Yearbook of New Zealand Jurisprudence

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The *Yearbook of New Zealand Jurisprudence* is published annually by the Waikato University School of Law. Subscription to the *Review* costs $NZ20 per year in New Zealand and $US40 (include postage) overseas; and advertising space is available at a cost of $200 for a full page or $100 for a half page. Back numbers are available. Communications should be addressed to:

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This issue may be cited as (1999) 3 *Yearbook of New Zealand Jurisprudence*.

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ISSN 1174-4243
EDITOR'S INTRODUCTION

The *Yearbook of New Zealand Jurisprudence* is an annual collection of papers contributed by participants in the Staff Seminar Series of the University of Waikato School of Law and published in conjunction with the Centre for New Zealand Jurisprudence. The School of Law was founded in 1991 to provide a professional legal education, develop a bicultural approach to legal education and to teach law in the contexts in which it is made and applied. The *Yearbook of New Zealand Jurisprudence* aims to stimulate and contribute to the development of New Zealand jurisprudence by publishing articles, essays and other forms of analysis and comment which directly address or are relevant to New Zealand jurisprudence. The articles contained in this issue are from both permanent and visiting scholars. The areas of law covered by the articles are diverse and topical.

Henry Reynolds’ article addresses the historical context of Aboriginal claims to sovereignty and analyses the contemporary situation in relation to land rights and rights to self-government. Caren Wickliffe and Matiu Dickson offer an interesting summary of contemporary and historical material which is not easy to access and which sheds light on the current state of ethnic relations in New Zealand.

Susan Boyd holds the Chair in Feminist Legal Studies at the Faculty of Law, University of British Columbia. Her article looks at the recognition of same sex relationships by Canadian laws that regulate “family” relations and the political and strategic implications of incorporation of lesbians and gay men into the legal system of “family”. She addresses the dilemmas arising from inclusion in a family law system that “bolsters” the privatization of responsibility for economic well-being. Her analysis is relevant to debates within New Zealand at a time when the Property (Relationships) Amendment Bill is proceeding through Parliament. This bill provides a legislative regime for the division of property when relationships end, which regime would apply to married, de facto and same sex couples.

In the context of pressure from various groups for the reform of New Zealand’s law in relation to cannabis, Neil Boister has provided a rigorous review of international law and New Zealand domestic law in relation to cannabis. He highlights the implications for New Zealand’s international obligations of changes to domestic law.

Anna Kingsbury’s article provides a context for the New Zealand debate about the patenting of human genetic and other life form inventions. The
author reviews patent law protection and alternatives, and addresses the problems arising from attempts to integrate moral and ethical considerations into the narrow ambit of the patent system.

Joan Forret highlights proposed amendments to the Resource Management Act 1991 (NZ). She focuses on proposed changes to the wording of ss 66 and 74 and consequent difficulties of interpretation. The implications for public participation which flow from the proposed amendments are identified.

We are grateful to the referees to whom these articles were sent for their considerable time and thoughtful contributions.

Jacquelin Mackinnon

Editor

Yearbook of New Zealand Jurisprudence
Sovereignty has been a contentious issue in Australia for the last 20 years. Aborigines and Torres Strait Islanders have questioned the status quo and have pursued the matter in the courts, the corridors of power and the streets. And while the contemporaneous campaign for land rights has achieved considerable success the attempt to question the basis of British/colonial sovereignty has been vigorously rebuffed by both politicians and jurists who argue that any concession to the indigenous position would undermine the state and divide the nation.

Jurists have been more emphatic in their defence of the status quo than have the politicians and commentators. Their reasoning was forcefully outlined in the first major case concerning sovereignty, *Coe v the Commonwealth*, which was heard by the High Court in 1979.¹

Coe was certainly ambitious. In his statement of claim he declared:

> From time immemorial to 1770, the Aboriginal Nation has enjoyed exclusive sovereignty over the whole of the continent now known as Australia. The Aboriginal people have had from time immemorial a complex social, religious, cultural and legal system under which individuals and tribes had proprietary and/or possessory rights, privileges, interests, and claims to particular areas of land...Clans, tribes and groups of Aboriginal people travelled widely over the said continent now known as Australia, developing a system of interlocking rights and responsibilities, making contact with other tribes and larger groups of Aboriginal people, thus forming the sovereign Aboriginal nation. The whole of the said continent now known as Australia was held by the said Aboriginal nation from time immemorial for the use and benefits of the said nation.²

Coe then went on to claim that Britain had illegally claimed this continent over which the Aboriginal nation held sovereignty and asserted:

> On or about the twenty-sixth day in April 1770, Captain James Cook RN at Kurnell wrongfully proclaimed sovereignty and dominion over the east coast of the continent now known as Australia for and on behalf of King George

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¹ Henry Reynolds is one of Australia's most influential and widely read historians. His publications include *The Other Side of the Frontier: Aboriginal resistance to the European invasion of Australia* (1982); *Frontier: Aborigines, settlers and land* (1987); *Fate of a Free People* (1995); and *Aboriginal Sovereignty: reflections on race, state and nation* (1996).

² (1979) 53 ALJR 403.

Ibid, 404.
III...on or about the 26th day of January, 1788 Captain Arthur Phillip RN wrongfully claimed possession and occupation for the said King George III...of that area of land extending from Cape York to the southern coast of Tasmania and embracing all the land inland from the Pacific Ocean to the west as far as the 135th longitude...3

The High Court bench unanimously rejected Coe’s sweeping propositions. The leading judgment was given by Mr Justice Gibbs who said, in part:

To suggest either that the legal foundation of the Commonwealth is insecure or that the powers of Parliament are more limited than is provided in the Constitution, or that there is an Aboriginal nation which has sovereignty over Australia can’t be supported. In fact we were told in argument it is intended to claim there is an Aboriginal nation which has sovereignty over its own people, notwithstanding that they remain citizens of the Commonwealth...The Aboriginal people are subject to the laws of the Commonwealth and of the States or Territories in which they respectively reside. They have no legislative, executive or judicial organs by which sovereignty may be exercised. If such organs existed they would have no power except such as the laws of the Commonwealth or of the state or territory might confer upon them. Contention that there is in Australia an Aboriginal nation exercising sovereignty even of a limited kind is quite impossible in law to maintain.4

Gibbs considered the situation of Indians in the United States as originally defined by Chief Justice Marshall in the 1831 case Cherokee Nation v State of Georgia5 but argued that their status as domestic dependent nations had no relevance to Australia.

A similar decision was handed down by the High Court in 1994 in the case of Walker v New South Wales. The plaintiff, activist Dennis Walker, appealed against a criminal charge on the grounds that the Australian parliaments lacked the power to legislate in relation to Aborigines without their request and consent. Chief Justice Mason dismissed the proposition that “sovereignty resided in the Aboriginal people”. The New South Wales parliament had power to make laws for the peace, welfare and good government of the state “in all cases whatsoever”. Therefore the proposition that state laws did not apply to Aborigines or to “particular conduct occurring within the State” had to be rejected.6

The High Court dealt with sovereignty in the now famous Mabo case of 1992. While rejecting by a 6 to 1 majority the doctrine of terra nullius in relation to property rights the bench decisively confirmed the traditional interpretation of the acquisition of sovereignty. Mr Justice Dawson was the

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3 Ibid.
4 Ibid, 408.
5 30 (US) (5 Pet) 1 (1831).
one dissenting voice in the case. But he spoke for all his colleagues when addressing the question of sovereignty, remarking that:

The annexation of the Murray Islands is not now questioned. It was an act of state by which the Crown in right of the Colony of Queensland exerted sovereignty over the islands. Whatever the justification for the acquisition of territory by this means (and the sentiments of the nineteenth century by no means coincide with current thought), there can be no doubt that it was, and remains legally effective.7

Australian courts have taken refuge in the established doctrine that the Crown, while acting outside Britain itself, exercises prerogative powers which cannot be questioned by municipal courts. In the 1975 High Court case, *New South Wales v the Commonwealth*, Mr Justice Gibbs declared that the acquisition of territory by a sovereign state was “an act of state which cannot be challenged, controlled or interfered with by the Courts of that State”.8

This is, indeed, long-established doctrine. It also provides Australian judges with an excuse for not dealing with fundamental problems relating to sovereignty. The answer to the question of how Britain acquired sovereignty over Australia remains as it has always been. The continent became British by settlement, there being no treaties and no acceptance of the idea of conquest. But the old story rests on two quite distinct foundations:

1. When the British arrived there was no sovereignty; there were neither laws nor government. Therefore British sovereignty was original rather than derivative.
2. British sovereignty itself was total, complete and indivisible from the very first moment of annexation.

Both these ideas demand re-examination.

The powerful and portentous idea that the Aborigines had no sovereignty was enunciated by Mr Justice Burton in the New South Wales Supreme Court in the 1836 case *Rex v Murrell*. He argued:

although it might be granted that on first taking possession of the Colony, the Aborigines were entitled to be recognized as free and independent, yet they were not in such a position with regard to strength to be considered free and independent tribes. They had no sovereignty.9

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8 (1975) 135 CLR 388.
9 Supreme Court Papers, 5/1161, NSW Archives, 24/48.
Burton’s case notes indicate that he spent considerable time dealing with, and dismissing, the idea of Aboriginal sovereignty. He wrote:

Yet I deny these tribes are entitled to be considered as so many Sovereign or Independent tribes in as much as that depends not only upon their independence of any foreign control but having also attained to such a situation in point of numbers and civilization as a nation and to such a settled form of government and such settled laws that civilized Nations may and are bound to know and respect them.\(^\text{10}\)

Burton’s view of Aboriginal society took hold in the courts and received the imprimatur of the Privy Council in 1889. In *Cooper v Stuart*, Lord Watson declared that in 1788 Australia was “a tract of territory practically unoccupied without settled inhabitants or settled law”.\(^\text{11}\)

Lord Watson also commented on the nature of British sovereignty in a situation like Australia where a colony had been acquired by settlement rather than by conquest or cession. In such circumstances there could be “only one sovereign, namely the King of England, and only one law, namely English law”.\(^\text{12}\)

Australian jurists have relinquished one aspect of the traditional story – that there was neither law nor government in Australia when the British arrived although the full consequences of the change have not become apparent. In 1971 Mr Justice Blackburn rejected the Yolngu people’s claim on their traditional land in the so-called Gove Land Rights case in the Northern Territory Supreme Court. But he concluded that the evidence presented showed:

a subtle and elaborate system highly adapted to the country in which the people lived their lives, which provided a stable order of society and was remarkably free from the vagaries of personal whim or influence...the system of law was recognized as obligatory upon them by members of a community.\(^\text{13}\)

In 1979 Mr Justice Murphy observed in *Coe v the Commonwealth* that there was a wealth of historical evidence indicating that the Aborigines “had a complex social and political organization” and that their laws were “settled and of great antiquity”.\(^\text{14}\) In the *Mabo* case several members of the High Court acknowledged that Aboriginal laws and customs were “elaborate and

\(^{10}\) Ibid.
\(^{11}\) (1889) 14 App Cas 286.
\(^{12}\) Ibid.
\(^{13}\) (1971) 17 FLR 267.
\(^{14}\) *Coe v the Commonwealth*, op cit n 1, 403.
obligatory" while the boundaries of traditional land were "likely to be long-standing and defined".\textsuperscript{15}

Enough has been cited to indicate that Australian courts have clearly rejected Lord Watson's assertion of 1889 that the continent was a place without settled inhabitants or settled law. That being so it has to be assumed that the indigenous tribes or nations held sovereignty over the country. What then happened to it in the absence of conquest or cession? We are back with the problem which confounded George Augustus Robinson, the notorious 'protector' of the Tasmanian Aborigines, who in a letter to a friend in 1832 confessed he was at a loss "to conceive by what tenure we hold this country for it does not appear to be that we either hold it by right of conquest or right of purchase".\textsuperscript{16}

Pursuit of that issue leads us back to the problem of sovereignty and to the twin questions of how and when Australia became British. The answer to them lies less in legal theory and more in the actual history of settlement and an assessment of when the colonial governments were in effective control of the territory claimed. There seems to be no doubt that the British government when it annexed Australia did actually acquire the external sovereignty. After all, no other foreign power challenged the external sovereignty of Britain over Australia but internally it was another matter all together. There was not just one sovereign but many sovereigns if you apply the views of Blackburn and Murphy to the problem - that is, there were many systems of law and there were many forms of government in Aboriginal Australia. The numbers exercising their laws and sovereignty declined progressively through the century. There was not one set of laws in Aboriginal Australia; there were many. But even more significant is the question: did Britain, or the colonial governments, actually achieve effective occupation of Australia? It was one thing to claim sovereignty; it was another thing to actually exercise it. Did the imperial and colonial governments exercise effective sovereignty over most of Australia in the nineteenth century? And the answer must surely be no.

This question of effective sovereignty was taken up by the most famous of the eighteenth century writers on international law - and the person most widely read in the nineteenth century - Emerich de Vattel in his book \textit{The Law of Nations}, first published in 1758 and republished many times. He wrote that it was:

\begin{itemize}
\item \textsuperscript{15} See the judgment of Deane and Gaudron, J.J., \textit{Mabo v Queensland}, op cit n 7, 99–100.
\item \textsuperscript{16} Robinson to Whitcomb, 10 Aug. 1832, Robinson papers, 35, Mitchell Library, Sydney.
\end{itemize}
questioned whether a nation can thus appropriate by the mere act of taking possession of lands which it does not really occupy and which are more extensive than it can inhabit or cultivate. It is not difficult to decide that such a claim would be absolutely contrary to natural laws. 17

In the nineteenth century there were large areas of Australia that Europeans had never even seen. They had sent exploring expeditions across most the country but the areas of country actually seen were limited. There were many parts of the continent where no permanent European settlement had taken place. There were large areas of country that were not effectively mapped. Applying standards which Britain itself applied in other parts of the world, it was clear that British occupation of the whole of the continent was not fully effective during the nineteenth century.

Contemporaries realized this at the time. One was a senior colonial official, James Stevens; the other was Justice Cooper, who was Justice Burton’s contemporary and the first judge in South Australia. Stephen’s comments were made in a memorandum to his Minister, Lord Glenelg, when he was drawing up the Letters Patent for the settlement of South Australia in 1835. He was pondering on the problem of where he should draw the borders. He wrote:

> how this is to be done in a terra incognita, I cannot imagine. How it can be done at all with any due regard to the rights of the present proprietors of the soil or rulers of the country. 18

So although sovereignty had been claimed in 1824 over this territory, eleven years later Stephens was talking about the Aborigines being “the proprietors of the soil and the rulers of the country”.

Similar comments were made by Cooper in a number of cases in South Australia in the early years of settlement. He was concerned about applying the law to people who had no knowledge of it – who were outside the control of European authority – tribes or nations who were outside British sovereignty. Cooper said of these people:

> The doctrine that they are to be held and dealt with as British subjects, and, under no circumstances, to be tried or punished, except according to the ordinary forms of our law cannot be received without modification. It may be true, in its full extent, as regards those tribes with whom we have constant and peaceable intercourse – for whose subsistence we provide – who acquiesce in, and acknowledge a friendly relation with us – and who are making advance towards civilization. To our intercourse with these, the ordinary forms of our Constitution and laws may be beneficially and effectually applied. The extension to them of the full rights of British subjects may be practicable, and

attended with no evil result. But it would be assuming too much to hold that the same maxims and principles must be applied without modification to distant tribes inhabiting a territory beyond the limits of our settlements with whom we have never communicated under friendly circumstances, whose language is equally unknown to us as ours is to them, and who betray in all their intercourse with Europeans, the most savage and brutal hostility – who have never acknowledged subjection to any power, and who, indeed, seem incapable of being subjected to authority or deterred from atrocious crimes, except by military force. Nor can it be doubted that circumstances may occur, in which, for the safety of the colonists, and for the prevention of plunder and bloodshed, it may be necessary to view such tribes, however savage and barbarous their manners, as a separate state or nation, not acknowledging, but acting independently of, and in opposition to, British interests and authority.¹⁹

The views of Stephen and Cooper suggest a different interpretation of the imposition of sovereignty, one more in touch with the actual history of colonization. At the beginning of settlement all the colonists could claim was to exercise sovereignty over those small areas they actually governed and where they could impose their laws. These areas grew progressively larger during the nineteenth century and early twentieth century. Beyond the zone of actual control were regions where British or colonial officials exercised authority some of the time and in some manner. Such areas could be termed ‘protectorates’ to use a name widely employed in other parts of the Empire. Farther away from areas under direct control, in regions where no European had settled – or had ever been – were parts of the continent where all the British could realistically claim was to have a ‘sphere of influence’ where no other power would be allowed to interfere and where Britain might have ambitions to impose sovereignty but nothing more. As the nineteenth century unfolded, as population grew and settlement expanded, the area of sovereign control expanded, impinging on the areas of protectorate which in turn impinged on the spheres of influence.

But one of the most interesting and intriguing questions about whether the Australian authorities had effective occupation of Australia was the persistence of frontier violence. Violence is important because one of the principal tests used to determine whether a European power was in effective occupation of colonial territory was whether it could impose its law – impose it in such a way that the Government could protect the indigenous people by that law, and where they did not have to use punitive expeditions or the gunboat to simply punish people collectively. This idea was authoritatively discussed in the classic 1928 text The Acquisition and Government of Backward Territory in International Law by M F Lindley. In discussing the question of when a colony had come under effective control,

¹⁹ The South Australian Register, 19 Sept. 1840.
Lindley referred to what he termed the "personal safety of the natives". In the chapter of that title he wrote:

In the early stages of the government of backward territory the only method of bringing unruly tribes to reason and maintaining order in outlying parts of the territory may be by way of punitive military expeditions directed against the tribe or district as a whole without it being possible to distinguish between innocent and guilty individuals. But the requirement of effective occupation clearly involves the duty on the part of the acquiring state of taking steps to secure the administration and policing of the whole territory under its full sovereignty or protection so as to render it possible, within a reasonable time, to mete out punishment to the guilty individually.

The requirements of "effective occupation", Lindley argued, demanded the "existence in the territory of an authority capable of protecting the natives in their persons and property". 20

If we apply that standard to Australia then, clearly, the governments – colonial, state and federal – were not in effective control until well into the twentieth century. Punitive expeditions which killed Aborigines disproportionately and indiscriminately, continued to operate until the 1920s. At Coniston in central Australia in 1928 a federal government police party shot down as many as 70 Aborigines – men, women and children – in revenge for the killing of one European and the wounding of another. An official inquiry determined that the actions of the police party were justified and no further action was taken.

Effective occupation – and sovereignty – were gradually extended over the Australian landmass. In those areas where Aborigines and Islanders still occupy their traditional lands and continue to exercise aspects of customary law sovereign control is still not comprehensive; the process of colonization is not complete. On that basis it must be assumed that remnant sovereignty has survived and should provide the basis for indigenous claims to exercise rights of self-government, to link their vestigial sovereignty with the developing international right to self-determination.

20 (1928), chapter xxxix.
MAORI AND CONSTITUTIONAL CHANGE

BY CAREN WICKLIFFE AND MATIU DICKSON*

E nga Rangatira katoa he mihi nui tenei ki a koutou kua huihui nei ki te korero i nga take hononu kei mua i a tatou. He mihi ki te hau kainga no ratou te mana whenua, oti ra ki te iwi o Rangitane. E aku Rangatira na koutou te karanga, te pohiri hoki ki a matou Kia tau nei ki runga i to tatou marae hei whiriwhiri i nga take e pa ana ki te kaupapa o te ra. He whakaaro rangatira tena.

No reira tena koutou, tena koutou, tena koutou katoa!

Ko tenei pepa na maua ko taku tuahine a Caren Wickliffe i whakarite. E tika ana ma maua hei whakahaere i te pepa nei no te mea he honohononga na maua i roto i te whakapapa. He uri ahau no Romainohorangi no te waka o Mataatua. Ka moe a Romainohorangi i a Paewhitu no te waka o Horouta, ko tenei te waka o Caren. Ka puta mai to raua tama ko Te Rangihouhiri. Ko ia te timatatanga o taku iwi o Ngaiterangi. Otira, ma te whakapapa, ko maua ano maua ko Caren.

I mua i taku kauhau ki a koutou, he paku korero taaku mo etahi o nga whakaaro kua putaina ke mai e nga kaikorero i mau i ahau. I ki mai tetahi o nga kaikorero, ko te kai a te rangatira he korero engari ki a matou o Ngaiterangi, he paruparu te kai a te rangatira. Koinei te take. I mua, ko te tahuna te wahi i whakaritengia ai nga toa o Ngaiterangi i o ratou mahi te mau tiaaha. He maha nga whawha ringa o te moana o Tauranga. Mena ka titiro te tangata ki a ratou i runga i te tahuna nei, orite tonu ratou ki nga papaka o te tai. Na ka huri te whakaaro ki te papaka hei tohu rangatira mo matou o Ngaiterangi.

Anei nga ahuatanga Rangatira o te papaka;

- Tino kaha ia ki te whakarongo ki tana iwi. Mehe mea tu ki te korero, kotahi tana korero heoi ano ma te iwi e tautoko i ana korero tohutohu. He tohu Rangatira tenei.

* Since this paper was written, Caren Wickcliffe has become a Judge of the Maori Land Court. At the time of submission of the article both she and co-author Matiu Dickson were Senior Lecturers in Law at the University of Waikato.
E kore te papaka e tino hiahia ana ki te whawhai i te mea kei mate atu etahi o nga tangata o tana iwi. Engari ke, mena kei te ahei ia ki te whawhai he tino hoariri te papaka. Ka kaha ake ki te whawhai tae noa kia mate ia. Ka pera hoki te papaka kia ora ai tana iwi. Ka whawhai tonu ahakoa kua ngaro te waewae, te ringaringa ranei. He tohu Rangatira tenei te mau tonu ki te kaupapa.

I te wa ka whakahokia ia ki tana rua, e kore ia e huri tana kanohi i te hoariri. Ka hikoi ma muri ia. Kua mataara te papaka. He tohu Rangatira ano tenei.

No reira kei aku Rangatira, he honore tenei kia tu ahau i mua i a koutou ki te kauhau, ki te tautoko te kaupapa o te ra!

The British Crown's revolutionary take over of power in Aotearoa, New Zealand legitimated only in part by the Treaty of Waitangi, was otherwise an 'immense intrusion into other people's business'— or indeed a large scale robbery.¹

Treaty gives Maori special status, but tino rangatiratanga as defined by the Courts and the Waitangi Tribunal, does not equate with the "sovereignty" or governance of the Crown.²

Incorporation of the treaty in the constitution was opposed explicitly by some participants and also by way of what one participant called "silent resistance" from non-Maori who did not want to engage in the debate.³

The above quotes form the backdrop for this article. The first quote is an acknowledgement from one of the country's well-known constitutional lawyers that the Crown's acquisition of sovereignty in New Zealand was a revolutionary take over of power. The second quote reflects the standard governmental and legal position on the status of Maori rights including sovereignty in New Zealand and the last quote mirrors the position adopted by many non-Maori when discussions begin on whether we need constitutional change in New Zealand.⁴ We have chosen these quotes to

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⁴ See Perry, P and Webster, A New Zealand Politics at the Turn of the Millennium New Zealand Politics (1999). A recent survey of New Zealand attitudes completed by Massey University indicated that 1/3 of those New Zealanders interviewed want to see the Treaty abolished, 29% want to see greater limits placed on Maori claims, 25% want claims to be dealt with through the Waitangi Tribunal and only 5% want the Treaty strengthened with the full force of law.
illustrate the different hurdles that Maori face when they turn to debate constitutional change, what it might look like and how it can be achieved.

This paper reviews the historical undermining of Maori sovereignty and self-government by the Crown from 1840 to the present leading to the "revolutionary take over of power" that Brookfield describes above. It also summarizes some of the models for constitutional change discussed to date by Maori and the means for giving them effect. Finally, it proposes the need for a national Constitutional Hui to continue to advance the debate and search for a common Maori position on constitutional change. In this paper we do not take a position on what form constitutional change should take for Maori. Rather we attempt merely to summarize developments that have taken place to this time and encourage further debate.

*The Role of Maori Tribes*

Ko Hikurangi te Maunga  
Ko Waiapu te Awa  
Ko Ngati Porou te Iwi

Ko Mauao te Maunga  
Ko Tauranga te Moana  
Ko Ngaiterangi me Ngati Ranginui nga iwi.

All Maori have ways of identifying themselves, their whanau, hapu and iwi. Through these words we all proclaim the traditional and cultural identity of our tribes, as collectives, as tribes, as nations. We also locate them by reference to geographical features of sacred significance and we announce our allegiance to and citizenship of these collectives. Without this allegiance there would be no tribal nation and we would not be able to claim collective, as opposed to individual, rights to self-determination, self-government over our lands, forests, fisheries and other taonga listed in the Treaty of Waitangi. We cannot ignore the tribe and other important Maori social groupings in our analysis of what constitutional change is necessary. We have, therefore, taken this review to the local and district level.

1. **BACKGROUND**

In 1835, when the United Tribes of New Zealand declared their sovereignty over New Zealand through the Declaration of Independence they would not have been able to predict that for over one hundred years Maori independence and autonomy would be usurped by a revolutionary take over
of power. After all, at this time Maori sovereignty was assumed and acknowledged by the British Colonial Office. Recognition of Maori sovereignty was manifest in instructions, imperial actions, legislation and policy in place from the so-called “discovery” by James Cook through to the instructions to James Busby in 1835. No rights were sought by the Colonial Office or exercised by the Crown over Maori tribes or their territory before 1840, although the Crown began to prepare the ground to infiltrate Aotearoa/New Zealand in 1839.

The Treaty of Waitangi would be the doorway into New Zealand. In 1839 the Colonial Office decided to acquire territories in New Zealand and colonial officials were instructed accordingly. Historians emphasise different reasons for this change in British policy. Some of the reasons are explained in Lord Normanby's Dispatch, 14 August 1839, to Captain Hobson before he was sent to New Zealand. He was advised that the principal objective of his mission was to negotiate with Maori for sovereignty and to facilitate the establishment of colonial government. Hobson was also advised that he must assert the right to pre-emption and to issue a proclamation requiring that all equitable purchases of Maori land be confirmed by Crown grant. Upon Hobson's arrival in New Zealand in early 1840 he issued a Proclamation announcing that titles to land in New Zealand not derived from or confirmed by the Crown were void. He then proceeded to organise the drafting of the Treaty of Waitangi.

The initial signing of the Treaty of Waitangi took place with the Northern chiefs on 6 February 1840. The Treaty of Waitangi was written in Maori and English. The Treaty of Waitangi was then taken to other locations and the

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10 Reproduced in McNab R (ed) Historical Records of New Zealand (1908) Vol I, 731.
11 Ibid, 733.
Maori version of the Treaty was signed by some 500 Maori chiefs between February and September 1840.14

Proclamations were issued by Hobson on 21 May 1840 declaring the Crown's sovereignty over the North Island by cession and over the South Island by discovery.15 On 5 and 17 June two further Proclamations were issued claiming sovereignty over Stewart Island by discovery and the South Island by cession.16 The first two Proclamations were confirmed by the Colonial Office on 2 October 1840.17 The two grounds upon which the Crown's assertion of sovereignty rests are the Treaty of Waitangi 1840 and the 1840 Proclamations.18 Recent legal scholarship indicates that the May Proclamations were the first step in the process of the Crown's assumption of power, at least partly by revolution, over the Aotearoa of the Maori.19

A review of the text of the two versions of the Treaty of Waitangi reveals that the Maori version is not a direct translation of the English version.20 According to Article the First of the English version, the chiefs ceded "absolutely and without reservation" all the rights and powers of sovereignty.21 The Maori version of the Treaty of Waitangi, on the other hand, conveyed only the right to "kawanatanga katoa" (all government) something less than full sovereignty.22 Article the Second of the English version confirmed and guaranteed to Maori the full exclusive and undisturbed possession of their lands, estates, forests, fisheries and other properties which they collectively or individually possessed so long as they

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15 Lieutenant-Governor Hobson to the Secretary of State for the Colonies, 25 May 1840 GBPP (IUP Shannon, Ireland) [1835-1842] Vol 3, 137. For a discussion on the impact of these Proclamations see Keith, K "International Law and New Zealand Municipal Law" in Northey, J F (ed) The AG Davis Essays in Law: A Tribute to Professor AG Davis formerly Dean of the Faculty of Law at the University of Auckland (1965) 136.
22 Kawharu, H "Translation of the Maori Text, Appendix" in Kawharu, H (ed) Waitangi, Maori and Pakeha Perspectives of the Treaty of Waitangi (1989) 319-321 and see New Zealand Maori Council v Attorney General, supra n 18 at 671-672 for a discussion on the different understandings of the Treaty of Waitangi held by Maori and the Crown. Contrast with the judicial position in 1877 when it was held that the Treaty of Waitangi was a simple nullity in Wi Parata v Bishop of Wellington (1877) 3 NZ Jur (NS) SC 72.
wished to retain them. This guarantee in the Maori version was described as “te tino rangatiratanga” (full chieftainship/authority) over their “whenua” (lands), “kainga” (villages) and “taonga” (matters of esteemed value). At the least, this article was intended as a positive guarantee of protection to be accorded to land, villages and other important assets. Article the Second in the English version also granted to the Crown the right of pre-emption. The Maori version describes this as the right to buy and sell. By Article the Third of the English version, Maori were granted all the rights and privileges of British subjects. The guarantee of protection is described in the Maori version as being treated the same as British subjects.

The consequence of the differences between the Maori and English texts was that Maori and the Crown arrived at quite different understandings and conclusions as to what the Treaty of Waitangi ceded and guaranteed. In contemporary times it is now agreed that the least the Treaty of Waitangi guaranteed was Maori “tino rangatiratanga” over their “whenua” and “taonga” or the full chieftainship over their lands, estates, forests and fisheries and other matters of value.

By the Treaty of Waitangi, and the proclamations of sovereignty that followed in May 1840, the Crown would seek the international and domestic legitimacy it needed to establish the governmental apparatus of the colonial state. Maori understanding of the process was quite different and many saw the Treaty of Waitangi as an affirmation of their right to self-determination or independence. That understanding has continued to the present day.

The Crown, however, set about establishing a system of local self-government for Maori tribes, a system that would subordinate Maori sovereignty and authority to that of the Crown. It is important to

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23 New Zealand Maori Council v Attorney General, supra n 18 at 674.
24 See Waitangi Tribunal Muriwhenua Fishing Report (Wai 22, Department of Justice, Wellington, 1989) 181 for a discussion on the meaning of the Maori version of Article the Second.
27 See for example the Constitution Act 1846 (UK) 9 & 10 Vic c. 103, s 10 and Constitution Act 1852 (UK) 15 & 16 Vict. c. 72, s 71. This last section was repealed by the Constitution Act 1986. For a general discussion on Crown policy see Ward, A
remember that self-government denotes the ability to exercise and enforce your authority coupled with the ability to make laws. The Crown has provided for some form of diminished local self-government from 1840 through to the present.

However, the effectiveness of even these reduced forms of recognition of the right to self-government would be undermined through the actions of the Crown and local settlers, namely large scale land purchases, the wars of the 1850s-60s, the repeal of legislation recognizing the limited right to self-government and the introduction of the Native Lands Act 1862 and 1865. These actions would attack and reduce the jurisdictional land base upon which Maori sovereignty and self-government was exercised. In addition, legislation would gradually encroach into Maori social life changing, for example, Maori customary practices in relation to whangai, marriage, divorce, land and natural resource use and crime. These mechanisms have been so successful that only significant constitutional change can fully restore Maori sovereignty, as it existed over the entire country pre-1840.

2. HISTORICAL CROWN MODELS OF MAORI SELF-GOVERNMENT

Maori have unsuccessfully attempted to adopt national models for self-government without reference to the Crown. These attempts have included the Kingitanga in the 1850s, which was a movement to establish a Maori King and *inter-alia* a land league of tribes committed to protecting Maori land from alienation to European settlers. While the movement has survived to this day, it was unsuccessful in its attempts to prevent the alienation of Maori land. Another significant attempt was the Kotahitanga or Maori Parliament convened for the first time in 1881 at Te Tii Marae,
Like the Kingitanga, the Kotahitanga was a movement designed to unify Maori tribes and it was used as a vehicle to discuss Maori grievances relating to land confiscations, Maori land laws and different Government policies. It survived until the early 1900s when its authority was eventually superseded by the Maori Councils established under the Maori Councils Act 1900. A contemporary example of a national model for self-government has been the Maori Congress established in the late 1980s to facilitate tribal development in line with the Government’s policies on devolution that were current at that time.

While successful for short periods in achieving some unity, most of these models collapsed due to serious resource constraints and differences of tribal opinions. They were movements that were very much dependent on certain historical leaders and the political context of their times.

In comparison, the Crown attempts in New Zealand have been equally unsustainable. While provision has been made for different forms of self-government for Maori at various times since 1840, these models have all been subjected to the whims of successive governments rendering them ineffective in representing Maori views. These models have been provided for in laws passed by Parliament and they include:

**National Level**

- The Constitution Act 1852 section 71 – where areas could be set aside as native districts within which Maori law, customs and usages could be used to govern themselves. This section was never used in New Zealand and no districts were ever set aside. Section 71 was repealed by the Constitution Act 1986 despite Maori objections from Professor Hirini Mead and the Maori Members of Parliament.

- The Maori Representation Act 1867 creating the Maori seats, still in existence in a different form today. The number of Maori seats in Parliament has always under-represented the entire Maori population. Today, the numbers are still determined by reference to those Maori who are enrolled on the Maori electoral roll rather than the entire Maori population. Although MMP has delivered more Maori into Parliament these MPs are constrained by party politics and there remains no independent Maori voice or body that can provide independent Maori advice and governance.

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Local and District Level

- The Native District Regulation Act 1858 and the Native Circuit Courts Act 1858 – used by Governor Grey to establish the Maori Runanga system during the 1860s whereby Maori could make laws relating to sanitation, fencing, wandering stock, development of housing, protection of property, control alcohol and suppression “injurious native customs”. Disputes where mediated by resident magistrates, Maori assessors and Maori juries. These Acts were subsequently repealed in 1891. Maori juries continued in various forms until 1962.

- The Maori Councils Act 1900 establishing councils that could exercise law making and administrative functions similar to local governments in villages and districts. It was their duty to formulate general plans for the purposes of ascertaining, providing, and proscribing rules for the observance and enforcement of rights, duties, and liabilities among the tribes in relation to all domestic matters. They also exercised the powers previously exercised under the Runanga legislation and they exercised some authority over their fisheries. The Councils were never adequately funded and they lost popularity.33

- The Maori Social and Economic Advancement Act 1945 was an attempt to meet Maori aspirations for self-government by creating a multi-layered scheme of tribal administration from the local to the regional or district level. Many of the by-law making powers of the earlier legislation relating to village works, sales of goods, fisheries and traffic and alcohol control were continued into this legislation. This Act was repealed by the Maori Welfare Act 1962.

- The Maori Welfare Act 1962 was later renamed the Maori Community Development Act 1962. This is the Act that establishes the New Zealand Maori Council with its layers of District Councils and Marae Committees. This Act was a component of a broad programme of law reform designed to integrate Maori and European leading to the eventual assimilation of Maori through rapid urbanisation.34 Under the Maori Community Development Act 1962 all lawmaking authority held pursuant to previous statutes, other than those restricted to marae control, were removed. However, section 18(c)(iv) does impose on the New Zealand Maori Council an obligation to “promote, encourage, and assist Maori to ... apply and maintain the maximum possible efficiency and responsibility in their local self-government and undertakings.” It is

33 See discussion by Cox L, ibid at 96.
through this provision that Maori rights to self-government remain recognised in New Zealand’s statute law.

- The Maori Trust Boards Act 1955, originally a consolidation of a number of statutes passed in the period 1920-1950 establishing individual trust boards. Basically these boards were established to administer tribal settlements of Maori claims. The Act was passed to ensure that the Parliament retained control over how these settlements and tribal assets would be administered. With the exception of Te Runanga o Ngai Tahu and the Tanui model, the Runanga established during the 1980s-1990s are all Maori Trusts Boards that remain subject to the jurisdiction of the Minister of Maori Affairs. These Boards exercise cultural, health, social, economic, welfare, educational and vocational training functions which can only be described as administrative. They are not models of self-government.

- After the settlement of their treaty claims, two tribes have accepted models for the administration of tribal assets pursuant to private statutes of the New Zealand Parliament. The Waikato Raupatu Claims Settlement Act 1995 dissolved the previous Tainui Maori Trust Board. Its successor in terms of the administration of assets has been the Waikato Raupatu Trustee Co. Ltd. In addition, the Waikato tribes have established a Kauhanganui or governing body to represent the views and interests of Tainui. Te Runanga o Ngai Tahu Act 1996 establishes a tribal structure to manage its assets and its business and to distribute benefits to the Papatipu Runanga (ancestral land holding councils) of Ngai Tahu and the individuals comprising the tribal membership of Ngai Tahu. Te Runanga o Ngai Tahu is comprised of the Papatipu Runanga of Ngai Tahu.

- The repealed Runanga Iwi Act 1990 which attempted to introduce a system of tribal registration and recognition for the purposes of government devolution policies.

As can be seen these models have been changed, rearranged, amended or obliterated by various laws of the New Zealand Parliament passed at the whim of successive governments. They have remained subordinate to and dominated by the Crown. This has been the history of Maori self-government in New Zealand. The consequence now is that constitutional change needs to take place in order to expressly affirm Maori rights to the expression of sovereignty and self-government guaranteed by the Treaty of Waitangi.

There have been a number of models for Maori self-government promoted at the national and local level. These include:

*National*

- Full independence and a restoration of full Maori sovereignty - Requires a form of constitutional change which would require either a written constitution reallocating power in favour of Maori or alternatively for Maori to rise up and take back power by revolutionary means. This model is one that would see the development of a Maori paepae/forum operated by reference to mana tangata, mana wairua and mana whenua. The legal system and the Parliament as we know it will no longer have lawful legitimacy. It is a model that has been promoted by the “tino rangatiratanga” movement.\(^{38}\)

- Three House Parliament, Tikanga Maori House, Tikanga Pakeha House and the Treaty House. This model would require changes to the current constitutional arrangements detailed in the Constitution Act 1986, the Standing Orders of Parliament and the Cabinet Manual. It would also require a radical review of the current constitutional conventions that govern constitutional behaviour in Parliament, Cabinet, Government agencies, the judiciary and the functions performed by the Governor-General. It would probably only be achievable by a written constitution. It does not need to result in the declaration of New Zealand as a republic.\(^{39}\)

- Maori Parliament like the Sami Parliaments in Europe. These bodies are advisory only and could be achieved by simple legislative enactment.\(^{40}\)

- National Policy Body similar to the Aboriginal and Torres Strait Islander Commission which is a national policy body and service delivery agency comprised of elected members – the Maori model that is being promoted would provide independent advice to the Crown and assume responsibility for programme service delivery. It was last discussed at Hopuhopu, Hamilton in 1998. All this would require is the passage of a simple law by Parliament. This model could be achieved by simple legislative enactment.\(^{41}\)

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\(^{38}\) The Tino Rangatiratanga Movement is an ad hoc collection of Maori organizations committed to the restoration of Maori sovereign authority over Aotearoa/New Zealand and as a model it can be described as reformist.

\(^{39}\) This bi-nationalist reformist model has been promoted by Professor Whatarangi Winiata of Te Wananga o Raukawa and the New Zealand Maori Council.

\(^{40}\) This bi-culturalist model is one where the proponents are arguing for the contribution of Maori to decision making to be recognized and taken into account while leaving ultimate lawmakership authority with the Crown.

\(^{41}\) This model would fall again under the bi-culturalist category.
• Written constitution for New Zealand that would incorporate a reference to the Crown’s obligation to adhere to the Treaty of Waitangi and the development of a national sovereign or subsidiary Maori body politic of some form, while also providing for tribal self-government on a par with local government. It would also require a radical review of the current constitutional conventions that govern constitutional behaviour in Parliament, Cabinet, Government agencies, the judiciary and the functions performed by the Governor-General. It would probably only be achievable by a written constitution. It does not need to, but could result in the declaration of New Zealand as a republic.

• Increasing the Maori seats and developing more Maori parties. This would require a change to the current electoral boundaries of the Maori seats and would be achievable by statutory amendment to the Electoral Act 1993.

Local and District Level

• Developing tribal governments in the same way as the Indian/First Nation Governments in the USA and Canada. Indian tribes in the USA are recognised as domestic dependant sovereign nations with exclusive authority over their territories subject only to federal oversight and jurisdiction. Many tribal nations in the USA are formally constituted under the Indian Reorganisation Act 1932 which provides for the establishment of tribal governments by elections. This form of governance has been further enhanced by statutes such as the Indian Self-Determination and Education Assistance Act 1973 and the Tribal Self-Governance Act 1994. These two statutes have enabled tribal governments to take responsibility for and management of federal government programmes on Indian reservations. In Canada, First Nation Band Governments are established and operate under the Indian Act 1985 to exercise a form of local government jurisdiction over Indian reserves held by the Bands. In New Zealand similar recognition of Maori Tribal Governments could be achieved by simple legislative enactment or by the development of a written constitution clearly allocating power to the different tiers of government.

42 This bi-nationalist reformist model recognizes the aspiration of all peoples to a form of self-determination and shared law making authority.

43 This model would see the continuation of the current status quo with a significantly increased number of Maori seats and therefore greater participation of Maori in the political process.

44 See Johnson v M'Intosh 21 US (8 Wheat.) 543 (1823); Cherokee Nation v Georgia 30 US (5 Pete.) 1 (1831); Worcester v Georgia (6 Pete.) 515 (1832); US v Wheeler 435 US 313 (1978).
Empowering tribal trust boards or other Maori bodies to become local governments under the Local Government Act 1974 and the Resource Management Act 1991. Under this model they would exercise all the powers and functions of local governments. Under the current Local Government Act 1974 there is provision for this to happen where there is sufficient ratepayer support. No constitutional change would be necessary for this model but a statutory amendment to the current laws would be required.

IV. WHAT ARE THE CHANCES OF CONSTITUTIONAL CHANGE UNDER LABOUR

Some indication that there may be room to further the debate on constitutional change has been signaled at the national level. On 7-8 April 2000 the Institute of Policy Studies (IPS), Victoria University of Wellington organized the “Building the Constitution” Conference. It was promoted as an opportunity to bring together “opinion leaders” throughout the country to conduct a national debate on the New Zealand constitution. It was the desire of the organisers that the Conference could begin the process of:

- Outlining a work programme for research;
- recommending to the Government and Parliament ways in which politicians might usefully contribute to the debate and the Building the Constitution project;
- establishing a modest independent constitutional commission which might promote future debate and research, seek modest funding for such debate and research, commission research, act as a central post box for other events and initiatives so all involved in the debate can be kept informed and offer assistance to organisers of future events.

The Conference was funded principally by private sponsors including the Crown Forest Rental Trust and supplemented by a small government contribution.

Approximately, one hundred participants were invited to the two-day meeting in the Legislative Council Chamber. Of those only 26 were Maori.

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45 Under the RMA this is achievable within the current law pursuant to s 33 of the Resource Management Act 1991.
46 Local Government Act 1975, Part IIB where under s 37Z0 a Maori tribal authority can initiate a reorganization proposal to constitute a new district or region where 10% of 10,000 (1,500) electors resident in the district petition for the proposal in the case of a district reorganization proposal or where 10% of 50,000 (5,000) electors petition for the proposal in the case of a regional reorganization proposal.
Of the 40 papers presented only 7 papers were written by Maori. As the majority of contributors were pakeha, this was very much a Conference concerned with what constitutional reform might look like in the eyes of pakeha New Zealanders. However, the Maori participants did take a very active role in the debates and that is reflected in the summary of the Conference written by the IPS Programme Director.

A. The Current New Zealand Constitution

Although the Treaty of Waitangi is often described as the “founding document” of our Constitution, according to orthodox legal thought, the New Zealand Constitution is “unwritten”, a term that is shorthand for saying the Constitution is not contained in any one document that is nationally known and upheld as “the Constitution”. Our Constitution has several sources: Acts of Parliament (both Imperial and New Zealand), prerogative instruments, decisions of the Courts, customary international law, the law and custom of Parliament, conventions of the Constitution and diverse practices and understandings of executive government. In the absence of entrenchment or “supreme law”, the Constitution is flexible and may be altered by ordinary parliamentary process. The only exception is under the Electoral Act 1993 which requires a referendum or a special majority of the House of Representatives to alter certain sections of the Act.

The Conference was divided into two days. On the first day the speakers were asked to address a number of issues that were designed to provide a context within which to review two main ideas for constitutional reform. The second day dealt with the substance of what the majority of participants and presenters were concerned with, namely whether New Zealand should:

1. become a republic;
2. adopt a written constitution.

In effect these two ideas became the focus for presenters and papers and discussions were centred on whether these were good ideas or bad ideas, the role of the Treaty of Waitangi and what consequential reforms would be necessary to the executive, parliament, the office of the Governor-General,

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47 These papers can be accessed on the internet at http://www.vuw.ac.nz/inst-policy-studies/conferences/conferences.html.
the judiciary, local and regional government and the electoral system should either or both options be adopted.

B. Presentations

Maori presentations focused on the Treaty of Waitangi and what the values and framework for constitutional change might look like. Professor Mason Durie provided a way forward beyond the Conference by suggesting the establishment of two constitutional commissions. The Maori Commission would consult with Maori regarding their aspirations for constitutional change, commission research and report to Maori and the Crown.

Non-Maori presentations focused on the substance of what reforms may be needed in the thematic areas of the conference. Generally non-Maori presenters paid little attention to developing a process that would move these ideas forward into the public domain for debate. Consequently, the great majority of the non-Maori present did not know where to take the results of the meeting. At the concluding session, the Chair of the meeting did suggest there was a case for some sort of small commission or foundation that might facilitate a continuation of the debate. It could do this by: collecting information and making it available to the public; putting people in touch with each other; helping facilitate seminars, forums and conferences; perhaps commissioning research. It would best be funded from non-government sources, out of reach of politicians with agendas. It could have a small (unpaid) board of people of standing, with a secretariat provided by some neutral body, such as the Institute Policy Studies. No vote was taken on this suggestion.

However, most of the Maori participants met on the last day of the Conference. They resolved to establish a Working Party to convene a national Maori Hui to discuss whether there should be established a Maori Constitutional Commission and if agreed, to appoint Maori Commissioners. Professor Mason Durie was asked to organise the Working Party.

C. Impact of the Conference on Government Policy

Although this was not a government conference it is important to note what the Prime Minister’s views were on the subject. In her opening address the Hon. Helen Clark noted that New Zealand has been undergoing a process of constitutional change in two key areas, the Treaty of Waitangi and the

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50 See Annex 1 for Summary of Maori Papers.
51 The thematic areas of the “Building the Constitutional” Conference were “What Makes Our Constitution” and “What We Should Now Make of Our Constitution.”
electoral system. When commenting on the need for further change she said:

There is of course a lot of sense in the old saying that "if it ain't broke don't fix it". It seems to me that there is nothing particularly broken about the way our arrangements work at present but they are quaint. It is that quaintness which will eventually spark more debate, if not now then sometime in the future. Generational and demographic change makes that inevitable.

She stressed that the Government has no official view on what the future shape of the country's constitutional arrangements should be. She indicated that Government would only be interested in constitutional change should a public mood develop in favour of such change. It is unlikely that there will be much movement from non-Maori who attended the Conference to ensure the debate on constitutional reform moves into the public domain. The implications for Maori are that unless there is a broad ground swell of unified support for constitutional change from as many Maori tribes and communities as possible, it is unlikely that the Government will review current constitutional arrangements.

V. Future Directions

It is necessary to start consulting with Maori on the different constitutional change models that are being promoted at the national and local levels. Research commissioned by the Commonwealth Foundation indicates that Maori are more likely than non-Maori to want change.52 They have also internalised the aspiration for self-determination. Maori claimants before the Waitangi Tribunal argue the right to exercise rangatiratanga under article two and point to evidence of the Crown’s violation of that right.53 Consequently, Maori aspire to have their right to rangatiratanga recognized in one or other of the models described above.

It is the contention of the authors that constitutional change is necessary if we are to progress these Maori aspirations forward. However, this requires the development of a process that will be transparent and which will win the confidence of Maori. The idea of a Maori Constitutional Commission that will go out and discuss the various options with Maori and bring Maori to a consensus on the best option to suit their needs is a necessary first step.

53 New Zealand Maori Council v Attorney-General, supra n 18.
In the interim Maori should be working to create an environment that will support the Maori position once it is finalised. For example Maori could encourage the Kohanga Reo trust and kura kaupapa to develop children’s programmes around the theme “The Treaty of Waitangi is Our Constitution” or “Maui says its time for Constitutional Change” etc. Maori can encourage visual and performing artists to continue building social awareness for constitutional change, we can prepare and present talks for Maori communities etc.

Maori have the power to unite – Tihei Mauri Ora.
Annette Sykes of Te Arawa argued that it was time to commit to building a new relationship starting with decolonising ourselves as a nation by grappling with the guilt from our past practices in order to construct a new world deeply rooted in our diversity. There is a need, she argued to make a collective commitment to restitution and to a new non-colonial, mutual and negotiated relationship between Maori and immigrant peoples. The Treaty of Waitangi Vision. Facing up to the past means owning all the history of Aotearoa, rather than perpetuating the myth of white settlers creating civilisation in uncharted wilderness. Taking responsibility means understanding that the national wealth has been accrued at the expense of Maori, in ways that were legislatively mandated by governments acting on behalf of business and immigrant interests. Decolonising means recognising that, culture has been both a divisive and a unifying force internationally and learning from those experiences. She noted that the local conflicts most likely to escalate into broader wars are those between groups and states from different civilisations. The Treaty vision recognised this potential and provides a framework to overcome this risk. Finally she pointed out that decolonisation in the Aotearoa context means engaging in the perpetual hard work of maintaining relationships, not so that it can be circumscribed and terminated, but so that it can carry us all into the future. This new relationship should provide a framework for the elaboration of a non-colonial form of governance arrangement, and for the creation of a society in which the history and well-being of some is not secured by obliterating the history and well-being of others. This approach demands rethinking economics and ways to regain ecological as opposed to exploitative use and management of taonga (resources) and that constructing new political strategies that reinforce spiritual connections to this land as part of the Pacific peoples of the world. This paper was essentially a bi-nationalist reformist critique.

Moana Jackson, of Ngati Kahungungu and Ngati Porou, focused on the need to consider the values that underpin a vibrant constitutional system and he argued that rather than focusing on what the substance of constitutional change may look like, it is more important to consider the human values we would want as the building blocks for a different constitutional order. He noted that many of the necessary values which Maori often conceptualise in phrases such as mana atua, mana whenua, mana tangata, manaakitanga, and kaitiakitanga were once the cornerstones of the sovereign authority exercised by Iwi and Hapu. They were ideals that society aspired to, and
they were realities that determined behavior and ordered political activity. They would almost certainly form the basis of a contemporary Maori constitutional ethos, and they could positively shape its relationship with the Crown. They would at least shape the institutional model developed to meet Maori needs. This paper was essentially a bi-nationalist reformist critique.

Roger Maaka and A. Fleras (both not present) warned that any proposed realignment of indigenous peoples-Crown relations is riddled with inconsistencies and contradictions as competing interests clash. This situation creates a state of uncertainty and expediency which is likely to persist until such time as conventional thinkers accept as “foundational principles” two consenting political communities, both of whom are sovereign in their own right, yet inextricably interlocked as partners. This paper was again a bi-nationalist reformist critique.

Caren Wickliffe, taking again the bi-nationalist reformist position, noted the calls from Maori for constitutional change. She argued that the objective of such a process should be to design a written constitution that reflects and implements the Treaty guarantees including providing for the recognition of a national Maori body politic made up of iwi/hapu representatives who exercise real and substantive self-government at the tribal and national level. She noted that other Maori may have a different view, as Maori do not have a common position on what the new arrangements should be. She called on the Crown to fund a series of hui whereby Maori can arrive at some consensus on the issue. Then, she argued, representatives of Crown and Maori should renegotiate the conventions and principles of New Zealand's ethereal constitution as full Treaty partners. If we are to reflect a truly substantive partnership in our constitution, this means structural realignment of current constitutional thought with Maori principles and structures of constitutionalism. In practical terms, this means that the Crown negotiators need to work in partnership with Maori for constitutional change. What is essential is to start the process of negotiation based on principles of mutual recognition and accommodation. Recognition of Maori rights under the Treaty of Waitangi, and then accommodation of the position of other Pacific peoples.

Justice Durie (although not present) argued in his paper that if there was constitutional change, it may be appropriate to recognise principles or rights that flow from the Treaty without presuming to foreclose on the Treaty itself by presenting those principles or rights as complete. He suggested that it may be appropriate to acknowledge Aotearoa/New Zealand as a place for all peoples while recognising at the same time that in the interpretation and administration of laws, weight shall be given to the status of Maori as
aboriginal inhabitants and the Treaty promise to protect their interests. In such ways the Treaty is expanded upon, has honorable mention, continues to morally bind but is not incorporated into law save to the extent specified. He concluded by considering Maori norms and New Zealand's place in the Pacific, and he suggested that it is useful to remember that New Zealand Maori are part of a common Pacific family, the common descendants of ancient voyagers, sharing with Pacific peoples many common values. Both Maori and government links to the Pacific might be recognised.

Denise Henare argued from a bi-nationalist reformist perspective, that future arrangements should acknowledge the origins of New Zealand (the Treaty) in the future building of the nation. She made the point that the Treaty cannot be overlooked by Parliament but neither can it be tied down nor limited. There is need, she said to:

1. to grapple with the concept of the Crown;
2. to articulate what in New Zealand is the Executive;
3. to consider the role of the Legislature; electoral and voting systems;
4. to consider the role of the Courts (including the Privy Council at one end and the Maori Land Court at the other) - systems, structures and laws,
5. to respond to the recommendations of the Royal Commission on Electoral Reform(16), noting: “Maori desire for a measure of self-determination has been a constant theme in Maori-Pakeha relations since the Treaty was signed.” recognising: “the constitutional position of the Maori people ... in our legislative processes and institutions.” and also recognising that: “the issues will not become any easier as time passes, and we think it desirable to face the problems before their resolution becomes even more difficult.”

When looking at models for accommodating Maori aspirations for self-determination Professor Winiata argued, as did the majority of other Maori present for reform, namely that institutional arrangements should be designed for the Crown and Maori to operate within their respective culture/tikanga while at the same time finding space common to both. He suggested three spaces for dialogue can be designed each with its own tikanga and/or paradigm.

1. the Crown House, also known as the tikanga Pakeha House;
2. the tikanga Maori House; and
3. the Treaty House.

Professor Mason Durie argued for open debate on the options for constitutional change, including the development of a constitutional
framework and the establishment of two Commissions to progress the debate.
FROM OUTLAW TO INLAW: BRINGING LESBIAN AND GAY RELATIONSHIPS INTO THE FAMILY SYSTEM

BY SUSAN B. BOYD

1. INTRODUCTION

In recent years, social groups that have been historically estranged from the legal system have begun to be recognized, or incorporated, or, as Ruthann Robson would say, "domesticated", by law. The incremental but uneven recognition over the past decade of same sex relationships by Canadian laws that regulate "family" relations offers an intriguing case study of this trend. This recognition represents a much-needed and long-awaited sea change to the heterosexual norm that has hitherto infused the legal system. Nevertheless, many scholars and activists have critically analyzed the political and strategic implications of incorporation of lesbians and gay men into the legal system of "family". I will briefly review these approaches and then explore the difficulties that most intrigue me: they are those related to the dubious benefits of being included in a family law system with objectives that bolster the privatization of responsibility for economic well-being in society. I shall also link these dilemmas to feminist analyses of the role of the family in the capitalist mode of production, using as a catalyst the debate between Nancy Fraser and Judith Butler concerning Fraser's identification of a recognition/redistribution dilemma. I raise these issues in a spirit of support for recognition of lesbian and gay lives, but also from a position of wanting to seek this recognition in the most progressive manner possible, taking into account class, gender, race and other social systems that intersect with sexuality.

Earlier versions of this paper were presented at the Faculty of Law, University of Waikato, May 31, 1999; the Australian Law and Society Association Conference, La Trobe University, Melbourne, Dec. 8, 1998; The Faculty of Law, University of Natal (Pietermaritzburg) South Africa, Oct. 16, 1998; and the Canadian Law and Society Association meetings, Ottawa, June 1, 1998. Some of the analysis formed part of a keynote lecture at an International Conference on Law, Gender and Sexuality at Keele University, England, June 21, 1998 that was published in Social and Legal Studies 8(3) (1999): 369-89. I would like to thank Judy Fudge for drawing my attention to the debates in New Left Review about Nancy Fraser's recognition/redistribution dichotomy; Bill Black, Lisa Phillips, Mehera San Roque, and Claire F L Young for reading early drafts and helping me to focus my analysis; the anonymous referees for the Yearbook; and Karey Brooks, Beth Long and Nicole Todosichuk for research assistance. This research was supported by a strategic grant under the "Women and Change" theme of the Social Sciences and Humanities Research Council of Canada.

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Throughout, I use the lesbian spousal support case decided in May 1999 by the Supreme Court of Canada, *M v H*, as an example. This case arose when a ten-year lesbian relationship terminated, leaving one woman (M) in a vulnerable economic position. She wished therefore to claim financial support from her ex-partner (H). Because the relevant family law statute in Ontario allowed only opposite sex cohabitants and married spouses to make such a claim, M had to bring a constitutional challenge to the definition of "spouse" in the *Family Law Act*. She did so by arguing that her equality rights guaranteed in section 15(1) of the *Canadian Charter of Rights and Freedoms* (the "Charter") were infringed by the definition because it discriminated against her on the basis of sexual orientation. M was successful in the Ontario courts and at the Supreme Court of Canada. In fact, she was the first lesbian or gay person in the world to be successful in such a challenge to the opposite sex definition of "spouse" at the highest court of her country. The case is thus emblematic of initiatives to recognize same sex relationships in a number of countries, most recently Vermont State and the Netherlands.

*M v H* was the first Supreme Court of Canada decision about the expansion of the definition of "spouse" to include same sex partners for the purpose of a *family law* claim. Previous Supreme Court of Canada cases had dealt with the definition of "spouse" in the context of bereavement leave entitlement in

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4 Section 15(1) of the Charter reads:
   Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability. *Canadian Charter of Rights and Freedoms*, Part 1 of the Constitution Act 1982, being Schedule B to the Canada Act 1982 (U.K.) 1982, c. 11. The Charter is entrenched in the Canadian constitution. Sexual orientation has been read in as an analogous protected ground of discrimination in *Egan v Canada*, [1995] 2 SCR 513 [hereinafter Egan].
a collective agreement (Mossop)\(^7\) and entitlement to the Old Age Security spousal allowance (Egan),\(^8\) and were unsuccessful efforts by gay men to expand the definition. However, partly as a result of one of these cases (Egan), it is now accepted by the Supreme Court of Canada that sexual orientation is a prohibited ground of discrimination under section 15 of the Charter, which is part of Canada’s Constitution.\(^9\) The Supreme Court decision in M v H meant that provincial and federal governments in Canada had to take this issue seriously and consider extension of the rights and responsibilities accruing to unmarried or married opposite sex cohabitants – and possibly those accruing to married couples – to same sex cohabitants across the country. However, as we shall see at the end of this article, the legislative reforms that the Province of Ontario and the Government of Canada have initiated since the case was decided tend to establish a legal regime of separation or segregation of same sex partners rather than integration, even as they are recognized in law.

2. BRINGING ESTRANGED SEXUALITIES INTO THE FAMILY LAW SYSTEM

Despite occasional efforts by lesbians and gay men to challenge the obvious heterosexism of the legal institution of marriage in the courts, Canada has not recognized same sex marriage.\(^10\) However, mainly as a result of the sustained momentum of lesbian and gay activists who have made relationship recognition a key focus of their campaigns for both legislative and judicial reforms,\(^11\) there has been an incremental and uneven extension of some Canadian laws applicable to unmarried heterosexual cohabitants to include same sex cohabitants. Typically, but not always, this extension has occurred through expansion of the definition of “spouse” to include same sex cohabitants in various pieces of legislation. Thus, the cases and legislative developments in Canada that recognize same sex relationships do so by analogy to the legal status of unmarried opposite sex cohabitants.\(^12\)

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\(^7\) Mossop v Canada, [1993] 1 S.C.R. 554. Note that Mossop was not a Charter of Rights and Freedoms case, but rather was based on human rights legislation.

\(^8\) Egan, supra note 4.

\(^9\) Ibid. See also Vriend v Alberta, [1998] 1 S.C.R. 493.

\(^10\) For example, in Layland v Ontario (Minister of Consumer and Commercial Relations) (1993), 104 D.L.R. (4th) 214 (Ont. Div. Ct.) and North v Matheson (1974), 52 D.L.R. (3d) 280 (Man. Co. Ct.). Most jurisdictions that have moved towards recognition of same sex relationships have done so not by opening up legal marriage, but rather by some sort of recognition short of marriage. The recent Netherlands legislation comes closest to opening up civil marriage to same sex couples, supra n 6.


\(^12\) For example, in Re K (1995), 125 D.L.R. (4th) 653 (Ont. Ct. Prov. Div.) a lesbian co-mother was permitted to apply to adopt the child of her partner under step-parent adoption rules. See also Re A [1999] A.J. 1349 [Q.L.] (Alberta). In 1997, the Province of British Columbia amended its family law statute to include same sex cohabitants.
Marriage as a legal institution reserved for opposite sex partners has not yet been challenged by these developments, which effectively run parallel to the legal regulation of marriage per se.\textsuperscript{13}

Married spouses in Canada still have more legally enforceable rights and responsibilities than unmarried spouses, whether opposite sex or same sex. Nevertheless, some conservative anti-gay protesters assume that \textit{M v H} came close to giving lesbians and gay men the right to marry. Shortly after the Supreme Court's decision, the right wing Reform Party of Canada (now the Canadian Alliance Party) introduced a motion in the House of Commons affirming that marriage is only possible between a man and a woman. The House of Commons affirmed the motion by 216-55, with the help of many of the governing Liberal Members of Parliament, including the Justice Minister Anne McLellan.\textsuperscript{14} This resistance shows that some important social and legal shifts in the normative structures relating to relationship recognition have occurred: unmarried spouses are obtaining more and more rights and responsibilities originally reserved for married and heterosexual spouses.

Clearly, at one level, legal acknowledgements of same sex relationships should be, and are, cause for celebration by those in the lesbian and gay communities who have struggled for recognition of their relationships, as well as by those who challenge the exclusivity of the institution of marriage. The cause for celebration is the symbolic positive recognition of lesbian and gay "sexual specificity" and the attendant revaluing of a despised sexuality, to use Nancy Fraser's words.\textsuperscript{15} Nonetheless, concerns have been raised about these developments by many authors and activists. These concerns can be broken down into two main categories: those related to assimilation and

\footnotesize{(for 2 years) in the provisions on spousal support, child support, and child custody and access. Family Relations Act R.S.B.C. 1996, c. 128, s. 1, amended by Family Relations Amendment Act 1997, S.B.C. 1997, c. 20 [Bill 31, 1997].

\textsuperscript{13} However, the British Columbia Family Relations Act makes a reference to marriage in its new definition of "spouse". "Spouse" now means a person who "lived with another person in a marriage-like relationship for a period of at least 2 years . . . and, for the purposes of this Act, the marriage-like relationship may be between persons of the same gender" (section 1).

\textsuperscript{14} Editorial, "The love that dare not be legally recognized," \textit{The Globe and Mail}, Thursday, June 10, 1999, A13. See also Bill 202, Marriage Amendment Act 2000 introduced by the Alberta government. This Act amends the Marriage Act R.S.A. 1980, c. M-6, to specify that 'marriage' means a marriage between a man and a woman. The new Federal bill passed by the Canadian House of Commons April 22, 2000, Bill C-23, The Modernization of Benefits and Obligations Act, also contains a 'defence of marriage' provision in its preamble.

to critiques of marriage as an oppressive institution, and those about the privatization of economic responsibility. All of these concerns, but particularly the second one, challenge suggestions that cultural/legal recognition is the key means by which to redress lesbian/gay oppression, in that they highlight important connections between lesbian/gay oppression, the sexual division of labour in marriage and the nuclear family, and the capitalist mode of production.

**Marriage as an Oppressive Institution and Assimilating Discourses**

Concerns have been expressed that the inclusion of lesbians and gay men in marriage or marriage-like relationships, such as legally recognized cohabitation, may bolster an institution that has been used to oppress women, Aboriginal peoples, and others, including of course lesbians and gay men themselves. This issue raises the question of whether by entering a social institution such as marriage, lesbians and gay men will automatically change it and remove its oppressive functions. This result seems unlikely, particularly given the assimilating discourses that will be discussed below and given that many lesbians and gay men are not inclined to challenge from within the role that marriage has played in reinforcing unequal relations in society. Indeed, some major proponents of same sex marriage seek to be admitted to that institution precisely because of some of its oppressive features.

For instance, Andrew Sullivan's well known arguments for same sex marriage include several "conservative" elements such as a vision of marriage as a "civilizing" institution that has the effect of taming the male impulse toward promiscuity and violence and rendering it socially manageable. He has argued that gay marriage would provide "role models for young gay people who, after the exhilaration of coming out, can easily lapse into short-term relationships and insecurity with no tangible goal in sight", and held out (in somewhat of a stereotyping!) lesbian relationships as

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16 See, for example, Paula L Ettelbrick, “Since When is Marriage a Path to Liberation?” in *Lesbian and Gay Marriage*, (ed) Suzanne Sherman (1992), 20-26; Polikoff, "We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not Dismantle the Legal Structure of Gender in Every Marriage"; Teressa Nahane, *Marriage as an Instrument of Oppression in Aboriginal Communities* (1995). However, Calhoun suggests that lesbian feminist approaches are problematic in that they obscure lesbian difference from heterosexual women, and take heterosexual women's concerns as primary; she suggests that marriage or family need not necessarily be oppressive for women nor a primary structure of patriarchy: Cheshire Calhoun, "Family's Outlaws: Rethinking the Connections between Feminism, Lesbianism, and the Family," *Feminism and Families*, (ed) Hilde Lindemann Nelson (1997) at 135-6.

"virtual textbook cases of monogamous commitment". In another conservative argument for legal recognition of same sex marriage, Richard Tafel said that marriage is "an evolving institution, which has consistently met the needs of society in each era" and argued that there is "a direct correlation between civilizing men through the institution of marriage and keeping order in society". A better example of using marriage as an instrument of social control I have not seen! Tafel goes on to argue that "the civilizing effect of marriage should not be denied to anyone willing to take the vows and live by them" and that marriage would bring "long-term stability and prosperity to the lives of millions of gays and lesbians" and "improve their health and deepen their personal fulfillment".

This type of conservative approach, which is geared towards capturing the approval of "middle America" for same sex relationships, raises the possibility that recognition of lesbian/gay relationships in family law may not challenge the economic privilege of men or the sexual division of labour within the privatized family that has for so long been the subject of critique by feminists. The continued exploitation of women’s unpaid work and the relationship between the family’s (i.e. women’s) responsibility for the costs of social reproduction constitutes an intrinsic component of the capitalist mode of production, a point that will be explored later in this article. From a feminist and left perspective, failing to challenge at a fundamental level the social institutions of marriage and family, and the roles they play in social inequality, is very problematic.

As well, many authors and activists are concerned that normalizing lesbian and gay intimate relationships by assimilating them into a normative model of heterosexual coupledom based on the institution of marriage will reinforce distinctions between “good” gays and lesbians, who look as much as possible like the traditional nuclear couple, and “bad” gays and lesbians, whose relationships violate familial norms (“the permanently single, the

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21 But see Calhoun in “Family’s Outlaws: Rethinking the Connections between Feminism, Lesbianism, and the Family” supra n 16, who argues that this position displaces the specificity of lesbian existence and arguments, in favour of a focus on the concerns of heterosexual women.
polygamous, the sexually non-monogamous, the member of a commune, and so on".\(^{22}\)

A clear example of the process through which "assimilation" occurs was provided in a British Columbia case, *Forrest v Price*, where a judge who recognized a property claim brought by one gay man against his ex-partner under the constructive trust doctrine, said that the men had "assumed the classic roles and the division of labour characteristic of many traditional heterosexual marriages" and "fulfilled their traditional roles as homemaker and breadwinner". She added: "They impressed all those around them as a couple and discussed "their" homes and projects."\(^{23}\) Many lesbians and gay men resist having to demonstrate such evidence of gendered domesticity in order to claim an equitable share of income or property from an ex-partner. Yet, when I conducted a review of Canadian judgments grappling with what constitutes "cohabitation" or a "conjugal" or "marriage-like" relationship, I found that judges stressed factors such as the importance of sharing the same roof, shared responsibilities, a committed sexual relationship with some permanence, exclusivity of the relationship, mutual support, recognition by the community, friends and families, and financial interdependence. Indeed, in *Re K.*, an Ontario lesbian adoption case that is a triumph over homophobic views of lesbians and parenting, Nevins J. emphasized that the lesbian couples had lived in relationships that had "all the characteristics of a relationship formalized by marriage". He said:

> Each of the couples have cohabited together continuously and exclusively for lengthy periods, ranging from six to 13 years; their financial affairs are interconnected; they share household expenses, have joint bank accounts and in some cases, they own property together in joint tenancy; they share the housekeeping burdens to the extent that they are able in light of their respective careers and employments; the individual partners share a committed sexual relationship. Most importantly, they all share equally the joys and burdens of child rearing.\(^{24}\)

Judges are usually careful to include a cautionary note that not all of these factors need to be found in order to establish a relationship worthy of legal recognition, and that the extent to which various components need to be taken into account varies with the circumstances of each case. Charron J.A., writing for the majority of the Ontario Court of Appeal in *M v H*,

\(^{22}\) Ibid at 147.

\(^{23}\) *Forrest v Price*, [1992] B.C.J. No. 2299 [Q.L.]; 48 E.T.R. 72. Nancy Polikoff suggests that historical examples of same sex marriage, e.g. the berdache in Native American societies were highly gendered and organized along the lines of husband/wife roles and a "sexual" division of labour (much like *Forrest v Price*): "We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not Dismantle the Legal Structure of Gender in Every Marriage" *Virginia Law Review* 79 (1993): 1535-1550.

\(^{24}\) *Re K.* supra n 12 at 657.
emphasized this point and noted astutely that “some factors may take on a greater or lesser significance than others in the case of same-sex couples. For example, some same-sex cohabiters may not have openly and publicly presented themselves as a couple for fear of reprisal or prejudice, a concern which may not be present to the same degree, if at all, in the case of unmarried heterosexual cohabiters.” Moreover, as at least one group that intervened in *M. v. H.* at the Supreme Court of Canada (the Women’s Legal Education and Action Fund or “LEAF”) pointed out, equality law in Canada does not require that equality-seeking groups show that they are similarly situated to those who already have equality before and under the law. There was therefore no need for lesbian litigants to portray their intimate relationships as if they were “just like” those of their heterosexual counterparts. The majority justices of the Supreme Court of Canada in *M v H* endorsed these approaches. It also appears that efforts in Canada to move towards gender neutrality in family law (for example, gender neutral definitions of “spouse” and reciprocal obligations of male and female spouses for financial support) have made it somewhat easier to imagine two women or two men fitting definitions such as a “marriage-like relationship”.

However, Epstein J. in the lower court in *M v H* had noted that H had been more involved in the shared business that M and H had during the 1980s, whereas M “appeared content to devote more of her time to domestic, rather than business, tasks.” Moreover, one of H’s arguments in resisting being defined as a “spouse” was that she and M had *not* taken on gendered roles and had consciously avoided a lifestyle that modeled itself after heterosexual relationships; that they were “best friends” and not spouses. H’s logic was that if she and M had not “assimilated” to the marriage model, then she should not incur “spousal” obligations.

Thus, despite the sensitivity displayed by Charron J.A. and other justices to the differences that may exist between same sex and heterosexual couples, there are serious concerns that the need to meet certain criteria in order to fit within existing legal categories such as “spouse” will “domesticate” the lives of lesbians and gay men; that the extent to which lesbian/gay lives challenge the status quo will be cloaked and the radical edge of this challenge dulled;

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25 *M v. H.* (Ont. C.A.) at 27.
26 Factum of the Women’s Legal Education and Action Fund (intervenor) in *M v H* in the appeal to the Supreme Court of Canada, court file no. 25838, at para 51 [hereinafter LEAF’s Factum].
27 *M v H* (S.C.C.) supra n 5 at paras 58-59, per Cory and Iacobucci J.J.
28 *M v H* (Ont. Gen. Div.) supra n 5 at 545.
that the diversity of lesbian/gay lives will be obscured and that a normative model of intimate relationship will be reinforced and re-created outside the marriage context, even in the context of lesbian or gay relationships.  

Privatizing Trends

A second key concern about the trend to recognize same sex relationships as “family” that is addressed less frequently in the literature, is the role of marriage, the family, and family law in the privatization of economic responsibilities. That is, individuals are expected to rely on family members for economic support, rather than generating a more collective sense of responsibility on the part of the wider community for all individuals in need. This approach is highly problematic for those who do not have family members with the economic capacity to provide support for them even if they might want to (e.g. many families with members who have disabilities, who are living with the HIV virus, etc.). It is also problematic from the point of view that it is mainly women who are expected to assume responsibility for the unpaid labour – the caring labour – involved in supporting dependent family members. To the extent that family law reinforces reliance on ex-spouses with whom one no longer is living for economic support, family law can thus be seen as a mechanism that relieves the social welfare system of responsibility for those who experience economic dependency for a variety of reasons, whether it be illness, lack of participation in the workforce, poor paying jobs, discrimination, and so on. On this analysis, enlarging the scope of the definition of “family” for the purposes of family law can be read as enhancing the privatization role of the family, and making it more difficult for individuals in need to rely on public support.

In fact, the recent Canadian legal challenge to heterosexist laws, the M v H case mentioned above, referred explicitly to the privatizing objective of family law as a key rationale for extending laws to include same sex relationships. The lower courts in M v H distinguished the Supreme Court of Canada decision in Egan v Canada (upholding provisions in the Old Age Security Act that restricted spousal allowances to heterosexual spouses) on the basis that those cases dealt with public funds which were not at issue in M v H. The lower courts emphasized that the objective of the spousal support legislation at issue in M v H was equitable resolution of economic disputes that arise upon the breakdown of intimate relationships between

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30 See Ettelbrick, “Since When is Marriage a Path to Liberation?” supra n 16.
31 See, generally, Susan B. Boyd, (ed) Challenging the Public/Private Divide: Feminism, Law, and Public Policy (1997). Robson has pointed out that the critique of marriage has too rarely been extended to a wider critique of “family”: “Resisting the Family: Repositioning Lesbians in Legal Theory” supra n 2 at 977, n 6.
individuals who have been financially interdependent. It did not, therefore, involve public funds. Furthermore, and most notably in terms of privatization, Charron J.A. wrote that a second underlying purpose was “to alleviate the burden on the public purse by shifting the obligation to provide support for needy persons to those parents and spouses who have the capacity to provide support to these individuals.” The majority of the Supreme Court of Canada affirmed these two objectives as they had been identified by Charron J.A. Cory and Iacobucci JJ., writing for the majority, emphasized repeatedly that the definition of “spouse” at issue and the spousal support provisions that it gave access to were “designed to reduce the demands on the public welfare system.” They also emphasized that the Court was not bound by the negative decision in Egan because the cases were based on entirely different statutes with their own unique objectives and legislative context. Many authors have asked why any individual’s economic well-being should be contingent on the wealth of family members, ex-spouses, and so on. The family law system is a flawed one that arguably benefits mainly those whose ex-partners were quite well-off financially. Scholars have also shown how many individuals fall between the cracks of the social welfare system and the family law system, and that predominantly these individuals are members of historically disadvantaged groups. Moreover, trends that bolster privatization of economic responsibility tend to diminish general public support for publicly funded programs, especially among those who are relatively privileged in their ability to rely on familial or other private means of support. In fact, the majority justices of the Supreme Court of Canada endorsed a negative vision of the public welfare system: “The impugned legislation has the deleterious effect of driving a member of a

32 M v H (Ont. C.A.) supra n 5 at 35. See also Justice Epstein’s reasons in M v H (Ont. Gen. Div.) supra n 5 at 553 and 557.
33 M v H (S.C.C.) supra n 5 at paras 4, 106.
34 Ibid at para 53. See also Major J. at para 283, and Bastarache J. at para 356.
35 Ibid at para 75.
38 Mary Jane Mossman and Morag MacLean, “Family Law and Social Assistance Programs: Rethinking Equality,” Women and the Canadian Welfare State, (eds) Patricia M Evans and Gerda R Wekerle (1997), 117-141 show that social assistance programs often view women as having a continuing entitlement to familial support, which in turn can create difficulties in relation to their claims for social assistance.
same-sex couple who is in need of maintenance to the welfare system and it thereby imposes additional costs on the general taxpaying public." It seems to be no coincidence, then, given increasing trends towards privatization, that cases such as *Egan* have failed when they involved public rather than private money, whereas cases such as *M v H* have succeeded. 40

3. ANALYSIS: HOW FAR WILL CULTURAL/LEGAL RECOGNITION TAKE US?

As we have seen, alongside the celebration of the recognition of lesbian/gay relationships in family related statutes, progressive scholars and activists who wish to destabilize the heterosexual norm have articulated major concerns regarding the trend. What I want to do now is recast the debate somewhat by engaging with the questions raised by political theorist Nancy Fraser in "From Redistribution to Recognition?". Fraser articulates a heuristic distinction between groups who are subject to both cultural injustice and economic injustice (such as women and people of colour), those who are subject mainly to economic injustice (such as the working class), and those who are subject mainly to cultural injustice (such as lesbians and gays). As a remedy for their oppression, the first group requires both political economic restructuring and cultural recognition. The last group - and gays and lesbians are the only example that Fraser provides of this group - needs only cultural recognition; any attendant economic injustices will be redressed accordingly. Fraser thus argues that pass in the Ontario legislature in 1994. It was this failure that gave rise to much subsequent litigation, including *M v H*.

Equally, however, it is my view that critical analysis of the implications for social transformation of such initiatives must occur simultaneously with legal struggles for recognition. I am very concerned that lesbian/gay strategies of engagement with state and law not stop at the point of recognition, and that recognition, while clearly necessary, not be seen as sufficient to achieve.

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39 *M v H* (S.C.C.) supra n 5 at para 115.
41 Fraser, “From Redistribution to Recognition? Dilemmas of Justice in a "Postsocialist Age"” supra n 15.
42 Fraser does acknowledge that this distinction is a heuristic device and that “we may question whether there exist any pure collectivities of this sort”, ibid at 18. Nonetheless she defends (in note 18) her decision to treat sexuality as significantly different from gender, which is rooted in the sexual division of labour.
43 Ibid at 18-19.
My first thought on reading Fraser’s chapter on redistribution/recognition was that it was problematic to single out lesbian oppression as rooted mainly in cultural injustice. My thought process was as follows. Dominant norms of heterosexuality in the legal system and elsewhere have been intrinsically connected to unequal gender relations between women and men, and to the unequal sexual division of labour in both the family and the workplace. In turn, both unequal gender relations and the sexual division of labour are related to the capitalist economic system, which relies on and benefits from the underpaid work of women in this sexual division of labour. Arguably, then, unequal gender relations and the heterosexual norms that support them cannot ultimately be challenged without changes to that capitalist system. I was therefore excited to discover Judith Butler’s response to Fraser’s schema, in which she developed some of these points. In looking at the debate between Fraser and Butler, I shall focus on Butler’s points about “queer politics and the disparagement of the cultural”. 

Butler asks how the attempts by the lesbian/gay movement to criticize and transform the ways in which sexuality is socially regulated can possibly be understood as separate from the functioning of political economy. She then refers to the trenchant critique of the heterosexual nuclear model of family made by socialist feminists in the 1970s and 1980s, pointing out that the production and reproduction of life in the family is a crucial component of the mode of production, or how society produces what it needs. These feminists showed not only that the family was part of the mode of production, but also that “the very production of gender had to be understood as part of the ‘production of human beings themselves’, according to norms that reproduced the heterosexually normative family.” Socialist feminists regarded the family not as a natural given, but rather as a specific social arrangement of kin functions that was historically contingent and, therefore potentially transformable. The reproduction of gendered persons - of “men” and “women” - depended on “the social regulation of the family and, indeed, on the reproduction of the heterosexual family as a site for the reproduction of heterosexual persons, fit for entry into the family as social form.” Thus, Butler points out, “the regulation of sexuality was systematically tied to the mode of production proper to the functioning of political economy.” In other words, (hetero)sexuality and gender are intrinsically connected, and gender is connected to the economic or material sphere, and so it makes no sense to argue, as Fraser does, that oppression of lesbians and gay men is a question of cultural recognition, whereas gender is a question of both cultural recognition and economic redistribution.

45 Ibid at 40.
46 Ibid.
Butler argues that gender and sexuality are part of material life not only because of the ways in which they serve the sexual division of labour, but also because normative gender serves the reproduction of the normative family. Butler's point here, in contrast to Fraser, is that "struggles to transform the social field of sexuality do not become central to political economy to the extent that they can be directly tied to questions of unpaid and exploited labour, but also because they cannot be understood without an expansion of the 'economic' sphere itself to include both the reproduction of goods as well as the social reproduction of persons." She then questions how it can be that the "queer question" of how normative sexuality is "confounded by the non-normative sexualities it harbours within its own terms - as well as the sexualities that thrive and suffer outside those terms" - can be viewed as only a matter of cultural recognition and not a question of the mode of production.

Because, in Butler's view, the production of normative heterosexuality is related to the mode of production, or the economic/material sphere, struggles over the recognition of non-normative sexualities (e.g. in the legal realm) must of necessity be relevant to challenges to the mode of production. Butler gives examples of ways in which lesbians and gays are excluded from legal definitions of family:

For example, in those instances in which lesbians and gays are excluded from state-sanctioned notions of the family (which is, according to both tax and property law, an economic unit); stopped at the border, deemed inadmissible to citizenship; selectively denied the status of freedom of speech and freedom of assembly; are denied the right (as members of the military) to speak his or her desire; or are deauthorized by law to make emergency medical decisions about one's dying lover, to receive the property of one's dead lover, to receive from the hospital the body of one's dead lover – do not these examples mark the 'holy family' once again constraining the routes by which property interests are regulated and distributed?

Butler also cites poverty rates among lesbians as being in relation to the normative heterosexuality of the economy. Presumably, then, she would consider the legal struggles for recognition of lesbian relationships as "spousal" as at least somewhat significant because they confound normative sexuality, which is in turn a part of the mode of production.

47 Ibid.
48 Ibid.
49 Ibid at 41.
50 Ibid.
51 Ibid.
52 Perhaps I am reading too much into what Butler's stance would be on this issue. It has been pointed out that Butler's work, "should it be used in the legal forum, would almost certainly be treated as incomprehensible": Carol Smart, "Law, Feminism and
Despite my initial excitement at discovering Butler’s response, I eventually found myself questioning the implications of her analysis as well. Although I agree that the production of normative heterosexuality is related to the mode of production, it does not follow that legal recognition of non-normative sexualities, such as same sex relationships, of itself will constitute a fundamental challenge to the capitalist mode of production. Having offered a useful reminder and summary of socialist feminist thought on the family, and having articulated an appropriately enlarged concept of the mode of production that includes the production of human beings and thus of gender and the heterosexually normative family, Butler fails to follow it through to a consideration of the problematic role of the family in social relations and social inequality. Instead she substitutes her tactic of confounding normative sexuality and appears to assume that some transformation in social relations will result. Re-affirming “the family”, even by including same sex spouses within it, will not stop the ways in which the “holy family” constrains the routes by which property interests are regulated and distributed.

In the end, I am troubled both by Fraser’s separation of recognition and redistribution and by Butler’s assumption that cultural struggles will of necessity challenge the political economy simply because they have a relationship to it. Surely the pertinent question is whether any given struggle has a significant impact in a historically, culturally, and geographically specific situation. Neither Butler nor Fraser develops an adequate dialectical analysis of the ways in which discursive challenges (for example to the heteronormativity of family laws) relate to resource distribution in late capitalist societies. I find myself agreeing with Fraser’s own response to Butler in Social Text that it is implausible that gay/lesbian struggles, at least for familial recognition, will challenge capitalism in its actually existing historical form. However, I continue to resist both the extent of Fraser’s

Sexuality: From Essence to Ethics?” Canadian Journal of Law and Society 9(1) (1994): 15-38 at 26. However, I shall make this assumption for the purposes of argument in this article.
53 See Teresa Ebert, Ludic Feminism and After: Postmodernism, Desire, and Labor in Late Capitalism (1996), 216-17, who argues that Butler confines “the regime of heterosexuality” entirely to the superstructure, to a discursive order, which is what Butler complains that Fraser does. Ebert points out that approaches such as Butler’s do not break “the logic of the dominant ideology of capitalism.” (at 217)
54 Butler, "Merely Cultural” supra note 44 at 41.
56 Nancy Fraser, “Heterosexism, Misrecognition, and Capitalism,” Social Text 52/53 15(3/4) (1997): 279 at 285. One of Fraser’s answers to Butler is to say that Butler
separation of sexuality from gender and Butler's implication that confounding the normativity of heterosexuality itself may challenge the material place of the family in capitalist relations of production.

Although both sets of concerns identified earlier in this article (marriage as an oppressive institution and assimilating discourses, and privatization of economic responsibility) are relevant to my resistance, it is the privatization role of the family, no matter whether lesbians and gays are included in it or not, that prevents me from going all the way with Butler's argument. I am concerned that the incorporation of lesbians and gay men within family law may be as much about the domestication of deviant sexualities within a safe and recognizable framework that is useful to capitalism, than about the transformatory confounding of normative sexualities.

Various authors working from a materialist or Marxist feminist framework have looked carefully at the relationship between the mode of production, social reproduction, and the family. They show that the ideology of the heterosexual nuclear family as the base of society remains strong and has a clear material underpinning in that it (and especially women within it) is allocated primary responsibility for the costs of producing and raising children, and caring for dependent family members. It is thus possible that "while the privatized family is not essential to the survival of capitalism, its abolition is not at all likely while capitalism exists." Such a change would require massive investment in the socialization of the costs and labour of the family by each capitalist state; any one state trying to achieve this goal would be at a competitive disadvantage (for example, if it were to increase spending on child care). Moreover, as Jacobs has argued, "the fight for alternative families does not confront the structures of women's economic oppression that have become increasingly significant with the development of public patriarchy, and thus it does not threaten gay men's economic

conflates the material and the economic (at 286). Fraser agrees that cultural struggles are "material" and of equal material importance to economic struggles; but that the "economic" is conceptually separate from the cultural. Fraser argues that it is problematic for political reasons to entirely collapse differences between the two.


privilege with respect to women.” So the ideology of the heterosexual nuclear family as the base of society prevails and has a clear material underpinning within capitalism despite the fact that various legal systems have begun to recognize lesbian and gay intimate relationships as well as to recognize women’s rights, and thereby have created clear cracks in the edifice of heteronormativity and the ideology of the family. As Fraser herself says, these cracks have arisen because contemporary capitalism seems not to require heterosexism and permits “significant numbers of individuals to live through wage labor outside of heterosexual families.” This is the contradiction in which we currently live: the heterosexual imperative has diminished along with the rigidity of gender roles, but nevertheless the normative family persists, as do many old and new forms of inequality and oppression that are being reinforced and exploited as globalization occurs.

Ultimately, I think Fraser is right in saying that Butler goes too far in conflating cultural and economic struggle, and that at least at a conceptual level they must remain somewhat separate in order to gain an understanding of how discursive challenges (e.g. to the heterosexual family) relate to resource distribution. However, I disagree with Fraser’s suggestion that the oppression of lesbians and gay men can be dealt with mainly through status recognition. This conclusion over-simplifies the sources of oppression that lesbians and gay men experience, and also overlooks the intersectionality of oppressive structures such as racism, class, and heteronormativity. An intersectionality analysis that asks us to attend to the ways in which indices of oppression such as gender, race, class, sexual orientation, and disability affect one another would assist us in seeing more clearly the limits of familial recognition strategies. For example, contrasting the situation of a poor black lesbian in ill health and that of a white gay man with a partner

59 Michael P Jacobs, supra n 20 at 173.
60 Fraser, “Heterosexism, Misrecognition, and Capitalism” supra n 56 at 285.
61 Ebert, in Ludic Feminism and After: Postmodernism, Desire, and Labor in Late Capitalism supra n 53, agrees with Fraser (from a more Marxian materialist perspective) that the emergence of the “homosexual” is characteristic of “a historical moment in which the forces of production have reached such a level of sophistication in their productivity that heterosexuality (as a means of maintaining the reserve army of labor at a relatively high level) is no longer necessary” (65-66). Ebert adds: “The fact that homophobia is an obstacle to full legal and social integration of lesbians and gays is more a matter of the contradictions between the social relations of production and forces of production, contradictions that are now the substance of what conservatives call ‘culture wars’ . . .” (66).
employed in a business with excellent health benefits helps us to understand the limits of a socio-economic system that is based on privatization. Although not all comparisons are so stark, contrasting these situations clarifies the differential effects of strategies such as recognition of relationships. A redistributive politics is crucial to lesbian and gay liberation.

4. HOW TO THINK ABOUT M V H AND OTHER LESBIAN/GAY STRUGGLES FOR FAMILIAL RECOGNITION

Despite the concerns noted above, I am certainly not arguing against recognition of same sex relationships per se. The symbolic power and the thrill of moments of legal recognition are real and may play an educative role in relation to the attitudes of the general public. Epstein J.’s statements in M v H at the Ontario General Division level, countering irrational discrimination against lesbians and gay men and their relationships, were very powerful and an important challenge to traditional definitions of “family”. She eloquently rebutted assumptions that our relationships do not manifest the interdependence found in heterosexual relationships and she showed how the objectives of family law would be enhanced by reading same sex cohabitants into the definition of “spouse”. At the Supreme Court of Canada level, the majority justices emphasized that “same-sex couples will often form long, lasting, loving and intimate relationships” and that the “exclusion of same-sex partners from the benefits of s. 29 of the FLA promotes the view that M., and individuals in same-sex relationships generally, are less worthy of recognition and protection.... Such exclusion perpetuates the disadvantages suffered by individuals in same-sex relationships and contributes to the erasure of their existence.” Moreover, recognition of spousal status will undoubtedly bring beneficial changes to at least some lesbians and gay men at a practical level. For instance, some tax benefits and retirement benefits will likely ensue. However, it must be kept in mind that the benefits of inclusion are often matched by disadvantages.

I felt strongly enough about the importance of the case to work (with others) on the legal argument of the intervenor group LEAF (the Women’s Legal

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64 M v H (S.C.C.) supra n 5 at paras 58, 73, per Cory and Iacobucci, J.J.
65 In family law, for example, financial obligations will ensue as well as rights; in tax law, Claire Young has shown that depending on the economic status of a couple, recognition as “spouses” may not result in benefits at all, especially for those couples where both partners are at a low income level: Claire Young, “Taxing Times for Lesbians and Gay Men: Equality at What Cost?” Dalhousie Law Journal 17 (1994): 534-559. See also Nitya Duclos, “Some Complicating Thoughts on Same-Sex Marriage” supra n 62.
Education and Action Fund) in the M v H case at the Supreme Court of Canada level, in which LEAF supported M’s position that same sex cohabitants should be included in the definition of “spouse” for the purposes of support law. The vitriolic homophobic reactions to the recognition of same sex relationships must also be taken seriously and resisted. I was outraged when Bill 167 (which would have included same sex couples in most legislative provisions that gave rights to unmarried heterosexual couples) failed to pass in the Ontario legislature in 1994. It was this failure that gave rise to much subsequent litigation, including M v H.

Equally, however, it is my view that critical analysis of the implications for social transformation of such initiatives must occur simultaneously with legal struggles for recognition. I am very concerned that lesbian/gay strategies of engagement with state and law not stop at the point of recognition, and that recognition, while clearly necessary, not be seen as sufficient to achieve social equality. I was disturbed while working with LEAF by the difficulty we had in avoiding assimilationist arguments, although I thought that the final factum that LEAF submitted to the Supreme Court largely succeeded in so doing. Moreover, many of the arguments in M v H in favour of including lesbian relationships in the Ontario Family Law Act can be read as adopting the problematic dichotomy between recognition and redistribution that Nancy Fraser describes, by focussing on the “cultural” effects of recognition and avoiding the implications for redistribution of economic well-being. M argued in her factum before the Supreme Court of Canada that the Act’s failure to include same sex couples “leaves same-sex couples standing outside of the law, both metaphorically and literally.” M then made a recognition argument reminiscent of Fraser: “Since the law articulates community standards, lesbian and gay people may

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66 See Edward Greenspon, “Reform seeks curbs on judicial activism” The Globe and Mail (June 11, 1998), A4, on the Reform Party’s motion in the federal Parliament declaring that courts should not be able to alter federal legislation, and offering as its sole complaint the recent ruling of the Ontario Court of Appeal in Rosenberg v Canada (1998), 158 D.L.R. (4th) 664 (which extended the definition of “spouse” in the Income Tax Act to include same-sex cohabitants for certain purposes related to survivor benefits from pension plans). The motion also called on the government to appeal the ruling. (The Reform Party, now the Canadian Alliance Party, is the opposition party in the federal Parliament). See also the discussion of the 1999 Reform Party motion, text supra at n 14.


internalize such an exclusion as a denial of worth. This internalization eats away at the place that love starts: self-love and the recognition of oneself as a valuable human being." Both M and LEAF emphasized the importance of recognition of the relationship. It was suggested, at least implicitly, that the oppression of lesbians and gay men can be addressed through recognition of relationships, without acknowledging the complex economic underpinnings of this oppression and the way that the role of family in capitalist societies relates to that oppression.

In addition, both M and LEAF emphasized the private nature of the remedy of re-defining "spouse" to include same sex cohabitants for the purposes of spousal support claims, which would alleviate demands on public funds. LEAF argued that there were three objectives of the legislation: reducing the burden on the public purse; imposing legal duties on spouses to treat one another in an economically fair fashion upon relationship breakdown; and assisting heterosexual women. Strategically, LEAF’s argument was partly directed at countering the justification made by the (conservative) Ontario government of its resistance to the inclusion of same sex couples in the definition of “spouse”. Its justification was that the Family Law Act was aimed at protecting dependent (heterosexual) women and children, and that this objective was pressing and substantial. The Ontario government had thus made a pseudo-feminist argument referencing the economic inequality of (heterosexual) women in marriage-like relationships. In rebutting the argument of the government against recognition of same sex cohabitants, LEAF tried at the same time not to undermine the importance of the issue of the economic inequality of heterosexual women. The connections between heteronormativity and gender and the family and allocation of the costs of social reproduction were therefore elided. This elision is apparent when one

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69 See also LEAF's Factum supra n 26 at paras 17-18.
70 See Factum of the Respondent M, supra note 68 at paras 62-63; LEAF's Factum supra n 26 at paras 22 and 27. LEAF also stated: "There is little sense in attempting to reduce the strain on the public assistance system by creating a private right for support that is only available to a limited segment of the population of potential welfare claimants. . . ." (para 37). LEAF also noted that leaving lesbians with poor remedies was "particularly problematic in an era when state economic support for individuals - including lesbians - is being eroded." (para 45).
71 LEAF's Factum supra n 26 at para 22.
72 Under section 1 of the Charter, it can be argued that a limit should be placed on a right or freedom if it is a reasonable limit that is demonstrably justified in a free and democratic society. In R v Oakes, [1986] 1 S.C.R. 103, the Supreme Court of Canada identified two central criteria in determining whether a limit is justified. First, the objective of the limiting measure must be of sufficient importance to warrant overriding the right. Second, the means chosen to achieve that objective must be proportional to the ends. The limiting measure must be rationally connected to the objective, minimally impair the right in question, and not so severely trench on an individual or group that the legislative objective is outweighed by the abridgment of rights.
considers that the LEAF factum raised concerns about the privatizing effects of inclusion with the Family Law Act, but then sidestepped the issue by stating that “in the current era of economic retrenchment by government, these concerns may be somewhat moot”.

Those who argued in favour of expansion of the definition of “spouse” in M v H thus endorsed family law’s purpose as being, at least in part, the privatization of economic responsibility. In accepting the argument in M v H that same sex cohabitants should be defined as “spouses” for the purposes of making spousal support claims under Ontario’s Family Law Act, the Supreme Court of Canada relied in part on the fact that this statute deals with obligations between individuals who were once intimate partners, as opposed to economic obligations that state and community might owe to individuals. In other words, these are private obligations as opposed to public, and thus more acceptable in a capitalist society in which privatization - always a key element - is an increasing trend. Although in cases such as M v H heteronormativity is challenged, the ways that the legal arguments must be formulated mean that the potentially disruptive lesbian (or gay) subject is absorbed back into familiar roles and her disruptive potential is displaced. 75

5. CONCLUSION

Overall, when one looks seriously at the objectives of family law, the excitement, and the benefits, of bringing lesbian and gay cohabitants into the system as spouses become less clear. Certainly, the right of an individual to be recognized as a legal parent of a child that she is co-parenting, via adoption, is crucial. Furthermore, for some lesbians or gay men, property settlements or spousal support payments make a difference in living standards. In some cases, if separating couples are unable to reach equitable and fair arrangements regarding property and children, the legal system may provide a normative framework that prevents some injustices as between the parties. However, as mentioned above, arguably the laws on property division and spousal support and social welfare and tax mainly aid those who are quite well-off already and can do real harm to those who have lower incomes. 76 In the end, the family law system operates in a manner that

73 Factum of the Respondent M supra n 68 at para 49.
75 Carol Smart has shown how these processes occur. See “Law, Feminism and Sexuality: From Essence to Ethics?” supra n 52 at 25 and Feminism and the Power of Law (1989).
encourages privatization of economic responsibilities and demarcation of who is recognized as family and who is not. Neither of these results seems highly desirable in a long term vision of a just society.

Canada has begun the process of making same sex relationships analogous to those of unmarried opposite sex cohabitants, at least if same sex partners conform to a normative model of “spouses”: showing a conjugal relationship; joint bank accounts; and so on. As Shelley Gavigan has shown, the legal form of “spouse” has proven itself to be flexible enough to accommodate this change. Other jurisdictions such as the Netherlands and Vermont State have gone further to recognize a form of same sex marriage. These developments have been - and should be - applauded for their recognition of same sex relationships. Nevertheless, I remain unconvinced of the potential for such recognition to disrupt heteronormativity sufficiently to result in major change in the lives of all lesbians and gay men, unless the gay/lesbian communities find a way to extend a simultaneous critique of current familial structures as they relate to economic inequalities. In other words, we must not be so eager for recognition that we settle for too little when it is received, or for provisions that benefit only some lesbians and gay men. We must lobby strenuously for measures that enhance the redistribution of wealth and well-being that are not contingent on whether we have had a wealthy spouse at some point in our lives or whether we conform to the model of "good" queer people. As Ruthann Robson has suggested, only if recognition of lesbians and gay men as “family” eventually destroys or displaces the centrality of “family” in how society organizes redistribution of economic well-being would such recognition lead to more fundamental social change.

There is no question that my perspective on this subject is influenced by a feminist politic as well as a concern for the rights of lesbians and gay men. Charlotte Bunch pointed out some time ago that lesbianism is not just cultural or a question of civil rights, but rather political: “Lesbian-feminist politics is a political critique of the institution and ideology of heterosexuality as a cornerstone of male supremacy.” Bunch went on to say: “It is not okay to be queer under patriarchy - and the last thing we should be

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78 Supra n 6.
80 Robson, “Resisting the Family: Repositioning Lesbians in Legal Theory” supra n 2.
aiming to do is make it okay." If being defined as "spouse" makes it okay for some lesbians and gay men to be queer under patriarchy, we must also beware of the possibility that it does not sustain a political critique of heterosexuality and its role in a capitalist/patriarchal society. As Ettelbrick has suggested, those who are closer to the norm or to power - those who are acceptable to the mainstream due to race, gender, economic status - are more likely to see marriage (or, presumably, legal recognition of marriage-like relationships) as a principle of freedom/equality. We would do well to re-visit Carol Smart's now quite old argument about de-centering marriage and devising "a system of rights, duties, or obligations which are not dependent on any form of "coupledom" or marriage or quasi-marriage" which seems quite radical in comparison to many current arguments that keep it at the centre of our normative universe.

The limitations of M v H should also be noted. The Supreme Court of Canada was extremely cautious in stating that the decision did not challenge traditional definitions of marriage, as was the federal government in its official response to the decision. The federal bill recently passed by the Canadian House of Commons to extend the application of various federal statutes to same sex couples took two measures to preserve the institution of marriage. First, its preamble contained language defending marriage as an opposite sex relationship only. Second, a legal distinction was drawn between married "spouses" and "common law partners", who will include both same-sex and opposite sex partners. A similar distinction was drawn in the Ontario statute, Amendments Because of the Supreme Court of Canada Decision in M v H Act, 1999, except that in Ontario same-sex "partners" are even further distinguished from unmarried opposite sex cohabitants by being denied the designation "spouse". M unsuccessfully sought a re-hearing of the appeal on the basis that the amendments did not comply with the Charter or with the decision of the Supreme Court of Canada. She argued

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82 Ettelbrick, "Since When is Marriage a Path to Liberation?" supra n 16 at 24.
84 Some recent research done for the Law Commission of Canada has begun to ask these questions in relation to the tax system. See Claire F L Young, What's Sex Got to Do With It? Tax and the 'Family' (2000). See also Law Commission of Canada, Recognizing and Supporting Close Personal Relationships Between Adults (2000), http://www.lcc.gc.ca/
85 Bill C-23, supra n 14.
86 S.O. 1999, c.6.
that the separate nomenclature draws an inappropriate distinction on the basis of sexual orientation and was therefore contrary to the *Charter's* equality provisions. The Province of Alberta too has now defined marriage clearly to specify a marriage between a man and a woman.\(^{87}\) Most recognition initiatives in other jurisdictions similarly preserve marriage as a heterosexual preserve and/or grant more rights and responsibilities to heterosexual partners than to same sex partners.\(^{88}\) Although it is difficult for those of us struggling to make change within the legal system to figure out how to abandon the field of family in regulating legal rights and responsibilities, authors such as Robson and Smart suggest that we struggle towards new organizing categories rather than re-affirming the family norm, and discriminatory distinctions within it.

\(^{87}\) Bill 202, supra n 14.

\(^{88}\) Kathleen A. Lahey, *Are We 'Persons' Yet? Law and Sexuality in Canada* (1999) argues that most legislative schemes developed to deal with lesbian and gay legal claims for recognition draw inappropriate distinctions between same sex relationships and heterosexual relationships that preclude full legal personhood for lesbians and gay men.
Decriminalizing Personal Use of Cannabis in New Zealand: the Problems and Possibilities of International Law

BY NEIL BOISTER

1. INTRODUCTION

New Zealanders are presently debating the wisdom of the prohibition of cannabis. If New Zealand was to move away from prohibition, various policy options are available. How extreme these options are in comparison to the present situation depends on how they treat three variables. The first of these is cannabis-related conduct. Such conduct ranges from those that use, possess and purchase cannabis for use (hereinafter simple possession), to those who cultivate cannabis, to those who supply and sell cannabis. The second variable is the substance itself. Its various forms include the stalks, leaves, seeds and heads of the flowering plants, cannabis resin and oil, and the active cannabinoids within the plant resin. The third variable is the level of restriction in the policy. The range of options is broad. They include the warning of offenders, diversion of offenders, non-prosecution of offenders, regulation of the substance, complete legalisation of the substance, and so forth. Decriminalization in the form of non-prosecution of simple possession, cultivation and supply without value of the cannabis plant and its

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1 Pressure for reform has been growing steadily, driven by large-scale domestic cultivation and use. In its Final Report of 30 March 1998, the Drug Policy Forum, an independent group of physicians and professionals, recommended that New Zealand regulate and tax cannabis commerce. A petition requesting decriminalization was referred to the Justice and Law Reform Select Committee on 25 July 1997 and then to the Health Select Committee on 18 November 1998. On 18 December 1998 the Health Select Committee concluded that although cannabis does have serious impact on certain individuals suffering from schizophrenia and psychotic illness, the 'moderate use of cannabis does not seem to harm the majority of people' and 'that current policies do not deter cannabis use to any great extent.' It recommended a harm minimisation approach, and that the Government review the appropriateness of the existing policy and legal status of cannabis: NZ House or Representatives Health Committee, Report on Petition 1996/686 On 26 December 1999 a police statement revealed that the police would prefer cannabis charges to be decriminalized and punished by an instant fine system. The Minister of Justice is currently reviewing the legal status of cannabis—New Zealand Herald, 24 January 2000. The Green Party policy on cannabis includes the immediate legalisation of cannabis for personal use and the small-scale cultivation for personal use: www.greens.org.nz, while the Aotearoa Legalise Cannabis Party (ALCP) has a more fully developed response along the same lines which recommends that cannabis and its derivatives be shifted to a Class D category within the Misuse of Drugs Act 1975 to make this possible: www.alcp.org.nz.
resin would be a tentative step for New Zealand. It would leave many questions unanswered. What of commercial cultivation and supply? What of cannabinoids? And why not regulation? But it is the basic assumption of this paper that the starting point of the cannabis market, simple possession, is likely to be the first area in which decriminalization will occur because experience in other jurisdictions has shown that such a model proposing an incremental inroad into prohibition is most easily accepted by the general public and is practically and legally possible.

The problem confronted by this paper is that domestic variation of the policy of prohibiting cannabis does not take place in an international vacuum. New Zealand's policy makers and legislators must decide whether it may vary this policy in terms of the obligations that New Zealand undertook when it ratified the multilateral drug conventions that institutionalise drug prohibition globally. While a change in domestic policy will be legal within New Zealand as these conventions are not self-executing, it cannot be made without considering the international legal consequences that flow from the Single Convention on Narcotic Drugs, 1961 (hereinafter the 1961 Convention), the Convention on Psychotropic Substances, 1971 (hereinafter the 1971 Convention), the Protocol of 1972 Amending the Single Convention on Narcotic Drugs, 1961 (hereinafter the 1972 Protocol), and the 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (hereinafter the 1988 Convention). New Zealand is party, without reservation, to all of these conventions. Its legal position in respect of the other Parties to these conventions is governed by the terms of these conventions.

2. THE PRESENT LEGAL POSITION OF CANNABIS WITHIN NEW ZEALAND
Cannabis was originally criminalized in New Zealand terms of the Dangerous Drugs Amendment Act 1960. The pertinent statute today is the Misuse of Drugs Act 1975. With regard to the substance itself, a distinction is made between more and less harmful forms of the substance. The more harmful forms are classified as Schedule B drugs (part 1) and they include cannabis preparations (any preparation containing tetrahydrocannabinols produced by subjecting cannabis plant material to any kind of processing, including cannabis resin or hashish and cannabis oil or hash oil), as well as tetrahydrocannabinols, except when contained in a class C drug. The less harmful forms are classified as Schedule C drugs (part 1) and they include cannabis fruit, cannabis plant (any plant of the genus cannabis whether fresh, dried, or otherwise except when all the resin has been extracted) and cannabis seed. Section 2(1) provides that cannabis is a "prohibited plant". With regard to the forms of drug related conduct criminalized, the Act makes the now globally common distinction between forms of supply, simple possession and cultivation. In terms of section 6, entitled "dealing", it is an offence to import or export (section 6(1)(a)), produce or manufacture (section 6(1)(b)) any form of cannabis. Section 6 also makes it an offence to supply or administer or offer to supply or administer or otherwise deal in Class B forms of cannabis (section 6(1)(c)) or to perform the same conduct in respect of someone under 18 (section 6(1)(d)) or sell or offer to sell to someone 18 or over any Class C forms of cannabis (section 6(1)(e)). These offences are punishable by imprisonment (section 6(2)). Section 7, entitled "possession", makes it an offence to procure or have in one's possession, or consume, smoke or otherwise use, any form of cannabis (section 7(1)(a)), or to supply or administer, or offer to supply or administer, any Class C form of cannabis to any other person, or otherwise deal in any such form of cannabis (section 7(1)(b)). Punishment for section 7 cannabis offences is 3 months or a fine of $500 or both (section 7(2)) although custodial sentences in respect of Class C cannabis will only be applied if previous convictions or exceptional circumstances demand such a sentence. Section 9, entitled "cultivation of prohibited plants", makes it an offence to cultivate cannabis (section 9(1)) and makes such cultivation punishable by a term of imprisonment not exceeding 7 years (section 9(2)).

3. New Zealand's International Obligations

3.1 The 1961 Convention

The 1961 Convention was designed to suppress the non-medical and non-scientific use of narcotic substances. Not surprisingly, seeing as it serves as the framework for most domestic drug laws, it follows the same broad structure as New Zealand’s Misuse of Drugs Act, i.e. it classifies cannabis
according to perceived harmfulness and obliges Parties to criminalize certain forms of cannabis related conduct. 8

The 1961 Convention’s classification of the different forms of cannabis is rooted in the conceptions about the substance prevailing in 1961. “Cannabis” is defined in article 1(b) as “the flowering or fruiting tops of the cannabis plant (excluding the seeds and leaves when not accompanied by the tops) from which the resin has not been extracted”. “Cannabis plant” is defined in article 1(c) as “any plant of the genus Cannabis”. “Cannabis resin”, in terms of article 1(d) “means the separated resin, whether crude or purified, obtained from the cannabis plant”. Interestingly, although cannabis leaves are separately provided for in the Convention, 9 by definition they fall outside of the scope of the prohibition in the convention. Cannabis seeds are simply ignored by the Convention, as its drafters did not consider them harmful. This leads New Zealand legal scholar Kevin Dawkins ingeniously to suggest that the Convention permits the decriminalization of conduct involving small quantities of cannabis leaves and seeds for private use, but he recognises that this would not affect total prohibition of cannabis tops and resin, commonly smoked for pleasure. 10 Cannabis and cannabis resin are included in Schedule I of the 1961 Convention and are therefore subject to all of the general control measures under the Convention. They are also included in Schedule IV that subjects them to a range of more severe measures at the discretion of the Parties. 11

Turning to the prohibition of specific forms of cannabis related conduct, these specific prohibitions must be seen against the background of the general obligation in article 4(1)(c) on Parties “to limit exclusively to medical and scientific purposes the production, manufacture, export, import, distribution of, trade in, use and possession of drugs” and the obligation in article 33 which provides that “the parties shall not permit the possession of drugs except under legal authority”. However, neither articles 4(1)(c) nor article 33 necessarily requires penal sanctions to attain the purpose of limitation or authorised possession. 12 Article 33 allows possession under legal authority while article 4(1)(c) is a “General obligation” specifically “subject to the provisions of this Convention”. 13 The specific obligation to

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8 The penal obligations in the conventions are not “crimes”, they are tortious obligations among states obliging states to criminalize.
9 Article 28(3) obliges Parties to adopt measures to prevent the misuse of and illicit traffic in cannabis leaves.
10 Dawkins, supra n 2 at 281-2.
11 Article 2(5).
12 Currie et al, supra n 2 at 247.
13 Dawkins, supra n 2 at 282.
1999 Decriminalizing Personal Use of Cannabis in New Zealand

criminalize is provided for in article 36(1) of the amended 1961 Convention. It states that:

subject to its constitutional provisions, each party shall adopt such measures that will ensure that cultivation, production, manufacture, extraction, preparation, possession, offering, offering for sale, distribution, purchase, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation, and exportation of drugs contrary to the provisions of this Convention, shall be punishable offences when committed intentionally.

Although article 36(1) deliberately does not mention “use”, it does specifically refer to “purchase” and “possession”. As the whole thrust of the penal provisions of the Convention is the prohibition of drug trafficking, there appears little doubt that Parties are obliged in terms of article 36(1) to criminalize purchase and possession for onward trafficking. Parties have, however, taken different approaches to the criminalization of simple possession. The United Nations Official Commentary on the 1961 Convention states:

Some Governments seem to hold that they are not bound to punish addicts who illegally possess drugs for their personal use. This view appears to be based on the consideration that the provisions of article 36...are...intended to fight the illicit traffic, and not to require the punishment of addicts not participating in that traffic.

The 1961 Commentary notes that this view is supported by the drafting history and context of article 36. Given that use has not been specifically mentioned in article 36, criminalization of simple possession, which amounts in effect to criminalization of use, appears not to have been contemplated by the drafters of the Convention. It thus does not appear that article 36(1) obliges Parties to criminalize simple possession of drugs. Logically, this must also exclude purchase for use from criminalization.

Cultivation for personal use is also at least arguably not prohibited in terms of the Convention. Because cannabis plants were still cultivated in many

14 Article 2(5)(b) does oblige Parties to prohibit the use of Schedule IV drugs including cannabis, but only if they are of the opinion that this step is the most appropriate means for protecting the public health and welfare.
16 In the Third Draft of the Convention, article 36 (then draft article 45) was included in Chapter IX entitled “Measures against illicit traffickers” before all chapter headings were deleted from the Convention. It is still included in that part of the Convention preceded by article 35 entitled “Action against the illicit traffic” and followed by article 37 entitled “Seizure and confiscation”. See 1961 Commentary, ibid at 112.
17 Noll A “International treaties and the control of drug use and abuse” (1977) 6 Contemporary Legal Problems 17 at 25.
states in 1961 whether for industrial purposes or for smoking, cannabis cultivation was not totally prohibited in the 1961 Convention; instead it was subject to a special regime. Article 28(2) specifically excludes cannabis cultivated "exclusively for industrial purposes (fibre and seed) or horticultural purposes" from the material scope of the convention. With respect to non-industrial non-horticultural cannabis, article 22(1) provides that a Party is only obliged to prohibit cultivation when the prevailing conditions render it a suitable measure for protecting the public health and welfare and preventing the diversion into the illicit traffic. Article 28(1) provides that where a Party permits the cultivation of cannabis, it is obliged to apply the same system of licensed cultivation that applies to the cultivation of opium. Both provisions suggest that the authors of the 1961 Convention did not foresee Parties prohibiting cultivation altogether. Dawkins seizes upon this gap in the system of international legal prohibition to suggest that each Party is free to decriminalize private cultivation of amounts of cannabis that neither threatens the "public health and welfare" nor contributes to the "illicit traffic". He argues, I think convincingly, that the prohibition of "cultivation" in article 36(1) is, like the prohibition of possession, limited to actions in the chain of trafficking rather than actions associated with personal use. It likely that the drafters of the Convention were prepared to tolerate cultivation for own use because of historical cultivation of the substance.

With respect to supply, Dawkins' argument holds if the supply is to oneself, but he probably goes too far when he suggests that supply for no or insignificant remuneration falls outside the scope of article 36(1), which he suggests is limited to criminalizing various commercial or trafficking transactions. Supply to others, whether as a gift or even for negligible amounts of money, does appear to be a target of article 36(1). The article specifically enumerates and thus distinguishes between "offering" and "offering for sale", and prohibits "delivery on any terms whatsoever" which would seem to cover disposal of drugs to another without consideration, including giving cannabis as a gift.

In sum then, while the 1961 Convention does admit of interpretations permitting parties to decriminalize the simple possession of cannabis and the cultivation for personal use, it does not appear as open textured as Dawkins suggests when it comes to the supply of cannabis. The prohibition on supply of any kind does appear to be an international obligation, and not just a stricter measure adopted voluntarily by Parties in terms of article 39.

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18 Dawkins, supra n 2 at 282.
19 Ibid at 283.
3.2 The 1971 Psychotropic Convention

The purpose of the 1971 Convention is to suppress the non-medical and scientific use of psychotropic substances. Tetrahydrocannabinol (THC), one of the psychoactive cannabinoids found in cannabis, is listed in Schedule I of the 1971 Convention. The cannabis plant does not fall within the material scope of the convention. THC must be separated or synthesised before the 1971 Convention applies, thus excluding for practical purposes its impact on most cannabis related actions which deal with cannabis in a raw or slightly altered state. For this reason the 1971 Convention would not be considered by most states to be important in respect of decriminalization as they would not consider it necessary to avoid the obligation to prohibit THC. However, for the sake of completeness, the decriminalization of THC is discussed here.

The general obligation in article 7 of the 1971 Convention on Parties to prohibit possession and use of THC except for medical or scientific purposes does not apply to the naturally occurring THC found in the cannabis plant, resin or preparations. Moreover, as with article 36 of the 1961 Convention, it is submitted that article 22(1)(a) of the 1971 Convention, the provision specifically directed at illicit conduct, was not intended to criminalize simple possession of psychotropic substances. The United Nations Official Commentary on the 1971 Convention notes that in terms of article 5 "use" of psychotropic substances is limited to medical and scientific purposes. Article 5(1) limits the use of Schedule I substances as provided in article 7, which prohibits their use except for "scientific and very limited medical purposes". It is arguable that use of Schedule I substances for any purpose is an action in violation of an obligation under the Convention and is thus, in terms of article 22(1)(a), a criminal offence. However, the tenor of article 7, which is devoted to control of supply of such substances, suggests that prohibition of use only for the purposes of trafficking is contemplated. The 1971 Commentary submits, however, that, apart from the requirement that possession of such substances for use requires authorisation in terms of article 7(b), these limitations relate to the supplier and not the consumer. Use, together with acquisition for use are, according to the 1971 Commentary, unauthorised actions, but they are not "actions" contrary to the laws and regulations that a Party is obliged to adopt under the Convention; they both imply possession and whether they are unlawful in terms of the

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21 1971 Commentary, ibid at 349.
Convention depends on whether possession is an offence under article 22(1)(a), which, it appears, it is not.\textsuperscript{22}

The term "illicit traffic" in article 1(j) of the 1971 Convention does not cover the cultivation of plants from which psychotropic drugs can be obtained. While the \textit{1971 Commentary} suggests,\textsuperscript{23} however, that cultivation may constitute an attempt or preparatory act in terms of article 22(2)(a) to commit an offence under article 22(1)(a), that is an interpretation not supported by the rest of the Convention which is aimed at the traffic of psychotropic substances.

It seems incontrovertible, however, that the drafters of the 1971 Convention intended article 22(1)(a) to oblige Parties to punish as an offence any unauthorised supply of THC by classifying such conduct as an intentional "action" contrary to laws or regulations adopted by Parties in pursuance of their obligations under the Convention. Actions must by implication mean the "illicit traffic" in psychotropic substances, and "illicit traffic" is defined by article 1(j) as "manufacture of or trafficking in psychotropic substances contrary to the provisions of this Convention", where "trafficking" means all forms of unauthorised trade and distribution, while "manufacture" is self-explanatory.\textsuperscript{24}

\textbf{3.3 The 1988 Convention}

The 1988 Convention relies entirely on the scheduling of drugs made in terms of the 1961 and 1971 Conventions. It only provides a revised system of "offences" for indirect application.

With regard to simple possession, the 1988 Convention's provisions are best understood in the context of their development. Within the spirit of the liberal interpretation of the earlier conventions states had adopted a variety of non-penal approaches to simple possession.\textsuperscript{25} Continuing in this spirit, early drafts of the 1988 Convention did not address the issue of personal use offences.\textsuperscript{26} "Illicit traffic" was defined so as to include most of the offences

\textsuperscript{22} \textit{1971 Commentary}, ibid.
\textsuperscript{23} \textit{1971 Commentary}, ibid at 25.
\textsuperscript{24} \textit{1971 Commentary}, ibid.
\textsuperscript{25} Krajewski K "How flexible are the UN drug conventions?" in \textit{Agenda and Delegates Materials Regulating Cannabis: Options for Control in the 21\textsuperscript{st} Century: An International Symposium} (1998) at 8. It is interesting to note that the whole effort to criminalize consumption at the 1988 Conference was made on the assumption that it had not been established as an offence by either the 1961 or 1971 Convention, \textit{1988 Records} vol.II at 151.
contained in article 36 of the 1961 Convention, but possession was limited to possession for the purpose of distribution. Successive drafts omitted simple possession reflecting the general view among delegations that the new Convention was a tool for the suppression of what they considered to be the more serious aspects of the drugs problem rather than for criminalizing trivial conduct like possession for personal consumption.

However, the Mexican delegation, opposing the general view because it assigned responsibility for illicit drug suppression to drug producer states, an imbalance reflected in the Convention's provisions as a whole, argued that the Convention should address all aspects of the illicit drug problem including personal use. Delegations opposed to the inclusion of a personal use offence, particularly delegations from Western consumer states, argued that it would be impractical to require Parties to render expensive and time-consuming legal assistance for relatively minor offences. As a compromise between the two positions, the Conference agreed that although a personal use offence should be added to the Convention, it should not be a subject of the expensive and logistically complicated obligations imposed by the Convention in respect of extradition, confiscation and mutual legal assistance. Article 3(2) is the net result. It reads:

Subject to its constitutional principles and the basic concepts of its legal system, each Party shall adopt such measures as may be necessary to establish as a criminal offence under its domestic law, when committed intentionally, the possession, purchase or cultivation of narcotic drugs or psychotropic substances for personal consumption contrary to the provisions of the 1961 Convention, the 1961 Convention as amended or the 1971 Convention.

Article 3(2) criminalizes possession, purchase and cultivation for use "contrary to the provisions of the 1961 Convention, the 1961 Convention as amended or the 1971 Convention". The earlier conventions define by implication what is unlawful conduct. The UN's official Commentary on the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988 points out that this may lead to the interpretation that Parties are able to retain the stance they had adopted to simple possession under the earlier conventions. The 1988 Commentary

27 Article 3(2) is not the only consumption-related measure in the Convention. Article 14(4) also attempts to balance the distribution of obligations between producer and consumer states by providing that consumer states "shall adopt measures aimed at reducing or eliminating illicit demand for narcotic drugs and psychotropic substances..." The wording of the provision as a whole suggests that these measures should be non-penal in nature but the implication is that article 3(2) is penal in nature.


29 1988 Commentary, ibid at 81.
suggests, however, that to be consistent with the express inclusion of "personal consumption" in article 3(2) "contrary to the provisions" of the earlier conventions merely "incorporates the schedules of controlled substances as well as the distinction under those conventions between licit and illicit consumption". Given the ambiguities surrounding the delimitation of lawful conduct under the earlier conventions, it is not easy to discern what conduct is rendered unlawful by article 3(2).

Three options present themselves. First, it is possible to argue that article 3(2) may be restrictively interpreted so as not to apply to the possession, purchase and cultivation of cannabis for personal use, because the earlier conventions do not do so and article 3(2) simply replicates the provisions of these conventions. Second, it is possible to argue that the earlier conventions did prohibit the possession, purchase and cultivation of cannabis for personal use, and article 3(2) simply confirms this prohibition. But both these arguments, whatever their merits, are entirely dependant on the interpretation of the earlier conventions fixing the scope of application of the later convention. A third option presents itself. It may be that article 3(2) of the 1988 Convention is an entirely novel provision meant to prohibit prospectively the possession, purchase and cultivation of cannabis for personal use. Dawkins submits that the latter is the better view. But does that mean that New Zealand is bound to criminalize these forms of conduct now that it has ratified the 1988 Convention without reservation in this regard? Following Dawkins, the New Zealand House of Representatives Justice and Law Reform Committee in their Report on the 1988 Convention concluded that "the absence of any prohibition on the possession and use of cannabis [in New Zealand] may be justified on the ground [inter alia] that the 1988 Convention is a trafficking Convention". However, article 3(2) must be viewed in the context of the statement in the Convention's Preamble that the Convention's drafters desired to "eliminate the root causes of the problem of abuse of narcotic drugs and psychotropic substances, including the illicit demand for such drugs and substances and the enormous profits derived from the illicit traffic".

Unlike the 1961 and 1971 Conventions, which are largely administrative instruments where penal control remains mainly a domestic choice, the 1988 Convention is a penal convention. The late introduction of article 3(2) into

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30 1988 Commentary, ibid.
31 One way of resolving for once and for all whether this interpretation of the 1961 and by extension the 1988 Convention is correct is to refer the matter to the ICJ for an advisory opinion (the ICJ has jurisdiction in terms of article 48).
the Convention was a deliberate act by drug producer states to shift some of the burden of prohibition onto drug consumer states. The provisions for diversion in article 3(4)(d) assume that demand related conduct will be prohibited. Demand elimination by criminal prohibition in the 1988 Convention was a victory for drug producer states and a burden assumed by drug consumer states. This reality was accepted by the German Federal Constitutional Court in the *Cannabis Decision*\(^{33}\) when it held:

Specifically, the United Nations have recognised, in the 1988 Convention...that any involvement with narcotics – including cannabis – should be subject to penalties because the production of narcotics and psychotropic substances, the illicit demand for them, and unauthorized involvement with them “seriously endanger health and well-being and damage the economic, cultural and political foundations of society” (Preamble to the 1988 Convention...). The United Nations has therefore decided to co-operate in removing the basic causes of this abuse, “including the illicit demand for such substances and the enormous profits resulting from the illicit traffic in them.” In this context, the countries of Europe, in which hardly any production of narcotics takes place, assume the task, above all, of combating demand for them. The Federal Republic of Germany has adopted this evaluation of the dangers by means of the Ratification Act on the 1988 Convention...and the subsequent actual ratification and has made it the basis of the obligation it has thereby assumed to combat involvement with narcotics, including by the imposition of penalties. The Narcotics Act is to be seen as the Federal Republic of Germany’s contribution to the international control of narcotic drugs and psychotropic substances, to controlling involvement with these substances, and to combating the illegal market in drugs and the criminal organizations involved in it. These aims are the common concern of the community of states making up the United Nations and according to their unanimous conviction can only be successfully achieved via co-operation between them.\(^{34}\)

In reality the developing states who sponsored article 3(2) seldom have the financial wherewithal to engage with users in any other way than treating them nominally as criminals and then simply ignoring them. But the result of the actions of these states is that although Parties are not obliged to criminalize use itself, they are obliged to criminalize possession, purchase and cultivation for the purpose of use. Those Parties that actually remove all legal sanction from the simple possession or cultivation of even small amounts of cannabis violate article 3(2) and the 1988 Convention unless their actions fall within the recognised exception to this obligation, discussed below.

The rest of the 1988 Convention’s penal provisions provide the full range of by now easily recognisable obligations, as well as some new ones.

\(^{33}\) *BverfG NJW* 1994, 1577.

\(^{34}\) *Ground C.I.2(a).*
Interestingly cultivation for supply is dealt with separately in article 3(1)(a)(ii) which obliges Parties to criminalize the cultivation of cannabis plants for the purpose of “the production of narcotic drugs contrary to the provision of the 1961 Convention or the 1961 Convention as amended”. The rest of article 3 sets out a full range of trafficking offences in article 3(1)(a)(i) and specifically criminalizes possession for the purpose of trafficking in article 3(1)(a)(iii).

In sum then, both the 1961 and 1972 Conventions provide the New Zealand government with some room for legislative manoeuvring in respect of cannabis. Neither convention obliges states party to criminalize use. Article 36(1) of the 1961 Convention does not require criminalization of simple possession nor arguably cultivation of cannabis tops and resin for personal use but does require criminalization of any form of supply, cultivation for supply or possession for supply. Sections 6(1), 6(2), 6(3) and 7(2) of New Zealand’s Misuse of Drugs Act serve the latter purpose, but section 7(1) in respect of possession and section 9 in respect of cultivation are not obligatory and could be altered to exclude possession and cultivation of cannabis tops and resin for personal use. Article 22(1) of the 1971 Convention does not require criminalization of simple possession of pure THC or preparations containing THC nor cultivation of cannabis containing THC but does require criminalization of any form of supply of THC. Sections 6(1) and 6(2) of New Zealand’s Misuse of Drugs Act serve the latter purpose, but section 7(1) in respect of possession is not obligatory and could be altered to exclude cannabis tops and resin.

Article 3(2) of the 1988 Convention requires the criminalization of possession, purchase and cultivation of cannabis tops and resin and THC for personal use, while article 3(1) requires the criminalization of any form of supply, or cultivation or possession for supply. Sections 6, 7 and 9 serve these purposes and their scope cannot be altered without breaching international obligations. If New Zealand were to do so, the international community, through the mouthpiece of the UN’s Commission For Narcotic Drugs, and the International Narcotics Control Board, would condemn this step as a breach of the 1988 Convention. The United States has up until now appeared generally pleased with the level of New Zealand’s commitment to

Interestingly, when it was proposed in 1993 that the sale of cannabis should be legalized in the Netherlands, the official response was that the Netherlands’ international obligations in terms of the drug conventions and particularly the 1988 Convention left no room for legalization of the supply of cannabis for recreational purposes. See Dutch Drug Policy, 2nd Chamber of Parliament, 1994-5, 24077, Nr 3-4, p.14. The expert opinion of JJ Schutte was provided in support of this (appendix II). He argued that the 1961 and 1988 Conventions did not make a formal distinction between hard and soft drugs.
the suppression of indigenous cannabis production and consumption. However, it would almost certainly apply diplomatic pressure if decriminalization took place, and while the possibility of economic sanctions is highly unlikely, it would become more likely were New Zealand's production of cannabis to begin to feed the US market, given the United States' use of de-certification to enforce implementation of the supply reduction elements of the 1988 Drug Convention.

However, the international scheme created by the conventions is not as impenetrable as it looks. There are loopholes and ways of altering the international scheme which warrant exploration. It must be noted, before beginning this examination, that even if the specific provisions in the drug conventions which provide for criminalization of cannabis were avoidable, a range of regulatory obligations governing the cultivation and provision of cannabis would still apply. If New Zealand were to legalize cannabis completely it would be in violation of these regulatory mechanisms.

4. Changing Domestic Law in Ways Permitted by Existing International Obligations

4.1 Constitutional exceptions

The provisions in the drug conventions criminalizing conduct are subject to constitutional "get-out" clauses. In respect of the 1961 Convention, article 36(1) makes it clear that criminalization takes place subject to each Party’s "constitutional limitations". Thus if it is legally impossible due to a constitutional provision for a Party to criminalize a particular form of conduct, then the Convention permits this exception. An escape clause is also provided by article 22(1)(a) of the 1971 Convention. Its obligations are also subject to the "constitutional limitations" of the Party. And in the 1988 Convention article 3(2)'s controversial obligation is subject to the "constitutional principles and basic legal concepts of [the Party's] legal system". While constitutional principles are easily identified, and Parties

37 Through the 1986 Anti-Drug Abuse Act the US amended its Foreign Assistance Act to the effect that states that did not co-operate with it in stopping the flow of drugs into the US would be decertified and forfeit all forms of foreign aid from the US.
38 For example, articles 29 and 30 of the 1961 Convention prevent the production of unlicensed cannabis.
39 If, however, it is not the constitution but some less significant domestic law that precludes the operation of the article, the elaboration of this proviso in article 36(2) to "subject to the constitutional limitations of a Party, its legal system and domestic law" tends to indicate that under article 36(1), the overruling of criminalization of the listed forms of conduct cannot be based on anything less than the constitution.
would not violate the Convention if their domestic courts held criminalization of cannabis offences to be unconstitutional, article 3(2)'s basic concepts are more difficult to identify. The inclusion of "basic concepts" reflects the concerns of many delegates at the experts' meetings that these offences would conflict with basic principles of their criminal law. Whether legislative decriminalization of, for example possession of cannabis, could be seen to be part of the "basic concepts" of a legal system and thus escape article 3(2)'s obligation is unclear. The International Narcotics Control Board (INCB) obviously does not believe that such an interpretation is valid because the INCB stated that Italian legislation repealing the non-medical prohibition on drugs passed after a referendum in April 1993 was not in line with article 4(c) and 33 of the 1961 Convention or article 3(2) of the 1988 Convention. It may be that "basic concepts" was intended by the authors of the 1988 Convention to refer only to conflicts with codified basic law, rather than specific drug legislation. Interestingly, some civilian (Civil Law) Parties, cautious in spite of the limitation clause, have made reservations to article 3(2)'s criminalization of personal use on constitutional grounds and because it conflicts with the basic concepts of their legal system. Other civilian Parties have stated that the basic concepts of their legal systems may alter, obviously anticipating that changes such as decriminalization may occur in the future. New Zealand made no such reservations or declarations so this option is no longer open to it. New Zealand could argue that the criminalization of conduct that does not harm the user such as the simple possession of cannabis is a violation of a basic principle of its law, but simple possession remains plausibly an offence \textit{mala prohibita} (rather than \textit{malum in se}) and still subject to formal prohibition under the 1988 Convention.

\begin{itemize}
\item [41] Bolivia has made a reservation (20/8/1990) to the effect that article 3(2) is inapplicable in Bolivia to the extent that it may be interpreted as establishing "as a criminal offence the use, consumption, possession, purchase or cultivation of the coca leaf for personal consumption". It declares that such an interpretation "is contrary to principles of its Constitution and basic concepts of its legal system which embody respect for the culture, legitimate practices, values and attributes of the nationalities making up Bolivia's population". Bolivia justified the reservation on the basis of the historical use of coca leaf, pointing out that it is not a drug, its use does not cause significant harm, it is widely used for medicinal and industrial purposes, criminalization of its consumption would result in a large part of the Bolivian population being criminals and its transformation into cocaine takes place using precursors that do not originate in Bolivia: \textit{Multilateral Treaties Deposited with the Secretary General: Status as at 31 December 1996} (1997) UN Doc. St/Leg/Ser.E/15 at 303. Colombia has only gone as far as declaring that article 3(2)'s obligation is conditional upon respect for its constitutional principles (10/6/1994): \textit{Multilateral Treaties Deposited} (1997) at 304.
\end{itemize}
The advantage of a judicial pronouncement of unconstitutionality is that the provisions obliging Parties to criminalize cannabis would immediately be of no effect. It does not carry the stigma of denunciation, and because it emanates from the judiciary, nor is it as easily subject to external political pressure as a legislative policy change.

In practice, courts have been active in this regard. Many of the earlier cases involved conflicts between criminalization and general rights such as privacy and equality. The early land mark case on decriminalization for constitutional reasons remains the 1975 Alaskan decision of *Ravin v State*\(^{43}\) where the State Supreme Court decided that the relative insignificance of cannabis consumption as a health problem in Alaskan society meant there was no reason to intrude on the citizen’s right to privacy by prohibiting possession of cannabis by an adult for personal consumption at home. Possession in public, and purchase and sale were not constitutionally protected.\(^{44}\) In 1994, the Colombian Constitutional Court\(^{45}\) ruled that the domestic criminalization of simple possession of small quantities of drugs article 2 and article 51 of Law 30 of 1986 was unconstitutional primarily on the basis that it interfered with article 5 of the Constitution, the right to personal autonomy. By regulating the conduct of an individual, when that conduct did not affect others, the legislator was held to cross an ontologically prohibited frontier because it held that law is only bilateral, while morality is unilateral. In spite of the chapeau in article 3(2), and the Colombian Constitutional Court’s opinion that the 1988 Convention distinguished between use and trafficking, the Court’s declaration was considered to be “not in conformity with the provisions of the international drug control treaties” by the INCB.\(^{46}\) In Germany, criminalization of cannabis under the Narcotics Act (Betäubungsmittelgesetz or BtMG) was considered unconstitutional by the Regional Court in Lübeck on the basis that as intoxicants such as alcohol were not criminalized it violated the principle of equality (article 3(1) of the Basic Law) and because becoming intoxicated fell within the principle of self-determination (article 2(1) of the Basic Law). The Federal Constitutional Court in the *Cannabis Decision*,\(^{47}\) held that the criminalization of the sale or donation of cannabis in the Narcotics Act was constitutional. In addition, it held that criminalization of

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\(^{43}\) 537 P.2d 494 (1975) per Rabinowitz CJ, Doochover and Conner JJ concurring.

\(^{44}\) In Hawaii, 3 out of 5 supreme court judges in *State v Kanter* 493 P.2d 306 (1972) concluded that an individual has a right to smoke cannabis.


conduct preparatory to the use of small quantities of cannabis products which does not endanger others, does not contravene the prohibition of excessive state interference, since the legislature has made it possible for the prosecution authorities to take account of any individual element of the wrongdoing by refraining from imposing a penalty (section 29(5) of the BtMG) or refraining from prosecution (sections 153ff of the Code of Criminal Procedure). The court ruled that in the latter instances the prohibition on excessive interference with the personal freedom of an individual when that freedom does not harm others effectively requires that the prosecution authorities refrain from prosecuting such offences.

The right to freedom of religion has also been relied upon in domestic jurisdictions to try to justify judicial intervention. Its narrower scope may make it more appealing to the judiciary. But it does not have a universal appeal. In the United States and Canada courts have affirmed the prohibition on drugs used for religious purposes. In 1997 in Forsythe v DPP, the Jamaican Supreme Court rejected the appellant’s argument that the statutory prohibition of possession of cannabis in Jamaica conflicted with his constitutional right to conscience and freedom of religion. However, in late 1999, in the People of Guam v Guerrero the Superior Court of Guam held that the importing of cannabis by a Rastafarian priest was protected by constitutional and statutory guarantees of freedom of the exercise of religion and against religious non-discrimination, and that the state had failed to demonstrate a compelling state interest in the denial of these rights. In a 1998 South African case, Prince v President of the Law Society, Cape of Good Hope and Others, currently on appeal, the provincial division of the High Court held that the Cape Law Society’s

48 In Employment Division Department of Human Resources of Oregon, et al v Smith [1990] 494 US 872, 108 Led 2(d) 876, the US Supreme Court decided a similar issue, the constitutionality of the prohibition of the possession and use of the hallucinogenic drug Peyote by members of the North American Church for sacramental purposes in terms of the free exercise of religion protected by the First Amendment to the Constitution. The majority held that the prohibition was not unconstitutional, although a significant minority dissented. Inferior US courts have consistently upheld such a position: Olsen v Iowa 808 F2d 652 (CA 1986 – marijuana use by Ethiopian Zion Coptic Church); Commonwealth v Nissenbaum, 404 Mass 575, 536 NE 2d 592 (1989 – marijuana use by Ethiopian Zion Coptic Church); State v Blake, 5 Haw App 411, 695 P 2d 336 (1985 – marijuana use in practice of Hindu Tantrism); Whyte v United States, 471 A 2d 1144 (1982 – marijuana use by Rastafarians); State v Rocheleau, 142 Vt 61, 451 A2d 1144 (1982 – marijuana use by Tantric Buddhist); and State v Brashear, 92NM 622, 593 P2d 63 (1979 – marijuana use by non-denominational Christians).

49 In Regina v Kerr [1986] 75 NSJ (2d) 305 (CA) the Nova Scotia Supreme Court upheld a conviction despite the defence that cannabis use was in accordance with the appellant’s religious beliefs.


51 Criminal Case No. 00001-91, August 1999.

52 1998 (8) BCLR 976 (CPD) Friedman JP, Brand J, Hlophe J.
decision that the applicant was not a "fit and proper person" to be admitted as an attorney because of his two previous convictions for possession of cannabis and his avowed intention as a Rastafarian to continue to use the substance, assumed that such an action limited his constitutional rights, right to freedom of religion, the prohibition against discrimination and the right freely to choose one's profession, but held that these rights could be reasonably limited in the circumstances. In doing so it relied heavily on South Africa's international obligations under the international drug conventions.\textsuperscript{53} It rejected the argument that an exception could be made in respect of Rastafarians by holding that "such an exception would be contrary to South Africa's obligations in terms of the international conventions to which it is a party".\textsuperscript{54} Amazingly, no mention was made of the chapeau in article 3(2) of the 1988 Convention.

Despite some positive authority from foreign jurisdictions, internationally permitted constitutional exceptions represents only a limited opportunity for decriminalization in New Zealand by the judiciary. New Zealanders do enjoy legally protected rights to practice and manifest their religion.\textsuperscript{55} They would appear to apply to the use of cannabis by Rastafarians or other cultural minorities for which cannabis use is part of that culture. Rights of a more general scope would be more useful in respect of recreational use of cannabis by any person in New Zealand.\textsuperscript{56} But there are also further formidable legal obstacles to overcome once the prohibition on cannabis is held to be within the scope of the right. The court may be convinced that it was demonstrably justifiable to subject these rights to reasonable limitation in terms of section 5 of the Bill of Rights Act 1990. Even if it chose not to limit the right, the almost insurmountable problem is that constitutional rights are not entrenched in New Zealand so all that the New Zealand Court could do would be to attempt in terms of section 6 of the New Zealand Bill of Rights Act 1990, to interpret the Misuse of Drugs Act consistently with the rights and freedoms contained in the Act. Strained interpretations are

\textsuperscript{53} At 985D-H.
\textsuperscript{54} At 989A.
\textsuperscript{55} For example, section 15 of the New Zealand Bill of Rights Act 1990, the right of every person to manifest their "religion or belief in worship, observance, practice, or teaching, either individually or in community with others, and either in public or in private", and section 20, which provides that "a person who belongs to an ethnic [or] religious...minority in New Zealand shall not be denied the right, in community with other members of that minority, to enjoy the culture [and], to profess and practice the religion...of that minority".
\textsuperscript{56} For example, section 19(1) of the New Zealand Bill of Rights Act, 1990, the right of everyone "to the freedom from discrimination on the grounds of discrimination in the Human Rights Act 1993".
likely to be rejected\(^{57}\) and it is difficult to imagine how such an interpretation would not be strained.

It is obviously open for New Zealand's legislature to amend its domestic law on the basis that its legislation criminalizing cannabis conflicts with the Bill of Rights Act 1990. I am unaware of such an example in practice. If New Zealand were to take this approach, it would simply have to state that in the memorandum accompanying the bill that it is amending the Misuse of Drugs Act because it considers it to be in conflict with the New Zealand's constitution of which the Bill of Rights Act 1990 makes up an important part. To take advantage of the escape clause in this way and to show good faith it would have to demonstrate such a conflict to the international community, and that the New Zealand Bill of Rights Act demands such legislative amendment. Conflict would be simple to demonstrate, but given that the Act is not entrenched, it would be difficult to demonstrate that the New Zealand Bill of Rights Act 1990 is of the fundamental nature that the authors of the conventions envisaged when they drafted the constitutional escape clause.

### 4.2 Refraining from prosecuting

One of the reasons given by the New Zealand House of Representative's Justice and Law Reform Committee's support for the ratification of the 1988 Convention was that the 1988 Convention recognised the requirement to criminalize cannabis related activities was subject to the principle that these offences shall in terms of article 3(11) "be defined, prosecuted and punished in conformity with the domestic law of the party".\(^{58}\) In terms of article 36(4) of the 1961 Convention, article 22(5) of the 1971 Convention and article 3(11) of the 1988 Convention it falls within the discretion of the Parties to define, prosecute and punish these laws in conformity with their domestic laws.

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\(^{57}\) See for example *R v Phillips* [1991] 3 NZLR 175 where the Court of Appeal was unwilling to interpret the reverse onus provision in section 6(6) of the Misuse of Drugs Act 1975 consistently with the right to be presumed innocent in section 25 of the New Zealand Bill of Rights Act 1990, to mean that only that some evidential foundation needed to be established by the accused sufficient to create a reasonable doubt that possession of more than 28 grams of cannabis was for the purpose of sale, and did not have to establish on a balance of probabilities that this was the case. On the inadequacies of the New Zealand Bill of Rights see Butler A S "The bill of rights debate: why the New Zealand Bill of Rights Act 1990 is a bad model for Britain" (1997) 17 OJLS 323-345. Butler notes at 327 that New Zealand's courts are reluctant to apply section 6 in all but the clearest of cases.

law. The scope of these discretionary powers in respect of the obligation to prohibit drug related conduct is contentious. It cannot remove the obligation to prohibit, or it would undermine the purpose of the convention completely and violate the fundamental principle pacta sunt servanda. But Parties do have discretion in choosing when and under what circumstances to prosecute the offences established. This autonomy includes the right to determine the level of offence (e.g. delict, misdemeanour, crime) and the right to choose not to prosecute. This kind of approach to discretion was taken by the New Zealand Justice and Law Reform Committee to be the justification for the approach of the Netherlands and certain Australian states, where the explicit prohibitions demanded by particularly the 1988 Convention remain on the statute books, but an administrative decision is made not to prosecute possession of less than a certain amount of cannabis (the Dutch position) or drug control legislation is amended to allow payment of a fine to expiate

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59 The autonomy of domestic law is reinforced by article 2(1) of the 1988 Convention which provides that “[i]n carrying out their obligations under the Convention, the Parties shall take necessary measures, including legislative and administrative measures, in conformity with the fundamental provisions of their respective domestic legislative systems”.


61 van Vliet H J “The uneasy decriminalization: a perspective on Dutch drug policy” (1990) 18 Hofstra Law Review 717 at 731-2 explains that in terms of the Opium Act of 1976 the possession of up to 30 grams of cannabis is a misdemeanour or delict subject to low penalties. By itself this does not amount to decriminalization but the authorities, applying the expediency principle, do not prosecute such possession on grounds of public interest (see Drug Policy Explanation, 2nd Chamber of Parliament, 1994-5, 24-0007, No.2-3, at 5). Their actions are regulated by prosecution guidelines, which rank such prosecution as the lowest priority. These guidelines also determine the authorities’ attitude to the prosecution of supply. Although supply, like possession remains illegal, if suppliers conform to certain rules such as no sale of more than 5 grams of cannabis, hard drug sales, no sales to minors etc. they will be left alone – Netherlands Ministrie van Justitie Fact Sheet Drugs: www.minjust.nl.a_beleid/fact.cfact7.htm. The decision to prosecute supply is made by a triangle of authorities at the local level, the mayor, chief of policy and chief prosecutor. When the Opium Act was revised in 1976 taking use and possession for use of cannabis products out of the criminal sphere, the official memorandum accompanying the change of policy recognised that this would violate the 1961 Convention but provided that the government would investigate the possibility of the Convention’s amendment to give states the option of adopting a separate regime for cannabis products – Memorandum of the Minister of Health and the Environment; 2nd Chamber 1973/1974, 11.742 No.3 cited by van Vliet supra at 724. Today, however, although the policy does not appear to have changed substantially, the Dutch believe that their policy fully conforms to international obligations and note that there has been much less criticism of it recently. See Memorandum of the Minister of Health and the Environment ‘Drug Policy’, 2nd Chamber of Parliament, 1999/2000, 24.077 No.71, at 24. A proposal to license coffee shops to sell cannabis was rejected in 1993 by the Ministry of Justice on the grounds that this would force withdrawal from the drug conventions.
the offence of possession or small-scale cultivation which remains on the statute books (a tactic adopted by some Australian states). Precisely why the application of the expediency principle in the Netherlands or expiation in Australian states do not breach treaty obligations is not all that clear. Article 3(2) of the 1988 Convention speaks of a "criminal offence"; article 3(11) itself refers to "prosecute and punish". The granting of extensive discretionary powers is difficult to reconcile with the provision in article 3(6) of the 1988 Convention, which reads:

The Parties shall endeavour to ensure that any discretionary legal powers under their domestic law relating to the prosecution of persons for offences established in accordance with this article are exercised to maximize the effectiveness of law enforcement measures in respect of those offences and with due regard to the need to deter the commission of such offences.

While it may be possible to classify as less serious a certain type of offence, some kind of penal obligation imposed by the Party is necessary to meet international obligations. Van Vliet, commenting on the position in Dutch law, notes: "There is, of course, a certain tension between the illegal status and the actual decriminalization of cannabis products".

Some may take the view that this tension is more apparent than real because in fact most international treaties only require purely formal application when indirect application is involved, and that this is particularly so in the drug conventions which expressly recognise a discretion to prosecute or not. It would follow that material non-compliance is not a breach of the treaty. However, where a treaty provides for supervisory machinery then it appears that material observance is required and such an action would be a breach of the treaty obligation. And the drug conventions do provide for such supervision by the UN's drug control organs. Under the drug conventions, the Commission on Narcotic Drugs (CND) is authorised in terms of article 8 of the 1961 Convention to consider all matters affecting the conventions' aim of suppression of the illicit traffic, and the implementation of the provisions relating to the illicit traffic, and to make appropriate recommendations. The INCB monitors implementation. Article 9(4) of the 1961 Convention provides that the INCB must endeavour "to prevent illicit

\[\text{In South Australia, for example, in terms of the Cannabis Expiation Notice Scheme instituted in 1987, the following fines can be paid to avoid a criminal conviction: possession of } <25 \text{ gms of cannabis } $A50; 25 < 100 \text{ gms } $A150; < 20 \text{ gms cannabis resin } $A50-$A150; \text{ smoking or consuming } $A50; \text{ possession of cannabis related equipment } $A10; \text{ and cultivation of three plants or less } $A150. \text{ Similar schemes have been set up in the Northern Territory and Australian Capital Territory.}\]

\[\text{This provision must include article 3(2) offences as other provisions of this nature which were intended to apply to article 3(1) offences only say so expressly.}\]

\[\text{See note 61 at 732.}\]
cultivation, production and manufacture of, and illicit trafficking in and use of, drugs". In terms of article 14(1) of the 1961 Convention if it has "objective reasons" to believe that the aims of the Convention are threatened by a Party's failure to carry out its obligations, for example, by failing to enact and apply article 36 offences, the INCB has the right to confidentially consult with that Party or request it to supply information. Article 14(1)(b) provides that the INCB may call upon the Party to adopt appropriate remedial measures. If results are undesirable, in terms of article 14(1)(c) the INCB can call the attention of the Parties, ECOSOC and the CND to the matter. But it may only do so if either: (i) the aims of the Convention are being seriously endangered and it is impossible to resolve the matter satisfactorily in any other way; or (ii) the INCB finds that there is a serious situation that needs co-operative action at the international level with a view to remedying it; or (iii) bringing such a situation to the notice of the Parties, ECOSOC, and the CND is the most appropriate method of facilitating co-operative action. If one of these conditions is met, the INCB can in terms of article 14(3) make a special report including the views of the defaulting Party to ECOSOC, and recommend in terms of article 14(2) that Parties stop the import and export of all drugs to and from that country for a designated period or until it is satisfied with the situation in that country. The Party has the right to put its case to ECOSOC.65

The INCB has been given similar powers under the 1971 Convention. It has the right to ask a Party to furnish information which it needs in connection with the Party's execution of the 1971 Convention's provisions, and article 19 allows it to recommend an embargo against a Party when it has reason to believe that the aims of the Convention are being seriously endangered by the Party's failure to carry out the Convention's provisions.66 Under the 1988 Convention, article 22 confers on the INCB powers of investigation in response to allegations that a Party is not meeting the aims of the 1988 Convention. No provision is made for the INCB to take steps against a defaulting Party to force it to comply with the Convention's provisions. Article 21 provides instead that the CND is authorised to consider all matters pertaining to the aims of the 1988 Convention. Article 21(a) obliges the CND to review the operation of the 1988 Convention, article 21(b) allows it to make suggestions and general recommendations based on the examination of the information it receives from the Parties and article 21(d) obliges it to take appropriate action on any matter referred to it by the INCB under article 22(1)(b). In practice the system's embargo powers have not been used. But

65 India has made a reservation in regard to article 6 of the 1972 Protocol (14/12/1978 - Multilateral Treaties Deposited (1997) at 295).
that does not mean that given sufficient political support from states party, they may not be brought into action. One source of support for the characterisation of the de facto decriminalization of cannabis as a “serious situation” would be the strong prohibitionists like the United States, but Bassiouni and Thony point out that support may also come from drug producer states that do not feel that the consumer states are pulling their weight in applying the system. Bassiouni and Thony comment:

The relaxed laws in states like the Netherlands presents a strange situation where Western states put a lot of pressure on developing countries to stop the illicit production of cannabis, and at the same time close their eyes to their own national production and use. This inconsistency could lead to a crack down of the international control system over cannabis.67

Whatever the source of the pressure, in the light of the capacity of the UN drug control organs to examine and enforce prohibition of cannabis it seems facile to argue that the drug conventions oblige states to engage in purely formal application. Purely formal application is contrary to the object and purpose of particularly the 1988 Convention and is thus a material breach of article 3 paragraphs (1) and (2).68

Another way of approaching the domestic autonomy granted by the conventions is to focus on which body within a party may exercise this discretion and still meet the terms of the international agreement. When a Party’s supreme law making body legislates to the effect that a discretion should always be exercised in favour of the non-prosecution of the accused, then that Party cannot argue that such a discretion in fact exists, and by extension it cannot be said to act within such a discretion when it decriminalizes cannabis. In other words, the discretion recognised by, for instance, article 3(11) of the 1988 Convention, cannot be a discretion simply not to meet the terms of the agreement or else it would be a fundamental violation of the principle of effectiveness in international law and render the Convention’s provisions in respect of offences optional. For a system of indirect application to mean anything, the bodies responsible for such application cannot have a choice about whether to adhere to the terms of the agreement or not. That would be a discretion to legislate rather than a discretion to apply. If the discretion is fettered by policy generated by bodies subordinate to the supreme domestic law-making body, as in the Dutch case where the local triangle of officials decide whether to prosecute cannabis


68 Article 60(3)(b) of the Vienna Convention on the Law of Treaties 1969, 1155 UNTS 331, provides that a material breach of a treaty is “the violation of a provision essential to the accomplishment of the object or purpose of the treaty”.
trafficking, the Party can plausibly argue that it is still exercising the “discretion” recognised by international law. The latter discretion is recognised by the international agreement because certain subordinate bodies will be closer to the individual accused and more aware of their actual situations and should be able to make case related decisions about prosecution. I would submit that Krajweks reads article 3(11) of the 1988 Convention correctly when he argues that by combining the principle that self-destructive behaviour should not be the subject of punishment\textsuperscript{69} and the expediency principle whereby a state introduces legislation but does not enforce it, Parties could enact the article 3(2) offence and then use their administrative discretion not to apply it when no-one other than the user is threatened by use.\textsuperscript{70} It has been stated by Parties that they possess greater discretionary legal powers with regard to simple possession than trafficking offences,\textsuperscript{71} and it seems to me that New Zealand could validly argue that it has retained the discretion in terms of the conventions to impose administrative limitation on the prosecution of the simple possession and cultivation of cannabis for personal use. A direction from the Ministry of Justice would serve this purpose effectively.

4.3 Refraining from punishing

Under this option, cannabis related offences would remain prohibited but penal sanctions would be replaced by civil or administrative measures. The basis of this option is the discretion granted by the conventions to divert offenders away from punishment for a specific purpose such as treatment or rehabilitation.

Article 36(1) of the 1961 Convention obliges Parties to provide for two standards of punishment. The general standard provides that all the forms of drug related conduct enumerated in article 36(1) shall be "punishable offences". The special standard provides that "serious offences shall be liable to adequate punishment particularly by imprisonment or other penalties of deprivation of liberty". Neither of these standards apply to personal use offences as "use" is not listed in article 36(1), and "possession" and "purchase" in article 36(1) have been restrictively interpreted as limited to possession or purchase for the purpose of trafficking. The 1961

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\textsuperscript{69} This principle was used by German Constitutional Court in its 1994 decision.

\textsuperscript{70} Krawjewski, supra n 2 at 8-12.

\textsuperscript{71} See the statement of the Netherlands delegate, 1988 Records vol. II at 30, where he points out that the Convention already adopts a softer approach to the punishment of simple possession in article 3 paragraphs 4(d) and 11. The Netherlands made a reservation to this effect upon signature and upon acceptance (8/9/1993) - Multilateral Treaties Deposited (1997) at 305, the latter pointing out that it only accepts article 3(6) insofar as it accords with Dutch criminal policy and legislation.
Commentary points out that Parties may “undoubtedly choose not to provide for imprisonment of persons found in such possession, but to impose only minor penalties such as fines and even censure” and thus in effect not to treat possession for personal use as a “serious” offence under article 36(1) deserving of imprisonment or other “adequate punishment”.

It is submitted that a Party may take the same approach to cultivation of cannabis for personal use, but it appears that article 36(1) requires the punishment of illicit trafficking offences such as the supply of cannabis. Article 36(1)(b), inserted by article 14 of the 1972 Protocol into the 1961 Convention, provides Parties with the discretion to implement measures such as treatment, education, and rehabilitation as alternatives to conviction and punishment or in addition to conviction and punishment, no matter how serious the offence, when the offender is an abuser.

As with the 1961 Convention, a dual punishment regime is envisaged by article 22(1)(a) of the 1971 Convention, viz.: “punishable offences” and “serious offences ... liable to adequate punishment”. If one accepts that simple possession is not criminalized by the 1971 Convention, then the question of its conviction and punishment is entirely a domestic affair. If not, article 22(1)(b) provides that when abusers of psychotropic substances have committed article 22(1)(a) offences, the Parties may provide, either as an alternative to conviction or punishment or in addition to conviction or punishment, for an obligation on abusers to undergo measures of treatment, education, aftercare, rehabilitation and social reintegration in conformity with article 20(1). The measures listed, viz.: “treatment, education, aftercare, rehabilitation and social reintegration”, are steps in the general process of reintegration of the drug user. The Party is allowed to employ substitution to any abusers of a psychotropic substance such as THC at any stage of criminal proceedings including at the arrest stage. Non-abusing suppliers are not so fortunate. Their offences are punishable under article 22(1)(a).

One of the reasons given for supporting the ratification of the 1988 Convention by the Justice and Law Reform Committee of the New Zealand House of Representatives was that the Convention “does not actually require the Parties to convict and punish persons for personal possession or use of cannabis”. Article 3(4)(d) of the 1988 Convention allows Parties to “provide either as an alternative to conviction or punishment, or in addition to conviction or punishment” for measures such as education and treatment for the personal use offence in article 3(2). With regard to the more serious
article 3(1) offences of supply and cultivation of cannabis, article 3(4)(a) obliges Parties to take into account their grave nature by applying sanctions such as imprisonment or other forms of deprivation of liberty, pecuniary sanctions and confiscation. Article 3(4)(b) allows Parties to provide for treatment etc in addition to conviction or punishment. In appropriate cases of a minor nature article 3(4)(c) provides for such measures in the alternative to conviction or punishment. It is arguable that cultivation of cannabis for personal use or supply of small amounts of cannabis for no value are article 3(1) offences of a minor nature and any Party is free to apply alternative measures to them.

The provisions in the drug conventions that allow Parties to apply treatment measures in the alternative or in addition to conviction or punishment only provides an escape route from violation of the conventions to those Parties that criminalize and then choose as a matter of administrative policy not to punish. They allow New Zealand to depenalize simple possession of cannabis in terms of all the conventions, cultivation for personal use in respect of all of the conventions, and supply for no value of small amounts of cannabis in respect of the 1988 Convention only. The problem with relying on these alternative measures is that under the 1961 and 1971 Conventions the options are limited to treatment, education, after-care, rehabilitation, and social reintegration. Thus if a Party chooses to retain the prohibition of cannabis but avoid prosecution and conviction of cannabis related offences, it has a problem if it does not want to treat potential offenders. Therapeutic measures like “treatment”, “aftercare” and “rehabilitation” of most cannabis users would simply be inappropriate, if what is really aimed at is decriminalization. “Education” of the general public on the health implications of cannabis use seems more apposite. On the other hand Dawkins argues, that “a decriminalization regime for small amounts of cannabis for personal use could be defended as a means of ‘social reintegration’ of a class of persons subject to a prohibition policy of dubious utility”. Under the 1988 Convention, the list of measures is not a numerus clausus and Parties are free to use whatever other methods are judged to be appropriate to the particular circumstances of the offender. Possible alternatives include confiscating the illicit substance, cautioning or fining, or only imposing therapeutic measures when chronic use endangers health. Parties have become more flexible in their punishment of use and

75 Dawkins, supra n 2 at 283.
76 1988 Commentary, supra n 28 at 89.
simple possession particularly, and it is submitted that state practice provides a solid foundation for non-therapeutic diversion as a valid interpretation of the drug conventions by New Zealand.

5. CHANGING INTERNATIONAL LAW TO ALLOW DOMESTIC CHANGE

5.1 De-scheduling cannabis

The drug conventions arrange drugs in separate schedules, corresponding to different regimes of control. Removing a drug from a schedule or moving it into another schedule, without amending the treaty can bring about a change in the degree of control of any drug. The most efficient way of decriminalizing cannabis at the domestic level, in that it is the least complex from a legal point of view, is to de-schedule the substance at the international level, and then adjust domestic drug schedules accordingly. Importantly, New Zealand could not de- or re- schedule cannabis unilaterally without violating its international agreements, even if it had decided that cannabis was a social risk worth taking or testing revealed that cannabis has medical benefits. The international system of drug control is structured in such a way that no signatory state has the authority to decide unilaterally that cannabis should be dealt with in a non-penal way or that cannabis has in fact got bone fide medical applications. In either case New Zealand would have to attempt to have the drug de- or re- scheduled using the international process. For most purposes the material scope of the 1988 Convention is defined by the 1961 and 1971 Conventions. It is therefore the scheduling process under the earlier conventions that is important here.

The procedure for de- or re- scheduling drugs under the 1961 Convention is most significant. Article 2 of the Convention divides narcotic drugs into four

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77 Fraser A and George M "Cautions for cannabis" (1992) 8 Policing 88 at 91 and cases cited note that British Courts are likely to impose non-custodial sentences for simple cannabis possession and that custody is only considered after the fourth or fifth conviction.

78 In terms of article 31(3)(b) of the Vienna Convention on the Law of Treaties the "subsequent practice in the application of a treaty which establishes the agreement of the Parties regarding its interpretation" may be taken into account in the interpretation of a treaty.

79 Bruun K, Pan L, Rexed I The Gentlemen's Club: International Control of Drugs and Alcohol (1975) at 47.

80 Thus article 1(n) provides that "narcotic drug" means "any of the substances, natural or synthetic, in Schedules I and II of the Single Convention on Narcotic Drugs, 1961, and that Convention as amended by the 1972 Protocol Amending the Single Convention on Narcotic Drugs" while article 1(r) defines "psychotropic substance" as "any substance, natural or synthetic, or/and natural material in Schedules I, II, III and IV of the Convention on Psychotropic Substances, 1971".
different schedules based on an assessment of their properties, and different control regimes are applied to the drugs in these schedules. Cannabis is listed in Schedule I, to which in terms of article 2(1) all the general regulative control articles apply, and in Schedule IV, a list of the drugs considered most dangerous, but to which it is only recommended in terms of article 2(5) that additional, special control measures should be applied. Article 3(6) allows the Commission for Narcotic Drugs (CND), in accordance with the WHO's recommendation, to (a) amend any of the schedules by transferring a drug from Schedule I to Schedule II, or (b) delete any drug from a schedule. Re-scheduling cannabis to Schedule II is pointless because it would still be subject to article 36's penal provisions, while Schedule III is reserved for preparations. De-scheduling is the only option. The article 3(6)(b) procedure can only be initiated by Parties who must notify the Secretary-General and furnish him with information in support of the notification. The Secretary-General must notify the other Parties and the WHO if necessary of the potential de-scheduling. The WHO, relying upon the expertise of its ad-hoc Expert Committee, makes the necessary recommendation upon which the CND takes the final decision. The decision making process is set out in article 3(3)(iii) and takes place in two stages. Stage one would require the WHO, relying on the decision of its Expert Committee, to find that cannabis is in fact not a) liable to similar abuse and productive of similar ill effects as the drugs in Schedule I or Schedule II, or b) convertible into such a drug. Criteria a) depends on similarity in abuse and effect to scheduled substances. Thus the criteria used originally to schedule the drugs by the Technical Committee at the 1961 Conference are important. The two tests it used in preparing Schedules I and II were the substance's "degree of liability to abuse" and "its risk to public health and social welfare". The 1961 Commentary notes that as a result of the application of these two tests "the substances in these two Schedules, that is, the drugs under the narcotics regime have morphine like, cocaine

81 Schedule I is composed of those substances which: a) have addiction-producing or addiction-sustaining properties greater than codeine and more or less comparable to those of morphine; b) are convertible into substances having addiction-producing or addiction-sustaining properties with an ease or yield such as to constitute a risk of abuse greater than codeine; or c) have a liability to abuse comparable to that of cocaine.

82 Schedule IV is composed of those substances which a) have strong addiction-producing properties or a liability to abuse not offset by therapeutic advantages that cannot be afforded by some other drug; and/or b) for which expunging from general medical practice is desirable because of the risk to public health. The cannabis plant and cannabis leaves are subject to special measures of control under article 2(6) of the 1961 Convention and article 1 of the 1972 Protocol.

83 Article 3(1).
84 Article 3(2).
85 Article 3(7).
86 Supra n 15 at 86-7.
like, or cannabis like effects or are convertible into 'drugs' having such effects'. Thus in withdrawing cannabis from control the WHO Expert Committee would in effect have to delete one of the core markers of abuse. The test leaves the Committee a measure of discretion, and it is guided by the risk the substance presents to "public health and social welfare". If cannabis was found by WHO not to be liable to similar abuse and productive of similar ill effects as the other drugs controlled, then the WHO will notify the CND of this finding. Stage two consists of the CND deciding, upon the basis of the WHO's recommendation, to delete cannabis from the schedules. The CND votes by simple majority. The CND's decision is binding immediately on the Parties upon receipt of notification thereof. It may be reviewed by ECOSOC on petition by a signatory state. De-scheduling would, I suggest, given that cannabis has served as a benchmark since 1961, be extremely difficult to achieve, despite the medical and welfare merit of the case. Without a much greater consensus than exists at present globally on the nature of its harmful effects, it seems an unlikely route for successful change. It may be possible to convince the WHO Expert Committee, the WHO itself, and the CND of the medical benefits of cannabis to specific users, given the growing evidence of such benefits to sufferers of conditions like multiple sclerosis. But the medicalization model is not a broad solution for the removing the prohibition of the recreational use of cannabis, because most users are not suffering from anything other than a desire to get high. The flaw of rescheduling cannabis to take account only of its medical uses is that it takes no account of the non-medical social nature of most cannabis usage - cannabis is more like alcohol than a prescription drug.

The procedure for scheduling substances under the 1971 Convention presents much the same apparent opportunities and actual problems. Barbiturates, tranquillisers and amphetamines fall outside the scope of the 1961 Convention, hence the elaboration of the 1971 Convention, which like the 1961 Convention, has four schedules of substances to which different control regimes apply. From the point of view of criminal law, the penal provision in article 22 of the 1971 Convention applies to any psychotropic substance covered by the Convention. Tetrahydroncannbinol (THC), is listed in Schedule I. As under the 1961 Convention, article 2(6) of the 1971 Convention provides that either a party or the WHO may, if it has information relating to a controlled substance and believes that it should be de-scheduled, notify the Secretary-General to this effect, justifying its opinion and thus setting in motion the process for de-scheduling. Under article 2(2) the Secretary-General is obliged to transmit the notification to

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the Parties, the CND and if the notification is made by a Party, the WHO. Under article 2(4), the WHO Expert Committee would have to find that THC does not in fact have the capacity to produce a state of dependence and central nervous system stimulation or depression, resulting in hallucination or disturbances in motor function or thinking or behaviour or perception or mood, or similar abuse and similar effects as a substance in Schedule I, II, III, or IV, and that there is no evidence that the substance is being abused so as to constitute a public health and social problem warranting the placing of the substance under international control. If it does so it is obliged to communicate an assessment of the substance to the CND. The WHO may in terms of the provision examine a substance solely on the basis of its chemical structure, but Chatterjee notes, that following it usual practice, it will take into account the harmful effects the substance might produce. While according to article 2(5) the Expert Committee’s assessment is determinative as to medical and scientific matters, the CND takes the decision to de-schedule the substance and in doing so it has the right to seek advice elsewhere. A two-thirds majority is required in the CND when voting on such a question. Article 2(7) obliges the Secretary-General to communicate the CND’s decision to all UN members, the WHO, the INCB and those Parties to the 1971 Convention who are not UN members. The CND’s decision is not binding until 180 days after receipt by the Parties of notification thereof, and a Party may take exception to such a decision and make a reservation. Article 2(8) provides for review of the CND’s decision. The discretionary power of the CND may suggest a possible opening should the WHO Expert Committee make an unfavourable decision in regard to de-scheduling, but in fact it is more likely to be used to block a favourable decision by the WHO. The same considerations apply - broad approval on a global scale - and the same result is likely - a negative one.

In essence then, de-scheduling under the 1961 and 1971 Conventions is a part scientific, part political process controlled by the UN’s central drug control supervision organs. Even though there may be dissenting voices within WHO about the harmful medical and social effects of cannabis, those voices are not in the majority and they are unlikely to sway the criminal justice professionals, diplomats and politicians who run the CND.

88 Chatterjee S K Legal Aspects of International Drug Control (1981) at 460.
89 A paper to a WHO Expert Working Group on Health Effects of Cannabis Use in Geneva in 1995, entitled “A comparative appraisal of the health and psychological consequences of alcohol, cannabis, nicotine and opiate use” concluded that “there are good reasons for saying that cannabis would be unlikely to seriously rival the public health risks of alcohol and tobacco even if as many people use cannabis as now drink alcohol or smoke tobacco”. This conclusion was not included in the Working Group’s Final Report because it was contradictory and not scientifically sound: WHO Press Release WHO/26, 19 February 1998.
5.2 Amending the Conventions

One possible way of avoiding the de-scheduling blockage would be for New Zealand to propose the amendment of both the 1961 and 1971 Conventions to remove any reference to cannabis or THC. The virtue of amendment is that it is direct and effective. Both conventions require that the text of and reasons for the amendment be communicated to the UN Secretary General who is obliged to communicate them to ECOSOC and to the Parties. The ECOSOC “may decide” either to call a diplomatic conference to consider the amendment or to ask Parties whether they accept the amendment and to submit their comments. In the latter case, if the amendment has not been rejected by one Party within eighteen months of circulation it shall enter into force. Rejection gives ECOSOC the choice of calling a conference or not.

Currie et al believe two options are available using the provisions for amendment – partial elimination or total elimination of international obligations requiring criminalization. Partial elimination would involve the decriminalization of the use and possession and provision of cannabis for no value, while total elimination allows legalization of cannabis or its being subject to a regulatory regime like that applying to alcohol. The advantage of amendment is that the whole of the international community would move forward together on this policy issue. That is also the reason why amendment is unlikely to succeed and may result in no change for a state, like New Zealand, desiring change. Such a proposal would almost certainly be challenged and acceptance without a conference is unlikely. It would have to be settled by a diplomatic conference. States opposed to such amendment would argue that the rescheduling process is the process for amending the schedules. The prospect of consensus being achieved at such a conference are difficult to gauge, but it seems unlikely.

5.3 Withdrawal from the conventions

If New Zealand were not satisfied with decriminalization by administrative action or depenalization within the possibilities of the drug conventions, and it wanted to remove the prohibition of cannabis from its statute books, it could assert its sovereign right to enact its own policies on the harm

90 Article 47 of the 1961 Convention and article 30 of the 1971 Convention.
91 Currie et al, supra n 2 at 245-8.
92 It would mean the amendment of article 36, removing the penalisation of small amounts of cannabis, and article 30, removing distribution of small amounts of cannabis for no value from the regulatory regime.
93 Regulation would involve the amendment of articles 19, 21 and 36 to exclude cannabis and cannabis resin, while legalization would involve amendment of articles 28, 29, 30 and 31.
minimisation of cannabis and denounce the conventions by written notification to the UN Secretary-General. Invocation of either of two separate grounds may serve to justify withdrawal and give New Zealand the moral high ground. New Zealand could state that its agreement to the scheduling of cannabis in the 1961 Convention and/or THC in the 1971 Convention was an error in terms of article 48 of the Vienna Convention on the Law of Treaties on the basis that it assumed that the substance was medically and socially harmful at the time it signed and ratified the Convention, when in fact it has since been discovered that it is not. A more plausible route would be to argue that New Zealand has determined that harm from cannabis use can best be managed using a regulation model, and invoke the doctrine of “changed circumstances” set out in article 62 of the Vienna Convention of the Law of Treaties. New Zealand would have to argue that acceptance of harm driven prohibition was fundamental to its consent to the scheduling of cannabis and its reassessment of this harm has in the interim radically transformed the extent of its obligations under the drug conventions because it obliges New Zealand to criminalize conduct it no longer regards as sufficiently harmful to justify criminalization.

Withdrawal would terminate New Zealand’s treaty obligations. Advocates of cannabis prohibition could argue that the obligation to criminalize cannabis within the drug conventions has become part of customary international law and New Zealand remains bound. However, evidence of contradictory state practice and opinio iuris abounds: many states take a very lenient approach to the prohibition of cannabis and particularly to the prohibition of cannabis for personal use. There may be a case for a customary rule obliging states to control cannabis, but the variation in intensity and scope of state control over cannabis militates against the establishment of a customary international rule of criminalizing cannabis.

When denunciation takes effect, New Zealand would be in a position to change its domestic law and either lobby to overturn the global policy against cannabis or re-ratify them with reservations in respect of the

94 1961 Convention in terms of article 46; 1971 Convention in terms of article 29; 1988 Convention in terms of article 30.
96 Australia, France, Germany, Italy, Netherlands, Poland, Spain, Switzerland and certain US States all have formal prohibition but, pursuing a wide variety of different strategies, display different degrees of official latitude in this regard. In addition, many developing states have the laws on their statute books but simply don’t apply them because of the cost involved and/or a lack of popular support for these measures.
97 This is the policy of the Aotearoa Legalise Cannabis Party (ALCP), which also advocates diplomatic assistance to New Zealanders arrested for cannabis offences abroad: www.alcp.org.nz.
The former action is probably not an option given New Zealand’s general commitment to international drug control. Transitional reservations to the 1961 Convention were permitted in respect of the “the use of cannabis, cannabis resin, extracts, and tinctures of cannabis for non-medical purposes” for twenty five years after the coming into force of the 1961 Convention in terms of article 49(1)(d), but article 49(2)(f) provides that such use had to be discontinued within twenty-five years of the coming into force of the 1961 Convention. Article 50 provides that no reservations other than those in article 49 shall be permitted unless in terms of article 50(3) the Party wishing to make a reservation notifies the Secretary General and no more than one third of states parties object within one year. Article 32 of the 1971 Convention also prohibits reservations generally except under the same criteria. Given the support for prohibition, such a low level of objection would be easily attained.

General international law provides no assistance because article 19 of the Vienna Convention on the Law of Treaties provides specifically that reservations are not permitted when they are a) expressly prohibited by the treaty in question or b) when they are not among those specifically provided for by the treaty. As the 1988 Convention has no provisions for reservations, general international law prevails. Article 19(c) of the Vienna Convention on the Law of Treaties provides that a state when ratifying a treaty may make formulate a reservation, as long as that reservation is not incompatible with the convention’s object and purpose. This raises the issue of whether a reservation in respect of the criminalization of cannabis would conflict with the object and purpose of the 1988 Convention. If decriminalization prior to withdrawal is considered as a contradiction of the object and purpose of the Convention resulting in a material breach of the treaty obligation in terms of article 60(3)(b) of the Vienna Convention on the Law of Treaties, then avoiding breaching by denouncing and reserving to the same effect means that the reservation will conflict with the object and purpose of the treaty, leaving such a reservation’s legality questionable.

Denunciation, whatever follows it, would generate a lot of official displeasure from advocates of global prohibition, like the United States, and these states may resort to sanctions to get New Zealand to conform. The argument that New Zealand presents little actual threat internationally due to its isolated geographical position which means that it is unlikely to contribute to global smuggling or drug tourism is tenable, but at least in the eyes of prohibitionists, almost certainly outweighed by the “bad” example it will have set. The control organs of the international drug control system

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98 Schutte made this point in respect of the proposed legalisation of supply of cannabis in the Netherlands, see supra n 35 at 69.
remain firmly opposed to decriminalization, something evidenced by the INCB’s continual criticism of Dutch drug policy.\textsuperscript{99} Withdrawal, an uncommon process in international law,\textsuperscript{100} is a difficult option, particularly in the light of the difficulties of re-entry with reservations.

6. CONCLUSION

The Justice and Law Reform Committee for the New Zealand House of Representatives concluded in its analysis of the consequences of ratification of the 1988 Convention as follows:

While liberalisation of laws against the possession and use of cannabis is not on the Government’s agenda at present, it would appear to us that ratification of the 1988 Convention would not unduly restrict the possibility of liberalisation of such laws in future.\textsuperscript{101}

Examination of the law leaves less room for manoeuvre than the Committee believed there to be. While the 1961 and 1971 Conventions arguably do not require New Zealand to criminalize simple possession and cultivation for personal use of cannabis or THC, the 1988 Convention does. And all three conventions criminalize supply for whatever purpose. If no attempt to change international law is going to be made, then New Zealand could argue that the constitutional/basic law exceptions to the obligation to prohibit permit decriminalization, but the difficulty would be convincing the international community that this was in fact the case, given the un-entrenched nature of the Bill of Rights Act 1990. Reliance on the autonomy of indirect application granted by the conventions is more promising although a legislated blanket decision not to prosecute cannabis offences at all would seem to be in violation of the convention obligations because falls outside domestic autonomy. An administrative decision not to prosecute would be effective, especially when based on the principle that those that do

\textsuperscript{99} Referring to aspects of this policy including the policy of tolerance of soft drug use and coffee shops selling cannabis products, the INCB expressed again in 1995 its “continued concern at the persistence of certain practices, only slightly altered, which call into question the Government of the Netherlands’ fidelity to its treaty obligations”. INCB Report of the International Narcotics Control Board for 1995 UN Doc. ENCB/1995/1 at 58. In much the same way the INCB has condemned harm minimisation steps like the opening of safe injection areas in Australia as “not in line with international conventions”: Sydney Morning Herald, 7 March 2000.

\textsuperscript{100} Jamaica withdrew recently from Optional Protocol 1 of the International Covenant on Civil and Political Rights, 23 October 1997, UN Status of Multilateral Treaties 1997 164 note 1. Its withdrawal was not welcomed, and the Secretary General hoped it would reconsider.

no harm to others should not be subject to the criminal law. Diversion from the system and depenalization is also a promising alternative permitted by the conventions.

If New Zealand sought to change international law in order to facilitate domestic decriminalization, the options are not attractive. If it sought to have cannabis rescheduled in the 1961 Convention, it would almost certainly fail, because it is unlikely that the international community is ready to make this step, especially to enable recreational use. Amendment would in all likelihood suffer the same fate as de-scheduling. Withdrawal and denunciation are possible but seem highly unlikely, given the recent decision to ratify, and would also be frowned upon by the international community. Re-ratification of the conventions with reservations in respect of cannabis would be very difficult and unpopular.

In sum then, it would seem that the best option for New Zealand to take would be to avoid trying to change international law, and to use the open textured nature of the provisions relating to the discretion not to prosecute or punish. It should retain the prohibitions in the Misuse of Drugs Act while making an administrative decision to refraining from applying it to the letter, and choosing to divert when no-one other than the user is threatened by use.102

At the centre of this debate is assessment of the medical and social harm caused by cannabis. It is central to the notion of rescheduling, of constitutional rights to use, and to decisions not to prosecute or to divert offenders or to withdraw from the system. It is important to understand that this assessment is not and probably never was purely scientific. It is, to a very large extent, a moral-political assessment. Crucial to this evaluation is not so much the fact of the evaluation itself, but who controls the evaluation. The global network that exists to suppress illicit drugs on behalf of states also serves to legitimise the policy of blanket prohibition. Removal of cannabis from scheduled prohibition in the international drug conventions would be a defeat for the international public political morality of prohibition. It would be a reclaiming of control over this issue by individual states. That political morality is not likely to give way without a fight. But the example of decriminalization of cannabis in NZ, within the bounds of international law, in response to a re-evaluation of the harm caused by cannabis and the inappropriateness of blanket prohibition, would add to a growing global trend to take the harm principle seriously. If nations that took such a view were able to link-up, it may result in the reconstruction of the global drug problem, at least to a degree, from the bottom-up.

102 This mixed approach was suggested by Krawjewski, supra n 2 at 8-12.
PATENTING "LIFE": HUMAN GENETICS, ETHICS AND PATENT LAW

BY ANNA KINGSBURY

SUMMARY

This article provides a background and context for the New Zealand debate about the patenting of human genetic and other life form inventions. It reviews the application of patent law to human genetic research internationally, examines the arguments against the patenting of genetic materials, and considers alternatives to the patent regime for human genetic research. The author concludes that the patent system is the most appropriate and effective regime for the protection of human genetic inventions, but that it is not the most appropriate forum for the resolution of moral and ethical problems in human genetic research, or for the regulation of such research. It is argued that moral and ethical considerations in human genetic research should be removed from the patent system, and regulated by more representative social institutions.

1. INTRODUCTION

Since the identification and elucidation of the structure of DNA in the 1950s, research in genetics and biotechnology has developed very rapidly; far more rapidly than the regulatory frameworks which supposedly govern its activities. In the area of human genetics, the Human Genome Project was established in 1988 to gain "complete knowledge of the organization, structure and function of the human genome." Co-operating internationally, scientists aimed to sequence the entire human genome and then to identify specific functions within the genome. A related project, the Human Genome Diversity Project, aimed to record genetic biodiversity. The very scope of knowledge involved in these projects, and the potential implications of that knowledge, have led to concern about the

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appropriateness and adequacy of existing ethical, legal and regulatory frameworks for genetic research. It is a widely expressed view that science, rather than ethics or law, is setting the agenda for research, and driving the regulators. To many, science is seen as "out of control". 3

Of all the legal and regulatory issues arising from genetic research and the "new genetics", one of the most hotly contested has been the patentability of genetic material and genetically modified organisms. This is understandable as patenting genetics raises very awkward questions about whether life can or should be "owned", and then consequently whether life should be susceptible to commercial exploitation. These issues have been extremely contentious as they apply to plants and animals. 4 But once questions of patentability are applied to the products of human genetic research, the issues become even more stark. To patent human DNA sequences seems to involve patenting the very fundamentals of human life. According to McLean:

Whilst it is generally accepted that people and companies will not innovate without profit in view, the possibility of 'owning' something so central to what it is to be human poses, for some, the ultimate nightmare scenario. This is because there is something both intimate and special about what it is that is to be the subject of property rights. 5

In New Zealand, debate continues about the patenting of human genetics and other life form inventions. In February 1999 the New Zealand Ministry of Commerce issued discussion documents for consultation with Maori on the patenting of life forms. 6 The Ministry sought advice as to whether inventions involving human beings should be patentable, whether the "contrary to morality" exception to patentability should be retained, and whether a new exception for human beings should be enacted. The Maori Patenting of Life Forms Focus Group has recommended a number of exceptions to patentability, including exceptions for humans, parts of humans, and highly significant species. It also recommends a ground for objection or revocation where a patent is "contrary to Maori values and interests." 7

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7 Patenting of Life Forms Focus Group, Maori and the Patenting of Lifeform Inventions: An Information Paper Produced by the Patenting of Life Forms Focus Group for the Ministry of Commerce (Feb 1999), 14.
In a related development, in response to concerns about the ethics and safety of biotechnology research, an Independent Biotechnology Advisory Council was established in May 1999, reporting to the Minister of Research, Science and Technology. This Council has no legislative or regulatory responsibility. Rather, it:

will help New Zealand explore and consider issues arising from advances in biotechnology. Its main role will be to stimulate dialogue and enhance public understanding about biotechnology. IBAC will also provide independent advice to Government on the environmental, economic, ethical, social and health aspects of biotechnology.8

The purpose of this article is to provide a background and context for the New Zealand debate about patenting of human genetics. The article reviews the application of patent law to human genetic research internationally, examines the arguments against the patenting of genetic materials, and considers alternatives to the patent regime for human genetic research. The author concludes that the patent system is the most appropriate and effective regime for the protection of human genetic inventions, but that it is not the most appropriate forum for the resolution of moral and ethical problems in genetic research, or for the regulation of such research. It is argued that the patent system is a non-representative, technically oriented institution designed to promote innovation and research by providing monopoly rights in inventions for a limited term. At best, it is poorly equipped to deal with moral and ethical concerns, as recent cases illustrate.9 It is therefore submitted that moral and ethical considerations in human genetic research should be removed from the patent system, and regulated by more representative social institutions, for example on the model provided by the Group on Ethics in Science and New Technologies established by the European Biotechnology Directive.10

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The purpose of patent law is to provide an incentive for innovation and promote investment in research. It has been suggested that the biotechnology industry is particularly concerned to receive legal protection for its work, and that biotechnology industries devote proportionately more time and money to patent protection than any other industry. Significant biotechnology and genetics research activity is motivated by the availability of patent protection, and there is therefore considerable interest in the availability of patent protection for the results of human genetic research.

Requirements of Patentability

The requirements for a valid patent are broadly similar across patent systems internationally. Generally, an invention is patentable if it:

i) is adequately disclosed and fully described
ii) constitutes patentable subject matter
iii) is novel
iv) involves an inventive step (is not obvious to a person skilled in the art)
v) is useful/industrially applicable
vi) is not covered by one of the exceptions to patentability (which exceptions vary across jurisdictions).

A number of problems arise when these criteria are applied to the results of human genetic research. Some of these problems are technical or practical problems in applying patent law to a new area, and some have an ethical or moral dimension.

(i) Full Description

It is a requirement of patent law that the patent specification must describe the invention fully, including the best method known to the applicant of performing the invention. The purpose of this provision is that the reader of the specification should have sufficient information to reproduce the invention.

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13 See Patents Act 1953 (NZ).
14 For New Zealand, see Patents Act 1953 (NZ) s10. For Australia, see Patents Act 1990 (Cth), s40(2).
For biotechnology inventions this requirement initially caused difficulties. Merely describing a living organism was not sufficient for it to be reproduced. For microorganisms, this difficulty was overcome by the creation of depositories under the terms of the Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the Purposes of Patent Procedure 1977.

However, there may still be problems in sufficiently describing human genetic material in order for a reader of the description to reproduce it. This is unlikely to be a problem for synthetic material, but it may be a problem in patenting human genetic material in its naturally occurring form.

(ii) Patentable Subject Matter: Is Living Material Invention or Discovery?

In patent law, there is a long-standing distinction between discoveries and inventions. Patents cannot be obtained for discoveries of things occurring in nature. Patents are for inventions, that is, for things falling within the definition of "manner of new manufacture" within s 6 of the Statute of Monopolies. Inventions are distinguished from discoveries as they involve some human technical activity or ingenuity. This distinction between discoveries and inventions reflects the essential principle of patent law; that the law grants a monopoly to an inventor as an incentive and a reward for skill, effort and endeavour. Such a reward should not therefore be available to someone who merely finds something which may turn out to be useful.

However, the distinction between discoveries and inventions has created considerable difficulties in its application to biotechnology research. Much of the work done in biotechnology research, and especially in human genetics research, may not go sufficiently beyond discovery to qualify for patent protection. For example, much of the work involved in sequencing the human genome involves identifying molecular entities that occur in a natural state in the human body. Arguably these are no more than discoveries, and do not qualify as inventions for the purposes of patent law. However, there is also a distinction drawn in Patent Offices internationally between things found naturally occurring in nature, which are regarded as discoveries, and things which occur in nature but have been isolated from nature by technical means, where the process for isolation is regarded as being a patentable invention. Further, the substance itself will be patentable so long as it can be shown to be new and inventive in the sense of not having

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15 See Patents Act 1953 (NZ), s2; Patents Act 1990 (Cth), s 18(1).
16 Laurie, op cit n 12, 242.
been previously recognised to exist. On this basis, patents have been regularly granted since the 1980s for products of genetic engineering, in the same way as they are granted for other chemical substances.

The distinction between discovery and invention is inevitably linked in the area of biotechnology to moral and ethical questions about the appropriateness of patenting 'life', and biotechnology patents have been opposed on this ground. Opponents have argued that life forms are not or should not be patentable per se, and that all life forms should be regarded as discoveries.

In the area of biotechnology, the distinction between discoveries and inventions has been considered in a number of cases in recent years. In the United States, it was the basis of the 1980 decision in the case of *Diamond v Chakrabarty*. This was a case which involved genetically engineered bacteria which were said to break down multiple components of crude oil, and therefore to be useful in cleaning up oil slicks. The patent application was refused by the patent examiner on the grounds that the bacteria were products of nature and living things. The patent examiner's decision was rejected by the majority of the United States Supreme Court. The Court held that "anything under the sun that is made by man" is patentable, and that:

> The distinction is not between living and inanimate things, but between products of nature, whether living or not, and human-made inventions.

*Chakrabarty* opened the way to large-scale patenting of biotechnology in the United States. It was inevitable that in time the scope of the decision would be tested in relation to higher forms of life. In 1988 the issues were raised in relation to the Oncomouse. The Oncomouse was a transgenic animal: a mouse specially bred to develop cancer. Harvard University obtained a US Patent for it in 1988 with little difficulty. The claim was very broad, covering any transgenic non-human animal bearing an activated oncogene sequence introduced by genetic engineering. Although a living thing, it was regarded as an invention within the scope of *Chakrabarty*.

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18 By 1997, over 300 patents had been granted by the EPO covering both genes coding for human proteins and the proteins themselves, and applications were being filed at about 300 per year. Dworkin, op cit n 17, 1080. Note also that almost 1200 patents on human DNA were issued worldwide between 1981 and 1995. G Yonover "What Hath (NOT) Chakrabarty Wrought" (1998) 32 Val U L Rev 349, footnote 46.

19 *Diamond v Chakrabarty* 447 US 303, 100 S Ct 2204, 65 L Ed 2d 144, (1980),USSC.

20 Ibid, 150.

21 Ibid, 152.

However, when Harvard University lodged a similar patent application with the European Patent Office (EPO), it faced considerable opposition. Initially the patent was granted by the EPO, but proceedings were brought to have the patent revoked, and these proceedings have still not been concluded. The European opposition to the Oncomouse patent was based on moral and ethical arguments, with critics suggesting that Oncomouse should come within the exceptions to patentability.23

The distinction between discoveries and inventions in relation to biotechnology arose again in the Howard Florey/Relaxin decision.24 In that case a patent had been granted for the expressed nucleotide sequence for the protein Relaxin which is produced by women during pregnancy, and which relaxes the uterus during childbirth. The Green Party opposed the application on a number of grounds, including a concern that "the patenting of human genes means that human life is being patented".25 Another major argument was that the application related to a discovery rather than an invention. The gene encoding Relaxin was always present in the female body. Finding it was therefore merely a discovery, not an invention. The EPO rejected this argument on the basis that the technical effort involved in extracting and isolating the gene constituted an invention within the EPO Guidelines. The isolated Relaxin gene was therefore the product of an invention.26

Thus, the definition of invention has been widely drawn, so that the biotechnology industry now experiences little difficulty in satisfying the invention criterion.

(iii) Novelty

Related to the patentable subject matter requirement and the distinction between discovery and invention is the requirement that the invention be novel. Novelty concerns may arise when patents are sought for the results of genetic research where these are similar or related to existing research, or where the results are the product of known techniques to identify something naturally occurring.27

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26 Dworkin, op cit n 17, 1080, and Guidelines for Examination in the European Patent Office.
(iv) Inventive Step

To be patentable, an invention must involve an inventive step, that is, it must not be obvious to a notional non-inventive person skilled in the art. Obviousness is a question of fact for a court in any particular case, and depends on expert evidence.

Questions of obviousness commonly arise in the area of biotechnology where known techniques are used to produce a known and commercially desirable product, for example in the use of recombinant DNA to produce a known protein. Similarly issues of obviousness are also likely to arise in human genetic research, where known techniques are used to identify genetic material.

(v) Utility and Industrial Application

Another technical difficulty that arises in patents for biotechnology, and particularly for patents for human DNA, is the problem of utility. To be patentable, an invention must have some utility; it must be useful.

Much genetic research to date has concentrated on isolating and identifying gene sequences and DNA fragments. The Human Genome Project is a clear example of this activity. The Human Genome Project was established in 1988 with the purpose of mapping and sequencing the entire human genome. The project was coordinated by the Human Genome Organisation (HUGO), and is now approaching completion.

In 1991, the United States National Institutes of Health (NIH), as a result of work on the Human Genome Project, filed applications to patent 2412 human DNA sequences. These DNA fragments had never previously been identified, but the complete gene sequences and their function in the human body were not then known. Further, at the time of applying for the patent they had no known utility.

These patent applications were made in the midst of considerable controversy about the appropriateness of patent protection for human genetic sequences. Concerns were expressed about the ethical and moral issues in patenting human life, and it was argued that the information in the human genome forms part of the common heritage of humanity and should not be

28 Ibid, 340.
made the subject of a monopoly.\textsuperscript{30} There was also concern expressed about the effects patenting the human genome might have on genetic research and product development. It was argued by some scientists that early protection of gene sequences might operate as a disincentive to others to engage in more complex product development. Such an effect would be contrary to the very purpose of patent law, which is to encourage innovation and research.\textsuperscript{31} It should be noted here that these objections were not to the patenting of gene sequences with a known function which can be isolated and used to produce therapeutic products of commercial value. The objections were rather to the patenting of gene sequences whose function is unknown and which have no known utility or industrial application.\textsuperscript{32} Where the sequence has no known use, then it may simply be a discovery without the utility required for patentability.

In 1992, the United States Patent and Trademark Office rejected the applications for several reasons including obviousness and lack of novelty, but the primary reason was that the identified sequences had no known utility.\textsuperscript{33} The NIH had attempted to address the concerns about utility and industrial applicability by specifying possible uses. For example, the NIH suggested that they could be used as identification markers and as markers within genome research.\textsuperscript{34} However these suggested uses were unacceptable to the United States Patent Office. Some were held to lack utility, some to be too vague, some to provide insufficient information and some to be obvious.\textsuperscript{35} Subsequently, European Patent Offices made similar decisions on the patenting of human gene sequences.\textsuperscript{36}

In 1994 the NIH decided against appealing the USPO decision, and a number of similar applications by other organisations have since been withdrawn. The Human Genome Organisation has now stated that:

Raw human genomic DNA sequences, in the absence of additional biological information and demonstrated utility, is inappropriate material for patent filing...[Access] to the initial genomic sequence as it is generated will provide the maximum opportunity for research and the development of new products\textsuperscript{37}

\textsuperscript{30} See for example the argument put forward by the French National Consultative Committee on Ethics condemning patenting the human genome, quoted in Dworkin, op cit n 17, 1082.
\textsuperscript{31} Laurie, op cit n 12, 248.
\textsuperscript{32} Dworkin, op cit n 17, 1082.
\textsuperscript{33} Laurie, op cit n 12, 247, McKeough and Stewart, op cit n 27, 337.
\textsuperscript{35} Dworkin, op cit n 17, 1082.
\textsuperscript{36} Ibid.
\textsuperscript{37} Ibid.
HUGO now asserts that all human genomic information should be in the public domain to encourage research and development, and because it is the common heritage of humanity. In 1996 all HUGO participants met and agreed on two key principles:

(i) Primary genomic sequences should be in the public domain; and
(ii) Primary genomic sequences should be rapidly released.

HUGO reaffirms, however, the role of patents for new processes and products which use genes. Such processes and products avoid problems of patentable subject matter, novelty and obviousness, and they are likely also to meet the requirement of utility and industrial applicability.38

(vi) Exceptions to Patentability

A product or process arising from human genetic research may meet all the requirements of patentability discussed above, but there still remains the additional hurdle presented by the exceptions to patentability.

In recent times, exceptions to patentability have become the principal focus for the moral and ethical arguments surrounding patentability of genetically modified plants and animals, such as Oncomouse, and also some human genetic research products such as Relaxin. It is therefore likely that future opposition to patenting genetic techniques, such as cloning, will be focussed on the exceptions to patentability. However, the attempt to use the exceptions as a means to regulate research ethics has produced rather unsatisfactory results to date.

TRIPS

Exceptions to patentability vary considerably across jurisdictions, despite international attempts to achieve a more uniform approach. A serious attempt to achieve such a uniform approach was made in the context of the General Agreement on Tariffs and Trade Uruguay Round negotiations, which culminated in the Trade Related Intellectual Property Rights (TRIPS) Agreement adopted in 1994 as part of the GATT Final Agreement.

All members of the World Trade Organisation (WTO) are signatories to TRIPS, which sets minimum standards for the protection of intellectual property rights, and is enforceable through the WTO dispute resolution processes.

38 Ibid.
Article 27 of the TRIPS Agreement relates to patentable subject matter. Article 27(1) provides that, subject to 27(2) and (3):

Patents shall be available for any inventions, whether products or processes, in all fields of technology, provided that they are new, involve an inventive step and are capable of industrial application.

Articles 27(2) and (3) provide for exclusions from patentability:

(2) Members may exclude from patentability inventions, the prevention within their territory of the commercial exploitation of which is necessary to protect ordre public or morality, including to protect human, animal or plant life or health or to avoid serious prejudice to the environment, provided that such exclusion is not made merely because the exploitation is prohibited by their law.

(3) Members may also exclude from patentability:

(a) diagnostic, therapeutic and surgical methods for the treatment of humans or animals;
(b) plants and animals other than micro-organisms, and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes. However, members shall provide for the protection of plant varieties either by patents or by an effective sui generis system or by any combination thereof. The provisions of this sub-paragraph shall be reviewed four years after the date of entry into force of the WTO Agreement.39

The question of exclusions from patentability was a controversial one both during the TRIPS negotiations, and subsequently. International debate about patentable subject matter focussed particularly on four concerns.

First, there was concern that patent protection for developmentally important products such as agricultural chemicals and pharmaceuticals would protect the interests of large international companies at the expense of local research and development.40 Indeed, India’s continuing concerns about patents for pharmaceuticals and agricultural chemicals led to the first TRIPS dispute under the World Trade Organisation dispute resolution process. The United States complained to the WTO that India had not complied with the TRIPS patent protection provisions, and the complaint was upheld both by the WTO panel and on appeal.41

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39 Note the final sentence in Art 27(3)(b) requires that 27(3)(b) be reviewed in 1999.
Second, there was concern that “biopiracy” by pharmaceutical companies would lead to those companies acquiring patents for indigenous knowledge, plant and animal materials. Indigenous and local peoples might then be excluded from using those traditional sources of information, except at a prohibitive price. A similar concern arose in relation to human genetic research, when a patent was granted in the United States for a human T-cell line from the Hagahai people of Papua New Guinea. The ensuing storm of controversy led to the patent being withdrawn in late 1996.

Third, there was concern about the impact of new agricultural and pharmaceutical technologies on biodiversity and the environment. This concern was reflected in the Rio Convention on Biological Diversity 1992, particularly the Preamble and Articles 8, 15 and 16.

Fourth, there were ethical concerns about the morality of granting patent monopoly rights for living things and genetic material. Concerns were raised about whether there should be property rights in life forms, and particularly for human beings and human genetic material. This concern was fuelled by publicised developments in genetic research, such as the Human Genome Project, and by the growth of biotechnology industries.

The original United States draft text for TRIPS allowed for no exceptions to patentable subject-matter. This reflects the approach to patentability of the US Supreme Court in Diamond v Chakrabarty; that:

Anything under the sun should be patentable if it meets the required conditions of novelty and inventiveness and is capable of industrial application.

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44 See discussion in Pottage, op cit n 25.

45 Issues about the ownership of human tissue were raised by the case of Moore v Regents of the University of California [1988] 249m Cal Rptr 494 (Court of Appeals); [1990] 271 Cal Rptr 146 (California Supreme Court). See discussion below. See also J Boyle Shamans, Software and Spleens (1997) 97-107.

46 McGrath, op cit n 40, 401. Note that the US approach was supported by Japan, the Nordic countries and Switzerland. See R Ford “The Morality of Biotech Patents” [1997] 6 European Intellectual Property Review 315.

47 Diamond v Chakrabarty 447 US 303, 100 S Ct 2204, 65 L Ed 2d 144, (1980), USSC.
The EC draft text excluded patents for (i) inventions that would be contrary to public policy or health; and (ii) plant or animal varieties, and the biological processes for their production. The European proposal was based on Article 53 of the European Patent Convention 1973.

A draft submitted by a group of twelve less developed nations agreed with the EC proposed exceptions, and also proposed excluding "discoveries, materials or substances already existing in nature, methods for the medical treatment of humans or animals, and nuclear material". 48

The final text of Article 27 was thus a compromise between the various positions in this debate, and it in part echoes the EC draft and the provisions of the European Patent Convention.

Article 27(2) allows, but does not require, Member States to exclude certain things from patentability. It is therefore useful to consider State practice, and the effect of existing exclusionary provisions.

Exceptions to patentability in the United States, Australia, New Zealand and in Europe.

The United States

In the United States there is no express legislative exclusion from patentability on grounds of morality or public order. The USPO has generally followed the approach to patentability of the US Supreme Court in Diamond v Chakrabarty. 49

Patents for biotechnology and life forms are granted regularly in the United States. However, prompted by publicity surrounding a biotechnology patent application, the USPO issued a statement in April 1998 indicating that the test for utility might in some cases require consideration of ethical arguments.

Australia

In Australia, the principal relevant exception to patentability is that excluding "human beings and the biological processes for their production". 50 There is also a discretion for the Commissioner to refuse an

48 McGrath, op cit n 40, 401.
49 Diamond v Chakrabarty 447 US 303, 100 S Ct 2204, 65 L Ed 2d 144, (1980), USSC.
50 Patents Act 1990 (Cth), s 18(2).
A wider discretion is incorporated in the definition of invention by reference to section 6 of the Statute of Monopolies, providing that patents should not be granted for inventions that are "contrary to the law [or] mischievous to the State...or hurt of trade, or generallie inconvenient". Australia has no legislative exclusion for public order or morality, as exists in other jurisdictions, notably in Europe.

In practice, the Australian Patent Office has a liberal policy of accepting most applications, taking a similar approach to the United States Patent Office after Chakrabarty. However, it may be that ethical considerations will arise in relation to utility, as they have begun to in the United States.

**New Zealand**

Like Australia, New Zealand has preserved the discretions in the Statute of Monopolies definition. In addition, it excludes from patentability inventions which are "contrary to morality". However, the practice of the Patent Office is similar to the liberal approach taken by the Australian Patent Office.

The New Zealand Ministry of Commerce has been considering reforms to the Patents Act 1953, including the exceptions to patentability, for some years. Most recently, in February 1999, the New Zealand Ministry of Commerce issued a discussion paper for consultation with Maori on the patenting of life forms. The Ministry particularly sought advice as to whether inventions involving human beings should be patentable, whether the "contrary to morality" exception to patentability should be retained, and whether a new exception for human beings, possibly similar to the Australian provision, should be enacted.

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51 Patents Act 1990 (Cth), s 51(a).
52 Patents Act 1953 (NZ), s 17.
55 Ibid, 14. See also Patenting of Life Forms Focus Group, *Maori and the Patenting of Lifeform Inventions: An Information Paper Produced by the Patenting of Life Forms Focus Group for the Ministry of Commerce* (Feb 1999), 14; which recommends a number of exceptions including exceptions for humans, parts of humans, and highly significant species. It also recommends a ground for objection or revocation where a patent is "contrary to Maori values and interests".
Europe

Article 53 of the European Patent Convention provides that:

European patents shall not be granted in respect of:
(a) inventions the publication or exploitation of which would be contrary to "order public" or morality, provided that the exploitation shall not be deemed to be so contrary merely because it is prohibited by law or regulation in some or all of the Contracting States...

The European Patent Office Guidelines initially indicated that the Article 53 exception would only be applicable in extreme cases, such as an application for a letter bomb.\(^{56}\) However, in recent years Article 53(a) has been used as a basis for opposition to the patenting of life forms and genetic material on ethical grounds.

The first major debate was over the patent application for the Harvard Oncomouse, the mouse specially bred to develop cancer. The European Patent Office agreed to consider ethical issues in light of Article 53(2). The Examining Division took an approach which assessed whether the invention was morally acceptable to the public by weighing the benefits of the invention against the detriments. The benefit was the utility to humanity in possibly curing cancer, and this was weighed against the detriments in the form of environmental hazards and negative effects on the welfare of the transgenic animals. Broad concerns of principle were excluded from this balancing exercise which focussed on specific objections only. For example, the objection that transgenic animals pose an unethical interference with evolution was not considered, because the possibility of escape into the environment was regarded as minimal. As a result of the balancing approach it was decided that the benefits of a possible cure for cancer outweighed the detriments. The invention was therefore held to be publicly acceptable morally, and the application was granted. But the decision is now subject to opposition procedures, and a final decision is still pending.\(^{57}\)

The EPO was widely criticised for its balancing approach to the Oncomouse application, from all sides of the debate. There was criticism of the EPO for involving itself in ethical considerations in which it has no expertise. It was argued that the Patent Office is not the appropriate forum for ethical debates, and that there are more appropriate fora for the assessment of morality. Opponents of the application argued that the range of moral concerns taken

\(^{56}\) Dworkin, op cit n 17, 1081.

into account was too narrow. Proponents argued that morality should be considered elsewhere than the patent system, and that patents should be granted unless they are for inventions which are unlawful. Further, it was argued that morality debates in the EPO can only lead to delays and inefficiencies in processing applications, to the detriment of the patent system and consequently to industry and innovation. 58

In two subsequent decisions, *Plant Genetic Systems NV* 59 and *Howard Florey/Relaxin* 60 the EPO took a different approach. 61 It took the view that the Patent Office was not the appropriate forum for balancing the ethical benefits and detriments of an application. Rather, it chose to avoid ethical debate by applying a different test for patentability. Under this approach, the EPO would not decline patent applications on morality grounds except in cases where the general public would consider the invention to be so abhorrent that patenting it would be inconceivable. 62

However, the "abhorrence" test has also been criticised, particularly by opponents of patents for life forms, as setting too high a standard. Debate has continued in Europe, much of it focussed on proposals for a European biotechnology directive.

European Directive on the Legal Protection of Biotechnological Inventions July 1998 63

In response to concerns about the uncertainty of legal protection of biotechnology industries in Europe, especially as compared with the United States and Japan, in 1988 the European Commission proposed a new Directive to harmonise protection. 64 The proposal provoked considerable debate about the ethical issues involved, and was only finally agreed by the European Parliament in July 1998.

The Directive preserves in Article 6(1) the EPC exception to patentability where commercial exploitation would be contrary to ordre public or morality. In Article 6(2) it goes further and specifies certain things that will be considered unpatentable:

Article 6(2)
On the basis of paragraph 1, the following, in particular, shall be considered unpatentable:

(a) processes for cloning human beings
(b) processes for modifying the germ line genetic identity of human beings
(c) uses of human embryos for industrial or commercial purposes
(d) processes for modifying the genetic identity of animals which are likely to cause them suffering without any substantial medical benefit to man or animal, and also animals resulting from such processes.

Article 5(1) also excludes from patentability “the human body at the various stages of its formation and development and the simple discovery of one of its elements”, although Article 5(2) permits patents for elements isolated by means of a technical process.

Recital 38 states that Article 6(2) is an inclusive rather than an exhaustive list, and does not preclude other examples. However 6(2) is arguably inconsistent with Article 53(a) EPC, as interpreted by the EPO light-touch approach in recent decisions such as *Relaxin*. The balancing exercise required by 6(2)(d) appears similar to that employed by the EPO in *Oncomouse* and since rejected.

Article 7 is a response to the perceived need for ethical expertise, and provides that ethical problems will be the responsibility of the Commission’s European Group on Ethics in Science and New Technologies. The Group is to report annually to the European Parliament under Article 16.

Recitals 12 and 36 of the Directive refer to the TRIPS agreement and indicate that the exclusions from patentability in the Directive are within TRIPS 27(2). Article 2 provides that the Directive shall be without prejudice to the obligations under TRIPS and also under the Rio Convention on Biological Diversity. However, the mandatory exclusion of items listed in Article 6 may actually be beyond the scope of 27(2). Arguably, Member States may rely on 27(2) TRIPS and not implement the Article 6 exclusions. Alternatively, if they do implement Article 6, they may be subject to criticism for non-compliance with 27(2) TRIPS.

The Cloning Patent: The Next Debate?

65 Critics have argued that it is undesirable to rule out technologies such as germ line gene therapy, as such exclusion may prove too inflexible in light of future technological developments. See Ford op cit n 46, 316, R Nott "You did It!: The European Biotechnology Directive at Last" [1998] European Intellectual Property Review 347, 349.

66 Ford op cit n 46, 316.

67 Ibid.

68 Ibid.
It is likely that the question of the test to be used in applying the morality criterion will arise again in Europe in relation to the patent applications based on Dolly the cloned sheep. The Roslin Institute in Edinburgh has filed two patent applications internationally covering the cloning techniques used to produce Dolly. The applications are framed broadly to cover the cloning by somatic cell nuclear transfer of "all animals", including a process for the cloning of humans. Unsurprisingly, there has been considerable opposition to these "cloning patents". For example, the Rural Advancement Foundation International is taking steps to ensure that it will be rejected by WIPO.

Of course, prima facie it appears that granting of a human cloning patent would be prevented by Article 6(2) of the Directive which prevents patenting of "processes for modifying the germ-line genetic identity of human beings" and "processes for cloning human beings". However, Article 5(2) allows patents for human biological material once isolated from the human body. It may be possible to patent the product of a nuclear transfer technique applied to human cells, because it is the technique applied to humans that is not patentable, not the product of the technique. This will depend upon the interpretation of the Article 5 prohibition on patenting the "human body, at the various stages of its formation and development".

It therefore seems that human cloning may be patentable in Europe, unless it is found to be contrary to public order or morality. Thus, the European Patent Office may once again have to address the morality criterion. Many commentators argue that the "public abhorrence" test used by the European Patent Office in Relaxin is a preferable approach to the intricate balancing exercise of Oncomouse. There may be more chance of achieving agreement as to what is "abhorrent" than there is as to what is "unacceptable".

The higher abhorrence test is preferred because, it is argued, the patent system is not the appropriate forum for the regulation of morality. Other regulatory bodies are better equipped than the Patent Office to conduct rigorous moral assessments; even the Oncomouse balancing approach did

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70 See information at http://www2.ri.bbsrc.ac.uk/library/research/cloning/archive/nt-ip.html [30 April 1999]. The patents have a priority date of 31 August 1995. See also Warren, op cit n 53.
72 Ibid, 450.
73 Ibid, 445.
74 Ibid, 448.
not consider the objections in principle that should be included in a moral assessment. Further, as patenting is not necessarily contemporaneous with exploitation, morality applied at the time of patenting could therefore be outmoded by the date of exploitation. Combining moral assessments of exploitation with legal questions of patent protection can produce public misunderstandings about what it is that is the subject of the patent. 75

A human cloning patent application might well succeed under the abhorrence test. While there is presently widespread support for a ban on human cloning, so that a cloning patent might well be regarded as abhorrent, there is nevertheless considerable support for allowing nuclear transfer technology in limited circumstances, for example in correcting human genetic "defects". 76 This suggests that the process and products are unlikely to be regarded as abhorrent for all purposes.

In contrast, under an Oncomouse-type balancing test the patent would be less likely to succeed. While there are arguments for human cloning, for example in therapeutic applications and in offering reproductive choice for infertile people, it is unlikely that on balance these applications would outweigh concerns about human cloning.

However, under either test it is possible that a patent for human cloning would be excluded in the present climate, and that the Roslin Institute will be limited to some category of "non-human" animals.

3. OPPOSITION TO GENETICS PATENTS: THE ARGUMENTS

Opponents of creating property rights in human genetic material through the mechanisms in the patent system raise a number of arguments in opposition.

Property Rights in Human Beings

Fundamental to the concerns raised about patenting of "life", and particularly the patenting of human genetic material, is a moral and philosophical objection to the creation of property rights in human beings. There are a number of formulations of this objection. 77 The first formulation is that if a person is not a slave and nobody else owns their body, then they

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75 However, opponents might equally argue that there is a certain artificiality in the suggestion that the patent process can be some kind of morally neutral legal process removed from the moral and ethical concerns of the wider community.

76 See for example the discussion of Harry Griffin of the Roslin Institute at http://www2.ri.bbsrc.ac.uk [30 April 1999].

must own their own body. Thus, every individual owns his or her own body, to the exclusion of others. This naturalistic approach is immediately attractive to contemporary conceptions, and it is widely held. However, it is based on flawed reasoning.

From the fact that nobody owns me if I am not a slave, it simply does not follow that I must own myself. Nobody at all owns me, not even me.\textsuperscript{78}

Nevertheless, the objection is useful as a device for emphasising a principle of bodily-use freedom.\textsuperscript{79} And it is an argument widely used in opposition to the creation of property rights in the human body and human DNA. For example, Magnusson makes this kind of argument when he suggests, in the interests of preserving human dignity, that:

Human tissue may usefully be regarded as personal property in order to enforce possession and to prevent damage and destruction, for the purposes of criminal offences such as theft, and for the purposes of bailment.\textsuperscript{80}

A second formulation of the objection to the creation of property rights in human beings is the argument that the human body is something which is fundamentally outside or beyond the reach of property analysis.\textsuperscript{81} Thus, critics of patenting human genetic material commonly draw a distinction between "nature" and "culture"; between "things", which can be owned, and "persons", which cannot. According to Pottage:

Most critiques of biotechnology patents seek to restore the proper bounds of property; the common basic practical response consists in the "juridification" of human life, granting it a form of legal immunity from commodification.\textsuperscript{82}

On its face, this distinction is compatible with the patent law distinction between discovery and invention, a distinction which also reappears in Article 5 of the European Biotechnology Directive. Thus, human life as "nature" or "discovery" is beyond the scope of patent rights. Indeed, this distinction is heavily relied upon to justify patenting of genetic material, and it is not uncommon to hear patent experts complain that much opposition to biotechnology patents is based on a fundamental misunderstanding of the distinction. For example, the EPO Opposition Board replied to Green Party concerns about the Relaxin patent by saying that opponents had fundamentally misunderstood the nature of a granted patent: a patent does

\textsuperscript{78} Ibid, 71.
\textsuperscript{79} Ibid, 84.
\textsuperscript{81} John Stuart Mill, for example, argued that human beings are beyond the scope of property. Harris also makes a version of this argument: see Harris, op cit n 77, 72.
\textsuperscript{82} Pottage, op cit n 25, 745-6.
not give the proprietor any right over a human being but merely the right to prevent another from practising the same invention outside the human body.\textsuperscript{83} In the Board’s words:

\begin{quote}
It cannot be overemphasised that patents covering DNA encoding human H2-Relaxin, or any other human gene do not confer on their proprietors any rights whatever to individual human beings...No woman is affected in any way by the present patent...\textsuperscript{84}
\end{quote}

However, the discovery/invention distinction appears simplistic when applied to biotechnology. In a sense biotechnology reduces a person to his or her component elements, and thereby by its very nature renders the discovery/invention distinction “transparent or implausible”.\textsuperscript{85} As the EPO Opposition Board said in relation to opposition to the Relaxin patent, DNA is not life but rather a chemical substance which carries genetic information to produce medically useful proteins.\textsuperscript{86} It is therefore arguable that political opposition to biotechnology patents is not fully answered by the patent law distinction between discovery and invention:

\begin{quote}
Rather, although their force is blunted by legal proceduralisation, political arguments show how legal doctrine mistakes its own interested definition of ‘nature’ for nature ‘as such’. From this perspective the doctrinal distinction between inventions and discoveries is itself a form of violence against nature.\textsuperscript{87}
\end{quote}

**Human Dignity and Human Rights**

Opponents of genetic patents also argue that patent rights in living things, especially in human beings, are contrary to the ideas of individual freedom, self-determination and human dignity that are essential to contemporary thought. Creating property rights in people is likened to slavery, and is described as fundamentally degrading to human beings.\textsuperscript{88} In the human dignity conception, the human body is seen as the means of existence of the human person, and as inalienable from the person as is freedom or citizenship.\textsuperscript{89}

Human dignity arguments form a basis for the protections which are increasingly appearing in human rights instruments. An example is the

\begin{itemize}
\item \textsuperscript{83} Dworkin, op cit n 17, 1081.
\item \textsuperscript{84} Ibid.
\item \textsuperscript{85} Pottage, op cit n 25, 745-6.
\item \textsuperscript{86} Dworkin, op cit n 17, 1081.
\item \textsuperscript{87} Pottage, op cit n 25, 753.
\item \textsuperscript{88} See for example the Green Party opposition to the Relaxin patent. Pottage, op cit n 25, 744.
\item \textsuperscript{89} Pottage, op cit n 25, 746-7.
\end{itemize}
January 1998 Council of Europe Additional Protocol To The Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine, on the Prohibition of Cloning Human Beings.\textsuperscript{90} Similarly, the Preamble to UNESCO’s Universal Declaration on the Human Genome and Human Rights emphasises that human genome research “should fully respect human dignity, freedom and human rights”.\textsuperscript{91}

However, human dignity in this context is a fragile concept, and it is difficult to see how it might most usefully be applied to the question of biotechnology patents. In practical terms the human dignity approach tends to be proceduralised through liberal requirements for informed consent.\textsuperscript{92} For example, in the \textit{Relaxin} case, it is not clear that human dignity arguments could have prevailed over property rights, given that the pregnant women who had supplied the tissue had consented freely to do so.\textsuperscript{93}

Thus, human dignity may be an insufficient basis for opposition to property rights. Rather, human dignity concerns may co-exist within a framework of regulated property rights. But the reliance on informed consent is not a guaranteed safeguard for human dignity in the commercialising of property in genes. As with any market in which trade is based on free choice, there will be imbalances in bargaining strength, asymmetries of information and anti-competitive behaviour.\textsuperscript{94} Additional regulation may be required to correct such imbalances.

The now famous case of \textit{Moore}\textsuperscript{95} highlights another interesting issue in relation to human dignity and informed consent arguments. Moore had his diseased spleen removed in a necessary and successful operation conducted by the medical centre at the University of California, on the advice of his doctor, Dr Golde. Moore was then required to attend regularly at the centre for the next seven years, and samples of his blood and other bodily substances were taken. Eventually, Moore learned that his diseased spleen

\textsuperscript{90} (Not yet in force). Relevant provisions are:

1. Any intervention seeking to create a human being genetically identical to another human being, whether living or dead, is prohibited.
2. For the purpose of this article, the term human being “genetically identical” to another human being means a human being sharing with another the same nuclear gene set.

\textsuperscript{91} Adopted 11 November 1997.

\textsuperscript{92} Pottage, op cit n 25, 765.


\textsuperscript{94} Ibid, 676.

\textsuperscript{95} \textit{Moore v Regents of the University of California} [1988] 249m Cal Rptr 494 (Court of Appeals); [1990] 271 Cal Rptr 146 (California Supreme Court).
had unique characteristics that gave it great therapeutic potential, and that Dr Golde and an associate had developed a cell-line from his spleen and the other extracted substances. The Regents of the University of California obtained a patent for the cell-line, and the patent became the basis for a three billion dollar pharmaceutical industry. Moore sued the doctors, the University Regents and the pharmaceutical company, arguing conversion, breach of fiduciary duty and lack of informed consent. He was successful on fiduciary duty and informed consent, but unsuccessful in conversion. The Court of Appeals held that Moore was unable to claim a property right in either his excised cells or in the genetic information coded into the cells which became the subject of the patent. The court relied on a number of reasons for this conclusion, among them the discovery/invention distinction. It stated that:

The patented cell line is both factually and legally distinct from the cells taken from Moore’s body. Federal law permits the patenting of organisms that represent the product of human ingenuity but not naturally occurring organisms. Human cell lines are patentable because “[l]ong-term adaptation and growth of human tissues in culture is difficult - often considered an art...” and the probability of success is low...it is this inventive effort that patent law rewards, not the discovery of naturally occurring raw materials.

Thus, the court overrode the naturalistic argument that Moore owned his own body and/or the genetic code in his cells, in favour of the patent law construct that distinguishes “naturally occurring raw materials” in which he has no property, and “the product of human ingenuity” in which there can be property rights in the interests of encouraging research.

Thus, the court created an anomalous situation. Moore was not able to profit from his contribution to a three billion dollar industry, but his doctors were. Moore had no property claim, and was not entitled to a return. But the researchers involved were granted a patent monopoly on their ‘invention’ which was based on that tissue. The only obligations the researchers had to Moore were fiduciary obligations requiring informed consent. Thus, the regulatory environment based on principles of informed consent provides no return for the individual in Moore’s situation, and “unjustifiably licenses entrepreneurs to take the whole profit from their exploitation of the human genome”.

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96 Boyle, op cit n 45, 23-4.
97 Moore v Regents of the University of California [1988] 249m Cal Rptr 494 (Court of Appeals); [1990] 271 Cal Rptr 146 (California Supreme Court), 492-3.
98 Beyleveld and Brownsword, op cit n 93, 676.
It is arguable, given that the court left open the possibility of property rights in human tissue for some purposes,\textsuperscript{99} that Moore could have legally sold his diseased spleen to Dr Golde and thereby secured a return.\textsuperscript{100} However it is by no means clear that this would have been the view of the majority, and it is equally possible that Moore would not have been entitled to sell his tissue, because he did not have property rights in it.\textsuperscript{101} In New Zealand, legislation provides for consent to use of donated tissue for scientific or medical purposes, implying some kind of property rights in the tissue, but this does not extend to donors selling their own tissue.\textsuperscript{102}

Thus, the arguments against property rights in the form of patents in human genetic material have not to date been particularly successful. While some patent applications have been withdrawn in the face of controversy, the opposition to patenting has not succeeded in prohibiting patents for human genetic material under the morality exceptions in Europe, the United States, Australia or New Zealand. Patents are likely to be increasingly granted for the results of human genetic research, and it is likely that patents for human cloning technology will also eventually be granted in some form.

However, it is also likely that genetics patent applications will continue to attract controversy, and probably increasing controversy, about morality of patenting and commercialising genetic research. It is already clear that the patent system is not well-adapted to deal with controversy surrounding considerations of morality, and there is growing concern about the possible effects of such controversy on the patent system. The patent system is designed to promote innovation by providing incentives in the form of a monopoly grant on commercialisation for a limited period. Its effectiveness in so doing will be seriously undermined if substantial delays and inefficiencies are created by political debates.

It is therefore desirable to find a solution to the more controversial aspects of commercialisation of genetic research outside of the patent system. To be effective, any alternative to patents must not only avoid the potential controversy involved in creating property rights in human beings, but it must also be commercially effective. Therefore, to be acceptable to the biotechnology industry, alternatives to patents must provide adequate

\textsuperscript{99} For example, to prevent theft or damage to severed tissue. Moore v Regents of the University of California [1988] 249m Cal Rptr 494 (Court of Appeals); [1990] 271 Cal Rptr 146 (California Supreme Court), 493.
\textsuperscript{100} Magnusson, op cit n 80, 53.
\textsuperscript{101} Beyleveld and Brownsword, op cit n 93, 676.
\textsuperscript{102} Human Tissue Act 1964 (NZ), s 3, and Health Act 1956 (NZ), Part IIIA. For the UK, see the Human Fertilisation and Embryology Act (UK), s 41(8). See also Magnusson, op cit n 80, 54.
rewards as an incentive to innovation. However, biotechnology is a very profitable industry, and it is possible that research would disclose that a lesser reward than that provided by the patent system might still constitute sufficient incentive.

4. ALTERNATIVES TO PATENT PROTECTION

Copyright

There is an at least theoretical possibility that copyright law might provide an alternative to patent protection for the results of genetic research. Where results are recorded they will attract copyright protection. If unauthorised copying then occurs, and can be established, an action for infringement will be available. Because there is no requirement of registration, the problems associated with applications and oppositions are avoided. However, since copyright is similar to patent law in that it creates property rights, the objections to creation of property rights in human beings would presumably still stand.

In reality, there has been little reliance on copyright by the biotechnology industry, and the use of copyright is little more than theoretical. This is for two main reasons. First, copyright does not provide protection from independent creation as patents do. In a highly competitive and lucrative industry, this is a crucial difference that reduces the value of copyright protection. Second, proof of copying is likely to be difficult. Therefore, copyright is not a complete alternative to patent law for the biotechnology industry.

Trade Secrets

It is arguable that trade secrets law provides a viable alternative to patent protection. Genetic research could be kept secret as confidential information, protected from disclosure through the action for breach of confidence. This approach both avoids the controversy surrounding the creation of new property rights, and also avoids the technical requirements of patentability. This may well be an option in some circumstances, for example for genetic research which does not satisfy the criteria for patentability.\footnote{For example, research might not be generally known, but might not meet the test for inventive step. McKeough and Stewart, op cit n 27, 341.}

However, this option is anathema to scientists, especially academic scientists who wish to publish their work and disseminate their results. For this reason
alone, trade secret protection is unlikely to be a popular option. Further, trade secret protection depends upon a very high level of secrecy being maintained, and this is another practical limitation vis a vis the patent system.\footnote{104}

\textit{Unjust Enrichment}

Another alternative means of protecting genetic research is to rely on the action of unjust enrichment. Unjust enrichment has the advantage that it depends on the appropriation of value rather than on property rights, and it provides a remedy in restitution. Unjust enrichment may therefore be of use to researchers wishing to share the results of their research with others, but wanting to prevent those others from using those results to unjustly benefit. For example, if a defendant took a database of genetic research data, to which limited access had been granted for particular purposes, and began to make that database available to others at a profit, then the original database producer might have an action in unjust enrichment.\footnote{105} However, as with copyright, the drawback to unjust enrichment from the point of view of the biotechnology industry is that it does not provide protection against independent creation, and therefore does not provide the level of economic incentive for research that is available through the patent system. It does not assure an inventor of monopoly profits, as patents do.

Interestingly, there is another possible application of unjust enrichment law in human genetics research. Unjust enrichment may provide a remedy for the donor in Moore's situation, where tissue is taken and used without consent, to the economic advantage of the taker. Unlike conversion, unjust enrichment does not require proof of property rights, and is available where the property interfered with in an unjustly enriching manner is an intangible, such as information in genetic code.\footnote{106}

\begin{quote}
Unjust enrichment is to the information age what the tort of conversion is to the mechanical/industrial age. In essence they are the same obligation dealing with different degrees of tangibility.\footnote{107}
\end{quote}

However, Magnusson identifies a curious anomaly in the application of restitution law to the tissue donor. Under Australian (and New Zealand) law, donors cannot sell their own tissue for direct financial advantage. As a result:

\footnote{104}{Ibid.}
\footnote{106}{Ibid, 244-5.}
\footnote{107}{Ibid, 255.}
It would be very generous indeed to consent to the use of tissue samples for biotechnological research, since this would vitiate the potentially enormous financial gains which a donor could obtain indirectly by way of damages or restitution for the donee's unauthorised use of tissue in the process of biotechnological manufacture.\footnote{Magnusson, op cit n 80, 54.}

Thus, unjust enrichment may provide an at least partial solution to regulating the interface between genetics researchers and source donors of tissue, without creating the problems associated with property rights as encountered in patent law. But it will not provide a complete alternative to patent law in providing incentives and protections for the biotechnology industry.

5. CONCLUSION

Patent law has attracted considerable controversy in its application to biotechnology research, and this controversy is likely to increase as more patents are sought for human genetic materials. The problems are sourced not in patent law itself, but in trying to integrate moral and ethical considerations into a patent system which is not inherently adapted to cope with them. The patent system is a technical system with a narrow ambit. It is not the appropriate forum for community debates about the regulation of genetic research.

It is therefore desirable to remove moral and ethical debates about regulation of genetic research from the patent system. One means of achieving this might be to employ an alternative system of incentives and protection for genetic research. Such a system would need to provide similar economic incentives to that provided by the patent system, but without creating the problems associated with property rights. As has been seen, none of the alternative regimes is adequate for this purpose. Existing alternative legal frameworks provide a partial solution at best. Patent law remains by far the best system for protecting and promoting innovation in biotechnology.

It is therefore submitted that patents should be available for all inventions that are lawful, and that ethical concerns in genetic research should be removed altogether from the patent system into a more representative forum. In New Zealand, the new Independent Biotechnology Advisory Council is a step toward this approach. But it has broad terms of reference encompassing biotechnology generally, it has no regulatory role, and its independence is limited by the requirement that it report to the Executive rather than to
Parliament. A better, if still imperfect model is The Group on Ethics in Science and New Technologies established by the European Biotechnology Directive. The Group is an expert committee that reports to an elected and representative body: the European Parliament. Although there are still unresolved questions as to exactly the role this group will play, it is submitted that such a group is better suited to governance of genetic research than are the Patent Offices. It is a more representative and accountable body, reporting to a constitutionally established and elected institution. It has better mechanisms by which to consult citizens, take account of community and social concerns, and give consideration to broader concerns of human rights and human dignity. It can interface with the patent system by providing guidance in applying and interpreting morality criteria. The patent system will benefit from being removed from the centre of political debate, and enabled to get on as efficiently as possible with its role of administering the patent system and facilitating research and innovation. And the debates about the future applications of biotechnology research can be held where they should be held: in a democratic and representative forum.

Note that the New Zealand Environmental Risk Management Authority regulates the development of genetically modified organisms. However, the definition of "organism" does not include a human being or a genetic structure derived from a human being. See Hazardous Substances and New Organisms Act 1996, s 2. There is no equivalent authority dealing with human genetic research and development.

TO "HAVE REGARD TO" OR "TAKE INTO ACCOUNT": DOES IT MATTER?

BY JOAN FORRET

1. INTRODUCTION

Now that we have a new government and a new parliamentary year, perhaps it is time to consider some of the proposed amendments to the Resource Management Act 1991 ("RMA") which did not receive much attention during the review process in 1999. Hopefully the new Minister for the Environment, Marian Hobbs, will pursue changes to the RMA with a view to all of the reports, academic and professional critique that were generated out of the recent reform proposals. Towards that end, I urge the Minister and the Ministry for the Environment, ("MfE") to consider carefully any cosmetic changes to the Act which do little to improve or alter the present interpretation. In particular, I refer to the proposed changes to ss 66 and 74 in relation to the duties of local authorities to "have regard to"/"take into account" relevant iwi planning documents. These changes highlight two different issues. The first is the subtle difference in meaning of the two phrases, and the consequent interpretation of these phrases in Part II of the Act. I will argue that the differences between these two phrases are by no means clear and their use in other parts of the Act could also benefit by some clarification. The second is the implication for public participation of having local authorities effectively bound to take into account documents which have been produced with no general community input.

The explanatory note to the 1999 Bill describes the proposed amendments to ss 66 and 74 as substituting new sections to ensure that a regional or territorial council, as the case may be, "must take iwi planning documents into account instead of having regard to them".1 This explanation suggests that local authorities have not given iwi planning documents sufficient consideration in the past and that they should do so in the future. I have no difficulty with the sentiment that Maori issues should receive genuine consideration by local authority decision makers as part of the consultation process inherent in their duty to take into account the principles of the Treaty of Waitangi.2 Rather, my difficulty lies with the vehicle by which it was to be effected and with the elevation of a privately crafted document to

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a status intended to be above that of publicly formulated documents, such as regional policy statements and plans, district plans and regulations made under the Act.

The present wording of section 66 reads as follows:

In addition to the requirements of section 67(2), when preparing or changing any regional plan, the regional council shall have regard to—

(c) Any—
(i) Management plans and strategies prepared under other Acts; and
(ii) Relevant planning document recognised by an iwi authority affected by the regional plan; (Emphasis added).

Contrast this with the proposed amendment which reads:

A regional council must, when preparing or changing a regional plan, take into account any planning document recognised by an iwi authority affected by the regional plan. (Emphasis added).

The change in wording from “shall” to “must” appears to be part of the strategy towards drafting legislation in plain language which was contemplated by the Law Commission’s Report on legislative drafting and by the purpose section of the Interpretation Act 1999. It seems perfectly reasonable to implement such changes into existing legislation during the wider process of legislative amendment and I support that variation, however, the rationale for substituting the phrase “have regard to” for “take into account” is less apparent.

2. BACKGROUND

For those readers who are not overly familiar with the RMA it is perhaps useful to briefly describe the structure of the Act. Like many modern pieces of legislation, the RMA contains specific purpose and principles provisions which are found in Part II. Part II forms the core of the Act and many of the subsequent provisions are subject to Part II. There are 4 sections in Part II, the first of which is the purpose section, s 5. Section 5 describes the purpose of the Act as being “to promote the sustainable management of natural and physical resources” and it goes on to define sustainable management within

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4 Section 2.
5 For example s 104, matters to be considered in relation to an application for a resource consent and s 171, recommendations by a territorial authority in relation to a requirement for a designation.
certain environmental constraints. Although entitled “purpose and principles” Part II makes no further reference to principles in the text. Instead, s 6 identifies the matters of national importance which those exercising functions and powers under the Act “shall recognise and provide for” and s 7 lists other matters that functionaries “shall have particular regard to”; both sections beginning with the words “in achieving the purpose of this Act”. Section 8 is the final provision in Part II. Like the preceding sections, s 8 is a requirement of all functionaries in achieving the purpose of the Act, this time to the effect that such functionaries “shall take into account” the principles of the Treaty of Waitangi (Te Tiriti o Waitangi). (Emphasis added)

From even a superficial reading it is very apparent that Part II, and particularly s 5, forms the heart of the Act. Not only are numerous subsequent sections tied to the goal of achieving the purpose of the Act, but so are the principles sections in Part II itself. The Act has been described as a hierarchy of planning6 which is:

[A]n unambiguous hierarchy. At the apex of the system is the purpose of the Act. Every other instrument is dependent upon it, driven by it, prescribing by it, or otherwise founded upon it. This is unique.7

The significance of the purpose section has also been noted in case law as illustrated in the following judgment from Judge Kenderdine.8

Section 5 under the 1993 Amendment to the Act may be considered the lodestar which guides the provisions of s 104 and in this appeal we are guided by the over-arching purpose of sustainable management as defined.

The hierarchical framework within the RMA is also repeated within Part II itself. Each of sections 6 to 8 is directed at achieving the purpose of the Act and is thus clearly subordinate to section 5. Likewise the wording of sections 6 and 7 suggests a reducing emphasis on the role of each section. The section headings are “matters of national importance” and “other matters” respectively, and indicate that these provisions have a decreasing influence on functionaries when implementing the purpose of the Act. Within the sections there are further indicators of a decreasing emphasis, with s 6 requiring that functionaries “shall recognise and provide for” the matters of national importance, while in s 7 the requirement is to “have particular regard to”. The words “provide for” suggest that a positive action

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towards implementation of the s 6 matters is needed rather than the more passive consideration implied by "have regard to". The descending importance within Part II has also received judicial commentary as indicated by Judge Jackson in *Baker Boys v Christchurch City Council*.

Further, some effects are more relevant than others eg effects impinging on matters in s 5(2)(a) and (b) or s 6 are generally more important than those in s 7 whilst always recognising that each case turns on its own facts.

In summary, the RMA is a statute that has a central focus on sustainable management of natural and physical resources and that focus is contained in s 5 of the Act. Section 5 is the first of 4 sections in Part II, and the following sections, 6, 7 and 8 are subordinate to s 5. Within Part II, s 7, incorporating the words "have particular regard to" is clearly subordinate to s 6. Where then does that leave s 8, which comes last in the Part, and includes the words "shall take into account"?

3. WHAT DOES IT MEAN?

I would argue that a plain and ordinary interpretation of the language of s 8, and its position at the end of a hierarchically organised Part suggests that it is the least important of the 'principles' which guide those empowered to achieve the purpose of the Act. The Act is meant to be a user-friendly piece of legislation that contains provisions that encourage and support the participation of non-lawyers, particularly at the local authority level of decision making, for example s 39, which requires local authority hearings to be public and without unnecessary formality and which forbids cross-examination of witnesses. Other examples are s 275 which permits parties to an Environment Court hearing to either represent themselves or be represented "by another person" and s 276 which provides that the Court is not bound by the rules of evidence. Thus a lay person reading the most fundamental Part of the Act, and without the benefit of access to judicial wisdom concerning nuances of meaning between "have particular regard to" and "take into account" is likely to infer that s 8 is the hypotenuse in a downward hierarchy in Part II. Such an interpretation was adopted by the Waitangi Tribunal in the *Ngawha Geothermal Resource Report* where the Tribunal commented:

As counsel put it, s 6 imposes a mandatory obligation on decision-makers to "recognise and provide for" matters of "national importance". Section 7 has less injunctive force; decision-makers need only have "particular regard to" "other" matters (which in turn are presumably of less than national importance). Section 8 in turn merely requires decision-makers to "take into

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10 (1993) 142.
account" Treaty principles. All of these matters are subordinate to the over­
riding importance of achieving the central purpose of sustainable
management of resources (s 5).

The Tribunal described s 8 as a "‘watered down’ version"\textsuperscript{11} of the reference
to the Treaty which is found in s 9 of the State Owned Enterprises Act 1986,
which states:

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

It was also described\textsuperscript{12} as a dilution of the reference in s 4 Conservation Act
1987 which provides:

This Act should be interpreted and administered to give effect to the
principles of the Treaty of Waitangi.

I agree with the Tribunal’s conclusion\textsuperscript{13} that the Crown was careful to select
wording that neither requires functionaries to conform with nor to
implement or apply the relevant Treaty principles in order to achieve the
purpose of the Act. Certainly there is nothing in the wording of s 8 to
suggest that it overrides either section 6 or 7 and it is clearly subordinate to s
5.

To return to the proposed 1999 amendments I question the point of the
substitution into ss 66 and 74 if the intention is to emphasise the requirement
to consider iwi planning documents. The current wording is analogous to
that found in s 7\textsuperscript{14} and the proposed wording is analogous to that found in s
8, however, there is nothing obvious in either the wording or placement of s
8 to suggest it has any greater influence on decision makers.

There has been judicial clarification on the difference in meaning between
the two phrases and this came from Judge Kenderdine in her decision in
\textit{Haddon v Auckland Regional Council}.\textsuperscript{15} In that case, the Tribunal\textsuperscript{16} had to
consider whether the Treaty principle of consultation had been sufficiently
taken into account, and her decision canvassed the different obligations
imposed by ss 7 and 8 on decision makers. Judge Kenderdine held that:\textsuperscript{17}

\begin{itemize}
\item \textsuperscript{11} Ibid.
\item \textsuperscript{12} Ibid.
\item \textsuperscript{13} Ibid, 145.
\item \textsuperscript{14} With the exception of “particular” from the phrase.
\item \textsuperscript{15} [1994] NZRMA 49.
\item \textsuperscript{16} The Planning Tribunal was renamed the Environment Court in s 274, which provision
was substituted by s 6 Resource Management Amendment Act 1996 (1996 No 160).
\item \textsuperscript{17} \textit{Haddon v Auckland Regional Council} supra n 15 at 61.
\end{itemize}
...the duty "to take into account" indicates that a decision maker must weigh the matter with other matters being considered and in making the decision, effect a balance between the matter at issue and be able to show he or she has done so.

In coming to her decision, Judge Kenderdine adopted the reasoning of the Court of Appeal in *R v CD*\(^{18}\) which determined that the two phrases are different. In *R v CD* the Court considered the meaning of "shall have regard to" in relation to s 5(2) of the Costs in Criminal Cases Act 1967 as follows:\(^{19}\)

The first question (not I think canvassed before Chilwell J), is what is meant by the words "shall have regard to". I do not think they are synonymous with "shall take into account". If the appropriate matters had to be taken into account, they must necessarily in my view affect the discretion under s 5(1)... Moreover, in distinguishing between the two phrases both the Court of Appeal and the Planning Tribunal illustrate the subtlety of the different wording. This subtlety was ignored completely by the Supreme Court in *Deans v Supplementary Benefits Commission*\(^{20}\) In considering s 2(2) of the Ministry of Social Security Act 1966, McMullin J substituted the phrase "shall take into account" for "shall have regard to" when asked to consider the meaning of the latter phrase. A similar substitution of intent was also made by the High Court in *New Zealand Co-operative Dairy Co Ltd v Commerce Commission*\(^{21}\) when Wylie J commented:

> We do not think there is any magic in the words "have regard to". They mean no more than they say. The tribunal may not ignore the statement. It must be given genuine attention and thought, and such weight as the tribunal considers appropriate. But having done that the tribunal is entitled to conclude it is not of sufficient significance either alone or together with other matters to outweigh other contrary considerations which it must take into account in accordance with its statutory function.\(^{22}\)

This interpretation is consistent with that of Judge Kenderdine in *Haddon* and it was also adopted in the recent High Court decision of *Foodstuffs (South Island) Ltd v Christchurch City Council*.\(^{23}\) In *Foodstuffs*, counsel for the appellant submitted that "shall have regard to", in relation to the s 104 matters to be considered for an application for a resource consent, should be interpreted as "shall give effect to". The court did not accept that

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\(^{19}\) Ibid, 437.


\(^{22}\) Ibid, 612.

\(^{23}\) [1999] NZRMA 449.
submission, commenting that "the requirement for the decision maker is to give genuine attention and thought to the matters set out..." 24

My purpose in addressing these nuances in meaning has been to question one aspect of the proposed changes to ss 66 and 74 and suggest that if the change is really in order to ensure that councils take iwi planning documents into account rather than having regard to them, then the resulting obligation will change negligibly in practice. 25 Any difference between the terms is subtle and is rightly the subject for expert legal interpretation. At most, and then only if councils are acquainted with either the R v CD or Haddon decisions, the amendments would require functionaries to weigh any relevant iwi planning document against other matters relevant to the matter under consideration.

4. PUBLIC PARTICIPATION

My second difficulty with the proposed changes to ss 66 and 74 is that the intention, if not the effect of the change is to promote iwi planning documents among the matters to be considered by decision makers. This seems contrary to the notion of public participation, a notion that is central to the purpose of local government as provided by s 37K(i) of the Local Government Act 1974. I profess no knowledge of the mechanisms for participation into the preparation of these documents within iwi, but would be astounded to discover that there is general public participation in their preparation. I have never read any notices calling for submissions on iwi planning documents, nor have I heard of anyone presenting submissions as the result of a general invitation to the public.

The RMA references to iwi authorities are linked historically with the now repealed Runanga Iwi Act 1990. That Act prescribed the characteristics of iwi 26 and runanga 27 and s 77 provided discretion for the preparation of iwi management plans. Such documents were intended to provide "a resource management overview of those matters that are of significance for the organisation and development of iwi." 28 This Act was repealed in 1991 when it was considered inappropriate to legislate for a representative structure that would be applicable to all Maori, however the references to iwi management plans and to iwi authorities live on in the RMA. 29

24 Ibid, 453.
25 For a discussion of the meaning of the term "shall have regard to" see Foodstuffs, ibid.
26 Runanga Iwi Act 1990 (repealed), s 5.
27 Ibid, s 2.
28 Ibid, s 22(2).
29 Section 2 of the RMA does, in fact include a definition of iwi authority, which relies heavily on the terminology and structures contained in the repealed Runanga Iwi Act.
There are no guidelines in the RMA regarding the preparation of iwi planning documents. Thus, iwi planning documents are not required to reflect the purpose of the Act and nor is there a requirement that such documents focus solely on matters relevant to the iwi, either exclusively or in conjunction with the wider community. Thus it is possible that such a document could contain policies which consider development in localities adjacent to the iwi’s present, not necessarily ancestral, land holdings. I suggest that if the proposed changes are actually more than cosmetic, then the effect will be to elevate the contents of iwi authority planning documents above all of the other matters to be considered by local authorities when preparing their plans: and that is contrary to other provisions in the Act which encourage public participation. The other matters, which remain with the unamended exhortation that the local authority “shall have regard to” include; regional plans and policy statements, the Crown’s interests in the coastal marine area, management plans prepared under other Acts, and district plans. These matters involve the wider public interest and receive input from the public via the submission and hearing processes and also electorally. The desire for greater public participation in resource management issues is also strongly supported by iwi. The (then) Minister’s Explanation of Key Policy Decisions which was released late in 1999 notes that Non Government Organisations (“NGOs”) and Iwi/Iwi were concerned at the detriment to public participation proposed by contestable processing of and changes to notification procedures for resource consent applications.

5. CONCLUSION

It is not my intention to suggest that iwi planning documents should receive less attention than other matters to be considered by decision makers nor that the role that these documents serve is unimportant or irrelevant. Rather, it is the method proposed to require local authorities to consider Maori issues and concerns. If local authorities are giving too little consideration to these issues, then perhaps it is s 8 which should be enhanced. If functionaries were obliged to “give effect to” the principles of the Treaty, or were not permitted to “act in a manner that is inconsistent with” its principles then all decisions would necessarily be made with the Treaty in mind. Such an amendment to s 8 would clarify the position of Treaty principles within resource management in New Zealand and it would remove the need to elevate iwi planning documents above other planning instruments which do reflect public submissions from the wider community. In addition, I suggest that amendments should be made to legislation in

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30 See for example, ss 39, 48, 93, 96 and the provisions of the First Schedule.
31 See ss 66 and 74 for a complete list.
order to change or to clarify. The proposed amendments to ss 66 and 74 were intended to clarify the intent of the Act, however, the substituted phrase is neither clearly different in meaning on the face of its wording, nor from its use in s 8 of the Act.

The new Minister will no doubt return to the RMA and its perceived difficulties in due course. When she does, I hope that she will avoid making futile semantic amendments and instead consider the place of Maori issues within the RMA and whether the formulation of s 8, as it stands is sufficient.