tax.<sup>39</sup> The same is true in the context of substantially lessening competition and in criminal law.<sup>40</sup> If someone plants a bomb on an aeroplane, his purpose under the law is to kill. This is so despite his motive having been to intimidate political opponents, gain publicity, show skill with explosives, collect life insurance or distract the police from his other criminal activities.

The Full Federal Court in *Seven Network* similarly distinguished between motive and purpose. It observed that:<sup>41</sup>

Purpose is not the same as motive: *News Limited v South Sydney District Rugby League Football Club Limited* 215 CLR 563. Motive will demonstrate the reason or reasons why the provision might be included but not the purpose. The purpose will be identified by examining the end sought to be accomplished by the provision.

### B. *New Zealand's Position on the Difference between Motive and Purpose*

New Zealand courts have drawn the same distinction. *Apple Fields Limited v New Zealand Apple and Pear Marketing Board* is an example. The plaintiffs had applied to the High Court for a declaration that that second tier levy that the Apple and Pear Marketing Board had imposed on new growers and existing growers who expanded production breached ss 27, 29 and 36 of the Commerce Act 1986. Holland J held that the purpose (under both ss 27 and 36) was not for the requisite anticompetitive purpose, rather it was to recover from those growers entering the market or increasing production a fair proportion of capital costs created by such entry and expansion. Accordingly, he held that under s 27 the purpose was not to lessen competition.<sup>42</sup>

On appeal, Cooke P disagreed with the High Court's findings on purpose.<sup>43</sup> Cooke P held that the Board, in imposing the levy, had set out to decrease the attraction to enter the market or make new plantings. In this light, the Board's motive was to increase fairness among growers. However, he held the levy "however well motivated has had a substantial purpose of deterring entry".<sup>44</sup>

The Australasian authorities are consistent on the meaning of purpose and how purpose differs from motive. However, as *ANZCO Foods* shows, they diverge greatly on whether purpose is subjective or objective or both.

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39 Ibid.

40 This example comes from Judge Posner's decision in *Johnson v Phelan* 69 F 3d 144 (7th Cir 1995).

41 *Seven Network Limited*, above n 15, at [852].

42 *Apple Fields Limited v New Zealand Apple and Pear Marketing Board* (1989) 2 NZBLC 103, 564 (HC) at 103 and 581.

43 *Apple Fields Limited v New Zealand Apple and Pear Marketing Board* [1989] 3 NZLR 158.

44 Ibid, at 162.

#### IV. PART 4: SUBJECTIVE OR OBJECTIVE PURPOSE OR BOTH

As mentioned above, Australia and New Zealand law differs on whether purpose is subjective or objective under s 27. What is the difference? By subjective purpose one means the purpose of the parties to the contract, arrangement or understanding.<sup>45</sup> Whereas objective purpose is that which the courts deduce or infer from the provision of the contract, arrangement or understanding in question.<sup>46</sup>

##### A. Australian Position on Subjective or Objective Purpose

Apart from a couple of early Federal Court decisions, Australian courts favoured subjective purpose.<sup>47</sup> *News Limited* settled the issue in favour of subjective purpose.<sup>48</sup>

##### B. Why the Australian Courts Use Subjective Purpose

Essentially there are two reasons why the Australian courts have chosen subjective purpose. First, s 45 contains both purpose and effect limbs. This means purpose is subjective because the effect limb would be redundant if the purpose limb concerned effect. If courts could infer purpose from effect and likely effect it would leave the purpose limb capturing nothing that the other limbs did not catch. This would create redundancies in the statutory wording. Also, as Gummow J noted in *News Limited*:<sup>49</sup>

In addition, there is a danger that an examination of the objective purpose of a provision will give undue significance to the substantive effect of the provision, as opposed to the effect that the parties *sought to achieve* through its inclusion.

The second reason is s 4F. This relevantly provides:

(1) For the purposes of this Act:

(a) a provision of a contract, arrangement or understanding or of a proposed contract, arrangement or understanding, or a covenant or a proposed covenant, shall be deemed to have had, or to have, a particular purpose if:

- (i) the provision was *included* in the contract, arrangement or understanding or is to be included in the proposed contract, arrangement or understanding, or the covenant was required to be given or the proposed covenant is to be required to be given, as the case may be, for that purpose or for purposes that *included or include that purpose*; and
- (ii) that purpose was or is a substantial purpose (emphasis added).

According to Gummow J in *News Limited*, and previously as a member of the Full Federal Court in *ASX Operations Pty Limited v Pont Data Australia Pty Limited (No 1)*,<sup>50</sup> the phrase “the provision was included in the contract ... for that purpose or for purposes that included or include that purpose” suggests that s 4F requires examining the purposes of the individuals who were responsible for including the relevant provision in the contract, arrangement or understanding. This di-

<sup>45</sup> *News Limited*, above n 5, at [126].

<sup>46</sup> *Ibid.*

<sup>47</sup> *Trade Practices Commission v TNT Management Pty Limited* (1985) 6 FCR 1; *Dandy Power Equipment Pty Limited v Mercury Marine Pty Limited* (1982) 44 ALR 173.

<sup>48</sup> *News Limited*, above n 5, at [63].

<sup>49</sup> *Ibid.*

<sup>50</sup> *ASX Operations Pty Limited v Pont Data Australia Pty Limited (No 1)* (1990) 27 FCR 460.

rects attention to the purpose of those individuals.<sup>51</sup> Furthermore, s 4F suggests that the provision may have been included in the agreement for a number of reasons. It suffices if the purpose is substantial. This shows that the Consumer and Competition Act 2010 requires examination of the purposes of individuals. As there are many individuals to an agreement, there will be an inevitable multiplicity of purposes. This too supports examining the subjective purpose of those individuals.<sup>52</sup> Also the fact that s 4F specifically refers to multiple purposes does not support objective purpose; it is unusual to infer multiple purposes.

*News Limited* concerned s 4D which deals with exclusionary provisions. However, it is clear that its reasoning on subjective purpose covers s 45 as well. Subsequently, the High Court of Australia, following *News Limited*, held subjective purpose applied to s 45 in *Rural Press Limited v ACCC*.<sup>53</sup> So too did the Full Federal Court in *Seven Network*.<sup>54</sup> This reasoning should apply to the equivalent New Zealand provisions, ie ss 27 and 29 of the Commerce Act. Indeed *Tui Foods* was a s 29 case.

In *News Limited*, McHugh J would have favoured objective purpose. However, he held that because the Full Federal Court had consistently used subjective purpose for 17 years, and because of the strength of the s 4F argument he supported subjective purpose.<sup>55</sup> Kirby J dissented on this issue in *News Limited*.<sup>56</sup> Subsequently in *Rural Press* he noted that on the whole he still preferred objective purpose. However, following *News Limited* he was bound to use subjective purpose.<sup>57</sup>

### C. *New Zealand's Position on Objective and Subjective Purpose*

The issue of objective or subjective purpose arose in *ANZCO Foods*. AFFCO is a substantial meat processing company. During the 1990s the meat processing companies believed New Zealand, and in particular the North Island, had too many meat processing plants competing for stock to slaughter. In 1994 Weddel NZ Limited (a substantial meat processing company) went into receivership. A number of meat companies, including AFFCO, formed a consortium for purchasing five Weddel meat processing plants and shutting them down. The consortium bought the Weddel properties from the receivers and requested encumbrances restricting future use of the land. The purpose was to decrease killing capacity in the North Island and, thus, help the existing companies' viability. These companies had all complained of excess capacity. The Commerce Commission approved their behaviour.

AFFCO had also been closing down and selling off its own plants, both before and after the Weddel receivership. Where the sale of a plant occurred, AFFCO required encumbrances to be registered over the land. These prevented use of the land for meat processing for 20 years. One of the properties was Waitara, at a reduced price. The initial purchaser of Waitara agreed to sell the site to ANZCO Foods Limited. ANZCO planned to use the Waitara site for cooling, freezing and storing meat for the production of smallgoods. This breached the encumbrance and AFFCO sued to enforce it.

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51 *News Limited*, above n 5, at [62].

52 *Ibid*.

53 *Rural Press Limited v ACCC* (2003) 216 CLR 53.

54 *Seven Network*, above n 15.

55 *News Limited*, above n 5, at [31]-[43].

56 *Ibid*, at [125]-[130].

57 *Rural Press*, above n 53, at [111].

In the Court of Appeal the issue was whether s 28 prevented enforcing the encumbrance. In the Court of Appeal the issue was purpose, not effect or likely effect. The reasons were the Waitara plant accounted for only about two percent of the North Island market for procurement of live-stock. There were low barriers to entry, thus, with and without the encumbrance, competition would be unaffected.

### 1. *William Young J's views*

In *ANZCO Foods* William Young J noted that it was not easy to reconcile a rigorously objective approach with the words of the Commerce Act.<sup>58</sup> Essentially his reasons were the same as the High Court of Australia. His first reason was that on a purely objective approach there would be little obvious reason for Parliament to introduce the concept of purpose. This left “effect” and “likely effect” to do all the work.<sup>59</sup> His second reason was the same as the s 4F argument the High Court used in *News Limited*. He used the New Zealand equivalent of s 2(5). He observed:<sup>60</sup>

The purely objective approach to “purpose” is not consistent with the definition of “purpose” in s2(5). While I agree that the concept of the purpose of a covenant connotes objectivity, the terminology of s2(5) (a)(i) in referring to the “purpose” for which a covenant was “required to be given” most obviously refers to the purposes of the relevant parties.

While William Young J cited the early Federal Court decisions of *Hughes v Western Australian Cricket Association (Inc)*<sup>61</sup> and *Pont Data* he did not mention *News Limited*. As his reasons for criticising a rigorously objective approach were essentially the same as the Australian courts’ reason for favouring a subjective approach, it is a wonder he did not go the whole way and prefer a subjective approach to purpose.

However, he accepted previous Court of Appeal authority that both objective and subjective purpose are relevant. The cases show how this came about. The New Zealand courts were initially split on whether purpose was objective or subjective.<sup>62</sup> However, in *Tui Foods Limited*, Cooke P held both objective and subjective purpose were relevant. He said:<sup>63</sup>

I am disposed to think that, if a purpose is discernible on the face of a contract or arrangement having regard to the express terms considered in the light of any relevant surrounding circumstances, such a purpose will qualify under the statute. That might be described as an objective approach. But it is at least conceivable that there may also be cases where, although the purpose is not so apparent, it can be shown by evidence dehors a contract or arrangement that the intention of the party who sought the inclusion of the relevant provision was of a kind falling within the prohibition in s29, and it may be that in such a case what may be called a subjective test is sufficient. It is unnecessary however for present purposes to express a definite view on that point because, on the face of this particular rebate arrangement and the evidence, it is manifestly well arguable in my view that there is no difference between an objective test and a subjective test: That both are satisfied.

McGechan J followed *Tui Foods* in *Commerce Commission v Port Nelson Limited* observing:<sup>64</sup>

58 *ANZCO Foods*, above n 4, at [145].

59 *Ibid*, at [145].

60 *Ibid*.

61 *Hughes v Western Australian Cricket Association (Inc)* (1986) 19 FCR 10.

62 Lindsay Hampton “Fundamental Concepts” in Cynthia Hawes (ed) *Butterworths Introduction to Commercial Law* (2nd ed, Lexis Nexis NZ Limited, Wellington, 2007) at 887-888 listing authority.

63 *Tui Foods*, above n 6, at 409.

64 *Commerce Commission v Port Nelson Limited* (1995) 5 NZBLC 103, 762 (HC) at 103 at 777.

Clearly, a plaintiff may establish anticompetitive purpose objectively, in the sense of inviting the inference from actions and circumstances. That will be the more ordinary approach. Alternatively, a plaintiff may establish anticompetitive purpose subjectively, in the sense of evidence otherwise of actual thinking. That will be less common, given evidential obstacles, but may occur through use of admissions. Where a plaintiff has both objective and subjective evidence, a plaintiff may - and doubtless will - present both. Any other approach is artificial. However, given the opening to a plaintiff to use subjective evidence, it should always be open to a defendant to attempt to rebut by subjective evidence. If open to a plaintiff, it should be open to a defendant. In that respect, the latest Australian approach [as set out in *General Newspapers Pty Limited v Telstra Corp* (1993) ATPR 41-274] is not adopted.

The Court of Appeal in *Port Nelson* agreed with Cooke P's comments in *Tui Foods*. It noted that the distinction between subjective and objective purpose is unimportant in practice.<sup>65</sup> Thus, as in *ANZCO Foods*, the Court of Appeal agreed the main approach for purpose under s 27 is objective with subjective relevant in marginal cases.

## 2. Glazebrook J's views

Glazebrook J accepted *Tui Foods* but came down heavily in favour of objective purpose. She reasoned that if the test were purely subjective it could excuse conduct that objectively has an anticompetitive purpose. Also a subjective test could expand s 27 to include procompetitive conduct, thereby frustrating the purpose of the Commerce Act.<sup>66</sup> Glazebrook J noted that using subjective purpose caused a difficulty because both hard competition and anticompetitive conduct involves the deliberate harming of rivals. If subjective purpose was the requisite purpose it could cover the deliberate harming of rivals.<sup>67</sup>

Regarding the s 2(5) argument of William Young J, her Honour noted that the Court of Appeal in *Port Nelson* held it was difficult to see how the purpose of a provision could be ascertained or negated subjectively.<sup>68</sup> She held the words "required to be given" for s 28 (or "is included" for s 27) referred back to s 28 (or s 27). Also she held s 2(5) is not a general definition of purpose but deals only with the special situation of there being multiple purposes.<sup>69</sup>

Glazebrook J held that subjective purpose conflicted with McGrath J's decision in *Giltrap City Limited v Commerce Commission*.<sup>70</sup> *Giltrap* concerned whether a party (Mr McKenzie) had entered into a price fixing arrangement, rather than the issue of whether purpose is objective or subjective. *Giltrap* argued, contrary to minutes of a meeting and not saying anything to the contrary, its purpose was not to agree on prices. According to McGrath J:<sup>71</sup>

It is plain for the language of the section that it is the purpose, or the actual or likely anticompetitive effect, of the *arrangement* that is the focus of s 27(1) rather than the purpose or expectation of those entering into it. It must follow that a person can be a party to a s 27 arrangement who does not personally intend to fix prices. The subjective intentions of individual parties to anticompetitive arrangements may differ, but the purpose of the statute is to prevent the public mischief that arises from the formation of any arrangements of this kind other than where permitted under the Act. This view of s 27 is reinforced by the objective standard for an unlawful arrangement of a *likely effect* of substantially lessening competition

65 *Port Nelson Limited v Commerce Commission* [1996] 3 NZLR 554 (CA) at 564.

66 *ANZCO Foods*, above n 4, at [256].

67 *Ibid*.

68 *Ibid*, at [258].

69 *Ibid*, at [259].

70 *Ibid*, at [258].

71 *Giltrap City Limited v Commerce Commission* [2004] 1 NZLR 608 (CA) at [73].

in s 27(1). The wider context, in particular ss2(5)(a) and 30, clearly indicates that s 27(1) was precisely drafted to focus on the provision rather than the subjective intentions of the individual parties.

Glazebrook J also held that subjective purpose conflicted with the per se provisions of the Commerce Act, such as ss 29 and 30:<sup>72</sup>

I also adopt the point made by McGrath J in *Giltrap City* that anything other than an objective ascertainment of purpose does not fit in with the per se provisions, such as ss29 and 30, which also refer to the concept of purpose - see at [238] above. It would be contrary to the intended mischief to which those provisions are aimed if a party were able to escape liability for conduct that is prohibited absolutely, on the basis of a subjective ascertainment of purpose.

Finally, she noted that Australian authority suggested a subjective approach. However, she concluded that there was little difference between the two countries' approaches because the Australian approach emphasised the result in view of the particular practice and not the participants' motive. Also she noted that courts would usually have to infer subjective purpose.<sup>73</sup> As with William Young J, Glazebrook J did not discuss the High Court of Australia's decision in *News Limited*.

#### D. Uncontroversial Points on Purpose

Before discussing Glazebrook J's reasons, it is necessary to note some points of agreement between objective and subjective purpose adherents. As many courts have noted, often there will be no difference between objective and subjective purpose.<sup>74</sup> The reason is that courts often have to infer subjective purpose. Courts have to do so because sometimes there will be no overt evidence of purpose. Evidence of state of mind is difficult to find, especially if companies have received competition law advice not to put things in writing.<sup>75</sup> Also subjective purpose does not involve a court accepting every proffered justification for behaviour.<sup>76</sup> The proffered purpose may be a pretext for the requisite anticompetitive purpose. As the High Court noted in *Union Shipping*<sup>77</sup> "protestations of inner thoughts which do not reconcile with objective likelihood are unlikely to carry much weight".

The United States Supreme Court monopolisation case, *Aspen Skiing Co v Aspen Highlands Skiing Corp*,<sup>78</sup> is an apt example. Aspen Skiing Co (Ski Co) and Aspen Highlands Skiing Corp (Highlands) operated rival skiing facilities in Aspen, Colorado. Of the four ski fields in Aspen, Ski Co owned three and Highlands one. Since 1962 the parties had operated an all-Aspen ticket coupon system that allowed skiers to ski on any of the four mountains. The parties distributed revenue from the all-Aspen ticket according to the number of coupons collected at each mountain. Highlands generally received 16 to 18 per cent of the revenue. For the 1976-77 season it only received 13.2 per cent. Before the 1977-78 season, Ski Co said it would only continue the all-Aspen ticket if Highlands accepted a fixed percentage of the revenues. Highlands found the percentage offered (13.2 per cent) unacceptable. Ski Co terminated the all-Aspen ticket. Ski Co then introduced its own three mountain ticket. It also started a national advertising campaign that suggested

72 *ANZCO Foods*, above n 4, at [260].

73 *Ibid*, at [263].

74 *Port Nelson*, above n 65, at 564; *News Limited*, above n 5, at [44]; *Rural Press*, above n 53, at [111].

75 Mark Berry "Competition Law" [2006] *New Zealand Law Review* 599 at 608-609.

76 *Union Shipping*, above n 34.

77 *Ibid*, at 707.

78 *Aspen Skiing Co v Aspen Highlands Skiing Corp* 472 US 585 (1985).

its mountains were the only ski fields in the area. Highlands tried to market its own all-Aspen ticket, but it failed because Ski Co refused to accept Highlands' tickets. Ski Co also refused to sell tickets for its mountains to Highlands. Without the all-Aspen ticket, Highlands' market share declined to 11 per cent.

Highlands sued, alleging Ski Co had monopolised the downhill skiing market in Aspen by refusing to cooperate in making the all-Aspen ticket available. One of the issues was whether Ski Co had a legitimate business purpose for discontinuing the all-Aspen ticket. Ski Co claimed it did because the system for monitoring usage and allocating revenue was unreliable and the system was cumbersome. Also Ski Co said that it did not want to be associated with Highlands' inferior services.

On Ski Co's purported purposes, the evidence showed Ski Co used the same type of joint multi-area tickets in other ski resorts where it operated but was not dominant. As for being administratively cumbersome, the evidence showed it took no longer to process an all-Aspen ticket than to accept payment by credit card at Ski Co's ticket windows. As for Highlands' inferiority, a number of Ski Co's executives sent their children to ski school at Highlands.

Thus, the Supreme Court had no difficulty in rejecting these purported purposes. They lacked credibility and were pretextual.<sup>79</sup> Thus, subjective purpose does not involve courts accepting every purpose a defendant puts forth, no matter how implausible.

### 1. Discussion and countering of Glazebrook J's reasons for rejecting subjective purpose

It is necessary to examine Glazebrook J's reasons for rejecting subjective purpose.

#### a) Excuse conduct that objectively would have an anticompetitive purpose

Her Honour's first reason is that a purely subjective purpose could excuse conduct that would objectively have an anticompetitive purpose.<sup>80</sup> The problem with this argument is that such conduct will not escape liability under s 27. The likely effect or effect limb will catch it. If a court uses objective purpose and infers it then such conduct will inevitably fall within, at least, the likely effect limb. A court will only infer a purpose of substantially lessening competition if that is the likely effect of the conduct. This supports subjective purpose. As mentioned above, each of s 27's three limbs must catch conduct which the others do not. If purpose is objective that will not happen. In William Young J's words, it renders the purpose limb, with "no work to do".<sup>81</sup>

#### b) Capture procompetitive conduct

Glazebrook J's next concern was that subjective purpose would catch conduct that is procompetitive.<sup>82</sup> However, she gave no example of such a situation. This argument depends on her defining anticompetitive purpose as the deliberate harming of rivals. She quoted Lord Coleridge in *The Mogul Steamship Company Limited v McGregor, Crow and Co and other*:<sup>83</sup> "It must be remembered that all trade is and must be in a sense selfish." She continued: "The

79 Ibid, at 609-610. See also: Marina Lao "Aspen Skiing and Trinko: Antitrust Intent and 'Sacrifice'" (2005) 73 Antitrust LJ 171; Ronald A Cass and Keith N Hylton "Antitrust Intent" (2001) 74 S Cal L Rev 657.

80 *ANZCO Foods*, above n 4, at [256].

81 Ibid, at [145].

82 Ibid, at [256].

83 *The Mogul Steamship Company Limited v McGregor, Crow and Co and other* (1888) 21 QBD 544 at 553.

difficulty [with this] is that both hard competition (which the Commerce Act is designed to protect) and anticompetitive conduct involves the deliberate harming of rivals.”<sup>84</sup>

This is the worldwide standard, mark one, all weather objection to using subjective purpose or intention as a means of proscribing anticompetitive conduct. The argument is that it is difficult, if not impossible, to distinguish between the purpose to compete aggressively and the purpose to substantially lessen competition. Every firm wants to beat its rivals. Thus, it is not always easy to determine whether a firm is beating its rivals by making its products more attractive and attending to consumer needs or by anticompetitive means that neither improve efficiency or satisfy consumers. According to this argument subjective purpose or intent does not distinguish the two scenarios.

However, if this argument is taken to its logical conclusion, it means that purpose should never be used to say whether conduct is anticompetitive or not. Yet, Parliament has chosen to proscribe the purpose of substantially lessening competition. Furthermore, courts have made it clear that the purpose of prevailing over rivals is not the requisite purpose under competition law. As Areeda and Hovenkamp note:<sup>85</sup>

There is at least one kind of intent that the proscribed ‘specific intent’ clearly cannot include: The mere intention to prevail over one’s rival. To declare that intention unlawful would defeat the antitrust goal of encouraging competition ... which is heavily motivated by such an intent.

Courts do not ascribe the requisite purpose on harsh language couched in war like or sports metaphors. Such statements are insufficient.<sup>86</sup>

Furthermore, relying on subjective purpose does not require trawling through warehouses of documents to find incriminating statements. As mentioned above, courts can infer subjective purpose. This is likely to be the case if the firm in question has received capable competition law advice and sanitised any documents. Nor, contrary to Posner, does a competition law victory on purpose depend fortuitously on a plaintiff’s happenstance discovery of incriminating evidence of a defendant’s state of mind.<sup>87</sup> This is not to say that such evidence is of no utility. *Australian Competition and Consumer Commission v Boral Limited*<sup>88</sup> is an example. One of the defendant’s documents read: “Our aim through 1996/97 and 1997/98 is to drive one competitor out of the market. The new plant gives us the ability to do this.”<sup>89</sup> This shows anticompetitive purpose.

c) Interpretation of s 2(5)

84 *ANZCO Foods*, above n 4, at [256].

85 Phillip Areeda and Herbert Hovenkamp *Antitrust Law* (2nd ed, Little, Brown and Co, Boston, 1986) at 806e.

86 *Advo Inc v Philadelphia Newspaper Inc* 51 F 3d 1191 (3rd Cir 1995); *US v AMR Corp* 335 F 3d at 1109, 1199 (11th Cir 2002); *Olympia Equipment Leasing Co v Western Union* 797 F 2d 370 (7th Cir 1986) at 379; *AA Poultry Farms Inc v Rose Acre Farms Inc* 881 F 2d 1396 (7th Cir 1989).

87 Richard A Posner *Antitrust Law – An Economic Perspective* (University of Chicago Press, Chicago, 1976) at 189-190.

88 *Australian Competition and Consumer Commission v Boral Limited* (1999) 166 ALR 410.

89 *Ibid*, at 448.

As for William Young J's argument on s 2(5)<sup>90</sup> (and indeed the High Court of Australia's argument on s 4F in *News Limited*), Glazebrook J noted that it was difficult to see how the purpose of a provision could be ascertained or negated subjectively. She cited *Port Nelson* and *Giltrap*.<sup>91</sup>

McGrath J in *Giltrap* noted that:<sup>92</sup>

This view of s 27 is reinforced by the objective standard for an unlawful arrangement of a *likely effect* of substantially lessening competition in s 27(1). The wider context, in particular ss2(5)(a) and 30, clearly indicates that s 27(1) was precisely drafted to focus on the provision rather than the subjective intentions of the individual parties: *Port Nelson Limited v Commerce Commission* [1996] 3 NZLR 554 (CA) at pp 563-564. Read together these provisions reflect the rigorous nature of the statutory regime regulating restrictive practices that tend substantially to lessen competition.

In this extract and the one at footnote 71, McGrath J is expressing that purpose alone does not suffice for liability under s 27. He is quite right to say that a person who does not intend to fix prices may be caught under the effect and likely effect grounds.

McGrath J also did not expressly deal with the s 4F (or New Zealand equivalent under s 2(5))<sup>93</sup> argument that convinced the Full Federal Court in *Pont Data* and the High Court in *News Limited*. His only discussion was on the words of s 2(5)(a) regarding the purpose of a provision. He says this focuses on the provision's purpose, not the subjective intentions of the individual parties. However, s 2(5) addresses the purpose of a provision that "was included" and "purposes that included that purpose".

The focus of s 2(5) purpose is on why the provision was included. That can only be the purpose of the party who included it, the subjective purpose. It is true that s 27 speaks of the purpose of a provision. However, when read with s 2(5) one determines that purpose by looking at the purpose of why it was included. Why a provision is included is not an objective inquiry; the reason as to why a provision was included is in the minds of the parties to the agreement. If purpose is objective one looks at the effect or likely effect of the provision and infers from those why the purpose was included. Again, this would render the purpose limb redundant.

Glazebrook J also held that s 2(5) only deals with the special situation of multiple purposes. The problem is that it will be rare that objectively speaking there will be multiple purposes. Conversely there are multiple parties to a contract, arrangement and understanding and these parties may have different purposes for including the provision. There will be multiple purposes and that is what s 2(5) addresses. The purposes of the makers of the provisions must be subjective.

As for the example of the evidence of Mr McKenzie in *Giltrap* that he had no intention of joining the others in price fixing, this seems to be a perfect example of pretextual and implausible purpose. Indeed Glazebrook J in the High Court trial of *Giltrap* rejected it.

#### d) Weaken the per se provisions

90 Section 2(5)(a) provides:

(5) For the purposes of this Act-

(a) A provision of a contract arrangement or understanding, or a covenant shall be deemed to have had, or to have, a particular purpose if-

- i) The provision was or is included in the contract, arrangement or understanding, or the covenant was or is required to be given, for that purpose or purposes that included or include that purpose; and
- ii) That purpose was or is a substantial purpose.

91 *ANZCO Foods*, above n 4, at [258].

92 *Giltrap City*, above n 71, at [73].

93 See above n 90.

Glazebrook J also adopted McGrath J's view in *Giltrap* that anything other than objective purpose would weaken the per se provisions.<sup>94</sup>

This concern is not valid. Price fixing under s 30 is per se in the sense a plaintiff does not need to prove substantially lessening of competition in a market. The plaintiff only needs to show a fixing, controlling or maintaining of prices. Section 30 deems this to breach s 27. If a party enters into a price fixing agreement then the likely effect and effect limbs will catch that party. Subjective purpose does not mean that the per se provisions become toothless. Also, as with Mr McKenzie, it is unlikely that a court will believe the purported benign excuse of a party who enters into a blatant price fixing cartel.

### *E. A Further Divergence from Australian Law Resulting From Relying on Objective Purpose*

As a result of favouring objective purpose, Glazebrook J used the counterfactual test in assessing purpose. As mentioned above, courts use this test to assess effect and likely effect. This too represents a break with Australian law, albeit not one evident at the time. In *Australian Competition and Consumer Commission v Liquorland (Australia) Pty Limited and Woolworths Limited*, Allsop J doubted that it was appropriate to use a counterfactual test when assessing purpose. He observed:<sup>95</sup>

Woolworths also submitted that as a matter of principle it was necessary to undertake a “counterfactual analysis” to analyse purpose. This was said to flow from *Stirling Harbour Services Pty Limited v Bunbury Ports Authority* (2001) ATPR 41-787 at [66]. That case included an allegation of an effect on competition. It can readily be accepted that one must, to assess effect, analyse the conduct with and without the conduct. However, it is meaningless and distracting to discuss the world with and without purpose. To require a case based only on purpose to contain a real effect on competition is to insert into the statute an element not provided for by parliament. I decline to do so.

This flows from the structure of s 45 (and s 27). As mentioned above, the purpose limb must catch agreements which the effect and likely effect limbs do not. Thus, it must be possible to condemn on purpose alone. If so, a court need not consider effect and likely effect and need not engage in counterfactual analysis.

The *Liquorland* case is an apt example. The Australian Competition and Consumer Commission sued Liquorland and Woolworths alleging (inter alia) breach of s 45. It alleged Woolworths and Liquorland had entered into, and given effect to, agreements with liquor licence applicants. These agreements had the purpose of substantially lessening competition. There were six agreements concerning liquor outlets. In each case Woolworths, who had or was going to have a take-away liquor outlet in the area, objected or threatened to object to the grant of a third party's application for a liquor licence. The parties settled the objections on the basis that the third party agreed to restrictions being placed on its liquor licence and, therefore, its business. Liquorland also had outlets in the areas and also objected and was a party to the deeds settling the objections. It settled the s 45 case.

Allsop J held that “a substantial purpose of the objections [to the liquor licence applications] and of the deeds' provisions was to prevent the licence being or becoming the platform or vehicle

<sup>94</sup> *ANZCO Foods*, above n 4, at [260].

<sup>95</sup> *Australian Competition and Consumer Commission v Liquorland (Australia) Pty Limited and Woolworths Limited* (2006) ATPR 42-123 at [802]-[803].

for a market entrant without restriction on its licence” either now or in the future.<sup>96</sup> He held that the fact that Woolworths could have legitimately pursued the same result (through rights under the Liquor Act 1982) was irrelevant. Also, he held it was irrelevant that Woolworths could have won those cases or that the Court may have imposed those restrictions. The purpose was to lessen substantially competition as it was directed to the competitive process in a meaningful or relevant way. The purpose the parties sought to achieve was just such an effect.<sup>97</sup>

Allsop J did not use a counterfactual analysis to establish this purpose. Had he done so there may have been no finding of effect or likely effect. The reason is that without the deeds Woolworths would have proceeded and could well have achieved the same result, ie restriction on the applicants. This would mean no difference between the factual and counterfactual and no likely effect nor effect of substantially lessening competition. This shows the dangers of inferring purpose from effect and likely effect. Also the fact the applicants were small businesses was irrelevant. Needless to say, Allsop J used subjective purpose. So contrary to one of Glazebrook J’s concerns, subjective purpose does not allow people to escape liability.

#### *F. The New Zealand Approach that Both Objective and Subjective Approaches may be Relevant*

One point of agreement in *ANZCO Foods* was that both William Young and Glazebrook JJ followed *Tui Foods* and held that both objective and subjective purpose were relevant under s 27. This is another sharp break with Australian law.

In *News Limited* the Australian Competition and Consumer Commission intervened in the High Court and submitted that both objective and subjective purpose were relevant, akin to the *Tui Foods* position. Gummow J emphatically rejected this submission. None of the other Judges mentioned it. Gummow J noted that:<sup>98</sup>

Before this Court, the Australian Competition and Consumer Commission (“the ACCC”), as intervener, submits that both the subjective purpose of the parties to the relevant contract, arrangement or understanding and the objective purpose of the impugned provision are relevant when determining whether or not the provision falls within the purview of s 4D. However, a construction which, depending upon the facts of the case, may require examination of either the subjective purpose of the parties or the objective purpose of the provision, or both, is not the product of reasoned statutory interpretation and falls foul of the provisions in s 4F. In addition, there is a danger that an examination of the objective purpose of a provision will give undue significance to the substantive effect of the provision, as opposed to the effect that the parties *sought to achieve* through its inclusion. The consistent distinction drawn in the Act, particularly in s 45 when read with s 4D, between “purpose” and “effect” demonstrates the impermissibility of such an approach.

It appears *Tui Foods* was not cited; Gummow J does not mention it.

It is unusual how New Zealand Courts have simply followed *Tui Foods* without discussion. It was an appeal of an interim injunction and the issue was whether there was an arguable case. Neither party discussed objective or subjective purpose in detail. Cooke P tentatively, rather than definitively, stated his views. Yet subsequent courts have accepted his statement without analysis. While subjective and objective purpose are often the same and the difference generally unimportant in practice, conceptually they differ and on occasion can differ in practice. Indeed, *Tui Foods’*

<sup>96</sup> *Ibid*, at [831].

<sup>97</sup> *Ibid*, at [829].

<sup>98</sup> *News Limited*, above n 5, at [63].

view that subjective purpose is relevant when one cannot discuss an objective purpose shows how objective purpose and subjective purpose can differ. *Tui Foods* results in “purpose” under s 27 meaning two different things.

It is a strange method of statutory interpretation that one word, ie “purpose”, means two different things, and creates difficulties in application. It makes it difficult to apply the section. Thus, the Australian position is preferable.

All this makes it hard to agree with Glazebrook J’s position that there is little difference between the Australian subjective approach and an objective approach.<sup>99</sup> Her reason was that “the Australian approach has regard to the end in view of the particular practice and not the motive of the participants”.<sup>100</sup>

However, Australian law has regard to the end in view of the participants to the particular practice. That is the subjective purpose of the participants to the practice. Contrary to Glazebrook J’s suggestion New Zealand courts do not equate motive with purpose. As in Australia, they differ; *Union Shipping* talks of purpose being object or aim.<sup>101</sup> That is not motive. Furthermore, Cooke P in *Applefields* effectively distinguished between motive and purpose.<sup>102</sup>

Objective and subjective purpose is not the only difference between *ANZCO Foods* and Australian law. They also disagree on whether, when it is obvious that a purpose of substantially lessening competition in a market could not be achieved, whether liability can still arise under s 27’s purpose limb. This was the source of the biggest disagreement between Glazebrook and William Young JJ.

## V. PART 5: PURPOSE OF SUBSTANTIAL LESSENING OF COMPETITION IMPOSSIBLE TO ACHIEVE

The issue has arisen in Australia. In *Universal Music* the Full Federal Court observed that:<sup>103</sup>

We turn to the subject of purpose. A person may have the purpose of securing a result which is, in fact, impossible for that person to achieve. That no doubt explains the reference to purpose, in para (a) of s47(10) of the Act, as an alternative to effect and likely effect. The paragraph is satisfied if the relevant corporation has the requisite purpose, regardless of whether or not that purpose has been, or was or is likely to be, achieved. It may conceivably be satisfied even in a case where the Court finds a purpose could never in fact have been achieved; although that finding would be relevant in determining whether to infer the proscribed purpose.

The issue also arose in *Seven Network Limited* in which a majority of the Full Federal Court agreed with *Universal Music*. In doing so, they overturned Sackville J at first instance. Dowsett and Lander JJ noted that:<sup>104</sup>

Whilst we accept that the Court must inquire as to whether a particular purpose is anticompetitive, it does not follow that the purpose must also be capable of achievement in the relevant market. The words “realistically capable of substantially lessening competition” do not appear in s 45 or s 4F. We agree that there must be a relevant market, that the relevant provision must have been included for the purpose of substantially lessening competition in that market, and that such purpose must be a substantial purpose

99 *ANZCO Foods*, above n 4, at [263].

100 *Ibid*.

101 *Union Shipping*, above n 2, at 707.

102 *Applefields*, above n 42.

103 *Universal Music*, above n 13, at 587.

104 *Seven Network*, above n 15, at [897].

for such inclusion. We do not agree that the Court must inquire into whether the object sought to be achieved was “realistically capable of substantially lessening competition in the relevant market” if those words mean more than that the purpose must be anticompetitive in an identified market. Such an inquiry would be, in effect, an inquiry into whether the provision had the likely effect of substantially lessening competition in that market. That approach would obviate or blur the distinction between purpose and likely effect or effect.

They continued:<sup>105</sup>

The vice which is addressed in s 45 by proscribing purpose is that of seeking to achieve an anticompetitive end. Section 45 also proscribes provisions which achieve, or are likely to achieve, an end. By proscribing anticompetitive purposes as well as effects or likely effects, parliament has cast its net widely so as to include provisions which simply have an anticompetitive purpose, whether or not they are achievable in the relevant market.

We accept that likely effect of particular conduct may be a relevant consideration in assessing the purpose which attended it. If to a person’s knowledge a particular end could not be achieved, it is difficult to see that he or she could have the purpose of doing so. That is because such knowledge could not readily co-exist with such a subjective purpose. However, the fact that a particular end may be impossible of achievement for reasons unknown to the relevant person does not exclude the possibility that he or she has the purpose of achieving that end.

On the issue they finally noted that:<sup>106</sup>

We agree that there must be a relevant market, that the relevant provision must have been included for the purpose of substantially lessening competition in that market, and that such purpose must be a substantial purpose for such inclusion. We do not agree that the Court must inquire into whether the object sought to be achieved was realistically capable of lessening competition in the relevant market. Such an inquiry would be, in effect, an inquiry into whether the provision had the likely effect of substantially lessening competition in the market. That approach would obviate or blur the distinction between purpose and likely effect or effect.

Interestingly, Glazebrook J did not cite *Universal Music* on this issue. She, however, cited *Universal Music* on another issue.<sup>107</sup>

### A. *ANZCO Foods Judgments on the Issue*

As mentioned above, the issue caused William Young and Glazebrook JJ to disagree.

#### 1. *William Young J’s approach*

William Young J’s legal reasons were essentially the same as the majority of the Full Federal Court in *Seven Network Limited*. First, requiring that a purpose must be capable of achievement would mean inquiring into whether the purpose would have the likely effect of substantially lessening competition in that market. Such a distinction would obviate or blur the distinction between the purpose limb and the likely effect and effect limbs as separate contraventions. It would equate purpose with effect and likely effect.<sup>108</sup>

Second, courts should ease the need to prove substantial anticompetitive effect or likely effect because there are various uncertainties, expense and imperfections in assessing this issue. Where

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<sup>105</sup> *Ibid*, at [899]-[900].

<sup>106</sup> *Ibid*, at [902].

<sup>107</sup> *ANZCO Foods*, above n 4, at [247].

<sup>108</sup> *Ibid*, at [145] and [147].

the purpose of an agreement is to substantially lessen competition there is no need to prove substantial anticompetitive effect.<sup>109</sup>

Glazebrook J's response was based on her view that purpose was objective. Given that the restraint in issue covered only two percent of the market in which barriers to entry were low and only involved a small competitor, she observed:<sup>110</sup>

It must be remembered that, to fall foul of s28, the purpose must be to lessen competition in the North Island market and to do so substantially - see at [276] above. In this case, it is difficult to see how AFFCO could rationally have thought it could lessen competition in the whole North Island market (let alone to do so substantially) by not allowing a competitor to use a site that accounted for such a small proportion of the market. It must also be remembered that the intention to harm one competitor where there are numerous competitors in a geographically wide market (and it could only ever be one competitor who could have used the Waitara site) is unlikely to be relevant to the lessening of competition in the sense that the term is used in the Commerce Act.

Her Honour also thought William Young J's concerns over litigation risk were misguided. This concern would proscribe conduct where there were difficulties of evaluation or proof. The Commerce Act only regulates conduct that threatens competition and is based on the premise that the market should be left to operate by itself. She said it would be wrong to regulate wishful thinking that in fact objectively has no anticompetitive effect.<sup>111</sup> In essence, she thought William Young J's approach amounted to a per se approach to purpose, which would subvert the existing per se provisions.<sup>112</sup>

### *B. Nature of Encumbrance*

It is necessary to characterise the conduct at issue in *ANZCO Foods*. Dealing with the Weddel consortium which bought and closed down the Weddel plants, this was a complaint that there was too much competition. Indeed the whole basis was that there was excess capacity. So the parties agreed to eliminate this capacity. The purpose of the scheme was to limit output. The need for such output limitation was that the industry was facing ruinous or cut-throat competition. This is often the excuse for forming a price fixing cartel. Indeed Judge Easterbrook has called it "the siren song of the cartel".<sup>113</sup> Parties cannot use this excuse to justify a price fixing cartel.<sup>114</sup> The reason is that this idea strikes at the heart of competition policy. The real justification of price fixing in such circumstances is that the parties are saying we do not like competition. Competition is hurting us. The proponent's argument is that a cartel enables them to stop the effects of excess capacity in industries with high fixed costs relative to variable costs. These industries will usually have excess capacity. When such firms compete or demand falls they will have to reduce price to where they barely recover variable costs. This will not be sustainable as all will be suffering substantial losses. Competition will be ruinous. A cartel enables "an orderly withdrawal of the excess capacity in the industry which is the root cause of the ruinous price competition."<sup>115</sup>

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109 Ibid, at [152].

110 Ibid, at [279].

111 Ibid, at [262].

112 Ibid, at [278].

113 *Fishman v Wirtz* 807 F2d 520 (7th Cir 1986).

114 The following is based on Scott, above n 17, at 411-412.

115 Sullivan, above n 18, at 203.

The cartel benefits only its members. It does not benefit society. Society suffers from higher prices and decreased output until the cartel members have eliminated the excess capacity. Society does not value excess capacity. It prefers capital to be placed in alternative investments, not propping up excess capacity. There is no societal benefit in propping up firms that face ruinous competition. That some firms may exit is simply a fact of competition.

The economic consequence of a price fixing cartel is increased prices and decreased output. The same thing is true of an output limitation scheme. It too leads to reduced output and increased price. Economically the two are identical.<sup>116</sup>

This issue arose in *Todd Pohokura Ltd v Shell Exploration Ltd*.<sup>117</sup> There the High Court was not prepared to hold that output limitations as part of a joint venture constituted price fixing under s 30. The High Court noted that the plaintiffs cited no authority for the proposition that arrangements to fix output are to be treated as if they are arrangements for the fixing of price, for the purposes of s 30.<sup>118</sup> The High Court said it was unnecessary to decide the point.<sup>119</sup>

However, the United States Supreme Court case that established the per se rule against price fixing, *United States v Socony-Vacuum Oil Co*,<sup>120</sup> was an output limitation case. This case involved the oil industry.

Oil refining was depressed. Independent refiners had insufficient storage capacity and were dumping gasoline at give-away prices. This depressed prices. Such gasoline was termed distress gasoline and the major oil companies informally agreed to buy all of it from the independent refiners. They did not agree on a set price, rather they bought at the “fair going market price”. As they had storage capacity and developed distribution systems, they succeeded in removing much of the distress gasoline from the market. Although such gasoline eventually reached the market, it had less effect on price than it would have had under competition.

The Government sued alleging price fixing under s 1 of the Sherman Act 1890. Douglas J held:<sup>121</sup>

Thus for over 40 years this court has consistently and without deviation adhered to the principle that price-fixing agreements are unlawful per se under the Sherman Act and that no showing of so-called competitive abuses or evils which those agreements were designed to eliminate or alleviate may be interposed as a defense.

Here the oil companies had not agreed on uniform or fixed prices. They argued that price fixing was only per se illegal when the agreement resulted in uniform, fixed prices. Douglas J disagreed. He noted that:<sup>122</sup>

Under the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal per se.

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116 George J Stigler *The Organization of Industry* (Homewood, Illinois, RD Irwin, 1968) at 39-63; Jack Hirshleifer, Amihai Glazer and David Hirshleifer *Price Theory and Applications* (7th ed, Cambridge University Press, Cambridge, 2005); Phillip Areeda and Louis Kaplow *Antitrust Analysis* (4th ed, Little Brown and Company, Boston, 1988) at 222-224.

117 *Todd Pohokura Ltd v Shell Exploration Ltd* HC Wellington CIV-1006-485-1600 13 July 2010, J Dobson and Professor Richardson.

118 *Ibid*, at [486].

119 *Ibid*.

120 *United States v Socony-Vacuum Oil Co* 310 US 150 (1940).

121 *Ibid*, at 221.

122 *Ibid*, at 226, above n 59.

It is still the law in the United States that output limitation is per se illegal.<sup>123</sup>

While output limitations do not fix prices under s 30, they constitute a control of prices. Lindgren J in *ACCC v CC (NSW) Pty Ltd* held that a controlling of price did not require some specificity as to price.<sup>124</sup> He held “controlling” a price meant that “an arrangement or understanding has the effect of ‘controlling price’ if it restrains a freedom that would otherwise exist as to a price to be charged”.<sup>125</sup> He also observed that:<sup>126</sup>

Concretes also submits that because the supposed UTF understanding left the tenderers with a great deal of freedom as to the price which they would charge, it did not have the effect of controlling price competition and therefore did not fall within the terms of [the Australia equivalent of s 30]. *It seems to me, however, that putting to one side de minimis cases, the degree of control, although relevant to penalty, is not relevant to the issue of contravention.* I do not consider the degree of control here to have been de minimis (emphasis added).

Although he did not cite Lindgren J, Salmon J appears to accept a similar definition of controlling in *CC v Caltex NZ Ltd*, where he adopted the Shorter Oxford Dictionary definition of control: “to exercise restraint or direction upon the free action of”.<sup>127</sup> This definition covers the impact of output limitation. It is a controlling of price under s 30.

The High Court in *Todd* noted that:<sup>128</sup>

Any agreement on price will obviously have an impact in the market and would rationally only be undertaken if the parties to it perceived their position in the market as sufficiently strong for them to be advantaged by it. In contrast, arrangements as to the level of output between joint owners of production facilities may have a legitimate rationale other than an intention to influence prices. The justification for attributing per se liability does not arise, and the consequences of arrangements such as the present should be measured by reference to the tests under s 27 itself. Accordingly, to the extent, if at all, that the off-take documents reflect an arrangement to limit supply, then it is not one that is to be treated as an arrangement to limit prices for the purposes of s 30.

This is true of output limitations that are part of, and necessary to, a legitimate joint venture.<sup>129</sup> However, it is not true where the whole point of the scheme is just to reduce output; such schemes are cartels.

Output limitation is cartel activity. The OECD defines a hard core cartel as: “[a]n anticompetitive agreement, anticompetitive concerted practice or anticompetitive arrangement by competitors to ... establish output restrictions on quotas”.<sup>130</sup>

So the Weddel consortium and its scheme was a cartel; with its encumbrances AFFCO wanted the same thing. It wanted to keep output down by preventing newcomers from using the plant to increase competition, about which the very thing the meat industry was griping. The encumbrances continued that output limitation and did so long after the end of the excess capacity problem. Arguably it would prevent this problem arising again.

123 *NCAA v Board of Regents of the University of Oklahoma* 468 US 85 (1984).

124 *ACCC v CC (NSW) Pty Ltd* (1999) ATPR 43 477 at 43, 510–43 and 511; See also GQ Taperell, RB Vermeeschand, DJ Harland *Trade Practices and Consumer Protection* (3rd ed, Butterworths, Sydney, 1983) at 229.

125 *Ibid.*, at 43 and 509.

126 *Ibid.*, at 43 and 511.

127 *CC v Caltex NZ Ltd* (1999) 9 TCLR 305 (HC) at 311.

128 *Todd*, above n 117, at [488].

129 Scott, above n 17, at 424–427.

130 OECD “Recommendation of the Council Concerning Effective Action Against Hard Core Cartels” (1998) at <www.oecd.org/dataoecd/39/4/2350130.pdf>.

AFFCO said the closure of Waitara was procompetitive. As William Young J noted, procompetitive seemed to mean simply an enhancement of AFFCO's financial position.<sup>131</sup> This is right: it may have improved AFFCO's cost structure, it did not improve competition anywhere. Private benefits to AFFCO, indeed any company, are not the benefits of competition.<sup>132</sup>

Furthermore, it was not as though the reduced output was necessary to any other procompetitive endeavour. There was no joint venture which enabled more to be produced or a new product to be developed.<sup>133</sup> It was a blatant output limitation which benefited only AFFCO and continued long after the excess capacity crisis had passed. As William Young J noted, AFFCO received a reduced price for Waitara which could only be justified as a result of the reduced competition flowing from the encumbrance.<sup>134</sup> In all these circumstances the only purpose can be to substantially lessen competition.

### 1. *Glazebrook J's view*

#### a) Affected only a small percentage of the market

Glazebrook J's first objection was that the encumbrance affected a small competitor in a small part of the market. She noted that s 27 is not concerned with the fate of individual competitors in a competitive market.<sup>135</sup> This is true. However, one of the ways in which parties to an agreement can lessen substantially competition is by practices in which the parties injure competitors and thereby injure the competitive process itself.<sup>136</sup> Competition law does not worry about the fate of individual competitors if their fate is the result of superior efficiency or facing better and cheaper products and services. Yet this was not the case in *ANZCO Foods*. The encumbrance simply prevented a competitor using the site. There were no efficiency gains or cheaper and better services as a result. Nor is the size of the victim dispositive. It may have been a maverick, a firm that was going to shake up the existing players.<sup>137</sup>

### C. *Ancillary Restraints Doctrine*

One way of looking at the encumbrance is through the United States' doctrine of ancillary restraints.<sup>138</sup> This shows that despite the encumbrance having a small impact, it was still anticompetitive. Under this, courts divide restraints into two categories: naked restraints and ancillary restraints. The sole object of naked restraints is to restrain competition and enhance or maintain price. Ancillary restraints are ancillary to a lawful purpose and reasonably necessary to accomplish that purpose.

Naked restraints are unlawful without any further analysis. Ancillary restraints are lawful if they are ancillary (ie subordinate and collateral) to another legitimate agreement and necessary to

131 *ANZCO Foods*, above n 4, at [139].

132 *National Society of Engineers v US* 435 US 679 (1978).

133 *Broadcast Music Inc v Columbia Broadcasting System Inc* 441 US 1 (1979).

134 *ANZCO Foods*, above n 4, at [154].

135 *Ibid*, at [248].

136 Robert H Bork "The Rule of Reason and the Per Se Concept: Price Fixing and Market Division Part 1" (1965) 71 *Yale LJ* 775 at 775.

137 Jonathan B Baker "Mavericks, Mergers and Exclusion: Proving Coordinated Effects Under the Antitrust Laws" (2002) 77 *NYUL Rev* 135.

138 See Scott, above n 17; *American Bar Association Section of Antitrust Law, The Rule of Reason* (American Bar Association, Chicago, 1999).

make that agreement effective. Only if the ancillary restraint is wider than necessary to achieve the legitimate purpose is the ancillary restraint unlawful.

United States' courts use this analysis when assessing restraints under the rule of reason.<sup>139</sup> If the restraint is naked they do not undertake full blown rule of reason analysis. They condemn it quickly. As Areeda and Hovenkamp note, sometimes the rule of reason can be applied in the "twinkle of eye".<sup>140</sup> The *ANZCO Foods* encumbrance was a naked restraint, and its whole purpose was to restrict competition. It was not ancillary to any legitimate purpose. Society need not put up with it. This is irrespective of the fact it only affected a small part of the market.

b) Finding the *ANZCO Foods* encumbrance had an anticompetitive purpose does not weaken the per se rule

Glazebrook J also noted:<sup>141</sup>

In my view, the approach taken in William Young J's judgement would have the effect of making s28 a per se offence like exclusionary arrangements (s29) or price fixing (s30). His approach would mean that a supermarket complex could not sell off (with presumably a consequential price adjustment) excess adjoining land with a covenant that it cannot be used for another supermarket without having a purpose of substantially lessening competition imputed to it.

Arguably, this is so. In essence, such an encumbrance would be like the deeds in *Liquorland*. It prevents a new entrant from using the adjoining land as a platform or vehicle to compete. This is especially so if it is not ancillary to a legitimate purpose. This scenario is not off the wall in competition law terms.

As mentioned above, Glazebrook J argued that William Young J's approach would turn s 28 [and s 27] into a per se provision and be contrary to the mischief at which the per se provisions are aimed.<sup>142</sup> In a sense Glazebrook J has a point. If courts can condemn on purpose alone without the need for any effect or where it is obvious that there could be no anticompetitive effect, this seems to go against the purpose of the per se provisions. Why are they needed?

However, the reason for per se rules is they catch practices that have a "pernicious effect on competition and lack of any redeeming virtue".<sup>143</sup> A per se illegal agreement "has no single purpose except stifling of competition".<sup>144</sup> It is "manifestly anticompetitive"<sup>145</sup> and "plainly anticompetitive".<sup>146</sup> Thus, the reason for per se offences is that they catch conduct that is almost always anticompetitive.<sup>147</sup> Also, they save society expense. Rather than have a full blown trial to examine all of an agreement and the market involved, courts can condemn quickly. With per se offences the courts would come to the same result. It would find a breach of s 27 if it fully analysed the same behaviour.<sup>148</sup> Parliament has put price fixing in the per se category under s 30. Yet, the purpose of a naked price fixing cartel must be to substantially lessen competition. Why else

139 *American Bar Association*, note 125.

140 Areeda and Hovenkamp, above n 85, at 395.

141 *ANZCO Foods*, above n 4, at [278].

142 *Ibid.*

143 *Northern Pacific Railway v US* 356 1 (1958) at 5.

144 *White Motor Co v US* 272 US 253 (1963) at 263.

145 *Continental TV Inc v GTE Sylvania Inc* 433 US 36 (1977) at 49-50.

146 *National Society of Professional Engineers*, above n 115, at 692.

147 *Ibid.*

148 Paul Scott "Unresolved Issues in Price Fixing: Market Division, the Meaning of Control and Characterisation" (2006) 12 *Canterbury L Rev* 197 at 200-204.

did the parties do it? As for the lack of effect with price fixing cartels, Krattenmaker notes that: "Indeed, the very suggestion, in such cases, that the competing firms lacked market power is incredible. Why did they agree to fix prices if they could not do so?"<sup>149</sup>

The same reasoning applies to output limitation schemes. Arguably, these could amount to a controlling of price under s 30. In any event they have the same effect as price fixing. As s 27's purpose limb could catch naked price cartels so also could it catch naked output limitation schemes. There is nothing inconsistent with the per se provisions and finding liability under s 27 for a purpose that could not possibly have any anticompetitive effect.

## VI. PART 6: CONCLUSION

There is now a large divergence between Australia and New Zealand on the purpose of substantially lessening competition. The Australian way is more principled and William Young J had the better argument in *ANZCO Foods*.

As for objective or subjective purpose, the Australian approach is more convincing. Relying on objective purpose leaves the purpose limb with nothing to do. If courts rely on objective purpose, then the likely effect and effect limbs will capture all instances of objective purpose. It is inconceivable that a court would find no liability under the likely effect limb, but be able to find an objective anticompetitive purpose. When proscribing purpose under s 27 Parliament cannot have intended this. Also contrary to Glazebrook J's views subjective purpose does not mean no liability when a party dreams up a benign purpose. Unless it is plausible, courts do not believe such reasons. Even if they do, liability still arises under the effect and likely effect limbs. Only by conflating the purpose to compete aggressively with the purpose to substantially lessen competition can Glazebrook J raise a problem with subjective purpose. Yet courts the world over have had no difficulty in distinguishing the two. Furthermore subjective purpose does not weaken the per se provisions. Liability still arises under the effect and likely effect limb. Contrary to Glazebrook J, objective purpose and use of counterfactual analysis to establish purpose can result in an anticompetitive scheme escaping liability. *Liquorland* is an apt example. In New Zealand, using Glazebrook J's analysis, the defendant would escape liability. Society does not benefit from such a result. As for New Zealand's approach of both objective and subjective purpose being relevant, this results in "purpose" under s 27 meaning two different things. As Gummow J noted in *News Limited*, this is "not the product of reasoned statutory interpretation".

As for impossible effect, the Australian approach is preferable. By allowing s 27 to catch such conduct it, too, means the purpose limb is not redundant. Also it allows blatant anticompetitive restraints such as the output limitation encumbrance in *ANZCO Foods* to be outlawed. Such restraints have no competitive effects and are simply designed to limit output and increase price. Allowing s 27 to capture them under the purpose limb does not weaken the per se provisions. Indeed one of the reasons for per se rules is that they shorten trials that would occur under full blown rule of reason or s 27 trials. The result would be the same under either type of analysis. There is no inconsistency between per se provisions and finding liability under s 27 for a purpose that could not have any anticompetitive effect.

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149 Thomas Krattenmaker "Per Se Violations in Antitrust Law: Confusing Offences with Defences" (1988) 77 Geo LJ 1965 at 173.

This is not to say Glazebrook J's views had no force: they did; she is not alone.<sup>150</sup> As for subjective purpose, Kirby J dissented on the issue in *News Limited*, while McHugh J would have preferred objective purpose but felt bound to follow it. As for impossible effect, the *Network Seven Limited* Full Federal Court split two to one, while the trial Judge had the same view as Glazebrook J.

However, what is disappointing is that in *ANZCO Foods*, the Court did not discuss the Australian authority. *News Limited* was a High Court of Australia case. It dealt with two of the issues in *ANZCO Foods*. To ignore it seems parochial, especially when the High Court of Australia completely rejected the notion that purpose can both be objective and subjective. Given that the main disagreement in *ANZCO Foods* was over impossible effect, it is strange that neither Glazebrook and William Young JJ discussed *Universal Music*, which dealt with the issue. It is even more unusual when *ANZCO Foods* cites *Universal Music*, albeit for another point.

The divergence with Australian law is important following *Commerce Commission v Telecom Corporation of New Zealand Ltd*.<sup>151</sup> There the Supreme Court noted that it was important that the restrictive trade practice provisions be broadly the same in both New Zealand and Australia.<sup>152</sup> Following *ANZCO Foods* they are not when it comes to the purpose of substantially lessening competition. Any future New Zealand Court of Appeal which deals with purpose under s 27 is going to have to confront the divergence squarely.

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150 Berry, above n 75, at 612-613.

151 *Commerce Commission v Telecom Corporation of New Zealand Ltd* [2010] NZSC 111.

152 *Ibid*, at [31].

# JUSTICE BARAGWANATH: A STUDENT'S TRIBUTE

BY MAX HARRIS\*

## I. INTRODUCTION

The readings required of students at law school can become a chore. One loses count of the formulaic statements of precedent and strained formalistic distinctions. Judgments tend to merge together in even the most assiduous of students' memories, so that often by the time a law test arrives all that is remembered is a blur of facts, case names, and dates – the residue of a few months' teaching of the common law.

However there are some glimmers of hope for the student worn out of such reading, and they often appear in the form of judges' names on the page. As the student is exposed to more and more cases, some judges' names, Denning LJ, Lord Steyn, Thomas J, begin to gather particular meaning. The student attaches to these judges a certain legal identity. The student comes to look forward to finding a judgment with one of these names across the top of it: an articulate dissent by Elias CJ, or a stinging rebuke of other judges by Kirby J. In short, these judges make reading cases interesting, even fun.

Sir David Baragwanath, who retired in 2010 from the Court of Appeal after fifteen years on the bench and was made a Knight Companion of the New Zealand Order of Merit in the 2011 New Year's Honours List, was one such judge. Whether his judgments were met in class by applause or criticism depended on the lecturer's own jurisprudential leanings, but his work always sparked discussion.

This short article aims to pick out just a few of the legacies that Justice Baragwanath has bequeathed to the law in New Zealand. It does not claim to be an exhaustive assessment of Justice Baragwanath's fifty year contribution to this country's legal system. It does not traverse his extensive work as counsel, in high-profile cases such as *Frazer v Walker*<sup>1</sup> and the *Lands* case,<sup>2</sup> only mentioning this part of his career briefly; nor does it offer an evaluation of his time as Law Commissioner. Rather, something much more modest is attempted: an account of some of the impressions Justice Baragwanath has left on the legal landscape, perceived from the viewpoint of a student about to enter the legal profession. This account draws primarily from Justice Baragwanath's judgments, although his extra-judicial writings are used to bolster the themes that are discussed. His legacies are unlikely to be quickly forgotten, given Justice Baragwanath's stature and his ongoing public prominence as an Appeal Judge for the Special Tribunal for Lebanon. However, lest they are not given the notice they deserve, this article hopes to act as a reminder that Justice Baragwanath has initiated a dialogue in many fields of law about the future path of the

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1 *Frazer v Walker* [1967] 1 AC 569 (PC).

2 *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 (CA).

law, and the principles that ought to guide lawmakers on that path. The article hopes to continue the conversation that Justice Baragwanath has started.

## II. PROTECTING SOCIAL AND ECONOMIC RIGHTS THROUGH THE COMMON LAW

The New Zealand Bill of Rights Act 1990 gives prominence to civil and political rights in New Zealand law. The Bill of Rights was modelled on the International Covenant on Civil and Political Rights (the ICCPR), and its focus is on the canon of traditional rights: for instance, the right to a fair trial, freedom of expression, and freedom of religion. However, the progress on civil and political rights in New Zealand (which has been gradual, if not spectacular) has not always been matched by a commitment to social and economic rights, rights such as the right to education, the right to housing, and the right to healthcare. Unfortunately, debate in New Zealand on the issue of whether social and economic rights should be protected in an equivalent way to civil and political rights has tended to be shallow.

It is this gap that Justice Baragwanath has sought to fill in a number of his judgments and extra-judicial speeches. Justice Baragwanath has underscored that social and economic rights are far more meaningful to many than the more 'legal' rights found in the Bill of Rights, and has attempted to give social and economic rights more recognition in the law. He has done this in a deft and creative manner, suggesting that the common law can be reinterpreted to give effect to these basic principles.

One of the major judgments written by Justice Baragwanath for the Court of Appeal, *Te Mata Properties Ltd v Hastings District Council*,<sup>3</sup> exemplified this resourceful approach to the common law on the issue of social and economic rights. In that judgment the reference was to the right to housing. In explaining why the *Hamlin* line of cases (seemingly anomalously) allowed recovery in negligence for pure economic loss,<sup>4</sup> Justice Baragwanath noted "the special and distinctive value of the home in any society as giving effect to *the basic right to shelter*".<sup>5</sup> Later in the judgment Justice Baragwanath characteristically fused international law and quintessential British common law history in fortifying this claim to a common law right to housing, writing:<sup>6</sup>

The right to housing is identified in art 25 of the Universal Declaration of Human Rights and art 11 of the International Covenant on Economic, Social and Cultural Rights to each of which New Zealand is a party. The right to shelter is bound up with those of autonomy and dignity expressed in the adage "an Englishman's home is his castle", echoing Sir Edward Coke's dictum in *Semayne's Case* (1604) 5 Co Rep 91a, 77 ER 194: "the house of every one is to him as his castle and fortress, as well for his defence against injury and violence as for his repose".

However, it was not just late in his judicial career that Justice Baragwanath advocated for a common law of social and economic protections. In *Daniels v Attorney-General*,<sup>7</sup> while sitting in the High Court, Justice Baragwanath accepted argument by counsel that a reference to the "right to free primary and secondary education" in s 3 of the Education Act 1993 (along with a reference to

3 *Te Mata Properties Ltd v Hastings District Council* [2008] NZCA 446, [2009] 1 NZLR 460 [*Te Mata*].

4 See, for instance, *Hamlin v Invercargill City Council* [1996] 1 NZLR 513 (PC).

5 *Te Mata*, above n 3, at [36] (emphasis added). A similar point is made by Justice Baragwanath about the "habitation interest" in his judgment in *North Shore City Council v Body Corporate 188529* [2010] NZCA 64, [2010] NZLR 486 [*Sunset Terraces*] at [25]. The Supreme Court recently affirmed this judgment on appeal: *North Shore City Council v Body Corporate 188529* [2010] NZSC 158, (2011) 9 NZBLC 103, 139.

6 *Ibid.*, at [57].

7 *Daniels v Attorney-General* HC Auckland M1615-SW99, 3 April 2002.

the “same rights” for all under s 8) could be used as a hook to justify more substantive protection of education rights, in that case for students with special educational needs. Drawing on policy guidelines, Justice Baragwanath suggested that the right to education might require an education system that is “regular and systematic” and “not clearly unsuitable” to children’s needs.<sup>8</sup> Justice Baragwanath deepened this analysis with reference to principles of equality under international law.<sup>9</sup> To the claim that such issues are inherently political and too entangled in policy for judicial determination, Justice Baragwanath said that the reference to rights in the legislation authorised such a determination.<sup>10</sup> Justice Baragwanath refused to empty the right to education of “legally enforceable content” purely out of fears of non-justiciability.<sup>11</sup>

There is no doubt that this decision was far-reaching and contentious. Indeed, the advancement of a substantive right to education proved too much for the Court of Appeal, which overturned the decision.<sup>12</sup> The Court of Appeal, in a unanimous judgment delivered by Keith J, rejected any “freestanding general right to education”.<sup>13</sup> Nonetheless, while Justice Baragwanath’s decision thus cannot be accepted as the current law of New Zealand, it illuminates much about his judicial philosophy: his willingness to draw on sources from at home and abroad, and boldness in developing the common law. The same impressions can be garnered from reading his judgment in *Taito v Chief Executive, Department of Labour*<sup>14</sup> where he suggested a right to family life emerging out of case law and international jurisprudence, but also had this judgment overruled by the Court of Appeal.<sup>15</sup>

As with many other issues that Justice Baragwanath has canvassed in his judgments, the issue of social and economic rights has been teased out further in his extra-judicial writings. In a 2006 speech on the distinctiveness of New Zealand law, Justice Baragwanath turned to international law figures once again in pressing the point that social and economic rights are worthy of the law’s attention. “The President of the International Court of Justice, Dame Rosalyn Higgins, has warned,” noted Justice Baragwanath, “against drawing a sharp line between civil and political rights, seen as true law, and economic, cultural and social rights which have long been regarded as moral pieties.”<sup>16</sup> He went on to note the special importance of these rights to Māori in New Zealand. More recently, in one of the lectures he delivered at New Zealand Law Schools in his final days as a judge in New Zealand, he summarised these rights as being fundamentally concerned with “dignity and decency”, an alliterative epithet that beautifully captured the aspirations at the core of the struggle for the enforcement of social and economic rights.<sup>17</sup>

8 Ibid, at [77].

9 Ibid, at [92]–[94].

10 Ibid, at [95].

11 Ibid, at [137]. For further discussion of this case, see EJ Ryan “Failing the System? Enforcing the Right to Education in New Zealand” (2004) 35 VUWLR 735.

12 *Attorney-General v Daniels* [2003] 2 NZLR 742 (CA).

13 Ibid, at [83].

14 *Taito v Chief Executive, Department of Labour* HC Auckland CIV2004-485-1987, 23 September 2004.

15 *Chief Executive of Department of Labour v Taito* (2006) 8 HRNZ 71 (CA).

16 The Hon Justice Baragwanath “What is Distinctive About New Zealand Law and the New Zealand Way of Doing Law? New Zealand Law and Māori” (Address to the Law Commission’s 20th Anniversary Seminar, Wellington, 25 August 2006) [“New Zealand Law and Māori”], online at Speeches and Papers – Courts of New Zealand <courtsofnz.govt.nz/from/speeches-and-papers>.

17 The Hon Justice Baragwanath “Can We Globalise the Law?” (Speech delivered to Auckland University Faculty of Law, Auckland, 4 August 2010).

In this area Justice Baragwanath has left an indelible mark on the law. He has created some traction for future legislative change on social and economic rights, but he has also illustrated vividly the lesson taught by Lord Atkin in his judgment in *Donoghue v Stevenson*,<sup>18</sup> that there is much scope for the common law to be moulded and reshaped in a more promising direction, if one commits to learning the law diligently, harvesting norms from quite diverse sources, and breathing life into those norms in fresh contexts. That is a lesson that gives comfort, an alternative perspective and hope to young lawyers that may be tempted from time to time to disregard the common law as a conservative and regressive body of principles.

### III. GIVING STRENGTH TO THE TREATY OF WAITANGI

In much of Justice Baragwanath's extra-judicial writing he has demonstrated a deep respect for Māori culture and ways of life, referring often to the high rates of Māori participation in the New Zealand army.<sup>19</sup> This respect is perhaps a consequence of his work as counsel for iwi, for instance in the *Lands* case, before his time as a judge. In a 2005 keynote address to the New Zealand police, he recounted one experience as counsel amongst iwi, speaking movingly of feeling "outrage[d] ... [about] the expropriation of the commercial fishing resources around the Aupouri Peninsula", and abruptly losing weight due to the shock of viewing such an impoverished community.<sup>20</sup> (In such passages one catches a glimpse of Justice Baragwanath's innate sense of right and wrong – the intuitive sense of justice that would later guide him as a judge.)

Out of this embedded respect for Māoridom, Justice Baragwanath has also offered fresh and constructive ways of conceptualising the Treaty of Waitangi in New Zealand society. Throughout his extra-judicial writing, he has artfully viewed the Treaty as a way of bringing New Zealand together. The Treaty, he said in his police address, "must be seen as an historical event with constitutional consequences and a vision for the future, not as a fetter or a crutch"<sup>21</sup> Justice Baragwanath has built this unifying vision of the Treaty by viewing Article 3 of the Treaty as a guarantee of rights for Māori, understanding Article 1 (conventionally) as affirmation of the Crown's right to govern, and seeing the Treaty as a whole as an expression of the rule of law. As Justice Baragwanath noted in his 2007 Harkness Henry lecture, the Treaty is "an icon of where New Zealand comes from"<sup>22</sup> It is not an irritating source of litigation, or a source of division, but a part of New Zealand's unique legal and historical framework that is to be treasured and cultivated. (This concern with cultivating a New Zealand jurisprudence preoccupied Justice Baragwanath through much of his extra-judicial writing.)

Justice Baragwanath has had occasion to comment briefly on the Treaty in cases. It is often said that the Treaty has no legal status until it is incorporated into New Zealand, but it is interesting to ponder whether Justice Baragwanath's comments might be read as incorporating the Treaty into the law in this way. In *Refugee Council of New Zealand Inc v Attorney-General*,<sup>23</sup> he described the Treaty as "another international treaty", a claim that perhaps supports a different

18 *Donoghue v Stevenson* [1932] AC 562.

19 Baragwanath "New Zealand Law and Maori", above n 16, at 24.

20 The Hon Justice Baragwanath "Overview: The Treaty and the Police" (Keynote Address to the Police Management Development Conference, Nelson, 8–10 November 2005).

21 *Ibid*, at 7.

22 The Hon Justice David Baragwanath "The Evolution of Treaty Jurisprudence" (2007) 15 Wai L Rev at 10.

23 *Refugee Council of New Zealand v Attorney-General* [2002] NZAR 717 at [38] (HC).

status for the Treaty in law. Most recently, in *Attorney-General v Mair*,<sup>24</sup> Justice Baragwanath reproduced the entire text of the Treaty in his Court of Appeal judgment. Whether any of these references can be considered “incorporation” of the Treaty is debatable, but Justice Baragwanath has perhaps created more room for that argument. He may have laid the foundations for those aiming in the future to fortify the Treaty’s status within New Zealand’s constitution.

As with his approach to questions of social and economic rights, Justice Baragwanath has not shied away from controversy when discussing Treaty-related matters. In at least one extra-judicial speech he has compared the Foreshore and Seabed Act 2004 to a racially discriminatory policy in South Africa struck down by the South African Constitutional Court in the *Alexkor*<sup>25</sup> decision. It would be no surprise if that comment ruffled the feathers of some, but others may think that it is justified for judges to speak out on issues on which they have some expertise. Indeed, it could perhaps be the most impressive mark of Justice Baragwanath’s moral courage that he was willing to stand out from the crowd, and speak on an issue surrounded by misinformation and misconceptions.

#### IV. MORALITY IN THE COMMERCIAL WORLD

A third theme running through much of Justice Baragwanath’s work is an insistence on the moral underpinnings of much of private law. This focus on morality has both a jurisprudential and a substantive dimension. Jurisprudentially, Justice Baragwanath’s reference to morality indicated his honest view that in reaching conclusions, moral intuitions are never far from a judge’s decision-making calculus. Substantively, Justice Baragwanath’s mention of moral concerns reflected his desire to hold those subject to private law to the moral standards lying beneath positive law.

The ability to observe the moral flavour of seemingly mechanical legal tests is most evident in Justice Baragwanath’s recent decisions. In *North Shore City Council v Body Corporate 188529*,<sup>26</sup> Justice Baragwanath offered an extended rumination on the need for concerns of morality to act as a check on the market, noting:

... The argument based on “economic” arguments is demolished by the 1991 Act’s lamentable lesson of what happens if the market is left untrammelled by law. The underlying neo-liberal theory has been influenced by one part of Adam Smith’s economic theories without regard to the important social and moral context on which *The Wealth of Nations* of 1776 was premised. It is set out in his 1759 essay *The Theory of Moral Sentiments* ...

Similarly, in *O’Hagan v Body Corporate 189855*,<sup>27</sup> Justice Baragwanath addressed the moral judgment embedded in evaluating contributory negligence. While not ruling definitively on how contributory negligence should be assessed, Justice Baragwanath commented that a test of “moral blameworthiness” is appropriate, given that contributory negligence is essentially concerned with the extent to which the behaviour of an individual departs from ordinary expectations of that behaviour.<sup>28</sup> In the judgment in *Air New Zealand Ltd v Wellington International Airport Ltd*,<sup>29</sup>

24 *Attorney-General v Mair* [2009] NZCA 625 at [124]–[126].

25 Baragwanath “Treaty Jurisprudence”, above n 22, at 4. The South African decision was cited there as: *Alexkor Ltd and the Government of the Republic of South Africa v Richtersveld Community* CCT 19/03, 2003.

26 *Sunset Terraces*, above n 5, at [55].

27 *O’Hagan v Body Corporate 189855* [2010] NZCA 65, [2010] NZLR 445.

28 *Ibid*, at [67].

29 *Air New Zealand Ltd v Wellington International Airport Ltd* [2009] NZCA 259, [2009] 3 NZLR 713.

Justice Baragwanath used moral reasoning to justify his dissenting judgment arguing for the availability of judicial review in commercial contexts. Speaking in broad terms, he noted that the “law will intervene against one who abuses a position of authority and acts unreasonably to inhibit another’s legitimate activity”.<sup>30</sup>

This focus on the need for moral behaviour in a commercial context has long been a concern for Justice Baragwanath. In a lecture given by Justice Baragwanath in 1987 when he was still a practitioner, he criticised Oliver Wendell Holmes for asserting that “[m]oral predilections must not be allowed to influence our minds in settling legal distinctions.”<sup>31</sup> For Justice Baragwanath, then as now, moral predilections do not in practice just influence judicial minds in settling legal distinctions: they should influence judicial minds. Moral reasoning enriches judicial decision-making, argued Justice Baragwanath in the 1987 lecture, and supports the ability of the courts to perform its primary functions: encouraging desirable behaviour; facilitating private arrangements between individuals; distributing (and redistributing) goods and services; and settling unregulated disputes.<sup>32</sup>

This claim that morality is entangled in adjudication and law as a whole may be jarring to those enmeshed in the positivist paradigm that retains its hold over New Zealand law schools.<sup>33</sup> Nonetheless Justice Baragwanath’s view provides a powerful counter to this prevailing narrative, and gives support to those who believe that the law should be grounded in a principled philosophical framework. Justice Baragwanath’s emphasis on the need for morality in the commercial context also resonates in light of recent claims by economists and political philosophers that the free market that governs much of the commercial world has become drained of values and ethics.<sup>34</sup> His approach to questions of morality provides the start of a solution to this crisis of values in the suggestion that the law can partly fill this moral gap by supplementing public discourse with moral reasoning.

## V. BROADENING THE SCOPE OF THE LAW

The three points noted thus far have all concentrated on commonalities of content across Justice Baragwanath’s judgments and extra-judicial speeches. However, it would be remiss, even in a modest account of Justice Baragwanath’s legacy, to say nothing of the style of his judgments. At a time when interdisciplinary approaches are often called for, but rarely practised, Justice Baragwanath’s judgments and speeches evidenced a way of looking at the world that integrates insight from other branches of knowledge. New Zealand has been blessed with judges with this polymath capacity: other judges, sitting or recently, that have had similar abilities include Sir Kenneth Keith (now a Judge of the International Court of Justice) and Justice Hammond of the Court of Appeal (appointed President of the Law Commission in 2010). Justice Baragwanath matched these

30 Ibid, at [159].

31 David Baragwanath “The Dynamics of the Common Law” (1987) 6 Otago LR 355.

32 Ibid, at 358. Justice Baragwanath further advanced the view that morality plays an important role in adjudication in a lecture on morality and tax avoidance to the AUT University Law School in 2010: David Baragwanath “Commerce, Morality and Law: The Role of the Academy” (Address to the AUT University, Auckland, 13 February 2010).

33 Of course, the positivist paradigm does not exclude a role for morality in judicial reasoning, but it certainly (in most iterations) leaves morality at the margins of the law.

34 See, for instance, Michael Sandel’s 2009 Reith Lectures, entitled “A New Citizenship”. These are available online at <[www.bbc.co.uk](http://www.bbc.co.uk)>. See also the related discussion in: Amartya Sen *On Ethics and Economics* (Blackwell, Oxford, 1987).

polymaths in the sheer breadth and peculiarity of his sources. His approach has expanded the conception of what might constitute a source of law, and in so doing enriched the common law as a whole.

He has been diverse in the sources that he cites from the humanities, drawing upon political philosophy, economics, and history (amongst other disciplines) to enhance his judgments. In *Ding v Minister of Immigration*,<sup>35</sup> Justice Baragwanath did not just canvas decisions about the children of alien overstayers from six jurisdictions (alongside a comprehensive survey of relevant New Zealand authorities), he also quoted judiciously from the sociologist TH Marshall on the issue of citizenship<sup>36</sup> and referred to the work of Rousseau,<sup>37</sup> seamlessly integrating these comments with analysis of case law going back to *Calvin's Case*.<sup>38</sup> In *Sunset Terraces*,<sup>39</sup> in discussing the right to housing, he referred to Abraham Maslow's "Hierarchy of Needs", and embellished the point within a New Zealand context by making reference to James Belich's most recent history, *Replenishing the Earth*,<sup>40</sup> as well as a housing workshop held at the New Zealand Reserve Bank.<sup>41</sup>

Justice Baragwanath has also reached outside of these disciplines one might associate loosely with the law, to the (usually) far-off sites of literature and religion. This is especially prominent in his extra-judicial work. Lewis Carroll's work is clearly a favourite, as Justice Baragwanath has cited *Alice in Wonderland* across several articles, most notably in rendering vivid his feelings when first representing iwi as counsel.<sup>42</sup> He also quoted Genesis 4:15 in his particularly perceptive 2006 address to the New Zealand Law Commission's twentieth anniversary seminar on the distinctiveness of New Zealand law.<sup>43</sup>

In addition to being unique in turning outside the legal profession to gather insight, Justice Baragwanath has been especially penetrative in turning inwards and uncovering sources in the margin of the law in an effort to expand the common conception of what can constitute a source of law. He has made a persistent effort to illuminate the work of academics, often underscoring the fact that many high-profile legal scholars are New Zealanders. (Campbell McLachlan and Michael Taggart receive special attention in Justice Baragwanath's writing.) He has also raised the profile of international law, citing numerous treaties and conventions in the *Ding* judgment<sup>44</sup> and the more recent *X v Refugee Status Appeals Authority*,<sup>45</sup> while drawing on insights from foreign jurisdictions (notably France and South Africa, discussed often to make points about the liability of the state in public law<sup>46</sup> and anti-discrimination law,<sup>47</sup> respectively). Lastly, he has returned

35 *Ding v Minister of Immigration* (2006) 25 FRNZ 568 (HC).

36 *Ibid.*, at [228].

37 *Ibid.*, at [232].

38 *Calvin's Case* (1609) 7 Co Rep 1, discussed at [2].

39 *Sunset Terraces*, above n 5.

40 James Belich *Replenishing the Earth: The Settler Revolution and the Rise of the Anglo-World, 1783-1939* (Oxford University Press, Oxford, 2009).

41 *Sunset Terraces*, above n 5, at [55].

42 Baragwanath "The Treaty and the Police", above n 20, at 1.

43 Baragwanath "New Zealand Law and Maori", above n 16, at 21.

44 *Ding*, above n 35, at [123]–[142].

45 *X v Refugee Status Appeals Authority* [2009] NZCA 488, [2010] 2 NZLR 73 at [208].

46 Baragwanath "New Zealand Law and Maori", above n 16, at 15.

47 See, for instance, David Baragwanath "The Magna Carta and the New Zealand Constitution" (Address to English Speaking Union, 29 June 2008) ["The Magna Carta and the New Zealand Constitution"] <courtsfz.govt.nz/from/speeches-and-papers> at 16.

further into history than most to mine the treasures that might be found in historical case law: *Calvin's Case* is one judgment that Justice Baragwanath seems to have regarded as paramount in articulating the relationship between State and citizen, given the number of times he referred to this case, judicially and extra-judicially.<sup>48</sup>

In using this multitude of sources, Justice Baragwanath, seemingly paradoxically, revealed both his erudition and his humility. The range of references obviously highlights his enormous intellect, one that has stayed in touch with contemporary developments. However, it shows, too, that Justice Baragwanath was willing to defer to experts in other fields, and was eager to search for meaning in a variety of texts. It reflects the fact that Justice Baragwanath sought always to give effect to his vision of the law as a force that reaches out into the community, and draws on community values to give it its enduring power. We might use his own words to make this point, spoken at an address to the English Speaking Union in 2008:<sup>49</sup>

The law and the constitution are the right not of lawyers and judges but of the whole community, whose lives are not static but dynamic; not simple but complex; and not identical but various.

In seeking to give effect to the ideal of interdisciplinarity, Justice Baragwanath has gone some way towards acknowledging the dynamic, complex, various make-up of the community at large. He has also demonstrated to students that law, far from requiring only narrow, inward-looking study, is sometimes at its best when it looks outwards to glean insight from other branches of knowledge.

## VI. CONCLUSION

There are likely some who disagree with the foregoing assessment of Justice Baragwanath's legacy. Given his tendency to be creative and adventurous, certain commentators might view his judicial philosophy as overly activist or his legal method as too unorthodox. No doubt not all will agree that the Treaty of Waitangi, as well as social and economic rights, ought to be advanced through the common law, but almost all would agree on two things. First, most would accept that Justice Baragwanath was a principled judge: a judge who grounded his reasons in robust philosophical premises, and always strived to be transparent about these premises. Critics may quibble over the content of these premises, but few would suggest that Justice Baragwanath had no such principles. Second, many would agree that he is a man of great integrity. It would be fair to say that the values of "dignity and decency", which Justice Baragwanath has suggested lie at the core of parts of the common law, also underpin his own character.

There may be some, too, that say that the analysis above collapses ultimately into hagiography. This is unfair. The assessment has not purported to be a balanced evaluation of Justice Baragwanath's merits and shortcomings as a judge. What has been attempted is a sketch of his legacy from an unabashed admirer, and while Justice Baragwanath may have had foibles, it is suggested (albeit from the biased perspective of that unabashed admirer) that those foibles will be submerged in his larger legacy.

Sir David Baragwanath widened the horizons of the law as a judge, and expanded in students' minds the possibility of what can be achieved in the law, and through the law. He had a vision of the law, in the same vein as the visions developed by Lord Cooke and Justice Woodhouse: a

<sup>48</sup> See, for instance, *Ding*, above n 35, at [2].

<sup>49</sup> Baragwanath "The Magna Carta and the New Zealand Constitution", above n 47, at 11.

sense of how the law fits into the rest of society. Within this context, he never allowed formalistic doctrine or technical arguments to impede what he viewed as his primary duty as a judge: to state the law uncompromisingly, and to hold individuals to those standards. He also strove, persistently, to seek justice for vulnerable or disadvantaged groups – refugees and indigenous people being just two such groups – while still offering balanced and objective adjudication. For these reasons, he will join the list of illustrious judges (which includes Learned Hand in the United States of America context, as well as Sedley LJ presently of the English Court of Appeal) who had great influence, even while never being appointed to their country's highest court. He will also join another list: the list of judges who offered markers to students for where the law might go in the future, and inspired students to see the law as something more than just a catalogue of precedents and formulas – as something greater, more dignified, more fundamentally decent.

# DEVELOPMENTS IN NEW ZEALAND JURISPRUDENCE

BY PROFESSOR MARGARET WILSON\*

The Supreme Court Act came into force 1 January 2004. It would be fair to describe the reactions to the birth of the Supreme Court as mixed. While many welcomed the fact New Zealand finally had its own final court of appeal and an opportunity to develop its own jurisprudence, there was criticism that the new Supreme Court would be 'activist' and challenge the sovereignty of Parliament to make the law. There was also concern that there would be insufficient work for the new court and that the quality of judicial decision-making would suffer without the reference to the Privy Council. While it is too early to assess the contribution of the Supreme Court to the development of New Zealand jurisprudence, it is useful to review whether some of the early criticisms and fears have been realised to date.

Te Piringa – Faculty of School is developing a database to research the work of the Supreme Court in terms of the number, nature and type of appeals to the Supreme Court. A longer-term project will review and assess the decisions of the Supreme Court in terms of contribution to the development of a distinctive New Zealand jurisprudence. One of the arguments for the need for a final court of appeal was that many cases were statute barred from the Privy Council, such as employment cases, and most criminal and family law cases. There was also a concern that the Privy Council did not fully appreciate the legal and policy context within which legislation was enacted in New Zealand and therefore had difficulty providing decisions with sufficient precedent value to guide legal advice and behaviour.

In terms of the Supreme Court having enough work, there appears to be a pattern emerging in the number of applications received and the number of cases where leave is granted and proceed to a substantive hearing. All appeals to the Supreme Court are only heard if leave is granted by the Court. Between 2004 and 2010 the Supreme Court heard 604 applications for leave to appeal. Of these applications 236 (39 per cent) were successful and the matter proceeded to a substantive hearing, though in a few cases the case did not proceed to a full hearing. The applications have steadily increased from 23 in 2004 to 152 in 2010. On the raw figures it appears the Supreme Court is receiving plenty of work. The Supreme Court Act s 16 requires that the Court must give reasons for refusing to give leave to appeal to it and that the "reasons may be stated briefly, and may be stated in general terms only" (s 16 (2)). Section 13 sets out the criteria for leave to appeal. The general rule is stated in s 13(1): "The Supreme Court must not give leave to appeal to it unless it is satisfied that it is necessary in the interests of justice for the Court to hear and determine the proposed appeal."

This general rule is qualified by the specific criteria in s 13(2):

It is necessary in the interests of justice for the Supreme Court to hear and determine a proposed appeal if –

- (a) the appeal involves a matter of general or public importance; or

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- (b) a substantial miscarriage of justice may have occurred, or may occur unless the appeal is heard;  
or
- (c) the appeal involves a matter of general commercial significance.

Section 13(3) states also that a significant issue relating to the Treaty of Waitangi is a matter of general or public importance.

In a review of the applications of leave during the Supreme Court's first two years, Andrew Beck concludes "the Court's attitude to the precise criteria has not quite jelled", and that "it is still difficult to predict the outcome of applications".<sup>1</sup> It may still be too early to identify any pattern in the reason for declining leave. A review of the cases would suggest that especially in criminal cases the absence of a miscarriage of justice (s 13 (2) (b)) is a principle ground for the decline in the application. It is also apparent that in most cases the Court gives extensive reasons for declining leave. In civil cases, however, the Supreme Court is more concerned with whether the case requires an issue of law that requires clarification or that the matter was of general or public importance.

While Andrew Beck also argues it would be more useful if the Supreme Court issued a written statement of the reason for declining the application, the Act only requires reasons to be stated briefly and in general terms. This provision was included in the Act to ensure the Supreme Court was not overburdened with written decisions when declining applications once the number of cases seeking leave to appeal increased in number. The challenge to the Court of Appeal issuing *ex parte* decisions<sup>2</sup> was considered when enacting the legislation and the policy compromise was to require written reasons but those reasons to be brief. A review of the Court's decision on applications for leave in criminal cases reveals the Court does give reasons and appears to strike a good balance behind giving a full judgment and explaining why leave was declined in that case.

An analysis of the type of cases seeking leave from the Supreme Court reveals the steady increase in the number of criminal cases. Although cases often involve more than one point of law, it does appear that criminal applications currently dominate the work of the Court. In 2004 there were nine applications involving criminal matters. This number increased to 29 in 2005, 34 in 2006, 36 in 2007, 46 in 2008, 54 in 2009, and 63 in 2010. The number of successful applications has also increased with 26 per cent successful applications in 2008 increasing to 35 per cent in 2010. An analysis of the criminal decisions in 2011 reveals that of the 21 successful applications for leave to appeal only five (23.8 per cent) resulted in the appeal being upheld, with one of those cases being an appeal by the Crown. If the total number of applications for leave in 2010 is considered, that is 63, then only in 7.6 per cent of the cases is the appeal upheld. It is apparent then that even if the initial test of being granted leave to appeal is successful, the chance of a successful appeal is still under 25 per cent.

One other matter of interest is that it appeared in three of the cases the applicant for leave appeared in person. In 2009 six applicants appeared in person, with an *amicus curie* appointed in a case where the applicant's mental state was uncertain. A question must be asked whether in the court of final appeal it is appropriate for unrepresented litigants. While the principle of access to justice is fundamental to the rule of law, it is also essential to recognise that justice needs competent representation, especially at the final court of appeal. This is an area that deserves further

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1 Andrew Beck "Litigation – The Court of Final Appeal" [2006] NZLJ 17 at 20.

2 *R v Taito* [2002] 3 NZLR 577.

study to identify whether there is a trend to applicants representing themselves in person, the reasons for this trend and the consequences.

Although criminal cases have dominated the applications for leave over the past three years, it is interesting to analyse the other areas of the law that have come before the Supreme Court. When the Privy Council was the final court of appeal, the majority of cases dealt with commercial matters, including contract, taxation, insolvency, intellectual property, insurance, company and property cases. These matters continue to apply for leave to appeal to the Supreme Court. In 2008 commercial matters comprised 21.6 per cent of the applications; in 2009 22.8 per cent; and in 2010 30.9 per cent of all the applications for leave to appeal. Of these applications in 2008 60.8 per cent were granted leave; in 2009 59.2 per cent were successful; and in 2010 55.3 per cent were successfully granted leave to appeal. The success rate compared with criminal matters is considerably greater at this stage in the process. In terms of successful appeals the chances appear to be greater for commercial cases than criminal cases. In 2008 two appeals were successful while seven were allowed; in 2009 five appeals were allowed and five dismissed; while in 2010 six appeals were allowed seven appeals were dismissed.

Although criminal and commercial cases dominate the matters before the Supreme Court, a review of the cases reveals administrative law, family law, employment law, immigration and tort law issues have all been before the Court. Also Bill of Rights issues are raised in a variety of cases. The Supreme Court is attracting a variety of appeals on matters that previously would not have heard by the Privy Council. Whether the Supreme Court is developing through its judgments a distinctive New Zealand jurisprudence requires further in depth analysis. It takes time for final courts of appeal to develop their own distinctive character. The Supreme Court in its short life has started to imprint its authority on the law with precedent making decisions, including the recent decisions in *Haronga v Waitangi Tribunal*<sup>3</sup> and *Penny & Hooper v Commissioner of Inland Revenue*.<sup>4</sup>

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3 *Haronga v Waitangi Tribunal* [2011] NZSC 53.

4 *Penny & Hooper v Commissioner of Inland Revenue* [2011] NZSC 95.

# WHAT ABOUT THE WĀHINE? CAN AN ALTERNATIVE SENTENCING PRACTICE REDUCE THE RATE THAT MĀORI WOMEN FILL OUR PRISONS? AN ARGUMENT FOR THE IMPLEMENTATION OF INDIGENOUS SENTENCING COURTS IN NEW ZEALAND

BY GREGORY BURT\*

## I. INTRODUCTION

Often described as invisible constituents<sup>1</sup> of the criminal justice system, women are both minority offenders and significant victims of crime. Māori, New Zealand's indigenous people, form a disproportionately large percentage of our offender population.<sup>2</sup> It is the intersection of ethnicity (or race) and gender that is the focus of this research which aims to analyse the factors contributing to the disproportionately high rate of custodial sentences received by Māori women, and seek a solution to these alarming statistics.

Looking specifically at the sentencing of Māori women, the paper argues that colonisation, legislative reform and judicial discretion play significant roles in the high rate of imprisonment experienced by convicted female Māori offenders. By looking to Canadian and Australian experiences, it is proposed that the implementation of indigenous sentencing courts will provide a viable solution that incorporates traditional practices to address this level of over-representation. In doing so, this sentencing alternative incorporates the principles of the Treaty of Waitangi (the Treaty) to increase the trust between the offender and a modified court system by empowering the Māori community to participate in the sentencing of their own people.

## II. PART ONE: MĀORI WOMEN AND SENTENCING TRENDS

Part One looks at criminal justice trends for the period spanning 1996 to 2005. Māori women are compared with other participants in a general sense and with specific regard to custodial sentencing.

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1 Julia Tolmie "Women and the Criminal Justice System" in J Tolmie and W Brookbanks (eds) *Criminal Justice in New Zealand* (LexisNexis New Zealand Ltd, Wellington, 2007) at 295.

2 Khylee Quince "Māori and the Criminal Justice System in New Zealand" in J Tolmie and W Brookbanks (eds) *Criminal Justice in New Zealand* (LexisNexis New Zealand Ltd, Wellington, 2007) at 333-334.

## A. Sentencing Trends: 1996-2005

### 1. Sentencing

Sentencing is only one stage of the criminal justice process. However, as it provides the “portal” to incarceration, sentencing assumes a degree of importance. New Zealand has recently been recognised as the second most punitive western world nation, behind the United States.<sup>3</sup>

In New Zealand between 1996 and 2005 custodial sentences increased.<sup>4</sup> Despite an increase in convictions, the corresponding increase in the percentage of convicted cases receiving sentences of imprisonment stands out for consideration,<sup>5</sup> increasing from 7.4 per cent of convicted cases in 1996 to 9.6 per cent by 2005.<sup>6</sup> In addition, based on a decrease in the average seriousness of convicted cases attracting custodial sentences,<sup>7</sup> it is concluded that the courts use imprisonment in 2005 where they may not have a decade before.<sup>8</sup> With the number of women sent to prison increasing by 7 per cent in 2004 alone,<sup>9</sup> the resulting effects have produced a female sentenced prison population that has grown by 111 percent in ten years,<sup>10</sup> thus displaying a strong trend towards increasingly punitive sentences.

### 2. Māori women

Making up around 15 per cent of the population, Māori are disproportionately more likely than non-Māori to be represented at every stage of the justice process.<sup>11</sup> This paper looks specifically at sentences of imprisonment illustrating the fact that Māori in general are far more likely to receive a custodial sentence upon conviction than non-Māori<sup>12</sup> with commentators suggesting that the margin is as high as seven times greater.<sup>13</sup> Overrepresentation based on ethnicity is amplified when gender is also considered with reports stating Māori women may be ten times more likely to receive a custodial sentence than European women.<sup>14</sup>

Women make up slightly more than half the population yet form a much lower percentage of those subjected to the justice system when compared with men.<sup>15</sup> Within these offenders Māori

3 John McCrone “Filling the Prisons” (2010) Stuff.co.nz <[www.stuff.co.nz/national/crime/4024049/Filling-the-prisons](http://www.stuff.co.nz/national/crime/4024049/Filling-the-prisons)> New Zealand sends 199 people out of every 100,000 to jail; the United States sends 748 per 100,000. Māori figures are approximately 700 per 100,000.

4 Julia Tolmie “Crime in New Zealand Over The Last Ten Years: A Statistical Profile” in J Tolmie and W Brookbanks (eds) *Criminal Justice in New Zealand* (LexisNexis New Zealand Ltd, Wellington, 2007) at 56.

5 Ibid.

6 Natalliya Soboleva, Nina Kazakova and Jin Chong *Conviction and Sentencing of Offenders in New Zealand: 1996 to 2005* (Ministry of Justice, 2006) at 63.

7 Ibid, at 64.

8 Tolmie, above n 4, at 57.

9 Greg Newbold *The Problem of Prisons: Corrections Reform in New Zealand Since 1840* (Dunmore Publishing Ltd, Wellington, 2007) at 209.

10 Tolmie, above n 1, at 309.

11 Tolmie, above n 4, at 68. Māori women were 45.83 per cent of apprehensions in 2005. See also Quince, above n 2, at 334.

12 “Policy, Strategy and Research Group, Over-representation of Māori in the Criminal Justice System: An Exploratory Report” (prepared for the Department of Corrections, 2007) at 22.

13 See Quince, above n 2, at 334.

14 Bronwyn Morris “Identifying and Responding to Bias in the Criminal Justice System: A Review of International and New Zealand Research” (prepared for the Ministry of Justice, 2009) at 18.

15 Tolmie, above n 1, at 297.

women form the most overrepresented group. When compared with general statistics for Māori, women fare worse than men.<sup>16</sup> Soboleva reported that whilst only 11 per cent of custodial sentences in 2004 involved female offenders, Māori women made up 58 per cent of those sent to prison compared with 36 per cent for European women.<sup>17</sup> Women predominantly receive convictions for property offences making up 39.84 per cent of all their convictions.<sup>18</sup> This has been inextricably linked to socioeconomic position in society, reflecting “the severe financial difficulties of unemployed women, especially those caring for children as solo parents”.<sup>19</sup> Notably Māori women are over-represented in both these indices.<sup>20</sup>

Statistics have not always separated ethnicity and gender to enable Māori women’s experiences in the criminal justice system to be evaluated as a unique entity.<sup>21</sup> However the above data displays trends which include: New Zealand’s increasing use of custodial sentences; the over-representation of Māori in all facets of the justice process; and importantly for this analysis, that Māori women receive a disproportionately high number of custodial sentences.

The trends speak for themselves but how has this occurred? This level of over-representation has not occurred overnight<sup>22</sup> and, while some call it a “national disgrace”,<sup>23</sup> it is the factors that contribute to this poor showing that must be analysed to ascertain why Māori women receive so many custodial sentences. The starting point of this analysis is the effect of colonisation on Māori women’s position in society.

### III. PART TWO: COLONISATION AND POST TREATY LAW

Part Two summarises the position of Māori women prior to European contact and argues that the negative effects of colonisation and post-Treaty laws can be linked to their high rate of custodial sentencing.

#### A. *Before Colonisation*

Light can be shed on the present and also the future by looking to the past.<sup>24</sup> Prior to European contact and colonisation, traditional Māori beliefs assigned women a status and position that utilised human resources efficiently and was socially sophisticated with respect to equality. Māori women were key figures in nurturing and organising the whanau and hapu,<sup>25</sup> and played leading roles in their communities. They were the primary transmitters of specialised knowledge (from

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16 Ibid, at 303.

17 Soboleva, above n 6, at 116.

18 Ibid, at 52.

19 Tolmie, above n 1, at 299.

20 Quince, above n 2, at 350.

21 Tolmie, above n 1, at 303.

22 See Moana Jackson “The Māori and the Criminal Justice System: He Whaipaanga Hou Part 2” (prepared for the Policy and Research Division, Department of Justice, 1988).

23 NZPA “Justice System Doesn’t Deliver Justice for Māori – Sharples” (2010) YAHOO!extra. <<http://New Zealand.news.yahoo.com/a/-/top-stories/7959810/justice-system-doesnt-deliver-justice-for-Māori-sharples/>>.

24 Law Commission “Māori Custom and Values in New Zealand Law” (Study Paper 9, 2001) at 5.

25 Law Commission “Justice: The Experiences of Māori Women” (New Zealand Law Commission Report 53, 1999) at 12-13. Whanau is a group of relatives comprised of several generations. Hapu reflects an extended kin group consisting of a collection of whanau.

childbirth to weaponry)<sup>26</sup> with whakapapa (genealogy) providing the lineage for a higher societal ranking irrespective of gender. Māori women were particularly prominent in the areas of diplomacy and negotiation.<sup>27</sup> A feature of pre-European Māori society was the ability of Māori women to have ownership or “use-rights” over land and resources.<sup>28</sup> The onset of colonisation irreversibly changed this dynamic, meaning the status and position of Māori women would never be the same.

### *B. Colonisation*

Colonisation altered the existence Māori had enjoyed for several centuries. All experienced the effects of this process but perhaps none were more affected by it than Māori women. The imposition of European ideologies systematically eroded the functions and value<sup>29</sup> they were used to providing within the whanau and hapu.

Many of the women’s core roles were directly challenged by European male dominance. As colonisation attempted to assimilate Māori to European standards, the legitimacy of female influence in Māori society was undermined. Colonial views of a nuclear family headed by men, with women holding a subordinate position, marginalised the leadership, organisation, and nurturing roles held by Māori women.<sup>30</sup> The “colonial concept of individual land ownership and the role of men as property owners” ignored Māori women’s relationship with the land.<sup>31</sup> Following the Treaty, the introduction of laws founded by British legislation and common law were applied with detrimental effect to Māori women.

### *C. After the “Treaty”*

The introduction of legislative measures struck at the core of Māori society,<sup>32</sup> intentionally disrupting the principle of collectivism and predicating the destruction of the whanau.<sup>33</sup> Losing the core social unit served to isolate Māori women by decreasing the material and spiritual support they had traditionally received,<sup>34</sup> whilst increasing their vulnerability to victimisation.<sup>35</sup> In addition the application of common law reduced the status of Māori women denying them any “legal personality or property rights divisible from those of [their] father or husband.”<sup>36</sup>

Quince suggests that the experiences of Māori women throughout colonisation resulted in a contemporary position that differs from that of Māori men.<sup>37</sup> The post-Treaty combination of Pakeha law and values, the increasing modernisation and urbanisation of Māori, and the breakdown of the collective social organisation contributed to socioeconomic disadvantages that were most

26 Ibid, at 14.

27 Ibid.

28 Ibid, at 15.

29 Ibid, at 15.

30 Ibid, at 11.

31 Ibid, at 15.

32 New Zealand Settlements Act 1863; Native Land Act 1865 and 1909. Required Māori to undergo legal marriage ceremonies.

33 Annie Mikaere “Māori Women: Caught in the Contradictions of a Colonised Reality” (1994) 2 Wai L Rev at 133.

34 Law Commission, above n 25, at 16.

35 Quince, above n 2, at 349. Māori women were confined to households meaning prior constraints on actions from an open and collective lifestyle no longer operated.

36 Ibid.

37 Quince, above n 2, at 349.

severely felt by Māori women.<sup>38</sup> When reviewing the social indicators of income, health, education and sole charge of dependent children, many of which are indicators of offending,<sup>39</sup> Māori women fare worse than their male counterparts.<sup>40</sup> It is arguable that the high rates of offending and the resultant sentences produced by colonisation driven poverty are directly connected with the ethnic and gendered identity of Māori women.<sup>41</sup> The consequences of this are manifested in Māori women receiving a disproportionately high number of custodial sentences.

The effects of colonisation are clearly apparent but are they the sole cause of the poor sentencing statistics? While they unequivocally contribute in a large way, other factors also play a role, most notably the legislation that governs the sentencing process which was reformed in 2002.

#### IV. PART THREE: SENTENCING REFORM

Part Three argues that the 2002 sentencing reforms, along with penal populism,<sup>42</sup> contributed to New Zealand's increasingly punitive justice system and had a direct affect on the high number of custodial sentences received by Māori women.

##### A. *Sentencing Reform*

Following the Citizen Initiated Referendum of 1999,<sup>43</sup> the Government passed the Sentencing Act 2002 (the Act), along with other legislative measures.<sup>44</sup> At the time penal populism garnered public support which provided the consent and moral justification<sup>45</sup> to influence sentencing's power to punish. Characterised by political discourse<sup>46</sup> and the use of "moral panics"<sup>47</sup> by groups like the Sensible Sentencing Trust,<sup>48</sup> the "punitive aspects of the legislation, [not] its restraining counterforces" shaped contemporary sentencing policy<sup>49</sup> by encouraging judges to imprison the worst offenders.<sup>50</sup> This flowed on to affect offenders across the spectrum of seriousness and particularly, if not predictably, Māori women.

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38 Ibid.

39 Peter Doone "Report on Combating and Preventing Māori Crime: Hei Whakarurutanga Mo Te Ao" (Crime Prevention Unit, Department of the Prime Minister, 2000) at 11 and 21.

40 Quince, above n 2, at 349.

41 Ibid, at 335.

42 John Pratt "When Penal Populism Stops: Legitimacy, Scandal and the Power to Punish in New Zealand" (2008) 41 *The Australian and New Zealand Journal of Criminology* at 364. Penal populism refers to various groups spreading a law and order message of "zero tolerance" which influences government policy.

43 Ninety two per cent of participants favoured reforms imposing "minimum sentences and hard labour for all serious violent offences".

44 Parole Act 2002; Victims' Rights Act 2002.

45 Pratt, above n 42, at 365.

46 John Pratt "The Dark Side of Paradise: Explaining New Zealand's History of High Imprisonment" (2006) 46 *British Journal of Criminology* at 557. In 2000, the Justice Minister warned judges to take note of public sentiment and expectations when sentencing.

47 John Ip "Crime, Criminal Justice, and the Media" in J Tolmie and W Brookbanks (eds) *Criminal Justice in New Zealand* (LexisNexis New Zealand Ltd, Wellington, 2007) at 401-412.

48 Pratt, above n 46, at 556.

49 Pratt, above n 42, at 372.

50 See Geoff Hall "Sentencing" in J Tolmie and W Brookbanks (eds) *Criminal Justice in New Zealand* (LexisNexis New Zealand Ltd, Wellington, 2007) at 258.

## B. *Effects of Reform*

### 1. *Reforms in general*

The Act's aim of improving clarity, transparency and consistency<sup>51</sup> was initiated by codifying the purposes governing the imposition of a sentence.<sup>52</sup> Hall suggests the Act applies a retributive or "just desserts" approach to sentencing based on the principle of proportionality,<sup>53</sup> thereby restraining the utilitarian aspects of various sentencing options. A broad review of the Act after its first year of operation failed to discuss Māori or women as stakeholders in sentencing and stated that the Act had not intended any general change in the use of imprisonment.<sup>54</sup> In reality this has not been the case for Māori women and therefore begs the question "what happened?"

### 2. *Effect on Māori women*

The Act affected Māori women in a disadvantageous way. Tolmie states that "the relevance of gender within the criminal justice system...is often unexamined or downplayed in social importance."<sup>55</sup> When combined with ethnicity the issues this intersection provides seem to be amplified. The Act abolished the use of suspended sentences. Parliamentary discussions did not recognise gender (or race) despite the large number of women receiving this sentence based on its suitability for women with dependent children, and their lower risk of re-offending.<sup>56</sup> The net effect meant women that may have received a suspended sentence were more likely to receive a custodial one instead. Based on imprisonment trends, the likelihood is high that this negatively affected Māori women more than other groups.<sup>57</sup> As Māori women commit and are sentenced in relation to property offences significantly more than other types of offence, the removal of the presumption against imprisonment when sentencing for this offence<sup>58</sup> again increased the likelihood of Māori women receiving a custodial sentence.

The Act retained the provision allowing an offender being sentenced to call a person on their behalf to address the court regarding their cultural background, its relevance to the offending, and possible whanau or community support that was available to the offender.<sup>59</sup> Although designed with Māori in mind<sup>60</sup> indications suggest a "low level of awareness" and therefore utilisation by Māori offenders.<sup>61</sup> The effect this has on sentencing outcomes has not been quantified however it cannot be helpful to judges or offenders to have less than the full picture regarding the offending. Improving s 27's use by making this exchange mandatory may help reduce rates of custodial sentences for Māori women.

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51 Ibid.

52 Sentencing Act 2002, s 7.

53 Hall, above n 50, at 259. Penalties should be proportionate to the gravity of the offence.

54 Rajesh Chhana and others "The Sentencing Act 2002: Monitoring the First Year" (prepared for the Ministry of Justice, 2004) at 41-42.

55 Tolmie, above n 1, at 296.

56 Ibid.

57 See Quince, above n 2, at 350. Māori women often imprisoned based on a violent action towards an abusive partner. Suspended sentences were often considered appropriate for this type of offence.

58 Criminal Justice Act 1985, s 6.

59 The Act, above n 52, at s 27. Replacing s 16 of the Criminal Justice Act 1985.

60 Charlotte Williams "The Too-Hard Basket: Māori and Criminal Justice Since 1980" (Institute of Policy Studies, Wellington, 2001) at 44.

61 See Quince, above n 2, at 351.

In response to the overrepresentation of aboriginal people in Canadian prisons, legislators included a mandatory inquiry into the “circumstances of aboriginal offenders” when sentencing an aboriginal person.<sup>62</sup> Despite Supreme Court endorsement of the provision,<sup>63</sup> the incarceration of aboriginal women has worsened in Canada over the past ten years, highlighting the limited capacity of reforms alone to institute change where social policy and judicial discretion play a dominant hand in the application of sentencing principles.<sup>64</sup> Sentencing reasons in Canada showed that judges tended to contextualise female aboriginal offenders with an “intersectionalised identity” which represented their offending as being determined by ancestry, identity and personal circumstances.<sup>65</sup> This concurs with New Zealand commentators’ suggestions that women are now treated in a similar fashion to men thus diminishing their different circumstances<sup>66</sup> and that an “intersectional analysis” demonstrates that the ethnic identity of Māori women causes their gender to be read by judges in a fashion that is worse than the separate categories of “Māori” or “women”.<sup>67</sup>

Without understating the obvious influence of the 2002 reforms on the high number of custodial sentences Māori women receive, the persistent theory of a connection between these high levels and ethnic identity<sup>68</sup> reflects the hypothesis that Māori women receive more custodial sentences largely because they are Māori. This suggests that judicial discretion and racial bias may combine to marginalise this group during sentencing.

## V. PART FOUR: JUDICIAL DISCRETION AND RACIAL BIAS

Part Four argues that the judiciary plays a role in the disproportionately high number of custodial sentences received by Māori women based on its make-up and the amount of discretion available when sentencing, before turning to investigate the presence of racial bias in this process.

### A. *Judicial Discretion*

It is the judiciaries’ role to sentence convicted offenders in an independent and impartial manner,<sup>69</sup> an ability which has been questioned by some Māori scholars.<sup>70</sup> The widely held perception is that the Bench is still a predominantly upper class white male fraternity,<sup>71</sup> and despite ongoing efforts to address this fact, the perception pervades how those scrutinising the sentencing of Māori women view the use of judicial discretion.

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62 Criminal Code of Canada RSC 1985, s 718.2(e).

63 *R v Gladue* [1999] 1 SCR 688 (SCC).

64 Toni Williams “Intersectionality Analysis in the Sentencing of Aboriginal Women in Canada” in Emily Grabham and others (eds) *Intersectionality and Beyond: Law, Power and the Politics of Location* (Routledge-Cavendish, New York, 2009) 79 at 88-89.

65 *Ibid.*, at 94-95.

66 Tolmie, above n 1, at 306.

67 Quince, above n 2, at 350.

68 *Ibid.*, at 335.

69 Peter Sankoff “Constituents in the Trial Process. The Evolution of the Common Law Criminal Trial in New Zealand” in J Tolmie and W Brookbanks (eds) *Criminal Justice in New Zealand* (LexisNexis New Zealand Ltd, Wellington, 2007) at 210.

70 Jackson, above n 22, at 113.

71 Compare Heath J “Hard Cases and Bad Law” (2008) 16 Wai L Rev at 1.

Women comprise around 18 per cent of convictions<sup>72</sup> with Māori women more than half that figure. Currently, approximately 30 per cent of District Court judges are female<sup>73</sup> with the High Court at 25 per cent.<sup>74</sup> Information regarding the ethnic makeup of judges is not available. On a gender basis alone, statistically there is a higher percentage of women judges than the percentage of convicted Māori women.

Sentencing allows the judge a broad degree of discretion. It involves receiving and utilising a diverse range of information from various sources, in order to prescribe an appropriate sentence under a legislative umbrella combined with appellate guidance.<sup>75</sup> Heath J noted “[j]udges... come from different backgrounds and have very different life experiences...[being]...the products of [their] own upbringing.”<sup>76</sup> On this basis it is questionable how the “life experiences” of the predominant male European judge enable them to appreciate the circumstances of the high number of Māori women standing before them, considering the above mentioned limited use of s 27.

Although discretion allows sentences to be individually tailored to the nature of the offence and the circumstances of the offender,<sup>77</sup> the combination of the wide discretion available<sup>78</sup> and the small amount of guidance received by judges has been problematic.<sup>79</sup> Pointing to inconsistency in sentencing between judges and courts, and the lack of a Parliamentary mechanism to adjust sentencing policies, the Law Commission proposed a Sentencing Council.<sup>80</sup> The Labour Government legislated for the establishment of the Council<sup>81</sup> which would draft “sentencing guidelines” and include amongst its members an expert on “the impact of the criminal justice system on Māori and minorities”.<sup>82</sup> Unfortunately the National Government abolished the Council<sup>83</sup> although the legislation has not been repealed. The failure to moderate judicial discretion with well devised guidelines reduces the likelihood of beneficial alterations occurring to policies that increasingly incarcerate Māori women. This does little to dispel one concern regarding whether wide discretion allows racial bias to permeate the process thereby detrimentally affecting Māori women.

## B. Racial Bias?

For over two decades commentators have suggested that by using monocultural stereotypes<sup>84</sup> sentencing operates in an institutionally racist way.<sup>85</sup> Jackson opined that in combination with judicial

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72 Soboleva, above n 6, at 52.

73 <[www.courtsofz.govt.nz/district/district/the-judges/judge-chief/district/judges.html](http://www.courtsofz.govt.nz/district/district/the-judges/judge-chief/district/judges.html)>.

74 <[www.courtsofz.govt.nz/about/high/judges](http://www.courtsofz.govt.nz/about/high/judges)>.

75 Hall, above n 50, at 249-254.

76 Heath J, above n 71, at [9].

77 Hall, above n 50, at 254.

78 Alex Latu and Albany Lucas “Discretion in the New Zealand Criminal Justice System: The Position of Māori and Pacific Islanders” (2008) 12(1) *Journal of South Pacific Law* at 90.

79 *Law Commission Sentencing Guidelines and Parole Reform* (Report 94, 2006) at 17-29.

80 *Ibid.*

81 Sentencing Council Act 2007.

82 *Ibid.*, at Schedule 1 1(f).

83 Patrick Gower “Red Tape Will Cost Crime Victims \$7.3m” *The New Zealand Herald* (New Zealand, 29 June 2009). <[www.nzherald.co.nz/nz/news/article.cfm?c\\_id=1&objectid=10581338](http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10581338)>.

84 Jackson, above n 22, at 108.

85 *Ibid.*, at 113.

discretion, racial bias has contributed either “deliberately or unwittingly”<sup>86</sup> to Māori’s (women) poor showing in sentencing statistics. The statistics, viewed in conjunction with the make-up and discretion of the judiciary, are highly suggestive that ethnicity factors provide the basis for the possibility that judges impose more severe penalties on Māori women.<sup>87</sup> Claims of this nature have however proved “problematic to show...in a systematic way that controls for variables such as age, criminal history, seriousness of offending, and legal representation.”<sup>88</sup> Commentators agree on the fact that indigenous minorities are overrepresented within the criminal justice system but disagree on how the disparities occur.<sup>89</sup>

Compared with other jurisdictions New Zealand has a dearth of empirical analysis regarding the presence of racial bias across sentencing decisions.<sup>90</sup> Complex overseas studies present arguments for and against the presence of racial bias. A number record an increase in the punitive nature of sentences encountered by ethnic minority groups whilst others find a lack of evidence that racial bias is occurring when legal factors are included in the analysis.<sup>91</sup>

Two Australian studies illustrate the varying nature of results in different court locations. A 2007 study in New South Wales<sup>92</sup> found that the indigenous status of the offender had only a slight effect on the risk of imprisonment.<sup>93</sup> Viewed with caution, this indicated the potential for racial bias to have some influence<sup>94</sup> on an increased risk of imprisonment. In contrast a 2009 study in South Australia<sup>95</sup> found indigenous offenders less likely to be handed a custodial sentence than non-indigenous when appearing under similar circumstances.<sup>96</sup> Interestingly the results showed that indigenous offenders received longer imprisonment terms when sentenced<sup>97</sup> and offenders with a personal history of victimisation were more likely to receive a prison sentence.<sup>98</sup> Illustrating the difficulty in pin pointing racial bias in the sentencing of indigenous minorities, these studies highlight the need for New Zealand to engage in research of our sentencing practices with regard to Māori women (and other minorities). The methodology used must distinguish regions in New Zealand and, of importance to Māori women, look at whether previous victimisation<sup>99</sup> affects the likelihood of receiving a custodial sentence.

The width of the judiciary’s discretion and its composition suggest the strong potential for factors based on the ethnicity and gender of convicted offenders to pervade the sentencing process and produce more severe sentences for Māori women. Without conclusively establishing the

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86 Ibid.

87 Latu, above n 78, at 92. Noting the fear and insecurity of the general public towards Māori.

88 Ministry of Justice “Sentencing Policy and Guidance: A Discussion Paper” (1997) <[www.justice.govt.nz/publications/global-publications/s/sentencing-policy-and-guidance-a-discussion-paper/10.-a-Māori-view-of-sentencing](http://www.justice.govt.nz/publications/global-publications/s/sentencing-policy-and-guidance-a-discussion-paper/10.-a-Māori-view-of-sentencing)>.

89 Morris, above n 14, at 31-32.

90 Ibid, at 42.

91 Ibid, at 45.

92 Lucy Snowball and Don Weatherburn “Does Racial Bias in Sentencing Contribute to Indigenous Overrepresentation in Prison?” (2007) 40(3) *The Australian and New Zealand Journal of Criminology* at 272.

93 Ibid, at 285.

94 Latu, above n 78, at 92.

95 Samantha Jeffries and Christine Bond “Does Indigeneity Matter? Sentencing Indigenous Offenders in South Australia’s Higher Courts” (2009) 42(1) *The Australian and New Zealand Journal of Criminology* at 47.

96 Ibid, at 60-64.

97 Ibid.

98 Ibid.

99 Quince, above n 2, at 350. Māori women are more likely to be victims than any other demographic in New Zealand.

incidence of racial bias, it is concluded that a combination of colonisation, legislative reform and judicial discretion combine to produce sentencing conditions that require a policy shift to address the disproportionately high number of Māori women receiving custodial sentences and the corresponding negative effects this has for Māori and society in general.

## VI. PART FIVE: WHY NOT INDIGENOUS SENTENCING COURTS?

Part Five argues that indigenous sentencing courts provide one solution to the sentencing problem facing Māori women with the ability to also act as a first step in resurrecting the criminal justice process for Māori through measures which introduce aspects of traditional Māori solutions to crime.

### A. *Māori Women and the Justice System*

The justice system is a foreign place for most Māori women. A lack of recognition for the principles of the Treaty,<sup>100</sup> combined with systemic failures, produce barriers to accessing elements within the system that could positively affect their sentencing outcomes.<sup>101</sup> Based on Māori women's socio-economic disadvantage, the inability to access the information needed to make informed choices<sup>102</sup> reduces the effectiveness of the justice system in meeting their needs with many suggesting that the system could improve by embracing their cultural identity and providing easier access to legal and community services by Māori for Māori.<sup>103</sup> While some Māori community services excel in the support they provide,<sup>104</sup> most are underfunded. Improvement in these support services is required and must be a priority for an integrated solution.

Jackson stated that the justice system needed to "address ways in which existing operations... [could] be made more meaningfully bicultural" and needed to "consider in what ways...specifically Māori institutions might be developed to...share the authority defined by the Treaty".<sup>105</sup> While advocating for autonomy in the administration of justice by Māori for Māori, Jackson had reservations about the use of the marae<sup>106</sup> as the centre for court procedures, as without altering the nature of the process it risked the marae being associated with injustice, thereby undermining its cultural significance.<sup>107</sup> There have been attempts at marae based courts<sup>108</sup> with moderate success but some Māori scholars view these as a furtherance of the colonial ethic<sup>109</sup> and a "co-option" of Māori justice practices which does little to address criticisms of the justice system.<sup>110</sup>

100 *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641.

101 Law Commission, above n 25, at 27. Includes the recognition of cultural values such as te reo Māori, whakapapa and whanau.

102 Ibid, at 32-34.

103 Ibid, at 41-43.

104 For example the Hamilton Community Programme pilot with Maatua Whangai.

105 Jackson, above n 22, at 204-205.

106 Meeting house.

107 Jackson, above n 22, at 237-238.

108 Quince, above n 2, at 351-353. For example, Te Whanau Awhina in Waitakere and Rangitahi court in Hamilton (for youth).

109 Ibid. Citing Jackson "Cultural Justice: A Colonial Contradiction or a Rangatiratanga Reality?" (1995).

110 Juan Tauri "Family Group Conferencing and the Indigenisation of New Zealand's Justice System" (Māori and Criminal Justice Conference, Victoria University Law School, 15-17 July 1998).

The modern landscape is not without institutions that claim a strong relationship with tikanga Māori.<sup>111</sup> The use of conferencing<sup>112</sup> in youth justice has received a mixed reception and produced mixed results.<sup>113</sup> While some Māori believe there is a place for attempting to adapt the modern criminal justice system to be more culturally appropriate<sup>114</sup> very little has been done to specifically address sentencing of Māori women whose statistics call out for attention. Could a more traditionally oriented practice provide a solution for them?

## B. *Indigenous Sentencing Courts*

### 1. *Why sentencing?*

Commentators allude to the fact that no simple solution exists in relation to the overrepresentation of Māori in the justice system.<sup>115</sup> Sentencing is but one part of a system that requires an integrated approach incorporating changes in policy, alongside Government and Māori community support. The focus on reducing custodial sentences for Māori women is two-fold. Firstly, positive changes to the way Māori women are sentenced will be socially significant<sup>116</sup> with lower incarceration rates improving the ability to care for the next generation. Secondly, with a complex road to improvement, the implementation of a new sentencing practice (which if successful could extend to include Māori men) could be accomplished in a short amount of time and if successful have immediate impacts on Māori society.

Both Jackson and Durie believe that addressing the cycle of poverty and harm in which Māori are often caught requires improved access to, and participation in, a healthy cultural identity.<sup>117</sup> Thus successfully responding to the high imprisonment rate of Māori women requires that Māori play a central role in the implementation and governance of a sentencing process that addresses structural inequalities, and provides support and monitoring to the individual.<sup>118</sup> In the twenty-two years since Jackson's report New Zealand has failed to address this issue in a meaningful way. It is therefore proposed that along with the re-establishment of a sentencing council and the repeal of the "three strikes" legislation,<sup>119</sup> that New Zealand look to Australia and implement indigenous sentencing courts similar to those already working well there.

### 2. *Following Australia*

New Zealand is not alone in having an indigenous population overrepresented in the criminal justice system. Both Canada and Australia experience similar problems. Drawing on "circle sentencing"<sup>120</sup> most Australian States have developed indigenous sentencing courts. The objective is to move away from retributive sentencing to a collaborative approach allowing community

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111 Valmaine Toki "Will Therapeutic Jurisprudence Provide a Path Forward For Māori?" (2005) 13 Wai L Rev at 180. The "right way".

112 Family Group Conference for youth offenders.

113 Quince, above n 2, at 351-353.

114 Ibid, at 353.

115 Morris, above n 14, at 14.

116 Tolmie, above n 1, at 310-311.

117 Quince, above n 2, at 335.

118 Morris, above n 14, at 14.

119 Sentencing and Parole Reform Act 2010.

120 Luke McNamara "Indigenous Community Participation in the Sentencing of Criminal Offenders: Circle Sentencing" (2000) 72 Indigenous Law Bulletin.

involvement in the process.<sup>121</sup> The success of this process requires a committed judge,<sup>122</sup> combined with a community that has the capacity and willingness to participate in criminal decision-making.<sup>123</sup> Each State has individual differences to the court make-up with procedures set up by the parties involved.

While this type of court requires resources and takes more time, the participation of respected cultural leaders increases the perception of confidence in sentencing thus adding to the legitimacy of penalties handed down.<sup>124</sup> The courts work within the constraints of the criminal law, therefore statutory terms of imprisonment<sup>125</sup> are available and may be used. Sentencing deliberations typify a power sharing arrangement which promotes the community holding “the key to changing attitudes and providing solutions”<sup>126</sup> and enables the implementation of creative sentencing options based on an understanding of the offender’s problems and likely solutions.<sup>127</sup> The process increases trust by encouraging open and honest communication between offender and judge and places greater reliance on informal modes of social control.<sup>128</sup> When surveyed, Aboriginal offenders cited facing their community and the realisation that respected members of the community were prepared to help, as reasons for its success.<sup>129</sup> This more culturally appropriate and inclusive format has empowered indigenous communities whilst reducing rates of imprisonment and recidivist offending.<sup>130</sup>

### 3. A solution?

It is proposed that New Zealand implement indigenous sentencing courts for Māori women. If successful this policy could be extended to other indigenous offender groups. Like Australia, offenders convicted of an eligible offence<sup>131</sup> would qualify for sentencing by this method thus providing a more culturally appropriate means of sentencing while resolving some of the barriers experienced by Māori. The process has the ability to empower the community and improve the self esteem of the offender via the supportive environment produced.<sup>132</sup> It moves away from a “rule-based approach towards a principle-based approach” consistent with tikanga.<sup>133</sup>

This proposal takes a positive step towards reducing the persistently high rate of imprisonment experienced by Māori women, whilst also drawing the community closer together by encouraging the sharing of responsibility for those at the margins of society, and reducing the number of young Māori separated from their mothers during periods of incarceration. This must improve their fu-

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121 Ibid.

122 Ivan Potas and others “Circle Sentencing in New South Wales: A Review and Evaluation” (prepared for the Judicial Commission of New South Wales 2001) at 53-54.

123 McNamara, above n 120.

124 Potas, above n 122, at 51.

125 Elena Marchetti and Kathleen Daly “Indigenous Sentencing Courts: Towards a Theoretical and Jurisprudential Model” (2007) 17 Sydney Law Review at 419.

126 Potas, above n 119, at 4.

127 Ibid, at 52.

128 Marchetti, above n 125, at 421.

129 Potas, above n 119, at 53.

130 Marchetti, above n 125, at 435. Citing Koori and Nowra Court results.

131 Potas, above n 119, at 5. Excludes serious indictable offences (violence and drugs), sexual offences or domestic violence offences. See also Marchetti, above n 125.

132 Ibid.

133 Toki, above n 111, at 180.

ture prospects. The proposed system also honours the principles of the Treaty by taking steps towards answering the Māori voice for self-determination. Although not providing the absolute right to Tino rangatiratanga<sup>134</sup> that many call for,<sup>135</sup> this move makes initial strides towards social change and the enhancement of race relations. If implemented in conjunction with other forms of intervention<sup>136</sup> New Zealand society is likely to reduce the disproportionate number of custodial sentences received by Māori women and begin the pathway to a more bicultural nation.

## VII. CONCLUSION

Sentencing is one step in the justice process. However it is the stage at which the convicted offender potentially loses their liberty. For women this often has significant effects not only for themselves but also their children. Proportionately, Māori women receive more custodial sentences than any other recorded group in New Zealand. This paper focuses on the reasons behind these statistics before suggesting a solution.

The disadvantaged socio-economic position of many Māori women, largely resulting from colonisation, is indicative of a propensity to offend and therefore be sentenced. The combination of reforms, which influenced Māori women's sentencing in a negative way and wide judicial discretion suggests that the intersection of ethnicity and gender factors contribute to their high rate of imprisonment. While racial bias cannot be confirmed, the lack of an affirmative response to these figures can be. Australia, experiencing similar issues, turned to indigenous sentencing courts that address Aboriginal offenders by utilising respected members of their community to participate in the sentencing process. By proposing the implementation of a similar system for Māori women it is submitted that their high rate of imprisonment can be reduced by incorporating methods which reflect more traditional Māori practices. Aside from the fiscal advantages of reducing female Māori incarceration, the corresponding benefits for the children of offenders and the potential for Māori communities to participate in the governance of their own people make indigenous sentencing courts a sound alternative. This is not a silver bullet and addressing justice figures in general will require an integrated approach however the implementation of indigenous sentencing courts will enable New Zealand to honour the principles of the Treaty and promote racial equality to a level not seen before. What about the wāhine? What about starting there!

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134 Self determination.

135 Jackson, above n 22.

136 Marchetti, above n 125, at 441. Citing economic development, education, health.

## BOOK REVIEW

THE NEW LAWYER: HOW SETTLEMENT IS TRANSFORMING THE PRACTICE OF LAW by Julie Macfarlane (UBC Press, 2008) 280 pp.

The aim of Professor Macfarlane's book is to promote debate concerning the impact of modern reforms to the civil justice system on the practice of law. Her contribution to the debate is to advance a carefully crafted, in depth analysis of how the institutional emphasis on settlement as the primary form of dispute resolution is fundamentally changing the practice of law. At the core of her analysis is the proposition that modern lawyers must be skilful settlement advocates. She concisely summarises the professional skills and role of the new lawyer in the following passage which boldly predicts:<sup>1</sup>

The most successful lawyers of the next century will be practical problem solvers, creative and strategic thinkers, excellent communicators, who are persuasive and skilful negotiators, thoroughly prepared advocates for good settlements, who are able and willing to work in a new type of professional partnership with their clients, and aware of the need to constantly update their knowledge of conflict management processes and techniques as well as substantive law. This is the lawyer as conflict resolution advocate, and whom this book calls the new lawyer.

The extensive repertoire of professional skills which define the new lawyer might at first glance seem a little daunting. Law schools have a vital role in exposing students to the skills and processes which are central to the modern practice of law. She laments the failure of traditional legal education, which focuses almost exclusively on rights based approaches to the resolution of disputes, rather than effective negotiation skills, and information about the relative merits of various consensual dispute resolution processes. More broadly she poses the question "how do we understand the relationship between legal practice and legal education"?<sup>2</sup> In this context she has some interesting insights into the perennial question concerning the nature of the relationship between intellectual development and vocational training of lawyers. Her response to this often debated issue is likely to provoke a hostile response from members of the academy who assert that legal education should be unconcerned with the actual practice of law. Members of the profession<sup>3</sup> and academics<sup>4</sup> may also challenge the primacy of settlement which is currently in vogue with policy makers. After all, it is difficult to quarrel with the notion that court based adjudication fulfils an important social function, vindication of rights, the reasoned articulation of public values<sup>5</sup> and is essential for the development of precedent.

Professor Macfarlane acknowledges that legal knowledge and expertise remain a critical dimension of the new lawyers' settlement advocacy skills, but she appears to overlook the importance of their co-operative problem solving skills in the efficient resolution of the small percentage

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1 Julie Macfarlane *The New Lawyer: How Settlement is Transforming the Practice of Law* (UBC Press, Vancouver, 2008) at 244.

2 Ibid, at 225.

3 Lawrence West "Have the Woolf Reforms Worked?" *The Times* (United Kingdom, 9 April, 2009).

4 See Dame Hazel Genn *Judging Civil Justice* (Cambridge University Press, 2009); Owen M Fiss "Against Settlement" (1983) 93(6) *Yale Law Journal* at 1085.

5 Ibid, Genn.

of cases which are decided by the court. It should not be overlooked that an important objective of the civil justice reforms is to promote access to court based adjudication within a reasonable time at a reasonable cost.<sup>6</sup>

The genesis of the author's conceptualisation of the settlement advocacy role of the new lawyer are the reforms to the civil justice system in Canada. She assesses the impact of these reforms on the culture of disputing by drawing on considerable empirical research, no doubt fortified by her experience as a practicing mediator. While civil justice reforms in Canada are not discussed in detail it seems clear that the reforms in Canada follow a similarly broad structure to reforms to civil justice in England and Wales, Australia and New Zealand.<sup>7</sup> Certainly a broad overview of the reforms in these jurisdictions offers clear support for her central proposition that settlement is now regarded by policy makers as the primary process for the resolution of disputes. There is some evidence that the reforms in England and Wales have mitigated adversarial litigation culture and have "forced" lawyers to disclose information about their case and engage in co-operative negotiations prior to the issue of proceedings.<sup>8</sup> To this extent the reforms appear to have compelled lawyers to engage with aspects of conflict resolution advocacy. A brief overview of the main features of reforms in the jurisdictions mentioned is a useful context to a discussion of the challenges, potential and scope of conflict resolution advocacy, the defining attribute of the new lawyer.

Pre-action protocols are the most obvious illustration of the settlement orientation of modern reforms to the civil justice system.<sup>9</sup> The purpose of pre-action protocols, in keeping with the overarching objective of the reforms, is the early cost effective and fair resolution of disputes.<sup>10</sup> Conceptually pre-action protocols, which require lawyers to disclose information critical to their case and engage co-operatively in settlement negotiations, represent a sea change to the traditional withholding of information and adversarial positional bargaining which typically characterise pre-issue negotiations in unreformed civil justice systems.

Professor Macfarlane's view that settlement advocacy places negotiation at the centre of legal practice clearly fits with the purpose of pre-action protocols, the prompt, cost effective and fair resolution of disputes. In fact, it is arguable that not only is the emergence of the new lawyer, in large part, attributable to the importance of settlement but that the success of pre-action protocols is largely dependent on the conflict resolution skills which she attributes to the new lawyer. Placing negotiation at the centre of legal practice raises questions about the skills necessary to negotiate effectively and the relationship between legal expertise and consensus building.

The new lawyer, as with the traditional lawyer, understands that information exchange is critical to the negotiated resolution of disputes. As noted above, an important purpose of pre-action protocols is to encourage the informal cost effective disclosure of information. An important dis-

6 Adrian Zuckerman "Court Adjudication of Civil Disputes: A Public Service to be Delivered With Proportionate Resources, Within a Reasonable Time and at Reasonable Cost" (2006) <[www.aija.org.au](http://www.aija.org.au)>.

7 Civil Procedure Rules 1998 (UK) no 3132 (L17) Ministry of Justice (UK); Civil Procedures Act 2010 (Vic).

8 John Peysner and Mary Seneviratne "The Management of Civil Cases: the Courts and the Post-Woolf Landscape" (DCA Research Series, 2005) at 8 and 35.

9 Civil Procedure Rules 1998 (UK) r 1.1(1); Civil Procedures Act 2010 (Vic), s 7; in New Zealand the process is managed through the exchange of information capsules in the Court as required by the District Court Rules 2.14-2.17.

10 Civil Procedures Act 2010 (Vic), s 7 "[t]he overarching purpose of this Act and the rules of court ... is to facilitate the just, efficient, timely and cost effective resolution of the real issues in dispute." Civil Dispute Resolution Act 2011 (Cth), s 3 "The object of this Act is to ensure that, ... people take genuine steps to resolve disputes before certain civil proceedings are instituted; Civil Procedure Rules 1998 (United Kingdom), r 1.1(1) "... overriding objective of enabling the court to deal to cases justly".

inction which influences the bargaining strategy of the new lawyer is that the objective of information disclosure is to achieve a robust, durable and fair settlement rather than to achieve victory in a trial. Settlement, rather than preparing for a trial which is statistically unlikely to occur,<sup>11</sup> is the focus of the new lawyer and building a relationship with the other party becomes much more useful than adversarial posturing. A critical factor in relationship building is the ability to conceptualise and understand the dispute from the perspective of the other side.<sup>12</sup> In some disputes however it is likely the client will be uninterested in the other side's perspective, particularly where there is no ongoing relationship between the parties or where party is weak. It is likely that the law will provide the most important benchmark against which possible settlement should be judged. For this reason Macfarlane explicitly acknowledges that "... the use of the law to predict alternatives to negotiation remains a critical dimension of skilful negotiation."<sup>13</sup> In these circumstances skilful negotiation involves a clear exposition of the law to the particular circumstances backed up by credible evidence grounded in a genuine attempt to resolve the dispute. Positional bargaining based on exaggerated claims unsupported by credible evidence with little legal merit is strongly discouraged by pre-action protocols and is eschewed by the new lawyer.

Careful analysis of substantive legal rights is critical to the achievement of fair settlement.<sup>14</sup> The integration of legal expertise with interest based bargaining, which acknowledge clients non-legal objectives, such as an ongoing commercial or personal relationship is recognised as the most challenging dimension of conflict resolution advocacy. A crucial factor in analysing the often complementary nature of the relationship between rights and interests is for the new lawyer to fully understand the client's motivations and considered objectives. Given the potential importance of non-legal interests in achieving an optimum settlement the traditional "lawyer in charge" model of the lawyer client relationship, based on legal expertise, is replaced by a partnership model. Aside from greater sharing of goals and motivations the partnership model encourages informed participation by the client in the appropriate dispute resolution process, negotiation, mediation, judicial settlement conference or adjudication. Further if a consensual process is selected the client is normally expected to engage in the process and not be relegated to the role of passive observer. Clearly the client's informed consent to the appropriate process requires the new lawyer to have substantive knowledge of the relative merits of consensual and adjudicative processes.

Professor Macfarlane considers that many of the ethical challenges confronting the new lawyer arise from the new lawyer's role as a conflict resolution advocate. She makes the point that the duty of lawyers to clients within a traditional adversarial litigation framework is reasonably well articulated by rules of professional conduct. In short, rules of professional conduct typically provide that the lawyer's obligation is to pursue the client's interests subject zealously to an overarching duty to the court.<sup>15</sup> In this context client interests are synonymous with legal rights and the procedural steps necessary to vindicate substantive rights are being increasingly managed by

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11 John Peysner and Mary Seneviratne above n 8.

12 This insight has been popularised in the book by Roger Fisher, William Ury, and Bruce Patton *Getting to Yes: Negotiating Agreement Without Giving In* (2nd ed, Penguin Books, New York, 1999).

13 Macfarlane, above n 1, at 166.

14 Fair, in this context, refers to settlements based on reasonable assessment of predicted adjudicated outcome; the new lawyer also understands that the law is just one way of achieving a principled basis for resolution.

15 See Lawyers and Conveyancers Act 2006 (NZ), s 4(d) which states: "the obligation to protect, subject to his or her overriding duties as an officer of the High Court and to his or her duties under any enactment, the interests of his or her clients".

the judiciary. So if disputes arise concerning the litigation strategies adopted by overly aggressive counsel, an impartial expert on the application of the rules is available to provide a binding decision. The ethical landscape takes a different shape when the settlement process is characterised by consensus building rather than adversarial posturing. If consensus building to produce an optimum agreement is the objective, the question is not how much deception is permitted by the rules, but rather, that the disclosure information concerning facts, motivations and interests is more likely to produce a robust agreement than the withholding of information. The author acknowledges that the new lawyers focus on consensus building and settlement is problematic to the extent that settlement might be viewed as the goal rather than satisfying the client's interests. This danger is memorably expressed by Dame Hazel Genn when she stated "the goal of ADR is just to produce settlement rather than a just settlement".<sup>16</sup>

In her pivotal Chapter 8 the author discusses the ethical issues raised by conflict resolution advocacy. As with the traditional concept of advocacy the objective of the new lawyer is to advance the clients' interests. Loyalty in pursuing the clients' interests zealously is complicated by the recognition that consensus building also requires the new lawyer to take into account to some extent the interests of the other party. Ultimately, however, the new lawyer has a professional responsibility to ensure that the client is not pressured into a settlement which does not as far as possible match the clients' interests. In this regard joint decision making and rigorous reality testing is critical. The new lawyer must be careful not to allow clients to be pressured into an unjust settlement by opposing counsel, mediators, judges or the settlement philosophy of the client's new lawyer. Conflict resolution advocacy is not just about settlement, although as discussed above, the notion of justice is not restricted to adjudication based on legal rights, negotiated justice can also take into account non-legal rights. As settlement philosophy becomes pervasive the new lawyer must ensure that the dispute resolution process is appropriate to the needs of the particular client and not merely reflect the personal preference of the lawyer.

Professor Macfarlane also confronts the broader issue of the relationship between ethics and professional identity in the context of the conduct of lawyers in informal dispute resolution processes. She argues that conduct of lawyers and clients in informal processes is largely unregulated by codes of professional conduct.<sup>17</sup> Such rules and laws seem to fall short of approaching informal processes in good faith. Although good faith is a nebulous term, it is obviously not acting in good faith to use mediation for instrumental purposes such as fishing expeditions, not being properly prepared, or not preparing the client to engage in the process (assuming mediation is the appropriate process). It is also arguable that good faith negotiation does not include withholding information which includes critical facts about the case, clear exposition of the law relied on, and if relevant, non-legal interests.

While historically the author is correct in her assertion that rules of professional conduct and civil procedure do not usually reach into disputes which are not before the court, this position is changing as policy makers seek to reduce the time and cost which inhibit access to justice. Pre-action protocols are a good example of a reform which is intended to assist the early resolution of disputes. Sanctions apply for breach of protocols which require parties to act cooperatively in the exchange of information and to engage in genuine negotiation.<sup>18</sup> The effectiveness of pre-action

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16 Genn, above n 4, at 117.

17 In New Zealand, rules for negotiation and private mediations are regulated by law: the Fair Trading Act 1986 and mirrored by rules of conduct which forbid deceptive practices.

18 See Civil Procedure Act 2010 (Vic), ss 29-31, ss 37-41; Civil Procedure Rules 1998 (UK), r 3.1.

protocols in enhancing timely, fair and cost effective dispute resolution is controversial.<sup>19</sup> Clearly the aim of protocols is to mitigate adversarial culture and to encourage parties to engage in conflict resolution advocacy rather than adversarial positional bargaining which often unnecessarily consume party and court resources before settlement is reached on the steps of the court.<sup>20</sup> Arguably the effectiveness of pre-trial protocols largely turns on lawyers discarding adversarial strategies and adopting the professional identity and skill set which Professor Macfarlane attributes to the new lawyer.

Given the inherent uncertainty of litigation, the changes to the rules of civil procedure which encourage early settlement are likely to contribute to the phenomena of “vanishing trials”.<sup>21</sup> It is understandable that the new lawyer is primarily concerned with conflict resolution advocacy rather than adversarial trial lawyering. Importantly, conflict resolution, or settlement advocacy, recognises that substantive legal rights often provide a benchmark for the fair resolution of a dispute and are particularly important to protect the position of vulnerable parties. So while it is crucial for the new lawyer to provide clients with competent legal advice, an essential element of conflict resolution advocacy is the insight that rights based strategies will not always result in a robust and durable settlement that meets the client’s interests. As might be expected in a book which focuses on the art of achieving a fair, timely and reasonable settlement which satisfies the client’s interests, Professor Macfarlane argues that the traditional adversarial approach to legal negotiation should be rejected in favour of a problem solving approach which encourages the informal disclosure of information and consensus building. Her view is that lawyers must be effective negotiators; indeed she contends that negotiation should be at the centre of legal practice. This is supported by pre-action protocols which require lawyers to disclose comprehensive information and engage in “cooperative” negotiation, in a genuine attempt to resolve the dispute before proceedings are issued.

The evolution of the new lawyer grounded in the role of a conflict resolution advocate not restricted by rights based strategies has significant implications for the client lawyer relationship. This is because the traditional “lawyer in charge” model of the professional relationship between lawyer and client is often based on the lawyer’s superior knowledge of procedure and substantive law. The basis of the relationship becomes more of a partnership to the extent the client’s non-legal issues including relationship issues are factored into the resolution process. Professor Macfarlane does not shirk from engaging with the ethical dilemmas raised by the new lawyers’ commitment to resolve disputes having regard to the legal and non-legal issues.

The author identifies traditional legal education as an impediment to the evolution of the new lawyer. Her starting point for this argument is based on her assumption that legal education is “...critical to both the creation and reinforcement of the dominant norms and values of the legal profession”.<sup>22</sup> Accordingly a legal education that largely remains in thrall to traditional models of lawyering<sup>23</sup> by focusing on dispute resolution via adjudication, is therefore failing to respond to

19 Dame Hazel Genn above n 4; Michael Zander *The State of Justice* (Sweet & Maxwell, London, 2000) at 41.

20 See, Civil Procedure Act 2010 (Vic), part 3.1 Pre-litigation requirements; Civil Dispute Resolution Act 2011 (Cth), s 4(1); Civil Procedure Rules 1998 (United Kingdom), r 1.4.

21 Julie Macfarlane “The Evolution of the New Lawyer: How Lawyers are Reshaping the Practice of Law” (2008) 1 *Journal of Dispute Resolution* at 61, citing Mark Galanter “The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts” (2004) 1 *Journal of Empirical Legal Studies* at 459.

22 Macfarlane, above n 1, at 224.

23 *Ibid.*

the phenomenon of the vanishing trial and range of settlement processes encouraged by reforms to the civil justice system. In this context she poses a big question “how do we understand the relationship between legal practice and legal education?”<sup>24</sup> The question is of course rhetorical as she forcefully argues that in order to remain relevant legal education must reflect the contemporary practice of law.

To achieve this end students should be exposed to learning experiences which promote client centred creative problem solving approach to the resolution of disputes. Substantive knowledge of the law, which is critical, must be supplemented by communication skills and exposure to the theory and practice of effective negotiation strategies and a broad range of dispute resolution processes. She emphasises that vocational skills based training must be integrated with a theoretical appreciation of the relative merits of, in particular, consensual dispute resolution processes. Legal education which does not consider the emerging professional identity of the new lawyer as a conflict resolution advocate is considered to be remote from the current practice of law. Although this view will be controversial in the academy, as many legal academics view the practice of law as distinct from teaching the law to be beyond the role of teachers. Perhaps the real question is how should conflict resolution skills be incorporated into the curriculum? Stand alone or integrated into core subjects? She does not appear to draw a firm conclusion on this point although she is absolutely clear that “legal education must teach and promote reflective practice and the related capacity for problem solving”.<sup>25</sup> She is surely correct to conclude that “information transmission via lectures that deal extensively with legal rules but ignore dispute resolution, client service, and professional attitudes provides neither reflective practice nor problem solving”.<sup>26</sup>

As a student and teacher of Dispute Resolution and Legal Ethics I particularly appreciated the way in which the author constructed the professional identity and role of the new lawyer around the idea of conflict resolution advocacy. There is, and always has been, much more to advocacy than the adversarial, partisan presentation of legal rights captured by the hired gun model of lawyering. The reconceptualisation of the role of lawyers as dispute resolvers rather than adversarial gladiators does raise problems in relation to client autonomy and ethical boundaries relating to settlement and processes of settlement, such as the exchange of information, which are simplified by the traditional adversarial model of lawyering.

It is critical to note that these challenges are inherent in the reforms to the civil justice system which typically promote settlement as the primary form of dispute resolution. Conflict resolution advocacy provides a valuable framework to critically consider the scope and application of modern reforms. Perhaps understandably given the settlement orientation of the book, little mention is made that an important feature of the reforms is also to enhance access to court based adjudication. An interesting question might be how would the new lawyer respond to the requirement to act ‘cooperatively’? Given the importance which Professor Macfarlane attributes to knowledge of substantive legal rights, exchange of information and importance of protecting weak and vulnerable clients, it is not difficult to imagine that the skills of the new lawyer adapt to the intention of policy makers to mitigate adversarial litigation culture.

Many law students, practitioners and judges are likely to find this important book inspirational and helpful in the development of practice which conforms with institutional rules attempting to

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24 Macfarlane, above n 1, at 225.

25 *Ibid*, at 230.

26 *Ibid*.

modify the role of lawyers, and judges, in resolving disputes. Some legal academics will be disturbed and perhaps surprised by the idea that legal education should be concerned with the changing realities of legal practice. After all the aims of law school are typically broader than preparing students for legal practice and the experience of many academics increasingly does not include the exigencies of practicing law. This is perhaps the context for Kronman's view that "... [i]ts schools now encourage a style of scholarly work that is increasingly remote from - even hostile to - the concerns of practicing lawyers".<sup>27</sup>

Les Arthur\*

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27 Anthony Kronman *The Lost Lawyer: Failing Ideals of the Legal Profession* (Harvard University Press, Massachusetts, 1993) at 353.

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## BOOK REVIEW

JUDICIAL RECUSAL – PRINCIPLES, PROCESS AND PROBLEMS by Grant Hammond (Hart Publishing, Oxford, 2009) 183 pp, hardback rrp NZ \$90.

I recall meeting Grant Hammond – officially The Honourable Sir Robert Hammond, KNZM - for the first time at the induction ceremony of former colleague Professor Peter Spiller as a District Court Judge in Hamilton in 2009. During the course of our chat, we had identified a mutual interest in judicial matters, and the discussion had turned to recusal. I mentioned that I had recently authored an article on judicial recusal in South Africa; Sir Grant replied that he had just written a hardcover book on recusal in the Commonwealth. Hammond 1, Olivier 0.

Self-deprecating humour aside, Grant Hammond's book is on a topic that hits at the heart of the administration of justice: judicial impartiality and independence. The foreword by Sir Stephen Sedley, a former Lord Justice of Appeal, gets to the nub of the recusal philosophy:

Fear and favour are the enemies of independence, which is a state of being. Affection and ill-will undermine impartiality, which is a state of mind. But independence and impartiality are the twin pillars without which justice cannot stand, and the purpose of recusal is to underpin them. That makes the law relating to recusal a serious business.<sup>1</sup>

It is a serious business indeed. Recently, judicial recusal has attracted much attention from media and the public in many countries, including New Zealand. The judicial misconduct case against former Supreme Court Justice William McLeod (Bill) Wilson for failing to recuse himself in the Court of Appeal *Saxmere wool growers' case* because of his having a personal and business relationship with the Wool Board's counsel Alan Galbraith QC, captivated the nation. The Supreme Court ruled in *Saxmere (No 1)*<sup>2</sup> that there had been no apparent bias on the part of Justice Wilson in the aforementioned case, but subsequently – in *Saxmere (No 2)*<sup>3</sup> - the Supreme Court recalled its earlier decision after further information came to light. Wilson resigned in 2010 before the complaints against him could be investigated.

It is accepted that there could sometimes be a measure of bias on the part of a judge, but the question that lies at the heart of recusal is what the line is between acceptable and unacceptable bias? How thick is this line? Hammond's book is useful in examining not only both sides of the line, but also the width and thickness of the line itself.

The author is eminently qualified to write this book. He is well-known not only as a judge of the Court of Appeal in New Zealand, but also as a former practitioner and academic of note, including service as Dean of Law at the University of Auckland. He currently serves as President of the Law Commission. His career exemplifies the three legs of the triangle that makes an ideal lawyer – academic, practitioner and judge. He was also the author of the Court of Appeal's judgment in *Muir v Commissioner for Inland Revenue*,<sup>4</sup> arguably New Zealand's leading judicial recusal case before the *Saxmere* cases.

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1 Foreword.

2 *Saxmere Company Ltd v Wool Board Disestablishment Company Ltd* [2010] 1 NZLR 35.

3 *Saxmere Company Ltd v Wool Board Disestablishment Company Ltd* (No 2) [2010] 1 NZLR 76.

4 *Muir v Commissioner for Inland Revenue* [2007] 3 NZLR 495 (CA).

The book is attractively presented. It is in hardcover with a simple background of navy blue. It creates a professional impression that signifies the book as one of gravitas - it is clearly not a student textbook. Inside, the typesetting, text layout and font size aid in making the main text and footnotes easy to read. The margins are justified, which gives a sleek, well-rounded appearance.

The book is divided conveniently into five parts: Introduction; Principles; Process; Some Specific Problem Areas; and the Future of Recusal Law. Each part represents a theme, and has its own chapters. The largest number of pages is devoted to the section on principles, which outlines the law as it presently stands. In total, there are nineteen chapters in the book. The book also contains six appendices, a bibliography, an index and a table of cases.

The book is a monograph, the first one on judicial recusal in the British Commonwealth. It adopts a case law approach to the discussion and analysis of judicial recusal. In his own words, Sir Grant's methodological approach has been to articulate as best he can "the central concepts that courts have seen fit to employ around the common law world, and offer some commentary on them."<sup>5</sup> He does this by addressing the following broad themes: from where the idea of judicial recusal came; how the essential concepts have developed; where the doctrine of judicial recusal presently rests in the common law world; and what, if anything, can be done to improve this doctrine.<sup>6</sup> He issues a number of disclaimers along the way, stating for example that it "is impossible to collate and critically examine all of the law on this topic in several countries".<sup>7</sup> He says that he will be content if the book "stimulates further research and close discussion on a subject matter of importance not just to judges but to the administration of justice, and hence the public at large".<sup>8</sup> I think he can rest assured, for the book is more than merely an initiator of debate; it is a text that makes a contribution to knowledge and understanding in the field. The book's benefit lies in its "big picture" approach to the subject matter, but without losing sight of the detailed pixels that constitute the picture.

Hammond calls recusal a "distinctly difficult and controversial area of the law".<sup>9</sup> He regards an understanding of it as important because it "helps clarify both what the adjudication of legal disputes is all about, and the essential nature of judging within the common law tradition. In short, to understand this doctrine is to better appreciate the judicial function and the role of the judge in society."<sup>10</sup> A particular challenge in studying judicial recusal, says Hammond, is the absence of so-called black letter law and the prevalence of practices, which are not easily determined. As he puts it, "ascertaining what 'really happens' behind judicial doors is not altogether easy."<sup>11</sup> Despite this challenge, Hammond provides a useful comparison between approaches within selected British Commonwealth jurisdictions, which are predominantly common law based, and the United States, which is statute based. There are commonalities of feature between the jurisdictions which Hammond illustrates by answering the following questions: when should a judge withdraw from a given case to which he or she has been assigned? Who decides when that judge should withdraw? What process or procedures should be utilised by the decision maker? This approach makes the

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5 Hammond at xii.

6 Ibid, at xii.

7 Ibid, at 11.

8 Ibid, at xii.

9 Ibid, at xii.

10 Ibid, at 3.

11 Ibid, at xii.

book understandable reading. The reader is not challenged to decipher first an inaccessible text before finding its hidden meaning.

Following an introduction of the essential questions in Part A, in Part B Hammond deals with the principles of judicial recusal law as they apply in the selected jurisdictions. Hammond takes the reader on a journey from past, to present, to future. Along the way, he explains the origins of judicial recusal, including the influence of canon law and the juror disqualification rules on its development. His technique of explaining principles through the cases is effective – and entertaining. For example, the case of *Between the Parishes of Great Charte and Kennington*<sup>12</sup> illustrates the farcical consequences that ensue when the principle of disqualification for direct pecuniary interest goes too far. In this case, which dealt with taxes, the judge was disqualified because of his status as a taxpayer.

In the automatic disqualification chapter, Hammond discusses pecuniary interest, and connection with the cause of the party to the litigation, as grounds for disqualification. His analysis of the impact of *Pinochet (No 2)*<sup>13</sup> is interesting, in particular his views on the mixed reception of the judgment in the United Kingdom and the impact of the *Ebner*<sup>14</sup> judgment of the Australian High Court on the further development of the test for judicial recusal in other jurisdictions. His emphasis on the importance of a jurisdiction's particular context is sound.

A common aspect of the rules governing recusal in the various Commonwealth jurisdictions is that actual bias is not required to meet the standard for recusal; apparent bias will suffice. This is discussed in Chapter 5. The test for apparent bias has been subjected to criticism – from it being too vague and difficult to apply, to it being too concerned with formality and appearance and less with actualities.<sup>15</sup> Hammond traces the less than straightforward development of this test in the United Kingdom, from confusion whether the test was one of a real likelihood of bias or the lesser reasonable suspicion of bias, through the recent cases of *Gough*<sup>16</sup> and *Pinochet (No 2)*, to its culmination in the reformulation of the test by the House of Lords in *Porter v Magill*.<sup>17</sup> In the United Kingdom, the test is now a hybrid one of “whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the judge was biased”.<sup>18</sup> In Australia post-*Ebner*, Canada, and New Zealand - after *Muir* in which the test in *Gough* was rejected, and *Saxmere (No 1)* - the test remains one of reasonable apprehension of bias. Hammond states that the test in South Africa is one of reasonable suspicion of bias, but the South African Constitutional Court has ruled that the use of the term “suspicion” in describing the test is inappropriate and that the test is in fact one of reasonable apprehension of bias.<sup>19</sup>

Following a discussion of *Muir*, Hammond expresses concern about a trend whereby “the legal profession has too often endeavoured to impugn a significant judgment after the event, by investigating the judge’s private affairs to see whether there might be something which can possibly

12 *Between the Parishes of Great Charte and Kennington* (1726) 2 Str 1173; 93 ER 1107 (KB).

13 *R v Bow Street Metropolitan Stipendiary Magistrate and Ors, ex p Pinochet Ugarte (No 2)* [2000] 1 AC 119 (HL).

14 *Ebner v Official Trustee in Bankruptcy* (2001) 205 CLR 337.

15 Hammond at 52.

16 *R v Gough* [1993] AC 646 (HL).

17 *Porter v Magill* [2002] 2 AC 357 (HL).

18 Hammond at 37.

19 See *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* [1999] ZACC 9; 1999 (4) SA 147 (CC); 1999 (7) BCLR 725 (CC) (*SARFU II*) at [30] and *S v Basson* [2005] ZACC 10; 2007 (3) SA 582 (CC); 2005 (12) BCLR 1192 (CC) (*Basson II*) at [27].

'tip up' the judgment."<sup>20</sup> He discusses this matter further in Chapter 10, under Part C: Process, but suggests that in this respect a judge should err on the side of candour:

Many judges will query why they should hand counsel a stick, with which they can then be beaten. But in this context there is a question of judicial ethics, as well as a prudential concern for judicial stewardship of the litigation which is in front of them.<sup>21</sup>

The problem with this approach, potentially, is the extent of the disclosure. How much disclosure would be sufficient to meet this requirement?

In Chapter 6, Hammond provides a concise overview of the application of the federal laws that apply to judicial recusal in the United States of America. Judicial recusal has become a common trial strategy and it is used often by lawyers to have a judge changed to one who may be more sympathetic to their client's case. In federal courts and some state courts, recusal is regulated by statute. Judges of the federal courts enjoy tenure and are not subject to popular election, unlike many judges in United States state courts. An interesting difference from the British Commonwealth is that alleged bias must arise from extra-judicial events, in other words, from things occurring outside the courtroom. Similar to most Commonwealth jurisdictions, the test is a reasonable one and requires the application of an objective standard; also, it is generally the impugned judge who decides the matter.

Part C deals with process. Hammond calls it the "least developed, but arguably the most important, aspect of recusal law ...".<sup>22</sup> He lists a number of criteria that contribute to procedural justice.<sup>23</sup> To his mind, recusal processes at present fall short of many of these.<sup>24</sup> Primary among these is the adjudication of the recusal application by the impugned judge himself. For a judge, an accusation of bias or lack of impartiality is the unkindest cut of all. However, judges should not become over-sensitive when they become the subject of a recusal application, especially when the application is devoid of merit. The customary argument in favour of this practice is that the impugned judge is in the best position to adjudicate the matter as he is best apprised of the facts and the circumstances. He is privy to the information that is vital to the determination of the issue. It cannot be denied that there are peculiar difficulties with this practice. Hammond deals with the vexing question of whether the challenged judge should decide the matter himself, in Chapter 9 where he makes some specific recommendations (see below for discussion).

Most recusal applications are made in courts of first instance, but this trend seems to be extending to appellate courts also. A particularly difficult problem lies with the recusal of judges of a country's top court, especially if it sits en banc. It is far more challenging to find a substitute for a judge of a court of final appeal, than a trial court. In New Zealand, the Supreme Court Act 2003 provides for the appointment of acting judges in the event of recusal; the replacing judge is generally a retired judge of the Supreme Court or Court of Appeal. However, in some other jurisdictions where legislation does not provide for substitution in the event of recusal, the matter is not so easily resolved. The contrast between the way recusal operates in practice at the level of final appellate court in the United Kingdom and the United States is illustrated effectively using the examples of Lord Hofmann and Justice Antonin Scalia. It is generally the prerogative of an

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20 Hammond at 47.

21 Ibid, at 90.

22 Ibid, at 71.

23 Ibid, at 73-74.

24 Ibid, at 75.

individual Justice to decide whether or not he will sit in a case, a decision which is not subject to review, although the Supreme Court does have a recusal policy (attached to the book as Appendix D).

Hammond deals with some specific problem areas in part D, of which “prior viewpoints” (Chapter 16) is most insightful. In 39 United States states, judges are selected or retained by some sort of public election. It is unfortunate that Hammond does not discuss the election factor’s impact on recusal in more detail. His views on questions such as whether campaign financing impact on the way judges rule, or whether judges should recuse themselves automatically if a campaign contributor appears in a case before the judge, would have been instructive. However, in Appendix F, Hammond refers briefly to the recent case of *Caperton v AT Massey Coal Company*<sup>25</sup> in which the United States Supreme Court considered whether a judge of the Supreme Court of Appeals of West Virginia to whose judicial election campaign a party to the proceedings had contributed more than USD\$3 million, should have recused himself from the case.

A further interesting discussion deals with extra-judicial writings. Do a judge’s extra-curial speeches or writings on a topic disqualify him or her from hearing a matter dealing with that topic? Does this mean that Hammond should recuse himself from all future recusal cases simply because he has authored a text on the subject which includes a statement of his views? The reasonable answer would be that analysis of arguments is acceptable, but not an outright rejection of potential arguments. As long as the judge leaves his mind open to convincing, there should be no reasonable apprehension of bias.

In Part E, attention is given to the future of recusal law. In this section, Hammond suggests possible reforms. He believes that objectivity on the part of the judge is essential and that everything that can practically be done to ensure it, should be done: “Law cannot hope to sustain its internal and external legitimacy in the modern political society it serves without objectivity.”<sup>26</sup> As a result, he does not favour “personal judicial determination” at trial court level. He calls the current position “quite indefensible in this day and age”<sup>27</sup> and that “[i]f we assume a visitation from an intergalactic jurist on a fact-finding mission around our galaxy, it is difficult to see how such a jurist would not feel bound to report this feature of recusal jurisprudence as being strange to the point of perversity.”<sup>28</sup> Hammond favours a system whereby the recusal application should go to the impugned judge first for resolution, but in the event of a continued dispute there should be mechanisms for review of that decision by another judge or panel. He suggests a number of forms that these mechanisms could take. At appellate court level, particularly courts of final appeal, Hammond again does not favour an application of the “impugned judge decides” rule. He supports the view that it must be “for the court itself to be satisfied that it is constituted in such a way that it will exercise its judicial functions both impartially and with the appearance of impartiality.”<sup>29</sup> This is clearly the most sensible approach. (His suggested solution to the “who decides?” problem is outlined in Appendix E.) He makes proposals also for other reforms, including mechanisms for the replacement of disqualified judges. He suggests, correctly it is submitted, that the recusal process is a matter best regulated by judges themselves, rather than by legislators and legislation. The reforms he has proposed should be effected by judges, therefore, not legislators.

25 *Caperton v AT Massey Coal Company* 129 SCt 2252 (2009).

26 Hammond at 146.

27 Ibid, at 148.

28 Ibid, at 144.

29 Ibid, at 113.

It is a pity that the book's purview is not wider. It would have benefited scholarship greatly had the book focused attention not only on first-world countries in the Commonwealth, but had considered the position in developing countries in the Commonwealth also. South Africa and India come to mind immediately as possibilities. The chapter on prior viewpoints, in particular the section on political connections, could have benefited from a discussion of the comprehensive South African case law on this issue. Also, some chapters are somewhat short considering their importance, such as the one on the rule of necessity (Chapter 12).

In the final analysis, the book represents high scholarship of the kind that one would expect from an experienced senior judge and academic. Although the book has a somewhat academic bent, it has a sufficiently practical focus to appeal to a cross-section of readers. It would be of interest and value to anyone involved in the administration of justice in whatever forum, including judges, advocates and tribunal members. I recommend it very highly.

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## BOOK REVIEW

SEEING THE WORLD WHOLE – ESSAYS IN HONOUR OF SIR KENNETH KEITH, edited by Claudia Geiringer and Dean R Knight (Victoria University Press, 2009) paperback rrp NZ\$60.

It is without any sense of hyperbole that the Rt Hon Judge Sir Kenneth Keith ONZ KBE QC is referred to on the back cover of the book as “one of New Zealand’s most eminent jurists”.<sup>1</sup> This collection of essays in honour of Sir Kenneth is published by Victoria University Press (in association with the New Zealand Centre for Public Law and with the assistance of the Law Foundation) to mark his retirement from the New Zealand Supreme Court, to honour his distinguished career as an academic, law reformer legal advisor, international advocate and judge, and to celebrate his appointment to the International Court of Justice – the first and only New Zealander ever to be so appointed. Any book which seeks to honour an individual with such a varied and outstanding career would run the risk of providing a disparate array of material on topics that are not necessarily able to be discussed within one volume. This book, based on essays that were prepared for a conference, “From Professing to Advising to Judging: A Conference in Honour of Sir Kenneth Keith” held in August 2007, manages to fulfil its brief by honouring Sir Kenneth with a collection of scholarly works that divulge no hint of disconnectedness. It is probably somewhat unusual because it is a book in which academics, law reformers, legal advisors, international advocates and judges, as well as law students, will all find something of interest.

Many of the contributors to the book begin their remarks or essays with an anecdote about their (often long-standing) relationship with Sir Kenneth Keith. In the same vein, this author will begin by noting that she has only had one point of contact with Sir Kenneth: in the context of a seminar on international courts and tribunals held in Wellington in 2004 Sir Kenneth gave a wonderful presentation on the litigation of disputes before the International Court of Justice. In the same context, the reviewer had the pleasure of meeting Sir Kenneth during a function at Government House. Other than sharing the same birthday, and an interest in international law, there is nothing much in common and the reviewer is certainly not qualified to assess his contribution to international law. Nevertheless, the opportunity of reading (and keeping) this book could not be passed up and so the following comments are humbly offered. The book is broadly divided into nine sections, within each of which there are several remarks and/or essays authored by a virtual “who’s who” of the New Zealand legal fraternity as well as several notable scholars from abroad. The first section consists of a Mihi from Paul Meredith<sup>2</sup> and an opening address from Dame Sian Elias.<sup>3</sup> The Chief Justice refers to Sir Kenneth’s early writings on constitutionalism, sovereignty, human rights and the relationship between international law and domestic law. In her eloquent address, the Chief Justice observes that “one of the gifts Sir Kenneth has is to see connections where

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- 1 Claudia Geiringer and Dean R Knight (eds) *Seeing the Word Whole – Essays in Honour of Sir Kenneth Keith* (Victoria University Press, Wellington, 2008) at rear cover.
  - 2 Paul Meredith “Mihi” in Claudia Geiringer and Dean R Knight (eds) *Seeing the Word Whole – Essays in Honour of Sir Kenneth Keith* (Victoria University Press, Wellington, 2008) at 2-3.
  - 3 *Ibid.*, at 3-13.

others see divisions.”<sup>4</sup> Although that observation is a reference to the connections Sir Kenneth saw between international and domestic sources of law, it is a pithy summary of the overarching theme of the book. The Chief Justice ends her opening address by suggesting that Sir Kenneth’s work in life has been “To demonstrate where the constitution is to be found, how international law impacts on domestic law, and to speculate about where it is heading.”<sup>5</sup>

The second section is called “Constitutional Foundations”; it includes brief remarks from Sir Ivor Richardson<sup>6</sup> and essays by David Feldman,<sup>7</sup> Janet McLean<sup>8</sup> and Claudia Geiringer.<sup>9</sup> Each of the essays is an impressive scholarly contribution in and of itself. Professor Feldman’s essay discusses constitutionalism in international law with an interesting analysis of the growing tension between United Nations agencies, member states and regional organisations over constitutional standards; Professor McLean explores the meaning of “the Crown” with an historical and a contemporary analysis, using a reference to “the Crown” by former Associate Minister of Māori Affairs, Tariana Turia, as her starting point; and Geiringer provides a close examination of Bill of Rights Act methodology with a particular emphasis on section 6 of the New Zealand Bill of Rights Act 1990 and the decision of *R v Hansen*.<sup>10</sup> Within the section there is, fittingly, a mixture of international and domestic constitutional law issues. Although all three essays have been published elsewhere<sup>11</sup> their reproduction fits well with the theme of the book and an additional airing of such scholarly works, exposing them to a wider audience, is valuable.

Opening remarks from Alison Quentin-Baxter,<sup>12</sup> in which she discloses her role in introducing Sir Kenneth to the realm of international law in 1959, and a closing commentary by Gerard van Bohemen,<sup>13</sup> in which he discusses Sir Kenneth’s contribution to the relationship between international and domestic law, as well as summarising changes in treating-making from a Ministry of Foreign Affairs perspective, bookend the third section, International Foundations. In between

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4 Right Honourable Dame Sian Elias “From Professing to Advising to Judging: Open Address” in Claudia Geiringer and Dean R Knight (eds) *Seeing the Word Whole – Essays in Honour of Sir Kenneth Keith* (Victoria University Press, Wellington, 2008) at 4.

5 Ibid, at 13.

6 Sir Ivor Richardson “Remarks from the Chair” in Claudia Geiringer and Dean R Knight (eds) *Seeing the Word Whole – Essays in Honour of Sir Kenneth Keith* (Victoria University Press, Wellington, 2008) at 16-17.

7 David Feldman “The Role of Constitutional Principles in Protecting International Peace and Security through International, Supranational and National Legal Institutions” in Claudia Geiringer and Dean R Knight (eds) *Seeing the Word Whole – Essays in Honour of Sir Kenneth Keith* (Victoria University Press, Wellington, 2008) at 17-47.

8 Janet McLean “Crown Him with Many Crowns: The Crown and the Treaty of Waitangi” in Claudia Geiringer and Dean R Knight (eds) *Seeing the Word Whole – Essays in Honour of Sir Kenneth Keith* (Victoria University Press, Wellington, 2008) at 48-68.

9 Claudia Geiringer “The Principle of Legality and the Bill of Rights Act: A Critical Examination of *R v Hansen*” in Claudia Geiringer and Dean R Knight (eds) *Seeing the Word Whole – Essays in Honour of Sir Kenneth Keith* (Victoria University Press, Wellington, 2008) at 69-99.

10 *R v Hansen* [2007] 1 NZLR 1 (NZSC).

11 (2008) 6 NZJPIL 1, 35 and 161, respectively.

12 Alison Quentin-Baxter “Remarks from the Chair” in ‘International Foundations’ in Claudia Geiringer and Dean R Knight (eds) *Seeing the Word Whole – Essays in Honour of Sir Kenneth Keith* (Victoria University Press, Wellington, 2008) at 100.

13 Gerard van Bohemen “Commentary: Sir Ken’s Contributions to the Making of International Law - Observations from a Practitioner” in Claudia Geiringer and Dean R Knight (eds) *Seeing the Word Whole – Essays in Honour of Sir Kenneth Keith* (Victoria University Press, Wellington, 2008) at 145-148.

those two individuals' comments are essays by Benedict Kingsbury,<sup>14</sup> Treasa Dunworth<sup>15</sup> and John McGrath.<sup>16</sup> Professor Kingsbury discusses the concept of "global administrative law"<sup>17</sup> and argues that national courts will and should give more weight to rules or decisions produced by external entities providing those entities meet requirements of "publicness".<sup>18</sup> He envisages "publicness"<sup>19</sup> to include considerations such as the principles of legality, rationality, proportionality as well as the rule of law and human rights. Essentially, he is focusing on the extent to which a court can or cannot review the actions of an institution which is not part of the legal system of the court and he is (I think) putting forward a conceptual framework, a "publicness criteria",<sup>20</sup> which domestic courts can utilize. Treasa Dunworth's essay delves into the earlier academic writings of Sir Kenneth and focuses on two key pieces which he wrote in the 1960s regarding the relationship between international and domestic law. Dunworth's essay begins by summarising usefully what Sir Kenneth wrote before going on to observe that Sir Kenneth's thinking was "ahead of its time".<sup>21</sup> Dunworth focuses on two themes that were a constant feature of Sir Kenneth's work and which she says remain relevant today: "the need to see the international/domestic relationship holistically and the equivocal nature of dualism".<sup>22</sup> The third and final essay, by McGrath J, provides more than just commentary on the preceding two essays by Kingsbury and Dunworth. McGrath J provides valuable insight into Sir Kenneth's judicial legacy in the context of discussing three seminal cases, namely, *Attorney-General v Transport Accident Investigation Commission*<sup>23</sup> (the *Air Line Pilots' Association* case), *Wellington District Legal Services Committee v Tangiora*<sup>24</sup> and *Sellers v Maritime Safety Inspector*.<sup>25</sup>

The fourth section of the book is entitled "Methodological Foundations". The opening remarks from Dr George Barton QC<sup>26</sup> allude to the process by which Sir Kenneth was poached from the Ministry of External Affairs and appointed as a junior law lecturer at Victoria University; he also refers to the "hopelessly academic topic"<sup>27</sup> that Sir Kenneth chose for his LLM. 'Methodological Foundations' reflects on Sir Kenneth's contribution to the way that law is taught in New Zealand

14 Benedict Kingsbury "Global Administrative Law: Implications for National Courts" in Claudia Geiringer and Dean R Knight (eds) *Seeing the Word Whole – Essays in Honour of Sir Kenneth Keith* (Victoria University Press, Wellington, 2008) at 101-125.

15 Treasa Dunworth "Law Made Elsewhere: The Legacy of Sir Ken Keith" in Claudia Geiringer and Dean R Knight (eds) *Seeing the Word Whole – Essays in Honour of Sir Kenneth Keith* (Victoria University Press, Wellington, 2008) at 126-135.

16 John McGrath "Commentary: International Law's Recent Influence on Domestic Court Decisions in New Zealand" in Claudia Geiringer and Dean R Knight (eds) *Seeing the Word Whole – Essays in Honour of Sir Kenneth Keith* (Victoria University Press, Wellington, 2008) at 136-144.

17 Benedict Kingsbury, above n 14, at 101.

18 *Ibid.*, at 103.

19 *Ibid.*

20 *Ibid.*

21 Treasa Dunworth, above n 15, at 129.

22 *Ibid.*

23 *Attorney-General v Transport Accident Investigation Commission* [1997] 3 NZLR 269 (CA).

24 *Wellington District Legal Services Committee v Tangiora* [1998] 1 NZLR 129 (CA).

25 *Sellers v Maritime Safety Inspector* [1999] 2 NZLR 44 (CA).

26 Dr George Barton "Remarks from the Chair" in 'Methodological Foundations' in Claudia Geiringer and Dean R Knight (eds) *Seeing the Word Whole – Essays in Honour of Sir Kenneth Keith* (Victoria University Press, Wellington, 2008) at 150.

27 *Ibid.*

through essays contributed by John Burrows,<sup>28</sup> Ben Keith<sup>29</sup> and Dean Knight.<sup>30</sup> Professor Burrows begins his contribution with an anecdote about teaching an LLM course at Canterbury in international law at the age of 24 and having his international law exam paper externally assessed by Sir Kenneth (Professor Burrows self-deprecatingly remarks that he did not subsequently teach international law). As with all the contributors to the book, Professor Burrows comments on Sir Kenneth's "breadth and depth of knowledge"<sup>31</sup> but he also provides interesting analysis on the importance of teaching statute law in law schools. He argues forcefully for a compulsory first year course in legislation. Harvard Law School has recently revamped its curriculum to include such a course. There is much in his essay that should cause all law teachers to pause and reflect, including his statement that "studying statutes in the context of a specific subject is not the same as the study of statutes as a type of law".<sup>32</sup> The title of Ben Keith's essay, "Seeing the World Whole"<sup>33</sup> was appropriated by the editors for the overall book. The essay is subtitled "Understanding the Citation of External Sources in Judicial Reasoning."<sup>34</sup> Its focus is explained by noting that Sir Kenneth:<sup>35</sup>

has been associated to a substantial, and arguably unique, degree with the citation of international and comparative law and, more broadly, with the invocation of external material in legal reasoning.

Ben Keith remarks that "Sir Kenneth has repeatedly exhorted lawyers to see the world 'steadily and see it whole.'"<sup>36</sup> As with the other contributions, justice cannot be done to this excellent essay in such a confined space. The section on 'Methodological Foundations' is brought to a close with an article on administrative law by Dean Knight. He poses the question: What is the appropriate standard of review that the courts should adopt when reviewing decisions of public bodies and officials? To cut a long story short, his conclusion is that "a sliding-scale of reasonableness or different standards of review for matters of substance represents, or soon will represent, the orthodox approach in New Zealand."<sup>37</sup>

The three sections of the book that broadly mirror the three areas of Sir Kenneth's working life professing, advising and judging, are preceded by a "Special Address" from Rt Hon Sir Stephen Sedley,<sup>38</sup> which discusses the constitutional ideas of the Levellers in the English Civil War. This address, to paraphrase Glazebrook J, speaks to Sir Kenneth's interest in everything and everyone

28 John Burrows "Legislation as a Degree Course" in Claudia Geiringer and Dean R Knight (eds) *Seeing the Word Whole – Essays in Honour of Sir Kenneth Keith* (Victoria University Press, Wellington, 2008) at 151-162.

29 Ben Keith "Seeing the World Whole: Understanding the Citation of External Sources in Judicial Reasoning" in Claudia Geiringer and Dean R Knight (eds) *Seeing the Word Whole – Essays in Honour of Sir Kenneth Keith* (Victoria University Press, Wellington, 2008) at 163-179.

30 Dean R Knight "A Murky Methodology: Standards of Review in Administrative Law" in Claudia Geiringer and Dean R Knight (eds) *Seeing the Word Whole – Essays in Honour of Sir Kenneth Keith* (Victoria University Press, Wellington, 2008) at 180-215.

31 John Burrows, above at n 28, at 151.

32 John Burrows, above n 28, at 152.

33 Ben Keith, above n 29, at 163.

34 Ibid.

35 Ibid, at 165.

36 Ibid, at 166.

37 Dean R Knight, above n 30, at 181.

38 Sir Stephen Sedley "The Sparks in the Ashes: The Constitutional Ideas of the Levellers in the English Civil War" in Claudia Geiringer and Dean R Knight (eds) *Seeing the Word Whole – Essays in Honour of Sir Kenneth Keith* (Victoria University Press, Wellington, 2008) at 219-228.

and his ability to draw connections between the past and the present that might escape the notice of others.<sup>39</sup> Out of the three following sections of the book, the one of particular interest to this reader was the section devoted to ‘Professing.’ There are some introductory remarks from Tony Smith<sup>40</sup> followed by essays from Peter Hogg,<sup>41</sup> Joanna Mossop,<sup>42</sup> Jacinta Ruru<sup>43</sup> and Michael Taggart.<sup>44</sup> At the risk of neglecting the equally important sections on Advising and Judging, some of the points raised in the Professing sections are worthy of closer attention. Professor Smith mentions, inter alia, the role of the law faculty within the university academy more generally and the extent to which governments control universities. Professor Hogg’s essay reflects on the ways in which law schools have changed in relation to fees, funding, enrolment, curriculum and degree structure. Joanna Mossop’s article examines the place of international law within the law schools’ curriculums as well as the role of women in New Zealand legal education. Aside from those two specific areas, she raises a number of questions which require further examination. In discussing the wider community role of the legal academy, Mossop asks whether legal academics could, and should play a greater part in public debates and pursue a more proactive relationship with the media. The first thing that came to this reader’s mind when reading Mossop’s call for a “more proactive relationship with the media”<sup>45</sup> was an opinion piece published in a Sunday newspaper by Steve Braunias in which he mocked an academic at another law faculty for his (in Braunias’ view) too frequent contributions to legal issues via the media. Carving out a greater role in public debates for law academics has to be a two way street: if the media, or certain people within it, are unable to see academics’ comments for what they are (an attempt to contribution to greater public understanding?) then it is probably unlikely that law lecturers will rush en masse to take up Mossop’s call and pursue a more proactive relationship with the media.

In another section of her essay, Mossop asks whether law schools are servicing the needs of the profession in training future lawyers. She observes that in the United States, clinical legal education is an important part of law schools. She also notes that:<sup>46</sup>

while [clinical courses] are popular with students and provide excellent training, one problem is that clinical law professors are often considered to be inferior to traditional law professors in terms of status and salary.

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39 Right Honourable Susan Glazebrook “Remarks from the Chair” in ‘Special Address’ in Claudia Geiringer and Dean R Knight (eds) *Seeing the Word Whole – Essays in Honour of Sir Kenneth Keith* (Victoria University Press, Wellington, 2008) at 218.

40 ATH Smith “Remarks from the Chair” in ‘Professing’ in Claudia Geiringer and Dean R Knight (eds) *Seeing the Word Whole – Essays in Honour of Sir Kenneth Keith* (Victoria University Press, Wellington, 2008) at 230-232.

41 Peter W Hogg “Legal Education at Victoria University of Wellington” in Claudia Geiringer and Dean R Knight (eds) *Seeing the Word Whole – Essays in Honour of Sir Kenneth Keith* (Victoria University Press, Wellington, 2008) at 233-235.

42 Joanna Mossop “International Law, Practitioners, and Women in New Zealand Legal Education” in Claudia Geiringer and Dean R Knight (eds) *Seeing the Word Whole – Essays in Honour of Sir Kenneth Keith* (Victoria University Press, Wellington, 2008) at 236-242.

43 Jacinta Ruru “Legal Education and Maori” in Claudia Geiringer and Dean R Knight (eds) *Seeing the Word Whole – Essays in Honour of Sir Kenneth Keith* (Victoria University Press, Wellington, 2008) at 243-249.

44 Michael Taggart “Some Impacts of the PBRF on Legal Education” in Claudia Geiringer and Dean R Knight (eds) *Seeing the Word Whole – Essays in Honour of Sir Kenneth Keith* (Victoria University Press, Wellington, 2008) at 250-259.

45 Joanna Mossop, above n 42, at 240.

46 Ibid.

She has touched on an important issue since focusing on clinical legal education is undoubtedly part of the law schools' core business, yet in a PBRF environment, law lecturers who focus on clinical legal education may expose themselves to a career path which provides less scope for publication, and hence, promotion.

One of the matters Mossop touches on is the under-representation of women in senior ranks within New Zealand universities. She refers to her own faculty at Victoria, where only one out of eight law professors are women, but she does not take the issue further and compare all law faculties across New Zealand which would have been interesting. A cursory glance at academic staff listings on websites shows that the number of women in the senior ranks differs markedly from law school to law school. At Canterbury University, for example, none of the five professors are women; three out of five of their associate professors, four out of nine senior lectures and two out of four lecturers are women.<sup>47</sup> At the University of Otago and the University of Auckland, it is more difficult to assess the numbers at each rank since the listings of academic staff are organized alphabetically rather than according to "rank".<sup>48</sup> At the University of Waikato's Faculty of Law, women are represented fairly well in the senior and junior ranks: two out of five professors, two out of three associate professors, six out of twelve senior lecturers and six out of seven lecturers are women.<sup>49</sup>

Mossop's essay is followed directly by a contribution from Jacinta Ruru who focuses on legal education and Māori. She singles out the University of Waikato Faculty of Law for both approval and criticism. She states that "Waikato is probably the best of the bunch"<sup>50</sup> but communicates a feeling that it is also deficient in meeting the needs of Māori law students. Without wanting to take direct issue with Ruru's statements and sources, statistics provide information which may be relevant to the debate which she is seeking to have. Māori Student Profile Statistics, generated by the University of Waikato, show that in 1997, seven per cent of the total number of law students at the University of Waikato Faculty of Law identified themselves as Māori.<sup>51</sup> That figure has risen gradually over the past decade: from 2000-2005 it was nine per cent, in 2006 it was ten per cent, in 2007 it dipped to nine per cent and in 2008 it was back at ten per cent. These figures cannot be a basis for comparison without figures from other law schools, but they demonstrate that Māori students have faith in this Faculty of Law and are willing to come here (often from outside the region) to study. Another statistic that provides some degree of comfort is that, when compared to all other schools at the University of Waikato, the Faculty of Law has the highest re-enrolment rates for Māori students (and is twenty per cent above the overall average rate for Māori re-enrolment at the University of Waikato).<sup>52</sup> The final statistic mentioned here is the pass rate for Māori law students compared with all domestic students at the University of Waikato: in 2008, Māori law students had an 87 per cent pass rate compared with a university average of 81 per cent. This relatively high pass rate may be due in part to the Faculty of Law's genuine commitment to biculturalism and its desire to assist Māori law students which presently includes a Māori Mentoring

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47 University of Canterbury, School of Law, Academic Staff, <[www.laws.canterbury.ac.nz/people/academic.shtml](http://www.laws.canterbury.ac.nz/people/academic.shtml)>.

48 See University of Otago, Faculty of Law, Staff Profiles, <[www.otago.ac.nz/law/staff/index.html](http://www.otago.ac.nz/law/staff/index.html)> University of Auckland, Faculty of Law, Academic Staff, <[www.law.auckland.ac.nz/uaa/law/about/staff/academic\\_staff.cfm](http://www.law.auckland.ac.nz/uaa/law/about/staff/academic_staff.cfm)>.

49 Waikato Law Faculty Staff Directory, <[www.waikato.ac.nz/law/staff/](http://www.waikato.ac.nz/law/staff/)>.

50 Jacinta Ruru, above n 43, at 247.

51 University of Waikato Planning, Policy and Information Office "Māori Student Profile Statistics 2008", 16 September 2008, on file with the author.

52 *Ibid.*, at 11.

programme and a Māori Liaison Co-ordinator (Kaitakawaenga Māori) on the Faculty of Law staff. Statistics cannot tell the full story, but there is a debate to be had here and figures such as these can help inform that debate.

The final chapter in the ‘Professing’ section is written by Professor Taggart. It is an illuminating discussion of the impacts of PBRF on legal education in which Taggart identifies some of the concerns he has as a result of his experience on the PBRF’s Humanities and Law panel. Amongst many other things, he questions the effect of PBRF on the quality of research being published: he draws upon overseas studies which suggest that the number of publications may have increased (there) but the overall quality has declined. Although he does not state that PBRF has had the same effect in New Zealand, he leaves that inference open. Professor Taggart also discusses some questions of etiquette and ethics whilst lamenting the lack of discussion or writing about academic legal ethics. He observes that there is “increased competition for good material from books of essays, published conference proceedings, Festschriften and other memorial volumes, which contain almost as many contributions each year as the well established law journals”. Professor Taggart then proceeds to tackle the impact of PBRF on teaching and administration. He says:<sup>53</sup>

Providing incentives to do more research – something that many legal academics want to do - does cut across teaching...Promoting research over teaching - and let us make *no* mistake that is what the PBRF does “on the ground” – encourages (tempts) legal academics to cut corners on teaching preparation, course materials, care and concern for students and their learning, and supervisions.

It is simultaneously comforting to read this observation (since it validates coffee conversations that have presumably taken place amongst law academics across the country) and disconcerting. The disconcerting feeling was further amplified by Professor Taggart’s remarks about “the lowly book review, reluctantly admitted through the PBRF portal of ‘research’”.<sup>54</sup> Professor Taggart goes on to explain that “it is notoriously difficult to persuade academics to review law books”<sup>55</sup> and “[T]he incentives are to write your own book and not to delay by reviewing those of others, all the while hoping that someone will review your book when it is published”.<sup>56</sup>

With a pressing need to bring this review to a close, it is necessary to observe that after the section on Professing there are two further sections on ‘Advising’ and ‘Judging’, followed by a bibliography of Sir Kenneth Keith’s work. Perhaps Victoria University Press will consider a volume(s) of Sir Kenneth’s publications as a stand-alone work, a suggestion made by Dame Sian Elias in her opening address.<sup>57</sup>

In the Foreword, Claudia Geiringer and Dean Knight suggest that they want to celebrate Sir Kenneth as they thought he would most want to be celebrated – through advancing knowledge and understanding on the topics about which he cared. It is clear that they have fulfilled their brief (although one is left wondering what Sir Kenneth’s thoughts on PBRF would be).<sup>58</sup> This book is not only a fitting tribute to an outstanding academic but is an excellent source of scholarly work in

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<sup>53</sup> Michael Taggart, above n 44, at 255.

<sup>54</sup> *Ibid.*, at 258.

<sup>55</sup> *Ibid.*

<sup>56</sup> *Ibid.*, at 258.

<sup>57</sup> See Elias CJ “Opening Address” at 6: “I do hope that one day Sir Kenneth’s writings, or at least a representative collection of them, may be published as a collection.”

<sup>58</sup> This question is posed in the essay by Professor Taggart, see M Taggart “Some Impacts of the PBRF on Legal Education” at 259.

its own right. It is respectfully submitted that this book is an all round excellent read which will be sought out by anyone who is interested in the law.

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