

WAIKATO LAW REVIEW

TAU MAURI



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FOREWORD

As New Zealand's newest law school reaches the end of its third year of operation and looks forward to honouring its first graduates in February 1994, it is appropriate to mark its coming of age with the first issue of this, the *Waikato Law Review*.

Such a publication was but a distant dream for the small group of University and Law Society representatives who met together from early in 1987 to prepare the case for the establishment of the country's fifth law school.

The Waikato Law School has had to surmount difficulties that could not have been foreseen when its establishment was first announced in October 1989. It has done that and it is now well and truly embedded into the University of Waikato and into the national educational scene.

The University has been fortunate in the calibre of the staff it has been able to recruit and delighted with the performance of its students.

Waikato Law School staff and students will play an increasingly prominent role in New Zealand and this publication will, I am sure, take its place as an important contribution to New Zealand's legal literature.

Gerald Bailey,
Chancellor,
University of Waikato.

EDITOR'S INTRODUCTION

In 1953, Professor Robert McGechan of Victoria University College launched the first of the New Zealand university law reviews. In an article in the first edition of the *Victoria University of Wellington Law Review*, Professor McGechan stressed the need to explore the political, economic and social background of legal decisions and to question whether they are good and sound decisions not only for their logic in law but in their justice and practical bearing on the lives of twentieth century New Zealanders.

Forty years later, the *Waikato Law Review* becomes the sixth New Zealand university law review to be published. Its goals closely reflect the approach advocated by Professor McGechan. Together, the articles in this first edition of the *Waikato Law Review* reveal the importance attached to examining the law in the context of its historical, social, economic and political background in New Zealand, with the use of critical, conceptual and empirical analyses.

The *Waikato Law Review* also cherishes the goal of biculturalism, which carries with it a commitment to advancing and encouraging the Maori dimension in the legal system. The Maori title of the *Review*, *taumauri*, means "to think with care and caution, to deliberate on matters constructively and analytically". This title both encapsulates and symbolises the values and goals of the *Review*.

The process of translating vision into reality requires much commitment and hard work, and this is no less true of the production of the first *Waikato Law Review*. I wish to record my thanks to the academic and administrative staff of the Waikato Law School who have worked towards the publication of the *Review*, especially those who have written for this first edition. I thank those who have willingly refereed articles submitted for publication, Mr Gerald Bailey for writing the foreword, and the New Zealand Law Foundation for its generous financial assistance for the first edition. Finally I thank you, the subscribers and readers of the *Review*, for your support: I trust that you will find in this and subsequent editions much to stimulate and inform.

Dr Peter Spiller,
Associate Professor of Law,
Editor, *Waikato Law Review*.

THE MAKING OF A NEW LEGAL EDUCATION IN NEW ZEALAND: WAIKATO LAW SCHOOL

BY MARGARET WILSON*

I. INTRODUCTION

The formal establishment of the Waikato School of Law on 1 July 1990 marked the opening of the first new School of Law in New Zealand in over ninety years. The impetus for the new School came initially from the University of Waikato and was supported by the local legal profession and the Council of Legal Education. While each of these institutions had its own reasons for wanting this new development in legal education, there was a consensus that a new type of legal education was necessary.

In this article I shall examine the precise nature and form of the new legal education represented by the Waikato Law School. I shall present the context within which the School was established, analyse the expectations of the various groups who assisted with the formation of the School, and describe the institutional framework that was constructed to realise these expectations. I shall then reflect on the first three years' experience of the School, and what lessons can be drawn from this for the School and legal education in New Zealand generally.

II. THE CONTEXT WITHIN WHICH THE WAIKATO LAW SCHOOL WAS ESTABLISHED

The discourses that surround legal education centre on the issue of what is the appropriate role for the lawyer within society. Those who see the occupation of the lawyer primarily being the delivery of legal advice to clients tend to support a *skills-based* professional education and training. Those who see a broader role for the lawyer as an active participant within the legal system and the larger community, tend to support a *conceptually-centred* professional education. Legal education in New Zealand for many years reflected the former approach. Initially, control of legal education lay in the hands of the judges and it was only in the late nineteenth century that the university colleges started to teach law. Even then, tuition was conducted primarily by practitioners, who were employed to teach part-time students in the evening because both teachers and students worked during the day in law firms.¹ However, certainly from the mid-1960's there were growing calls to provide a more liberal legal education. These came from

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¹ Weston, "Early Law Tuition in Canterbury" (1958) 34 NZLJ 71.

the growing number of full-time academically qualified law teachers, who taught a growing number of full-time students, and who were anxious to gain professional recognition for their skills from both the profession and the university authorities.² By the late 1980's, these developments had gathered pace.³ The establishment of the Waikato School of Law was a conscious attempt by the New Zealand Council of Legal Education to move towards a new form of legal education that reflected a conceptual, contextual and critical approach to the study of law and the legal system, while providing the students with a professional qualification.⁴

Since 1984, New Zealand society experienced and is continuing to experience a period of radical change to all its institutions, including its tertiary educational and legal institutions, although they are amongst the last to be affected. This period is not dissimilar to that experienced during the 1890's when the foundations of what came to be known as the welfare state were being laid. Part of those foundations was the establishment of universities and the provision for legal education within them. The primary responsibility of the state for the social well-being of all its citizens was acknowledged in the 1890's but developed more comprehensively from 1935. Acceptance of this social responsibility by the state has been a distinguishing feature of New Zealand society over the past fifty years.

This basic assumption of an active state role has been reflected within the design of all economic and social institutions, including the educational and legal systems. While it is easy to see the primacy of the state in the provision of education, it may also be argued that the legal system has reflected the proactive role of the state. For example, the abundance of legislation and the underdevelopment of common law legal principles may be seen as indicative of an active state which quickly moved to provide remedies where they seemed unavailable under the common law. Also, the reliance by the individual on the state to resolve disputes over allocation of resources, rather than pursuing legal rights through the courts, has had an influence on the development of the legal system. Employment law and family law provide two obvious examples of this development.

² Northey, "Legal Education and the Universities" [1962] NZLJ 9; Denham, "Legal Education" (1966) 2 NZULR 130; Sim, "Legal Education in New Zealand: A Symposium: The Ormond Report and Legal Education in New Zealand" (1973) 3 Otago Law Review 76; and Haslam, "F W Guest Memorial Lecture: Some Reflections on Legal Education in New Zealand" (1970) 2 Otago Law Review 113.

³ Richardson, "Educating Lawyers for the 21st Century" [1989] NZLJ 86.

⁴ Council of Legal Education, *Report of the Fifth Law School Working Group* (1989).

It is this primary role of the state however that has been concertedly challenged since 1984. The market, as opposed to the state, has been asserted as the more appropriate mechanism for the allocation of resources. The implementation of this new ideology in all aspects of life is fundamentally changing the nature of New Zealand society, including the provision of education and legal services.

It was then within challenging times that a new approach to legal education was introduced. An approach that reflects the old values of social as opposed to individual responsibility as being of dominant importance would appear to contradict the larger policy environment. It may be argued however that the essence of being professional is to consider matters beyond the individual alone. The legal professional person must provide a competent legal service to her or his client, but advice tendered should always be in the context of the ethical rules and practices that accompany the legal rules. The behaviour of lawyers who responded to the new ideology by putting their clients, and on occasions their own financial well-being, above all else has brought the legal profession into disrepute. It has also raised the questions of who should teach this aspect of professionalism and how it should be taught. Academic institutions have not seen the teaching of legal ethics as their primary responsibility, as it is difficult to teach professional responsibility unless it is related to practical legal situations. The more conceptual the degree course becomes the more difficult it is to teach professional responsibility. Yet it is difficult to argue that a degree that is intended as a professional qualification should not address this issue.

The new policy environment, with its emphasis on individual rights and the market approach to resolve conflicts of interest, also increases the need for a higher level of legal literacy in the community. The move towards decentralisation of the delivery of services and the introduction of formally contracting for all services has created a new demand for a different type of legal education. "Voluntary" community organisations require professional services now if they are to get the funding to continue to deliver their service. School trustees, for example, are learning that higher standards of professionalism are required in the administration of schools. All organisations that receive public funding are finding that the compliance requirements demand higher levels of expertise. Since a failure to comply may have financial as well as legal consequences, legal knowledge is required for the conduct of a whole range of activities. The much-heralded age of deregulation that was meant to accompany the ascendancy of the market has proved illusory. What has happened in effect is a reregulation of the community. The nature and consequences of this are beyond this article,

but its impact on the type of legal education that is now required is relevant in this context.

While the Waikato legal education project was conceived before the full effects of the new policy environment became apparent, its conception was influenced by a desire to provide a different type of legal education. The difference was expressed in terms of a much more inclusive approach to legal education. Legal rules and principles alone are no longer sufficient. Legal education should now include a knowledge and understanding of the cultural, social, economic and political contexts in which laws are made and administered. The bicultural context, in particular, is now an essential element of the new law degree. Waikato Law School is expected to provide a legal education that acknowledges the new demands on legal educators to produce an education that will train people to be not only lawyers, but legal professionals.

III. EXPECTATIONS OF THE WAIKATO LAW SCHOOL

Since the establishment of the University of Waikato in 1964, there had been a lobby led by members of the legal profession in the region to establish a law school.⁵ Finally, in 1987, members of both Waikato and Auckland Universities met with members of the legal profession and the judiciary and decided that the time had come to support the establishment of a new law school at the University of Waikato. The dominant factor in this decision was the shortage of law graduates to meet the demand from the profession for new graduates, especially in the regions south of Auckland. Waikato University established a committee that produced the report *Te Matahauriki* ("the horizon where the earth meets the sky/the meeting place of ideas and ideals").⁶ This report, which incorporated the University's submission to the University Grants Committee and the Council of Legal Education for approval to establish the school, clearly identified three objectives for the Waikato law degree. First, it was to provide a professional legal education, in the sense that it complied with the requirements to practice law. Secondly, it was to provide legal education through teaching law in its context, which meant introducing students to the social, economic and political environments within which the law was made and practised. Thirdly, the Waikato law degree was to develop a bicultural approach to legal education, which meant that the Maori perspective had to be reflected in all aspects of the curriculum and the activities of the School.⁷

⁵ See Wilson, "Waikato Law School: A New Beginning" (1990) 14 NZULR 103, for an account of the history of the establishment of Waikato Law School.

⁶ *Te Matahauriki: The Report of the Law School Committee* (1988).

⁷ *Response to Vice-Chancellor's Request to Provide Input into Council of Legal Education Report* (1989).

The Council of Legal Education considered the University of Waikato submission, together with a submission from Massey University, in the context of reviewing the supply and demand factors affecting legal education; the arguments to expand the numbers of students in existing law schools; and the future direction of legal education.⁸ Included in the Report was a brief history of legal education in New Zealand which concluded with the following observation:

Despite all these changes, the modern New Zealand law school retains the mark of its heritage. It is strongly oriented towards training for the legal profession. At the same time, it recognises the historical divergence between “theoretical” training on the one hand, and “professional” training on the other, a divergence which can be traced back to the earliest forms of legal education in New Zealand. It is much influenced by the struggles of its former Deans and academic staff (some of whom still occupy senior positions in the Universities) to win recognition for the “academic” standing of legal theory, both from the legal profession and from the university system as a whole; and to obtain levels of staffing comparable to those prevailing in other disciplines. It is, in other words, a distinctive institution, if not one which should necessarily be held up as the model when the shape of any new law school is under consideration.⁹

The Council was therefore conscious that the past influences the future, and it recognised the difficulties facing a School that attempted to provide an alternative legal education. The Report nevertheless supported a different approach to the traditional “black letter law” education that characterised the four existing law schools. It recognised that law graduates have traditionally pursued careers other than the practice of law, and referred to the fact that over the period 1966-1987 the number of practitioners had doubled but that it appeared a third did not practice law.¹⁰ It also recognised that the existing law schools did not fulfil the needs of some students, in particular women and Maori students, and that an opportunity for them to pursue a more relevant legal education was required.¹¹

The Council of Legal Education, the University Grants Committee and the then Labour Government all eventually supported the University of Waikato application for a new law school. An attempt to incorporate the expectations of the various constituencies that contributed to its formation is reflected in the first goal of the School in its statement of objectives which reads:

⁸ *Supra* note 4.

⁹ *Ibid.*, 20.

¹⁰ *Ibid.*, 8-9.

¹¹ *Ibid.*, 18.

To provide the students with a legal education that gives them the skills of legal reasoning and analysis; that gives them an understanding and awareness of the relationship between the law and society; and that enables them to contribute to the development of New Zealand jurisprudence, that will be distinguished by its recognition of Maori culture and laws as a full and legitimate part of the New Zealand legal system.

IV. THE INSTITUTIONAL FRAMEWORK OF THE WAIKATO LAW SCHOOL

1. Academic structure

It was essential that the goals of the School were reflected in the structure of the LLB degree. The Council of Legal Education had made this task easier through the reduction of the number of compulsory professional courses from 17 to 6, which provided greater scope to introduce optional courses and to concentrate on teaching law in context. The University of Waikato regulations and practices were not so flexible and originally required the four-year LLB degree to contain 28 courses, instead of the normal 22 to 24 courses contained in other New Zealand LLB degrees. A compromise of 25 courses was negotiated between the University and the School, which has had a distorting effect on the organisation of the courses in the degree. This early encounter with the University bureaucracy quickly introduced the School and the University to the realities of translating the theory in Te Matahauriki into practice. The Law School discovered it needed to maintain a “Janus-like” stance to satisfy the requirements of both the legal profession and the University.

The degree structure that emerged from the negotiations with the University and the Council of Legal Education is as follows:

Law I

Legal Systems

Legal Method

Law and Societies

Plus four courses chosen from those offered for bachelors degrees other than a Bachelor of Laws, provided that at least two of the courses must be in one of the subjects specified as a major subject for one of the bachelors degrees offered by a School of Studies other than the School of Law.

Law II

Public Law A

Public Law B

Jurisprudence

Plus three courses chosen from those offered for bachelors degrees other than a Bachelor of Laws, provided that at least two of the courses must be at the Part II level and must be in one of the subjects specified as a major subject offered by a School of Studies other than the School of Law.

Law III

Crimes
Torts
Contracts
Property (including Equity)
Corporate Entities
Dispute Resolution

Law IV

The equivalent of six full year courses which include the following:
Civil Procedure; Commercial Law; Company Law; Competition Law; Employment Law; Environmental Law; Evidence; Family Law; Intellectual Property Law; International Law; International Trade Law; Law and Information Technology; Maori Land Law; Revenue Law; Treaty of Waitangi Jurisprudence; Welfare Law; and Women, Law and Policy.

The Regulations require students to pass all of their Law I courses before they proceed to Law II, and all of their Law II courses before they proceed to Law III. There is provision for the exercise of the Dean's discretion if students fail courses. There is also an Honours degree option which is available to students who at the end of their Law III year have achieved a high standard of performance. They are required to enrol in two Honours seminars during their Law IV year and to complete a dissertation.

The School also offers LLM and M Jur degrees and will be offering Post Graduate Diplomas in Commercial Law, and Maori and Indigenous Law, with a planned Post Graduate Diploma in Disputes Resolution. There is one further development that Waikato Law School is pioneering and that is the combined degree in law and a non-law major. This degree consists of the total number of law courses, with an option to substitute two optional law courses with a non-law course, plus the courses required for a major in Management Studies, Humanities, Science, Social Sciences, and Computing and Mathematical Sciences degrees. The combined degree was approved with difficulty through the Vice Chancellor's Curriculum Committee and the Council of Legal Education. The reasons for the objections are still not entirely clear, but this experience highlighted one of the contradictions within university educational bureaucracy, that one's competitors determine whether or not a new degree can be introduced. The combined degree is an attempt to fulfil the original expectations of the creators of the School, namely, to develop an integrated law and non-law programme. The combined degree differs from conjoint degrees offered by other law schools in that the degree is a planned programme of study and not a series of cross credits between two separate degrees. There is still considerable resistance to the whole notion from the other law schools, and the pressures towards conformity are considerable. This attitude is not surprising and the Council of Legal Education foreshadowed such difficulties often associated with new enterprises.

The structure of the LLB was designed to reconcile the competing demands of the School's founders for a professional, bicultural, interdisciplinary LLB degree. The main distinguishing characteristic of the Waikato degree is that it does not include an intermediate year. The Waikato Law School decided that if it was to remain true to the interdisciplinary objective it had to integrate the non-law courses with the law courses. It has endeavoured to accomplish this through requiring students to complete both level I and II non-law courses as part of their Law I and Law II course programme. The educational advantage of such a scheme is that the students are exposed to non-law subjects at a higher level, while at the same time being able to prepare themselves better for the employment market by completing a combined degree within the minimum time.

The entry of students directly into Law School has required a different approach to the admission criteria. The objectives of the School also require that an opportunity be given to students who may not normally be admitted to law school. The current admission policy requires all students to be "academically prepared". This releases the School from the arbitrary decisions that result from a fixed grade entry qualification, but requires a close scrutiny of the students' academic capability. There is no point in admitting students who cannot cope with the work. The School does not have a quota system for categories of students, such as Maori, mature students or Pacific Islands students as do the other schools. The Admissions Committee looks at the academic qualifications, relevant work experience and non-tertiary qualifications of the students where there is no formal tertiary qualification. The School has had only three years' experience at admissions policy and procedures. The emerging pattern is that students normally require 285 marks in their Bursary exams if they apply from secondary school, and B/B+ if they come with another degree or university courses. The precise level of entrance depends to a large extent on market demand in a particular year. The result of this admissions policy is a School profile which includes nearly 58% women students, 20% Maori students, and nearly 40% of "mature" students who include graduates and students with no tertiary qualification. The number of students with no tertiary qualification is quite small, approximately 10%.

The first and second years of the Waikato law degree are also characterised by the emphasis on public law, as opposed to private law courses which are the norm in other New Zealand law schools. This structure was designed to provide the context within which the private law operates. The first two years have a high level of integration in terms of course material. The courses are intended to build on each other to give the student a thorough

understanding of basic legal concepts, structure and institutions; an introduction to legal skills, including writing, research, reasoning, analysis, computer literacy, and advocacy; an introduction to the relationship between law and culture, law and policy, the state and the individual, and the legal mechanisms to protect the individual from the arbitrary use of power by the state institutions; and an introduction to legal theory.

It is intended that by the time the students graduate from Law II they have a good understanding of the context within which the legal system operates, including the influence of the dominant culture and its effect on Maori culture. Included within the first two years are the Council of Legal Education professional courses, Legal Systems and Public Law. Public Law was divided into two courses primarily to comply with the University of Waikato requirement for 25 courses, and also to provide an opportunity to explore constitutional and administrative institutions, processes and principles in some detail. Another noteworthy feature of the first two years is the inclusion of Jurisprudence at the second year. This is something of an experiment, but it was judged important that such a course be compulsory and that it be introduced as part of the "context" for students before they moved on to the private law courses in Law III.

The Law III year contains the remainder of the Council of Legal Education professional courses of Crimes, Torts, Contracts and Property, and also includes two additional new courses that are unique to the Waikato degree. They are Corporate Entities which provides the students with an introduction to the concepts of incorporation which are necessary if students are to understand the relationship between law and the present economic system, and a course on the Theory and Practice of Dispute Resolution. The latter is intended to underline the importance of the changing role of the lawyer in the settlement of disputes. It is intended as a practical course that illustrates through the examples provided in Crimes, Torts, Contracts, Property and other parts of the law such as Family and Employment law, the various alternative methods available to resolve disputes. The course is designed to develop practical negotiation skills and to encourage students to think laterally.

There is a concern that too much may be expected of the students in this year and that there is not enough time to cover all the material. Corporate Entities and Dispute Resolution were intended as half courses to minimise this problem but only experience will determine whether the students can cope with the work. The "too much" work criticism is reminiscent of earlier criticisms that everything must be covered within the course of the degree. The Waikato Law School recognises that it is impossible ever to give a

complete coverage of all material, and therefore concentrates on teaching concepts, principles and relevant case-law. Case work is still a very important element in the teaching materials, but it is the quality of the decision that is important, not the number of cases cited. For this approach to be successful, it requires a high level of legal understanding, and just as importantly very good teaching skills from the staff. This was emphasised at the time of staff appointment and most staff last year placed the development of their teaching skills as a high career development objective for that year. Assistance is available to staff from the Teaching and Learning Development Unit, which has helped staff to develop some very innovative teaching methods. The School has also assigned to one of the staff the special responsibility for teaching development.

The fourth year of the Law degree is designed to give students the opportunity to specialise in specific areas of the law. While there are no compulsory courses, suggested programmes of study are designed to ensure students do not end up with an eclectic array of courses that are of limited use to them when seeking employment. The fourth year's programme is intended to make available options that prepare students for the traditional general practice of law; a speciality practice of law; policy analysis in either local or central Government; employment within the various parts of the justice system; work with community and lobby organisations that require professional expertise; and further graduate study in legal education. The Honours programme is available during this fourth year and is designed to enhance the programme of study chosen by the student. It is also intended in the future to introduce a clinical education component into the fourth year programme but there is much planning to be done on the appropriate type of clinical experience and how it will be resourced.

2. Curriculum and Teaching

While the structure of the degree is important, it is the content of the curriculum and teaching that will have a greater influence on the success of the programme. A detailed account of the curriculum is beyond the scope of this article. A lack of appropriate materials was the major challenge faced by the staff. However, in order to honour the commitment to include the Maori perspective within all courses and not only Maori-specific courses, the staff developed their own materials. This process has identified the need for research in a variety of areas, but it has also demonstrated that inclusion of the Maori perspective can be achieved with perseverance and commitment. The development of the curriculum is an on-going process, with the main constraint being the time available for the staff to devote to it.

The curriculum also demands high levels of coordination and cooperation amongst the staff. The structure of degrees requires categories to be created that are essentially arbitrary. For example, the requirement of 25 courses makes no rational sense in terms of legal education. It is primarily an accounting device to enable the funding of the degree. The challenge for the staff is to be aware of the artificiality of the categories, and the dangers of "ownership" of a particular course. Ownership is a problem when it impedes development of the programme as a whole. At the same time respect must be accorded to staff fields of expertise and an opportunity given to staff to pursue such fields. There are no easy answers to this process. It requires commitment to the objectives of the degree, which assumes an integrated programme, the time and willingness to discuss the curriculum, and how it relates to both student and staff needs.

Time has been identified as the main barrier to effective curriculum and staff development. A lack of time is partially due to a lack of staff resources, but also to inefficient time management. Ways to try to ensure that the most effective use is made of time has become a School priority. The ways experimented with to use time more efficiently include different methods of teaching to free staff for concentrated periods of time for research; and attempts to organise the management and administration of the School's affairs in such a way as to ensure that academic staff concentrate more on policy matters while professional general staff handle the administrative activities.

The School has a balance between small and large group teaching within each year's courses. In the larger compulsory courses, team teaching is encouraged to enable staff to concentrate on specific areas of the course, which has the advantage of enabling them to organise their time better to provide for the separation of teaching and research time. It also enables the students to relate to different teachers. The importance of the student/teacher relationship is recognised and the innovations in teaching are designed to improve the quality of the contact time. There is a wide range of teaching styles within the School and the fashionable Socratic teaching method is neither encouraged nor discouraged. The staff are encouraged to develop an effective teaching style with which they feel comfortable. The School is however emphasising computer-assisted learning, which is designed to make the actual time of teaching contact more productive. It is not a substitution for formal contact between student and teacher. Student study groups and cooperative peer group learning are encouraged amongst students. Support for these forms of learning has come particularly from Maori students and women students, who appear to respond better to cooperative forms of teaching.

The staff member in charge of teaching development, Kaye Turner, has accurately summarised the progress and importance of teaching to the success of the Waikato LLB degree in the following terms:

It is probably in the successful realisation of participatory teaching and learning in all classroom settings, both those involving small numbers of students, and those involving large numbers, that the School's capacity to "deliver" legal education which supports and encourages values of cooperation, professionalism and excellence in a bicultural framework will eventually depend. Teaching and learning, too, are at the centre of the working out and working through of the tensions and contradictions inherent in the School's foundation goals, principles and objectives.¹²

Although the School's efforts in experimenting with different forms of teaching are in their infancy, it has been a School priority to concentrate on excellence in its teaching. Too often this is assumed to mean research is sacrificed for teaching. The assumption at Waikato Law School is that it is impossible to teach well unless teaching is informed by good quality research. The very different curriculum has required staff to undertake research in new areas. Since research is only recognised if it is expressed in writing and published in approved forums, it is essential that the School gives the staff an opportunity to publish. In order to do this, the staff need quality time to write and publish. Hence the important emphasis on effective time management. The value attributed to teaching and research is a matter of University policy. The University is increasingly recognising the value of good teaching and the Law School continues to affirm its importance.

3. Administration

The demands of the new managerialism that pervades universities today has increased the number of administrative tasks and the time required to fulfil them. The University of Waikato has a devolved administrative structure, and each School is bulk funded and responsible for the expenditure of those funds on the provision of agreed educational services. There is also a notional form of contracting for central services. The institution is in the process of determining the nature of the relationship between the Schools and the central administration. While this process requires a full discussion on its own, for the purposes of this article it is relevant because of the increased demands it has placed on all the staff.

¹² Wilson, "The Challenge For Aotearoa/New Zealand Legal Education: The Development of An Indigenous Jurisprudence and the Waikato Programme", a paper presented at the Conference on Emerging Educational Challenges for Law in Commonwealth Asia and Australasia: The Implications for Legal Education, Hong Kong (1992) 27.

The School has yet to determine finally the precise nature of its administrative structure because this must evolve with the School. The decisions taken so far have been to employ six professional administrative and technical staff, one of whom is the School manager. The academic staff have organised themselves into teams with an emphasis on individual members being responsible for specific tasks. There are six teams, each of which concentrates on a specific set of activities, namely, academic programmes, research and publications, student support, staff support, infrastructure services, and school promotion and development. The teams report to a monthly plenary staff meeting. There is also a monthly Board of Studies meeting that specifically considers University academic policy matters. Each of the teams has administrative but not secretarial support. The staff are expected to do their own word processing and have computer literacy. All staff have their own personal computer and the School employs a full-time computer consultant.

Experiences with a team-based administrative structure have been mixed. This has been because of the difficulty to distinguish between policy and administration; a tendency to want to control and own decision-making processes; and a reluctance of some staff to act independently in the performance of a task and a tendency to rely on more hierarchical committee-based structures. The required administrative staff support was not in place when the system started so some staff justifiably felt overwhelmed; and there are the normal problems of getting acceptance for anything that is new, especially the feeling of uncertainty of what is to be done and who is to do it. The motivation for the team-based structure was in response to the staff experience of having too little time to arrange meetings, and their desire for more involvement in administrative decision-making.

It is too early to assess whether this current arrangement will be more time efficient and lead to better decision-making. It does have the advantage of involving more staff in decision-making, but only if they wish to be involved. Since time is such a valuable commodity, staff have to decide where their energies are better placed - in the classroom and at their research, or within the School's administrative structure. It is impossible to separate these functions, but a rethinking of their relationship is being necessitated by the new managerial pressures placed on the University.¹³

¹³ See Moodie, "The Androgynous Professional" *Campus Review* (September 1993) 8-9, for a discussion of the challenges the new managerialism places on university decision-making.

V. REFLECTIONS ON THE FIRST THREE YEARS OF THE WAIKATO LAW SCHOOL

1. *Withdrawal of Establishment Funding*

The challenges and contradictions that have faced the School in its short life have come from outside as well as within the programme itself. As has been previously explained, Waikato Law School was established during the cusp of the transition from a social welfare-based society, in which the state played a central role, to an individually-based society, in which the state's role was to be more passive. The educational objectives and structural arrangements for the School reflected the former environment. It was assumed that it was the responsibility of central agencies such as the University Grants Committee and the Council of Legal Education to spearhead a change of emphasis in legal education. Likewise it was assumed that the state had a responsibility to fund this new development. While the Council of Legal Education and the University of Waikato provided the academic framework and direction for the Waikato law degree, the then Labour government committed \$10 million over a four year period to fund this new development. Most of the money was to fund the law library. Although it is argued that legal education is less expensive than other forms of tertiary education, the costs of a good law library are considerable and the quality of legal education is related to the quality of the library.¹⁴ An essential precondition of the approval of the Council of Legal Education and the University Grants Committee for the University of Waikato to proceed with the establishment of the School of Law was the Government commitment of extra funding.

The election of the National Government in September 1990 was accompanied by a change of tertiary education policy. Although the Labour Government had shown signs of retreating from the market driven policy, the new National Government was determined to finish the process of dismantling the social welfare state.¹⁵ While the University of Waikato was moving with speed to prepare for the opening of the School of Law in March 1991, the National Government was moving with equal speed to remove the funding for the School. Unfortunately, or perhaps fortunately, the Government did not convey its intentions to the University until 19

¹⁴ Supra note 4.

¹⁵ See James, C *New Territory: The Transformation of New Zealand 1984 - 1992* (1992) for a general review of the policy changes during this period; and Boston, "The Funding of Tertiary Education: The Rights and Wrongs" in Boston J and Dalziel P (eds), *The Decent Society? Essays in Response to National's Economic and Social Policies* (1992), for an account of the changes in tertiary education policy introduced by the National Government.

December 1990, when the Minister of Education sent a fax to the University notifying it that the funding had been removed. The press release conveying this decision stated:

At a time when every education dollar has to be well spent, I question the decision to open a fifth law school, especially when many law students who graduated last year have not been able to find jobs in which they can apply their legal training, Dr Smith said. In the future decisions to fund new schools in law or other disciplines would lie with the universities and not with central government.

The facts that high unemployment meant all occupations were experiencing higher levels of unemployment, and that the Waikato Law School's programme was intended to redress this precise problem by providing a degree that enhanced the career options of law students, were obviously not considered relevant factors by the National Government.¹⁶ It is an interesting question whether the Universities should produce only enough students to replenish the vacancies created in the legal profession through death, retirements or career changes. Such an approach would appear to support monopoly control of legal services by the current members of the legal profession and run counter to the general market driven policy approach of the National Government. The basis for the public justification of the decision to withdraw funding was that in future new developments must be funded out of existing university resources. Whatever the merits of this policy approach, it ignored the legal contract between the previous Government and the University of Waikato to fund this new development.¹⁷

There has been much speculation about the real reasons behind the decision. Requests under the Official Information Act for documents relating to the decision were unanswered by the Minister of Education, although the Department of the Prime Minister and Cabinet did reply that it had no documents on the matter.¹⁸ This may have been true since these decisions

¹⁶ There had been much criticism of the fact that the Universities graduated more lawyers than graduates in agriculture, forestry, horticulture and veterinary science combined and were therefore not assisting the economic recovery. This statistic resulted from research published in Crocombe, G T, Enright, M J, and Porter, M E *Upgrading New Zealand's Competitive Advantage* (1991) 103. While such figures and their interpretation could be contested (for example, there are four times more science graduates than law graduates, and the assumption was that all lawyers practice law rather going into a variety of other occupations, including business), this research made good political rhetoric and was used to justify the funding decision on numerous occasions.

¹⁷ The University had sought a legal opinion on whether the National Government was legally bound by the contract with the Labour Government. The opinion indicated that there was a case to be answered. However, the University decided not to pursue this claim.

¹⁸ Letters dated 14 March 1991 and 14 August 1991 from the Minister of Education's Private Secretary stating that enquiries were being made and the Minister would reply

were made by a small *ad hoc* group of officials and Ministers. Whatever the real reasons, the action has been interpreted as an attempt to prevent a form of legal education that would have been challenging to policy decision-makers. It could be argued that the emphasis on biculturalism, and introducing new legal analyses such as feminist legal theory, were not consistent with the National Government's priorities. The irony of the Government's decision was that it was attempting to destroy a new form of legal education that redressed many of the criticisms of the lack of relevance of current legal services.

Although the action of the Government was in breach of its contract with the University, the University decided not to challenge the decision in court and the funding was lost.¹⁹ The University did decide however to continue with the Law School development, though there were critics of this decision within and outside the University. The problem was that, while the Government thought it had effectively closed the Law School by withdrawing its funding, this took no account of the reality that twelve staff had been employed and 1100 students had applied for the 350 places that were available for tuition in both Law I and Law II courses to be taught in 1991. It also took no account of the considerable planning for this development by the University and the support for it within the community. The School therefore opened at the scheduled time in March 1991. This traumatic start to the life of the school has had remarkably little effect on the pace of the development of the School. The School will graduate its first LLB degree students in February 1994. This is a tribute to the support from the University, and also to the commitment of the staff.

at his earliest opportunity. He did not so reply and a decision was made not to pursue the matter but to put all energy into the establishment of the School. A letter dated 21 March 1991 from Simon Murdoch, Director of the Advisory Group, advised that the Department had no material on the Law School.

¹⁹ The University eventually accepted \$1million as compensation for the general loss of funding that had resulted from the Government's change in funding policy. The University was careful not to accept this as a settlement of the outstanding claim for loss of the establishment funding for the Law School. \$1.1million already paid to the University by the Labour Government as a progress payment was also retained by the University. The University therefore received a total of \$2.1 million for the School of Law and most of this sum has gone towards the costs of the Library. The costs of running the School have been substantially met through EFTS funding and students' fees. Once the School's graduate programme is fully implemented it is intended that the School should generate enough income to cover all its costs. See *On Campus* (4 February 1991) for an account of the funding situation at the University of Waikato when the Law School funding was withdrawn.

2. *Effects of National Government Policy*

Although the School has been able to achieve its major objective of graduating its students on schedule, this has not been without difficulty. Apart from the withdrawal of the establishment funding, the National Government tertiary education policy, especially the introduction of the study right/non-study right funding regime, has increased student fees. This increase in fees adversely affects mature students, who are mainly women and Maori. Thus, two of the main potential student groups for the Law School have had an additional barrier erected to prevent them from pursuing a law degree. This policy will be fully implemented in 1994 so it is too early to assess the effects of the policy on the student profile. There is some evidence that students are seeking part-time study or dropping out for a year to earn money to return. This does have implications for the programme which is designed for full-time continuous study. While the funding regime has not yet affected the curriculum, it has the potential to affect the inclusion of those groups which have traditionally been excluded from the study and practice of law, namely women and Maori.

Apart from the direct impact of the increase of student fees, the changes in funding have had two other discernible consequences for the School's programme. The first is the impact of the new managerialism on the administration of academic matters. For example, the ever-increasing search for greater efficiency has led to proposals to restructure the University year to provide for continuous teaching organised over three semesters. Without entering into a debate on the merits or otherwise of semesterisation, such a proposal will require a major rethinking of the best mode of delivery of the knowledges required by our type of programme, that endeavours to reconcile the sometimes competing demands of a professional, contextual, bicultural legal education. This rethinking may be timely, but it requires a clarity of vision regarding the objectives of the Waikato LLB degree. There is no reason to depart from the School's original objectives of a professional, contextual, and bicultural legal education, but there may be a need to sharpen the focus of the degree.

This need for clarity of vision is compelled by the second consequence of the National Government's policy, which is the greater competitiveness for students and funding within the tertiary education sector generally. Universities and law schools must now promote themselves to recruit students who provide the most financial benefit to them. At the moment these groups include graduate students and international students.²⁰ The fact

²⁰ Waikato Law School has admitted 50 international students, mainly from the South Pacific and Malaysia. The School has appointed academic advisers for each student,

that Waikato Law School is newly established is both a competitive advantage and disadvantage. It is an advantage in that it is easier to adapt to the new demands of the market, and a disadvantage because there is always a suspicion of a new product until it is proven. The law is also a conservative occupation that does not easily adapt to change. The School however has had its supporters because from the outset its degree has reflected the needs of the modern legal practice, which include not only a "black letter" law training, but also a flexibility to provide the legal services demanded by clients.²¹

3. *Legal Professionalism*

Where Waikato Law School decides to position itself within the legal education market will depend on a reconciliation of the type of legal education with which it feels academically comfortable, and the need to attract students which will to some extent depend on the ability of the Waikato graduates to compete on the employment market. The concept that may assist with this reconciliation is legal professionalism. If the School is aiming at a broader employment market then it must produce students with generic legal skills which can be used in a variety of contexts and environments. The School must also promote the needs for these skills, and demonstrate that a greater degree of legal literacy is required by all sections of the community. The School must then concentrate on educating the new legal professional, who may or may not be found in traditional legal practice. The Waikato LLB degree is already well positioned to meet the new types of demand for legal services.

The future will determine whether this assessment of the type of legal services required is correct, but as much as one can anticipate the demands of future markets, the Waikato LLB programme is well positioned to service a particular need for legal services. It is acknowledged that this assessment would appear to be at variance with much of the early criticism of the Waikato law degree. This criticism concentrated on the biculturalism of the

and with the assistance of the Ministry of Foreign Affairs and Trade, provides a tutor to assist students with their study skills. The needs of these students are different from other students and a strategy is being developed to ensure that there is sufficient flexibility in the curriculum to enable them to pursue courses of relevance to their own cultures.

²¹ For example, the Hamilton/Bay of Plenty District Law Society has supported the School's computer training of its students by donating \$40,000 to establish the School's computer laboratory, and the School has provided computer training courses for local practitioners. The compulsory course on Dispute Resolution is also providing valuable skills that are now a required part of legal practice. (The School has gratefully received other generous donations from individuals and from Tainui).

programme and the fact that feminist legal theory would be taught.²² It ignored the other aspects of the programme, such as Waikato having the only LLB that requires a knowledge of corporations, or the fact that knowledge of these areas is now necessary to be able to service the legal needs of clients in a professionally competent way. Criminal law, Family law, Environmental law, and Treaty law are examples of areas of the law where new knowledges have become essential. The issue is really one of the relevance of the knowledge to the education of the legal professionals of the future. Waikato Law School argues that such knowledges are now essential to the provision of quality legal services.

4. Professional Legal Training

In 1988, the Institute of Professional Legal Studies (IPLS) course was introduced through four branches in Auckland, Wellington, Christchurch, and Dunedin. It represented the separation of conceptual and skills-based legal education. The profession now had primary responsibility for the skills-based training, and the universities for the conceptually-based legal education. Since both forms of education are inter-related, the organisational link remained the Council of Legal Education. The introduction of new programmes is never easy and the IPLS course attracted its share of criticism and was reviewed at the request of the Council of Legal Education in 1990 by Christopher Roper.²³ The Roper Report recommended changes to the content and delivery of the courses, which were implemented, though the recommendations relating to the organisational structure and administration of the IPLS were deferred. At this time in New Zealand, there was a debate on the best mode of delivery of educational services generally, which had been provoked by the Hawke Report.²⁴ Essentially the debate involved the relative merits of centralised and decentralised organisational and administrative structures for education service delivery. The IPLS had a central administrative structure but the delivery of the actual courses was devolved to the branches, which were situated in the centres in which there was a law school. Roper had recommended the maintenance of this structure.

²² It is difficult to document these criticisms because they are normally made in conversation - often at dinner parties! I have received as Dean requests for reassurance that the Waikato LLB is of the same standard because of the number of Maori students and the commitment to develop a bicultural approach to legal education.

²³ Roper, C *Report of a Review of the Institute of Professional Legal Studies* (1990).

²⁴ Hawke, G R *Report of the Working Group on Post Compulsory Education and Training (Hawke Report)* (1988); see also *A Response to the Report of the Working Group on Post Compulsory Education and Training by the Waikato Branch of the Association of University Teachers of New Zealand* (October 1988).

Waikato Law School participated in the Roper review, though the School had not commenced its degree programme until 1991. It supported the retention of the decentralised branch mode of delivery, and assumed that a branch would be established in Hamilton. The branch structure was supported because it provided students who could not travel because of financial or domestic reasons with an opportunity to study for the professional programme. When Waikato Law School made a formal request for a branch to be established in 1994, this request resulted in another review of the number and location of branches of the IPLS.²⁵ This Report, which is known as the McQueen Report, recommended that the IPLS course be delivered in three centres only, namely, Auckland, Wellington and Christchurch. Consequently students from Otago and Waikato Law Schools would have had to travel to these other centres. This would have seriously disadvantaged the students and would have compromised the ability of both those Schools to recruit students.

The recommendations were contested by both Otago and Waikato Law Schools,²⁶ and the Council of Legal Education eventually decided to reject the recommendations of the McQueen Report.²⁷ Although the Otago branch was to continue and a new branch was to be established in Hamilton, the Council also decided to seek a report for its 1994 meeting on the feasibility of the course being contracted out, in line with a Waikato Law School proposal. The IPLS's move to centralise its course has now led to a more fundamental rethinking of the role of the IPLS itself. It is at least arguable that the Council of Legal Education should function as the agency to credential institutions to provide the professional course. There is no reason in principle why the IPLS should have the monopoly on the delivery of such courses.

This whole recent episode about the appropriate provision of skills-based legal training is another chapter in the tensions created by the demands for the provision of both skills and conceptually-based legal education. The two are inextricably linked through the necessity for those who practice law or law-related activities to acquire both forms of knowledge. The way in

²⁵ McQueen, H *The Report of a Review of the Branch Structure of the Institute of Professional Legal Studies* (1992).

²⁶ See the *Otago Submission The Case for Rejecting the Recommendations of the McQueen Report*, which analysed in detail the false assumptions and lack of evidence for the recommendations; and also the letter from the Dean of Waikato Law School to the Director of the IPLS dated 2 February 1993, which supported the Otago submission but offered two solutions, either the formation of a branch at Hamilton or the contracting out of the course to Waikato Law School.

²⁷ Council of Legal Education Minutes (1993).

which this knowledge is delivered and the institutions through which it is delivered is where the discourse centres and will continue to be centred.

5. A Bicultural Approach to Legal Education

The development of a bicultural approach to the LLB degree has proven to be the most challenging aspect of the programme. It has been challenging because the concept of biculturalism is ill-defined, both generally and by the University,²⁸ and because the external policy environment that had been supportive of the concept when the School was established, changed with the election of the National Government. The current environment is not so much one of opposition, but one in which active support is not forthcoming from the state for these initiatives. As has already been stated, the emphasis on biculturalism has been a major source of criticism of the School and has been used to undermine its credibility, through questioning the competency of the students, especially the Maori students. This is a form of racism and must be condemned, and it could be damaging not only to the School, but more importantly to the ability of its Maori students to gain employment and the opportunity to use their skills for the benefit of their people.

It is therefore an essential task of the School's bicultural approach not only to provide a relevant curriculum that is inclusive of Maori and Maori customs and values, but also to provide for students the best legal training in the English-based, but New Zealand-developed, common law system. In this way Maori students obtain understanding and knowledge of the dominant legal system, while Pakeha and other students obtain knowledge of the effects of the existing system on Maori and the fact that Maori have their own lore and values that regulate aspects of Maori life. The purpose of this approach is to enable students more effectively to challenge the existing legal system's exclusion of Maori, while also enabling them to use the system, where possible, for the benefit of Maori. A difficult task is facing this generation of young Maori lawyers, who must be both proficient users

²⁸ Biculturalism is most commonly defined to mean an equal partnership. This concept of partnership is derived from the obligations incurred under the Treaty of Waitangi. If partnership was interpreted to mean immediate numerical equality in the Law School context, that is, 50% of staff and students being Maori, and all courses being taught in the Maori language as well as in English, then the School was established under false pretences and given a task in which it must immediately be perceived as having failed. Since it seemed unlikely this was the interpretation applied by the University, the School interpreted the objective to mean that this was the goal to be achieved. As Dean, I had assessed that the School needed a 20 to 30-year development plan which involved the training of Maori students to become future staff members, and research to provide the materials in the Maori language and in English that could be progressively introduced into the curriculum. Many students did not support this progressive policy but wanted the goals to be achieved within the first 12 months.

of the system and continually challenging it. It is not surprising that many Maori students resisted this approach, which is seen as the Pakeha legal value system coopting the Maori. Some students had enrolled in the School in the mistaken belief that they would be taught only Maori law and resisted learning anything else. The fear of cooption was real for some students and underscored the need for Maori themselves to provide the students with this knowledge. Unfortunately Waikato Law School is currently not in the position to fulfil that need. I would also argue that it would not be appropriate for the School to attempt to do what can only be done effectively by Maori elder scholars within the culturally appropriate environment.

Criticism of Waikato Law School's attempts to develop a bicultural approach came then, not only from Pakeha, but also most loudly from some Maori. This is not surprising since there were unrealistic but understandable expectations of what the Law School could achieve within the first year. The Law School was also perceived by some to be the next site of struggle in a campaign to raise awareness of the injustices inflicted on Maori through the non-observance of the Treaty of Waitangi. While as a political tactic this was conventional behaviour, it was somewhat ironic that the criticism and campaign was launched against the one University and Law School in New Zealand that has seriously attempted to redress the injustices inflicted on Maori.

The focus of the criticism was the lack of provision for Maori language in law courses. Some students demanded the right to be taught and examined in Maori. Biculturalism was interpreted as bilingualism by these students. The incident that highlighted the student demands occurred in 1991 when two students wrote one question of their Public Law A examination paper in Maori, which had to be translated before they could be marked and assessed. Neither the teacher nor the assessors were competent to examine in Maori. Unfortunately the students did not give notice of their action, so there was no time to organise a translation. The students argued that it was their right to respond in Maori and therefore notice was not required. Whatever the merits of this argument, and they are considerable in the context of a bicultural policy environment, the practical fact remained that an appropriate method of assessment had to be found.

What was appropriate was contested²⁹ and highlighted the basis of the dilemma for the School. From the School's perspective it needed a publicly

²⁹ The Chief Examiner informed the Registrar and Academic Registrar of the matter and sought permission to have the papers translated by the Chairperson of the Maori Language Department before they were sent to the assessor.

credible method of assessment, otherwise the competence of its students would be suspect and their employment opportunities curtailed. Since the School was teaching a degree programme that included the professional courses prescribed by the Council of Legal Education, and the questions answered in Maori were in the examination of one of these courses, the School was required to ensure that the assessment met the standards applied by the Council. The students on the other hand were more concerned with asserting their right to use their language, and to answer the examination questions in a more political than legal context, though it is difficult to separate these contexts on occasions and what needs to be shown is competence in both. Thus the objectives of both parties were understandable within their own contexts.

The issue went to an inquiry which was called for by the Council of the University. The Report of the Inquiry supported the actions of the Dean, criticised the University's general handling of the matter, and recommended another translation and marking of the questions.³⁰ This will be the third translation and marking, which at the time of writing has not been completed. It was also recommended that the University implement a policy on the use of Maori language in assessment. As it was already undertaking the development of this policy prior to the inquiry, it is difficult to see what has been achieved by the whole process. The original inquiry was also meant to look at the whole issue of biculturalism within the University, which could have been a useful exercise because the Law School might have been able to derive some guidance and assistance from the process. This aspect of the inquiry has not yet taken place and the School still awaits a conclusion to the whole matter.

The School has survived this difficult period in its short life, and attempts at understanding the various points of view have been facilitated by the School's kaumatua. In essence the differences appear to centre on methods and tactics, rather than ultimate objectives, though the objectives of the Law School it may be argued are not entirely clear either because they are expressed in the vague language of biculturalism which can mean many different things to different people. There is also a line of argument that the concept itself is no longer useful. The students were using the time-honoured student tactics of confrontation and challenge, against a group of people who essentially agreed with their arguments about the importance of the preservation of the Maori language. The University, which has had a long-standing commitment to what has come to be called biculturalism, was trying through the establishment of the Law School to acknowledge in a

³⁰ See *Report of the Committee of Inquiry into the Conduct of the Examination in Public Law at the University of Waikato in 1991* (1993).

practical way the ideological aspirations of Maori. The positive side of the incident was that it raised the issue for debate and discussion, which the Law School and the Department of Women's Studies took advantage of to sponsor a seminar series on Biculturalism, Justice and the Politics of Difference.³¹ The negative side of the incident is that some time has been lost in the development of the policy, because such incidents absorb energy and resources. The future challenge in this area will lie in the reconciliation of the demands of professionalism and biculturalism. It may be that they are irreconcilable, but all the same progress may be made in acknowledging the legitimacy of Maori values and lore in the context of Maori life.

VI. CONCLUSION

The Waikato LLB degree endeavours to meet the expectations of its founders - the Maori community, the University and the Council of Legal Education - and its students by providing a programme of study in which the law and the legal system are taught within their cultural, social, economic, and political context, and with an emphasis on the teaching of legal principle and legal skills. The degree is distinguished in the New Zealand context by its curriculum and course sequence, notably its emphasis on public law over private law; the integrated arrangement of the law and non-law courses over two years; the emphasis on Maori materials within all the courses; the introduction of new compulsory courses such as Corporate Entities and Dispute Resolution; and the retention of Jurisprudence as a compulsory course.

Waikato Law School is also characterised by the priority accorded to the development of teaching methods and skills; the relatively high level of resources it has committed to the assistance of Maori students; the emergence of a large number of international students enrolled for the degree and the assistance available to these students; and the conscious emphasis on the development of a New Zealand jurisprudence. This concept of a New Zealand jurisprudence is at the heart of the Waikato Law School. It is not a concept that lies easily within the context of a legal system that has developed from the common law, or within a society that is struggling to find its own unique identity. Gault J recently described jurisprudence as:

³¹ This seminar series highlighted the obvious point that not all Maori share the same interests, even when defined in terms of pakeha. Biculturalism as a concept still assumes that differences within the two cultures can be subsumed within the larger concept of biculturalism. This is too simplistic an approach to biculturalism and is one of the reasons for the difficulties with the whole concept as a means of redressing Maori grievances. The papers presented in the seminar series will be published in 1994.

the study and knowledge of the law, its sources, its integrity and utility in society. It is not possible to contemplate the law in those terms without regard to its setting. ... The true picture is of an emerging national identity in which the dominant influence of British heritage is adapting to, and merging with, Maori, Polynesian and other values in lands with their own peculiar attributes.³²

New Zealand society is in a period of enormous change in which basic values are being questioned and in some instances replaced with a value system, especially an economically-centred value system, that for many people is very alienating. The challenge for the Waikato Law School is to play a relevant and constructive role in the development of a New Zealand jurisprudence, that reflects not only the current economic policy, but that is inclusive of the social and cultural values and experiences of all people within the New Zealand community.

³² Gault, Rt Hon Justice T M *The Development of a New Zealand Jurisprudence* (1992) 1-2.

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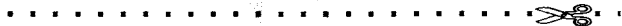
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DEVELOPING AND TEACHING AN INTRODUCTION TO LAW IN CONTEXT: SURROGACY AND *BABY M*

BY NAN SEUFFERT, STEPHANIE MILROY AND KURA BOYD*

The opening of Te Piringa,¹ the first law school founded in New Zealand in ninety years, was celebrated in 1991. Te Piringa was founded explicitly to develop a legal education that approaches law and the legal system in the context of the society in which the laws are made and applied. The opening celebrations for the School included a week-long introductory programme to the study of law in context for students that focused on the issue of surrogacy. The first two parts of this article present the perspectives of two law lecturers on the development and teaching of the introductory programme, the first from a feminist standpoint and the second from a bicultural viewpoint. The final part of the article presents the perspective of a student who participated in the programme.

I. A FEMINIST PERSPECTIVE ON TEACHING LAW IN CONTEXT²

The opening of any new law school is an exciting event, not only for students and staff, but also for the wider professional, university and local residential communities. To those interested in social equity and approaches to justice from a contextual perspective, the opening of a law school established “to contribute to the development of a New Zealand jurisprudence that supports the principles of justice, democracy, equality and a sustainable environment, and that respects and reflects the rights and responsibilities of all peoples and cultures”³ was a truly significant occasion. The principles guiding the foundation of the School were summarised as “the creation of an environment of participation, of challenge, debate and justice in which a legal education programme would be developed that is based on a commitment to biculturalism and the analysis of the law and the legal system within the society in which laws are made and applied”.⁴

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¹ The Maori name for the School of Law was described at the Law School naming ceremony as “holding together”, and expresses a sense of coming together and holding together to a firm purpose. See “Te Piringa: Holding Together”, *On Campus* (4 March 1991) 1.

² Part I was written by Nan Seuffert.

³ *University of Waikato School of Law Handbook* (1991) 7.

⁴ *Ibid.* The new school was founded on a set of principles that explicitly recognised and focused on biculturalism and a study of the law in context. This focus is in stark contrast to more traditional law schools, which have a narrow focus on “black letter law”. See, Frug, “A Critical Theory of Law” (1989) 1 *Legal Education Review* 43 (“[m]any law professors consider their primary job to be teaching legal doctrine and

I arrived in New Zealand in December of 1990 to prepare for the opening of Te Piringa in March 1991.⁵ Part I of this article presents my experience as a member of the committee developing the Law School's introductory programme to law in context in a manner consistent with, and designed to facilitate the goals of the School. It then explores my experience as a staff member attempting to teach the programme from a feminist perspective, incorporating feminist pedagogies.

1. Developing the Programme

In celebration of the opening of the Law School, the staff organised a one-week introduction to the study of law in context which concentrated on the issue of surrogacy, with a specific focus on *In the Matter of Baby M*.⁶ A committee was formed to organise the programme. One of the committee's first tasks was to decide on the basic structure of the programme. This section presents a brief outline of the basic structure of the programme and

legal skills”); and Gordon, “Critical Legal Studies as a Teaching Method, Against a Background of the Intellectual Politics of Modern Legal Education in the United States” (1989) 1 *Legal Education Review* 59.

⁵ Prior to arrival in New Zealand I practised law in a large commercial law firm in Boston. An avowed feminist, I co-founded a *pro bono* programme to represent survivors of domestic violence. Further, I served as a member of the Massachusetts Governor's Anti-Crime Commission, Battered Women's Group, and as a founding member of a Domestic Violence Advisory Council which was intended to coordinate services offered to survivors of domestic violence in the Boston area.

⁶ *In the Matter of Baby M* 537 A 2d 1227 (NJ 1988); 525 A 2d 1128 (NJ Sup Ct 1987). On 6 February 1985 the Sterns and the Whiteheads signed a surrogacy contract in which Mary Beth Whitehead agreed to be artificially inseminated with the sperm of William Stern, to bear a child, to surrender physical custody of the child to the Sterns and to terminate all of her parental rights to the child. Mary Beth Whitehead gave birth to a baby girl on 27 March 1986. On 5 May 1986 the Sterns filed for an order to show cause why the trial court should not grant summary judgement to enforce the contract, and require Mary Beth Whitehead to surrender custody of her child to the Sterns. The trial court granted the order *ex parte*; the child was eventually forcibly removed from her grandparents' home and Mary Beth Whitehead's care, and surrendered to the Sterns (537 A 2d at 1238). On 31 March 1987 the trial court issued a decision enforcing the surrogacy contract, terminating Mary Beth Whitehead's parental rights, and allowing adoption of the child by Mrs Stern (525 A 2d at 1128). Mary Beth Whitehead appealed and the New Jersey Supreme Court granted direct certification (*In the Matter of Baby M* 107 NJ 140, 526 A 2d 203 (1987)). The New Jersey Supreme Court invalidated the surrogacy contract because it conflicted with the law and public policy of the state. It found “the payment of money to a ‘surrogate’ mother illegal, perhaps criminal, and potentially degrading to women” (537 A 2d at 1234). It granted custody to William Stern, voided both the termination of Mary Beth Whitehead's parental rights and the adoption by Elizabeth Stern, and remanded the case for a determination of visitation rights for Mary Beth Whitehead. The Court also stated: “[w]e find no offence to our present laws where a women voluntarily and without payment agrees to act as a ‘surrogate’ mother, provided that she is not subject to a binding agreement to surrender her child” (537 A 2d at 1235).

then explores the ways in which the design of the programme reflected the goals of the school.

We decided to teach the programme in streams of twenty-five students meeting for five discussion sessions, one each day of the week. A two-hour plenary panel presentation of six members of the University community was scheduled for the middle of the week. All staff were involved in teaching the programme. The students' regular law classes were suspended for the week. First and second year law students were mixed in all classes.

On the first day class discussion focused on the presentations of the facts of the case in the judgments. The second and third discussions focused on the law in the cases and the relevant New Zealand law. The plenary panel presentation occurred on the third day. The discussion on the fourth day was a consideration of the contextual issues raised by the panel presentations. Finally, on the fifth day, students met in small groups to draft Law Commission recommendations on the issue of surrogacy.⁷

The programme was specifically designed to reflect the goals and principles of the new School, namely, professionalism, law in context (incorporating a commitment to the recognition of feminist legal thought), and biculturalism. The committee distilled these goals and principles from the language of the foundation documents of the school. The "law in context" aspect of the foundation principles is consistent with approaching the law in the context of societal power differentials based on gender.⁸

⁷ Reading materials were distributed to the students prior to the first day of the programme. The materials included the cases at the trial and the appellate levels, and the Status of Children Amendment Act 1987, the New Zealand statute that deals with the issue. The cases were edited: the styles of the factual approaches of the courts were maintained, as were the custody discussions and a representative sampling of the contract issues. The surrogacy contract was included in the materials. Panellists were asked to contribute a written piece for inclusion in the students' reading materials for the week, in recognition that the contextual material and the approaches of the lay people were an integral part of the programme. Students were given a summary of recommendations to the Law Commission to facilitate their own recommendations. The materials also included a piece by John Rangihau explaining the Maori Whaangai (raising of kin children) System to the High Court judges.

⁸ For one definition of feminism in a legal context see MacKinnon, "Feminism in Legal Education" (1989) 1 *Legal Education Review* 85-86: "feminism is an approach to society from the standpoint of women, a standpoint defined by concrete reality in which all participate to one degree or another. This is not to say that all women are the same or that all women in all cultures and across history have been in an identical position. Rather, it is to say that the experience of women is concrete, not abstract, and socially defines women as such and distinguishes them from men... This experience includes segregation into forms of work which are paid little and valued less and the devaluation of women's contributions. It includes the demeaning of women's secondary sex characteristics. It includes domestic servitude and wife

The goal of professionalism, training the students to be capable of participating as professionals in the legal community, was addressed in the programme in at least three ways.⁹ First, *In the Matter of Baby M* illustrated the interrelationship between different areas of the law, specifically contract and family law. Many students graduate from traditional legal educations with little understanding of the connections among the seemingly discrete subject areas of their study, much to the detriment of their practice. Highlighting these connections at the outset of the law programme seemed an appropriate manner in which to introduce a law programme that would explicitly recognise, in both form and content, such connections. Secondly, students were asked to analyse the case at the trial and appellate levels in the form adopted by the Law I Legal Method course. Thirdly, introduction to the form and content of a contract occurred through a close look at the surrogacy contract involved in the case. Traditional legal education has spent little energy in introducing students to legal documents that they encounter in the profession or in the interpretation of contracts as a whole. Looking at the contract involved in the case provided students with a basic understanding of the origins of the case.

The goal of presenting the law in context in the programme was addressed on three levels. First, the issue of surrogacy was placed in the context of the broader legal system: at the conclusion of the programme the students were required to draft recommendations to the Law Commission on laws to deal with the issue of surrogacy. Secondly, the issue of surrogacy was considered in the wider context of the University community, including the Maori community. The plenary panel presentation of six members of the University community exposed students to a variety of community views on surrogacy. Each member of the panel presented his or her perspective on surrogacy and specifically on the *Baby M* case, as “testimony” for the students’ consideration in drafting their recommendations to the Law Commission.¹⁰ Thirdly, some staff chose to address the issue of surrogacy

battering....Women are made a sex through these experiences which deprive them of respect, personal security, human dignity, access to resources, and access to speech and self-expression....To describe who is doing what to whom..., men are doing this to women....Whether men enjoy it or not, they surely benefit from not being those to whom it is done, and from being in the position to choose to do it or not. This is what it means to say that men have power - male power - and women do not”.

⁹ It is artificial to identify only these aspects of the programme with the goal of professionalism. An understanding of the law in all of the contexts in which it occurs, as well as an understanding of the development of bicultural jurisprudence, are crucial to the training of competent professionals.

¹⁰ See Wildman, S “The Question of Silence: Techniques to Ensure Full Class Participation” (1988) 38 *Journal of Legal Education* 147, 153. In describing classroom techniques that help to generate lively class discussion as well as to assist

from a feminist perspective in the context of a society that structures gender as a man/woman dichotomy that is also a hierarchy of power.¹¹

The programme demonstrated a recognition of feminist legal thought in a number of ways. Surrogacy contracts are a relatively recent development and are directly relevant to women's lives, and so the issue is of particular current interest to feminists. In addition, a wide range of feminist perspectives on this issue exist, highlighting the diversity of feminist thought. The decision to teach the programme in streams of twenty-five students facilitated the implementation of feminist teaching methodologies, and the recommendations to the Law Commission, to be developed by groups of three to five students and presented to the stream, built some aspects of a feminist teaching methodology into the structure of the programme.¹²

The programme committee's tentative understanding of possible roles of biculturalism in legal education led it to address this goal in a somewhat limited manner. The two Maori women on the panel related their personal experiences of the Maori practice of placing children. In addition, the reading materials included John Rangihau's address to the High Court Judges on the issue of adoption.¹³

2. *Teaching the Programme*

The programme provided an opportunity to implement feminist teaching methods,¹⁴ which attempt to facilitate empowerment, promote community¹⁵ and problematise authority in the classroom setting.¹⁶ This section begins

students to participate who might otherwise remain silent, Wildman describes "[c]onvening as a legislative body to decide whether to adopt a certain law... divide the entire class into groups, each representing a different special interest lobby that will offer 'testimony' to the legislature about the proposed legislation". Our technique presented "testimony" about the issue of surrogacy from each of the panellists and then asked the students to formulate recommendations for legislation based on what they had heard.

¹¹ See MacKinnon, *supra* note 8.

¹² This was also a way to get the students involved, and to allow them to work in small groups, providing the seeds for the student community.

¹³ Rangihau, J *The Whangai (Raising of Kin Children) System* (unpublished address, 3 April 1987).

¹⁴ See Morrison, "Teaching Law in a Feminist Manner: A Commentary From Experience" (1990) 13 *Harvard Women's Law Journal* 87, 90.

¹⁵ *Idem.* See also Menkel-Meadow, "Feminist Legal Theory, Critical Legal Studies and Legal Education or 'The Fem-Crits Go to Law School'" (1988) 38 *Journal of Legal Education* 61, 81.

¹⁶ Gore, J *The Struggle for Pedagogies* (1993) 67.

with a brief description of the methods that I used in the programme. It then covers my teaching of the programme.

Feminist teaching methods can be said to promote community in the classroom by explicitly addressing issues of authority and attempting to facilitate empowerment. For example, to the extent that society constructs authority and nurturance as opposites and men as authoritative and therefore capable of teaching law and women as nurturers and care-givers, feminist teachers become a paradox whose existence represents the contradictions of authority and nurturance. This paradox is addressed by some feminist teachers by challenging the dominant methods of teaching as patriarchal enterprises that occur in patriarchal institutions. Teaching methods therefore begin by avoiding patriarchal models of authority based on power over students, with emphasis on hierarchy, competition and control:

Building trust, collaboration, engagement and empowerment would be pedagogical goals, rather than reinforcing the competition, individual achievement, alienation, passivity and lack of confidence that now so pervade the classroom.¹⁷

Feminists also challenge patriarchal conceptions of authority by reclaiming the authority of women in the classroom as a method of empowerment - the authority of our experiences, emotions and perspectives. This reclaiming is done by both students and teachers and often involves telling stories of experiences. Storytelling in law can work to disrupt the legal categories created by the dominant groups in society by presenting moving stories of experiences that do not correspond to established legal categories.¹⁸ Not surprisingly, the creation of this method of teaching is attributable to women of colour, lesbians and other so-called minority groups or outsiders.¹⁹ The stories of outsiders create bonds between those who share the experiences that the stories represent, and they challenge the dominant characterisation of the experiences of these groups. They may also serve to open up space within the dominant groups and the legal categories for the recognition of these experiences.

¹⁷ *Supra* note 15, at 81. Feminist teaching methods “depend on teaching for empowerment (building up by conversations and sharing experiences, rather than by attack/defence) and foster a more open and flexible understanding of the many ways problems can be solved”.

¹⁸ See Abrams, “Hearing the Call of Stories” (1991) 79 *California Law Review* 971, 975-976; and Goldfarb, “A Theory Practice Spiral: The Ethics of Feminism and Legal Education” (1991) 75 *Minnesota Law Review* 1599, 1630-31.

¹⁹ See generally Delgado, “Storytelling for Oppositionists and Others: A Plea for Narrative” (1989) 87 *Michigan Law Review* 2411, 2412.

In New Zealand issues of authority and empowerment have been addressed by Elisabeth McDonald in her feminist legal theory course.²⁰ First, she notes that the best way for women to learn about feminist legal theory is by talking to each other, recognising the authority of class participants and the importance of storytelling. This method is a response to the recognition that women's experiences often do not fit into established legal categories. It de-centres the teacher as an authority figure: she becomes a facilitator of class discussion. Secondly, she points out the importance of how students talk to each other, and of how students take responsibility for what happens in the class, for their authority. The traditional patriarchal power relations in the classroom are deconstructed and replaced with empowerment of the students.

I now turn to my teaching of the introductory programme. In my stream, students sat in a circle, facing other students. As much as possible, I was simply another participant in the class, rather than the focus of attention and a centre of authority.²¹ This arrangement reflects the recognition that empowerment occurs through sharing information, rather than existing as a recipient of information parcelled out from an authority figure. This arrangement also acknowledges that each participant has valuable information to exchange which is as important as the information received from the instructor and that all participants are responsible for the quality of the discussion.²² When we had a full group discussion, I asked the students to introduce the next speaker themselves, in an attempt to give them a sense of both control over and responsibility for the discussion.²³

²⁰ McDonald, "The law of contract and the taking of risks: feminist legal theory and the way it is" (1993) 23 VUWLR 113.

²¹ This style contrasts with both the classic "Socratic" method and the "Socratic dialogue cum lecture" which continue at most law schools. See supra note 15, at 70 ("In actual practice many law school classes now consist of brief lectures with a 'Socratic' tag question occasionally punctuating a paragraph of lecture"). Both the "Socratic" method and the "Socratic dialogue cum lecture" can be seen as what the Brazilian educator Paulo Freire has termed the "banking" model of education. Jennifer Gore summarises Freire's explication of the banking model: the teacher teaches and the students are taught; the teacher knows everything and the students know nothing; the teacher thinks and the students are thought about; the teacher talks and the students listen meekly; the teacher disciplines and the students are disciplined; the teacher chooses and enforces his [sic] choice and the students comply; the teacher acts and the students have the illusion of acting through the action of the teacher; the teacher chooses the programme content, and the students (who were not consulted) adapt to it; the teacher confuses the authority of knowledge with his own professional authority, which he sets in opposition to the freedom of the students; the teacher is the subject of the learning process, while the pupils are mere objects. See also supra note 16, at 41.

²² On the first day I also asked the students to create name placards, in order to facilitate the learning of names as quickly as possible.

²³ Supra note 14, at 94 ("to achieve shared leadership, anyone could speak without being called upon; if more than one person wanted to speak, the last speaker would designate

The programme began with students introducing themselves and identifying their areas of interest. I then introduced myself, and identified staff members who shared interests that the students had expressed. Another introductory exercise was held on the fourth day of the programme. In addition, students were asked to record each day in a journal their thoughts on the issues of surrogacy, *In the Matter of Baby M*, and the programme. Journal entries were discussed at the end of the fourth day.

On the first day, after introductions, we discussed the goals of the School and how the programme we had developed was intended to meet the goals, as well as the general goals of the programme. As the week progressed, we identified aspects of the programme that reflected goals of the School. For example, the students' recommendations to the Law Commission were identified as placing the issue in the context of law-making. The panel was identified as placing the issue in the context of the University community and reflecting the perspectives of that community.

On the first day we also looked at the language used by the trial and appellate courts in presenting the facts of the case, the facts emphasised, and the underlying assumptions contained in the language. This focus was important for three reasons. First, the power of men to name and define is integral to their ability to create and maintain male hegemony. Men impose their world view at least in part through their control of the meaning of language.²⁴ This was particularly apparent in the language of the trial court opinion in the *Baby M* case. At an early stage, the trial judge described Mary Beth Whitehead as the "surrogate" and William Stern as the "natural father", foreshadowing the outcome of the case.²⁵ The question I posed was: why is Mary Beth Whitehead a "surrogate" as opposed to a "real" mother? By identifying the characteristics of a mother, as opposed to those of the "surrogate" contemplated by the contract, it became clear that, at least until the time of birth, there is nothing that a "real" mother does that a "surrogate" mother does not do. Both contribute the egg to the child's genetic make-up, both carry the child to term and both give birth to the child. If Mary Beth Whitehead was not the mother at the time of the birth of the child, when the dispute arose, who was the mother? By identifying Mary Beth Whitehead as the "surrogate" at the beginning of the opinion, the trial court judge defined her as not the mother, both commodifying her as a

the next"). Unfortunately, this was not completely successful. I attribute this to it being a method that the students were not familiar with and which, in a one-week programme, we did not have sufficient time to develop fully.

²⁴ *Supra* note 14, at 97.

²⁵ 525 A 2d, at 1137.

“surrogate” and foreshadowing the outcome of the case. A judicial decision taking a child away from her mother may be more controversial than a decision that awards the child to her “natural father” rather than a “surrogate.”

Secondly, focusing on the judge’s language highlighted the importance of the characterisation of facts in litigation, a point that is often overlooked in legal education. Understanding the importance of the characterisation of facts is essential to any practising litigator. Looking closely at the use of the word “surrogate” enabled students to understand that winning a case at the trial level is often tied to convincing the judge to adopt one’s characterisation of the facts.

Thirdly, a close reading of the facts contributed to our deconstruction of the text, allowing us to repaint pictures of each party from different perspectives than those presented by the court. The court focused and elaborated on the psychologists’ and psychiatrists’ negative findings with respect to the Whiteheads, and emphasised the positive aspects of the findings with respect to the Sterns. For example, in assessing the emotional stability of the Whitehead household the trial court stated that, although it was currently stable, it had earlier been “plagued with separations, domestic violence and severe financial difficulties requiring numerous house moves”. In contrast, the Sterns were said to “have a close, loving and very supportive relationship with each other”.²⁶ The focus on the Sterns was on the present and dealt exclusively with emotional stability, while the court expanded the focus on the Whiteheads to encompass past periods of trouble and financial aspects, thus making the comparison problematic. If the court had limited the focus on the Whiteheads to the present, it would have simply stated that the Whiteheads’ marriage was currently stable.²⁷

Throughout the judgment, the Whiteheads’ socio-economic status and financial problems were cast in a negative light.²⁸ The court did not give Richard Whitehead credit for serving in and receiving an honourable discharge from the Vietnam War, during the same period that William Stern was a student at medical school and thereby exempt from the draft.²⁹

²⁶ Ibid, at 1148.

²⁷ Ibid, at 1154.

²⁸ Ibid, at 1140-41, 1147. The Court questioned “Mary Beth Whitehead’s emphasis about the importance of education in light of her ... own limited high school experience”.

²⁹ Ibid, at 1138, 1140.

Focusing on the positive aspects of the experts' reports of the Whiteheads, and the negative aspects in the reports of the Sterns, revealed that the Whiteheads could have been portrayed as good parents and the Sterns as cold and limited in their ability to express emotions. Mary Beth Whitehead had "done a good job parenting her son and daughter" and was "a fit mother", and the Whitehead marriage was stable.³⁰ Further, Mary Beth Whitehead was able to recognise that her husband's alcohol abuse was his own problem.³¹ Richard Whitehead was described as a benign force in the Whitehead household who permitted Mary Beth Whitehead to make decisions. He was also described as "articulate though not loquacious and there is a direct, 'down to earth' quality about him".³² The Whiteheads were described as having made a mutual decision that he have a vasectomy, which demonstrated mature cooperation and understanding between the couple.³³ In addition, one expert found that much of the other expert testimony, emphasising negative aspects of Mary Beth Whitehead's personality, was flawed because it was based on her behaviour during a severe life crisis.³⁴

Elizabeth Stern was described as "having an adjustment disorder with depressive features".³⁵ William Stern was described as an introverted person who contained his feelings,³⁶ and the court noted that while Mary Beth Whitehead was willing to share custody of the child, he was not.³⁷ Further, William Stern had no surviving relatives: the child's extended family was therefore necessarily limited.³⁸

This repainting of the parties in the case emphasised the crucial nature of the portrayal of the facts in legal decisions and highlighted for the students the bias in favour of the "natural father" in the trial court's opinion.

³⁰ Ibid, at 1150, 1154.

³¹ Ibid, at 1141. One of the first steps to curing alcoholism is the recognition by the alcoholic that he or she is responsible for his or her own problem. The recognition of those close to the alcoholic that the drinking is the alcoholic's problem is crucial to this process.

³² Ibid, at 1155.

³³ Ibid, at 1140.

³⁴ Ibid, at 1150.

³⁵ Ibid, at 1153.

³⁶ Idem.

³⁷ Ibid, at 1150. A feminist critique of the experts' reports begins here, see Chesler, P *Sacred Bond: The Legacy of Baby M* (1989) 43 ("Why didn't the mental health experts ever pause, just once, to wonder: What kind of man would use both contract and penal law to make sure that 'his' daughter would never again see, smell, breast-feed from, play with - even come to know her birth mother?").

³⁸ Ibid, at 1138, 1139.

On the second day we looked closely at the surrogacy contract between the Sterns and the Whiteheads and the obligations assumed in each of its paragraphs. This “hard law” analysis was what the students thought law school was all about. It was also identified as a part of the programme that corresponded to the school’s goal of professionalism.

Reading the contract introduced students to the form and content of a standard contract. As we focused on who assumed obligations in each paragraph, it became clear that the contract was drafted by the Infertility Center³⁹ with the interests of the infertile couple in mind.⁴⁰ This opened the enquiry into the context surrounding the signing of the contract. The New Jersey Supreme Court stated:

the only legal advice Mary Beth Whitehead received was provided in connection with the contract that she previously entered into with another couple. Mrs. Whitehead’s lawyer was referred to her by the Infertility Center, with which he had an agreement to act as counsel for surrogate candidates. His services consisted of spending one hour going through the contract with the Whiteheads, section by section, and answering their questions. Mrs. Whitehead received no further legal advice prior to signing the contract with the Sterns.⁴¹

The situation was fraught with ethical concerns. The trial court judgment revealed that William Stern paid for the lawyer under the contract provision

³⁹ Infertility Center of New York (hereafter referred to as the “Infertility Center”).

⁴⁰ See 537 A 2d at 1248 (Mary Beth Whitehead’s “interests are of little concern to those who controlled this transaction”). See also 537 A 2d at 1265-68. The only obligations placed on William Stern by the contract were that he pay Mary Beth Whitehead \$10,000 upon surrender of custody of the child and that he pay medical expenses incurred as a result of her pregnancy which were not covered by her medical insurance. This obligation ceased six months after termination of the pregnancy, and did not apply to latent medical expenses occurring subsequent to six weeks after the birth of the child. Further, even the obligation that William Stern pay \$10,000 was qualified in several respects: Mary Beth Whitehead received no compensation if the child was miscarried prior to the fifth month of pregnancy, and, if the child was miscarried, died or was stillborn subsequent to the fourth month of pregnancy, she received only \$1,000, and the contract was terminated. Further, William Stern might terminate the contract if, in his opinion, pregnancy had not occurred within a reasonable time, and might demand that she abort the foetus if it was genetically or congenitally abnormal, in which case the fees to be paid were as set forth above. In the event that the child was born with genetic or congenital abnormalities, William Stern assumed only the paternal obligations imposed by existing statutory law. Mary Beth Whitehead assumed all risks incidental to pregnancy, including death and *postpartus* complications; she agreed to surrender the child to William Stern, not to form any parent-child relationship with the child, and to terminate her parental rights to the child; she agreed not to abort the child unless necessary for her physical health or if the child has been determined to be physiologically abnormal; and she agreed that if William Stern died the child was to be placed in the custody of his wife.

⁴¹ 537 A 2d at 1247 (emphasis added).

requiring that he pay ancillary expenses of the Whiteheads.⁴² The contract, of course, was drafted by the Infertility Center: to what extent was the lawyer connected with the Infertility Center? Was he acting as counsel for the Whiteheads? If he was acting as counsel for the Whiteheads why did he only answer their questions, without offering legal advice on the advisability of their entering into the contract and the rights and duties that they were assuming?

The court's statement suggested that, unless Mary Beth Whitehead questioned her contractual obligations with respect to abortion, this issue would not have been discussed by the attorney. The contract provided that Mary Beth Whitehead agreed not to have an abortion unless the inseminating physician determined that it was necessary for her physical health or that the foetus was determined to be abnormal. It also provided that she would abort an abnormal foetus at the request of William Stern.⁴³ This raised the question: how could any lawyer allow a client to sign away a constitutional right without discussing the implications of such an action?⁴⁴ This discussion alerted students to the quality of representation that Mary Beth Whitehead received.

As the discussion of the contract proceeded, the interrelationships between "hard law," context and feminist perspectives began to emerge. What are the implications for women of the convergence of the fact that the Infertility Center drafted the contract in the interests of the infertile couple and then referred the "surrogate" to a lawyer with whom it had an agreement and who played a minimal role as advocate for her? How should these considerations affect, if at all, the court's interpretation of the contract and its response to a breach of the contract? How did these factors affect the outcome in the Baby M case? This discussion created the context for the discussion of the contract claims of illusion, adhesion and unconscionability, which were briefly addressed at an introductory level.⁴⁵

The probable outcome of the issues presented by the *Baby M* case under New Zealand law was also discussed.⁴⁶ The Status of Children Amendment

⁴² 525 A 2d at 1160.

⁴³ 537 A 2d at 1268.

⁴⁴ The trial court found the clause limiting the right to abortion to be unenforceable (525 A 2d at 1159).

⁴⁵ See Williams, "On Being the Object of Property" in Fineman M and Thomadsen N (eds) *At the Boundaries of Law* (1991) 22, 29 ("within the framework of contract law itself, the agreement between Ms. Whitehead and Mr. Stern was clearly illusory").

⁴⁶ For a complete discussion of the New Zealand law on the issue of surrogacy see Rotherham, "Surrogate Motherhood in New Zealand: A Survey of Existing Law and an Examination of Options For Reform" [1991] *Otago Law Review* 426.

Act 1987 (the “1987 Act”)⁴⁷ provides that where a married woman’s husband consents to her artificial insemination he shall be the father.⁴⁸ If the woman is not married or her husband does not consent, the man who donated the semen shall not have the rights and liabilities of a father to any child born.⁴⁹ Section 16 of the 1987 Act further provides that it shall be effective notwithstanding “any conflicting evidence [under the Status of Children Act 1969 (the “1969 Act”)]” or “any other evidence that the man who produced the semen was the father of the child of the pregnancy”.⁵⁰ The 1969 Act protects sperm donors from the liabilities of parentage. However, it seems clear that its application to the facts in *Baby M* would require the declaration that Mary Beth Whitehead was the mother of the child; William Stern would not have any of the rights or liabilities of a father. Any surrogacy contract would be irrelevant under section 16. This enquiry emphasised the cultural specificity of law and the extent to which it is dependent upon the society in which it is made,⁵¹ challenging any beliefs held by students that the legal answers to difficult moral and social issues are easy,⁵² or that there is any one “correct” approach to the issue of surrogacy.

The panel discussion also focused on the context of New Zealand society by presenting perspectives of the wider university community. These perspectives were intended to inform the students’ drafting of recommendations to the Law Commission. The speakers included a lecturer from the biology department, the acting director of Women’s Studies, a Professor of Economics, the University Chaplain, a lecturer from the Centre for Maori Research, and a lecturer from the Department of Maori Studies. Each speaker presented his or her perspective on surrogacy and *Baby M*. A question and answer session was held, and the panel presentations were further discussed in each stream.

The students were excited about the presentations and eager to share their views. One student commented, “I thought the law would be so rigid and

47 1987, No 185, amending the Status of Children Act 1969.

48 S 5(1).

49 S 5(2). The Act also provides that the child shall not have the rights and liabilities of a child of the sperm donor.

50 S 16.

51 The Maori perspectives presented in the panel discussion also helped to make this point explicit.

52 One student evaluation of the programme noted that it “made you realise how involved the law is in moral and ethical issues”.

closed, but it affects society so much more than I realised". Another stated: "It made me examine my own prejudices".⁵³

The presentations of personal experiences by the two Maori women affected the students profoundly. These women spoke from their own experiences about the Maori practice of women bearing children for infertile members of their community. They also spoke of the Maori practice of the grandparents raising the oldest grandchild. Neither of these practices involve cutting the mother off from her child, and the child is always free to return to the mother. One woman spoke eloquently of her experience of refusing to give her child, once born, to an infertile relative. The practice of asking women to share their personal experiences that are related to law has been identified as a feminist teaching method.⁵⁴

The panel presentations and discussion placed the law relating to the issue of surrogacy in a wider societal context. It also highlighted the cultural specificity of law, even within one nation.⁵⁵

At the end of the discussion of the panel, we considered how the contextual material presented to the students following the reading and briefing of the cases had influenced their thinking about the cases and about surrogacy. At the beginning of the programme all of the students in the stream except one indicated that they thought that the Sterns should have custody of the child. After the panel discussion, several students indicated that they had changed their minds and now thought that the Whiteheads should have received custody. The discussion of the contract and the views presented in the panel discussion influenced their opinions.

One of the women students commented that, although she would never have identified herself as a feminist, the feminist perspective presented in the

⁵³ These statements were part of the student evaluations completed at the end of the introductory week.

⁵⁴ See Menkel-Meadow, *supra* note 15, at 80: "[i]t is not uncommon for feminist law teachers to make real the actual human conditions of the parties in the cases".

⁵⁵ The reading materials included a piece by John Rangihau explaining the Maori Whaangai (raising of kin children) System to the High Court judges (*supra* note 13). This stated that "[c]hildren were best placed with those in the hapu or community best able to provide, usually older persons relieved from the exigencies of daily demands but related in blood so that contact was not denied. [Cited genealogies] were maintained to affirm birth lines but placements were arranged to secure lasting bonds, commitments amongst relatives, the benefit of children for the childless or those whose children had been weaned from the home, and relief for those under stress. There is no property in children. Maori children know many homes but still one whaanau. 'Adopted' children knew birth parents and adoptive parents alike and had recourse to many in times of need".

panel made perfect sense to her and called into question her own previously unquestioned identification with the Sterns.⁵⁶ This comment highlighted the value of considering a specific issue in depth and in context. Presenting students with perspectives not incorporated in the cases broadened their understanding of the ways in which the cases could have been decided.

On the final day of the programme students formed small groups and wrote up recommendations to the Law Commission on large sheets of paper. Each group explained and defended its recommendations. Some of the groups had difficulty in agreeing upon recommendations. This experience helped to illustrate that disagreement within committees is a fact of life, and part of the law-making process. Further, it illustrated one reason why statutes with inconsistencies and vague language are enacted as law, as a result of compromises among lawmakers. The experience of producing recommendations should inform the students' reading of statutes throughout their law school education.

Not surprisingly, the range of recommendations was broad, from specifically incorporating a Maori approach to surrogacy, to simply stating that surrogacy contracts should be enforced. All of the approaches, however, involved state monitoring of the process and limited or eliminated the amount of money that could change hands. All prohibited the existence of brokering agencies such as the Infertility Center. We discussed reliance on the state in these times of privatisation. The students seemed unanimously to have confidence in state proceedings and saw the state as an appropriate actor on this issue.

3. *Conclusion*

Developing and teaching the Introduction to Law in Context programme was a challenging and exciting endeavour. It stimulated my consideration of

⁵⁶ Hilary Lapsley, the acting Director of Women's Studies, presented a talk at the panel discussion that focused on "Who is My Mother?" This piece considered contractual parenting and feminist principles, a woman's right to control her own body, combating objectification, placing a positive value on diversity, the political aspects of personal experiences and the right to informed consent. She suggested that collaborative parenting contracts that do not protect the mother's control over her own body and pregnancy should be illegal, that any "contract" should be considered a statement of agreement at the time that it is made, and subject to changes of heart by the parties, in which case the birth parents and the "designated nurturing parents" should all be considered to share the rights and responsibilities of parenthood. She stated: "We believe cars are appropriate things to buy and sell. Babies, on the other hand, we have agreed are not. Babies, we have agreed, are not things at all. They are people. But acting as though they could be bought and sold, acting as though they are commodities, reduces them to a state of thingness. This is what commodification means" (Broadsheet, March, 1989).

approaches to law teaching that place law in the many contexts in which it is made, applied and has influence. For me, this stimulation is the challenge and the promise of Te Piringa.

II. BICULTURALISM IN ACTION?⁵⁷

When I came to the Law School in October 1990, I was also the only Maori staff member, although one other came to the School in 1991. In New Zealand there are only three Maori legal academics. These numbers should throw into perspective the magnitude of the task of translating into reality the School's commitments to biculturalism and the teaching of law in context. A major question for me was what the commitment to biculturalism would require of the designers of the induction programme and its participants.

It was clear from the beginning that biculturalism was not a teaching product that could be designed and produced in the same way that one might produce, say, a Contract law course. A commitment to biculturalism means an ongoing challenge requiring one to change one's own ideas, attitudes, and behaviour, and corresponding changes in the institutions which seek to foster biculturalism.

For the induction programme committee there was precious little available in the way of guidance or a "recipe" that would give us the proper ingredients to be mixed together in the right order to produce a "bicultural programme". It is much easier to say what is wrong with the old (why it is not bicultural) than to create the new, because one is stepping into the unknown. The induction programme was the first test of our ability to envision the new and, inevitably, at that stage in our development, our vision would be immature, perhaps naive, certainly imperfect.

Matters to be addressed as part of this development were the choice of topic, materials, teaching methodology, and personnel. There were "givens" which could not be altered. Teaching personnel of the School were already chosen, each with his or her own views on methodology; there were deadlines to meet for putting the course together; and the venue was set at the Law School itself. So to some extent the process of developing biculturalism, even in so small a field as an induction course, was hedged around by and built upon existing structures into which there had been minimal Maori input.

⁵⁷ Part II was written by Stephanie Milroy.

Within these limits my vision of biculturalism in the developmental stages of the programme amounted to incorporating Maori content, attempting to develop some sort of bicultural teaching methodology, and creating an atmosphere in which Maori students would hopefully feel less alienated.

My part of this article looks at how we dealt with choice of topic, materials, methodology and personnel in terms of biculturalism and considers some ways in which the programme could be changed in future.

1. Choice of Topic

The idea of an induction course for the students came from the foundation Dean, Margaret Wilson, in the year prior to the first teaching year at the Law School. Not all staff had arrived to take up their positions and the topic was chosen by those staff who were present at the time. A number of possibilities were discussed with the intent that the topic should provide an introduction to law in context, with the focus to be a case of general interest which would have within it a wide range of issues. The case also had to be one that students with no knowledge of the relevant law would be able to debate.

Baby M was chosen as having those characteristics. It is a case that is intrinsically interesting and upon which the students should be able to form an opinion without knowing family law. It is about some of the fundamental concepts of society - the family, motherhood, human identity, the value of human life, and the role of the state in dealing with these matters.

At first glance, the case did not appear immediately open to analysis or treatment from a bicultural perspective. It was set in another country and was between people whose lives and experiences may have had no similarity whatsoever to that of a Maori growing up in New Zealand in the latter half of the twentieth century. The social and cultural context was different.

However, the potential for bicultural analysis was present because concepts such as family, mother and identity are fundamental to any culture. It was possible to relate the *Baby M* situation by analogy to the adoption of children in Maori society. There are significant differences between the two situations but these differences could inform students about the surrogacy issue in Western society by displaying the set of values at work in Maori society.

At the same time, I now wonder whether the choice of topic indicates the unconscious tendency to frame all questions and issues within the bounds of

the familiar dominant reference point of the Western state, law and legal system. Why did we not make more effort to choose a case involving Maori issues, one which would bring biculturalism directly into consideration and which would be set in the context most familiar to the students? What topic might we have chosen if we had taken the Maori worldview as a reference point?

There are difficulties in dealing with a Maori issue. Would staff and students have the knowledge or experience to be able to identify with the case and discuss it with sensitivity and understanding? After all, the majority of staff and students are not Maori and some might consider that the discussion of Maori issues in these circumstances would be likely to be superficial in the extreme.

Nevertheless, we did not even consider these questions. Are we in a cultural straitjacket that, despite our best intentions, unconsciously limits our worldview and therefore our vision of what biculturalism should be? If so, we must become more self-aware, more questioning of our motivations for taking a particular course of action, always measuring that action against the bicultural aim if we are to continue to progress.

2. *Materials*

In order to relate the *Baby M* situation by analogy to the adoption of children in Maori society, it was necessary to collect information about this concept in Maori society. Immediately we ran into difficulties finding material which was about Maori adoption and which was Maori in origin. It was only by chance that I came across the transcript of a speech given by John Rangihau which dealt with the raising of kin children and questions of identity in Maori society. This speech was ideal because the method of communication and the content were Maori - that is, oral (originally) and, as described by Te Rangihau in the speech, "a circular style of communication, when you feel led by the orator through a maze with little indication of where you are headed or indeed, whether there is light at the end of the tunnel".⁵⁸ There are efforts now being made to create a bibliography of Maori materials, some of which are held by government departments and some in universities. A comprehensive bibliography is a necessity; but we also need further research and writing from Maori themselves.

Given the scarcity of suitable written materials it was apparent that in order to attempt to fulfil the objective of bicultural methodology (as it was then

⁵⁸ *Supra* note 13.

conceived) and to obtain further Maori materials we would need to bring in Maori who would speak about the issues from the Maori perspective.

3. Panellists

There was a suggestion made at the beginning of the planning process that, given the context in which we were operating, there be a panel of Maori members who would be able to give their views on the issues without feeling that they were being required to give the definitive Maori view. They would also be able to give support to each other and ensure that all the relevant matters were covered. This was considered desirable because when a Maori stands up to speak on Maori issues, that person feels the weight of being a representative of his or her people and is accountable to those people for what he or she says. In such circumstances the speaker often feels the necessity to make it clear that he or she is expressing his or her own view and that it is not necessarily the "right" Maori view or the only Maori view. Therefore it seemed sensitive and sensible to have more than one Maori panellist. Time and room limitations meant that there could only be one panel session for the programme, and to give the students as wide range of perspectives as possible the panellists were chosen from various academic disciplines. As it happened the Maori panellists were academics and were used to working in an environment which emphasises individual performance, but it was still important to the integrity of the programme that there be more than one Maori.

The two panellists were women, one from a rural background and of an older age group than the other, who was from an urban background. Both women personalised the issues. They looked to their own personal experiences to begin thinking about the issues and they both talked about their own family histories in the panel session, although they also gave some information regarding adoption in classical Maori society.

Had the panellists not been academics or not been used to the university environment then I would have had some concern about bringing them into the programme. However, the academics were able to deliver their information, even where it concerned their personal experiences, in a way similar to that in which the other experts on the panel presented information. Had the panellists spoken in the ambulatory style of traditional Maori oratory I have some doubts that the students, particularly Pakeha students, would have understood and given weight to that speaker's view in the same way that they gave weight to an academic's view who was able to present information in a form that people educated in the European tradition consider is learned. That is only one form of learning but it is the form with which our students are familiar.

There is another danger in that those people who are often used by academics to come along and speak about the Maori perspective can become “burnt out”. Once people are found who can be called upon for this purpose it is too easy to continue calling upon them rather than to find other people or to educate ourselves.

4. *Venue and Format*

The teaching format for the first and second year subjects in the Law School was to be small group teaching, in groups of about twenty-five. It therefore seemed natural to present the *Baby M* programme to the students in small discussion groups of this size in classrooms rather than large lecture theatres. This teaching format gave group members more opportunity to develop confidence and a close working relationship with each other.

I did not know the venue and format in which Maori students would feel most comfortable - it could be on their own marae or home environment learning with other Maori on a collective basis, or it could be in a traditional lecture method in some circumstances, small groups in others. After all, most Maori students have now come through a Pakeha education system and are familiar with it (even if figures show that Maori are doing poorly under that system).⁵⁹ It is also dependent on a variety of factors - who the teacher is, what the subject matter is, and the mix of students. A small group format seemed a workable compromise as, at least from my experience of law school as a Maori student, it seemed that other Maori were likely to be more comfortable in a small group working environment than in large lectures. Small groups could be broken down into even smaller discussion groups which could work on problems collectively. In a small group there are fewer inhibitions on class participation.

In my own group I had only one or two students who were Maori. Even so, I felt that to begin to carry out our commitment to biculturalism I would need to greet the students in both English and Maori. I opened with a very brief mihi (greeting) and then invited as many of them as would wish to reply to do so. I received a reply from one of the Maori students in accordance with custom. Apart from greeting the students in Maori at every class I did nothing else that was conspicuously a part of Maori culture. For instance, I could have opened and closed each class with a karakia but did

⁵⁹ Spoonley, *P Racism and Ethnicity* (1990) 23.

not do so.⁶⁰ I did make great use of small group discussion and encouraged collective work by setting questions for the groups to work on in class. The focus of the programme - having students produce recommendations for law reform - allowed these methods to be used. However, the bulk of the Maori content came in the discussions of concepts of family, motherhood and identity in the presentations from the panellists and the Rangihau article.

While I was teaching I did not feel that small group teaching was necessarily bicultural - it just seemed a good way to teach. In fact I did not feel that what I was doing was bicultural at all. As a first-time teacher I was too busy surviving one class and preparing for the next. With more teaching experience I still do not think that what I did or do in class is bicultural. Inevitably I model my teaching style on the teachers I have known, all of whom taught within a monocultural system.

The panel session had to be held in a very large lecture theatre in order to fit in the whole student body. Such theatres are isolating, intimidating and impersonal. For a person of any culture they are alienating places and, if given a second opportunity, I would try to arrange the panel session to take place elsewhere. For instance, it would have been interesting to have had the panel session take place on a marae, or at least to have had the Maori contributions given there. It may have been more comfortable for the Maori panellists and it would also have put the students in the physical context where the values and the concepts they were hearing about were most relevant.

Once I would have thought that this was part of the vision of what a bicultural law school would do and I still think it is a possibility. However, during the ensuing year comment came from non-Maori students that they would have liked to know more about Maori culture and one of their suggestions was a marae visit. The reaction from Maori students was that if non-Maori students wanted to visit a marae that was fine but Maori students did not want one if it was only for the purpose of informing non-Maori students about their culture. Their point was that it could be part of the function of a bicultural law school to teach non-Maori students something about Maori culture but not at the time, effort or expense of the Maori students. Nor should staff presume to know best what the needs of Maori students were and then deal with them in a way that seems expedient to staff without consulting those students.

⁶⁰ A karakia is a prayer to encourage participants in a meeting to focus their thoughts on the matters to be dealt with at the meeting and to provide a spiritual and intellectual marking-off of that time.

5. Possible Paths for Change

If the programme were to be run again in future there are a number of changes that could be made to provide more Maori input, although time, resources and the availability of people and venues meant these were not possibilities this time.

First, there could be more opportunities for those Maori students who speak the language to be able to use it in class and for written work. Ideally this should be provided by way of Maori-speaking teachers, although these are scarce in the area of law. Part of the answer could be use of video or audio cassettes that students could use out of class or in company with other Maori-speaking students. Yet by doing this we could be isolating Maori students and continuing their invisibility in the legal environment.

Secondly, the panel session or other parts of the course could take place in a marae setting, where Maori values are paramount.

Thirdly, more Maori panellists and teachers could be brought into the programme. It is an absolute necessity that more Maori staff be recruited into the Law School to provide input and to do the essential research into Maori issues. This development should occur naturally when more Maori students graduate and move into university positions. Another aspect of this issue is that we may need to redefine and widen our employment criteria so that those Maori who are not qualified in law but have other qualifications, such as deep knowledge of Maori things, could be employed.

Fourthly, Maori students might be concentrated in one or two of the *Baby M* classes, instead of being spread in different groups throughout the student body. If this was done it would deprive the non-Maori students of a source of information about Maori concepts. On the other hand it would allow Maori students to work together and to be supported by other Maori instead of being solitary voices. The Maori who were in my group were lost, swamped by the numbers of Pakeha in the group. There can be no doubt that, for Maori students in such an environment, expressing a view that is controversial because it is based on a different cultural perspective takes courage and is a threatening process for all involved. Are we thus insisting on "integration" or silencing Maori, instead of giving Maori students the support and understanding of sufficient numbers of other Maori students in which to form and express their views?

Fifthly, there is some onus on teachers in a law school committed to contributing to the debate on biculturalism to make the effort to identify

sources of information; educate themselves about Maori issues; perhaps to invite others who may have the information to come to class.

Finally, some consideration needs to be given as to the way in which students can participate in the programme. From a Maori point of view it might have been useful to allow the Maori students time to consult their own kaumatua (elder) on the conceptual issues and to give them credit for doing so. There may also be ways in which other groups of students could also consult non-Law School sources and be given time and credit for it.

6. Conclusion

The form which the *Baby M* programme took allowed flexibility and variety in teaching method through which we could try to incorporate elements of the bicultural vision that we had at the beginning of the year. The programme as it was set up did give students the opportunity to consider another cultural perspective. They were given the chance to try to accommodate that perspective and the personalised, ambulatory, allegorical, spiritually-based narrative of the Maori participants within a framework which also included contributions of a traditional professional, legal and academic nature. Moreover, they were forced to consider how insights into another culture could be translated into a form which could then be used as the basis for dealing with the resolution of disputes in a country where there are at least two cultures. This format gave the students the opportunity of being radically imaginative in the way they resolved tensions. Not surprisingly, the students had difficulty in coming up with any specific recommendations which dealt with cultural issues. The best that they could do was to say that these issues should be taken into account. In the circumstances of limited time and knowledge, this was understandable.

With hindsight I am disappointed that I did so little in class towards creating a sense that this was a law school committed to biculturalism. I certainly do not think that it was sufficient to fulfil that objective just to greet the students in Maori, whether from the point of view of the Pakeha students, who would like more information about Maori culture, or the point of view of the Maori students, for whom it would only be a beginning.

The insufficiency of our efforts in the programme at the beginning of the year in terms of a commitment to biculturalism became clear to me during the programme and throughout the rest of the year. I noted the lack of knowledge on the part of the staff, lack of opportunities for Maori students to use the language, lack of thought as to how best to make Maori students feel themselves to be in a supportive environment, and lack of consideration of what biculturalism might mean in terms of the choice of topic for the

programme and how Maori issues might have been used in the programme. These factors all tend to sustain the cultural straitjacket that we must constantly struggle with if the commitment to biculturalism is to be fulfilled.

In offering a bicultural education like this one the ultimate question is: "Who benefits?" Incorporating Maori content and marae visits may benefit Pakeha students but does it benefit Maori students? We need to consult with the students and with the Maori community to find out what it is that they would value. We did not have time for this consultation when putting the *Baby M* programme together, but we must now do so if the Law School's development of biculturalism is to continue.

If such a course is to grow to reflect a fuller, richer vision of biculturalism it will depend on bicultural development in the Law School as a whole and, indeed, the University environment. I think that the experiment with *Baby M* was worthwhile as a microcosm of what we are trying to do. In such an undertaking as ours we must expect and accept the mistakes and failures, as well as the successes, if we are to go forward.

III. STUDENT PERSPECTIVE⁶¹

He Puta Taua ki te Tane
He Whanau tamaiti ki te Wahine

I share some reflections as a Maori student on the *Baby M* programme.

Before I do so, I want to talk a little about my first impressions of the Law School. It was a joy to see that the Law School was not a concrete structure which was cold, impersonal and detached. Instead, it was a small assemblage of buildings which were compact and personal. The gardens were still to be completed, but I was overjoyed to learn that the plants to be used in the garden would be from Aotearoa. It is time for our garden designs and architecture to reflect our place in the South Pacific, rather than imitate imported ideas.

This week we were to talk about the *Baby M* case. This was a creative and innovative way to start a Law School, with people talking and sharing instead of being alone reading books.

The lecturer who opened our class programme was welcoming and warm. The class was small. The lecturer was skilful at facilitation and was non-threatening in manner.

⁶¹ Part III was written by Kura Boyd.

A mihi in Maori was given by the lecturer. I felt immense pride, I felt I belonged. An affirmation of the Law School's commitment to bi-culturalism was given. I was struggling with tears: tears kept within from years of Pakeha education in this country, denying that knowledge from Maori culture was of value.

Your culture and my culture had embarked on a long journey at this Law School. Our destination was bi-culturalism. We would need resilience, tenacity, patience and sensitivity for this journey.

As a Maori woman, it seemed strange to me that perfect strangers would want to create a child together. They came from separate nuclear families with no kinship ties. Money was involved. Courts and lawyers were involved. It was very different from my culture.

Later in the week a panel of experts provided a wide variety of opinions on surrogacy, and this was stimulating and challenging. My mind wandered to my mother and grand-aunts. We did not have scientific experts to advise us about bringing life into the world or about the ownership of that life. There is a "knowing" amongst our elderly women about these matters. In Western eyes, they would have to be our experts.

I am a member of a whanau (an extended family). It is a secure feeling. If there are people who are childless, this can be attended to by the extended family. If a woman is unable to conceive a child, a female member of the extended family, such as a sister or a cousin, could carry the child for her. When the child is born, the baby will be raised by the adoptive parents. The child belongs to the extended family and to the iwi (tribe). The tribal members will be aware of the biological parentage of the child. Throughout the child's growing-up, the child will know about its biological parentage as well as its adoptive parents. The child is free to move among the households of the entire extended family and the tribe. It is secure. This has happened in my extended family.

There is no fuss, no exchange of money, no courts, no lawyers. It is a tribal system. The extended family are the arbiters of human relations and the conflict resolution managers.

Noho ora mai.

Na kura.

IV. CONCLUSION

This article has presented three perspectives on Te Piringa's programme to introduce students to law in context. Developments in the teaching and learning of law in context are on-going at Te Piringa. The exploration of possibilities for empowerment of all students, reversing the silencing and invisibility of women and Maori, continue. We also continue to experiment with teaching methods that facilitate the connection between empowerment and the goals of the Law School. We hope that this article has contributed to the growing discussion and critique about teaching law with methods that further the aims of social equity generally, and specifically with methods that provide a contextual approach to legal education.

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THE "PAKEHA CONSTITUTIONAL REVOLUTION?" FIVE PERSPECTIVES ON MAORI RIGHTS AND PAKEHA DUTIES

BY PAUL HAVEMANN*

I. INTRODUCTION

Between 1975 and 1990 the Treaty of Waitangi 1840, once regarded as a "simple nullity", came to be "constitutionalised",¹ acquiring the status of the basic founding document of the nation. A "constitutional revolution" occurred, a "paradigm shift" within the dominant commonsense of practitioners in the juridical-political system which shattered the tradition-bound conception of Maori rights and Pakeha duties.² Similar change in the status of indigenous peoples was evident in Canada during 1982-1990 and is now evident in Australia.³

Altered official discourses have yet to change material conditions and halt the impending ethnocide of indigenous First Nation peoples.⁴ Social indicator data on education, employment, housing and the justice system illustrate the structural realities of Maori disadvantage. In New Zealand, where 9.5% of the population self-identify as Maori and 3.6% as Pacific Islanders:

* Maori are 3.5 - 4.4 times less likely than Pakeha to attend a university.⁵

* One fifth of the Maori working age population lost their jobs in the two years from March 1987 to March 1989 - a loss four times higher than that for "non-Polynesians".⁶

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1 Attrill, W *Aspects of the Treaty of Waitangi in the Law and Constitution of New Zealand* (unpublished LLM dissertation, Harvard Law School, 1989); Havemann, "What's in the Treaty? Constitutionalising Maori Rights in Aotearoa/New Zealand 1973-1993" (forthcoming *Justice and Reform: Cross cultural studies in Criminology*).

2 See Kuhn, T *The Structure of Scientific Revolutions* (1962).

3 Fleras, A and Elliott, J L *The Nations Within: Aboriginal-State Relations in Canada, the United States and New Zealand* (1992) 229; and *Mabo v Queensland (No 2)* (1992) 107 ALR 1.

4 See *Draft Declaration [of the Rights of Indigenous Populations] as agreed upon by the members of the working group at its eleventh session* (1993) Article 7.

5 Pool, I *Te Iwi Maori: A New Zealand Population. Past Present and Projected* (1991) 183.

6 The unemployment rate among Maori increased from 10.8% in 1987 to 18.2% in 1990. More recently it has fluctuated between 23.8% to 27.3% (*New Zealand Herald*, 8 October 1993).

* Only 44% of Maori owned their own homes in 1986, compared with a national figure of 75%.⁷ Maori retain only 5% of freehold land in New Zealand. Moana Jackson estimates that since 1840 Maori dispossession has been "legalised" by over 100 pieces of legislation which breach the Treaty.⁸

* Maori offenders are over-represented in the criminal courts and jails. Of non-traffic adult offenders sentenced to imprisonment in 1991, Maori accounted for 48%, Europeans 43%, Pacific Islanders 7%.⁹ Among young people convicted under the Children, Young Persons and Their Families Act 1989, Maori account for 53.4%, Europeans 32.2% and Islanders 6.9%, despite the Act's whanau-oriented family group conference and diversion-based model.¹⁰

While Labour's social democratic constitutional agenda ostensibly tried to advantage Maori, it was Maori who bore the brunt of Labour's antidemocratic monetarism, the hegemonic "revolution" of 1984-1990 which abruptly jolted New Zealand from dependent agricultural Fordism to Post-Fordism.¹¹

II. BACKGROUND: A "CONSTITUTIONAL REVOLUTION"

Before being ousted from office for a decade Labour set up the Waitangi Tribunal, under the Treaty of Waitangi Act 1975, to promulgate principles for interpreting the Treaty and for identifying Crown activities inconsistent with those principles. Despite its compromised beginnings, the constitutional revolution began with the creation of the Tribunal.¹² In 1985

⁷ Spoonley, P *Racism and Ethnicity* (1993) 23-24.

⁸ Jackson, M "Land Loss and the Treaty of Waitangi" in Ihimaera, W (ed) *Te Ao Marama 2: Regaining Aotearoa* (1993) 77.

⁹ Spier, P, Norris, M, and Southey, P *Conviction and Sentencing of Offenders in New Zealand: 1982-1991* (1992) 50.

¹⁰ *Ibid*, 90.

¹¹ Kelsey, J *A Question of Honour? Labour and the Treaty 1984-1989* (1990); Jackson, "Corporatisation, Privatisation and the Treaty: The Ultimate Rejection of Maori Rights" in Neilson, D (ed) *Private Power or Public Interest* (1989); and O'Brien, M and Wilkes, C *The Tragedy of the Market* (1993). Fordism is a term used to describe the political economies of advanced capitalist countries of the post-World War Two period, and is characterised by liberal/social democratic politics oriented to compromise and settlement of class antagonisms, and legislation designed to promote social goals of equality and employment. Post-Fordism is characterised by market values, competitive individualism and the abandonment of social equity as a goal.

¹² Sharp, A *Justice and the Maori: Maori Claims in New Zealand Political Argument in the 1980s* (1990) 74. Oliver, W H *Claims to the Waitangi Tribunal* (1991) 9-10 says Pakeha "radicals" were quick to identify the Tribunal's ethnocentric mode, citing its use of judges lacking taha Maori, its use of lawyers and common law procedural and evidentiary rules, and its alien venues as incompatible with the Tribunal's mission to

the Fourth Labour Government (1984-90) attempted unsuccessfully to incorporate the Treaty into an entrenched Bill of Rights.¹³ More successful was the gradual 1984-90 promulgation of the principles of the Treaty emerging from the reports of the Waitangi Tribunal.¹⁴ These principles have been reaffirmed and complemented in decisions of appellate courts,¹⁵ reinforced by directives issued by the executive,¹⁶ and validated by incorporating recognition of tikanga Maori and the principles of the Treaty into legislation.¹⁷ For the first time since 1840, a set of principles by which disputes about Pakeha duties and Maori rights were to be honourably settled became part of official discourse.

Pakeha analysts, surprisingly unanimous on the radical or “revolutionary” character of this feature of the Fourth Labour Government’s term of office, characterise it, for example, as “the most important of the changes wrought by the Labour government”,¹⁸ as the “Maori Constitutional Revolution”,¹⁹ and as an “intellectual revolution”.²⁰

Some intellectuals, both Maori and Pakeha - such as Ranginui Walker and Bill Renwick - even described these developments as “post-colonial”,²¹ while hardly claiming that assimilationist colonialism had gone away. Other writers, though avoiding the term “post-colonial”, have foreseen and

deliver decisions which reflected the “spirit of the Treaty”. Some suggested alternatives were later to become Tribunal practice for a time: see especially Williams, *D V Memorandum to Minister of Maori Affairs concerning the Waitangi Tribunal* (1977), and Kelsey, “Te Tiriti o Waitangi and the Bill of Rights” *Race, Gender, Class* (1986) 23-30.

¹³ Palmer, *G A Bill of Rights for New Zealand* (1985).

¹⁴ Renwick, “A Variation of a Theme” in Renwick W (ed) *Sovereignty and Indigenous Rights: The Treaty of Waitangi in International Contexts* (1991) 214; and Palmer, *G New Zealand's Constitution in Crisis* (1992) 79.

¹⁵ Parliamentary Commissioner for the Environment, *Environmental Management and the Principles of the Treaty* (1988); Palmer, *supra* note 13, at 89; Havemann and Turner “The Waitangi Tribunal: Theorizing its Place in the Re-Design of the New Zealand State” (forthcoming *AJLS*); and Oliver, *supra* note 12. See *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, 651, *MRR Love v Attorney-General* (unreported, High Court, Wellington, 17 March 1988, Ellis J, C P135/88), and *NZMC & Runanga O Muriwhenua v AG & Ministry of Fisheries* (unreported, High Court, Wellington, 30 September 1987, Greig J, CP 553/87).

¹⁶ Department of Justice, *Principles for Crown Action on the Treaty of Waitangi* (1989); and MAF, *The Impact of the Treaty on Government Agencies* (1990).

¹⁷ Legislation Advisory Committee Report No 6, *Legislative Change: Guidelines on Process and Content*, Appendix D (1991). Tikanga Maori refers to Maori tradition and custom, and includes protocol, ceremony, values and beliefs.

¹⁸ James, C *The New Territory: The Transformation of New Zealand 1984-1992* (1992) 122-134.

¹⁹ Palmer, *supra* note 14, at chapter 4.

²⁰ Renwick, *supra* note 14, at 211.

²¹ Walker, R *Struggle Without End* (1990) 228.

described in analogous terms the unfolding emphasis on Maori rights and their place in the evolution of an ideology of biculturalism.²² Colin James speculates that the revolution leading to recognition of the Treaty may, in ideological terms, be the most important act of independence and affirmation of nationhood since New Zealand's reluctant acceptance of legal independence from Westminster in 1947. He argues that this "decolonising" process required the "fashioning of an identity and a wholeness out of a conflict no one else can resolve".²³ If not "post-colonial", the constitutional revolution perhaps represented the first "post-assimilationist" step towards a post-colonial settlement.²⁴ In this post-assimilationist vision, Pakeha duties and rights and Maori rights and duties were couched in terms of a "re-discovered" bicultural partnership under the Treaty "Made in New Zealand/Aotearoa", not "Made in England".

So what was and is the significance - if any - of the changing constitutional rhetoric? Is it benign or malign? Conflicting theories and assumptions underlie the commentaries of academics, practitioners, and political analysts and activists on the constitutional revolution. This article examines five relatively distinct "paradigms"²⁵ which emerge out of a review of the literature, distinguished by identifying implicit and explicit perspectives on: (1) the nature of the "ideological work" done by the Waitangi Tribunal and the principles of the Treaty in bringing about the "paradigm shift"; and (2) the scope of rights' strategies - the politics of rights²⁶ - for bringing about ideological change within the liberal democratic state. The label the "orthodox legal paradigm" is self-inflicted; the others identified here are the Prendergast Paradigm, Te Tino Rangatiratanga Paradigm, the Marxist Paradigm, and the Post-Assimilationist Paradigm.

²² See Metge, J *The Maoris of New Zealand, Rauahi* (1976); Adams, P *Fatal Necessity* (1977); Levine, H B and Vasil, R *Maori Political Perspectives* (1985); Mulgan, R *Maori, Pakeha and Democracy* (1989); Temm, P *The Waitangi Tribunal* (1990); Ritchie, J *Becoming Bicultural* (1992); and Palmer, *supra* note 14.

²³ *Supra* note 18, at 123. In 1947 New Zealand belatedly accepted the autonomy bestowed upon the Dominions by the Statute of Westminster of 1932.

²⁴ Assimilation has until very recently been the principal goal of settler policies for pacifying and controlling indigenous populations; post-assimilation respects and promotes separate or parallel governance and self-determination such as authentic biculturalism.

²⁵ Paradigm seems an appropriate term since McHugh in "Legal reasoning and the Treaty of Waitangi" in Oddie, G and Perret, R (eds) *Justice, Ethics and New Zealand Society* (1992) classifies his own work as located within an "orthodox legal paradigm".

²⁶ See Scheingold, S *The Politics of Rights: Lawyers, Public Policy and Political Change* (1974).

III. THE PRENDERGAST PARADIGM

In 1877 a Maori tribe brought an action against the Crown to reclaim unused land they had earlier donated to the Church of England as the site for a School which was never built. They relied on Treaty rights. Prendergast CJ stated that Treaty rights such as aboriginal title were irrelevant unless incorporated expressly into municipal statute. In a judgment redolent with the then-contemporary tenets of Victorian scientific race theory, Prendergast CJ found that the Treaty of Waitangi was: “[a] simple nullity. No body politic existed capable of making cession of sovereignty, nor could the thing itself exist”.²⁷

Contemporary writers from the orthodox legal paradigm say that he got the law “wrong”,²⁸ although for the purpose of consolidating settler hegemony it would be an understatement to say that it was a useful judgment. From 1877 to the 1980’s, despite its “wrongness” in international law and British colonial practice,²⁹ it remained the paradigm for understanding the status of the Treaty - it was the “correct” statement of the Treaty’s position in New Zealand law, in the textbooks and law journals,³⁰ and in the hegemonic discourse until the current “constitutional revolution”.

One recent, oft-cited piece by an Auckland practitioner, Guy Chapman, challenges the new “revolutionary” commonsense and may represent a significant body of seldom-articulated opinion.³¹ Chapman supports his critical position on the post-revolutionary law partly by arguing the continuing correctness of Prendergast’s view of the Treaty. He writes that Prendergast’s statement “has stood the test of time in its clarity of exposition and basic soundness”.³² Informing Chapman’s position appears to be a single static standard of justice, based on equal *treatment* of all, no matter how unequal they may be. This notion of equality is often used to oppose affirmative action of any sort. It usually emanates from majoritarian, neo-conservative politics and appeals to populist egalitarianism. Chapman challenges the contemporary resuscitation of the Treaty because it has endowed it with a “political afterlife” which gives Maori a “never ending,

²⁷ *Wi Parata v The Bishop of Wellington* (1877) 3 NZ Jur (OS) 78.

²⁸ McHugh, *supra* note 25, at 113, and Palmer, *supra* note 14, at 72.

²⁹ Williams, “British colonial treaty policies: a perspective” in Yensen, Helen *et al* (eds) *Honouring the Treaty: An Introduction for Pakeha to the Treaty of Waitangi* (1989).

³⁰ See eg Hinde, G W, McMorland, D W, and Sim, P B A *Introduction to Land Law* (1978) 6; Molloy, “The Non Treaty of Waitangi” [1971] NZLJ 193; and O’Keefe, “Waitangi Tribunal ‘Decision’” [1983] NZLJ 136-137.

³¹ Haughey, “A Vindication of Sir James Prendergast” [1990] NZLJ 230.

³² Chapman, “The Treaty of Waitangi - Fertile Ground for Judicial (and Academic) Myth-Making” [1991] NZLJ 228, 231.

exclusive cosy relationship with the Government to which others are not admitted". He condemns "the legally sanctioned preferment of groups" which he argues is inimical to "a modern, pluralist, multiracial democracy" which "will quite simply come apart at the seams if such were to be its prescription".³³ In this paradigm "multi-culturalism" is confined to promoting "cultural diversity in the private domain coupled with equality of opportunity in the public sector".³⁴

Condemning the activist judiciary for usurping the position of the legislature by elevating the Treaty to the status of higher law, Chapman says that "Parliament has never given direct legislative force to the Treaty"; there has been "no vote for a judicially created Bill of Rights designed to advantage one section of society..."; and "the principles so-called are judicially invented" and have come through the "back door".³⁵

Another Auckland lawyer, David Garrett, shares Chapman's perception that the elaboration of "principles" of the Treaty by the courts is anti-democratic, or at variance with parliamentary supremacy and the normal process whereby the common law evolves:

Parliament has not so much *given* the task of enunciating the meaning of the supposed principles of the Treaty to the courts; rather successive governments have *allowed* the judges, through deliberately or accidentally vague statutory references, to interpret what should be clear statements of rights. These are statements which should be made in parliament by elected representatives facing public scrutiny.³⁶

Garrett's critique has an authoritative, Diceyan "Made in England" ring to it. Like Chapman's, however, it is flawed by contradiction and anachronism. The Treaty of Waitangi Act 1975 mandated the quest for the "principles" which judges have "found", and it was the elected Parliament which passed the numerous Acts which incorporated recognition of Treaty "principles" throughout 1984-1991.

Chapman describes the Treaty principles as fixed in time "like it or not" and denies that they bespeak "rights" or "fundamental rights"³⁷ since at the time the Treaty was framed and signed "modern" concepts of human/fundamental rights were "largely or wholly, unconceived". This is surely an anachronistic

³³ Ibid, 228, 229.

³⁴ Levine, "The cultural politics of Maori fishing: an anthropological perspective on the first three significant Waitangi Tribunal hearings" (1987) 96 *Journal of the Polynesian Society* 421, 438.

³⁵ *Supra* note 32.

³⁶ Garrett, "Resources: Treaty Rights and Private Property Rights" in Novitz, D and Wilmott, B (eds) *New Zealand in Crisis* (1992) 103.

³⁷ *Supra* note 32, at 232-4.

argument, given that the Treaty of 1840 followed the American Bill of Rights (appended to the 1776 Constitution in 1787) and the French Declaration of the Rights of Man and the Citizen 1789, both of which not only employed the symbolism of such rights with vigour but also remain part of the living law of their respective jurisdictions and provide models for modern human rights codes.³⁸

Mark Tushnet analyses from an American perspective the key problems of the originalist, textualist or even neutral principles approach to constitutional interpretation implicit in the Prendergast paradigm. Such interpretation, he says, assumes static, shared systems of meaning such that the meanings of rules or words used in the past can be retrieved without distortion.³⁹ Strangely for a common lawyer, Chapman attacks as “mythical” the depiction of the Treaty as a “living instrument” and the resulting revolution of the principles in the “Spirit of the Treaty”: he singles out as “crypto-legal myths” the principles of “partnership” and “the fiduciary duty”.⁴⁰ It is no coincidence that these are the lynch pins for constructing a bicultural future in the dialectical relationship between affinity and difference in which both Maori and Pakeha have parity of respect.

Chapman astutely recognises the revolutionary scope of the “principles of the Treaty”, and the process of constitutionalising Maori rights, for the honouring of prospective claims through the recognition of historical obligations. The material and possibly ideological outcomes of such a “revolutionary” approach are anathema to those whose liberal-conservative Prendergast paradigm is based on nineteenth century liberal assumptions about the virtues of utilitarianism, majoritarianism, individualism, private property and the illimitable sovereign. One can also trace within this ideological framework social Darwinist justifications for selectively applying equality dimensions of the “rule of law”, illustrated by Prendergast CJ’s use of the “act of state” doctrine to shield executive, legislative and administrative tyranny from judicial scrutiny, for which he was duly chastised by the Privy Council.⁴¹ This paradigm delegitimises the constitutional revolution by selectively using arguments from the orthodox legal paradigm, as McHugh points out.⁴²

³⁸ Waldron, J (ed) *Nonsense on Stilts; Bentham, Burke and Marx on the Rights of Man* (1987).

³⁹ Tushnet, M *Red, White and Blue: A Critical Analysis of Constitutional Law* (1988) 22, 63.

⁴⁰ *Supra* note 32, at 233.

⁴¹ *Wallis v Solicitor General* (1902) [1840-1932] NZPCC 23.

⁴² See McHugh, “Constitutional Myths and the Treaty of Waitangi” [1991] NZLJ 316 for a personalised but vigorous rebuttal of Chapman’s arguments.

The Prendergast paradigm offers no support for biculturalism, that is, for a politics of affinity and difference based on the mutual understanding, respect and power-sharing or reparative justice implied in the “constitutional revolution”. It echoes the nineteenth century liberal conservatism which legitimated the benignly meant but monocultural, Christianising and assimilationist policies which are partially responsible for the ethnocide of indigenous First Nations peoples throughout the Empire.

IV. TE TINO RANGATIRATANGA PARADIGM

Moana Jackson (Ngati Kahungunu, Ngati Porou) and my colleague Annie Mikaere (Ngati Raukawa ki te Tonga), the chief analysts and activists writing from within this paradigm, are both tangata whenua, people of the land. They base their position on this historical ground. Their assertion of Maori rights and Pakeha duties is derived from the concept of Rangatiratanga as understood in Maori, recognition of which was promised in the Maori version of the Treaty. In contemporary Pakeha analytical discourse Rangatiratanga implies self-determination, including recognition of the Maori parallel juridical-spiritual-political order embodied in the sovereign power of the iwi. Iwi as tribal nations were promised control over taonga (treasures) and iwi resources, to ensure justice for iwi members and “to make the world live again through Maori institutions defined and controlled by Maori” as covenanted by the Treaty.⁴³

The assertion that the Treaty was a “treaty of cession” by Maori of their sovereignty to the British Crown, resulting in a single *grundnorm* for testing the validity of law, is rejected as a denial of Rangatiratanga promised in Article 2 of the Maori text of the Treaty.⁴⁴ Hence “the Treaty guarantees Maori law itself since it is both the source of rangatiratanga and the product of its exercise”.⁴⁵ The use of the word kawatanga, “government over their land”, in the first Article means that authority to exercise government over settlers on Maori land was granted to the Crown: “for the Maori text to have done more would have been contrary to Maori law, and the rangatira [chiefs] would have been unable to sign”.⁴⁶

43 Jackson, “The Treaty and the Word: The Colonization of Maori Philosophy” in Oddie, G, and Perrett, R (eds) *Justice, Ethics and New Zealand Society* (1992) 9, and see his succinct “Changing Realities: Unchanging Truths” *Commission on Folk Law and Legal Pluralism* (1992) 1-9. See also essays on Te Tiriti in Ihimaera, supra note 8.

44 Mikaere, Book Review (1990) 14 NZULR 97, and Jackson, “Commonwealth Law Conference” [1990] NZLJ 334.

45 Jackson, supra note 44, at 334.

46 Jackson, supra note 43, at 7.

On this interpretation of Pakeha duties and Maori rights, the “constitutional revolution” of 1984-1990 is a distortion and a Pakeha re-definition of Rangatiratanga, the effect of which has been to “freeze Maori cultural and political expression within parameters acceptable to the state”.⁴⁷ Legal pluralism cannot accommodate Rangatiratanga, whether by recognising aspects of tikanga Maori in the procedural and substantive law, or by incorporating the principles of the Treaty into state law and practice, or by adapting Pakeha political institutions. Such kowhaiwhai (cosmetic) bicultural innovations mask the imposed nature of the common law and constitute a denial of the rights under Treaty. The Treaty is declarative of Maori rights, not constitutive of them, since they are not considered to be dependent upon or subordinate to the legal or political sovereignty of any other nation.⁴⁸ But, even though:

Pakeha judges, and institutions such as the Waitangi Tribunal, no longer dismiss the concept of rangatiratanga, they simply redefine it as a limited property right... Pakeha academics frame the whole discussion of Maori rights in a bi-cultural jurisprudence of the wairua that is consistent with the common law. Those who pursue such views are neo-colonialists who neither understand nor respect Maori philosophy or culture.⁴⁹

Reviewing Kawharu’s *Waitangi: Maori and Pakeha Perspectives of the Treaty*, an edited collection of essays on the Treaty, Mikaere comments that the word Rangatiratanga and other Maori concepts have been “bandied about... almost as though they were qualified to understand them” by Pakeha judges and other contributors.⁵⁰ She is no less damning than Jackson about the Tribunal:

What then of the Waitangi Tribunal, widely perceived as being essentially Maori... at the very least a bicultural body... The Waitangi Tribunal is not a Maori institution...[it was] established by a Pakeha dominated parliament... [and] exists at the whim of a Pakeha electorate... Any recommendations it makes must always be acceptable to non-Maori voters.⁵¹

Rejecting the imposed regime of the settler state and critiquing the constitutional revolution, the state, and the politics of social change through enhancing legal rights, the Rangatira paradigm is an expression of Maori nationalism and the quest for cultural survival. Hauraki Greenland suggests that the key themes in this ideology revolve around the land itself and the concept of land: the ideology contrasts Maori and Pakeha values and,

47 Ibid, 8.

48 Jackson, *supra* note 44, at 334.

49 Jackson, *supra* note 43, at 8.

50 Mikaere, *supra* note 44, at 99.

51 Ibid, 100.

especially, divergent Pakeha and Maori philosophical perspectives on land. For Maori, land represents *turangawaewae*, the symbolic, spiritual and material place upon which they stand and assert their rights under the Treaty. By contrast, Pakeha dishonesty over land dealings and the tyranny of the state led to the ongoing loss of land rights and the *raupatu* (wrongful confiscation of land in the 1860's). Maori nationalism as an ideology emphasises attributes of the Pakeha conception of land which are anathema to the Maori way such as acceptance of the commodification and environmental exploitation of land. The assertion of Maori peoplehood through their Treaty-guaranteed *kaitiakitanga* (guardianship) of the land and other treasures, as Maori understand and value these, is thus the key discourse in the construction of Maori identity and resistance. The politics of difference, rather than affinity, dictate tactics and strategies and explain the rejection of *kowhaiwhai* biculturalism.⁵²

The Rangatiratanga paradigm resembles strands of the Marxist paradigm and the related Critical Legal Studies approach in that it repudiates claims that progress has resulted from the "Maori Constitutional Revolution". But the historical, political and ideological roots of the Rangatiratanga movement are altogether different from those of Marxism or neo-Marxism. In my view the conflating of the two paradigms (and consequent characterisation of the *tangata whenua* as fellow travellers of these valuable though Eurocentric paradigms) by some commentators⁵³ demeans the legitimacy of the Maori nationalist position.

Those conceptualising the "revolutionary" function of the Waitangi Tribunal and the "principles of the Treaty" through this paradigm fully understand the discursive potential of the official discourse emerging from the Tribunal, and the significant role of the principles in this process. They see the degree to which a discourse of interests is being transformed into a discourse of bicultural rights by the re-defined concept of Rangatiratanga, and they distance themselves from pragmatic Maori leaders who perceive the discourse of bicultural rights as at least offering some purchase on power. Te Tino Rangatiratanga paradigm-based analysts and activists argue that the process "inhibits the development of strategies"⁵⁴ to achieve self-determination and that their separate and abstentionist oppositional posture will enhance Maori identity with its symbolism and message.⁵⁵

52 Greenland, "Maori Ethnicity as Ideology" in Spoonley, P *et al* (eds) *Nga Take: Ethnic Relations and Racism in Aotearoa/New Zealand* (1991) 93-95, 97-98.

53 *Supra* note 42, at 384 regarding Moana Jackson, and *supra* note 25, at 98 regarding Annie Mikaere and Moana Jackson.

54 *Supra* note 43, at 9.

55 *Supra* note 52, at 105.

V. THE MARXIST PARADIGM

Dr Jane Kelsey of Auckland Law Faculty is the analyst and activist whose articles and books reflect assumptions and models within the Marxist paradigm.⁵⁶ This *corpus* of work represents the most sustained and comprehensive analysis of the political economy of the New Zealand juridical-political apparatus 1984-1993 produced to date. Its omnibus coverage is unmatched by work in any other paradigm. Kelsey's thorough and readable work coherently presents a total analysis of the issues of the period, in a way rarely if ever achieved by non-Marxist legal-historiographic scholars. The clarity we gain from the overview is essential to understanding events of the period as a whole.

Since the 1970's, neo-Marxist analysis in many different forms, such as Marxist-Leninism, Gramscianism and Critical Legal Studies (hereafter CLS), including some feminist legal theory, has precipitated an irreversible paradigm shift in liberal, positivist, pluralist scholarship. This shift is especially evident in legal theory and in socio-legal and criminological writing. The CLS movement, with which Dr Kelsey's work is associated by some commentators, is as much a child as a progenitor of this shift.

Kelsey's theoretical framework, while having Gramscian nuances, appears to be primarily based on an instrumentalist view of the nature and function of law. Hunt crystallises the instrumentalist view:

Law is the instrument of a ruling class which functions directly at the behest and control of dominant economic and political interests as an instrument of oppression and domination. It is all the more successful because of the way it is able to disseminate "false consciousness", for example, spreading the illusion of neutrality and impartiality. Liberals and radicals connive consciously and unconsciously, because in proclaiming the possibility of "using law" they bind the subordinate classes more closely to capitalist values and exacerbate the "feeling of powerlessness". In general the use of law has the effect of increasing the domination of law over peoples' lives.⁵⁷

From the instrumentalist viewpoint the "constitutional revolution" has been myth-making - a "passive revolution"⁵⁸ or no revolution at all, leaving the dominant "common sense" unchanged. The jurisdictional expansion, recommendations and findings of the Tribunal, the evolution of the

⁵⁶ See *A Question of Honour? Labour and the Treaty 1984-1989* (1990) and *Rolling Back the State: Privatisation of Power in Aotearoa/New Zealand* (1993).

⁵⁷ Hunt, "The Radical Critique of Law: An Assessment" (1980) 8 *International Journal of the Sociology of Law* 33-46, 41.

⁵⁸ Kelsey, "Treaty justice in the 1980s" in Spoonley, *supra* note 52, at 128.

“principles of the Treaty” in the jurisprudence coming from the Court of Appeal, and changes in government policy and practice associated with changes in media perspectives and public perceptions of Maori/Pakeha relationships, all tend to be analysed as “rhetoric”. Behind this rhetoric “Maori remained in essentially the same position they had been in since 1840” and “arguably they were worse off”.⁵⁹

An assumption of Marxist/conflict theory is that classes, genders and races with unequal power in a capitalist, patriarchal settler state will be forever locked into super-ordinate/sub-ordinate positions unless capitalism, patriarchy and imperialism are overthrown by armed or ideological revolutions. Reformism is at best a palliative and at worst likely to perpetuate the “false consciousness” of the oppressed which manifests itself in their “passive consent” to a coercive social order. Hence, for instrumentalist analysts, the response of the state, the law and officialdom to challenges to the *status quo* is “inevitable”; social democratic reformism such as the “constitutional revolution” must “inevitably” lose out when the state must choose between the demands of capital and the rights of Maori:

This was not through some grand conspiracy although there were elements of that, but because the base line of the legal and political structures within which the battle was fought was absolute Crown sovereignty and the protection of a capitalist economy.⁶⁰

Pragmatic, rather than principled, application of the new “principles of the Treaty” jurisprudence, by judges who were merely responding to the climate of the mid-1980’s which demanded “flexibility” and sympathy to Maori claims, has won merely “pyrrhic” courtroom “victories”. Any sensitivity has been dictated by the internationalisation of concern over indigenous peoples’ rights, reflected and reinforced by the re-discovery of the doctrine of common law aboriginal title. Fears of accusations of institutionalised racism, of further entrenching Maori hostility, and of the judgments of their peers in the law who acknowledged Maori grievances have all played a part in bringing about the constitutional revolution.⁶¹

Addressing a process whereby events have enabled people to shed their “false consciousness”, Kelsey concludes that by the end of the 1980’s the “allegedly neutral” courts and allegedly “pro-Maori” Waitangi Tribunal are seen “for what they undoubtedly always were - arms of the state”.⁶²

59 Kelsey, *supra* note 11, at 262.

60 *Idem*.

61 *Ibid*, 213.

62 *Supra* note 58, at 128.

The process and outcomes of the “constitutional revolution” are conceptualised as a process of “legitimation”, meaning a process whereby “consent” is purchased from the oppressed by means essentially inimical to their interests. Instrumentalist theory influenced by Marxist-Leninism distinguishes reformism from revolution. Reformists serve the system by propping up structures “whose legitimacy depends on the oppression of others” and which will simply “not hand over power”.⁶³ In Lenin’s work, particular vitriol was poured on the “compromiser and social democrat” - identified as more of a handicap to the revolution than the class enemy himself. Maori (co-optees),⁶⁴ lawyers and academics (“organic intellectuals of capitalism whichever side they are on”)⁶⁵ are targets of criticism on the same sort of grounds.

The state’s intolerance of threats to its dominant position is instanced by the precarious tenure of semi-autonomous state agencies like the Tribunal which dare to challenge the state. Evidence adduced includes the consistent pattern of neglect of, and cutbacks to, the Tribunal’s infrastructure and inaction on the Tribunal’s recommendations by both Labour and National Governments.⁶⁶ Labour’s 1989 rewrite of the *Principles of the Treaty for Crown Action* to re-assert Crown sovereignty over Te Tino Rangatiratanga, and the Court of Appeal’s assertion that it, not the Tribunal, had authority to determine Principles, are also submitted as such evidence.⁶⁷

As a consequence of such state retaliation the Tribunal’s reports can be no more than a resource to be used by the state “to legitimate a fundamental denial of tino rangatiratanga in the name of honouring the Treaty... The Waitangi Tribunal had become a non-threatening but symbolically significant legitimating agent of the state”.⁶⁸

The intention of Kelsey’s book *Rolling Back the State* is to enhance the “understanding of the structural nature of the crisis affecting each [Maori and Pakeha]”, making it possible “to identify points at which contradictions can be exploited and alliances can be formed”. But Kelsey claims that “the

⁶³ Kelsey, supra note 11, at 269.

⁶⁴ Supra note 58, at 122.

⁶⁵ Kelsey, “‘Rogernomics’ and the Treaty of Waitangi - An Irresolvable Contradiction?” (1989) 7(1) *Law in Context* 66-92, 69.

⁶⁶ Parliamentary Commissioner for the Environment, supra note 15.

⁶⁷ Kelsey, supra note 58, at 122, and supra note 9, at 264. To this could be added the Treaty of Waitangi (Amendment) Act 1993, which prohibits the Tribunal from making recommendations affecting land in private ownership.

⁶⁸ Supra note 58, at 127.

traditional institutions of parliamentary democracy and the courts, and strategies of corporatism and welfarism, are not the way to achieve this".⁶⁹

Kelsey offers little to help "identify contradictions" as such, and, once parliamentary democracy and the courts are abandoned and the traditional forms of social democratic citizen/state settlements such as corporatism and the welfare state are rejected even as interim or defensive positions, few avenues of public activity in the framework of current politics are left. While I acknowledge that instrumentalist theory has had enormous diagnostic value, and that dialectical struggle must occur over the ideological framework and institutional forms and politics needed to address the current fiscal and ideological crises enmeshing New Zealand/Aotearoa, it must also be said that instrumentalist theory tends to disempower those who would attempt to provide practical answers to Lenin's question "what is to be done?"

Other analysts working within the Marxist paradigm who have also sought to identify contradictions in the dominant liberal ideology have not rejected the courts and law as resources to be exploited in the interests of revolutionary change. Marxist historian E P Thompson, for example, writes that "if we assume law is no more than a mystifying and pompous way in which class power is registered, we need not waste our labour studying its history and forms".⁷⁰ He comments further:

If the law is evidently partial and unjust, then it will mask nothing, legitimise nothing, and contribute nothing to any class's hegemony. The essential precondition for the effectiveness of law, in its function as ideology, is that it shall display an independence from gross manipulation and shall seem to be just. It cannot seem to be so without upholding its own logic and criteria of equity; indeed on occasion, by actually being just.⁷¹

Thompson has provocatively described the rule of law as "an unqualified human good" to curb the tyranny of the state. According to Hirst, Thompson was reacting against Marxists in his "own camp", "the libertarian anticommunist Left" who conceived law as purely repressive.⁷²

Franz Neumann much earlier identified the dialectic between law as repressive and law as beneficial within liberal ideology:

⁶⁹ Supra note 56, at 364.

⁷⁰ Thompson, "The Rule of Law" in Beirne, P and Quinney R (eds) *Marxism and Law* (1982) 136.

⁷¹ Ibid, 133.

⁷² Hirst, "Law, Socialism and Rights" in Carlen, P and Collison, M *Radical Issues in Criminology* (1980) 58, 94. Hirst specifically identifies Taylor, I, Walton, P, and Young, J *The New Criminology* (1973).

The general character of the law and its presumptions in favour of the right of the individual and against the state play three roles in modern society: a moral [role], in that they guarantee a minimum of freedom, equality and security; an economic [role], in that they make possible a competitive contractual society; [and] a political [role], in that in varying degrees they hide the locus of power.⁷³

Kelsey gives no sense of the dialectical nature of politics or law. Her Marxist-Leninist version of the Marxist paradigm emphasises the repressive character of the “constitutional revolution”, leaving its beneficial potential unexplored: the “constitutional revolution” is produced and reproduced through a “bicultural” jurisprudence which hides the *locus* of power by purporting to “accommodate the needs of Maori culture” within a “culturally sensitive” common law system which still denies Rangatiratanga. The Pakeha social order after the “constitutional revolution” is at best:

no different from any other time since 1840 unless it can be forced to address the central issue of economic and political power. In large part the success of resistance will depend on whether Pakeha can be convinced that the successful re-assertion of Te Tino Ranagiratanga... over Aotearoa is in their interests too.⁷⁴

No indication is given of how Pakeha might be “convinced” or of how alliances might be formed. It is a pity that Gramscian theory - a more empowering version of the Marxist paradigm - is merely nuanced as a framework in Kelsey’s work, since it resonates today with a far broader constituency of critical, change-oriented analysts and activists than does instrumentalism.

Ironically, two other commentators on the intellectual and ideological pedigree of critiques of the “constitutional Revolution” - both unsympathetic to Kelsey’s approach - have chosen to associate her work with Gramsci’s version of neo-Marxism or with CLS.⁷⁵ But both associations are misleading. To start with, the label CLS has been over-used, and in McHugh’s case has pejorative connotations. These commentators have conflated too many critical “radical” voices under the CLS and Gramscian labels for the labels to mean much.

The American CLS “movement” which emerged during the 1980’s is the dominant faction, largely non-Marxist in orientation.⁷⁶ Pre-dating the

⁷³ Neumann, F *The Democratic and the Authoritarian State: Essays in Political and Legal Theory* (1970) 170.

⁷⁴ *Supra* note 11, at 269-270.

⁷⁵ McHugh, *supra* notes 25 and 42, and Brookfield, “Maori rights and two radical writers” [1990] NZLJ 406.

⁷⁶ MacCormick, “Reconstruction after Deconstruction: A Response to CLS” (1990) 10, 2 *Oxford Journal of Legal Studies* 534 -558, 552.

emergence of CLS from the mid-1970's onwards, a significant Anglo-American Marxist, neo-Marxist⁷⁷ and anarchist⁷⁸ legal scholarship began to evolve, which now overlaps with and may even self-identify with CLS for convenience. Kelsey's instrumentalist, Marxist-Leninist (rather than Gramscian, Foucauldian, post-structuralist or post-modernist) work fits much more comfortably into this Marxist tradition.

What distinctive characteristics of Gramsci's Marxism make it important to use the Gramscian label with care and not conflate it with other forms of Marxist theory? Gramsci took the subject of ideological struggle seriously. He did not see its outcomes as exclusively determined by political and economic interests acting at the behest of capital. Gramscian theory addresses whether the crisis of hegemony is primarily economic or ideological. Whereas Marx and Lenin emphasised the base (that is, economic relations, understanding crises as primarily economic), Gramscian theory does not conceive of the hegemonic ideology as a coherent, economically-determined world view. Nor did Gramsci conceive of counter-hegemonic ideology as a "Trojan horse" of the mind, constructed in some other terrain by the "Party" elite to do battle with the bourgeoisie and capture the state by armed revolution.

Gramsci's theory allows for the influence of ideas on history and for the impact of free will; intellectuals are recognised as working both for and against the dominant bloc. The "masses" are seen, not as the "lumpen proletariat", but as endowed with intellectual qualities which are their source of power to create change.⁷⁹

Gramsci viewed the hegemonic ideology as the site of counter-hegemonic struggle, not simply as coerced nor as evidence of "false consciousness":

but as exercised as much through popular "consensus" in civil society... especially in advanced capitalist societies where education, the media, the law, mass culture, etc, take on a new role. To the extent that "superstructural" phenomena such as beliefs, values, cultural traditions and myths function on a mass level to perpetuate the existing order, it follows that the struggle for liberation must stress the task of creating a "counter-hegemonic" world view..., a new integrated culture. Gramsci insisted that socialist revolution should be conceived of as an organic *process*, not an event (or series of events), and that *consciousness transformation* is an inseparable part of structural change, indeed that it is impossible to conceptualize them as distinct phenomena.⁸⁰

⁷⁷ Eg Taylor, Walton, and Young (supra note 72), Fine, B *et al* (eds) *Capitalism and the Rule of Law* (1979), and Bierne and Quinney (supra note 70).

⁷⁸ Eg Bankowski, Z and Mungham, G *Images of Law* (1976).

⁷⁹ Carnoy, M *The State and Political Theory* (1984) 87.

⁸⁰ Boggs, C *Gramsci's Marxism* (1976) 17 and see chapter 2.

Maureen Cain, a prominent neo-Marxist sociologist of law, highlights significant contradictions in Gramsci's theory but stresses that it is not instrumentalist: monocausal, undialectical and unilinear explanations are not part of Gramscian analysis. From within this version of the paradigm "the revolutionary task in civil society is therefore a struggle for control of the law, that is a struggle to achieve authoritative norm-creating positions in a society based on active rather than passive consent".⁸¹

Alan Hunt, another prominent neo-Marxist legal theorist, has developed the most contemporary application of the relationship between social movements, rights and counter-hegemonic strategies. Ideological change is presented as the transformation of discourses such as the changed official discourse represented in the "constitutional revolution". Hunt observes that "new discourses are not invented but rather transform already existing elements and it is generally within this context that 'new' or original elements are added and, conversely, old elements are excised".⁸² Employing a Gramscian analysis to assess the impact of rights-based counter-hegemonic strategies such as the "constitutional revolution", he cautions:

it is not a matter of securing some immediate interest... a key feature of any such assessment revolves around their capacity to put in place a new or transformed discourse of rights which goes to the heart of the way in which the substantive issues are conceived, expressed, argued about and struggled over.⁸³

Within the instrumentalist paradigm employed in Kelsey's work, the evaluation of the significance of the "constitutional revolution" discounts its counter-hegemonic potential and highlights only its repressive or palliative function. Kelsey claims that "the passive revolution of the 1980s may have provided temporary respite but the prognosis for the 1990s [is] full scale crisis in the dual state".⁸⁴ The cryptic reference to the "crisis in the dual state" may perhaps signal that "non-bourgeois uses of bourgeois legality" are possible counter-hegemonic strategies.⁸⁵ Lenin identified the dual state as a striking feature of the revolution. He said that "side by side with the provisional government of the bourgeoisie there has developed another

⁸¹ Cain, M "Gramsci, the State and the place of Law" in Sugarman, D (ed) *Legality, Ideology and the State* (1983) 106 and 103.

⁸² Hunt, A "Rights and Social movements: Counter-hegemonic strategies" (1990) 17 *Journal of Law and Society* 309, 324-5.

⁸³ *Ibid*, 320.

⁸⁴ *Supra* note 58, at 129.

⁸⁵ De Sousa Santos, B "Popular Justice, Dual Power and Socialist Strategy" in Biernie and Quinney, *supra* note 70, at 365.

government, weak and embryonic as yet, but undoubtedly and actually existing and growing government".⁸⁶

Trotsky also saw "dual" power as a distinct condition of social crisis not peculiar to the Russian revolution.⁸⁷ Dual power or the dual state is understood in revolutionary Marxism as a temporary transitional phase "interlocking" the bourgeois state with the revolutionary state. It was assumed that such a condition could not last long "since two powers cannot exist in a state".⁸⁸

De Sousa Santos, an internationally known neo-Marxist Portuguese scholar, offers some analysis of "dual power" in an ethnographic study of the Portuguese "revolution" and self-government established by squatters in Rio.⁸⁹ He suggests that the concept of dual power might be used "in a weakened but nonetheless valuable form in non-revolutionary situations embodying complementary rather than confrontational powers... to address intra-class conflict at the surface level".⁹⁰ The dual state/dual power concept is useful when it is accompanied by recognition of contradictory state forms and class interests, compromises of power and the making of concessions, the plurality of centres of political power, and legitimacy from class power not conferred by the central government, all of which are compatible with Kelsey's concluding visioning about "what is to be done" in *Rolling Back the State*. In the end, though, this strategy requires that some instrumentalist assumptions are challenged.

Marxist-Leninist political strategies were predicated on a nineteenth century European notion of revolution through the self-emancipation of a homogeneous working class. Gramscian theory grappled with fascist populism in the inter-war period. Both, though Eurocentric and metropolitan, have considerable diagnostic utility, but only when employed with great care. For visioning a post-colonial practice of counter-hegemonic struggle in a post-Fordist era, a more empowering paradigm is needed. The Marxist paradigm, like the Prendergast and Rangatiratanga paradigms, clearly acknowledges the "ideological work" represented in the "constitutional revolution", but, whereas in Marxist instrumentalist theory the "constitutional revolution" legitimates the pernicious *status quo*, in the Rangatiratanga paradigm and the Prendergast paradigm the "constitutional

⁸⁶ Lenin, V I *Selected Works* (1960) quoted by De Sousa Santos, *ibid*, 366.

⁸⁷ Trotsky, L *Basic Writings* (1961) 101.

⁸⁸ Lenin, *supra* note 86, at 58-59.

⁸⁹ *Supra*, note 85, at 373.

⁹⁰ *Ibid*, 368.

revolution” has had a pernicious counter-hegemonic impact - pernicious for very different reasons, of course.

VI. THE ORTHODOX LEGAL PARADIGM

The exponent of the Orthodox Legal Paradigm (hereafter OLP) as a distinctive approach is Paul McHugh, a Pakeha New Zealander educated in New Zealand, Canada and England and author of a substantial *corpus* of work.⁹¹ McHugh’s work contributed the historical and comparative doctrinal perspectives which enabled tribunals and courts in New Zealand to view aboriginal title as part of New Zealand’s common law. Thus, aboriginal title became a professionally and intellectually respectable doctrine. McHugh’s work of the last decade now informs the courts, the Tribunal, government and the academy, not least because its style of presentation and form locates the path of change within the well mapped terrain of the common law.

McHugh explains the workings of the OLP as follows. It consists of:

(1) the definition of a Treaty claim or right and (2) the translation of that articulated Treaty right into the vocabulary of the legal paradigm. Step (1) is an exercise which legal method leaves to the plaintiff... The lawyer must perform (2), informing the claimant of the way the law responds to his (*sic*) articulated claim... In the context of Treaty claims the process of definition is clearly a task which only Maori can perform, whilst lawyers must tackle the second step of translation. The translation of a Treaty right is not the definition of a right. There may be a wide gulf between the definition and the translation of a particular Treaty right. Revelation of the gulf and provision of strategies for narrowing it is one of the most valuable tasks performed by orthodox legal methodology be it in legal articles or court judgements.⁹²

The orthodoxy of the method legitimates its discourse in a way that “politically correct” but “technically wrong” work will not do. Hence discourse emanating from the OLP cannot easily be dismissed as politics masquerading as law. The identification of the translation of Maori-defined claims into the Aboriginal rights strategy has indeed been a valuable service.

⁹¹ See eg “Aboriginal Title in New Zealand Courts” (1984) 2 *Canterbury Law Review* 235, *The Rights of the New Zealand Maori at Common Law* (unpublished PhD dissertation, University of Cambridge, 1987), and *The Maori Magna Carta: New Zealand Law and the Treaty of Waitangi* (1991). The OLP overlaps in methodology with the post-assimilationist paradigm and shares analysts and activists such as Professor Jock Brookfield, Professor Gordon Orr, Judge E Durie, Sir Geoffrey Palmer, Alex Frame, Sir Kenneth Keith, Sir Robin Cooke and Dr David Williams. See (1990) 14 *NZULR*, a special Treaty issue edited by Dr Peter Spiller.

⁹² *Supra* note 25, at 98.

The OLP's evaluation of the so-called constitutional "revolution" reflects its emphasis on the gradualist approach to understanding law and change and the translator role of lawyers. McHugh states:

the encounter with Treaty issues has required New Zealand lawyers to reassess and reorient the traditional positivist methodology. The developments I have described have all occurred in the context of orthodox legal doctrine and methodology. There has not been a revolution in traditional legal outlook so much as an organic and very gradual reorientation.⁹³

Analysts and activists critiquing the OLP from within the Prendergast (with the exception of Chapman), Rangatiratanga, Marxist, and post-assimilationist paradigms seldom, however, engage with it on the ground of doctrinal strategy. Critics of the OLP have focussed on *what* the political meaning and material impact of changed discourses such as legal doctrine might be. McHugh devotes considerable energy to critiquing his critics in what he over-generalises as the "so-called CLS movement" (including the Rangatiratanga and Marxist paradigms) and in the Prendergast paradigm,⁹⁴ but he tends not to theorise about *why* changes such as the "constitutional revolution" have occurred and *what* their political meaning might be, concentrating instead on *how* they can and do occur within legal doctrine. He regards the "reorientation" of the common law achieved through orthodox methods as axiomatically a "good thing": after all, the "wrong approach to international law, contractual principle and British colonial practice",⁹⁵ which constituted the dominant paradigm for almost a hundred years of New Zealand legal practice, has been corrected.

Even within the self-circumscribed parameters of the OLP, however, it is hard to see the constitutional developments of 1984-90 as "gradual" (most change having taken place in the decade of the 1980's after a hiatus of almost 100 years) or as "organic". The *volksgeist* did not call for change. The changes were not popular and were indeed handicapped by fear of a backlash. The OLP as a method does not need to contextualise these constitutional developments, but McHugh needs to when engaging his critics on their ground.

The political meaning of doctrinal change needs to be located somehow within a complex process of structuration. This process involved the interplay of traditional and radical Maori leadership, activists in the legal profession and the academy from all paradigms, and institutions such as the media, an activist judiciary and the programmes and policies of biculturally

⁹³ Idem.

⁹⁴ Supra note 42.

⁹⁵ Palmer, supra note 14, at 72; Frame, "A State Servant Looks at the Treaty" (1990) 14 NZULR 83.

committed segments within successive Labour Governments. McHugh's lack of contextuality makes his work vulnerable to critics concerned about the socio-political "meaning" of doctrinal legal change.

Missing the point that his critics have been asking whether such "Treaty justice" is *desirable*, not whether it is *possible* through the OLP, McHugh criticises them for their dismissiveness, which

hardly deserves description as a critique, for it absolves its proponents from any form of intellectual engagement with the paradigm except through what is usually superficial and selective scholarship based on a weak to non-existent historical method tailored to reveal the conspiratorial character of Pakeha law and governance.⁹⁶

McHugh complains that:

[a]ny description, then of change which signifies greater receptivity to the Treaty within the orthodox legal paradigm is treated with scorn. Those who inhabit that paradigm are the "organic intellectuals of Pakeha capital", or depicted as deluded, starry-eyed or short-sighted proponents of a glorious, justice-delivering common law.⁹⁷

As my earlier description and analysis of other paradigms attempts to show, these critical voices, with the exception of the Marxist paradigm, do indeed detect greater receptivity - possibly even a "revolution" - in the paradigm used in the dominant, Pakeha, legal system. They argue, however, about the value of the change.

The OLP method seems compelled to de-emphasise as atypical and politicised significant aspects of legal evolution which have changed the status of the Treaty, if these are not outcomes of orthodox common law evolution. To be internally consistent with its own method, a purist version of the OLP like Austinian positivism and Langdellian orthodoxy⁹⁸ permits only rather linear explanations of change.⁹⁹ Judges, after all, only "find" the law which originates as "the command of the sovereign backed by threats". Thus, sets of interpretative principles which bespeak the wairua (spirit) of the Treaty are problematic because they have been promulgated both by

⁹⁶ Supra note 25, at 98.

⁹⁷ Idem.

⁹⁸ The OLP's depiction of the common law and its evolution resonates with this orthodoxy: "Law, considered as a science, consists of certain principles or doctrines. Each of these doctrines has arrived at its present state by slow degrees ... extending in many cases through centuries. This growth is to be traced through a series of cases" (Langdell, *C C A Selection of Cases on the Law of Contracts* (1871) viii, quoted in Twining, *W Karl Llewellyn and the Realist Movement* (1973) 11).

⁹⁹ Mulgan, *R Maori, Pakeha and Democracy* (1989) 114.

activist appellate courts operating in an almost Americanised fashion and by the Tribunal, a mere commission of inquiry. Both are rather unorthodox modes of adapting Anglo-New Zealand common law.

Perhaps McHugh does not treat the Tribunal and the triangulated political dynamic surrounding it, the courts and the executive, as of central importance for this reason? Yet he tantalisingly describes the nature of his major work, *The Maori Magna Carta*, by stating that “ultimately the topic of this book is the legal framework for the exercise of power within the New Zealand state”.¹⁰⁰ Unfortunately, given the encyclopaedic depth and breadth of McHugh’s scholarship, he does not attempt to contextualise the legal framework by articulating the nature of either “power” or the “state”. An analysis of “power” would have to deal with the socio-political meaning of doctrinal legal change and in such a debate McHugh and his critics in other paradigms would not be talking past each other.

Nigel Jamieson, reviewing this 392-page volume, highlights the modest place occupied by the Tribunal in McHugh’s analysis:

Would it detract from the legal status of the Waitangi Tribunal to recount something of its history in terms of party politics? Thirty four pages on the Treaty of Waitangi Act 1975 subsume all government activity as the work of the Crown - a surprisingly strict legal account for one who opposes conventional legal theory on partisan grounds.¹⁰¹

One presumes “conventional legal theory” here means Prendergast jurisprudence?

McHugh concludes about the Tribunal that “as an aboriginal claims forum it is certainly unique in the Australasian and North American experience”, that it had achieved considerable mana among Maori, and status and profile among Pakeha, through its eminently reasonable approach, the practical application of principles, shunning of extremism, and avoidance of a strictly reparative approach, focussing on needs rather than on desserts.¹⁰²

McHugh considers neither arguments about power made in the 1960’s by “radical” poverty lawyers,¹⁰³ nor arguments made in the 1980’s by feminist, CLS, First Nations/Indigenous/ Black scholars, that the lawyer/translator frequently if not invariably employs a disabling interpretive monopoly

¹⁰⁰ *Supra* note 42, at 3.

¹⁰¹ Jamieson, “Books: The Maori Magna Carta - Fact or Fiction, Myth or Reality?” (1992) NZLJ 101

¹⁰² *Supra* note 42, at 330.

¹⁰³ Wexler, “Practicing law for Poor People” (1970) *Yale Law Journal* 1049.

reflecting the fetishism of rights in liberal legal ideology.¹⁰⁴ McHugh unquestioningly accepts as “given” the validity of the process he describes. Ironically, his own intelligent and thorough, though brief, description of the Tribunal’s way of working illustrates how this “unique” body has deviated procedurally and methodologically from the orthodox forensic procedures of courts and tribunals.¹⁰⁵

Without an analysis of power or the state, the Treaty tends to be reified. It becomes the agent of change, propelled by the inexorable logic of the common law. For example, as the encounter between explorer and indigenous people wrought irreversible change, so “the Treaty encounter has required New Zealand lawyers to re-assess and reorient positivist methodology”.¹⁰⁶ McHugh eschews attempts to explain why actors or agencies of the state permit change or paradigm shifts. He states simply that “the advances in legal scholarship on the Treaty have been underpinned by an unwillingness to regard law as a discrete intellectual system removed from the mainstream of other thought and the circumstances of New Zealand society”.¹⁰⁷ How does this fit with his earlier defence of the OLP and his repudiation of an American Realist or CLS approach, since the latter *par excellence* examine law in the mainstream of other thought and the circumstances of society? By way of an answer within the parameters of the OLP he states:

The movement away from the *Wi Parata* mentality by the legal community of this country was accomplished by two methods. First, orthodox case analysis exposed the internal contradictions of the *Wi Parata* approach and its incompatibility with other cases from Anglo-American jurisdictions. Second, an approach examined here rejected late nineteenth century attitudinizing about Maori rights. Instead lawyers have tried to capture or at least to comprehend the intellectual milieu within which British colonial administrators confronted with questions of tribal rights had operated. Lawyers have thus been exposed to a form of intellectual history which challenges dogged positivism.¹⁰⁸

¹⁰⁴ See Turpel, “Aboriginal Peoples and the Canadian Charter: Interpretive Monopolies and Cultural Differences” (1989-90) 6 Canadian Human Rights Yearbook 3; Karuishi, *V Jurisprudence as Ideology* (1991); and Medcalfe, *L Law and Identity: Lawyers, Native Americans and Legal Practice* (1989). Boast, “Treaty Rights or Aboriginal Rights” [1990] NZLJ 32, 33 makes the point that to bring Maori rights in under the resuscitated doctrine of aboriginal title is merely to view them through the monocultural prism of the common law and does not affirm their unique and independent status.

¹⁰⁵ Supra note 42, at 309-321. See also Durie and Orr, “The Role of the Waitangi Tribunal and the Development of a Bi-cultural Jurisprudence” [1990] NZULR 62, 79-80.

¹⁰⁶ Supra note 25, at 98.

¹⁰⁷ Ibid, 92.

¹⁰⁸ Ibid, 94.

McHugh seems to be saying that lawyers and legal academics working within an orthodox paradigm are nevertheless the agents of change, somehow motivated by a new rationality based on new knowledge and new methods. Such staunch advocacy for the flexibility of the late twentieth century common law and, implicitly, its inherent capacity to do justice for Maori smacks of the “myth of rights”.¹⁰⁹ This is hardly a case of “rights without illusions”.¹¹⁰

VII. CONCLUSION: FROM A POST-ASSIMILATIONIST PARADIGM TO A POST-COLONIAL ONE?

Most analysts and activists who have promoted and supported the “constitutional revolution” appear to be committed to a post-assimilationist immediate future and the possibility of a post-colonial future in the long term. One presumes that the choice of path to realise this vision is predicated on the assumption that the politics of the twenty-first century will consist of contest and settlement within the dialectic of affinities and difference.¹¹¹ There may be recognition that outcomes will be transitory and thus continually under review; that power requires equalising, and that representation and participation in the affairs of the state require voice and choice; and that multidimensional antagonisms on the axes of race, gender, class and region require multidimensional, multicultural and bicultural institutional vehicles and processes to achieve settlements. Hence the interest in institutional re-design, biculturalism and electoral reform, at least since 1985.

The decolonising of assimilationist culture will be slow and difficult as difference is interlocked with affinities and the past with the future.¹¹² James argues that the acceptance of the Treaty is the most important act of independence and affirmation of nationhood since the reluctant acceptance of legal independence in 1947 when New Zealand recognized the Statute of Westminster of 1932. The new constitution unlike Canada’s patriated Constitution of 1982 was made more by accident than design. Nonetheless the now accepted post-revolutionary rhetoric of a bicultural partnership

¹⁰⁹ See Scheingold, *supra* note 26. Scheingold’s monograph significantly predates the CLS movement, though McHugh implies that Scheingold’s work is somehow an expression of it (*supra* note 25, at 101).

¹¹⁰ *Supra* note 23, at 100.

¹¹¹ Levine states: “The interests of the tangata whenua which the treaty guarantees necessitate an incorporation of taha Maori in the public sector. It is the nature of the secular, civil culture of the state itself that is being challenged to become bicultural.” (*supra* note 34, at 438).

¹¹² Ashcroft B, Griffiths G, and Tiffin H *The Empire Writes Back; Theory and Practice in Post Colonial Literatures* (1989) 195.

requires the “fashioning of an identity and a wholeness out of a conflict no one else can resolve”.¹¹³ James does not assume that the process of “decolonising” will always be progressive. Any counter-hegemonic struggle is shaped by advances and retreats, changes of pace on the shared and hence contested terrain of the dominant ideology. James warns that “there are now no comfortable colonial myths to retreat to”, and that “whether they like it or not - and many do not like it - all European New Zealanders now know they live inescapably alongside a South Pacific race and they are inescapably part-defined by that.”¹¹⁴

The Prendergast paradigm alone has a concrete vision of the future and the means by which settlements will be achieved. This vision consists of the present with a gesture in the direction of cosmetic multiculturalism, without the Tribunal and without an activist judiciary of the variety currently on the bench. The OLP suggests Treaty justice but “justice” to be done by predominantly monocultural means, namely, the common law. The Ranagatiratanga paradigm envisages a splitting of the *grundnorm* emphasising difference rather than affinity. The post-colonial vision embryonically found in the post-assimilationist paradigm explicitly envisages a bicultural future achieved by bicultural means.

A consciousness has evolved in which the nature of identity of all citizens is contested, Maori self-confidence has been significantly increased and reinforced, official discourse on the Treaty has been radically altered, the history of Pakeha/Maori relations has been re-written, and the Treaty has been constitutionalised. Alongside such developments the momentum for a “counter revolutionary” backlash¹¹⁵ is building within the hegemonic ideology of the post-Fordist market state, the material circumstances of Maori are largely unchanged and conditions for the rest are worsening. As Kelsey concludes in *Rolling Back the State*, now is the time for cross-cultural alliance building. In my view, such alliance building and the new politics to be created cannot afford to forego the political resources that social rights, parliamentary democracy and citizenship still offer. The “constitutional revolution” has been a necessary but not sufficient precondition for the realisation of a post-colonial Aotearoa/ New Zealand.

¹¹³ Supra note 18, at 123.

¹¹⁴ Idem.

¹¹⁵ Vowles, J and Aimer, P *Voters Vengeance :The 1990 Election in New Zealand and the fate of the Fourth Labour Government* (1993)171-4.



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**The Court of Appeal, 1958 (from left)
JUSTICE CLEARY; JUSTICE GRESSON, President; JUSTICE BARROWCLOUGH, Chief Justice; JUSTICE NORTH**



The Court of Appeal, 1968 (from left)
JUSTICE McCARTHY; JUSTICE NORTH, President; JUSTICE WILD, Chief Justice; JUSTICE TURNER.

Inset: Temporary judges of the Court of Appeal (left) JUSTICE WOODHOUSE; (right) JUSTICE RICHMOND.

**JUDGES AT WORK:
THE NEW ZEALAND COURT OF APPEAL (1958-1976)**

BY PETER SPILLER*

I. INTRODUCTION

On 11 September 1957, the New Zealand Attorney-General, the Hon John Marshall, moved the second reading of the Bill for the establishment of a “permanent and separate” Court of Appeal. He declared that this was “a notable landmark in our judicial history and a significant advance in the administration of justice in New Zealand”.¹ The Bill was duly passed and the Court commenced sitting in February 1958.

In this article I shall analyse the reasons for the creation of the so-called “permanent and separate” Court of Appeal. I shall then examine the Court of Appeal judiciary, the relationship between the Court of Appeal and the Supreme Court, and the work of the Court of Appeal, during the tenures of the first four Presidents of the Court. I shall conclude by assessing the extent to which the expectations of the Court at its outset were realised in the period under review. The aim of this article is to provide insight into the personalities and processes that have shaped the development of the law in the highest local Court in New Zealand.

II. GENESIS OF THE “PERMANENT AND SEPARATE” COURT OF APPEAL

The New Zealand Court of Appeal existed as an effective entity from February 1863, when it commenced sitting in terms of the Court of Appeal Act 1862.² The Court had been established in response to requests by the judges for a Court within New Zealand which would provide a level of appeal more accessible than that which lay to the Judicial Committee of the Privy Council in London.³ The Court was composed of all the judges of the Supreme Court. It has been observed that New Zealand judges were required to be judges of first instance and of the Court of Appeal because “in the early stages of our history one man had to play many parts”.⁴

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¹ NZPD Vol 313, 1957: 2373.

² Officially, the first “Court of Appeals” was created by the Supreme Court Amendment Ordinance 1846, and comprised the Governor and members of the Executive Council, other than the Attorney-General. George Barton comments that this Court was convened once before it was abolished in 1860 (letter 5 November 1993).

³ *Lyttelton Times*, 14 February 1863.

⁴ *Supra* note 1, at 2377. See also Judicature Amendment Act 1913, s 5.

The policy of drawing the Appeal Court from the ranks of the Supreme Court judiciary was essentially a pragmatic solution in a thinly-populated country and could operate effectively only with a small volume of litigation. By the early twentieth century, in the face of an increase in population and litigation, there was pressure for the establishment of a separate Court of Appeal, and by the 1950's this pressure had become irresistible. There were two major complaints levelled at the Court of Appeal. First, not all Supreme Court Judges were suited to Court of Appeal work and so the performance of judges acting in an appellate capacity was inevitably uneven.⁵ It has been said that the Supreme Court, during the course of its history, had a "very mixed bag of judges, including some of limited experience and capacity and who were not up to the mark of appellate work".⁶ Secondly, the process of repeatedly switching Judges from the Supreme Court to the Court of Appeal and back again (referred to as "a game of shuttlecock and battledore") increasingly undermined the effective functioning of the Court of Appeal. This process resulted in lengthy delays in obtaining hearings, "appalling pressure" on the judges, and further delays and limited time in producing reserved judgments.⁷ Furthermore, the competing demands of Supreme Court duties meant that judges who heard appeal cases had little chance to confer with each other on their ideas and views at the conclusion of Court of Appeal sessions, and were left with the task of "having to work on and exchange drafts of judgments in the midst of their Supreme Court duties".⁸ Not surprisingly, without opportunity for calm, detached and collegial deliberation, the Court was largely content to draw upon established legal precedents, notably from English law.⁹

Nevertheless, until the mid-1950's, attempts to establish a separate and permanent Court of Appeal foundered in the face of resistance from many of the judges.¹⁰ Their opposition centred on a reluctance to lose their automatic Court of Appeal status and the advantage of meeting with other judges in appeal sessions, their fear that the prestige of the Supreme Court would be lowered by a separate Court of Appeal, and their suggestion that a small Court of Appeal could be dominated by a strong judge and lose touch with public sentiment.¹¹ However, the members of the bar continued to press for change, and by the mid-1950's several of those who had actively

5 Editorial, "A Separate Court of Appeal" (1947) 23 NZLJ 29.

6 Interview, Sir Alexander Turner, 16 May 1993.

7 *Supra* note 1, at 2377 and 2384.

8 Interview, Sir Robin Cooke, 28 May 1993.

9 "The Supreme Tribunal of the British Commonwealth?" (1956) 32 NZLJ 235.

10 See (1934) 10 NZLJ 180, (1946) 22 NZLJ 192, and (1947) 23 NZLJ 61.

11 Leary, "A Permanent Court of Appeal" (1954) 30 NZLJ 109, 110-1.

advocated the advantages of a separate Court of Appeal had been appointed to the bench.¹² Finally, in 1956, the Chief Justice, Sir Harold Barrowclough, reported to the Government that the Judges had come round to supporting a permanent Court of Appeal, chiefly because of the difficulty and inconvenience of preparing reserved judgments “without conference”.¹³

The aim of reconstituting the Court of Appeal was thus to replace a system in which all Supreme Court judges periodically exercised appellate functions with a system whereby only certain judges with particular aptitude for appellate work were appointed as Court of Appeal judges. It was hoped that, as the Court of Appeal judges worked in combined and consistent operation, the work of the Court would be despatched with heightened expertise and efficiency, and greater harmony and certainty would be brought to the New Zealand legal system.¹⁴ Ronald Algie MP, during the second reading debate of the Judicature Amendment Bill, declared that through the passing of this Bill “our work will be done better, by men better qualified to do it”.¹⁵

III. THE COURT OF APPEAL JUDGES

The Judicature Amendment Act 1957 provided that three judges of the Supreme Court would be appointed as judges of the Court of Appeal, and that one of them would hold the office of President of the Court.¹⁶ The judges so appointed had seniority over all the judges of the Supreme Court except the Chief Justice or the acting Chief Justice.¹⁷ The Attorney-General, in introducing the Amendment Bill, acknowledged that five judges “would certainly give greater strength to a Court of Appeal as a separate Court”, but he believed that a Court of three could “deal satisfactorily with the majority of cases”.¹⁸

The Act further provided that a judge might be appointed as a judge of the Court of Appeal “either at the time of his appointment as a Judge of the Supreme Court or at any time thereafter”.¹⁹ This allowed for members of the Court to be appointed directly from the bar or from the ranks of Supreme

¹² [1972] NZLJ 109, per North P.

¹³ *Supra* note 1, at 2374.

¹⁴ “Court Structure” [1976] NZLJ 122, 126-7.

¹⁵ *Supra* note 1, at 2382. In like fashion Sir Robin Cooke stated that the new Court of Appeal was meant to be a “more efficient and a better equipped Court than its predecessor” (*supra* note 8).

¹⁶ See Judicature Act 1908, s 57(2).

¹⁷ See Judicature Act 1908, s 57(2, 3 & 6).

¹⁸ *Supra* note 1, at 2376.

¹⁹ See Judicature Act 1908, s 57(3).

Court judges. Attorney-General John Marshall indicated that it would be the rule for judges of the Court of Appeal to be appointed from the Supreme Court bench, as there was “much to be said for an appeal Judge having the experience of a Judge of first instance behind him”. However, he noted that there might “from time to time be members of the Bar who would be unwilling and perhaps less suited for the work of a Supreme Court Judge, but who would be eminently qualified for an appointment to the Court of Appeal”.²⁰ In the event, during the period 1958-1976, of the seven men appointed as permanent members of the Court of Appeal, only one (Cleary J) was appointed directly from the bar.

The first President was Kenneth Gresson (1891-1974), who was in office from February 1958 to March 1963. Gresson P served in the First World War and qualified LLB at Canterbury University College in 1917. He practised in Christchurch for nearly thirty years, during which time he was also a lecturer and later the Dean of the Law Faculty at Canterbury University College.²¹ In 1947 he was appointed to the Supreme Court bench, and at the time of the constitution of the separate Court of Appeal he was the most senior Supreme Court judge after the Chief Justice.²²

During his time as President of the Court of Appeal, Gresson P won respect for his leadership and judicial qualities. He exercised a “firm presence on the bench” and was a tireless worker.²³ The soundness and quality of his judgments were reflected in fields as diverse as automatism and estoppel.²⁴ Gresson P was described as “a down-to-earth, no-nonsense Judge - a plain man of the law”.²⁵ He was more conservative than his colleagues in his approach to legal precedent, particularly that emanating from England. In *Corbett v Social Security Commission*, Gresson P (in a minority decision) “regretfully” felt bound by a standing decision of the House of Lords, notwithstanding his strong reservations about the precedent.²⁶ Yet, in cases where he did not consider himself bound by legal precedent, he showed an independent-minded and at times liberal spirit. In *Re Lolita*, he declined in a

²⁰ Supra note 1, at 2377.

²¹ Cooke P described Gresson P as “essentially an equity lawyer from Christchurch with a robust Canterbury outlook” (“Court of Appeal President” [1986] NZLJ 170, 177).

²² “Tributes to Sir Kenneth Gresson” [1974] NZLJ 511.

²³ Supra note 6, and interview Sir Clifford Richmond, 24 March 1993.

²⁴ *R v Cottle* [1958] NZLR 999 and *Auckland Harbour Board v Kaihe* [1962] NZLR 68. Gresson P’s views on automatism were adopted by the House of Lords as correctly stating the law (*Bratty v Attorney-General for Northern Ireland* [1963] AC 386).

²⁵ Supra note 22, at 513.

²⁶ [1962] NZLR 878, 896 and 898. George Barton writes: “I have a vivid recollection of the argument in *Corbett* when I was criticising the judgment of the House of Lords... Gresson said to me, rather pugnaciously: ‘Are you saying that the House of Lords was wrong?’ I said: ‘Yes, it was’. He said: ‘We can’t have that’” (supra note 2).

minority judgment to hold that a publication was indecent for “unduly emphasising matters of sex”. He declared that “liberty of expression is too precious a thing to be lightly interfered with”, that it should “extend to every field of human conduct, including sexual behaviour”, and that he saw “no reason why the generation growing up should not be permitted to learn from their reading something of the vagaries of sexual behaviour”.²⁷

Whereas seniority on the Supreme Court Bench was recognised with the appointment of Gresson P it was not with the appointment of the other two permanent members of the new Court of Appeal.²⁸ Alfred North (1900-1981) was at the time of his appointment the fifth-ranking Supreme Court judge (after the Chief Justice), having served for six years on the bench. North had come to the Supreme Court bench in 1951 after graduating LLM from Canterbury University College and practising for over twenty-five years, the last sixteen in Auckland. His career in practice was noted for the width of the field that it covered, and in conducting his colossal Auckland practice he was regarded as a formidable lawyer “no specialist but a general practitioner worthy of any brief”.²⁹ North J served as a judge of the Court of Appeal for fourteen years, and during the last nine years he was President. Thus, his personality and contribution had a decisive influence on the Court in its foundation years.

North J’s great strength was an intuitive legal logic grounded in practical reality: his colleague Turner J commented that he had “the best legal bones in New Zealand”.³⁰ North J remarked that he had had the “considerable advantage of living in a family where discussion and indeed argument was the order of the day and views were freely exchanged between my father [a Baptist minister] and his four sons”, and his subsequent wide legal practice gave him self-reliance and broad exposure to human affairs and court work.³¹ North J’s clear understanding of “the ordinary run of cases” and “the nature of things” in jury trials, and his exposure of arguments that involved “results both surprising and anomalous” characterised the judgments which won him renown.³² In *Corbett v Social Security*

²⁷ [1961] NZLR 542, 551. See the reference to Gresson’s judgment in Blom Cooper, L J *The Language of the Law* (1965) 261.

²⁸ North P remarked that “seniority could have no predominant place when it came to the selection of members of [the Court of Appeal]” (“Sir Alfred North Retires” [1972] NZLJ 107, 109).

²⁹ “Court of Appeal: The New President” [1963] NZLJ 447.

³⁰ Supra note 6.

³¹ Supra note 28, at 108.

³² See eg *R v Cottle* [1958] NZLR 999, 1029 (approved by the House of Lords in *Bratty v Attorney-General for Northern Ireland* [supra note 24]); and *Truth (NZ) Ltd v Avery* [1959] NZLR 274, 290 (approved by the English Court of Appeal in *Broadway Approvals v Odhams Press* [1965] 2 All ER 523, 535).

Commission, he refused to accept as conclusive an objection by a Minister of the Crown to the production of documents: he declared that “it is all very well to say that it is the Judge who is in control of the trial, not the executive, and that the decision ruling out the documents is the decision of the Judge, but this statement has a somewhat hollow ring if the Judge has no power to overrule an objection made [by the Minister]”.³³ North P’s insight into human behaviour buttressed his judgment in *Atkinson v Brown*, where he decided that a statutory tribunal was entitled to deliver a majority decision. He commented that the Legislature must have intended the statute to work smoothly, and that to hold otherwise “one member, by adopting an obstructionist attitude, could impede the whole system of appeal”.³⁴

North J’s logical, practical insight enabled him quickly to discern the essence of legal issues.³⁵ In *Jeffs v NZ Dairy Board*, North P noted that “the interesting argument we heard from counsel ranged over a wide field, but I am of opinion that at the end of the day the case for the appellants really narrowed down to one point, namely whether they were given an adequate opportunity to present their case to the deciding body, namely to the board”.³⁶ North P’s insight led him to decisions which he considered were most in accordance with logic and the climate of New Zealand law, even, on occasions, where these conflicted with authority.³⁷ At the same time, North P was enough of a traditional lawyer to be constrained by established precedent and norms. In *Loan Investment Corporation Ltd v Bonner*, he reversed a decision of Wild CJ on the basis that it is “all very well to speak of the substance of an agreement such as this, but, in my view, the parties are bound by the form in which they expressed their contract”. He declared that he was “content to follow” the judgment of Sir Joshua Williams “one of our most distinguished jurists” in the absence of “any compelling authority to the contrary”.³⁸ While North J was apt to express his judgments in clear, bold and at times forthright language,³⁹ he was open to admitting when issues presented difficulty, was sensitive to the needs of

³³ [1962] NZLR 911. But cf North J’s judgment in *Hinton v Campbell* [1953] NZLR 573.

³⁴ [1963] NZLR 755, 768.

³⁵ Cooke P believed that North P’s “speed and depth of thought were unique” ([1981] NZLJ 337).

³⁶ [1966] NZLR 73, 86 (dissenting judgment upheld by the Privy Council [1967] NZLR 1057).

³⁷ *R v Naidanovici* [1962] NZLR 334, 339 and *Dragicevich v Dragicevich* [1969] NZLR 306, 308.

³⁸ [1968] NZLR 1030, 1034 (upheld by the Privy Council [1970] NZLR 724).

³⁹ See eg *Chemists’ Service Guild v Stilwell* [1966] NZLR 654, 663 (dissenting judgment upheld by the Privy Council [1969] NZLR 78). Dugdale recalled North P’s “marked acerbity of manner” ([1993] NZLJ 300).

litigants, and was gracious in his acknowledgement of the help and support he received from his colleagues on the bench.⁴⁰

The third foundation member of the Court of Appeal was Timothy Cleary (1900-1962). Cleary had qualified in law at Victoria University College in 1920, and over the ensuing thirty-seven years established an enormous practice centred in Wellington. During his legal career at the bar, Cleary won the respect and great affection of the legal profession as an industrious, knowledgeable, self-effacing man of formidable intellectual equipment and of the highest integrity. From 1954 until his elevation to the Court of Appeal, Cleary served as President of the New Zealand Law Society, and he was seen as a logical choice to accompany Gresson P and North J on the Court of Appeal bench.

Cleary J's long-term impact on the Court of Appeal proved to be limited, because of the shortness of his tenure on the bench (which ended with his death in August 1962) and his lack of previous judicial experience.⁴¹ However, Cleary J's clear-thinking and industrious approach left its mark in judgments which are still relied upon today. In *Heard v NZ Forest Products*, he displayed a knowledge of legal principle and lucidity of expression in terms which also showed his characteristic kindness. In the face of argument which showed that counsel "had not quite appreciated the rather confusing line of authority which distinguishes the position of a plaintiff who is truly *volens* and a plaintiff who is only guilty of contributory negligence", he provided a classic outline of the distinction between the two concepts.⁴² Further, he played a behind-the-scenes role which gave support and strength to the bench in its early years. Significantly, in *Wood v Attorney-General*, where argument had been heard in May 1962 but judgment was delivered in September 1962, Gresson P reported that a draft of the judgment of the Court had been prepared by Cleary J before his death and that this had later been settled in its final form by the remaining members of the Court.⁴³ Following Cleary J's death, his successor Turner J remarked that "the country has lost one of the chief supports of its judicial structure" and that the judges of the Court of Appeal mourned the death of their "daily associate and helper".⁴⁴

⁴⁰ See eg [1970] NZLR 590, and [1971] NZLR 312, 347 and 873.

⁴¹ It has been suggested that, had Cleary J had the experience and confidence of having been a Supreme Court judge, he "would have been remembered as an outstanding appellate Judge rather than an extremely competent one" (Pope, "Whither the Court of Appeal?" [1973] NZLJ 329).

⁴² [1960] NZLR 329, 356-7.

⁴³ [1963] NZLR 44.

⁴⁴ "Mr Justice Cleary: Tributes in Court" [1962] NZLJ 370, 372.

Alexander Turner (1901-1993) was a judge of the Court of Appeal from 1962 to 1973 and during his last eighteen months served as President. He had graduated MA (in economics) and LLB at Auckland University College, and then practised in Auckland for thirty years. In 1953 he was made a Supreme Court judge, and at the time of his appointment to the Court of Appeal was second in seniority on the Supreme Court bench. During the four years prior to his permanent appointment to the Court of Appeal, Turner J served periodically in the Court in a temporary capacity and was involved in key judgments.⁴⁵

Turner J's judicial attributes stood in marked contrast with those of his colleague North P: it has been said that "Turner was more scholarly, more patient, more serene, less impulsive".⁴⁶ Turner J acquired a reputation as one of New Zealand's most distinguished jurists by virtue of his wide knowledge (including economic theory), painstaking research, analytical ability and lucid exposition.⁴⁷ On numerous occasions North P would pay tribute to the detailed and careful analysis which Turner J conducted of the issues before the Court and which added great weight to the Court's findings. In *Morrison v USS Co*, North P noted that Turner J had "endeavoured to rationalise the plea *volenti non fit injuria* in the field of negligence" and had "no doubt that his judgment will be closely studied".⁴⁸ Turner J was regarded as a great expositor of the law, as reflected in his publications and in his judgments, and readers shared the delight with which Turner J grappled with ideas and words in written form.⁴⁹ His statements were quoted with approval by the Privy Council,⁵⁰ and a number of his judgments were to be highly influential in New Zealand law.⁵¹

⁴⁵ The Law Reports reveal that Turner J was an additional judge of the Court of Appeal in June-July 1958, July-August 1960, and July 1961. See eg *In Re the Bed of the Wanganui River* [1962] NZLR 600.

⁴⁶ "Obituary. The Right Honourable Sir Alexander Kingcome Turner" [1993] NZLJ 299, 303 (per Cooke P).

⁴⁷ *Ibid*, 301 (per Barker J). For evidence of Turner J's economic theory, see *Wellington City Council v National Bank* [1970] NZLR 660, 678 and *Holden v CIR* [1973] 2 NZLR 523.

⁴⁸ [1964] NZLR 468, 482.

⁴⁹ See eg *J T Coltman Ltd v Police* [1971] NZLR 203, 212 ("So much for logical relevance. Now for legal relevance"). Turner P's writing skills were evident also in his second edition of G S Bower's *The Doctrine of Res Judicata* (1969), which was characterised by "exact legal scholarship" and "lucid elegance of style" ([1970] NZLJ 53).

⁵⁰ See eg *Mangin v CIR* [1971] NZLR 591, 597-8 and *Holden v CIR* [1974] 2 NZLR 52, 57.

⁵¹ See eg *R v Convery* [1968] NZLR 426, 436 and *Naniseni v The Queen* [1971] NZLR 269, 270.

Turner J was a cautious judge, who repeatedly warned against judicial legislation and against “lightly changing” settled rules of law and practice, as he believed that it was “better that the law should be certain”.⁵² In *Ross v McCarthy*, Turner J upheld an archaic rule of English law preventing liability of farmers for stock trespassing on highways, on the basis that it was not proper to overturn such a long-standing rule, especially in the light of “the established interests of the farming community in a country like this”.⁵³ However, Turner J had a keen sense of justice, and was certainly open to the modification of rules of procedure where appropriate.⁵⁴ This reflected Turner J’s much-respected integrity and his concern for individual human rights. In *Blackie v Police*, the point at issue was whether the prosecutor (an experienced traffic officer) should be allowed to give in evidence his opinion as an expert that the accused was guilty. Turner J emphatically declared that “if such a procedure is to be held acceptable it will not be with my assent”, and directed that the conviction be quashed and the matter remitted to the Magistrate’s Court.⁵⁵

In 1963, North and Turner JJ were joined on the Court of Appeal bench by Thaddeus McCarthy (1907-), who served for thirteen years, the last three as President. He qualified in law at Victoria University College in 1928, and during the ensuing twenty-nine years he practised at the Wellington bar, completed the LL.M degree (in 1930), and went on active service overseas during World War Two. McCarthy acknowledged that he and his colleagues did not have the advantage of postgraduate educational training and so missed out on the intellectual side. But he believed that the learning of the law through self-help, the experience of practice in “minor human problem type matters”, and service in the fighting units gave him a “wide experience of human nature and knowledge of the things that make people work”.⁵⁶ In 1957 McCarthy was appointed to the Supreme Court bench, from 1958 onwards he served periodically as a temporary judge of the Court of Appeal, and at the time of his permanent appointment to the Court of Appeal he was fifth senior Supreme Court judge.⁵⁷

McCarthy J was respected as an industrious and humane judge, who had a fund of common sense and sound practical judgment. He believed that “the great function of the law is not the building of strange castles for people who

⁵² *E v E* [1972] NZLR 932, 935.

⁵³ [1970] NZLR 449, 455-6 (Turner himself never learned to drive).

⁵⁴ [1968] NZLR 1164, 1170.

⁵⁵ [1966] NZLR 910, 921.

⁵⁶ Letter, Sir Thaddeus McCarthy, 24 March 1993, and interview, Sir Thaddeus McCarthy, 28 May 1993.

⁵⁷ The New Zealand Law Reports show that McCarthy J was an additional judge of the Court of Appeal in June 1958, October 1959, and February 1963.

do not exist, but rather labouring amongst those who do exist in order to meet their problems and to serve them”.⁵⁸ In *Attorney-General v Lower Hutt City*, where an injunction was sought restraining a corporation from adding fluoride to the water supply, McCarthy J concluded that “pure water” did not require the absence of all other substances, as “the Legislature was not speaking in a scientific context, but was dealing with a practical matter touching the everyday life of the people”.⁵⁹ McCarthy J recognised that judges should take heed of changing community attitudes, and in *Re Wilson (Deceased)* declared that “the Family Protection Act is a living piece of legislation and our application of it must be governed by the climate of the time”.⁶⁰ McCarthy J’s desire to serve the needs of “real people” carried with it a commitment to obviate delay and dispose of litigation at the “earliest possible moment”.⁶¹ In *Rees v Sinclair*, he upheld the immunity of barristers from negligence actions for court work partly on the basis that it was “very much in the public interest that justice be administered with reasonable despatch”.⁶² McCarthy J tended to write short and succinct judgments, focussed on the central issues in the cases before him. In *Campbell Motors v Storey*, Hardie Boys J noted that McCarthy J “has put in such a concise way the reasons which led me to the same conclusion as he has expressed, that no purpose would be served by my delivering a separate full judgment”.⁶³

McCarthy J repeatedly demonstrated a determination to maintain the rights of individuals against state action or prosecution.⁶⁴ At the same time, he was alive to the “limitations which our society, for its social health,” put on individual freedoms and the need for the law to define such limitations. In *Melser v Police*, he dismissed an appeal against conviction for disorderly behaviour at Parliament on the basis that “the purposes of a democratic society are only made practicable by accepting some limitations on absolute individual freedoms”.⁶⁵ Furthermore, McCarthy J was (like North P) enough of a traditional lawyer to stress the need for the courts to decide “according to the law” and evidence, and refused to “take large steps in proof” or to modify the law in the face of statute or long-established judicial

58 “Sir Thaddeus McCarthy Retires” [1976] NZLJ 377.

59 [1964] NZLR 450, 463 (upheld by the Privy Council [1965] NZLR 116).

60 [1973] 2 NZLR 359, 362.

61 *Hunyady v Attorney-General* [1968] NZLR 1172, 1176.

62 [1974] 1 NZLR 180, 185.

63 [1966] NZLR 584, 597.

64 *Buckley v Transport Department* [1964] NZLR 334, 339 and *Credit Services Investment Ltd v Carroll* [1973] 1 NZLR 246, 262.

65 [1967] NZLR 437, 445 (cf *Cozens v Brutus* [1973] AC 854, 859). See also McCarthy J’s “The Role of the Police in the Administration of Justice” in Clark, R S (ed) *Essays on Criminal Law in New Zealand* (1971) 170, 188.

authority.⁶⁶ McCarthy J would however not refrain from calling for statutory amendment where he considered this appropriate. In *Carey v Hastie*, he declared that “there are few areas in the law of contract which cause more trouble than that of illegality, and it may be ... that the time has come when the Legislature might look carefully at this subject and consider doing something to remove the over-severe consequences which sometimes flow from a breach of one of the less important of the very large number of regulations which a managed welfare State seems to require”.⁶⁷

Following the retirement of North P in December 1971, Clifford Richmond (1914-) was appointed to the Court of Appeal and he was to remain a member of the Court until 1981. Richmond had graduated LL.M. from Auckland University College in 1936, and over the ensuing years (apart from his time in service in World War Two) practised in Auckland. He was appointed to the Supreme Court in 1960, temporarily served in the Court of Appeal at intervals from 1968, and was at the time of his permanent appointment fourth in seniority in the Supreme Court.⁶⁸ Richmond J was a painstakingly careful judge, who earned the appreciation of his colleagues for his meticulous analyses of the relevant facts and law.⁶⁹ Richmond J’s analytical and scholarly ability was reflected in judgments such as that in *Stephenson v Waite Tileman Ltd.* In this judgment, of which Macarthur J observed that he had “had the very real advantage of reading”, Richmond J thoroughly examined the “very strong body of opinion both in England and in Commonwealth jurisdictions in favour of the view that the eggshell skull rule remains a part of our law notwithstanding the [Privy Council] decisions in *The Wagon Mound (No) 1*”.⁷⁰ As this judgment also shows, Richmond J generally took a cautious approach which was securely grounded in established English and New Zealand legal authority, but he was not unaware of the social changes evident by the 1970’s and the need for reform of certain areas of the law.⁷¹

Joining Richmond J in the Court of Appeal was Owen Woodhouse (1916-) who was appointed to succeed Turner P in 1974 and who remained a judge

⁶⁶ *Spence v Relp* [1969] NZLR 713, 731, *Ross v McCarthy* [1970] NZLR 449, 457, and *Haldane v Haldane* [1975] 1 NZLR 672, 676

⁶⁷ [1968] NZLR 276, 282.

⁶⁸ The New Zealand Law Reports show that Richmond J sat in the Court of Appeal in June-July 1968 and July-December 1970.

⁶⁹ *Engineers Union v Arbitration Court* [1976] 2 NZLR 283, 284-5.

⁷⁰ [1973] 1 NZLR 152, 168 & 170.

⁷¹ Richmond J saw himself as the type of judge who dealt with each case as it cropped up, and who would try to see that folk obtained a fair answer within proper principles (supra note 23). See *Haldane v Haldane* [1975] 1 NZLR 672, 681, *R v Johnston* [1974] 2 NZLR 660, 668, and *Police v Creedon* [1976] 1 NZLR 582.

of the Court until 1986. Woodhouse graduated LLB from Victoria University College and then practised in Napier for fifteen years, the last seven as Crown Solicitor. In 1961 he was appointed to the Supreme Court, served as a temporary judge of the Court of Appeal at intervals from 1968, and at the time of his appointment was fourth senior judge in the Supreme Court.⁷² By virtue of his imaginative judgments in matrimonial property cases and his central involvement in the momentous accident compensation reform, Woodhouse J had come to the Court in 1974 as “an inventive Judge whose name has throughout the world become identified with enlightened reform”.⁷³ He attributed much of his attitude to the knock-about experience in the Navy during World War Two, which involved meeting many different people and making decisions in conditions of emergency, and which meant that he returned to New Zealand with a more independent outlook and a greater readiness to strike out.⁷⁴ In the short period that he was in the Court of Appeal up to 1976, Woodhouse J gave notice of his disdain for archaic and “quaintly labelled legal doctrines”, his commitment to “decide cases upon the law as it has been developed and made applicable here for contemporary New Zealand needs and conditions”, and his opposition to “the deprivation of individual liberty”.⁷⁵ In *Haldane v Haldane*, he dissented from the majority view of the Court on the Matrimonial Property Act 1963, and argued against “technical legal grounds” and in favour of recognition of the wife’s domestic contribution to the matrimonial home.⁷⁶

Woodhouse J and his six predecessors in the permanent Court of Appeal together brought to the Court a variety of personal attributes and abilities. However, it is important not to lose sight of the fact that they had a number of characteristics in common: all were pakeha males, born in New Zealand, who studied part-time and graduated in law from New Zealand University colleges, and who practised for a considerable period at the bar before their appointment to the bench. A high proportion came from professional families and went to private or church schools, and all but one had post-

⁷² The New Zealand Law Reports show that Woodhouse J sat in the Court in September 1968 and September-November 1971.

⁷³ [1973] NZLJ 505. North P paid tribute to the “thoughtful and imaginative judgment” of Woodhouse J in *Hofman v Hofman* [1967] NZLR 9 ([1971] NZLR 873), and Cooke J remarked that Woodhouse J’s “contribution to matrimonial property law is unrivalled in New Zealand” (*Meikle v Meikle* [1979] 1 NZLR 154).

⁷⁴ [1973] NZLJ 505, and interview, Sir Owen Woodhouse, 25 March 1993. Woodhouse J declared that the qualities he valued in a good judge included “good instinctive judgment, common sense, a feeling for people, and regard for the human factor” (*idem*).

⁷⁵ *Bannerman & Co v Murray* [1972] NZLR 411, 429, *Bognuda v Upton & Shearer* [1972] NZLR 741, 771, and *Taylor v Attorney-General* [1975] 2 NZLR 675, 690.

⁷⁶ [1975] 1 NZLR 672, 686. Woodhouse J’s approach was preferred by the Privy Council (see [1976] 2 NZLR 715).

graduate involvement in University education (in Masters' study or as part-time lecturers). All but one studied and/or practised in Wellington or Auckland and were involved in District Law Society affairs while in practice, and their combined pre-judicial careers spanned the period from the end of World War One to the early 1960's. These common features no doubt helped to weld the judges of the Court of Appeal into a homogeneous unit and to bridge differences in personality and experience.

IV. THE RELATIONSHIP BETWEEN THE COURT OF APPEAL AND THE SUPREME COURT

The entrusting of appellate work to judges especially appointed for this purpose was designed to establish a Court of Appeal as a separate institution with a distinctive identity. However, it was important for the Government of the late 1950's to make the new system acceptable to the Supreme Court judiciary (particularly those judges who were not in line for appointment to the Court of Appeal), and minimise the perception of appointment to the Court of Appeal as promotion. The result was that the Judicature Amendment Act 1957 maintained important links between the Supreme Court and the new Court of Appeal, and these ties significantly qualified the notion of a "permanent and separate" Court of Appeal.

First, the new legislation specifically provided that "every Judge of the Court of Appeal shall continue to be a Judge of the Supreme Court, and may from time to time sit as or exercise any of the powers of a Judge of the Supreme Court".⁷⁷ Secondly, the Chief Justice was retained as a member of the Court of Appeal "by virtue of his office as the head of the Judiciary".⁷⁸ Thus, from the outset, the permanent Court of Appeal had two chief judges: the Chief Justice, who continued as administrative head of the superior Courts and who was legally entitled to attend and preside over the Court of Appeal, and the President of the Court of Appeal, who was the most senior permanent appellate judge and who would preside unless the Chief Justice was also present.⁷⁹ The position afforded to the Chief Justice in the Court of Appeal was an obvious concession to the office of Chief Justice, and no doubt helped to overcome the traditional opposition of the judiciary. Furthermore, the Chief Justice was seen to be an important link between the Supreme Court and the Court of Appeal especially in criminal cases (where it was claimed that the Supreme Court had a better appreciation of the reality of criminal trials).⁸⁰ Nevertheless, the situation of having a Chief

⁷⁷ Judicature Act, s 57(4).

⁷⁸ Judicature Act 1908, s 57(2)(a).

⁷⁹ Judicature Act 1908, s 60(2).

⁸⁰ *Supra* note 1, at 2376.

Justice alongside a permanent President of the Court of Appeal was evidently “an awkward one calling for tact by the holders of the respective offices”.⁸¹

During the first eight years of the permanent Court of Appeal, the Chief Justice was Sir Harold Barrowclough. Barrowclough CJ was much admired and liked by his team of judges for his kind, generous, upright and obliging nature, and relations between the Court of Appeal and Barrowclough CJ were generally cordial and co-operative. Barrowclough CJ himself expressed the desire to sit on the Court of Appeal, but this was resisted by the Appeal Court judges largely on the ground that his experience and capabilities were better suited to work in the Supreme Court.⁸² It was ultimately agreed that, while the Chief Justice was certainly entitled to sit and preside in the Court of Appeal, this would be on the understanding that it was open for the President to indicate to the Chief Justice when it was not appropriate for him to sit. In the event, Barrowclough CJ sat only on rare occasions, mainly in criminal cases.⁸³

However, in January 1966 Sir Richard Wild became Chief Justice, and during his period of office (which lasted until 1978) the problems inherent in the Chief Justice’s role in the Court of Appeal came to the fore. Wild CJ was a forceful and assertive man, a highly able and incisive lawyer, and a Chief Justice who had a capacity for sustained and concentrated work and a concern for efficient administration.⁸⁴ His view was that the Court of Appeal judges formed part of a coherent team of people subject to the direction of the Chief Justice. Thus, he wished to (and did) sit in the Court of Appeal more often than had been the convention, and believed that Court of Appeal judges could be ordered to do Supreme Court work when the need arose.⁸⁵ For its part, an increasingly self-confident Court of Appeal bench believed that the role of the Chief Justice in the Court of Appeal should be a limited one and confined to sitting on “comparatively rare selected

⁸¹ Supra note 8.

⁸² Supra note 6. See *Petrie v Ashburton Electric Power Board* [1961] NZLR 762 and *Levin & Co v CIR* [1963] NZLR 801.

⁸³ The New Zealand Law Reports show that Barrowclough CJ sat in Court of Appeal cases in June and October 1958, June 1960, November and December 1961, June, August and October 1962, and June 1964. See eg *R v Halliday* [1958] NZLR 1036.

⁸⁴ See eg the comment by Richardson J that Wild CJ was “a truly great New Zealand Chief Justice” ([1993] NZLJ 199).

⁸⁵ Supra note 6. The New Zealand Law Reports show that Wild CJ sat in Court of Appeal cases heard in April and May 1967, May, July and October 1968, March 1970, February and May 1971, September 1972, May, July and December 1973, April, June, September and November 1974, March, April, May and October 1975, and April 1976.

occasions”.⁸⁶ The Court of Appeal judges also held to the view that they formed an autonomous group of judges, who retained the right to refuse to do Supreme Court work. The conflict between the Chief Justice and the Court of Appeal was evident in the retirement speech of Turner P in 1973. He observed that there were “two opinions” as to whether the Court of Appeal was “just a department of the Supreme Court”, though “never among the working members of the Court of Appeal, either past or present”. He declared firmly that the Court of Appeal believed that “it should determine its own programme, make its own fixtures, and devote itself to its own work, uninterrupted, except possibly in cases of the greatest emergency, by any requirements arising from the work or organisation of the Supreme Court”.⁸⁷ Tensions between the Chief Justice and the Court of Appeal continued during the Presidency of McCarthy P and were a factor in his decision to take early retirement.⁸⁸

A third link between the Court of Appeal and the Supreme Court was the provision for the temporary appointment of Supreme Court judges as “additional judges” of the Court of Appeal. Such appointment could be made “at any time during the illness or absence of any Judge of the Court of Appeal”, or “whenever the Chief Justice and the President of the Court of Appeal certify that in any appeal or proceeding before that Court it is expedient that any Judge of the Supreme Court nominated by the Chief Justice should act as an additional Judge”.⁸⁹ In 1973, further provision was made for temporary appointments from the Supreme Court when a vacancy occurred in the Court of Appeal or when a Court of Appeal judge was on leave “preliminary to retirement”.⁹⁰

During the period under review, when the Court of Appeal comprised only three permanent members, the temporary appointment of Supreme Court judges was at times essential to the continued existence of the Court. This was because there were repeated occasions when one or other of the permanent members of the Court was absent on sabbatical leave, in attendance at the Privy Council, on other official duties or on leave pending retirement.⁹¹ Furthermore, the seconding of Supreme Court judges to sit in

⁸⁶ “Sir Alexander Turner Retires” [1973] NZLR 322, 324.

⁸⁷ *Ibid*, 326.

⁸⁸ *Supra* note 56.

⁸⁹ Judicature Act 1908, s 58(1 & 2)).

⁹⁰ Judicature Amendment Act 1973, s 2.

⁹¹ In particular, McCarthy J, who described himself as a “restless mover”, was absent chairing Royal Commissions during most of 1964, 1968, and 1970-72; and Woodhouse J, though chosen as successor to Turner P in early 1974, only sat continuously from February 1975 (*supra* note 58, at 378, and *supra* note 56). Other lengthy absences indicated in the New Zealand Law Reports were those of North J

particular appeals was useful when the President and Chief Justice wished the Court to convene as a bench of five members, to deal with difficult or controversial issues. In *J T Coltman Ltd v Police*, which concerned an appeal from the Chief Justice on the Sale of Liquor Act 1962, North P noted that the appeal was originally heard by a Court of three but that “when it became plain that the members of the Court were not in full agreement, it was decided that in view of the importance of the case it should be re-argued before a Court of five”.⁹²

The Court of Appeal certainly benefited from the input of highly capable Supreme Court judges, who kept the Court in touch with Supreme Court processes and brought new insights to bear on the work of the Court of Appeal. These judges included men who were later permanently appointed to the Court of Appeal, and other senior judges such as Hutchison, McGregor, Macarthur and Haslam JJ who were not. A relatively young and recently-appointed Supreme Court judge who soon made his mark on the Court of Appeal was Robin Cooke. He first sat in the Court in September 1974, sat frequently in a temporary capacity during 1975, and was permanently appointed on the retirement of McCarthy P. He gave early notice of his penetrating intellect, his scepticism of traditional legal labels and categories and his search for underlying legal principles, all of which were to be evident in his subsequent long career in the Court.⁹³

However, especially by the 1970’s, the provision for the temporary appointment of Supreme Court judges to the Court proved to be a mixed blessing. This was because the provision was used to forestall the much-needed expansion of the permanent Court, required by a greatly-increased workload and the almost continual absence of one or other of the permanent Court of Appeal judges. The ready resort to the appointment of a succession of temporary judges undermined the effective functioning of the Court in that the independence and teamwork of the Court were weakened and an increasingly heavy burden was placed on only two permanent members of the Court. A commentator noted that “an appellate Court, any more than a rugby team, cannot operate with anything approaching efficiency if its personnel is changing”, and that inevitably, “a disproportionate share of the work load must fall on the permanent members”.⁹⁴ On the retirement of

(March-September 1960, May-July 1961, and April-September 1967), Turner J (February-May 1965), and Woodhouse J (September 1975-March 1976).

⁹² [1971] NZLR 203, 204 (the Court comprised the three permanent members and Haslam and Richmond JJ). See also *R v Halliday* [1958] NZLR 1036 where the issue of imprisonment of a youth aged 17 was considered.

⁹³ *R v Grice* [1975] 1 NZLR 760, 765, *NZIAS v Ellesmere County* [1976] 1 NZLR 630, 636, and *Police v Creedon* [1976] 1 NZLR 571, 585.

⁹⁴ *Supra* note 41, at 331.

Turner P in 1973, it was learned that his position was not “at once” to be filled by a permanent member of the Court and would instead be occupied by a series of temporary appointments each for a few months.⁹⁵ This produced an outraged response from Turner P, who objected to Supreme Court judges being “able to be nominated into this Court for temporary periods of duty, as a matter simply of administrative convenience”, and who bemoaned “the unsatisfactory situation of my Court as I leave it”.⁹⁶ The pattern of repeated absences of permanent Appeal judges and heavy reliance on temporary appointees continued under McCarthy P. He remarked on his retirement that, in the three years of his Presidency, the permanent members of the Court had been able to sit together for only several months, which he claimed was “a state of affairs never contemplated when this Court was established”. He suspected that “the quality of our work has not always reached the levels I had hoped for”, as a result of the Court being over-committed and “the constant change in personnel”.⁹⁷ Wild CJ was not prepared to support the Presidents’ requests for additional permanent members, the strains on the permanent members of the Court intensified, and McCarthy P recalled that “altogether it was quite an unhappy time”.⁹⁸ By the end of Wild’s Chief Justiceship, the case for an additional permanent Court of Appeal judge had become unanswerable, and in the year after McCarthy P’s retirement legislation was passed allowing for such an appointment.⁹⁹

V. THE WORK OF THE COURT OF APPEAL

1. *Nature of the Court’s work*

The permanent Court of Appeal continued the civil jurisdiction which the former Court had exercised. The most commonly exercised civil jurisdiction was the hearing of appeals from judgments and orders of the Supreme Court.¹⁰⁰ Further, the Court of Appeal regularly adjudicated on motions, cases stated and questions of law removed into the Court by

⁹⁵ Supra note 86, at 324-5.

⁹⁶ Ibid, 325-6.

⁹⁷ Supra note 58, at 379. McCarthy P may have had in mind the case of *R v Nakhla (No 1)*, where, as a result of an administrative error, the judgment read out by McCarthy P omitted a key passage; the error was later discovered but Nakhla then commenced an unsuccessful action against McCarthy claiming damages for “abuse of legal process” and consequent false imprisonment (*Nakhla v McCarthy* [1978] 1 NZLR 291).

⁹⁸ Supra note 56. The unhappy state of the Court of Appeal was epitomised by the unsatisfactory state of the Court of Appeal building: this was poorly ventilated and heated and was an earthquake risk (per Sir Thaddeus McCarthy).

⁹⁹ Judicature Amendment Act 1977, s 5(1).

¹⁰⁰ Judicature Act 1908, s 66. See *In Re Lolita* [1961] NZLR 542.

Supreme Court judges and other Courts.¹⁰¹ Civil cases heard in the Court ranged across a wide field. They included private law matters of procedure, contract, negligence (including personal injury cases), property and wills, and administrative law issues centred on the prerogative writs and (from the early 1970's) the Judicature Amendment Act 1972.¹⁰² The Court was repeatedly called upon to interpret New Zealand legislation such as the Matrimonial Property and Proceedings Acts of 1963 and the Land and Income Tax Act 1954.¹⁰³ In *Marx v CIR*, North P commented (in his judgment on the latter Act) on the "struggle by the Commissioner of Inland Revenue to combat the ingenuity of legal advisers and accountants who, in these days of high taxation, have been engaged in devising schemes for what has been somewhat picturesquely described as 'the art of dodging tax without actually breaking the law'".¹⁰⁴ Section 108 of the Act, which struck down transactions which had as their main purpose tax avoidance, proved to be particularly troublesome, and the vagaries of judicial interpretation produced a string of split decisions in the Court and the Privy Council.¹⁰⁵

At the time of the passing of the Judicature Amendment Act 1957 there was a strong body of opinion that the existing Court of Appeal should be retained for criminal appeals and that the new permanent Court of Appeal should have civil jurisdiction only. It was believed by many that criminal appeals were best dealt with by judges who had the day to day experience of presiding over criminal trials, and who were in contact with prisoners, witnesses and juries.¹⁰⁶ However, it was finally resolved that the Court of Appeal should take over the criminal jurisdiction of the Court of Appeal to ensure enough work for the permanent Court of Appeal and greater

¹⁰¹ Judicature Act, s 64. See *Jorgensen v News Media (Auckland) Ltd* [1969] NZLR 961. See also Judicature Act 1908, ss 67-68.

¹⁰² See *Stephenson v Waite Tileman Ltd* [1973] 1 NZLR 152, *Boots (NZ) Ltd v Tews Pharmacy Ltd* [1969] NZLR 890, 896, and *Auckland Medical Aid Trust v Taylor* [1975] 1 NZLR 728.

¹⁰³ See *Hofman v Hofman* [1967] NZLR 9, *E v E* [1971] NZLR 859, and *Haldane v Haldane* [1976] 2 NZLR 715.

¹⁰⁴ [1970] NZLR 182, 188-9.

¹⁰⁵ See eg *Mangin v CIR* [1970] NZLR 232 and [1971] NZLR 591, *Ashton v CIR* [1975] 2 NZLR 717, and *Europa Oil (NZ) Ltd v CIR* [1976] 1 NZLR 546. In the *Mangin* case, the majority of the Court of Appeal reversed a Supreme Court decision, and the majority of the Privy Council upheld the Court of Appeal's decision; while in the *Europa* case the Court of Appeal allowed an appeal in part from the Supreme Court, but the majority of the Privy Council allowed the appeal from the Court of Appeal. Cooke J described section 108 as "unique in New Zealand legal history" (*Tayles v CIR* [1982] 2 NZLR 726, 727). He also said of the *Europa* cases ([1971] NZLR 641 and [1976] 1 NZLR 546) that "the best that can be said about this unsatisfactory history of litigation is that in the ultimate the taxpayer and the Commissioner each had one win, so it could be called a draw" (letter, 1 November 1993).

¹⁰⁶ See eg Editorial (1957) 33 NZLJ 262.

uniformity of approach to criminal appeals and penalties.¹⁰⁷ The major area of criminal jurisdiction was the hearing of appeals against conviction and/or sentence, which required leave to be given unless the ground of appeal involved a question of law alone.¹⁰⁸ Criminal cases also reached the Court of Appeal by cases stated by the Supreme Court for the opinion of the Court of Appeal on a question of law.¹⁰⁹ The Court of Appeal heard appeals from decisions of Supreme Court judges on questions of law or on cases stated on questions of law by the Magistrates' Court, provided leave was given, and cases stated on questions of law from the Magistrates' Court for the opinion of the Supreme Court might be removed into the Court of Appeal by the Supreme Court.¹¹⁰ On rare occasions, the Court of Appeal considered matters referred by the Governor-General in exercising his prerogative of mercy.¹¹¹

In hearing appeals the Court was commonly concerned with alleged misdirections to the jury, the admissibility of evidence and questions of criminal practice and procedure, and after the introduction of the Crimes Act 1961 the Court was called upon to interpret the provisions of this Act. Criminal appeals heard by the Court included the sensational murder case of Arthur Allan Thomas, of which a full Court of Appeal later said that "no criminal case in recent times has caused such controversy and stirred the public conscience as much".¹¹² During the period 1971-1975, the Court of Appeal dismissed an appeal against Thomas's conviction, ordered a new trial on a petition to the Governor-General, dismissed a conviction from the second trial and answered a further petition to the Governor-General in the negative.¹¹³ At the more mundane level, but of far greater practical significance, the Court heard appeals and questions of law concerning

¹⁰⁷ *Supra* note 1, at 2376 and 2388.

¹⁰⁸ Criminal Appeal Act 1945, s 3, superseded by the Crimes Act 1961, s. See eg *R v Nakhla (No 1)* [1974] 1 NZLR 441. Note, of the 164 criminal cases heard in 1976, 148 were against conviction and/or sentence (figures supplied by Court of Appeal Registrar).

¹⁰⁹ Crimes Act 1908, s 442-443, superseded by the Crimes Act 1961, s 380-381. See *R v Maxwell* [1960] NZLR 624 and *R v Strawbridge* [1970] NZLR 909. Further, where it appeared to the Supreme Court that a criminal case was one of "extraordinary importance", it might be removed into the Court of Appeal for a "trial at bar" (Judicature Act, s 69). George Barton believes that this procedure has never been and never will be invoked (*supra* note 2).

¹¹⁰ Summary Proceedings Act 1957, ss 144, 113 and 78. See *Police v Anderson* [1972] NZLR 233 and *Police v Lloyd* [1973] 2 NZLR 486.

¹¹¹ Crimes Act 1961, s 406. See *R v Dick* [1973] 2 NZLR 669.

¹¹² *Re Royal Commission on Thomas Case* [1982] 1 NZLR 253, 255.

¹¹³ See *Thomas v The Queen* [1972] NZLR 34 and *R v Thomas (2)* [1974] 1 NZLR 658.

convictions under the Transport Act 1962, especially after the introduction of the blood and breath alcohol provisions of 1968.¹¹⁴

The hope of Attorney-General Marshall that, with the combined civil and criminal jurisdiction, the Court of Appeal would have sufficient work was more than amply fulfilled. In May 1959, it was reported that “in the first fifteen months of its work the reconstituted Court of Appeal of New Zealand disposed of some ninety-three cases”.¹¹⁵ Indeed, on his retirement, Gresson P predicted that “this Court will not be able to function properly unless there is some cessation of appeals without any merit at all and some restraint exercised in regard to the amount of time occupied in argument and in citation of cases”.¹¹⁶ In ensuing years, the total number of cases heard grew markedly, rising from 116 in 1964 to 216 in 1976. Criminal appeals consistently outnumbered civil appeals, usually by more than two to one, although a higher proportion of civil cases extended over more than one day’s hearing.¹¹⁷

In the face of the ever-increasing workload, the Court adopted several measures to improve efficiency and the despatch of business.¹¹⁸ In 1969, the Court issued a Practice Note to try to overcome the problem of cases on appeal being “frequently filed in an unsatisfactory state”, so that the Court’s time was “wasted in searching for details which should be readily ascertainable”. The Note directed the Registrar not to accept cases on appeal unless they were legible, numbered, correctly ordered and indexed.¹¹⁹ In 1973, McCarthy P issued a Practice Note to save the time of the Court and counsel “in preparation for issues not really in dispute and in the taking of notes during the hearings” and directed counsel to file detailed, fully informative grounds of appeal and synopses of argument.¹²⁰ Cooke P

¹¹⁴ See eg *Thomas v Auckland City Council* [1975] 1 NZLR 751.

¹¹⁵ (1959) 35 NZLJ 117.

¹¹⁶ [1963] NZLJ 123. Note, there were instances of considerable delay in delivering judgments during Gresson P’s Presidency (see *In re the Bed of the Wanganui River* [1962] NZLR 600 (nearly 19 months) and *Corbett v Social Security Commission* [1962] NZLR 878 (14 months)).

¹¹⁷ Civil appeals heard went from 38 in 1964 to 79 in 1975 and 52 in 1976, and criminal appeals from 78 to 132 to 164 ([1976] NZLJ 127 and figures supplied by the Court of Appeal Registrar).

¹¹⁸ See [1972] NZLJ 107. Further, in 1968 the Court held sittings in Auckland to dispose of several appeals in that area, and in 1971 it sat in Christchurch for the first time in over 100 years ([1968] NZLJ 385 and [1971] NZLJ 511).

¹¹⁹ [1969] NZLR 864.

¹²⁰ Practice Note [1973] 2 NZLR 357. The Note also provided that except in special circumstances the judges would no longer read their written reasons for their judgments, but would merely indicate their conclusions and then hand their judgments to the Registrar for distribution. Ten years later the English Court of Appeal issued a similar Practice Note ([1983] 2 All ER 34). See also [1976] NZLJ 376.

remembered that when he appeared as counsel in cases before the early Court of Appeal, “the form was a good deal tougher than we are today” and that “it was a strong Court in more ways than one”.¹²¹ North P himself remarked that counsel “must be willing to accept the searching questions that come from the bench” and conceded that they might on occasions leave Court with “bloody heads”.¹²² The Court would sometimes intervene and direct counsel to make submissions not referred to in argument but which the Court considered were relevant. Thus, in *Provident Life Association v Official Assignee*, the Court took this decision on a question touching statutory regulations having wide application.¹²³

2. Judgments of the Court

Turner J believed that the strength of the Court of Appeal lay in “the permanent and continuous association of three of the best lawyers in the country, held together as a team, if not with one voice, at least after ample opportunities for conference and discussion, and the reconciliation of conflicting views”.¹²⁴ He recalled that North P would, after a case was argued, invite him and the other judge into the President’s room and have a conference about the way the case should go, and that often they would wrangle for a whole day about the case.¹²⁵ The collegial nature of the Court of Appeal process made for effective and efficient decision-making and kept dissenting judgments to a minimum. In *Liverpool Insurance Co v Waianiwa Transport*, North P noted in his oral judgment on the day of the hearing that the members of the Court had had the opportunity over the luncheon adjournment to consider the argument heard that morning, had a clear view of the case, and so did not think it necessary to call on the opposing counsel.¹²⁶ In *R v Nakhla (No 1)*, Beattie J explained that, following the hearing, all the various issues involved were discussed, a decision was taken that the appeal should be dismissed, and then a judgment was prepared which reflected the combined views of the members of the Court.¹²⁷ Even

¹²¹ *Supra* note 21, at 172.

¹²² *Supra* note 29, at 110.

¹²³ [1963] NZLR 961.

¹²⁴ [1973] NZLJ 325-6.

¹²⁵ Turner J recalled that he, North P and McCarthy J had very different backgrounds and lines of thought, being “not a devout Methodist, the son of a Baptist minister and a Roman Catholic respectively”. Yet, through “bickering in a friendly, liberal way”, they reached a good understanding of issues (*supra* note 6 and [1991] NZLJ 437). Likewise, North P remarked that the success of the Court of Appeal “depends in a great measure on the willingness of the individual members to listen to the views of each other” (*supra* note 28, at 109); and McCarthy P stressed the collegial nature of the Court “built on mutual confidence and trust” (*supra* note 56).

¹²⁶ [1965] NZLR 731.

¹²⁷ *Nakhla v McCarthy* [1978] 1 NZLR 291, 299.

where members of the Court delivered separate judgments, there were exchanges of views beforehand, as reflected, for example, in comments such as “I have derived considerable advantage from reading the judgment prepared by North J”.¹²⁸ In *Police v Wyatt*, Turner J acknowledged that, while at first he had been attracted to the counter-argument presented by counsel, he had had the advantage of reading the judgments of North P and McCarthy J and had come to concur with them.¹²⁹ The “team” approach of the Court was also evident in the practice sometimes adopted for the President to invite another member of the Court to present his judgment first, particularly where the other member had produced the major judgment.¹³⁰ The combined efforts of the Court’s judges gave the Court the confidence to overrule decisions of the Supreme Court, including those of the Chief Justice, where it considered appropriate.¹³¹ The collegial nature of the process also reduced the overall length of judgments and made judgments more mutually complementary. All of this helped to give the Court a more coherent and authoritative voice.¹³²

In criminal cases, statute dictated that the judgment of the Court of Appeal be pronounced by one member of the Court unless “in the opinion of the Court the question is one of law on which it would be convenient that separate judgments should be pronounced”.¹³³ Turner J recalled the lengths to which North P went to produce a combined, compromise judgment in *R v Lorimer*, in the face of different views of the Court.¹³⁴ However, separate judgments would be given where important issues of law were fully argued and the Court considered it important that guidance should be given.¹³⁵ In *R*

¹²⁸ [1963] NZLR 661.

¹²⁹ [1966] NZLR 1118, 1131. See also *De La Rue v The Queen*, where Richmond J acknowledged that, “after the benefit of argument and discussion in this Court”, he had come to agree that an earlier judgment he had delivered in the Supreme Court should be overruled ([1971] NZLR 532, 535).

¹³⁰ *Nicholls v CIR* [1965] NZLR 836 and *Dimond Manufacturing Co v Hamilton* [1969] NZLR 609.

¹³¹ *R v Currie* [1969] NZLR 193. Such was the sense of judicial independence that, on occasions, both the Chief Justice and the President of the Court of Appeal would find their judgments overruled (see eg *Hocking v Attorney-General* [1963] NZLR 513 (decision of Barrowclough CJ reversed by North and Turner JJ, Gresson P dissenting).

¹³² *Supra* note 6.

¹³³ Criminal Appeal Act 1945, s 18 and Crimes Act 1961, s 398.

¹³⁴ In this case, North P and McCarthy J were of the view that the consequences of a verdict (ie for sentencing) were not the concern of the jury and the judge had the right to refuse to tell the jury of the consequences; but Turner J believed that there might be circumstances where the jury should be told of the consequences. After considerable persuasion, separate judgments were averted and the combined judgment reflected the views of all concerned (see [1966] NZLR 985).

¹³⁵ *R v Cottle* [1958] NZLR 999, 1007, 1023, 1030; and *R v Johnston* [1974] 2 NZLR 660, 661.

v Convery, North P noted that “the appeal raises questions of some interest in relation to the application of the English Judges’ Rules in criminal trials in New Zealand”, and “accordingly we have found it convenient that separate judgments be pronounced”.¹³⁶

Separate judgments were more common in civil cases. Obviously, separate judgments would occur where the members of the Court were divided in their views as to the outcome or as to the reasons for the decision.¹³⁷ Members of the Court would also wish to give separate judgments so as to give weight to the Court’s judgment “on issues which have not yet been the subject of any authoritative decision in this country”.¹³⁸ Further, Turner P in *Walker v Walker* commented on the “desirability of issuing several judgments, not one only, where statutes were construed or applied in appellate courts”, as this reduced the “danger of attributing the ratio of a decision to a single sentence”.¹³⁹ Judges also decided to give separate judgments out of deference to the “full argument” of counsel, and where the Court differed from judgments of the Supreme Court.¹⁴⁰ In *Public Trustee v CIR*, North P noted that he had had “the advantage of collaborating, in a measure, with my brother Turner in determining the form that his judgment should take”, but that as he was differing from the Chief Justice it was “desirable that I should say a few words of my own”.¹⁴¹ During the Presidency of North P, there was a greater tendency for members of the Court to deliver separate judgments, for reasons such as wanting to put in their own words the way they looked at the case or because “the dispute had engendered a good deal of heat and ill-feeling”.¹⁴²

Overall, the Court adopted a cautious and restrained approach to its judicial function. The oft-repeated policy of the Court was to avoid presenting final conclusions on issues unless there had been argument from counsel and the matter fell “directly for determination”.¹⁴³ In *Hunyady v Attorney-General*,

¹³⁶ [1968] NZLR 430.

¹³⁷ *Morrison v USS Co* [1964] NZLR 468.

¹³⁸ *USS Co of NZ Ltd v Wenlock* [1959] NZLR 173.

¹³⁹ [1973] 2 NZLR 7, 8.

¹⁴⁰ *Preston v Preston* [1960] NZLR 385, 403, and *Smith v Attorney-General* [1974] 2 NZLR 225, 230.

¹⁴¹ [1971] NZLR 77, 89.

¹⁴² *McDowell v Attorney-General* [1963] NZLR 878, 895; and *Upper Hutt City v Burns* [1970] NZLR 578, 590.

¹⁴³ *R v Pellikan* [1959] NZLR 1319, 1320-1; and *R v Grice* [1975] 1 NZLR 760, 766-7. In *Re Havill (Deceased)* [1968] NZLR 1116, 1133, Turner J noted that his view on a point not necessary for his decision “cannot be regarded as an essential part of my judgment”. But note, Cooke J appeared readier to express his views on issues of principle that arose (*Roome v Roome* [1976] 1 NZLR 391, 392-3 and *Stewart Investments Ltd v Invercargill CC* [1976] 2 NZLR 362, 366, 373-4).

where the issue was the “highly technical” area of discovery of documents, and the Court had derived no assistance from a lay litigant, Turner J stated that “it will not be desirable for us to attempt a statement of general principle, which in another case we might find it necessary to examine more meticulously”.¹⁴⁴ In *Re 110 Martin Street, Upper Hutt*, Turner P doubted whether there was an existing *lis*, and noted that “this Court is usually reluctant to write purely advisory judgments when no active dispute exists between specific contesting parties”.¹⁴⁵

The Court adhered strictly to the established constitutional principle that it was bound by statute law, even where the result was “most unfortunate” and “justice between the parties was not well served”.¹⁴⁶ Furthermore, the Court accorded great weight to judicial precedent and the notion of certainty in the law. In *Re Manson (Deceased)*, the Court of Appeal refused to overrule a decision of the Court which had stood for thirty-five years. McCarthy J, in delivering the judgment of the Court, stated that the Court would not substitute for an earlier decision an opposite conclusion which it merely thought preferable, particularly where the earlier decision had been followed and applied over many years and the decision caused no injustice to individuals.¹⁴⁷ The Court followed this approach to the extent that it would not abrogate doctrines of law which were well established in New Zealand law, even where these were clearly outmoded. In *Spence v Relph*, McCarthy J admitted that the actions for enticement or for harbouring a wife were “hardly popular in Judicial circles in this age”, but (in line with North P and Turner J) stated that they were too well established to be abolished except by legislative action.¹⁴⁸

Besides New Zealand precedents, English judgments were accorded a prominent place. The Judicial Committee of the Privy Council played a role far beyond the limited number of cases which went on appeal and the even fewer cases in which appeals were successful.¹⁴⁹ The Court of Appeal

¹⁴⁴ [1968] NZLR 1172, 1173.

¹⁴⁵ [1973] 2 NZLR 15, 17.

¹⁴⁶ *Cotton v Central District Finance Corporation* [1965] NZLR 992, 997-8.

¹⁴⁷ [1964] NZLR 257, 271-2 (note, this case had been removed into the Court for the specific purpose of enabling the Court, if it saw fit, to overrule its earlier decision). See *McFarlane v Sharp* [1972] NZLR 838, 841 and *E v E* [1972] NZLR 932, 935. Turner J recalled that he and his fellow judge would “listen to the arguments, establish the facts, apply the law to the facts and then reflect upon whether they had the sense of having got things right or of having made fools of themselves” (supra note 6).

¹⁴⁸ [1969] NZLR 713, 731. See also *Attorney-General v Wilson* [1973] 2 NZLR 238, 249.

¹⁴⁹ In the years 1958-1976, 26 appeals from the Court of Appeal were heard by the Privy Council and of these 11 were successful (“Appeals to the Privy Council” [1973] NZLJ 506-8 and [1977] NZLJ 42).

judges were very conscious of the Privy Council being the “supreme and ultimate appellate authority for New Zealand” and would scrupulously follow the Privy Council’s speeches and observations.¹⁵⁰ McCarthy J recalls the brooding influence of the Privy Council in North P’s repeated refrain in considering legal issues: “what would the Privy Council say?”¹⁵¹ On his retirement, McCarthy P spoke of the “inhibitions” which the right of appeal to the Privy Council “places on the capacity of this Court to develop our case law in a way which best suits New Zealand and the New Zealand way of life”.¹⁵² The House of Lords was described by Gresson P as “in practice the alter ego of the Privy Council”.¹⁵³ North P affirmed that the House of Lords was “entitled, particularly on substantive law, to the very greatest respect and only departed from on rare occasions”.¹⁵⁴ Decisions of other English Courts, notably the Court of Appeal, were found to be helpful and of great persuasive value, and judges such as Gresson P would routinely follow strict rules “settled in England by the strong trend of authority and all the English textbook writers”.¹⁵⁵ Of other Commonwealth precedents, those of Australia played the most important role. New Zealand statutes such as the Land and Income Tax Act corresponded closely with Australian counterparts, thus prompting extensive reference to case-law thereon; and pronouncements of the Australian High Court were accorded great value and at times even preferred to English judgments.¹⁵⁶

The Court’s cautious stance was most clearly revealed in its response to legal issues of broader cultural and social significance. On the rare occasions when issues relating to Maori rights were heard, the attitude of the Court was informed by the view that “the Treaty of Waitangi was only a solemn statement of intention by the monarch to do all that was reasonably possible, and it did not give individual Maori the right to sue under the Treaty”.¹⁵⁷ In its interpretation of the Matrimonial Property Act 1963, the Court’s approach was expressed by North P when he said that “the mere fact that a wife has been a good wife and looked after her husband domestically,

¹⁵⁰ *Corbett v Social Security Commission* [1962] NZLR 878, 900 (per North P).

¹⁵¹ *Supra* note 6.

¹⁵² *Supra* note 58, at 380.

¹⁵³ *Corbett v Social Security Commission* [1962] NZLR 878, 898.

¹⁵⁴ *Ross v McCarthy* [1970] NZLR 449, 453. See eg *Satterthwaite v New Zealand Shipping Co* [1973] 1 NZLR 174, 177.

¹⁵⁵ See *NZ Industrial Gases Ltd v Anderson Ltd* [1970] NZLR 58, 60 and *R v Naidanovici* [1962] NZLR 334, 337.

¹⁵⁶ See eg *Elmiger v CIR* [1967] NZLR 161, 177 and *Attorney-General v Wilson & Horton Ltd* [1973] 2 NZLR 238, 241-2. Note Cooke J’s comment in *MOT v Burnetts* [1980] 1 NZLR 57.

¹⁵⁷ *Supra* note 6. See *In Re the Bed of the Wanganui River* [1962] NZLR 600; *In Re The Ninety-Mile Beach* [1963] NZLR 461; *Hereaka v Prichard* [1967] NZLR 18; and *Hauhungaroa 2C Block v Attorney-General* [1973] 1 NZLR 389.

cannot possibly, in my opinion, justify an order being made in her favour in respect of a business owned by the husband in the running of which the wife had no share".¹⁵⁸ This approach was not in tune with the rising notion of marriage as a partnership of equals who normally performed different functions.¹⁵⁹ It was criticised by later judges as effectively giving a disproportionate weight to monetary contributions normally provided by the husband and underestimating intangible services normally provided by the wife.¹⁶⁰ No doubt the cautious response of the Court to such issues facilitated the disappearance of "universal and uncritical approval of our judicial system" and the emergence (certainly by the 1970's) of a climate of "questioning and criticism".¹⁶¹

However, over time, the collegial expertise of the Court of Appeal ensured that it made a major contribution to the development of New Zealand law. This the Court did in an indirect way through its clear, well-reasoned and authoritative calls for reform of areas of the law, which motivated the legislature into action. The Court's impact was seen, for example, in the passing of the Illegal Contracts Act 1971, and the reform of the Town and Country Planning Act 1953.¹⁶² Further, certain Court of Appeal judgments brought controversial areas of the law into sharper focus and this too prompted legislative action. The legal tests relating to censorship and indecency adopted by North and Cleary JJ in *Re Lolita* had a considerable influence in bringing forward the Indecent Publications Act 1963 which was designed to "loosen the restrictions on publishing and sound recording imposed by the previously existing legal tests".¹⁶³

Increasingly, the Court also acted in a direct way to fashion the law in a manner appropriate to the needs of New Zealand in the second half of the twentieth century. This the Court was prepared to do especially in areas which it regarded as judge-made law, such as practice, procedure and evidence.¹⁶⁴ In *McKnight v Davis*, Turner J said that "the Court must

¹⁵⁸ *E v E* [1971] NZLR 859, 885. This was broadly followed in *Haldane v Haldane* [1975] 1 NZLR 672, 673-675.

¹⁵⁹ *Haldane v Haldane* [1976] 2 NZLR 715, 721.

¹⁶⁰ *Reid v Reid* [1979] 1 NZLR 581 & 599 (per Woodhouse and Cooke JJ).

¹⁶¹ *Supra* note 58, at 379. See also the criticism of Sir Alfred North's role as Commissioner in the Moyle inquiry (Mummery, "The Privilege of Freedom of Speech in Parliament" (1978) 94 *Law Quarterly Review* 276).

¹⁶² See *Stewart Investments Ltd v Invercargill CC* [1976] 2 NZLR 362, 363.

¹⁶³ See *Customs v Lawrence Publishing Co Ltd* [1986] 1 NZLR 407 (per Woodhouse P). George Barton states that the "disastrous decision" of the Court of Appeal in *In re Sheridan* [1959] NZLR 1069 prompted the Public Trustee to seek an amendment to the Trustee Act 1956, and this was effected in s 12 of the Trustee Amendment Act 1960 (*supra* note 2).

¹⁶⁴ [1963] NZLR 858.

always be the master of its own procedure, and must when necessary use its inherent jurisdiction to ensure that justice is done”, and that “due enquiry for the truth is not to be stifled by outmoded procedural restrictions”.¹⁶⁵ The Court accepted that New Zealand rules of procedure and evidence sometimes differed from those of England, and by the late 1960’s the distinctive nature of New Zealand legal processes was increasingly emphasised.¹⁶⁶ In *Jorgensen v News Media (Auckland) Ltd*, the Court held, contrary to a long-standing decision of the English Court of Appeal (which had been followed in New Zealand), that a certificate of conviction was admissible evidence of guilt in a subsequent defamation action. North P referred to “the climate of New Zealand law” and stated his belief that “on matters of evidence it is within the province of the Judges to adapt the existing law of evidence to meet modern conditions”. Turner J concurred, noting that “the law of evidence is Judge-made law, directed to the control of the processes by which Judges daily endeavour to do justice; and that if it requires modification, that modification is particularly a matter with which the Judges should be entrusted”.¹⁶⁷

Traditionally the Court of Appeal drew a clear distinction between adjectival law where it accepted the right to modify the law to meet local needs, and substantive law where “only in exceptional circumstances will the Courts be willing to entertain an application to strike out a new line differing completely from established long-settled principles”.¹⁶⁸ However, in 1971, the Court took the momentous step of “striking out a new line” in an area of substantive law which had been governed for ninety years by a decision of the House of Lords. In *Bognuda v Upton & Shearer Ltd*, the Court (comprising North P, Turner J and Woodhouse J) rejected the House of Lords ruling that, where a landowner had no easement of lateral right of support, no action would lie for damage caused by the adjacent landowner. The Court held that the House of Lords decision was not binding and was based on a system of acquisition by prescription of lateral support which was not available in New Zealand. North P, in his judgment delivered the day before his retirement, declared that there was “no binding authority in New Zealand standing in our way” of finding that the adjacent landowner owed a duty of care. Woodhouse J, whose presence was probably decisive to the outcome, declared that “the responsibility of this Court is to decide

¹⁶⁵ [1968] NZLR 1164, 1170.

¹⁶⁶ See eg *R v Naidanovici* [1962] NZLR 334, 339; *R v Parker* [1968] NZLR 325, 327; and *Rowley v Wilkinson* [1968] NZLR 334, 339.

¹⁶⁷ [1969] NZLR 961, 979 & 990-1. See also *R v Fox*, where Turner P upheld the criminal practice adopted in New Zealand which differed from that of England, and noted that “the ordinary rule, which is that the Courts will in general follow English practice, is not slavishly to be followed” ([1973] 1 NZLR 458, 469).

¹⁶⁸ *Ross v McCarthy* [1970] NZLR 449, 456.

cases upon the law as it has been developed and made applicable here for contemporary New Zealand needs and conditions". He stated firmly that it would be "quite inappropriate" for the Court to follow a rule of the House of Lords which was based upon a set of principles that "unquestionably are inapplicable in New Zealand".¹⁶⁹

VI. CONCLUSION

This review of judges at work in the permanent Court of Appeal during the first eighteen years of its existence indicates that the Court more than fulfilled the expectations of its proponents. The administration of justice in New Zealand's highest local Court was despatched with heightened expertise and efficiency.¹⁷⁰ From the "permanent and continuous association" of three of the best appellate lawyers in New Zealand there evolved a Court which was greater than the sum of its parts. The blend of common sense, logic, pragmatism, and scholarship displayed by the Court's members produced, over time, an increasingly distinctive and self-confident legal identity. The development of the Court of Appeal was hampered by anomalies such as the ambivalent roles of the President and the Chief Justice; by the lack of support given to the Court by the authorities, particularly in the 1970's; and by the forces of tradition expressed in the Privy Council and in deeply-ingrained legal attitudes held by judges who came from a narrow band of the population. Yet these factors did not seriously affect the growing prestige that the Court acquired in New Zealand and overseas.¹⁷¹ In 1959, the conferment of knighthoods on the members of the Court was welcomed as "public recognition of the fact that our Court of Appeal is the most important unit in the community".¹⁷² In particular, the period of 1963-1971, when the Court was staffed by North P and Turner and McCarthy JJ, was seen as a "golden age" in the history of the Court.¹⁷³

By 1976, the foundations of the modern Court of Appeal had been laid. McCarthy P's retirement marked the end of an era, as he was the last of the Presidents to have sat in the Court (albeit in a temporary capacity) from the year of its inception. In subsequent years the Court was to assume an expanded and increasingly self-confident form in the hands of a new

¹⁶⁹ [1972] NZLR 741.

¹⁷⁰ Wild CJ commented that "I doubt if it is sufficiently appreciated even in the legal profession itself how well the appeal system has worked" and emphasised the "expedition with which appeals have been dealt with" ([1971] NZLJ 372).

¹⁷¹ *Supra* notes 24, 32, 38, and 50.

¹⁷² (1959) 35 NZLJ 183.

¹⁷³ Dugdale, "Obituary Sir Alexander Turner" [1993] NZLJ 299, 300. See also [1973] NZLJ 328.

generation of judges whose legal careers were established in the post-World War Two years. In concluding his retirement speech in May 1976, McCarthy P remarked in his characteristically apt and concise way:

We of the Court that sat here so long, Sir Alfred North, Sir Alexander Turner and I, have run our race. I am vain enough to think that that was a good Court. An entirely new generation now takes over.¹⁷⁴

¹⁷⁴ *Supra* note 58, at 380.

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**“WHAT'S LOVE GOT TO DO WITH IT?”
AN ANALYSIS OF AN INTERVENTION APPROACH TO
DOMESTIC VIOLENCE**

BY RUTH BUSCH AND NEVILLE ROBERTSON*

Dedicated to Angelina Julia Poli (aged 21), Taina Huriana Poli (aged 4 years 9 months) and Maria-Luisa Poli (aged 20 months) stabbed to death in Hamilton as we worked on this paper.

I. INTRODUCTION: THE GAP IN THE JUSTICE SYSTEM

It is now widely appreciated that the criminal justice system in most Western nations has poorly served those who have been victimised by members of their own families. A San Franciscan Family Violence Report stated:

The criminal justice system is one of the primary institutions to which battered women and their families turn for help and protection. By virtue of its power to enforce existing laws, it is also the institution critical to public condemnation of violence, wherever it may occur. However, the criminal justice system shares the biases of society at large, biases which hold that family matters are private. Such a bias has led to the selective non-enforcement of laws when violence occurs between family members...This stance of non-intervention indirectly condones violence and ignores the frequent escalation which all too often ends in homicide.¹

The Hamilton Abuse Intervention Pilot Project (HAIPP),² launched in July 1991, represents an attempt to reform the justice system's response to domestic violence, particularly the violence of men directed against their women partners. In this article, we outline the philosophy of intervention, describe the intervention protocols which have been developed in Hamilton, analyse their operation and assess some of the impacts the intervention approach has had on the administration of justice. In order to demonstrate the wide-reaching changes brought about by the adoption of an intervention approach in Hamilton, we look first at some of the problems identified within the justice system which HAIPP was established to rectify.

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¹ Family Violence Project, *Domestic Violence is a Crime* 1.

² The Hamilton Abuse Intervention Pilot Project is a three-year pilot programme sponsored by the Intervention Working Party of the Family Violence Prevention Coordinating Committee (FVPCC). At the onset of the programme in July 1991, the authors were contracted by FVPCC to perform periodic evaluations of the project. To date, five evaluations have been co-authored by us. They describe in detail the workings of the project and the consequences of the development of an interagency approach to domestic violence.

In our previous work, we have suggested that there is a “gap” between victims' experiences of violence and the justice system's response to that violence.³ The gap is manifested in many ways. For example, New Zealand police have historically tended to avoid arresting domestic assaulters, in effect screening them out of the criminal justice process.⁴ Prosecutions against abusers have not been particularly successful, with a high proportion of charges being withdrawn or dismissed.⁵ When abusers have been convicted of assaulting their partners, they have often received lighter sentences than men who have committed comparable assaults against strangers.⁶ In the Family Court arena, battered women have experienced difficulty in obtaining protection orders, particularly when the application does not proceed *ex parte*.⁷ Moreover, these orders often fail to provide effective protection from further abuse.⁸ Indeed, Family Court hearings and court-ordered counselling sometimes provide further points of exposure for the victim.⁹

These problems reflect the beliefs and attitudes about domestic violence held by certain police officers, judges, lawyers, counsellors and other social service personnel. In particular, they reflect a tendency to focus on the

³ Busch, R, Robertson, N, and Lapsley, H *Protection From Family Violence: A Study of Protection Orders Under the Domestic Protection Act* (1992). The authors' discussion of the justice system's approach to domestic violence is drawn largely from this previously published report. The material in the report is derived from the interviews we conducted with 21 women whose protection orders had been breached, and from our interviews with 73 key informants including 6 judges, 25 police officers, 15 women's refuge workers, 10 Family Court Counselling Coordinators and counsellors, and 8 solicitors. Justice Department statistics, police files, and 46 reported and unreported court decisions were also analysed in the report.

⁴ Church, J and Church, D *Listen to Me Please: The Legal Needs of Domestic Violence Victims* (1981) 47. Ford, G *Research Project on Domestic Disputes: Final Report* (1986) 11.

⁵ Statistics supplied in a letter dated 28 November 1992 from Philip Spier of the Policy and Research Division, Department of Justice, indicate that less than two-thirds of the prosecutions laid under section 194(b) of the Crimes Act (male assault female) result in a conviction: 20% are withdrawn and the balance are dismissed. It is not possible to provide an analysis of all the prosecutions in respect of domestic abusers because Justice Department statistics do not distinguish domestic assault from other assaults. However, the analysis of section 194(b) prosecutions provides a reasonable measure. While not all domestic assaulters are charged with male assaults female (other charges are common assault, assault with intent to injure, and threatening to kill charges may be laid), police informants have told us that nearly all prosecutions for male assaults female are related to domestic assaults.

⁶ *Supra* note 3, at 264-265.

⁷ Moore, J M *Is a Non-Molestation Order Enough? Women's Experiences of the Family Court* (unpublished MA. Thesis, Victoria University of Wellington, 1989); and *supra* note 3, at 207-236.

⁸ *Supra* note 3, at 264-269.

⁹ *Ibid*, 134 and 152-153.

relationship between the abuser and the victim rather than on the violence. How else can one explain the general tendency among certain police to avoid arresting domestic assaulters?¹⁰ In one police district we visited, it was routine for domestic abusers to be dealt with by way of diversion; the diversion programme included a referral to counselling for both the abuser and his victim.¹¹ Would any of us expect to be referred to counselling with our attacker if we were mugged by a stranger?

Judges and counsellors often see the violence as a symptom of a problem in the relationship, rather than a problem of itself. There is sometimes a quite explicit focus on the relationship. In *Lynch v the Police*,¹² Ellis J, on appeal, ordered a section 19 discharge in respect of a conviction for breach of a non-molestation order and commented:

As is so often the case in domestic disputes that end up in the Criminal Court on matters such as this, the resolution of *the real problem* is impossible. I bear in mind the fact that the District Court judge was plainly of the view that this matter did not warrant a penalty of any great substance and it is also plain to me that this incident is part of a wider dispute and that a conviction of the appellant on this charge may well militate against a final resolution of the problems that have arisen between the husband and wife and, I bear in mind, a conviction may also militate against the welfare of the children.¹³

Similarly, in *P-W v P-W*,¹⁴ Inglis DCJ refused an application for a final non-molestation order commenting that what the wife needed “is a temporary respite from the husband’s persistent overtures so that the real problems in the marriage can be addressed and if possible put right”.¹⁵

Some counsellors take a similar stance. One of the women we interviewed recalled her counsellor as being more concerned about her “failings” as a wife than her partner’s violence: “[She told me that] I was a poor wife and I should stay at home more often”.¹⁶ Another was angry that she had been referred to joint counselling to see if she and her husband “could get back together again”, despite the fact that he had just been convicted of an assault on her.¹⁷ A third reported the Family Court Coordinator as being more

¹⁰ *Supra* note 4.

¹¹ *Supra* note 3, at 171. *The Commissioner’s Policy Circular 1992/07* states that diversion may be suitable in domestic violence cases “where suitable local programmes are in place”. It states that “there is good evidence that when properly managed, diversion can be a very effective form of treatment”.

¹² Unreported, High Court, Auckland, AP 16/86, 24 February 1986.

¹³ *Ibid*, 2 (emphasis added).

¹⁴ Unreported, Napier Family Court, FP 041/079/90, 16 May 1990

¹⁵ *Ibid*, 3.

¹⁶ *Supra* note 3, at 255.

¹⁷ *Idem*.

interested in the fact that her ex-partner had attended an alcohol treatment programme than in the violence from which she was seeking protection. The coordinator said to her: "Oh he is trying. Why don't you go back to him?"¹⁸

Of course to the women concerned, the violence is a real problem. Unless the violence is addressed, they are likely to continue to be battered and/or intimidated.

Consistent with a relationship focus is what we have termed a "two-to-tango" analysis of domestic violence, the view that both parties are equally to blame for the abuser's violence. For example, one Family Court judge described his perspective about domestic violence as follows:

Except in the most unusual circumstances, it isn't helpful to apportion blame [between the parties]. I don't see it as a black and white situation, where the aggressor is totally responsible and the victim is totally exculpated from any responsibility because I don't think it's common sense or human nature for one party for no reason whatsoever to up and knock someone else on the nose. If someone is mentally disordered or - I can't really think of any other reason why someone just gets up and hits another person. I think that in the context of a relationship or marriage of two people, what goes through my mind - I will express it, but it's totally inadequate and really probably not helpful - but "it takes two to tango". The two are entwined to the degree that I don't accept that one person alone is responsible for the violence.¹⁹

Similarly, in elaborating his theory of domestic violence, one of our police informants said, "Some women have a huge capacity to create massive problems within their household. They can't keep their bloody mouths shut at the appropriate time".²⁰ As well, our analysis of the domestic violence related case-law revealed that certain judges appeared to impose what can only be described as "compassionate" sentences because of the perceived provocative behaviour of the victim.²¹

¹⁸ Ibid, 76.

¹⁹ Supra note 3, at 191.

²⁰ Ibid, 165.

²¹ See *The Queen v Panoa-Masina*, unreported, Court of Appeal, CA 309/91, 7 October 1991, in which a High Court judge imposed a sentence of 9 months periodic detention on an accused convicted of manslaughter for beating his wife to death. The accused's embarrassment at learning that his spouse had not passed on the \$50 he had given her for his nephew's birthday was characterised as a "special circumstance" by the High Court judge permitting the latter to impose a non-custodial sentence. While the Court of Appeal allowed the Crown's appeal and sentenced the accused to a prison term of 18 months, the Court concluded, "We agree with the Judge that this is a case which called for a compassionate sentence for the reasons expressed by him." (at 6-7). For a fuller discussion of the *Masina* case, see supra note 3, at 242-243. See also *Newlands and the Police* [1992] NZFLR 74. This case concerned the appellant's tenth conviction in less than two years for breach of a non-molestation order against the

The relationship focus of certain decision-makers and their “two-to-tango” analysis means that they are often reluctant to hold abusers accountable for their violence. This is evident in the attitude of a police officer who told us that men who breach non-molestation orders are “not real criminals” but simply men who are “suddenly denied access to” their home, their family, their children “by a piece of paper”.²² Similarly, a High Court judge described an appellant's assault as having “arisen out of the instinctive reaction” by him to an argument he had had with his spouse.²³ A man who repeatedly breached his non-molestation order was described by a judge as “gravitating instinctively” towards the former matrimonial home.²⁴ In that case, the judge's perspective is readily apparent from the remainder of the sentence, “even though his condition when he arrives there regrettably sometimes makes him an unwelcome visitor”.²⁵

Decision-makers' sympathetic attitudes towards abusers may mean that the threat posed by abusers to intended victims is not recognised. This was graphically illustrated in a recent murder/suicide case where police officers decided to give bail to a man arrested for breach of a non-molestation order after he was found outside his ex-wife's home carrying four rounds of .303 ammunition. When questioned, he admitted that he had intended to leave the bullets in her letterbox. He was bailed despite the fact that his former wife had a non-violence order against him and that his admission, coupled with the bullets in his possession, constituted a breach of that order in that they involved a threat to cause her bodily harm. Even though one of the arresting constables stated that he believed that the offender was attempting to “terrorise” his former spouse, that officer said that the man was not “dangerous”. He characterised him instead as “blubbing”, “pathetic”, and “harmless”. Another officer recalled the offender as insisting that he was

same complainant. In *Newlands*, Tipping J substituted a fine of \$200 without court costs for the sentence of three months periodic detention which the District Court judge had imposed. Justice Tipping commented: “Having reviewed all the evidence I am by no means satisfied that her subsequent actions were not designed to be provocative also. If she was trying to get a reaction from Newlands that would lead him into yet further trouble on the non-molestation order front she has succeeded because unfortunately he was unable to restrain himself. He certainly delivered, on the view which the learned Judge formed, a message to her in distinctly uncomplimentary terms. However, it is my view that on the evidence Mrs Walker was substantially the author of her own misfortune on this occasion. There is no doubt however that Mr Newlands did commit an assault on her and to that extent he was at fault...For the future Mrs Walker would be wise to refrain from any action which could be seen as provocative or ambivalent as to the need for a non-molestation order” (at 77-78).

²² *Supra* note 3, at 177.

²³ *Kelly v The Police*, unreported, High Court, Rotorua, AP 29/91, 15 May 1991.

²⁴ *G v G*, unreported, Wellington Family Court, FP 085/1127/83, 8 October 1986.

²⁵ *Ibid*, 3.

not a real criminal and that he only wanted to see his wife. After being bailed, the offender collected a rifle and more ammunition from his home, returned to his ex-wife's home, shot her dead and then killed himself.²⁶

Some decision-makers appear to blame victims for their reluctance to expose themselves to the risks of further violence. For example, Erber DCJ recently criticised women who declined to testify against their abusers in the criminal courts and commented that “the failure of victims of domestic violence to testify against alleged offenders could lead to a lowering of concern about domestic violence assaults”.²⁷ In the same manner, many of the police we spoke to criticised women who did not follow through with complaints.²⁸ This victim-blaming analysis fails to acknowledge the controlling nature of the violence to which battered women are subjected as well as the general lack of support services for victims in the courts.

Part of the “gap” that we have identified is attributable to a lack of interagency coordination, both between different branches of the justice system and between government departments and community groups. This can often mean that individual decision-makers accept the abuser's minimisation of his violence, interpret a specific violent incident as a unique, isolated act rather than as part of a pattern of abusive behaviour, and underestimate the cumulative effect of the abuse on the victim. In one case we investigated, a man was convicted thirteen times in a four-year period of breaching protection orders but was able to maintain the respect and sympathy of nearly all the police officers in his area.²⁹ The one police officer who described him as having mounted “a total campaign of intimidation” against his former wife stated that “he was able to convince each new police officer that he was okay”.³⁰

The danger of this lack of coordination is starkly illustrated by the recent case of a woman killed by her ex-partner as she emerged from a Family Court ordered counselling session. When it occurred, her death was described by the local police as unpredictable and unavoidable. However, our investigations suggested otherwise. At least four different agencies were involved with the parties; with minor exceptions, no information was shared between them.

²⁶ For further details, see Peggy's case study in *supra* note 3, at 145-149.

²⁷ *New Zealand Herald*, 14 January 1993, 3.

²⁸ See *supra* note 3, at 166-170.

²⁹ *Ibid*, 72-73.

³⁰ *Ibid*, 73.

Thus, the staff of a psychiatric unit which was dealing with the abuser treated him entirely as a suicide risk (he was referred there after an attempt to take his own life) and did not make contact with his wife to ascertain what violence or threats of violence he had directed against her. Neither were they aware of the protection orders which had been granted to the estranged wife. The Family Court counsellor, to whom a referral had been made under section 10 of the Family Proceedings Act 1980 at the time that the wife applied for a separation order, found out only by accident about the protection orders which had been granted subsequent to the counselling referral. She was informed about the existence of the orders when she ran into the Family Court Counselling Coordinator in a lift. The police in three different districts had had a number of contacts with both parties. These related to the husband's repeated threatening telephone calls, an assault which had occurred when he broke into the home of his parents-in-law and tried to take one of the children, and another assault on his wife at her workplace. The husband was not charged by the police with the assaults and little information about the incidents was recorded on their files. No information was recorded in a central place. Nor was it available to the Family Court, the counselling service or the psychiatric unit.

From the deceased wife's mother we learned that, when the couple's four-year-old son was told of his mother's death, his first response was "Did Daddy shoot her?" The poignancy of that comment belies both the sense of surprise and the "unavoidability" of the event that the various decision-makers expressed when the murder/suicide occurred. The deaths could only have been a surprise to people who saw only part of the pattern, viewing single acts in isolation rather than as a whole. We share the belief of the wife's mother that her daughter could well be alive today if there had been adequate interagency cooperation.³¹

Each element of the "gap" we have discussed serves to disadvantage women who have been abused. In particular, by working in isolation and without clear guidelines, decision-makers too often use their discretion in ways which endanger the victim, restrict her freedom and collude with the abuser.

II. THE ELEMENTS OF INTERVENTION PROJECTS

Intervention projects aim to "close the gap".³² At the heart of an intervention approach is a shared philosophy about the nature of violence

³¹ For the full case study, see *ibid*, 149-154.

³² We would like to thank Ellen Pence for sharing with us her experiences of the development and operation of the Duluth Abuse Intervention Project, a programme she founded in Duluth, Minnesota approximately 12 years ago. The Hamilton Abuse Intervention Pilot Project is modelled on the philosophy and practices of the Duluth

and the priorities which should guide the community's response to such violence. The elements of intervention entail the development of such a shared philosophy, the adoption of policies and practices to implement the agreed philosophy, networking between agencies to ensure a consistent systemic approach to violence, the monitoring of compliance with intervention protocols, the establishment of programmes for victims and abusers, and the systematic evaluation of the outcomes produced by the intervention model.³³

The first element of intervention, the development of a shared philosophy, involves the privileging of violence above the relationship between abuser and victim. Physical violence is recognised as one of a range of tactics by which abusers seek to maintain power and control over their partners. Other tactics of power and control utilised by abusers include emotional and verbal abuse; intimidation; isolation; treating the victim as subservient while the abuser reserves to himself the right to make all major decisions in the relationship; minimising and trivialising the violence; blaming the victim for such violence. The use of the two latter tactics is not limited to individual abusers. As discussed, such tactics are sometimes used by members of the justice system and serve to deny women's experiences of the realities of the violence they face.

Power and control tactics operating on a systemic level legitimise abusers' perspectives of violence and result in the further victimisation of those who look to the justice system for protection. It is a process that has been identified by certain researchers as "the cultural facilitation of violence".³⁴ An intervention project, on the other hand, aims to enhance victim safety and autonomy.

The key concerns of the intervention approach involve a focus on the extent of the abuser's violence, and the pattern and impact of his violence. With such a focus, violence cannot be dismissed as a symptom of "relationship problems". Rather, "relationship problems" are recognised as symptoms of the violence. It is a "given" of an intervention approach that one cannot have a good relationship with a partner who enforces his will through the use of violence.

project. In August 1993, Ellen Pence was a Visiting Scholar at the University of Waikato and this paper in part reflects the numerous lengthy discussions with her about the aims and elements of an intervention approach to domestic violence.

33 Brygger and Edleson, "The Domestic Abuse Project: A Multisystems Intervention in Woman Battering" (1987) 2(3) *Journal of Interpersonal Violence* 326.

34 See, for instance, Pence, E *The Justice System's Response to Domestic Assault Cases: A Guide for Policy Development* (1986) 1-8.

Inherent in the philosophy of intervention is the recognition that an act of physical violence is part of a continuum of power and control, rather than an isolated, uncontrollable eruption. Also implicit in the philosophy of intervention is the view that the use of violence creates imbalances of power. These premises indicate that mediation cannot be viewed as an appropriate process for resolving disputes during marital separation for relationships which have been characterised by violence.³⁵ Mediation implies equal bargaining positions of the parties. Violence vitiates such equality.

Moreover, a judicial requirement for “fresh and immediate evidence”³⁶ of physical violence prior to the granting of an *ex parte* non-molestation order belies the perspective that physical violence is only one form of an abuser's pattern of control. The intervention philosophy underscores that one need not hit someone continually to control him or her and that a narrow judicial focus on physical violence renders other forms of control invisible.

The second element of intervention is the development of an agreed set of policies and practices, often codified as intervention protocols, which provide concrete and specific ways in which agency personnel must put the safety of victims first. For instance, protocols may require the safety of victims to be the prime consideration in determining whether abusers should be granted bail. Similarly, as a result of the recognition that violence has on-going and disempowering consequences for victims, intervention protocols may mandate that police lay assault charges which arise within a domestic context rather than putting the onus on victims to initiate complaints.

The emphasis of an intervention approach is on the implementation of intervention protocols so that the justice system becomes more responsive

³⁵ The recently published *Review of the Family Court: A Report For the Principal Family Court Judge* (1993) supports this position. In that report, Boshier DCJ and the other committee members agreed “that where domestic violence is evident, joint counselling and/or mediation is not appropriate. This should only be cautiously considered if there is informed and free agreement by both parties”. The Committee went on to state: “Domestic violence, as a reflection of power, is obviously an important concept when it comes to considering how a Court process should operate when domestic violence exists. *We believe that mediation should be avoided by the judicial process as a legitimate means of dispute resolution in such circumstances*” (at 119, emphasis in original).

³⁶ In our previous work, we recommended that “There should be no requirement for ‘fresh’ or ‘immediate’ violence to have occurred as a prerequisite for issuing *ex parte* non-molestation orders. Past violence coupled with present threats is as compelling a reason for issuing protection orders as is present physical violence” (supra note 3, at 212). For a discussion of Family Court practices in terms of granting *ex parte* non-molestation orders, see *ibid*, 208-212.

and oriented towards victims. Emphasis on consistent implementation may be contrasted with a focus on the attitudes held by police officers, prosecutors, judges and probation officers about domestic violence. These attitudes are often blamed for the justice system's inadequate response to the victimisation of women.³⁷

From a victim's perspective, however, it does not much matter what attitudes police officers, for instance, hold as long as they do their job in accordance with the relevant intervention protocols. The concentration on implementation entails an implicit acknowledgment that attitudinal changes are more difficult to effect than behavioural changes and that the changing of behaviours may in fact be instrumental in the changing of attitudes.³⁸

Networking between government and community agencies is a third element of intervention. A common problem facing efforts to curtail domestic violence is that abusers generally can find a decision-maker within the justice system who will sanction their analysis of their abusive behaviour. The tendency to trivialise domestic violence and the victim-blaming analyses which constitute "the gap" have already been discussed within the police and court contexts. These problems may also arise in respect of probation officers who often do not have access to all the details of an assault or to the historical framework within which an assault has occurred. They may find it easy to accept an abuser's rationalisations (for example, "She never listens to me") and minimisations (for example, "I only pushed her" or "I didn't mean it, I just lost it") and recommend relationship counselling which fails to address the violence.³⁹ As well, Family Court counsellors typically do not have access to detailed information about violence in the relationship of parties they are working with and are unlikely to obtain it from victims if they hold only joint counselling sessions.⁴⁰

³⁷ For a discussion about police attitudes, see Kurz, "Battering and the Criminal Justice System: A Feminist View" in Buzawa, EDS and Buzawa, CG (eds) *Domestic Violence: The Changing Criminal Justice Response* (1992) 31. For a discussion about police prosecutors' attitudes, see Cahn, "Innovative Approaches to the Prosecution of Domestic Violence Crimes: An Overview", *ibid*, 162-163.

³⁸ Deaux, K and Wrightsman, L S *Social Psychology* (5th ed, 1988) 199-203.

³⁹ These are examples of the rationalisations the second author has heard over 8 years working as a probation officer and a similar period facilitating groups of domestic assaulters. For examples of how even experienced workers who have access to only the abusers' stories can easily collude with their violence, see also Pence, E and Paymar, M *Power and Control: Tactics of Men who Batter* (1986) 30.

⁴⁰ Relevant here is the applicability of the Stockholm syndrome to some battered women. The syndrome accounts for the paradoxical psychological reaction of hostages to their captors: when threatened with death by a captor who is also sometimes kind, hostages develop a fondness for their captor and an antipathy to the authorities working for their release. They may become quite protective of their captor. For a description of this phenomenon, see Graham, Rawlings and Rimini, "Survivors of Terror: Battered

Networking and the sharing of information between different agencies allow for abusers to be held fully accountable for their actions. Often such networking and information sharing may, however, be seen as conflicting with the very philosophies and processes currently adopted by the justice system for dealing with domestic violence, including notions of confidentiality and privacy. This is especially true in the Family Court arena.⁴¹ One contentious element of an intervention approach, therefore, is that confidentiality and privacy will not be privileged over concerns about victims' safety.

A second reason for networking and information sharing arises because members of various agencies all too often do not understand where their "bit" fits in terms of an overview of the system's approach to domestic violence in general or to specific cases involving an individual abuser and victim. It is essential if victims' safety is to be enhanced that decision-makers within the justice system gain a better sense of the collective impact of their work, on both a case-by-case and systemic level.

Monitoring, the fourth element of intervention, ensures that the intervention protocols are consistently implemented and that abusers receive appropriate, pre-determined consequences for their violence from the justice system. Victim advocates can track the performance of individual practitioners in the criminal justice system and monitor whether such practitioners are holding abusers accountable for their violence by following cases through the processes of arrest, prosecution, sentencing and the enforcement of sentences. The best policies will not enhance the safety and autonomy of victims unless they are implemented.

The fifth element of intervention entails providing services for women who have been battered. These services may include providing safe housing (for

Women, Hostages and the Stockholm Syndrome" in Yllo, K and Bograd, M (eds), *Feminist Perspectives on Wife Abuse* (1988) 217-233.

⁴¹ S 18(1) of the Family Proceedings Act 1980 provides that "No evidence shall be admissible in any Court or before any person acting judicially, of any information, statement, or admission disclosed or made-(a) to a counsellor exercising his functions under this Part of this Act; or (b) in the course of a mediation conference". S 18(3) states that it is a summary conviction offence punishable by a fine not exceeding \$500 for a counsellor to disclose "to any other person any information, statement or admission received by or made to the counsellor in the exercise of the counsellor's functions under this Part of the Act". The emphasis on the importance of confidentiality is underscored in *Lawson v Lawson* (1986) 4 NZFLR 380 (FC). In that case, Principal Family Court Judge Mahoney DCJ stated: "The confidentiality of counselling carried out under the Family Proceedings Act is absolute. It is so important to the integrity of our system that there can be no exceptions" (at 384).

example, women's refuges), court advocacy, and support and education groups. They may also involve supplying assistance in obtaining income support benefits, finding employment or obtaining training or education. Any service which will enhance the ability of women to live independently of their abusers falls under this heading. In an offender-oriented justice system, attention is placed on programmes for men who abuse. While the effectiveness of such abuser programmes is still a matter of debate,⁴² only rarely is the focus on providing properly resourced programmes for women aimed at reducing the chances that they will remain in or re-enter abusive relationships.

The sixth element of intervention involves rehabilitation of abusive men coupled with an invocation of penalties if men fail to attend court-mandated programmes or are uncooperative. Consistent with the philosophy of intervention, the meaning, power and criminality of violence is central to men's rehabilitation programmes. The programmes help men to understand the origins of the belief systems which give legitimacy to male domination and abuse, and the ultimately self-defeating nature of attempts to enforce their will over partners if what they seek are relationships based on mutual support and trust.

The final element of intervention is evaluation. Regular process and outcome evaluations, especially evaluation from a victim perspective, are needed to identify unanticipated problems in the implementation of intervention protocols so that policies and procedures can be refined. Inherent in this evaluation process is a definition of "success" which concentrates on whether the aims of intervention are achieved rather than on a focus limited to abuser recidivism or minimisation of financial costs.

III. THE HAMILTON INTERVENTION MODEL

In Hamilton, the elements of intervention have been implemented through the coordinated efforts of the Maori and non-Maori women's refuges, the police, the criminal courts, the Family Court and Community Corrections. Each of these organisations is represented at monthly HAIPP inter-agency meetings which identify and review problems and plan solutions in respect of the implementation of intervention protocols. A project office has been established in the city centre (easily accessible to transport) which employs

⁴² For reviews of abuser programmes, see Tolman and Bennett, "A Review of Quantitative Research on Men who Batter" (1990) *Journal of Interpersonal Violence* 87; Eisikovits and Edelson, "Intervening with Men who Batter: A Critical Review of the Literature" (1989) *Social Services Review* 384; and McLaren, K *Programmes to Reduce Domestic Violence: Draft of a Literature Review* (unpublished draft of a paper prepared by the Penal Policy Division of the Department of Justice, 1992).

paid staff to coordinate the intervention efforts of the participating agencies, provide advocacy services for women and manage a large pool of volunteers who run the men's and women's educational programmes. Over the past two years that HAIPP has been in existence, specific intervention protocols and less formal practices and policies have been implemented which now determine how government agencies and community groups deal with domestic violence in Hamilton.

1. Police

The police have a pivotal role to play in ensuring that there is a consistent community response to battering. The protocols which have been developed between HAIPP and the police pinpoint several key aspects of policing in terms of domestic violence cases.

First, there is mandatory arrest of abusers whenever there is a prima facie case made out that an assault has occurred. An arrest should occur without the police seeking a complaint from the victim, and she should not be required to give evidence in court unless there is no case to answer without her evidence. These aspects of HAIPP's intervention protocols have officially been police policy since 1987.⁴³

Secondly, there is notification of attendances at "domestics" by the police to the HAIPP Crisis line in order to ensure that victims receive immediate follow-up support from women's advocates. This should happen whether or not an arrest has been made.

Thirdly, men who commit assaults against their partners are to be charged under section 194 (b) of the Crimes Act (male assaults female) unless a more serious charge is warranted. All breaches of non-molestation orders will also be charged. This intervention protocol prohibits police from issuing warnings in lieu of charging and rules out assailants being charged with common assault under the Summary Offences Act 1981. It also prohibits police from offering diversion to offenders who admit that they have committed assaults or breached non-molestation orders.⁴⁴

Fourthly, offenders (whether charged with assault or breach of a non-molestation order) will not receive police bail but will be kept in the cells until the next court sitting after their arrest. If such arrest occurs on a

⁴³ Police Commissioner, *Commissioner Circular 1987/11* (1987). See also Police Commissioner, *Commissioner Circular 1992/07*, *supra* note 11.

⁴⁴ Contrast this with the national police diversion approach to domestic violence as set out at *supra* note 11.

weekday night, an offender will be brought into the District Court the following morning. If such an arrest occurs on Friday night or over the weekend, the offender will be held in the cells until the Monday morning sitting of the court. This policy provides for victim safety and helps restore victim autonomy by reducing the risk of intimidation.

In addition, HAIPP staff have been involved in police training to improve officers' understandings of the dynamics of abuse.

While aspects of project protocols are consistent with national police policy, the existence of HAIPP has had additional implications for Hamilton police in that they have been asked to place their performance under a greater degree of external scrutiny than is the case elsewhere in the country. In Hamilton, for instance, a victim advocate reviews the log of telephone calls to the police to determine whether the police arrest policy and other police protocols regarding charging of assaults have been implemented in every instance.

2. Women's Refuges

The work of women's refuges is fundamental to intervention projects. In conjunction with the HAIPP office, the local women's refuges (Te Whakaruruhau and Hamilton Refuge and Support Services) operate a joint Crisis line which handles after-hours calls from the police as well as calls initiated by women. The refuges operate a roster of call-out advocates who attend incidents, provide immediate support for women, discuss the victim services which are available, collect information about the assault (which is forwarded to the court advocate) and admit women to a refuge if that is necessary. Call-out advocates also participate in HAIPP's monitoring function by asking women to evaluate the services they have received from the police. Problems with policing can subsequently be raised with the relevant officers, and letters of commendation are sent when police officers have been particularly helpful and supportive to victims.

3. The District Court

An intervention project has important implications for the operation of the District Court and the prosecution of abusers. Prosecutors in cases of domestic violence have faced particular difficulties in obtaining convictions.⁴⁵ The most common difficulty is that a significant number of victims decline to give evidence or seek to have the charge(s) against their abusers withdrawn. This is understandable as abusers characteristically use

⁴⁵ *Supra* note 5.

a variety of tactics, including intimidation, to dissuade their victims from cooperating with the prosecution.

Intervention protocols aim to shield victims from such tactics by not requiring them to lay charges and having police collect sufficient evidence so that a defended prosecution will succeed without the victim being required to give evidence at trial. In addition, when a defendant is remanded on bail, judges in Hamilton will now usually impose as a condition of bail an order prohibiting the accused from associating with the victim.⁴⁶ This condition is imposed unless the victim specifically requests that the defendant be allowed to return home.

It is now the practice in Hamilton for prosecutors to decline victims' requests to have charges withdrawn. Instead, victims are advised that they should attend the court and tell the presiding judge why they do not want the abuser prosecuted. Support from the HAIPP court advocate is available to women who may be considering withdrawing from a prosecution.

Intervention policies also relate to sentencing convicted abusers. There is an informal agreement with Community Corrections that probation officers will recommend the HAIPP men's education programme as part of the sentence for all suitable convicted offenders.⁴⁷ And although the Hamilton District Court judges have felt it important not to have their sentencing discretion fettered, they have manifested their support for intervention policies in their sentencing approaches. Most convicted abusers are ordered to attend the HAIPP men's education programme, either as a condition of a sentence of supervision or as part of a parole programme following a term of imprisonment (which is a likely outcome for repeated and/or more serious assaults).⁴⁸

A key aspect of the intervention model in the District Court is the role of the HAIPP court advocate. She attempts to demystify court processes for women who have been abused and helps to ensure that they have knowledge of and input into those processes. She keeps victims informed of what is happening to their abusers as a result of court appearances. Information about victims' safety concerns and the impact of the assaults on them are provided by her to both the police prosecutor and the Community Corrections Court Servicing Team. She provides support for victims

⁴⁶ Robertson, N and Busch, R, *Hamilton Abuse Intervention Pilot Project Report No. 5: The Two Year Review* (1993) 10. See *infra* note 75 for a statistical breakdown of remand outcomes for the year August 1992 to July 1993.

⁴⁷ See *infra* for examples of "unsuitability".

⁴⁸ *Supra* note 46, at 11.

required to give evidence in defended hearings, helps them organise child-care and transportation, talks to them about their fears about appearing in court, outlines court procedures and protocol, and discusses the implications of making a stand against the abuse they have received. While the court advocate does not give formal legal advice, she does provide information to women about protection orders and other legal issues.

The court advocate also represents a crucial part of HAIPP's monitoring process. She tracks abusers through the criminal justice system, and documents departures from intervention policies by prosecutors, probation officers and judges.

4. Community Corrections

Probation officers have an influential role in the criminal justice system. They make recommendations to judges about the sentencing of offenders, monitor community-based sentences such as supervision and community care, and supervise offenders released on parole. Probation officers exercise a significant degree of discretion in terms of their sentencing recommendations and the types of programmes which they require men under supervision to attend. In the past, probation officers have been criticised for being offender-oriented, sometimes to the detriment of the victims of domestic assaults.⁴⁹

As has been already mentioned, there is an informal agreement with HAIPP that probation officers in the District Court will recommend the HAIPP men's programme for all domestic abusers, either as part of a sentence of supervision or as part of a parole programme in those instances where offenders are sentenced to imprisonment. The agreement includes a provision that exceptions to this practice should only be made where an offender is clearly unsuitable to attend the HAIPP programme. "Unsuitability" arises where an offender has a language barrier or is not living within the Waikato district or where he has a specific psychiatric condition which would severely limit his ability to benefit from the programme.

Since the advent of the project, probation officers have had access to victim statements collected by refuge call-out advocates soon after the assault has occurred. This information has been supplied by HAIPP to assist probation officers in preparing their pre-sentence reports. Probation officers have been criticised for not obtaining victims' perspectives in the preparation of these

⁴⁹ Penal Policy Review Committee, *Report to the Minister of Justice* (1981) 116-117.

pre-sentence reports.⁵⁰ The problem has been especially acute when reports have been prepared during a short stand-down period and the victim has either not been present in court or alternatively when members of the Court Servicing Team have been too pressed to have time to interview her. The victim statement is aimed at focussing probation officers' attention on the specific instance of violence in question and its consequences for the victim. It also contains a summary of any previous violence that has occurred between the parties.

Probation officers also ensure that offenders comply with the conditions of their sentences. Under HAIPP protocols, if men fail to attend HAIPP as directed, enforcement action will be initiated by the probation officer. Absences for genuine cases of illness or other legitimate reason (such as unavoidable work commitments) are accepted and usually the first absence without good reason will result only in a warning. In all other cases, offenders will be charged either with breaching the conditions of their supervision orders or else will be subject to an application to have their supervision reviewed and another sentence substituted. A term of imprisonment is most likely when offenders are re-sentenced.

5. The Family Court

In Hamilton, intervention protocols have been developed to cover aspects of the operation of the Family Court. Respondents who have had protection orders (interim or final) made against them are now directed to attend the men's education programme under the provisions of section 37A of the Domestic Protection Act.⁵¹ The section 37A direction remains in force even if an applicant who has obtained interim protection orders does not proceed with an application for final orders. Protocols have also been developed for enforcing attendance of respondents at the men's programme through the issuing of summonses and the prosecution of non-attenders. While section 37A of the Domestic Protection Act provides for such prosecutions, the prosecutions provisions have hitherto rarely been invoked.⁵²

⁵⁰ Department of Justice, *Submission to the Committee of Inquiry into Violence* (1986) 177.

⁵¹ S 37A (1) states that "the Court may, on making an order under this Act, direct the respondent to participate in counselling of a nature specified by the Court". Subss (4) and (5) lay out provisions for summoning and prosecuting respondents who fail to participate in such directed counselling. By contrast, s 37 states that "On making an order under this Act, the Court may recommend either party or both of them to participate in counselling of a nature specified by the Court". Such "recommendations" are not mandatory.

⁵² *Supra* note 3, at 260.

Applicants are recommended to attend the women's programme under section 37 of the Domestic Protection Act. As a corollary to this section 37 recommendation, the Hamilton Family Court Counselling Coordinators have instructed court-appointed counsellors to delay the onset of counselling in respect of custody and access issues (except for an initial, individual appointment) for six weeks to allow women the opportunity to attend women's education and support groups run by the project office. Participation in the women's groups is seen as a way in which women can become more empowered and able to take part in court-ordered counselling and mediation on a more equal footing with their abusers. It is hoped that by gaining some distance from the trauma of the recent violence and by sharing their experiences of custody and access arrangements, women in these HAIPP groups will be able to enter into negotiations about long-term childcare options without resorting to the placation and appeasement tactics which so frequently characterise women's behaviour towards their abusers.⁵³ They will be better positioned to evaluate realistically which arrangements are likely to work for them. It is believed by Family Court personnel that over time this deferral of counselling will result in a decrease in the number of repeat applications for revision of custody and access orders, thereby saving court time and expense.⁵⁴

6. HAIPP's Women's Programmes

The HAIPP office offers a range of services and programmes for women. One-to-one crisis support and advocacy is provided by HAIPP staff and volunteers. These services complement similar services offered by the two Hamilton women's refuges. While quite time consuming for the project, the provision of one-to-one support is a necessary aspect of restoring victim autonomy. Such support may involve listening while a woman painfully recounts the most recent incident involving violence or intimidation during a court appearance or access changeover time. On the other hand, it may involve accompanying her to the Department of Social Welfare and helping her apply for a domestic purposes benefit or helping her prepare for and then accompanying her to her lawyer's office if she is applying for protection and other orders from the Family Court. It may take up to three or four hours at the Department of Social Welfare offices for a woman to complete the procedures necessary to obtain the domestic purposes benefit and several hours of waiting at the police station before her statement concerning a domestic incident is taken.

⁵³ A cliché often used by battered women to describe their appeasement tactics is, "He said, 'Jump!' And I said, 'How high?'"

⁵⁴ See Robertson, N and Busch, R, *Hamilton Abuse Intervention Pilot Project Report no. 2: Six Month Evaluation Report* (1992) 39-40.

While victims often need one-to-one support, group work is an important part of the women's support and advocacy programme. Group activity breaks down the isolation abusers typically impose on their victims. Through meeting women who are in similar situations, participants can more easily come to understand the systematic (and sometimes systemic) nature of the violence to which they have been subjected. The result is that they are less likely to accept abusers' attempts to make them feel responsible for the violence. Over time, members of women's groups are able to understand their own stories against the backdrop of commonplace domestic violence as well as the justifications often accepted by the justice system for that violence. Participation in women's groups allows women to contextualise socially their spouse's behaviour.

Because of the guilt victims are often encouraged to feel by their abusers, it is often difficult to engage women in support and education groups. For some battered women, they have been "punished" for visiting friends and family and having interests outside the home; and they have been told who they are allowed to speak to and what they can say at social events with or without the abuser being present. Partly because of these women's understandable reluctance to participate in groups where violence is the focus of discussion, HAIPP has found it helpful to provide other types of women's groups.

The first of these is the HAIPP Orientation Group. All women whose (ex) partners attend a men's education programme are invited to attend one of these one-off groups. Some women find it easier to attend a group which can be seen as helping their partner than one which is clearly designed for them. The orientation group is an opportunity for women to be informed about the content of the men's programme, to see the control logs and videos used in teaching men about power and control, to learn about the language their partners will probably start to use as a result of their participation in the men's education groups, to find out what will happen if their partners fail to attend the programme, to discuss their personal safety issues, and to learn what other women's groups are available to them at HAIPP.

The other type of women's group is the Court Orders group. The purpose of this group is to inform women about the meaning and scope of protection orders and how to get police to action them. The group is run by the HAIPP court advocate, who, in collaboration with others, has produced a simple language guide to protection and other Family Court related orders. This guide sets out the grounds on which protection orders may be granted, the procedures involved in applying for such orders, information about what

behaviour constitutes breaches of those orders and what steps to take to get police to action those breaches. It also sets out information relating to custody and access issues.

7. HAIPP's Men's Education Groups

The men's education programme also operates out of the HAIPP office. The programme accepts referrals from Community Corrections and the Family Court. Some men are "self-referred" in that they are not court-mandated to attend the programme. "Self referral", however, is often a misnomer in that certain men are referred to HAIPP by other social services and some are "partner referrals". The latter attend HAIPP in response to ultimata from spouses that unless they do something to end their abuse, the relationships will be over. Some men apparently "self-refer" prior to court appearances. In HAIPP's first eighteen months, 5% of self-referred men were subsequently ordered by the courts to attend the men's programme.⁵⁵

Approximately 900 men have been referred to the HAIPP programme over the past two years. Of the 193 men on the programme as of 30 June 1993, 70% had been referred by Community Corrections, 6% by the Family Court and 24% were self-referred.⁵⁶ Only two women have been referred to HAIPP as a result of their violent behaviour, both from Community Corrections and both in the past two months. Because of their infinitesimal number, there is no group programme established for them, and they are dealt with on a one-to-one basis by HAIPP staff.⁵⁷

It is important to note that the HAIPP men's programme is an education programme. It is not a therapy programme, neither is it an anger management programme. While many men might benefit from therapy or anger management training, such programmes are not a priority for protecting victims and restoring their autonomy. Therapeutic approaches typically address the presumed causes of the violence rather than the effects of such violence.⁵⁸ For example, if the presumed cause of an abuser's violence is his lack of communication skills, poor self-esteem or inadequate ways of expressing anger, providing him with communication skills training, self-esteem enhancement or assertiveness training may be seen as appropriate remedies. Such approaches risk turning out more skilled and confident abusers.

⁵⁵ Supra note 46, at 27.

⁵⁶ Ibid, 25-26.

⁵⁷ Information given by the HAIPP court advocate in a discussion held 3 October 1993.

⁵⁸ Adams, D "Counselling Men Who Batter: A Profeminist Analysis of Five Treatment Models" in Yllo and Bograd (eds), supra note 40, at 176-199.

On the other hand, if the violence and the effects of the violence are the focus, then abuser rehabilitation programmes become victim-oriented. Instead of anger being seen as a cause of violence, it is recognised as one of the weapons abusers use to intimidate their partners. Poor self-esteem is recognised as a self-serving justification for using violence which is in fact directed at getting the victim to do something, to stop her from doing something or to punish her for what she has or has not done.

Consistent with the philosophy of intervention, the focus of the men's education programme is on seeing the violence as part of a pattern of tactics utilised by abusers to control their partners. In groups, men are encouraged to re-examine the notions of hierarchy implicit in their belief systems which characteristically condone the use of violence. The curriculum explores the consequences of adopting a "one-up, one-down" model of relationships. For abusers, such consequences may include the loss of their spouse's intimacy, trust, and love. Ultimately, it may result in the loss of the relationship itself and (potentially) in the loss of father-child relationships as well. By exploring the contradictions in their rationalisations and the self-defeating nature of their violence (including arrest and conviction), men are introduced to an alternative model of relationships based on equality and respect.⁵⁹

The men's groups are usually co-facilitated by a woman and a man. In part, this provides an opportunity for the co-facilitators to model an equal relationship between men and women. The women facilitators also play a monitoring role as part of the project's accountability process. They maintain close links with the women's programme so that they bring a victim-oriented perspective on violence and its effects to the men's groups.

Further steps to ensure accountability of the men's programme to victims include women's advocates making regular checks with the partners or ex-partners of men's group participants to gather feedback on the abusers' behaviour outside the group and to offer help to women who need it. Support for women whose partners are undergoing a men's education programme is vital. Both American and local research shows that women are more likely to remain in a relationship if the abuser is undertaking some form of treatment.⁶⁰ In this context, providing a programme for abusers

⁵⁹ *Supra* note 39. The curriculum used in the HAIPP men's programme was developed in Duluth, Minnesota and then adapted for New Zealand conditions (eg to provide separate men's groups for Maori and non-Maori abusers, and production of local video vignettes of abusive behaviour).

⁶⁰ Gondolf, E W "The Effect of Batterer Counselling on Shelter Outcome" (1988) 3 *Journal of Interpersonal Violence* 275; and Furness, J A *From a Woman's*

without support for women may actually increase the danger faced by women.

HAIPP men's group facilitators sometimes comment that some of the men seem to be less interested in actually changing their behaviour than in convincing their partners that they have changed.⁶¹ Our evaluation data includes instances of women reporting that their abuser has used participation in the programme to abuse them further (for example, by telling her that she has nothing to "moan" about given what other men in his group do to their spouses, or by adopting the terminology of the curriculum to accuse her of using power and control tactics to dominate him).⁶² Some women who remain with their abuser as he participates in the men's programme have been characterised as being on a virtual emotional roller-coaster as he alternates between behaving himself and relapsing into old patterns.⁶³ Given the priority, on safety and autonomy of victims, support for women can be seen as a necessary part of running programmes for men. This approach has been codified in a standard of practice developed in Pennsylvania which states that:

No intervention program for batterers should be initiated in a community unless there is a program for battered women that provides safe housing, advocacy and counselling and these services are available to the battered partners of participants in the intervention program.⁶⁴

Indeed we would argue that it is unethical to provide programmes for abusers which do not have built into them processes to ensure accountability to the partners of those abusers. Moreover, a full array of appropriate services for those women must also be provided.

Despite HAIPP's clear priority in terms of victim advocacy services, the men's education programme is frequently seen by the justice system's representatives as the most important part of the project.⁶⁵ This view is

Perspective: A Multiple Case Study Evaluation of an Education Programme for Abusers (unpublished M Soc Sc Thesis, University of Waikato, 1993) 203.

⁶¹ Supra note 46, at 29-30.

⁶² Robertson, N, Busch, R, Glover, M, and Furness, J *Hamilton Abuse Intervention Project: The First Year* (1992) 44.

⁶³ Furness, supra note 60, at 213-214.

⁶⁴ Foster and Bicehouse, "Principles of Practice" in Hart, B J (ed) *Accountability: Program Standards for Batterer Intervention Services* (1992) 5.

⁶⁵ For example, a discussion paper prepared for FVPCC by a senior police officer regarding the evaluation of HAIPP suggested 9 measures which could be considered as indicators of the success of the project. The first was "reduced levels of recidivism and therefore a reduced incidence of violence". The next 5 indicators related exclusively to abusers. Only the last 3 related to victims and each of these related to reduced need for medical services (eg, hospitalisation and specialist services such as

reflected in many of the enquiries regarding the programme received by HAIPP. Evaluations of HAIPP, moreover, have at times been criticised for not paying sufficient attention to measuring the extent of re-offending.⁶⁶ The emphasis on offenders is clearly evident in the funding arrangements between HAIPP, the Family Court, and Community Corrections which entail fee-for-service in relation to offenders. The Family Court, for instance, pays a fee for respondents directed to HAIPP under section 37A of the Domestic Protection Act. It does not fund the women's support and education programme for victim applicants who are referred under section 37.

Whether or not individual men stop their violence is obviously an important measure of HAIPP's success. However, the intervention focus on safety and autonomy of victims means that the most important evaluations of success must be victim-oriented. It must be asked whether, as a result of HAIPP's involvement with them, individual women are now living abuse-free lives. This result may occur because former victims have continued to live with abusive partners but the latter have stopped using power and control tactics. Alternatively, former victims may be living independently or may have formed other relationships which are violence-free.

In terms of the systemic problems discussed earlier in this article, the most salient issues are whether the decision-makers in the justice system in Hamilton currently respond to domestic violence in ways which enhance the safety of victims, restore their autonomy and hold abusers accountable for their violence. It is clearly this systemic focus which distinguishes intervention projects from more limited approaches which concentrate on individual abusers and/or victims in isolation. The latter approaches explicitly or implicitly deny the crucial link between the justice system's practices and paradigms about domestic violence and the ongoing abuse of victims who turn to police or courts for protection.

IV. THE IMPACT OF THE INTERVENTION PROJECT

It is not our intention in this section to provide detailed evaluation data on the impact of the project. For that, the reader is referred to the five HAIPP evaluation reports prepared to date. Instead, we briefly review some of the

psychologists). No mention was made of increased victim autonomy as an indicator of success. Only the first indicator related (indirectly) to victim safety. See Smith, D C: unpublished discussion paper prepared for the 3 December 1992 meeting of the Intervention Working Party of FVPCC.

⁶⁶ This was evident from a discussion paper prepared by Bruce Asher of the Department of Justice and tabled at the 24 March 1993 meeting of the Intervention Working Party of FVPCC.

major impacts of an intervention approach on police, women's refuges, the courts and Community Corrections.

1. Police

The impact of intervention on police workloads has been difficult to quantify, mainly because police records do not generally distinguish stranger and domestic violence.⁶⁷ However, estimates based on a sample of telephone messages suggest that the Hamilton police are now arresting more than twice the number of abusers than prior to the establishment of HAIPP.⁶⁸ This seems to reflect a combination of an increase in the number of calls concerning domestic violence and an increase in the proportion of calls resulting in arrest. On the other hand, we have been told by some officers that it is now less common for police to be repeatedly called to the same houses.⁶⁹

While we cannot quantify the level of reduction in repeat calls, this would be consistent with a more effective police response. Here we do have reasonable data.⁷⁰ When refuge call-out advocates visit women after a police-attended incident, part of their procedure involves asking the victim how satisfied she was with the police response. The overwhelming majority of victims report being satisfied with police intervention. Some problems do remain: some officers are considered to be rude, unsympathetic, or victim-blaming. But even when there are complaints about the attitudes of police officers, it is very rare for women to be dissatisfied with the outcome of police intervention.

⁶⁷ See *supra* note 5.

⁶⁸ One impact that HAIPP has had is that record-keeping is now much improved compared to prior to the project's establishment. For example, we can determine with considerable accuracy the number of abusers arrested in Hamilton each month. Establishing comparable figures for the months prior to the project's launch is more difficult. An approximation can be obtained by searching the records of telephone messages received at the Watch House. This requires making a judgment on limited information as to which calls were domestic-related. This method fails to include some arrests - eg where a complaint was made in person rather than over the telephone, or where an offender was arrested more than a day after the telephone call was made. Police advise that few arrests are made in the latter circumstances. Working from a sample of telephone messages for January to June 1991, we calculated an estimate of 16 domestic arrests per month. During the same period in 1993, an average of 42 arrests per month were recorded by HAIPP.

⁶⁹ From conversations with Hamilton police sergeants in February 1992.

⁷⁰ *Supra* note 46, at 5-6.

2. *Women's Refuges*

For all the agencies, intervention has resulted in an increase in domestic violence related work, at least in the short term. This is most evident for the two Hamilton women's refuges which have reported a four-fold increase in their workload.⁷¹ The increase is due primarily to refuges' provision of advocacy services to women who do not make direct contact with the refuges themselves but who are seen by refuge call-out advocates after police have contacted the Crisis line about them. Refuge call-out advocates work long hours under highly stressful and potentially dangerous conditions. The risk to advocates is especially evident when they respond to non-arrest calls. In those situations, the perpetrator may be lurking around the neighbourhood or may even be in the house.

The establishment of HAIPP has resulted in a change of focus for Hamilton refuges from providing services for residents of the refuge house to community support work. Three-quarters of the work done now by the two refuges involves supporting women who never become refuge residents but who require crisis counselling about the violence they have faced as well as transport to and assistance in dealing with the Department of Social Welfare, lawyers, the courts, doctors and police.⁷² Moreover, refuge workers perform their call-out advocacy role in addition to all the "traditional" activities of a refuge service, namely, running the refuge houses and providing counselling and support services for the women and children who are residents of those houses. Finally, refuge workers carry out various functions within HAIPP's education and support programmes. For instance, both refuges have members who facilitate groups in the men's and women's programmes.

3. *District Court*

Prosecuting domestic abusers has been particularly problematic. This is reflected in Justice Department statistics for the whole of New Zealand: in 1991, only 64% of the men charged with male assaults female were convicted.⁷³ During the second year of the project, on the other hand, 87% of the men charged with male assaults female were convicted in the Hamilton District Court.⁷⁴ This is a significant improvement in holding abusers accountable for their violence and appears to be the result of a combination of HAIPP-related factors. First, the non-association conditions

⁷¹ Ibid, 6.

⁷² Idem.

⁷³ Supra note 5.

⁷⁴ Supra note 46, at 10. For a comparison of outcomes of prosecutions for male assault female charges for HAIPP and national samples, see Table 3, *ibid*, 12.

generally imposed on bail⁷⁵ presumably help protect women from being intimidated and increase the chances that they will give evidence in defended cases. Moreover, the role of the court advocate appears to be crucial; during the past year, only one woman who has been supported by the court advocate has declined to give evidence in a defended hearing.⁷⁶ This can be contrasted with the experiences of the Christchurch District Court. Certain judges in that court have commented several times over the past year that women complainants were refusing to testify at defended assault hearings, thereby causing substantial problems in terms of the court's calendar.⁷⁷

While statistical analyses can provide a global view, individual cases are needed to establish exactly how well the intervention approach has been accepted by the judiciary. The cases monitored by the court advocate show that there are still times when District Court judges in Hamilton minimise the violence victims have experienced or accept an abuser's rationalisation for his behaviour. Some sentencing decisions in terms of the "special circumstances" provision of section 5 (1) of the Criminal Justice Act 1985 are illustrative of this problem.⁷⁸ For example, in one case, an accused was charged with assault with intent to injure for pushing his spouse to the floor, putting his hands around her throat, choking her and kicking her in the face. While the judge characterised the attack as "serious violence", he found that the section 5 special circumstance criterion had been fulfilled because, just prior to the assault, the accused had learned that his wife had formed a new relationship. Rather than imprisonment, the accused was sentenced to six months periodic detention and attendance at the HAIPP men's programme. While the judge stressed that he did not feel that the accused was "justified" in his assault, his willingness to characterise the new relationship as a special circumstance tended to legitimise the accused's view (expressed at

⁷⁵ Ibid, 9-10, especially table 1. For the year between August 1992 and July 1993, of the men charged with domestic violence related offences (n=344), 22% (77) were remanded in custody, 60% (207) were remanded on bail with non-association conditions and 17% (60) were remanded on bail with no non-association conditions.

⁷⁶ Ibid, 10.

⁷⁷ Reported in *New Zealand Herald*, 14 January 1993, 3; *Waikato Times*, 11 March 1993, 8. See also supra note 27.

⁷⁸ S 5(1) of the Criminal Justice Act states that "where (a) an offender is convicted of an offence punishable by imprisonment for a term of 2 years or more; and (b) the court is satisfied that, in the course of committing the offence, the offender used serious violence against, or caused serious danger to the safety of, any other person, the court shall impose a full-time custodial sentence on the offender unless the court is satisfied that, because of the special circumstances of the offence or of the offender, the offender should not be so sentenced".

the trial) that his wife “deserved” what he had done to her.⁷⁹ As a minimum, the judge’s approach indicated that he understood how learning the news could result in the accused’s assaultive conduct. In fact, during separation, it is a rather “ordinary” circumstance that former partners form new relationships.

In another case, a District Court judge found that an assault which consisted of pushing the complainant into a door and repeatedly punching her to the body and to the head had missed the “serious violence” measure of section 5. Although the complainant had required medical attention and had needed a neck brace, the accused was not imprisoned but was instead sentenced to three months periodic detention and six months supervision with a condition to attend HAIPP. In that case, no victim impact report had been called for and the judge was apparently unaware of the extent of the complainant’s injuries.⁸⁰

Of more general concern, certain District Court judges (as well as lawyers and police) have expressed reservations about the protocol that requires police to charge all domestic assaults under section 194 (b) of the Crimes Act.⁸¹ Section 5(2) of the Criminal Justice Act 1985 mandates that an accused convicted twice under section 194(b) within a two year period shall be sentenced to a term of imprisonment unless “special circumstances” can be found. There is no requirement of “serious violence” in terms of these assaults, but “violence” must be used.⁸² Section 5(2) coupled with the charging protocol limits judicial discretion in terms of sentencing.

In some ways, this concern is a positive and direct result of the police arrest policy in that far more domestic violence cases, which previously would not have resulted in prosecutions under section 194(b), are now coming before the District Court. Some of these cases may involve single punches or pushing and shoving or incidents in which both spouses have been drinking

⁷⁹ *Police v Descatoires*, unreported, District Court, Hamilton, 13 May 1993 (Brown DCJ).

⁸⁰ *Police v Te Amo*, unreported, District Court, Hamilton, 19 April 1993 (Latham DCJ).

⁸¹ For instance, such a reservation was expressed by Latham DCJ in *Police v Rangitua*, unreported, District Court, Hamilton, 21 September 1993. The accused had been charged under section 194(b) of the Crimes Act. and after a defended hearing, the judge granted him a section 19 discharge without conviction. The incident had involved the accused grabbing the complainant in a headlock. When she pulled away and ran into the road, he caught her, dragged her back and then held her in a bear hug. The judge referred to the incident as an “ex lovers’ tiff”.

⁸² In *Police v Wilson*, unreported, District Court, Hamilton, 4 August 1993, Jamieson DCJ distinguished “force” from “violence”. The assault consisted of one open hand slap across the head which had not resulted in any injury to the complainant: the judge stated that, while an assault had occurred, the incident was not a violent one.

or violent to one another. In the past, these abusers would probably have been warned or charged with common assault under the Summary Offences Act 1981.⁸³ A subsequent assault conviction would not, therefore, have brought the accused into the section 5(2) category.

The majority of cases, however, show that clear and unambiguous messages about the criminality of domestic violence are being given by the judiciary. For instance, in one case in which the offender had delivered at least twelve punches to the victim's face and head (causing bruising and swelling), defence counsel argued that the offender had used some restraint (ie. the blows were not as forceful as they might have been), that the defendant had taken out most of his frustration on the wall and that the violence was a result of the couple's communication problems and financial stress. She submitted that the violence was not "serious" and that a non-custodial sentence would be appropriate. The District Court judge rejected the lawyer's submissions, imposed a six month term of imprisonment, and ordered the offender to attend HAIPP upon his release. In passing sentence the judge observed that "nine and a half offenders out of ten have financial stress at some time or other but do not resort to violence". He considered the attack to be a "prolonged beating", stated that the head is a delicate and vulnerable part of the body and that repeated beating is liable to do serious harm. He also noted that there had been a history of violence by the offender against the victim.⁸⁴

In another case, a judge rejected a section 5 special circumstances submission despite the fact that the victim had sent a letter to the court saying that she forgave the accused. In this case, the offender was facing three charges of male assaults female. One charge involved a push which knocked the then eight-month pregnant victim unconscious. A second incident - which had occurred when the victim was changing their baby's nappies - had involved head-butting which left the victim suffering from chronic headaches. He was sentenced concurrently to nine months imprisonment on each charge. The District Court judge rejected the submission that the victim's forgiveness was a special circumstance.⁸⁵ His approach was consistent with an intervention focus on the extent and effect of the violence and contrasts with certain other reported cases from around New Zealand which have viewed forgiveness by victims of domestic

⁸³ Supra note 3, at 163-164, 167-168.

⁸⁴ *Police v Manihera*, unreported, District Court, Hamilton, 3 May 1993 (Jamieson DCJ). Comments of the judge found in notes taken during the sentencing by the HAIPP court advocate.

⁸⁵ *Police v Chambers*, unreported, District Court, Hamilton, 12 May 1993 (Latham DCJ).

violence in a positive light when assessing special circumstances under section 5.⁸⁶

4. Community Corrections

The increase in the number of abusers arrested in Hamilton has impacted on Community Corrections: the caseload of domestic abusers on supervision and parole has increased dramatically.⁸⁷ However, there are efficiency gains in that, because the direction to attend HAIPP is usually the main focus of the sentence, relatively little face-to-face contact with offenders is required of probation officers. Thus the officer who supervises most of the HAIPP supervision caseload is able to handle far more offenders than would be possible if he were required to carry out traditional case-work tasks.

Community Corrections officers have been consistent in enforcing attendance at the men's programme although eleven men referred to HAIPP between January 1992 and December 1992 were not compelled to complete.⁸⁸ In the majority of cases of non-attendance, enforcement action has been taken. Of the 285 men referred by Community Corrections during the first eighteen months of the HAIPP programme, 14% have had their sentences reviewed for non-compliance while 4% have been convicted of further partner assaults.⁸⁹

5. The Family Court

The first twelve to eighteen months of the HAIPP project also had substantial workload implications for the Hamilton Family Court. The Court staff had to devise procedures for the referrals of women and men to HAIPP under the provisions of sections 37 and 37A of the Domestic Protection Act including procedures for summoning and prosecuting men referred to the men's education programme who failed to attend. While these procedures are now in place, only approximately 50% of the respondents referred to HAIPP under section 37A are actually inducted into

⁸⁶ In *Thomas v Police*, unreported, High Court, Wellington, AP 222/91, 13 November 1991, Eichelbaum CJ saw the victim's forgiveness as relevant in his determination of special circumstances. In *Thomas*, the accused (who poured a kettle of boiling water over his wife causing her grievous injuries after she had spilt her coffee on him by accident) was given a sentence of six months periodic detention on appeal. The Chief Justice stated: "I think it is highly unlikely, given his background, that the offender will re-offend in a similar manner (at 2.) In *Queen v Panoa-Masina*, supra note 21, the deceased's family's forgiveness was seen as one of the special circumstances.

⁸⁷ J Davies, personal communication, October 1993. Collated Community Correction statistics cannot be used to track HAIPP-related changes in workload because those statistics do not distinguish domestic assaulters from other offenders.

⁸⁸ Supra note 46, at 15, 28.

⁸⁹ Ibid. 27-28.

the men's programme.⁹⁰ The majority of men who fall into the "no show" category cannot be located and therefore have not had HAIPP referral notices or section 37A(4) summonses served upon them. So far, no respondent has been prosecuted for failing to attend HAIPP.⁹¹

The Family Court has faced an increase in the number of defended applications for final non-molestation orders since HAIPP's establishment.⁹² Court staff attribute this increase to the fact that there are now tangible outcomes when protection orders are granted. Non-molestation orders and non-violence orders are no longer seen as "simply pieces of paper".⁹³ Specifically, the practice of referring respondents to HAIPP under section 37A after a protection order has been granted as well as the consistent implementation of police intervention protocols in respect of breaches of non-molestation orders appears to have resulted in the view that protection orders now have "clout".⁹⁴

Court personnel report that there are also more applications by respondents for discharges of protection orders and/or discharges of the section 37A HAIPP referral.⁹⁵ While few of those applications are successful, there have been instances where such orders have been discharged because there is no continuing contact between the parties or where the relationship has ended and there are no children or only adult children.⁹⁶ Moreover, if women do not contest their partners' applications, those orders will in fact be discharged. Judges see the fact that the application for discharge is not opposed as evidence that the parties may have reconciled or worked things out and consider that it would be inappropriate not to grant the discharge.⁹⁷ However, court staff express some concern that some women are too frightened to oppose the discharge applications. As well, the victim may have relocated away from Hamilton and it is difficult to serve her.⁹⁸

Interestingly, lawyers for men in defended hearings do not appear to be challenging the fact that their clients have been violent; their argument is rather that there is not an on-going need for protection.⁹⁹ Court staff underscore the difficulty of proving such an on-going need if the respondent

90 Ibid, 16.

91 Idem.

92 Ibid, 17.

93 Idem.

94 Idem.

95 Idem.

96 Ibid, 17.

97 Idem.

98 Idem.

99 Idem.

has not been violent during the six months that it takes to get a defended application for discharge of protection orders before the Family Court. They stress that it may well have been the existence of the non-molestation order which deterred further instances of violence.¹⁰⁰

Judges and court personnel are better informed about the dynamics of domestic violence since the establishment of HAIPP. Some judges have stated that five or six years ago, they did not know what they now know.¹⁰¹ There is now a focus on the violence in the relationship as well as on other relationship issues, and the power and control analysis of such violence is used. This new focus is reflected in recent protection order decisions in which the facts of the violence have been articulated more explicitly.¹⁰² In the past, such facts had often been glossed over.¹⁰³

With the nationwide and international interest in HAIPP and the establishment of "mini-HAIPPs" throughout New Zealand, the Hamilton Family Court staff has taken on the somewhat time-consuming role of sharing its experiences of the HAIPP programme with other Family Court Coordinators and overseas specialists.¹⁰⁴ For instance, a paper on HAIPP and the power and control approach to domestic violence was recently co-authored by a Hamilton Family Court Judge and the Hamilton Family Court Coordinator and presented to a national Family Court judges' conference.¹⁰⁵ The paper emphasised the effectiveness of the interagency approach to domestic violence and stressed the positive aspects of having community groups involved in interagency meetings.¹⁰⁶

V. CONCLUSION

HAIPP evaluations to date have focused on the results produced by the consistent implementation of intervention protocols. Now that the project is moving into its third year and a reasonable follow up period has elapsed, the evaluation process has begun to focus on the impact of an intervention approach for individual abusers and victims. The data collected so far is encouraging. For example, although some abusers may continue to use violence, 71% of women interviewed for the six month evaluation reported

¹⁰⁰ Ibid, 17-18.

¹⁰¹ Ibid, 20.

¹⁰² Idem.

¹⁰³ Supra note 3, at 193.

¹⁰⁴ Supra note 46, at 19.

¹⁰⁵ Twaddle, A J and Wasey, J F *Hamilton Abuse Intervention Pilot Project (HAIPP)*, unpublished paper delivered to the Family Court Judges' Conference, Wellington, April, 1993.

¹⁰⁶ Idem.

that their partners had shown clearly positive changes (the rest reported either limited changes, no change or ambiguous changes).¹⁰⁷ The majority of women interviewed as part of the twelve-month evaluation reported that they felt safer and that their partners (or ex-partners) were less controlling.¹⁰⁸ In addition, the increased number of women who telephone the police when they have been assaulted suggests that there is a perception that women are being taken more seriously by the justice system.

We have anecdotal evidence of men wanting to move out of Hamilton because it has become too "hot" for them. This suggests the power of an integrated approach to domestic violence. Such an approach, however, can only be effective if there continues to be regular and thorough monitoring of the justice system by victim advocates and on-going interagency consultation and accountability. There must also be on-going funding of HAIPP and the other intervention projects which are springing up around the country. While it may be difficult to quantify the costs of domestic violence in New Zealand today,¹⁰⁹ it is clear that such costs are substantial not only in financial terms but also in the daily misery experienced by thousands of New Zealand women and children. In Hamilton, HAIPP has clearly been significant in reducing some of that misery for some women. In addition, it has brought hope to some justice system personnel that a constructive approach to this demoralising, chronic problem is being set in place.

¹⁰⁷ *Supra* note 54, at 19.

¹⁰⁸ *Supra* note 62, at 43.

¹⁰⁹ For a discussion of the financial costs of domestic violence in New South Wales, see New South Wales Domestic Violence Committee, *Costs of Domestic Violence* (New South Wales Women's Co-ordination Unit: Sydney, 1991).

RECLAIMING ECONOMIC, SOCIAL AND CULTURAL RIGHTS

BY PAUL HUNT*

I. INTRODUCTION

Most bills of rights focus on civil and political rights, such as the prohibition against torture and freedom of expression. They rarely include economic, social and cultural rights, like the rights to education and health services. Of course, the line between these two categories - sometimes called first-generation and second-generation rights - is blurred. For example, provisions for the protection of minorities do not fall neatly into either category. Nonetheless, an examination of national bills of rights shows that first-generation rights are commonly included and second-generation rights are not. The New Zealand Bill of Rights Act 1990, with its emphasis on civil and political rights, conforms to this global practice.

In the 1980's, when the bill of rights proposal was debated in New Zealand, support for the inclusion of economic, social and cultural rights was not widespread. The White Paper, *A Bill of Rights for New Zealand*, argued for the exclusion of second-generation rights.¹ The interim report of the Select Committee charged with examining the White Paper adopted the same position.² Moreover, it rejected a compromise proposal, modelled on the Indian constitution, that economic, social and cultural rights should be included as directives to government rather than judicially enforceable provisions.³

The Committee's final report took a different view. Its main recommendation was for the introduction of a statute that was neither supreme law nor entrenched and it appended an "outline" draft bill with the traditional focus on civil and political rights.⁴ But the report also noted New Zealand's international obligations and suggested that a bill of rights should include key economic, social and cultural rights, such as education, housing and medical care.⁵ The government did not take this advice and thus the bill subsequently debated in Parliament excluded second-generation rights. This

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1 *A Bill of Rights for New Zealand, A White Paper* (1985) A 6.

2 *Interim Report of the Justice and Law Reform Select Committee, Inquiry into the White Paper - A Bill of Rights for New Zealand* (1987) 1.8A, 79.

3 *Idem*.

4 *Final Report of the Justice and Law Reform Committee on a White Paper on a Bill of Rights for New Zealand* (1988) 1.8C, 3.

5 *Ibid*, 10.

is not surprising since Geoffrey Palmer, the main architect of the legislation, was firmly against their inclusion.⁶

In some respects, New Zealand's bill of rights debate was similar to the discussions of the 1950's and 1960's within the United Nations about the international Bill of Rights.⁷ Although both generations of rights form part of the international Bill, they are treated differently. For example, the international machinery relating to civil and political rights is more sophisticated than the equivalent arrangements concerning second-generation rights. The reasons for this different treatment were essentially the same as those used to exclude economic, social and cultural rights from the New Zealand Bill of Rights Act.

In the last few years, however, attitudes within the United Nations have changed. Today, there is increasing recognition that the two generations of rights are "parts of a single whole."⁸ Also, the United Nations and some regional human rights bodies are trying to devise ways to implement second-generation rights. They appear to be endeavouring to reclaim economic, social and cultural rights from the margins of international human rights' protection.

Thus, although the implementation of second-generation rights is not today a significant issue for New Zealand's major political parties, it is climbing up the agenda of the international human rights community. For the time being the issue may have disappeared from Wellington, but New Zealand's United Nations representatives will be confronted with it in Geneva and New York. Accordingly, it is of contemporary relevance to examine the way in which second-generation rights have been dealt with at the international level, and to explore the different treatment afforded to first-generation and second-generation rights.

II. THE DEVELOPMENT OF THE INTERNATIONAL BILL OF RIGHTS

In April 1945, the founding conference of the United Nations opened in San Francisco. New Zealand's delegation to the conference, led by Peter Fraser, played an active part in the proceedings.⁹ In June, the United Nations

⁶ Infra note 84 and accompanying text.

⁷ The UN debate was complicated by the Cold War. More recently the issue has been complicated by the North-South divide.

⁸ Infra note 32 and accompanying text.

⁹ For Fraser's official report see *UN Conference on International Organisation, Report on the Conference held at San Francisco 25 April - 26 June 1945* AJHR (1945) A 2.

Charter was open for signature and it entered into force before the end of the year.¹⁰

The purposes of the United Nations are set out in the first four paragraphs of the Charter, one of which states:

To achieve international co-operation in solving international problems of an economic, social, cultural and humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion;¹¹

There are several other references to human rights in the Charter.¹² Some delegates at San Francisco argued that the Charter's human rights provisions should be stronger. One suggestion was for the incorporation of an international bill of rights. The conference closed, however, with the understanding that a separate bill of rights would be drafted as soon as possible.¹³

The Charter places primary responsibility for human rights with the Economic and Social Council (ECOSOC).¹⁴ In 1946, ECOSOC established a Commission on Human Rights and its first task was to prepare an international bill of rights. With Eleanor Roosevelt in the chair, the Commission agreed a draft Declaration which was adopted by the General Assembly in 1948.¹⁵

The Universal Declaration on Human Rights does what the Charter omitted to do: it sets out in some detail the meaning of the Charter's phrase "human rights and fundamental freedoms". Significantly, the Declaration includes the classic civil and political rights and also economic, social and cultural rights, including the rights to an adequate standard of living and just working conditions.¹⁶ The Declaration treats both generations of rights equally; there is no sign that one has priority over the other.

When the Declaration was being drafted, Eleanor Roosevelt said it "is not, and does not purport to be a statement of law or of legal obligation".¹⁷ According to its Preamble, the Declaration is "a common standard of

¹⁰ Bailey, S *The United Nations: A Short Political Guide* (2nd ed 1989) 13.

¹¹ Article 1(3).

¹² Articles 13, 55, 62, 68, 76 and in the Preamble.

¹³ Robertson, A H and Merrills, J G *Human Rights in the World* (3rd ed 1989) 24.

¹⁴ UN Charter, chapter 10.

¹⁵ UN Centre for Human Rights, *Human Rights: A Compilation of International Instruments* (1988) 1.

¹⁶ Respectively, articles 25 and 23.

¹⁷ Harris, D J *Cases and Materials on International Law* (4th ed 1991) 610.

achievement for all peoples and all nations”, rather than an instrument imposing legally binding obligations. In the last fifty years, however, the Declaration has grown in stature to the extent that some commentators now argue it forms part of customary international law.¹⁸ For present purposes it is not necessary to debate the status of the Declaration; suffice it to say that it is a uniquely authoritative human rights instrument which gives equal weight to civil, political, economic, social and cultural rights.

The General Assembly resolution which approved the Declaration also decided work should proceed on other parts of the international Bill of Rights.¹⁹ As one commentator explained: “There then began a period of discussion, drafting and negotiation which lasted for eighteen years.”²⁰

Briefly, the Commission on Human Rights produced a text devoted exclusively to civil and political rights. In 1950, the Assembly decided that economic, social and cultural rights should be included, but two years later it changed its mind. As Henkin put it: “Western states fought for, and obtained, a division into two covenants”.²¹ In accordance with the Assembly's instructions, the Commission submitted drafts of two Covenants in 1954, each devoted to one generation of rights.

Twelve years later, three instruments emerged from the negotiating process and were unanimously approved by the General Assembly. In addition to the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Assembly approved a First Optional Protocol to ICCPR which established an individual complaints procedure in relation to states ratifying both ICCPR and the Protocol.²² No equivalent complaints procedure was set up in relation to economic, social and cultural rights; in other respects, too, the implementation provisions of ICESCR are weaker than those in ICCPR.

In 1976, after acquiring thirty-five ratifications, the three instruments entered into force. New Zealand ratified ICCPR and ICESCR in 1978 and acceded to the Optional Protocol in 1989. For those states ratifying or acceding to them, the three treaties impose legally binding obligations. Together with the Universal Declaration on Human Rights, they constitute the international Bill of Rights.

¹⁸ See eg Robertson, *supra* note 13, at 27.

¹⁹ *Idem*.

²⁰ *Ibid*, 28.

²¹ Henkin, L *The International Bill of Rights* (1981) 10.

²² UN Centre for Human Rights, *supra* note 15, at 7, 18 and 38.

Thus, although the Declaration did not distinguish between civil and political, and economic, social and cultural rights, a dichotomy between these two categories of rights soon emerged in the United Nations. Moreover, this division has had a profound influence on the development of international human rights protection.

III. ATTITUDE CHANGE WITHIN THE UNITED NATIONS

In his recent report to a leading United Nations human rights body, the Sub-Commission on Prevention of Discrimination and the Protection of Minorities, Danilo Turk briefly surveyed the shifting United Nations debate about the two categories of rights.²³ Like so much else in the United Nations, the debate was a victim of the Cold War.

He referred to the traditional Western doctrine that appears to give primacy to civil and political rights.²⁴ By contrast, "up until the mid-1980s, the preference of socialist States and of most developing States was clearly for economic, social and cultural rights."²⁵ Turk suggested that from the late 1960's to the mid-1980's, the majority of United Nations members gave priority, at least at the rhetorical level, to economic, social and cultural rights.²⁶ In this period, however, remarkably little practical progress was made to develop the international protection of social rights.²⁷

In the 1980's, a significant change of attitude began to occur. Turk argued that some of the states which had hitherto been active supporters of social rights, began to recognise that neither set of rights should have priority over the other.²⁸ For example, the Declaration on the Right to Development, adopted by the General Assembly in 1986, states:

All human rights and fundamental freedoms are indivisible and interdependent; equal attention and urgent consideration should be given to the implementation, promotion and protection of civil, political, economic, social and cultural rights.²⁹

²³ Turk, D *The Realization of Economic, Social and Cultural Rights*, E/CN.4/Sub.2/1992/16; in particular, see Part I.

²⁴ *Ibid.*, para 15. Not all commentators agree with all of Turk's analysis. In 1990, for example, Alston wrote that the debate "is between the United States on the one hand, and most of the rest of the world on the other. It is not principally between East and West" (Alston, "US Ratification of the Covenant on Economic, Social and Cultural Rights: The Need for an Entirely New Strategy" (1990) 84 AJIL 365, 376).

²⁵ Turk, *supra* note 23, at para 15.

²⁶ *Ibid.*, para 16.

²⁷ For convenience, sometimes social rights will be used as an alternative to the phrases economic, social and cultural rights and second-generation rights.

²⁸ Turk, *supra* note 23, at paras 19-22.

²⁹ Article 6(2).

This Declaration is one of the major human rights initiatives of developing states, yet it unequivocally rejects the view that one category of rights has preference over another. Turk saw this as evidence of an important shift of attitude within the UN.³⁰ This change in perspective was further reinforced by the disintegration of the socialist bloc towards the end of the decade.

As Turk put it:

the political and ideological considerations which influenced much of the earlier reasoning on the primacy of economic, social and cultural rights have become obsolete.³¹

He argued that “(t)he realization of civil and political rights and the realization of economic, social and cultural rights are, in fact, parts of a single whole.”³² In his opinion:

this is precisely the time when a unified and balanced approach should be sought in the interpretation of the relationship between the two major sets of human rights.³³

A new approach would be especially timely today as new economic policies throughout the world expose vulnerable communities and individuals to increasing hardship and exploitation. Although the norms, procedures and institutions relating to civil and political rights remain incomplete and flawed, they are more fully developed than those involving economic, social and cultural rights. One component of “a unified approach” should be to redress this juridical imbalance between the two categories of rights.

IV. DIFFERENCES BETWEEN THE TWO COVENANTS

Apart from an identical provision concerning the right to self-determination, the substantive rights enshrined in the ICCPR and ICESCR Covenants are not the same.³⁴ In addition, there are other significant differences between the two international treaties.

First, the nature of the states parties' general obligation is different.³⁵ Under article 2(1) of ICCPR:

³⁰ Turk, *supra* note 23, at para 22.

³¹ *Ibid*, para 26.

³² *Ibid*, para 19.

³³ *Ibid*, para 26.

³⁴ The common article on self-determination is article 1 in both Covenants. The substantive non-discrimination provisions of both Covenants begin differently but in effect are the same. See article 2(2) ICESCR and article 2(1) ICCPR.

³⁵ States parties are states which have agreed to be legally bound by a treaty.

Each State Party to the present Covenant *undertakes to respect and to ensure* to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant.³⁶

This provision is not free from ambiguity: does it impose an “immediate obligation or only an obligation to do something in the future?”³⁷ The general view is that it imposes an immediate obligation.³⁸ This immediate obligation, however, is qualified by article 2(2):

*Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.*³⁹

Thus, if the substantive rights are not already provided for in national law, a state party undertakes to take the necessary steps to realise them. In effect, the immediate obligation (article 2(1)) is subject to the possibility of progressive application (article 2(2)).⁴⁰

The approach of ICESCR, on the other hand, is significantly different:

*Each State Party to the present Covenant undertakes to take steps ... to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means.*⁴¹

Thus, states parties' general obligation under ICESCR is not immediate, but explicitly progressive. It is also subject to the availability of resources.

A second difference between the two Covenants can be seen in the way that some of their substantive rights are formulated. ICCPR tends to use the classic formulations “Every one has the right to”⁴² or “No one shall be subjected to”.⁴³ ICESCR's formulation, however, is often less emphatic, such as, “The States Parties to the present Covenant recognize the right”.⁴⁴ This wording tends to reinforce the Covenants' different approaches to states parties' general obligations, as already discussed.

³⁶ Emphasis added.

³⁷ Robertson, *supra* note 13, at 33.

³⁸ *Idem*.

³⁹ Emphasis added.

⁴⁰ Robertson, *supra* note 13, at 34.

⁴¹ Article 2(1) (emphasis added).

⁴² Eg article 9.

⁴³ Eg article 7.

⁴⁴ Eg article 11.

A further difference concerns the two Covenants' implementation provisions. Briefly, ICCPR establishes the Human Rights Committee, an independent body of human rights experts. The committee publicly examines periodic reports submitted by states parties; it also considers "communications" submitted under the First Optional Protocol by individuals complaining that their civil and political rights have been infringed.

ICESCR, on the other hand, does not establish an independent body of experts to supervise implementation of the Covenant's provisions. Instead, responsibility for implementation is placed with ECOSOC, which is composed of governmental representatives. In 1976, ECOSOC set up a Sessional Working Group (consisting of governmental delegates) to help discharge its responsibilities under the Covenant. The Working Group was not a success and in 1987 ECOSOC replaced it with a committee of human rights experts acting in their personal capacity. This new committee, which in some ways is akin to the Human Rights Committee, has made good progress in recent years.

Another significant difference between the two Covenants in relation to implementation, concerns the First Optional Protocol. The complaints procedure established by the Protocol only extends to the rights enshrined in ICCPR. There is no equivalent complaints procedure for rights guaranteed by ICESCR.

V. THE REASONS FOR THE DIFFERENT TREATMENT OF THE TWO CATEGORIES OF RIGHTS

The traditional view is that the different treatment reflects the different character of the rights involved.⁴⁵ Another argument is that it is not the character of the rights which is inherently different, but the nature of their implementation measures.⁴⁶ As Turk intimates, a third view is that the dichotomy between the Covenants has more to do with ideological differences between the proponents of the two categories of rights rather than conceptual or theoretical differences between the rights themselves.⁴⁷

⁴⁵ See eg Henkin, *supra* note 21; Robertson, *supra* note 13, at 230; and Bossuyt, "International Human Rights Systems: Strengths and Weaknesses" in Mahoney K and Mahoney P (eds), *Human Rights in the Twenty-first Century* (1993) 47.

⁴⁶ Kartashkin, "Economic, Social and Cultural Rights" in Vasak K and Alston P (eds), *The International Dimensions of Human Rights* (1982) 112 (Vol.1).

⁴⁷ Turk, *supra* note 23, at para 26.

Several commentators have examined the arguments for and against the distinction drawn between the two categories of rights.⁴⁸ Here, I will introduce and comment upon some of the reasons commonly given for distinguishing the two sets of rights.

1. State Abstention versus State Intervention

Some commentators argue that civil and political rights are negative and social rights are positive;⁴⁹ or that civil and political rights require non-interference by the state, in contrast to social rights which need state intervention; or that civil and political rights are largely cost-free while the realisation of social rights needs substantial expenditure.

It seems to me that these are not really different arguments but different ways of making essentially the same point: if a right needs substantial expenditure it almost certainly requires state intervention of one sort or another - in other words it is a positive right. Thus, I will not differentiate between these three points, but treat them together.

Bossuyt has argued that civil and political rights impose on the state a number of prohibitions:

the prohibition against torture and slavery, the prohibition against depriving someone arbitrarily of his/her life or liberty, the prohibition against interfering in someone's privacy or in his or her freedom of opinion, expression, association, assembly and circulation.⁵⁰

Thus, to respect such rights a state must not practise torture, disappearances, arbitrary detention, religious persecution, censorship of the press, or race discrimination. The argument continues that this self-restraint by the state is

⁴⁸ See eg Vierdag, "The Legal Nature of the Rights Granted by the International Covenant on Economic, Social and Cultural Rights" in *Netherlands Yearbook of International Law* (1978) 69; Bossuyt, supra note 45; Sampford C J G and Galligan D J (eds), *Law, Rights and the Welfare State* (1986); van Hoof, "The Legal Nature of Economic, Social and Cultural Rights: a Rebuttal of Some Traditional Views" in Alston P and Tomasevski K (eds), *The Right to Food* (1984) 97; and Alston, "No Right to Complain about being Poor: The Need for an Optional Protocol to the Economic Rights Covenant" in Eide A and Helgesen J (eds), *The Future of Human Rights Protection in a Changing World* (1991) 79. Sometimes the discussion concerns the differences between the rights as they are enshrined in the two Covenants; this aspect of the debate will not be considered any further here as it is accepted that, as drafted, the Covenants treat the rights differently (see the preceding section).

⁴⁹ Positive in the sense that action is required if they are to be realised.

⁵⁰ Bossuyt, supra note 45, at 53.

cost-free or at any rate “does not go beyond the minimum required to ensure the very existence of the State”.⁵¹

Vierdag considered Bossuyt's “penetrating analysis of the differences between these two types of rights” and noted that “according to a general consensus” social rights “require state-action for their realisation” while civil and political rights “traditionally directed against wrongs committed by the state - require state-abstention”.⁵²

Social rights are distinguished from civil and political rights on the ground that social rights demand positive state action accompanied by very considerable expenditure. The rights to education and health services require costly literacy and primary health care programmes, as well as schools, colleges, clinics and hospitals. Second-generation rights are not really rights at all, it is said, but programmatic aspirations.⁵³

This alleged difference between the two categories of rights is used to support the contention that civil and political rights - but not social rights - are enforceable in the courts.

It is misleading to suggest that civil and political rights require only non-interference by the state. The prohibition against torture, inhuman and degrading treatment, for example, obliges the state to provide places of detention which conform to international standards and to establish training programmes for prison and police officers. As the work of the United Nations Committee against Torture shows, a state does not discharge its international responsibilities simply by passing a national law banning the practice of torture.⁵⁴ Yet the construction of humane places of detention and the creation of training programmes for state officials are costly exercises.

Courts in the United States are confronted with these and related issues by the Eighth Amendment to the Constitution which prohibits “cruel and

⁵¹ van Hoof, *supra* note 48, at 103.

⁵² Vierdag, *supra* note 48, at 80-1. Vierdag and Bossuyt are often regarded as representatives of the school of thought which differentiates between the legal nature of the two categories of rights (see van Hoof, *supra* note 48). But there are significant differences in their analyses. Vierdag, for example, remarked that some of Bossuyt's observations “are based entirely on the sharp distinction between state financial intervention and abstention” but submitted “that this criterion for differentiation is not a quite adequate one” (Vierdag, *supra* note 48, at 82).

⁵³ See eg Bossuyt, *supra* note 45, at 52; and Vierdag, *supra* note 48, at 103.

⁵⁴ For a summary and critique of the work of the committee see Byrnes, “The Committee against Torture” in Alston P (ed), *The United Nations and Human Rights: A Critical Appraisal* (1992) 509.

unusual punishments".⁵⁵ Although the precise meaning of the phrase is unclear, according to Chief Justice Warren:

the basic concept underlying the eighth amendment is nothing less than the dignity of man ... (I)t must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.⁵⁶

Thus, from time to time the amendment is used to challenge deplorable conditions of detention, such as overcrowding and inadequate sanitation. In response, penal administrators have "repeatedly sought to explain poor conditions as the result of insufficient funds".⁵⁷ The courts, however, have consistently declined to accept this argument:

Inadequate resources can never be an adequate justification for the state's depriving any person of his constitutional rights. If the state cannot obtain the resources to detain persons awaiting trial in accordance with minimum constitutional standards, then the state simply will not be permitted to detain such persons.⁵⁸

As it was put in another case "(h)umane considerations and constitutional requirements are not ... to be ... limited by dollar considerations".⁵⁹ Thus, the United States courts recognise that civil and political rights are not cost-free, and they state that the prohibition against inhuman treatment is not to be violated for fiscal reasons.

Obviously, if individuals are to enjoy the right to a fair trial, states have to build courts and pay the salaries of judges, prosecutors, administrators and interpreters; in some circumstances, they are obliged to provide individuals with free legal assistance.⁶⁰ The promotion and protection of other civil and political rights, such as the right to free and fair elections, also require considerable state expenditure.

The following table provides the annual expenditure of the New Zealand Government for some civil and political rights. The list is not exhaustive, for example, it does not make allowance for any component of the Ministry

⁵⁵ According to the Eighth Amendment of the US Constitution: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted". All state constitutions in the United States except Connecticut, Illinois and Vermont contain similar provisions. The wording derives from the English Bill of Rights 1688. See Wood, "Recent Applications of the Ban on Cruel and Unusual Punishments: Judicially Enforced Reform of Nonfederal Penal Institutions" (1972) 23 *Hastings LJ* 1111, 1113.

⁵⁶ *Trop v Dulles* 356 US 86, 100 (1958).

⁵⁷ Wood, *supra* note 55, at 1132.

⁵⁸ *Hamilton v Love*, 328 F Supp 1182, 1194 (ED Ark 1971).

⁵⁹ *Jackson v Bishop* 404 F 2d 571, 580 (8th Cir 1968).

⁶⁰ Generally, see article 14 ICCPR; in relation to legal assistance, see article 14(3)d.

of Maori Development's budget. Also, some of the amounts are approximate, such as those depending upon a percentage of Department of Justice figures.⁶¹ Nonetheless, the table tends to show that the realisation of civil and political rights is neither a cost-free exercise nor one requiring only modest state expenditure.

The New Zealand Government's Expenditure on the Domestic Realisation of Civil and Political Rights

	\$NZ, millions
Human Rights Commission ⁶²	2.24
Race Relations Conciliator ⁶³	1.27
Ombuds ⁶⁴	2.78
Commissioner for Children ⁶⁵	.54
Wanganui Computer Centre Privacy Commissioner ⁶⁶	.37
Privacy Commissioner ⁶⁷	.34
Legal Aid ⁶⁸	56.60
Department of Justice: Policy Advice, including advice on claims by Maori arising under the Treaty of Waitangi ⁶⁹	1.62
Department of Justice: Administrative Services to Courts and Tribunals ⁷⁰	59.51
Department of Justice: Information Services to Courts and Tribunals ⁷¹	9.34
Department of Justice: Services to Parties Appearing before Courts and Tribunals, including the provision of duty solicitors ⁷²	15.18

61 One can debate what is an appropriate percentage of Department of Justice figures to treat as a contribution to the realisation of civil and political rights. I do not insist that the percentages identified in the text are the most appropriate ones. The exercise is intended to convey simply that the implementation of civil and political rights is a costly business. I am not suggesting that New Zealand's expenditure in relation to civil and political rights is adequate. Plainly, it is not.

62 *Report of the Human Rights Commission, for the year ended 30 June 1991* (GP E 6) 35.

63 *Report of the Office of the Race Relations Conciliator, for the year ended 30 June 1991* (GP E 6) 72.

64 *Report of The Ombudsmen, for the year ended 30 June 1992* (GP A 3), 52.

65 *Report of the Office of the Commissioner for Children, for the year ended 30 June 1992*, 14.

66 *Report of the Wanganui Computer Centre Privacy Commissioner, for the year ended 30 June 1992* (GP A 4) 12.

67 Projected costs for 1992-3. Information provided by the Office of the Privacy Commissioner.

68 Projected costs for 1992-3. Letter dated 5 February 1993 from Secretary of the Legal Services Board to the author. The government has allocated the Board \$53 million for the 1992-3 financial year. In addition, the Board receives funding from the NZ Law Society Special Fund; in January 1993, the Board received over \$300,000 from this source.

69 20% of the entire figure for this "output". See *Report of the Department of Justice, for the year ended 30 June 1992* (GP E 5) 50.

70 50% of the entire figure for this "output" (idem).

71 Idem.

72 Idem.

Department of Justice: Custodial Remand Services to Courts ⁷³	5.64
Department of Justice: Administration of Court Sentences of Imprisonment ⁷⁴	49.11
Department of Justice: Management of the Electoral System ⁷⁵	4.19
Ministry of Women's Affairs: Policy Advice, including advice on legislation and other policy proposals of significance for women's social, economic or political equality ⁷⁶	2.26
Ministry of Women's Affairs: Information Services, including the organisation of seminars on women's issues ⁷⁷	.71
Ministry of Women's Affairs: Ministerial Services, including services to the Minister to enable her to meet her obligations to Parliament ⁷⁸	.61
Maori Language Commission, the aim of which is to promote and maintain the Maori language as a living language ⁷⁹	1.01
TOTAL	213.32

Thus, the New Zealand government's annual expenditure on the domestic realisation of civil and political human rights is more than NZ\$ 210 million. A similar exercise undertaken in relation to the cost of civil and political rights in Canada comes to over Canadian \$1.76 billion, roughly NZ\$ 615 million.⁸⁰

In summary, both first-generation and second-generation rights require state intervention and the expenditure of substantial sums of money.

2. The Policy Objection

Another argument closely related to the preceding one is that there are more policy choices associated with the realisation of social rights than civil and political rights. Judges, it is said, may properly adjudicate on cases involving first-generation rights, but social rights involve policy choices better left to legislators, ministers, civil servants and their experts.

⁷³ 20% of the entire figure for this "output" (idem).

⁷⁴ Idem.

⁷⁵ 100% of the entire figure for this "output". Note the year in question, 1991-2, was not an election year (idem).

⁷⁶ 100% of the entire figure for this "output" (*Report of the Ministry of Women's Affairs, for the year ended 30 June 1992* (GP G39) 14).

⁷⁷ Idem.

⁷⁸ Idem.

⁷⁹ *Report of the Maori Language Commission, for the year ended 30 June 1991* (GP E 34) 24.

⁸⁰ Unpublished paper presented by Paul LaRose-Edwards, Director, Human Rights Unit, Commonwealth Secretariat, to the NGO Conference on Empowering People, held in Arusha, Tanzania, August 1991.

Vierdag has argued that “the implementation of (social rights) is a political matter, not a matter of law, and hence not a matter of rights”.⁸¹ According to Mureinik:

The most effective realization of (social) rights depends upon ... policy choices and it is precisely choices of this kind for which the judges lack two essential qualifications: expertise and political accountability.⁸²

Davis agreed that disputes about social rights “are no more than decisions about policy”.⁸³ According to Palmer, it was impossible to include social rights in New Zealand’s Bill of Rights because “such broad policy questions would have made it unmanageable”.⁸⁴

In common law jurisdictions the judiciary has always been - and remains - constantly involved in the formulation of law and policy. As Lord Reid said:

There was a time when it was thought almost indecent to suggest that Judges make law - they only declare it. Those with a taste for fairy tales deem to have thought that in some Aladdin’s cave there is hidden the Common Law in all its splendour and that on a judge’s appointment there descends on him knowledge of the magic words Open Sesame. ... But we do not believe in fairy tales anymore.⁸⁵

More recently, Sir Robin Cooke argued that:

the great majority of New Zealand Judges, perhaps all, now openly recognise (albeit no doubt to varying degrees) that the inevitable duty of the Courts is to make law and that this is what all of us do every day. Doubtless some make more than others, but it could not seriously be contended that Judges at any level are merely applying black-and-white rules.⁸⁶

Wade put it more pithily: “judges are up to their necks in policy, as they have been all through history”.⁸⁷

⁸¹ Vierdag, *supra* note 48, at 103.

⁸² Mureinik, “Beyond a Charter of Luxuries: Economic Rights in the Constitution” (1992) 8 SAJHR 464, 467.

⁸³ Davis, “The Case Against the Inclusion of Socio-Economic Demands in a Bill of Rights except as Directive Principles” (1992) 8 SAJHR 475, 484.

⁸⁴ Palmer, *G New Zealand’s Constitution in Crisis* (1992) 57.

⁸⁵ Reid, “The Judge as Lawmaker” (1972) 12 J.SPTL 22.

⁸⁶ Cooke, R “Dynamics of the Common Law” in IXth Commonwealth Law Conference, *Conference Papers* (1990) 1.

⁸⁷ Wade, H W R *Constitutional Fundamentals* (rev ed 1989) 78. Lord Denning MR said: “In the end, it will be found to be a question of policy, which we, as judges, have to decide” (*Dutton v Bognor Regis UDC* [1972] 1 QB 373, 391).

Moreover, judicial law-making is not incidental or peripheral to policy matters. On the contrary, it has shaped concepts and principles with crucial policy content, such as the law of negligence and rules of natural justice.⁸⁸ Whatever one's view of the case, the Court of Appeal's decision in *New Zealand Maori Council v Attorney-General*, concerning the State-Owned Enterprises Act 1986 and the Treaty of Waitangi, dealt with weighty policy issues of constitutional importance.⁸⁹

More specifically, when tribunals adjudicate upon civil and political rights, they become involved in policy issues. The landmark United States decision of *Brown v Board of Education*, concerning the civil right of non-discrimination, had major policy implications.⁹⁰ When the European Commission on Human Rights held that the absence of statutory controls over the British security services amounted to a violation of the right to privacy guaranteed under the European Convention on Human Rights, its decision impinged on policy issues of national importance.⁹¹ The United Nations Human Rights Committee's decision in *Lovelace v Canada* that the Indian Act violated minority rights also raised significant policy questions.⁹² International and regional human rights case reports, as well as national law reports, are replete with examples of the courts deciding civil and political rights cases which involve "broad policy questions". If policy content is not an obstacle in these instances, why should it be a problem in relation to social rights?

In this context, it is worth emphasising the negative nature of most judicial review proceedings. These days, the courts continually scrutinise the exercise of state power and decide whether or not it conforms to statute and the common law. This is what judicial review and the doctrine of *ultra vires* is all about. A purported exercise of a statutory power may be quashed if it does not conform to the express provisions of the relevant Act of Parliament. Also, a power must be exercised in conformity with limitations implied into the statute by the common law, such as the rules of natural justice and *Wednesbury* unreasonableness, otherwise the courts may set it

⁸⁸ *Donoghue v Stephenson* [1932] AC 562 and *Ridge v Baldwin* [1964] AC 40.

⁸⁹ *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641.

⁹⁰ *Brown v Board of Education* 347 US 483 (1954).

⁹¹ *Hewitt and Harman v UK* (1989) 14 EHRR 657. As a result of these proceedings, the government introduced legislation which gave MI5 a statutory framework and established a Security Service Tribunal and Commissioner. Note the case's fiscal, as well as policy, implications.

⁹² Communication No 24/1977. Canada amended the offending legislation and so 24,000 individuals regained their Indian status. See Newman, F and Weissbrodt D *International Human Rights* (1990) 82.

aside.⁹³ In an application for judicial review, the role of the court is to consider the facts and the law and decide the lawfulness or otherwise of the decision under review. The court's function is not to quash an unlawful decision and substitute its own.⁹⁴ In this sense, the judiciary only has the power of negative review.

There is no reason why the courts could not play the same role in relation to social rights. A ministerial decision could be measured by the court against social rights enshrined in statute. If the court found the decision to be inconsistent with a statutory social right, it might quash the decision - but not substitute its own view by telling the minister what to do. Thus, it "would be reviewing policy choices, not making them".⁹⁵ This negative review mirrors the judicial function associated with civil and political rights and may mitigate the concerns of those who fear that statutory social rights give too much scope for judicial policy-making.

It may be useful to give two examples of this approach in the context of social rights.

In April 1991, the New Zealand Government introduced cuts in welfare. According to the Human Rights Commission, the reduced rates brought some beneficiaries below the Treasury's own "income adequacy" levels.⁹⁶ If New Zealand law provided that individuals have a right to an adequate standard of living, why could a court not declare that the cuts were unlawful because they violate this right?⁹⁷ No doubt, among the evidence before the court would be the Treasury's "income adequacy" figures. The role of the court would not be to formulate economic or other policies; it would be to ensure the government initiative was consistent with previously agreed social rights.⁹⁸ Such a function is not conceptually different from a court

⁹³ *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.

⁹⁴ Exceptionally, a court hearing an application for judicial review not only quashes an unlawful decision but also substitutes its own. In New Zealand, a clear example of this is *Fiordland Venison Ltd v Minister of Agriculture and Fisheries* [1988] 1 NZLR 544.

⁹⁵ Mureinik, *supra* note 82, at 472. An unavoidable policy element would remain as the court decided whether or not to quash the ministerial decision. That element also exists, of course, when courts adjudicate upon civil and political rights.

⁹⁶ Finance Bill Submission to Social Services Select Committee, Human Rights Commission, no date.

⁹⁷ According to article 11(1) of ICESCR: "The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living".

⁹⁸ In this instance, the reduced rates were passed by Parliament. Thus, a court could not find the rates were unlawful unless the right to an adequate standard of living was constitutionalised as a form of superior law. The point of mentioning this example here, however, is to show that there is no conceptual, theoretical or juridical reason

deciding whether or not prison overcrowding violates the prohibition against "cruel and unusual punishment"; or whether a ministerial decision is *ultra vires* for *Wednesbury* unreasonableness.

Secondly, imagine a poor rural community dependent on the cultivation of black beans.⁹⁹ The government introduces a scheme of financial incentives whereby landowners are induced to stop growing beans and instead produce flowers for export. The scheme causes malnutrition among sections of the local community. If the state in question recognises the right to food, there is no juridical reason why the courts could not declare the scheme unlawful because it infringed individuals' right to food. The government may have the policy goal of increasing the nation's export earnings. The function of the court would not be to identify lawful ways by which the government could attain this legitimate goal. Instead, its task would be to ensure that the government initiative did not infringe the basic social rights of individuals.

In summary, there appears to be no conceptual or juridical reason why social rights, like civil and political rights, cannot be adjudicated upon by a tribunal in the manner described. That is not to say that the problems associated with implementing the two categories of rights are identical. But it is suggested that the juridical difficulties traditionally associated with the implementation of social rights have been overstated.

VI. RENEWED ATTENTION TO SOCIAL RIGHTS FROM INTERNATIONAL HUMAN RIGHTS BODIES

Within the last few years, the international human rights community has shown a renewed interest in the implementation of second-generation rights. New mechanisms have been agreed and important studies commissioned. Although these developments are not dramatic, they appear to represent an emerging and significant trend. I shall briefly outline some of the social rights' mechanisms and studies recently introduced by the United Nations and regional human rights bodies.¹⁰⁰

why this particular social right - the right to an adequate standard of living - may not be adjudicated upon by a tribunal in the manner described.

⁹⁹ This example is based upon Henry Shue's illustration in Sadurski, "Economic Rights and Basic Needs" in Sampford C J G and Galligan D J (eds) *Law, Rights and the Welfare State* (1986) 57.

¹⁰⁰ There is a close relationship between the realisation of social rights and the right to development. Thus it is interesting to note that in 1993 the UN Commission on Human Rights established for the first time a thematic procedure on the right to development. Hitherto the focus of the Commission's thematic procedures has been classic civil and political rights: see eg the Special Rapporteur on Torture and the Working Group on Disappearances. Therefore the creation of a fifteen-person Working Group on the Right to Development is a significant departure. Moreover, given the close relationship between the right to development and social rights, the

1. The Committee on Economic, Social and Cultural Rights¹⁰¹

Considering that the Committee was only established in the late 1980's, it has made significant progress. Its public scrutiny of states parties' periodic reports submitted under ICESCR is more rigorous than the practice adopted by its predecessor. It has introduced into its sessions general discussion days on selected rights, including the rights to food and housing. These discussions may lead to the Committee subsequently formulating General Comments, such as the one on the right to housing, which are designed to provide "jurisprudential insights" into the provisions of the Covenant.¹⁰² The Committee has actively sought the participation of United Nations specialised agencies, such as the International Labour Office, as well as non-governmental organisations.

In 1992, the Committee took what Turk described as "critical and path-breaking steps" in the protection of social rights.¹⁰³ It declared that a presidential decree of the Dominican Republic, which purported to evict - if necessary by force - 70,000 residents, was a violation of the Republic's obligations under the Covenant's right to housing provision. According to housing rights campaigners in the Republic, without the Committee's action the families would have been evicted. As one commentator observed, the Committee issued what "amounted to an injunction".¹⁰⁴

Another initiative which could have a dramatic impact is the Committee's proposal for an optional protocol which would permit it to hear complaints alleging that states parties have violated the Covenant's provisions. In broad terms, the proposal parallels the First Optional Protocol to ICCPR which enables the Human Rights Committee to hear complaints from individuals who allege that a state party has violated ICCPR. More than anything else, the adjudication of complaints develops jurisprudence, in particular the normative content of the provisions in question.

There appears to be growing support for the Committee's proposal. For example, according to Turk:

establishment of the Working Group would appear to be part of the emerging trend outlined in this section of the article.

¹⁰¹ Supra: "Differences Between the Two Covenants".

¹⁰² Alston, "The Committee on Economic, Social and Cultural Rights" in Alston P (ed), *The United Nations and Human Rights: A Critical Appraisal* (1992) 473, 494.

¹⁰³ Turk, supra note 23, at para 184.

¹⁰⁴ Leckie, "From Infancy to Adulthood - UN Committee on Economic, Social and Cultural Rights - and the Right to Adequate Housing" [1992] 3 Human Rights Tribune 10.

Work on the Optional Protocol should be continued as a matter of priority, with a view to giving the rights in (ICESCR) practical meaning for the hundreds of millions of citizens who have yet to benefit from the norms of the Covenant.¹⁰⁵

The proposal was included in the Final Outcome of the World Conference on Human Rights, held in Vienna during June, 1993:

The World Conference encourages the Commission on Human Rights, in cooperation with the Committee on Economic, Social and Cultural Rights, to continue the examination of optional protocols to (ICESCR).¹⁰⁶

The International Commission of Jurists, an influential international human rights non-governmental organisation, has also publicly supported the initiative.¹⁰⁷

2. *Danilo Turk's study*¹⁰⁸

Between 1989-92, Turk produced four annual reports focusing on second-generation rights and issues like the role of social and economic indicators, the indivisibility and interdependence of rights and the role of the International Monetary Fund.¹⁰⁹ The reports include numerous recommendations, some of which have already been implemented.¹¹⁰ Probably, the study is the most comprehensive and authoritative undertaken to date by the United Nations on the realisation of economic, social and cultural rights.¹¹¹ It seems likely to influence debate throughout the 1990's.

3. *Report on the Right to Adequate Housing*

In 1992, the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities appointed its independent expert from India, Rajindar Sachar, as Special Rapporteur on the right to adequate housing.¹¹² The right to housing is a classic social right and forms

¹⁰⁵ Turk, *supra* note 23, at para 186.

¹⁰⁶ A/CONF157/DC/1/Add.1, at Part III, III (Cooperation, Development and Strengthening of Human Rights), 1993, para 10.

¹⁰⁷ It did so at the UN Commission on Human Rights, 1993.

¹⁰⁸ Turk, *supra* note 23.

¹⁰⁹ E/CN.4/Sub.2/1989/19; E/CN.4/Sub.2/1990/19; E/CN.4/Sub.2/1991/17; E/CN.4/Sub.2/1992/16.

¹¹⁰ Turk, *supra* note 23, at para 202.

¹¹¹ Other United Nations studies on the general issue include E/CN.4/988 (1969) and Ganji, M *The Realization of Economic, Social and Cultural Rights: Problems, Policies, Progress*, UN Sales no E75.XIV.2 (1975).

¹¹² In accordance with one of Turk's recommendations.

part of the international Bill of Rights.¹¹³ The precise meaning of the right, however, is not clear. This difficulty is not confined to social rights. The content of some civil and political rights - such as the prohibition against degrading treatment - is not at all certain.

Obviously, if human rights are to be implemented, their normative content has to be clarified. There are different ways of doing this and the Sachar report exemplifies one of them. Among other issues, the two-year report will explore the content of the right to housing, developing the work begun by the Committee on Economic, Social and Cultural Rights.¹¹⁴

4. Protocol of San Salvador

In addition to the international human rights standards and procedures associated with the United Nations, there are regional arrangements such as the American Convention on Human Rights which is an instrument of the Organisation of American States. The American Convention, which entered into force in 1978, guarantees a range of civil and political rights. Its enforcement is entrusted to the Inter-American Commission and Court of Human Rights, which may receive complaints about alleged violations of the Convention.¹¹⁵

In 1988, the states parties to the American Convention approved an Additional Protocol, known as the Protocol of San Salvador, which guarantees many economic, social and cultural rights.¹¹⁶ Broadly, the Protocol and ICECSR guarantee similar substantive rights and provide comparable reporting procedures for states parties.¹¹⁷ For our purposes, however, there is one noteworthy difference between the two treaties. While ICESCR establishes no complaints procedure, the Protocol creates a petition system for individuals in relation to the right to education and trade union rights.¹¹⁸ The complaints may be heard by the Inter-American Commission and Court of Human Rights.

¹¹³ See article 11(1) ICESCR.

¹¹⁴ Alston, *supra* note 103 and accompanying text.

¹¹⁵ For a brief introduction to the Convention see Harris, *supra* note 17, at 714-6.

¹¹⁶ (1989) 28 ILM 156.

¹¹⁷ But there are some significant differences between the substantive rights guaranteed by the two instruments, for example, the right to a healthy environment (see article 12(2)b ICESCR and article 11 San Salvador Protocol).

¹¹⁸ See article 19.

The Protocol has not yet entered into force and so it is impossible to say how effective it will be.¹¹⁹ Its complaints procedure, however, certainly represents a new *départure* for the international protection of social rights in the Americas.

5. *European Social Charter*

As the European Convention on Human Rights is the regional counterpart of ICCPR, so the European Social Charter is the regional equivalent of ICESCR.¹²⁰ The Charter, which entered into force in 1965, has always lived in the shadow of the Convention.¹²¹

According to Harris, a member of the supervisory Committee of Independent Experts established under the Charter, the treaty has not realised "its full potential".¹²² The reasons for this are beyond the scope of this article. What is important for our purposes is that in the last two or three years the Charter has gained "a fresh impetus".¹²³ In 1990, the Council of Europe established an *ad hoc* committee to make "proposals for improving the effectiveness of the European Social Charter".¹²⁴ The Committee drafted an Amending Protocol which was adopted and opened for signature the following year.

For the most part, the Protocol's reforms are modest. In some cases, they merely introduce commonplace features of United Nations human rights mechanisms.¹²⁵ Nonetheless, as Harris says: "Upon entry into force, the Protocol will considerably improve the effectiveness of the Charter".¹²⁶

The Amending Protocol may not be the only change to emerge from the reform process. The Council of Europe meeting which approved the Protocol also resolved that at the earliest opportunity there should be an

119 The Protocol will enter into force when eleven parties have agreed to comply with its provisions.

120 The Convention and Charter are instruments of the Council of Europe, which is quite different from the European Community. The controversial Maastricht Treaty, which has important social rights provisions associated with it, is an instrument of the European Community.

121 The Convention establishes the European Commission and Court of Human Rights which sit in Strasbourg, France. Each year these bodies hear many civil and political rights cases; they are developing a considerable jurisprudence.

122 Harris, "A Fresh Impetus for the European Social Charter" (1992) 41 ICLQ 659.

123 *Idem*.

124 *Ibid*, 660.

125 For instance, the Protocol enables the Committee of Independent Experts, which considers the periodic reports of states parties, to meet with representatives of the reporting states.

126 Harris, *supra* note 123, at 660.

examination of “a draft protocol providing for a system of collective complaints, with a view to its adoption and opening for signature”.¹²⁷

According to Harris:

... the future of the European Social Charter as an international treaty-based instrument for the protection of economic and social rights in Europe is brighter than could possibly have been foreseen just a year or two ago.¹²⁸

VII. CONCLUSION

In 1992, 1.5 billion individuals were deprived of primary health care and a safe water supply, 2 billion lacked safe sanitation, over 1 billion adults could not read or write and 180 million children suffered from serious malnutrition.¹²⁹ Moreover, the numbers are escalating, not decreasing.¹³⁰ As the Committee on Economic, Social and Cultural Rights recently observed, the international community tolerates breaches of economic, social and cultural rights which, if they occurred in relation to civil and political rights, “would provoke expressions of horror and outrage”.¹³¹

In addition, breaches of second-generation rights have obvious implications for the enjoyment of first-generation rights:

Can an illiterate, hungry person participate in the political process let alone social life? Does a marginalised, rural woman ... have anything remotely akin to civic equality to her urban, middle-class male compatriot?¹³²

This is not to argue that social rights should have priority over civil and political rights, but to agree with Turk that human rights require a holistic approach. Social rights challenge discriminatory patterns of domination and subordination which survive the formal enjoyment of civil and political rights. Hence Wright's suggestion that “the category of rights which might be of greatest applicability to women are economic, social and cultural rights”.¹³³ The same can be said about other marginalised groups which is probably why there is such a lively debate about the constitutionalisation of social rights in contemporary South Africa.

¹²⁷ Ibid, 674.

¹²⁸ Ibid, 676.

¹²⁹ Turk, *supra* note 23, at para 38.

¹³⁰ *Idem*.

¹³¹ Quoted in *Human Rights Monitor* (1993) Vol 19, 12.

¹³² Haysom, “Constitutionalism, Majoritarian Democracy and Socio-Economic Rights” (1992) 8 SAJHR 451, 460.

¹³³ Wright, “Human Rights and Women's Rights” in Mahoney K and Mahoney P (eds), *Human Rights in the Twenty-first Century* (1993) 87.

Finally, neither first-generation nor second-generation rights can be implemented exclusively by judicial processes. In New Zealand and elsewhere, numerous institutions modelled on the Swedish Ombudsman, for example, promote and protect civil and political rights. Equally, the implementation of social rights needs non-judicial investigatory devices, in addition to complaint-based procedures. One suggestion is for national Social Rights Commissions “to monitor, report on, do research on, receive complaints on and generally supervise the implementation of social rights programmes”.¹³⁴ Sachs suggested:

An adverse report by the Social Rights Commission might not be as powerful in a technical legal sense as an adverse judgment by a court of law, but it could have great significance with public opinion, and end up being enforced in practice through consequent legislative or executive action.¹³⁵

There is no doubt that more work needs to be done on the formulation of judicial and non-judicial mechanisms, at the international and national levels, for the implementation of second-generation rights, so that they may become part of mainstream human rights promotion and protection.

¹³⁴ Sachs, *A Affirmative Action and Good Government - A Fresh Look at Constitutional Mechanisms for Redistribution in South Africa* (unpublished paper, 1992). It is interesting to note parallels between the Waitangi Tribunal and the proposed Social Rights Commission.

¹³⁵ Idem. Sachs adds ruefully: “if the law were as inventive in relation to securing the rights of the poor as it is in respect of the rights of the rich, there would be no difficulty in finding appropriate ways and means to enforce basic social rights” (idem).



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CASE NOTE

SECURITIES COMMISSION V R E JONES¹

1. The Securities Amendment Act 1988 Part II: disclosure of interests

The Securities Amendment Act 1988 (“the Act”) has been in force since 21 December 1988. When it was first introduced into Parliament in July 1988 nearly all the attention was focused upon Part I of the Act which introduced the insider trading provisions and there was little comment on the provisions in Part II of the Act which dealt with the disclosure of interests of substantial security holders.² However, in terms of litigation there have been more actions under Part II than under Part I.³

Part II is aimed at ensuring that the market (via the public issuer and the stock exchange) is informed as to “the identity of persons who are entitled to exercise, or control the exercise of, significant voting rights in a public company”.⁴ The Act sets out to provide a framework for the provision of this information by placing an obligation of disclosure upon substantial security holders. Section 21 of the Act requires a substantial security holder to notify the public issuer and the stock exchange of any change in its holding that is equal to 1% or more of the total number of issued voting securities of the public issuer.

The Act goes further than merely requiring a substantial security holder to disclose its shareholding. Section 28 gives a public issuer (either at its own motion or at the request of members who hold at least 5% of the public issuer’s voting securities) the power to require disclosure by a substantial security holder as to who holds relevant interests in the voting securities held by the substantial security holder. Section 29 is an even more extensive power since it allows the public issuer to request “any person who the public issuer believes has, or may have, a relevant interest in voting securities of the public issuer” to supply “such information as [the public issuer] may

¹ (1993) 6 NZCLC 68, 547

² NZPD Vol 490, 1988: 5280-5284.

³ The few cases involving Part I of the Act have been limited to procedural questions, and in particular who has the right to control an action against an alleged insider. A simple explanation for the difference in the number of actions is that under Part II the Securities Commission may make an application for orders (s 31(a)) whereas under Part I it does not have standing. In a discussion paper issued by the Securities Commission in 1992, the Commission raised the question whether it should also have standing under Part I (*Proposed Practice Note on Insider Trading - A Discussion Paper* (1992) 25).

⁴ *Supra* note 2, at 5283.

specify” for the purpose of assisting the public issuer to ascertain who is, or may be, a substantial security holder.

The legislative muscle provided as a backup to these provisions is set out in sections 30 to 32. Under section 30 the court has jurisdiction to grant an order under section 32 where it has “reasonable grounds to suspect” that a substantial security holder has not complied with Part II.⁵ The orders the court can make under s.32(1) include directions requiring compliance with Part II, prohibiting the exercise of voting rights, suspending registration of transfers of shares, or ordering the forfeiture of any voting securities of the public issuer.

In introducing the first reading of the Securities Law Reform Bill, the Minister of Justice made the following remarks:

I do not propose to deal in detail with the provisions of [Part II], as they are mainly procedural, but I do need to comment on clauses 30 to 32, and clause 34. Clauses 30 to 32 provide sanctions for breaches of the disclosure requirements. In accordance with the [Securities Commission’s] report on nominee shareholding, those clauses provide civil sanctions against the voting securities themselves, ranging from court orders prohibiting the exercise of voting rights to, in extreme cases of non-compliance, orders forfeiting the voting securities – the most serious sanction.⁶

There was no further discussion of these provisions during the course of the debate on this piece of legislation. No one took up the issue as to whether or not the low standard of “reasonable grounds to suspect” was appropriate for all the orders that could be made under section 32. The remedies provided for under section 32 vary enormously in their potential impact upon a transgressor of Part II. For example, an order for the forfeiture of voting securities is a serious sanction which one would imagine should be exercised more cautiously than the granting of an order temporarily restraining the exercise of voting rights. However, the commencing words of section 32 merely provide that the Court may make any of the listed orders on an application under section 30 of the Act.

2. Case-law prior to *Securities Commission v R E Jones*

In *Brook Investments Ltd v Palladin Ltd*, Sinclair J dealt with one of the first cases under Part II.⁷ In this case a company, incorporated in Bermuda, carrying on business in Hong Kong and listed on the Hong Kong and New Zealand Stock Exchanges, sought to utilise section 29 of the Act to

5 The court also has jurisdiction under s 32 where a person has not complied with a request under ss 28 or 29 of the Act (see s 32(b)).

6 *Supra* note 2, at 5283.

7 Unreported, High Court, Auckland, 21 October 1989, M 1581/89.

determine who was holding the relevant interests in its voting securities which had been acquired overseas. The company was to hold its annual general meeting in Hong Kong on 23 October 1989 and there was concern that there could be a change in control of the company at that meeting. The replies to the notices issued by the company were considered to be inadequate. Accordingly an application was made for orders under section 32 by a member of the company, with the company served as a defendant.⁸ In effect this case concerned an attempt by the public issuer and one of its members to “flush out” those overseas persons who appeared to be intent upon taking over the control of the company (and possibly stripping the company which had \$4 million in assets in New Zealand).

Sinclair J described the purpose of Part II as being designed to:

ensure that a public issuer, its members, the Stock Exchange and the investing public at large are kept informed as to the ownership of voting securities in a public issuer and as to the identity of those who are, or may be, in a position to control the company. In particular it is aimed at restricting secret dealings in shares for a takeover advantage.⁹

Sinclair J gave orders which prohibited the registration of the transfer or transmission of shares held by particular overseas interests and suspended the voting rights of these shares until at least after the annual general meeting.¹⁰

Sinclair J's decision showed that the Court was prepared to use its new powers in relation to the suspension of registration and voting powers where it considered the fulfilment of a substantial security holder's obligations under the Act had not been met. However, as the orders sought were in effect temporary restraining orders, Sinclair J did not enter into any discussion of the threshold question as to what was needed to grant him jurisdiction under section 32. No application was made for a forfeiture of the voting securities which were at the centre of this dispute.

Another major decision under Part II was *Securities Commission v. Honor Friend Investment Ltd.*¹¹ This case, like *Paladin*, involved the purchase of shares in a company by overseas interests as well as by New Zealand interests. A complicated funding and share purchase arrangement was put in place with the ultimate aim of using the funds of Euro-National Ltd (“ENC”), a publicly-listed company, to support the purchase of its own

8 Sinclair J noted that the plaintiff and defendant in this case were in fact openly acting in concert in bringing the application before the court (at 5).

9 Ibid, 18.

10 Ibid, 4-5.

11 (1991) 5 NZCLC 67,512.

shares in breach of section 62 of the Companies Act 1955. The purchasers of the shares failed to comply with Part II of the Act. A major difference between this case and the *Paladin* decision was that the applicant in this case was the Securities Commission which was applying for a forfeiture of half of the shares in issue (which would have amounted to a penalty of around \$9 million).¹²

Heron J discussed section 30 of the Act, which gives the court jurisdiction to make orders under section 32 where there “are reasonable grounds to suspect” non-compliance with Part II. Heron J pointed out that this established a lower than normal standard of proof in relation to the existence of a substantial security holder and the failure to comply with Part II.¹³ In this context, Heron J discussed McGechan J’s decision in *Securities Commission v Gulf Resources and Chemical Corporation*.¹⁴ Here, McGechan J had been troubled as to how to apply this standard in relation to an application for forfeiture of voting securities. McGechan J commented:

Whatever the case, at least in theory, a Court which has reasonable grounds to suspect non-compliance could make orders ranging up to the extremity of forfeiture of shares as sought in the application filed in this case. While it is conceivable, I suppose, that the legislature intended such an extreme solution, the mind rather rebels (at least outside wartime conditions) against a confiscation and redistribution based merely upon a suspicion, even where the suspicion is based upon reasonable grounds.¹⁵

McGechan J decided to accept the approach to the issue proposed by the Securities Commission. This was that, once reasonable grounds to suspect were found, it was up to the defendant to satisfy the Court that “no reasonable grounds for suspicion any longer existed”.¹⁶ However, McGechan J stated that, even if this was the test, which he was prepared to accept for the purposes of that case, the court still retained a discretion as to what remedial orders it should make. In the end he found that, on the evidence, there were no reasonable grounds to suspect that there had been a failure to comply with the Part II.¹⁷ Accordingly, this meant that he was saved from having to consider whether the test of “reasonable grounds for suspicion” was sufficient to justify an order for the forfeiture of the voting securities in question.

12 Ibid, 67,533.

13 Ibid, 67,517.

14 (1990) 5 NZCLC 66,324.

15 Ibid, 66,630.

16 Ibid, 66,331.

17 Ibid, 66,334-66,335.

In the *Honor Friend* case, Heron J dealt with the issue of what was a sufficient ground for granting an application for forfeiture of voting securities. He took the view that in determining the primary facts that would lead to a reasonable suspicion he would apply the “normal civil standard”.¹⁸ His dislike for basing remedies upon “a reasonable suspicion” showed when he stated:

I also had regard to the fact that in arriving at a conclusion of reasonable suspicion I might then be required to impose a penalty as drastic as forfeiture *which could not justify the wholesale rejection of conventional methods of proof or the proper standard of proof on all but the issue of relevant interest.*¹⁹

Heron J went on to say that provided the background and aggravating circumstances were proved to the normal civil standard then “I see no further restraint on the discretion to exercise all the powers given by section 32”.²⁰

In the end Heron J found that the evidence of the holders of the relevant interests “met the normal civil standard”.²¹ Consequently, he was required to consider the relief that should be granted. The Securities Commission had sought forfeiture of one half of the relevant shares but Heron J was only prepared to grant a forfeiture for 20% of the relevant shares (which amounted to a loss of \$1.8 million).²² He also ordered that the voting rights of Honor Friend Ltd were only available for a number of voting securities that were one less than the shares held by Impala Ltd (the other significant minority shareholder holding 25% of the issued share capital) and that the balance of the shares did not have voting rights.²³

In determining the penalty to be imposed Heron J decided that an attempt to compensate shareholders should be made and that an order for forfeiture of some of the shares would achieve this goal.²⁴ However, apart from noting that “non disclosures in this case largely flow[ed] from the desire to use the company’s cash resources in an improper fashion”,²⁵ and “the case calls for relief which reflects the breach of both the letter and the spirit of the securities legislation and the near successful raid on a substantial part of ENC’s undertaking”,²⁶ the only reason offered by Heron J for the imposition

18 *Supra* note 11, at 67,517.

19 *Idem* (emphasis added).

20 *Ibid*, 67,518.

21 *Ibid*, 67,519.

22 *Ibid*, 67,534.

23 *Idem*.

24 *Ibid*, 67,533.

25 *Idem*.

26 *Idem*.

of the forfeiture remedy was that “[the] company and its shareholders have incurred expenditure and been distracted from their proposed course by decisions made by interests as represented now by Honor Friend Ltd and the value of the company has declined accordingly”.²⁷ No reasons were put forward for the quantity of shares forfeited.

The other issue that had been considered in the *Gulf* and the *Honor Friend* cases was that of costs. Unlike the *Paladin* case, these cases involved the Securities Commission as the applicant. In the *Gulf* decision, the Securities Commission was unsuccessful in its attempt to show that *Gulf* had a relevant interest that should have been disclosed. McGechan J did not accept criticisms by *Gulf* that the Securities Commission should not have brought the action and in fact went so far as to say that the Securities Commission had “acted entirely properly in placing this matter before the Court and would have failed in its statutory duties if it had not done so”.²⁸ However, having dismissed the proceedings, he stated: “Costs are reserved. Memoranda may be submitted if desired. I do not encourage application by any party.”²⁹ In effect, he was rewarding the Securities Commission for its actions by refusing to make the normal order for costs to the successful party. The low threshold (“reasonable grounds to suspect”) required under section 30 justified the Securities Commission’s action.

In the *Honor Friend* decision, Heron J noted that the proceedings had “been costly of time and effort for the Commission and it [had] been convincingly successful”.³⁰ However, he did not see that he had a “mandate for elevating the [Securities Commission] to a position above that of other litigants in this commercial area.”³¹ While he was prepared to order substantial party and party costs he was not prepared to grant solicitor and client costs. Accordingly, Heron J’s approach stands in contrast to McGechan J’s approach in the *Gulf* decision where McGechan was prepared to depart from the usual rule in relation to costs in the light of the Securities Commission’s “statutory duty”.

27 *Idem*.

28 *Supra* note 14, at 66,336. It is interesting that McGechan J found that the Securities Commission had a positive duty to bring the application. Section 31 provides that a number of persons may bring the action, including the Commission, the public issuer, or a holder of securities in the public issuer. The terms of section 31 are not expressed in such a way as to lead one to the necessary conclusion that the Commission has a positive duty to bring actions. McGechan J’s statement could be put in the category of statements made to justify a departure from the costs rule rather than a strict interpretation of section 31.

29 *Idem*.

30 *Supra* note 11, at 67,534.

31 *Idem*.

3. *McGechan J's Judgment in Securities Commission v R E Jones*

McGechan J had the opportunity to consider further the provisions of Part II when he heard one of the most highly publicised corporate trials in recent years. The Securities Commission applied for the forfeiture of 40 million shares held by Sir Robert Jones and his interests in Robt Jones Investments Ltd ("RJI"). A significant difference between this case and the previous cases is that this was the first to deal with the non-disclosure of the *sale* of voting securities in a public issue, rather than the non-disclosure of the *purchase* of voting securities. A further difference is that there was little or no dispute as to who held relevant interests in the voting securities and as to when they were sold.³² As McGechan J pointed out in his judgment his role was to consider "a claim arising from [the] *failure to file certain statutory notices*" and it was not to consider the "general commercial morality" of RJI.³³ In essence the decision was about the quantum of the penalty to be imposed, rather than whether or not there had been a transgression of Part II of the Act.

The claim in this case was based on the failure to file some eleven notices required under section 21 of the Act.³⁴ McGechan J described the Securities Commission's claim in this case as "one of [a] secret selldown by Sir Robert's interests, and within that certain other unacceptable commercial activity, both facilitated by absence of s 21 1% notices".³⁵ The Securities Commission claimed that there was a deliberate decision on the part of Sir Robert Jones and other executives of the companies involved not to file the notices required under Part II in order to facilitate a number of transactions for the benefit of Sir Robert Jones, and (in some instances) RJI.³⁶ McGechan J found that Sir Robert Jones was not aware of the "1% rule", although other executives involved in RJI clearly were.³⁷ McGechan J was even prepared to go so far as to say that had Sir Robert been aware of the rule "he would have given notice in respect of all transactions now impugned".³⁸ However, he found that the omission to file the required notices was deliberate on the part of some of the executives of RJI.³⁹

32 *Supra* note 1, at 68,550.

33 *Ibid*, 68,551 (emphasis in the original).

34 *Idem*.

35 *Ibid*, 68,549.

36 *Ibid*, 68,550. The transactions identified were the sale of 85 The Terrace, Wellington in order to inflate RJI's 1990 annual profit; sales of shares by Robert Jones Holdings Ltd to, and through, Carad Holdings Ltd; and a stand in the market by Sir Robert Jones (with the shares being bought by Carad Holdings Ltd).

37 *Ibid*, 68,552 to 68,553.

38 *Ibid*, 68,553.

39 *Idem*.

McGechan J discussed the issue of the standard of proof required under Part II. He noted that all that was required to establish “the essential ingredients of 1% shift and absence of notice” was a reasonable ground to suspect.⁴⁰ However, there was no indication as to “‘how well’ associated aggravating or mitigating factors, going beyond essential ingredients, should be proved”.⁴¹ While Heron J had taken the approach in the *Honor Friend* decision of requiring the normal civil standard in relation to these elements, McGechan J decided that the correct approach was to allow proof of both aggravating and mitigating circumstances on the lower standard of “reasonable grounds to suspect” since this approach recognised the difficulties of proof faced by the Securities Commission in this area.⁴² For McGechan J the dangers inherent in relying upon such lower standards were to be controlled by the Court’s discretion in granting a remedy. In his view, where the Securities Commission was only able to rely upon “reasonable grounds to suspect”, “a Court will be so much slower, and in appropriate cases quite unwilling, to act in any draconian fashion as by forfeiture”.⁴³ While he had earlier commented that Parliament did not appear to have turned its attention to a question of the standard of proof in relation to mitigating and aggravating circumstances, McGechan J went on to find that Parliament would have been content to leave the Court to determine the appropriate remedies “in an expectation Courts would act cautiously and sensibly, given lower-grade proof along with all other circumstances.”⁴⁴ In any event he stated that he had considered all the significant matters at “the higher level of balance of probability.”⁴⁵

Having discussed what was the standard required under Part II, and having discussed his findings on the facts, McGechan J considered the question of relief. In terms of general principles he noted that the legislature had opted not to provide for criminal sanctions but rather to rely upon civil relief.⁴⁶ In his view Part II provided not only a compensatory regime since the civil sanctions “could be severe in the extreme” and the legislature clearly envisaged some transgressions that warranted “strong and punitive responses”.⁴⁷ Coupled with these aspects of relief was the issue of deterrence. As McGechan J noted, the provision of information which was

40 Ibid, 68,550.

41 Idem.

42 Ibid, 68,551.

43 Idem.

44 Idem.

45 Idem.

46 Ibid, 68,584.

47 Ibid, 68,585.

late could serve little purpose. Consequently it was important to prevent an impression that compliance with Part II was not necessary.⁴⁸

Having set out the underlying principles of the relief available under Part II McGechan J attempted to balance the various principles. While relief could be compensatory it appeared preferable in his view that:

a truly compensatory approach be ... left for individual proceedings by those injured eg for insider trading, where losses can be more precisely measured and allocated. There should be no blind principle that remedy (sic) is to be governed by amount of loss, or gain, or the resources of the defendant.⁴⁹

In relation to the punitive and deterrent elements he was concerned that the remedy should be a measured one and that the circumstances such as “knowledge and ignorance; defiance and oversight; major and minor share volumes; frequent and rare occurrence; significant and minor consequences” should be borne in mind.⁵⁰ McGechan J also pointed out sections 6 and 21 of the New Zealand Bill of Rights Act 1990 as being relevant elements “pointing to construction against ‘unreasonable’ seizure of property”.⁵¹

In applying these general principles to the facts before him he emphasised that it should be clearly signalled to the market that Part II had to be strictly observed. In his view, the signal to be sent was through the damage done to personal and corporate reputation if notice was not given and by financial penalties.⁵² As this particular trial was so well publicised the first had been met. In relation to the second McGechan set out those features which pointed towards moderation and those which pointed towards rigour.

In his view moderation was called for as Sir Robert had been ignorant of the requirements of the “1% rule”, the persons who knew of the rule had failed to understand the seriousness of non-compliance, and, although the property transaction with 85 The Terrace caused increased losses to RJI and to some shareholders, Sir Robert was not the cause of the end of the property market boom nor the corresponding decline in RJI’s price.⁵³ In addition, Sir Robert had himself lost millions in the general decline. On the other hand, there had been a deliberate decision by executives administering his interests not to file notices, and a number of the transactions were facilitated by non-compliance with Part II (which in his view was of particular concern).⁵⁴

48 *Idem.*

49 *Idem.*

50 *Idem.*

51 *Idem.*

52 *Idem.*

53 *Ibid*, 68,586.

54 *Idem.*

Having considered these factors McGechan J finally decided that he would order forfeiture of 6 million shares out of the 40 million then held by Sir Robert Jones and his interests. His reasoning for this was that, while in theory a forfeiture operated to compensate the remaining shareholders, in this case as the capital structure of RJI was considerable there would be little benefit in the forfeiture. By contrast, in his view, forfeiture could work to the disadvantage of former (or existing) shareholders who contemplated other compensatory proceedings since it would reduce the judgment pool potentially available.⁵⁵

A further issue that McGechan J dealt with was the question of costs. Like Heron J he did not agree with a special regime of solicitor and client costs and he openly expressed a concern that “indemnity for costs [could] encourage excessive regulatory zeal”.⁵⁶ This comment seems in marked contrast to his view in the *Gulf* judgment that the Securities Commission had a “statutory duty” to bring such an action. In any event he was prepared to award “very substantial party and party costs and disbursements” on the basis that there was “no reason why a defendant found liable should not make a substantial reimbursement to the taxpayer for costs of regulatory proceedings [which] he has rendered necessary”.⁵⁷ He stated that the level of costs awarded “should enter as a factor into the overall remedy considerations”.⁵⁸ In fact the costs awarded (\$200,000 and up to \$50,000 for disbursements) were approximately half the estimated value of the forfeited shares.⁵⁹ However, no indication was given as to the solicitor and client costs and the actual level of disbursements incurred by the Securities Commission.

4. Implications of the Case-law for the Securities Commission Act Part II

In relation to the issue of the court’s jurisdiction to consider relief under section 32, the courts are clearly uncomfortable with the “reasonable grounds to suspect” test. While Sinclair J had no difficulty with the test in the *Paladin* decision he was dealing only with an application (effectively) to suspend temporarily voting rights for the voting securities until section 28 and 29 notices were complied with by various parties. Both Heron J and McGechan J have grappled with the problem and appear to have arrived at different solutions. McGechan J’s solution was to accept the lower standard

55 *Idem.*

56 *Idem.*

57 *Idem.*

58 *Idem.*

59 *Idem.*

but to be more cautious in exercising the discretion vested in the court under section 32 (particularly where the application was for the forfeiture of voting securities). This approach effectively introduces a tiered approach to the court's powers under section 32 with some orders being able to be obtained on a lower standard, while others require more than reasonable grounds to suspect. Heron J's approach puts the onus upon the applicant to prove mitigating or aggravating factors to the normal civil standard.

Whichever approach is considered it is clear that Part II (and particularly section 30) as it is currently drafted is inadequate in setting an appropriate threshold for the exercise of some of the powers under section 32. In the author's view, section 32 should be redrafted to separate out those orders which are in the nature of interim or compliance orders, and which could rest on the "reasonable grounds to suspect" test as in the *Paladin* decision. In relation to those orders which are compensatory or punitive in nature they should be placed in another section which should clearly indicate the level of proof required before the court would exercise its discretion to order, for example, the forfeiture or disposal of the shares. If the judicial view was followed, the level of proof would be at least the normal civil standard, and one could imagine this would be buttressed by the court's reluctance to grant what is clearly seen to be a potentially "draconian" remedy.

The issue of costs should also be addressed. Currently the only reference to costs is in section 32(3)(d)(i) which provides that where shares are disposed of pursuant to an order under s.32(1)(j) the court can order the proceeds to be applied towards the costs of the application. This leaves the Securities Commission, which has brought three out of four of the actions under Part II so far, in an uncertain position. McGechan J in particular has sent out contradictory messages to the Securities Commission. On the one hand he encouraged it by not awarding costs against it when it was unsuccessful (in the *Gulf* decision) and on the other hand he expressly stated his concern about not encouraging "excessive regulatory zeal".⁶⁰ Perhaps the change in tone relates to an underlying concern that the Securities Commission in the *R E Jones* decision was being extreme in its attempts to portray Sir Robert Jones as consciously ignoring the requirements of Part II. In this instance McGechan J's found that Sir Robert's sell-down was more of "a drift, occasioned by circumstances" rather than "an actual and operative sell-down plan on Sir Robert's part".⁶¹ In Australia, by comparison, there does not appear to be a concern about awarding solicitor and client costs to the regulatory body.⁶²

60 *Idem.*

61 *Idem.*

62 See *North Broken Hill Holdings Ltd* (1986) 10 ACLR 270, 287.

As practicalities dictate that most of the applications under Part II will be brought by the Securities Commission, the legislation should be clarified on the question of costs. The legislation should include a provision that allows the awarding of solicitor and client costs to any applicant, subject to the court's discretion to award a lower level of costs. However, such an amendment may be unlikely given the tendency of recent governments to allow the market to regulate itself rather than have the Securities Commission play a major regulatory role.⁶³

What, in the mind of the legislature, was obviously a minor procedural part of the Securities Amendment Act 1988 has turned out in fact to be more than envisaged. The lack of thought that went into Part II is creating difficulties for both the judiciary and those persons who seek to rely upon the Act. It clearly needs far more attention than was originally given to it, particularly in relation to the questions of the standard of proof and costs.

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63 For example, the Takeovers Act 1993 provides for the promulgation of a Takeovers Code. However, the government has decided to put this aside in the light of the Stock Exchange's regulatory regime, and while it sees how the provisions in the Companies Act 1993 will work in relation to the securities markets (*New Zealand Herald*, 15 September 1993, section 3 page 1).

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BOOK REVIEW

PUBLIC LAW IN NEW ZEALAND - CASES, MATERIALS, COMMENTARY AND QUESTIONS by Mai Chen and Sir Geoffrey Palmer. Auckland, Oxford University Press, 1993, xxvii and 1016 pp. Price \$ 119.95 (paperback).

Just a few years ago, the student of New Zealand public law seeking a textbook written specifically for this country had only two works from which to choose - *The New Zealand Constitution* by Kenneth Scott, published in 1962, and *New Zealand - The Development of its Laws and Constitution*, edited by J L Robson, and last issued in 1967. The dearth of constitutional law texts was perhaps understandable - this was a field in which there had been very few developments. Indeed, apart from the abolition of the Legislative Council in 1950, the establishment of the office of Ombudsman in 1962, and the country's undramatic move towards independence under the Statute of Westminster Adoption Act 1947, the New Zealand Constitution Amendment Act 1973 and the Royal Titles Act 1974, the institutions of government remained the same as they had been since before World War II.

From the mid-1970's public law has come to assume far greater importance, for a number of reasons. The establishment of the Waitangi Tribunal in 1975 and the litigation that has ensued from Treaty-based claims has brought fundamental questions concerning the origin of existing constitutional authority to the fore. The Treaty has also sparked political debate on the extent to which groups are entitled to self-determination, although there has been surprisingly little written by constitutional lawyers on the institutional form self-determination could or should take. Attention has also been focused on public law by a heightened appreciation of the power that New Zealand's combination of constituency elections, legislative supremacy, unicameralism and parliamentary government places at the disposal of the executive. The ease with which this power was used to manage the economy until the first half of the 1980's and to implement a change in the direction of *laissez faire* since then, revealed how uncontrolled the New Zealand constitution was, and indeed still is. This realisation did not however translate into a widespread demand for institutional change - as the lukewarm reception accorded the New Zealand Bill of Rights Act 1990 attests. Yet there does seem to be a growing realisation that if there is to be fundamental change, it must encompass reform of the institutions of state. The electoral reform debate is indicative of this, although it is difficult to determine whether the desire for change proceeds from dissatisfaction with the electoral system *per se* or is a manifestation of antipathy towards

politicians caused by the often painful changes the country has experienced in recent years.

It is against this background of increasing interest in constitutional issues that a number of books dealing with public law have been published within the last eighteen months: Sir Geoffrey Palmer's *New Zealand Constitution in Crisis*, which appeared in 1992, provides an analysis of contemporary constitutional questions, while Phillip Joseph's *Constitutional and Administrative Law in New Zealand*, published in 1993, is a major constitutional and administrative law text. Chen and Palmer's *Public Law in New Zealand - Cases, Materials and Commentary* is the latest work to appear.

The first noteworthy aspect of Chen and Palmer's book is that it is a collaborative effort. As any co-author soon discovers, the secret to the success of a joint project is effective co-ordination and avoidance of contradiction. To use the analogy of cabinet government, joint authorship requires that participants assume the obligations of collective responsibility and speak with one voice, and in this Chen and Palmer have clearly succeeded. *Public Law in New Zealand* stands as a coherent whole, betraying no unsightly seams to the external observer.

So far as content is concerned, Chen and Palmer's book avoids the traditional format of public law texts and instead follows the materials book model that is popular in the United States, and which many New Zealand law lecturers follow when preparing course outlines. As the authors state in their preface, theirs is not a reference work containing an exposition of the law, but rather a compilation of materials from which students can discover the law for themselves, and which lecturers can use as the basis of Socratic instruction. Commentary by the authors is included, but this has been kept to a minimum. Although the materials are arranged under various subject headings, the book abandons the traditional scheme of beginning with a definition of terms such as "state" and "constitution" and instead plunges into an analysis of *Fitzgerald v Muldoon* [1976] 2 NZLR 615, which is used as a vehicle to introduce students to the three branches of government in one fell swoop. What is particularly attractive about this technique is that the case and surrounding correspondence is dealt with in an almost narrative style, which turns it into a rather gripping story that prompts students to read further. And thus it goes with most of the chapters - an example of the operation of the law or a scholarly article discussing it is followed by a series of questions designed to encourage students to expand upon the principles and think how they might apply in different situations.

Topics that receive particularly good treatment are Parliamentary sovereignty, which includes one of the few extensive pieces of commentary (and one that summarizes the debate succinctly and well), and which is accompanied by excellent problem questions on entrenchment. Another impressive section is that on the Constitution Act 1986 which reveals how a practical problem (in this case the devaluation crisis of 1984) can spark reforms going beyond what was necessitated by the problem itself. The section on contemporary constitutional reform issues emphasizes the fact that constitutional law has become a far more lively subject than it was formerly. A final point to note in this regard is that the authors' predilection is above all for a *practical* approach to public law. This is reflected in the attention given to issues such as how legislation is drafted and passed through Parliament, how a claim is pursued before the Waitangi Tribunal, and how Cabinet government operates.

As anyone who has compiled materials knows, the task of selection is difficult, and one cannot avoid giving emphasis to some topics at the expense of others. Nevertheless, *Public Law in New Zealand* omits some topics that one would expect to have been included. For example, no space is allocated to local government, to the Human Rights Act, or to the important topic of Crown liability in contract and tort and the relevance in that area of executive discretion. The section on the judiciary would have benefited from an inclusion of material on judicial immunity. An issue which it would have been interesting to include in the section on the Treaty debate is to what extent, if any, indigenous status begets an entitlement to special constitutional rights - perhaps comparative material from Fiji could usefully have been included here. One obvious limitation of the book is the imbalance between constitutional and administrative law. Despite the inclusion of the very useful summary of the principles of judicial review by the Crown Law Office, and the step-by-step analysis of the correspondence, litigation and consequent legislative change in the *Daganayasi* case, judicial review is covered in less than 150 of the book's 1016 pages. Granted, the authors warn that space permitted them only an introduction to administrative law, but for this reason alone *Public Law in New Zealand* must be supplemented by a conventional text. A fuller treatment of the issues mentioned in this paragraph would of course have necessitated cuts elsewhere. Possible areas in which this might have been done include the political party constitutions, which did not need to be included in their entirety, and the sections on comparative constitutions and the international law dimension of human rights which, although both relevant and interesting, are arguably not as important as some of the topics that were excluded. An overall space saving could have been achieved by leaving some of the statutes and cases for students to read separately, or by editing

them so as to include only the most important sections of Acts and the kernel of decisions.

But these reservations are minor in comparison with the overall usefulness of the work, and it is clear that *Public Law in New Zealand* provides a valuable compendium of both primary and secondary authorities with which constitutional law students must become familiar. Selection of materials is a difficult business, and the painstaking way in which the authors have done this makes *Public Law in New Zealand* a ready-made materials book that teachers of constitutional law will without doubt find extremely useful.

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