

# WAIKATO LAW REVIEW

## TAUMAURI



VOLUME 9

2001

### CONTENTS

<i>Some Human Rights Issues</i>	Hon Dame Silvia Cartwright	1
<i>Conditional Gifts and Freedom of Testation: Time for a Review?</i>	Noel Cox	24
<i>Great Elucidations: The Interpretation of Revenue Statutes in New Zealand</i>	Thomas Gibbons	63
<i>No Rights Without Responsibilities? Third Way and Global Human Rights Perspectives on Citizenship</i>	Paul Havemann	75
<i>The Extensive Powers of the Commissioner of Inland Revenue in Assessing and Collecting Tax Debts</i>	Joel Manyam	91
<i>Henry Greathead Rex Mason QC CMG: An Outstanding Law Reformer</i>	Derek Round	131
<i>Close Corporations in South Africa: A Viable Option for New Zealand Small Business Corporate Law?</i>	Michael Spisto and Helen Samujh	153
<i>EEO for Māori Women in Māori Organisations</i>	Linda Te Aho	187
<i>Reading Hate Speech from the Bottom in Aotearoa: Subjectivity, Empathy, Cultural Difference</i>	Catherine Lane West-Newman	231
<i>Waikato Law School's Bicultural Vision – Anei Te Huarahi Hei Wero I A Tatou Katoa</i>	Leah Whiu	265
<i>Book Reviews</i>	Joel Manyam, Brenda Midson, Stephanie Milroy, Sue Tappenden	293
<i>The McCaw Lewis Chapman Advocacy Contest</i>	Anton Usher	315

*Editor:* Professor Peter Spiller

*Editorial Committee:* Peter Spiller, Wendy Ball, Radha D'Souza, David Gendall, Al Gillespie, Paul Havemann, Anna Kingsbury, Brenda Midson, Stephanie Milroy, and Gay Morgan.

The *Waikato Law Review* is published annually by the Waikato University School of Law. Subscription to the *Review* costs \$20 per year (plus postage for overseas subscribers); and advertising space is available at a cost of \$200 for a full page or \$100 for a half page. Back numbers are available. Communications should be addressed to:

The Editor  
*Waikato Law Review*  
School of Law  
Waikato University  
Private Bag 3105  
Hamilton  
New Zealand

North American readers should obtain subscriptions direct from the North American agents:

Wm W Gaunt & Sons Inc  
3011 Gulf Drive  
Holmes Beach  
Florida 34217-2199  
U S A

This issue may be cited as (2001) 9 *Waikato Law Review*.

All rights reserved. No part of this publication may be produced or transmitted in any form or by any means electronic or mechanical, including photocopying, recording or any retrieval system, without permission from the editor.

ISSN 1172-9597

## EDITOR'S INTRODUCTION

I am pleased to present the ninth edition of the *Waikato Law Review*. I thank the authors who submitted articles to the *Review*, the referees to whom articles were sent, and the members of the editorial committee.

The *Review* is proud to publish the Harkness Henry Lecture of Her Excellency the Governor-General, the Honourable Dame Silvia Cartwright. Her lecture on "Some Human Rights Issues" was eagerly awaited in the light of her extensive involvement in international human rights, and was well received by a large audience.

The growing prestige of the *Review* in New Zealand is reflected in the increasing number of articles which are being received from outside the University of Waikato. The *Review* is pleased to publish articles on testation and hate speech by academics from Auckland, and the article on Rex Mason by the journalist Derek Round.

There are two student publications in the *Review*. One, by Thomas Gibbons, is on the interpretation of taxation legislation. The other, by Anton Usher, is the winning submission in the annual student advocacy contest kindly sponsored by the Hamilton firm McCaw Lewis Chapman.

The other articles in the *Review* are written by staff at the University of Waikato. These articles, and the others noted above, underline the Waikato Law School's continuing commitment to professionalism, biculturalism and law in context.

Professor Peter Spiller,  
Editor, *Waikato Law Review*.

# Harkness Henry & Co

## Barristers & Solicitors

---

### *Partners*

Warren Scotter  
Paul Middlemiss  
Simon Menzies  
Lynden Earl  
Christine Grice  
Simon Ellis  
Mark Thomson  
Mark MacLennan  
Murray Branch

### *Associates*

Chris Marr  
Jillene Peters  
Jake Casey  
Paul Pinton  
Susan Woodhouse

### *Address*

KPMG Centre  
85 Alexandra Street  
Hamilton  
New Zealand

### *Postal Address*

Private Bag 3077  
Hamilton  
New Zealand

### *Communication*

Telephone (07) 838 2399  
Facsimile (07) 839 4043  
DX GP 20015  
Email [harkness@harkness.co.nz](mailto:harkness@harkness.co.nz)  
Website [www.harkness.co.nz](http://www.harkness.co.nz)



# THE HARKNESS HENRY LECTURE

## SOME HUMAN RIGHTS ISSUES

BY THE HONOURABLE DAME SILVIA CARTWRIGHT\*

### *Greetings*

*Nga hau e whā,  
ngā iwi e tau nei,  
tēnā koutou katoa.  
E ngā mana, e ngā reo,  
rau rangatira mā,  
tēnā koutou, tēnā koutou, tēnā koutou katoa.*

*My greetings to you all, people who have gathered from near and far. To all honoured guests, to the speakers, my respects and, again, my greetings.*

*Ngā mihi o te tau kia koutou.  
Thank you for your warm welcome.*

I am delighted to be invited this year, in the first year of my term as Governor-General, to present this prestigious lecture. My connections with the Waikato, with Hamilton, with this University and with Harkness Henry are long and fond, at least on my part. I am conscious too, that I follow in the footsteps of a number of eminent judges and lawyers who have delivered this address. I am deeply honoured to have been invited to speak today and on the topic of Human Rights in New Zealand.

You may wonder why I have chosen this, rather than a legal or judicial topic, or a subject associated with my new vice-regal role such as a constitutional issue. The answer is quite simple. I am rapidly losing touch with the juridical issues which might be engrossing for this audience, and there have been no major new constitutional developments upon which I wish to touch, since Sir Michael Hardie Boys so ably discoursed on the subject of “Continuity and Change – The 1996 General Election and the Role of the Governor-General” in July 1997.

Human Rights and its impact on our society and internationally is an evergreen subject, one which I find fascinating, and one which has real

---

\* DBE, PCNZM, Governor-General of New Zealand.

application through all the social, economic, cultural and political changes that this country and, many overseas, undergo.

## I. INTRODUCTION

So my subject tonight is human rights. Though it is not a topic on every lip, I hope that I can convince you that it deserves more attention than it receives.

In New Zealand, human rights tend to be thought of as someone else's issue – in Africa and Asia, in recent history in Latin America, sometimes in the United States of America and in the Middle East. We tend to think that we have no problems in New Zealand. In our media, stories with the headline “human rights” tend to the trivial and even the silly.

Some of you may, for instance, have seen the splash in the news recently about what the Race Relations Conciliator wore to the Wellington Club. Was that really an issue of human rights? And why was there so much fuss about it? What about real stories of racism in New Zealand or pieces on the way in which dress restricts a person's right to work, to go to school without looking and feeling different from other students – as if in some way you are marked out as being in a minority.

Why would dress be of any importance anyway? Well, of course it is important to the young woman who must wear a veil or be stoned, or to the young girl born in New Zealand who even here must wear a scarf out of some outdated biblical notion that women's hair must be hidden.

But most of you might say real human rights issues are not hindering our people. Listen, however, to what Kofi Annan, the Secretary-General of the United Nations, has to say:

Simply stated, the pursuit of development, the engagement with globalisation, and the management of change must all yield to human rights imperatives, rather than the reverse.

Well, New Zealand has an interest in development, perhaps not at the level of a developing country, but the issue is of vital importance to us as we continue our ongoing struggle to maintain our standard of living. And globalisation – it has benefits and disadvantages for New Zealanders, so we are keenly interested in the debate. And we all know about change and its management. That has been a hot topic for two decades now. All of these issues can have an impact on the human rights of sectors of our community,

and we must constantly be on guard to ensure that these rights are not subjugated to those of others.

Perhaps a good starting point for today are the questions posed for all countries by Mary Robinson, High Commissioner for Human Rights and Secretary-General for the World Conference against Racism:

As a new century begins, we believe each society needs to ask itself certain questions. Is it sufficiently inclusive? Is it non-discriminatory? Are its norms of behaviour based on the principles enshrined in the Universal Declaration of Human Rights?

Those questions come from the Declaration on Tolerance and Diversity. Supported by Kofi Annan, with Nelson Mandela as its Patron, this Declaration has been signed so far by 79 nations, including New Zealand. It has its roots in the Universal Declaration of Human Rights drafted at a time of intense interest in human rights. The Declaration, to which I shall return later, is inspiring and challenging.

## II. NEW ZEALAND'S ROLE IN INTERNATIONAL HUMAN RIGHTS DEVELOPMENT

Not many of us know about New Zealand's proud history in the human rights field. Starting with the conference where the United Nations' Charter was drafted in 1945, New Zealand has been a leader. The original proposals for the Charter had no substantial material on human rights – the notion was that states' rights took precedence over individuals' rights.

New Zealand was among an outspoken group of states that insisted that the United Nations' Charter must have stronger language on human rights. This was based on both a moral stance and a pragmatic assessment. With the example of Nazi Germany clearly in mind, we saw that regimes which do not protect human rights are also likely to lead to international instability. In 1945, Peter Fraser, the Prime Minister of New Zealand, made this remarkable statement from this little and insignificant country at the bottom of the world:

unless in the future we have the moral rectitude and determination to stand by our engagements and our principles then the procedures laid down in this new Organisation will avail us nothing; the suffering and the sacrifices our peoples have endured will avail us nothing; and the countless lives of those who have died in this struggle for security and freedom will have been sacrificed in vain. The world will be bound for all time by what we, who are here today, make of our heavy and

onerous responsibility here and now. It is my deep fear that if this fleeting moment is not captured the world will again relapse into another period of disillusionment, despair, and doom. This must not happen.

The final version of the Charter is evidence of the power of those views. Human rights are central. It begins: "We the peoples of the United Nations ... reaffirm faith in fundamental human rights".

The next question at that crucial crossroad was whether a Bill of Rights could be incorporated into the United Nations' Charter. Although the proposal failed, a Commission was established to develop an International Bill of Rights. The New Zealand delegation again played an important role, always arguing for the strongest possible protections for human rights. Ever since that time, we have played a leading role in the development of the international laws of human rights, laws that establish the principles, the standards, and the goals for the relationship between states and their citizens, and amongst citizens themselves.

New Zealanders have always placed great emphasis on the prevention of war and the attainment of peace. For many years we have continued to work within the United Nations' system to resolve conflict and to prevent new ones.

Our humanitarian efforts, in the form of support for United Nations' peacekeeping missions and foreign aid programmes, and our long-term work for nuclear disarmament, demonstrate our strong commitment to peace and security. Most recently, we played a pivotal role in leading the negotiations of a key group at the meeting negotiating the Kyoto Protocol – and if anyone wonders what that has to do with human rights, think of the overlap between the right to development unhindered by environmental constraints and the obligations of nations to ensure the health and economic well being of their people.

New Zealand continues also to be committed to working with the United Nations to help bring an end to violence. The Cold War has ended, but internal conflicts continue to plague member nations. Recent turmoil in East Timor, Kosovo and Sierra Leone has highlighted the brutal consequences for civilians caught up in conflict.

Wherever conflict occurs, huge numbers are displaced internally and become refugees, hunger and violence escalate, racism increases, and the education of children is disrupted, sometimes permanently. Women and children, the disabled, the displaced, and ethnic and religious minorities fare particularly badly.



New Zealand has a long and distinguished record of supporting multinational peacekeeping missions. And it is an area of activity for which we show particular aptitude, and for which our forces are much in demand. That lengthy record is continued in one of the government's current key objectives for New Zealand's defence policy, which is to contribute to global security and peacekeeping through participation in the full range of United Nations and other appropriate multilateral peace support and humanitarian relief operations.

New Zealand peacekeepers have acquired their excellent reputation overseas for their professionalism, diplomacy, empathy, relative absence of racism, and dedication. The small size of our nation, and our lack of geo-political importance, have given our peacekeepers the skills required to get along with other nationalities and to broker peace agreements where a different and more egocentric attitude would have failed.

But as a nation, we are anxious to move from reaction to prevention. Nowhere is this need for preventive action more critical than in the area of disarmament. The threat of proliferation of nuclear weapons and other weapons of mass destruction still hangs over us all. Tens of thousands of nuclear weapons remain in the arsenals of the five recognised nuclear powers.

Again, New Zealand has played a valuable role. There have been significant successes arising from our work with the international community to reduce this accumulation of weaponry. The number of nuclear weapons has halved since 1982, and we were instrumental in establishing the nuclear-free zone in the South Pacific. Since then, there has been solid progress made towards establishing nuclear-free zones in South East Asia, Africa and Central Asia. Should like-minded nations and we succeed in this objective, we will have achieved significant progress in preventing war.

Peace is necessary for there to be human rights, but it is not sufficient. Real peace extends beyond the absence of war. To the Secretary-General of the UN, it "is a phenomenon that encompasses economic development and social justice ... it means democracy, diversity and dignity; respect of human rights and the rule of law".

As I said in my swearing-in speech, for me, first and foremost, peace means also the elimination of violence and intimidation, peace between women and men, adults and children, and protection of our environment. Respect for human rights is a core ingredient of peace.

What New Zealand understood from those first days in San Francisco is that human rights are not just an optional extra for any nation, nor just an issue for countries far away. We understood that human rights underpin the basic rules of a free and democratic society. We know that human rights are the essential platform on which we can construct an authentic peace in New Zealand.

Today I would like to trace some of the major themes in international human rights developments, and then move to the developments and challenges for human rights in our own country.

### III. HUMAN RIGHTS INTERNATIONALLY

Today, many people think of the United Nations as a peacekeeper – the forum for negotiating and the last resort for sending in troops to keep the peace.

But the United Nations is more than a tool for the engagement of nations. As the Charter makes clear, it was established in order to introduce new principles into international relations. Even beyond that, the Charter is written in the name of “we, the peoples” - the Charter reaffirms the dignity and worth of the human person, and respect for human rights and the equal rights of men and women.

It is useful to remember what the world was like when nations gathered to create an international body. When the United Nations was founded, two-thirds of the current Members did not exist as sovereign states – their people were still living under colonial rule. The planet hosted fewer than 2.5 billion of us, rather than the 6 billion human beings who now call this planet home.

Most big companies operated within a single country and produced for their home market. The annual output of steel was a prized symbol of national economic prowess. The world’s first computer had just been constructed – it filled a large room, bristled with 18,000 electron tubes and half a million solder joints, and had to be physically rewired for each new task. Ecology was just a subset of biology.

The vision of universal human rights in a world so much more disparate, so much less “global”, is miraculous. It was the first time a world organisation had articulated and agreed to a common set of rights – civil rights, political rights, economic rights, social rights, and cultural rights. Those who promoted the vision and the nations that made it into a reality, and who

continue to pursue the dream of human rights for all, deserve both our respect and our support.

Since that first declaration, there has been no looking back. The nations of the world have articulated standards in many more areas of human activity: racial discrimination, children, torture, and the rights of women, to name just a few.

But there has been more than just a proliferation of standards. While there are continuing efforts to develop new, and to strengthen existing international standards, the emphasis in the international human rights agenda is shifting to ensuring better implementation of, and compliance with existing standards. There is a focus on more effective monitoring, on technical assistance, and on “mainstreaming” human rights through the United Nations.

Kofi Annan has said that the core challenge of the United Nations is:

to forge unity behind the principle that massive and systematic violations of human rights – wherever they may take place – should not be allowed to stand .... If states bent on criminal behaviour know that frontiers are not the absolute defence, if they know that the Security Council will take action to halt crimes against humanity, then they will not embark on such a course of action in expectation of sovereign immunity.

In a sense, this is no more than a conventional statement of criminal justice policy – it is of little use appealing to the good side of human nature, or humiliating or scolding criminals. The main way to reduce criminal offending is to instil a realistic fear of being caught, tried, and, if convicted, punished.

And this pragmatism has guided a number of initiatives, for example, the negotiations to form an International Criminal Court and to adopt an Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). Without a complaints mechanism, states – as they have done since the Convention came into force – will make high sounding statements about their commitment to improving the lot of women in their countries, promise to do more when the economy improves, or, in order to give the government more time to pay attention to women, when the economy slows down.

States will describe policy which never comes into force, boast of the heaven on earth in which their women live, and say that their women do not

want to be literate or to be free from traditional forms of violence. But without the big stick of detection and punishment (in the form of publication of the state's failure to comply with the principles of the Convention), change will never occur.

Of course the changes in United Nations' standards have not sprung only from the member states of the United Nations. A strong degree of encouragement has been required from civil society. When it comes to women's issues, the international movement of women's non-governmental groups has worked tirelessly to promote and ensure improvements in the lives of the women of the world, as have those NGOs whose primary interest is in freeing the world of nuclear weapons, helping reduce refugee numbers, or ensuring that children have access to an education and good quality health care.

States cannot do these things on their own even where there is a will. They need the commitment and the skills and energy of civil society – all given freely and with astounding generosity by hundreds of thousands if not millions of workers in NGOs in every country in the world.

Civil society is becoming more organised and more influential. This development both supports states' endeavours to improve their human rights' compliance, and polices those that do not measure up. Civil society plays an invaluable role in the setting and monitoring of human rights' standards.

#### IV. INDIVISIBILITY AND RELATIVITY OF HUMAN RIGHTS

There are two areas of current controversy in international human rights which I would like to discuss briefly.

The first is sometimes called "indivisibility" – basically, this phrase refers to the argument about whether some rights are more important than others. The debate has largely been played out along North-South lines, with developing countries complaining that the dominant influence of developed states has skewed the human rights' agenda. Developing countries have said that developed states have downplayed economic, social, and cultural rights, and overplayed civil and political rights.

New Zealand had an active role in 1993 in Vienna, where 170 states adopted by consensus a statement that all human rights are "universal, indivisible, and interdependent, and interrelated", adding that "while the significance of national and regional particularities must be borne in mind, it is the duty of

States, regardless of their political, economic, and cultural systems, to promote and protect all human rights and fundamental freedoms”.

That is the official commitment. Few people separate their experience into different categories of rights, and those who are most vulnerable to violations of their civil and political rights are the most likely also to be the economically and socially marginalised. For those people, the two categories of rights may often be violated simultaneously and by the same actions. This is the practical meaning of the “indivisibility of rights”.

But most would agree with Mary Robinson when she said, on the fiftieth anniversary of the Universal Declaration:

We must be honest and recognise that there has been an imbalance in the promotion at the international level of economic, social, and cultural rights and the right to development on the one hand, and of civil and political rights on the other.

There is increasing recognition that this imbalance needs to be addressed, and, moreover, a growing acknowledgment of the intimate relationship between governance, human development, and human rights. Quotes from two quite different sources are apposite:

The World Bank wrote recently:

The World Bank believes that creating the conditions of the attainment of human rights is a central and irreducible goal of development. By placing the dignity of every human being – especially the poorest – at the very foundation of its approach to development, the Bank helps people in every part of the world build lives of purpose and hope.

Then, in more graphic language, Amartya Sen, the 1998 Nobel Laureate in Economics said:

It is not surprising that no famine has ever taken place in the history of the world in a functioning democracy – be it economically rich or relatively poor. Famines have tended to occur in colonial territories governed by rulers elsewhere (as in Ireland administered by alienated English rulers), or in one-party states (as in Cambodia in the 1970s) or in military dictatorships (as in Ethiopia or Somalia). Authoritarian rulers, who are themselves rarely affected by famines, tend to lack the incentive to take timely preventive measures.

The second area of controversy in international human rights is referred to as “cultural relativity” sometimes called “exceptionalism”. The argument

here is that what have been called universal human rights are nothing of the sort – they have been defined by developed countries and imposed over the cultural wishes of the less developed. This is a challenge led by radical Islam and by the assertion of differing “Asian values”.

As Steiner and Alston put it:

partisans of universality claim that international human rights like rights to equal protection, physical security, free speech, freedom of religion and free association are and must be the same everywhere ... [although those partisans concede that] many basic rights (such as the right to a fair criminal trial) allow for culturally influenced forms of implementation or realisation (i.e. states are not required to use the Anglo-American jury to assure a fair trial, states need not follow any one particular voting system to meet the requirement of a government that represents the will of the people).

Those who advocate cultural relativism claim, by contrast, that:

rights and rules about morality are encoded in and thus depend on cultural context, the term “culture” often being used in a broad and diffuse way that reaches beyond indigenous traditions and customary practices to include political and religious ideologies and institutional structures. Hence notions of right (and wrong) and moral rules based on them necessarily differ throughout the world because the cultures in which they take root and inhere themselves differ. This relativist position [asserts] that the world contains an impressive diversity in views about right and wrong that is linked to the diverse underlying cultures.

The relativist argument has some anomalous aspects to it. First and foremost, the universal standards delineated by the United Nations since the Second World War are just that - universal. So the instruments speak in inclusive terms – the Universal Declaration of Human Rights says, for example, that “everyone” has the right to liberty, “all persons” are entitled to equal protection, “no one” shall be subjected to torture, and “everyone” has the right to an adequate standard of living.

However, the African Charter on Human and Peoples’ Rights, after noting in its preamble the “essential [need to] pay particular attention to the right to development and that civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality”, states that the parties to the Convention will take into account “the virtues of their historical tradition and the values of African civilisation”. Palpably, African tradition plays an important role in the attainment of human rights standards.

The Charter nonetheless states its determination to “struggle for ... dignity and genuine independence [by eliminating] colonialism, neo-colonialism, apartheid, Zionism and to dismantle aggressive foreign military bases and all forms of discrimination particularly those based on race, ethnic group, color, sex, language, religion or political opinions”. The Charter does not therefore give pre-eminence to traditional values.

In most Constitutions, the language of universality is also used, reflecting the influence that the United Nations’ instruments have had in the elaboration of national standards. Nor can it be overlooked that the international standards are both drafted by the member states of the United Nations and ratified by them.

There is no one sector that imposes these values over the protest or in the face of reluctance from other parts of the world. Indeed, during the drafting of the Optional Protocol to CEDAW, African states played an influential role, insisting on strong language. Many were disappointed at what they saw as an instrument which had been weakened by the opposition of some states from West Europe, Asia, and Latin America, as well as of the United States of America, which, although not a party to CEDAW, had lobbied effectively for a watered-down version.

In a recent article in *Foreign Affairs*, Thomas Franck also argues that many prominent voices in non-Western societies reject the claim of “cultural relativity”. Those who propound it are not therefore, in his view, the only voices that we should hear from the developing world. More importantly, he says that those who claim “cultural relativity” often do not legitimately represent those for whom they claim to speak. His evidence is that oppressive practices which are defended as “culturally necessary” are often little more than manifestations of the current self-interested preferences of a power elite. As Franck says:

If Afghan women were given a chance at equality, would they freely choose subordination as an expression of unique community values? We are unlikely to find out.

He goes on to discuss the case of Sandra Lovelace, a Maliseet Indian from New Brunswick, who, under Indian customary law incorporated into Canadian law, lost her right to live on tribal land when she “married out” of the tribe. When the Human Rights Committee of the International Covenant of Civil and Political Rights (ICCPR) upheld her claim that this was gender-discriminatory law, the Canadian government repealed it. On further investigation, as Franck wrote:

As with much that passes for authentic custom, the rules turn out to have been imposed, quite recently, by those who stood to benefit. Discrimination against women by the Maliseet, far from being a traditional requisite of group survival, was shown by recent anthropologist research to have been copied from male-dominated Victorian society.

Radhika Coomaraswami, the United Nations special rapporteur on violence against women, says that practices such as female genital mutilation, flogging, stoning, and amputation of limbs, as well as laws restricting women's rights to marriage, divorce, maintenance, and custody, are all inauthentic perversions of various religious dogmas. She insists that "cultural diversity should be celebrated only if those enjoying their cultural attributes are doing so voluntarily".

Others argue that this is not a North/South, Western/Asian divide. There is nothing "Western" about religious freedom and tolerance, as a cursory look at our rather patchy and all-too-often bigoted history will show. These observers maintain that the move to more personal autonomy in religion, speech and employment, and to more equality for the races and sexes, is a product of universal education, industrialisation, urbanisation, the rise of a middle class, and new information technology. And everywhere that such development has occurred, basic human rights norms have shifted as well.

Certainly human rights' standards are more readily adopted where the people are literate – how else can they know what their rights are? They thrive too, where they have employment, adequate food and reasonable health care – how else can they have the time or the energy to do anything other than simply subsist? They thrive where there is a functioning democracy – how else can they assert their rights? They thrive where women are not oppressed – how can a person oppressed both in public life and in her private life realistically claim her right to equality with men?

Stripping away the diverse cultural, philosophical, and economic strata, it seems to me that ultimately a bedrock of shared values and rights across this earth's societies and cultures is uncovered. As Kofi Annan has said:

Do not African mothers weep when their sons and daughters are killed or tortured by agents of oppressive rule?

Do not African fathers suffer when their children are unjustly sent to jail?

Is not Africa as a whole poorer when one of its voices is silenced?

Human rights ... are African rights. They are Asian rights; they are European rights; they are American rights.



So if the move toward universal human rights is inevitable, if respect for those rights will come automatically with development and progress, why not simply wait for the inevitable?

First, that would be an immoral approach. New Zealand's privileged position in this world requires us to maintain our leadership in human rights. There are too many who will suffer for far too long if other nations sit back and wait – whether they be women in Afghanistan, Kurds in Iraq, or Indians in Fiji.

Secondly, development is a slow process, one that requires the optimum coalition of resources, trade, good agricultural, technical and industrial practices, educated citizens, strongly democratic government, and a good human rights record – some of which factors occur only when a country reaches an elevated stage of development, making this argument a circular one.

But the circumstances in which human rights can flourish are frequently not present. It seems unfortunately true that extreme tribalism is on the rise, from the Balkans to the Horn of Africa, from Indonesia to Western China. And this is not a problem just for those who will suffer the consequences directly – the stability of world peace is endangered by the use of terrorism and the export of guns and money that accompany such turmoil.

Franck puts it starkly:

Let there be no mistake: the fight is essentially one between powerful ideas, the kind that shake the pillars of history. It is a deadly earnest conflict between an imagined world in which each person is free to pursue his or her individual potential and one in which persons must derive their identities and meanings exclusively in accordance with immutable factors: genetics, territoriality, and culture.

I would join with Kofi Annan in celebrating the liberating power of human rights, both individually and for cultures:

There is no single model of democracy, or of human rights, or of cultural expression for all the world. But for all the world there must be democracy, human rights, and free cultural expression .... The Universal Declaration of Human Rights, far from insisting on uniformity, is the basic condition for global diversity. That is its great power. That is its lasting value. The Universal Declaration enshrines and illuminates global pluralism and diversity. It is the standard for an emerging era in which communication and collaboration between States and peoples will determine their success and survival.

As promised, I will now return to Mary Robinson's vision for the twenty-first century – one of tolerance and diversity. That vision is rooted in a realistic assessment, an acknowledgment that “racism, racial discrimination, xenophobia, and all kinds of related intolerance have not gone away”, but points out compassionately that “their persistence is rooted in fear: fear of what is different, fear of the other, fear of the loss of personal security”.

Many in this room will acknowledge that on occasion they have reacted out of those fears – I know that I have. But the vision goes on to say “while we recognise that human fear is in itself ineradicable, we maintain that its consequences are not ineradicable”.

I believe that she is right – fear is universal. But we do not need to act on that fear, to institutionalise its consequences. That is one of our world's challenges.

Tolerance and diversity are therefore key concepts for the future. Diversity is the colour in which our world is painted. But what do we mean by tolerance? If it means that the majority “tolerates” the existence or the culture of the minority, then it is not a value that will promote equality and diversity in any society.

Legal definitions are scarce: the dicta that do exist generally suggest the notion of “negative” tolerance - “not interfering with other people”, thereby containing difference within parameters. There is no associated idea of any “positive” duties.

The United Nations General Assembly concluded however that tolerance – “the recognition and appreciation of others, the ability to live together, with and to listen to others – is the sound foundation of any civil society and of peace”.

## V. HUMAN RIGHTS IN NEW ZEALAND

So what does all this mean in our own country? New Zealand has been a leader in international human rights, and many think that we enjoy the full breadth of human rights here at home. Well, yes and no. There is no doubt that we are happily in the company of those nations where there is little regular threat to the most basic of rights for most people.

We have worked very hard to ensure that that is so, and we have continued to enlarge our understanding and our promotion and protection of human rights here at home. But it requires eternal vigilance and unceasing self-

monitoring. Experience and history show that slippages in rights usually begin incrementally, or initially only affect very small groups, often already at the margins of society. By the time the erosion of human rights has become widespread or very substantive it is difficult to reverse the situation without war.

This is not a simple matter of passing the right laws. Human rights, and particularly those of the vulnerable, are protected or violated because of the strength of our domestic institutions. In the words of our Australian human rights colleagues Brian Burdekin and Anne Gallagher, we need a “pluralistic and accountable Parliament, an executive which is ultimately subject to the authority of elected representatives and an independent impartial judiciary”, as well as a vigorous civil society “which not only tolerates but encourages respect for individual difference and which enjoys a free and responsible press”.

Do we feel confident we would pass all those tests with flying colours?

### *1. New Zealand Bill of Rights Act*

Thankfully in human rights as in all areas, our ideas, our laws, and our institutions are always in change. I think that the Bill of Rights is a fascinating case in point. We have come a long distance in 40 years, done the unusual by making constitutional change in a time of peace, and in the end reached a peculiarly New Zealand solution.

But of course the roots go much further back. The first time a Bill of Rights formally appeared on our domestic horizon was the 1960s. In 1961, 1962, and 1963 the Governor-General’s speech from the Throne indicated that the government intended to introduce a Bill of Rights. In 1963 the government did so, though its ambivalence was clear. That Bill of Rights Bill, based on the Canadian Bill of Rights, went to a “Constitutional Reform Committee” and submissions gave it a comprehensive thumbs down.

Those submissions were a wonderful study in diversity – either the Bill would achieve nothing, or it would plunge our law into uncertainty and judges into controversy, or both. There were only two even lukewarm supportive submissions. The Bill, not surprisingly, lapsed.

There was a particularly vehement argument, made in 1968 by a young academic named Geoffrey Palmer: a Bill of Rights, he said, would “catapult our judges into a political role for which they do not seem to have any

inclination or ability” and it would be “contrary to the pragmatist traditions of our politics”.

But from the mid 1970s views began to change. This may well have had something to do with the fact that “pragmatism” was now rather influenced by the experience of a Parliament dominated by Cabinet, itself dominated by a Prime Minister willing at times to act in ways that many thought were unconstitutional. Kenneth Keith, then a professor of law at Victoria University, said in a 1976 lecture that “[i]n 1963 several of us ... gave evidence opposing a Bill of Rights. I am not sure I would be quite as confident as I was then”.

In 1978 this country ratified the International Convention on Civil and Political Rights. By 1979 Geoffrey Palmer was in Parliament, with much altered views about the need for a Bill of Rights.

And the mid 1980s were a time of tremendous change on many fronts. In 1984 our representative at the United Nations told the General Assembly that:

The human rights set forth in the various international human rights instruments have been secured in New Zealand through a complex mix of fundamental common law precepts, jealously safeguarded by a fully independent judiciary, and the enactment of specific provisions in statute law. The New Zealand government has now decided that to improve the level of understanding about fundamental rights and liberties and to ensure that as a nation we are vigilant in protecting them, it will draw up a Bill of Rights which will overlay our existing democratic institutions and ensure proper restraints on the exercise of power by the executive and Parliament.

In 1985 a White Paper was tabled on “A Bill of Rights for New Zealand”. It is unnecessary to chart the various steps over the remainder of that decade, but in 1990 a Bill of Rights was passed into law, based on the ICCPR we had ratified 12 years earlier, and on the United Nations’ Universal Declaration of Human Rights which we had championed more than 40 years earlier.

The one feature worth noting in passing is the way that this country handled the question of “supreme law”. The question, which sat at the centre of many of the debates from 1963 to 1989, was whether a Bill of Rights should be able to override other Acts of the legislature. In the end, we have come up with what is a peculiarly New Zealand solution.

The Bill of Rights, as you will all be aware, quite explicitly says that it will not override other statutes. But it has two mechanisms to balance that prohibition which some said would make the Bill ineffectual. One is that, where possible, all legislation must be construed consistently with the Bill of Rights. The courts have not been reluctant to use that provision. For those who thought that the Bill of Rights would have no impact on our jurisprudence, I simply refer to Sir Kenneth Keith's recent research that showed that there were 2,636 references to it in Court of Appeal judgments in just the ten years since it came into force.

The other provision requires all proposals for legislation to be vetted for their consistency with the Bill of Rights. And, if they are found wanting, then the Attorney-General is required to stand up in Parliament, tell her colleagues, and explain. This has proved to be a very effective way to bring human rights into sharp focus in our policy and political processes.

There can, of course, be no way of counting the number of times that legislative proposals have been re-shaped before they reach the House, changed in the light of that looming audit against the Bill of Rights. Policy makers are required to consider not only whether their proposal would fail a vetting, but hopefully are reminded of the positive goals and intentions of the Bill of Rights.

And by my last count, since 1990 the Attorney General has had to stand before other Members and report an inconsistency with the Bill of Rights for only eight government Bills. Several of those were subsequently amended or the offending provisions were withdrawn.

It has been quite a road of change, but we have ended up with what, I think, is a rather kiwi way of dealing with this thorny issue – we do not have an American system with explicit balances of power, we do not generally pit the judiciary against the legislature, but nor do we have the rigidity of a written constitution which is too sacred to be flexible.

But we do want human rights considerations to be taken seriously. So we have given the courts room to comment and interpret, and have created political processes which mean that human rights cannot be forgotten.

## *2. The Treaty of Waitangi and Human Rights*

Another area where change is occurring, but rather more slowly than the incorporation of a Bill of Rights into our law, is the whole subject of

indigenous rights. I can do no more, in a lecture as diverse as this, than point out the conundrum.

The international human rights system has grappled with international indigenous rights since the early 1980s. Developments to date include the International Labour Organisation Convention 169 concerning indigenous and tribal peoples in independent countries, the draft declaration on the rights of indigenous peoples, and the recent decision of the United Nations agreeing to a Permanent Forum for indigenous peoples.

Even though the law in this area is still emerging, there has been noticeable internationalisation of indigenous civil society – in part as a result of the commonality of experience of indigenous groups around the world.

That is the international human rights framework. At the local level in New Zealand, human rights and Treaty issues are as yet generally regarded as almost completely separate. In part this is because the Treaty provides for a unique relationship between the Crown and Māori. The principle of partnership – a reciprocal obligation on both the Crown and Māori to act in good faith, fairly, reasonably and honourably towards each other – is paramount.

It is difficult conceptually to fit this unique relationship alongside the human rights framework. In part this is perhaps because the human rights discourse generally focuses on the rights of the individual, as opposed to the collective. And, in part, it is perhaps due to a reluctance by Māori to be grouped with other minorities, and a strong sense that the notion of minority rights is sufficient to capture Treaty rights. Nevertheless this remains an area of potential future development, particularly in view of developments at the international level.

### *3. Indivisibility of Human Rights*

I thought it might be illuminating to return to the notion that human rights are “indivisible”, and see how we are doing here in New Zealand. On the basics like the right to vote and be free from torture, we are doing pretty well. But what about that accusation from the developing world that everywhere social, economic and cultural rights are relatively neglected?

First, I would like to make clear that I agree that poverty erodes or nullifies not only social and economic rights like the right to health, adequate housing, decent food, and education, but it also erodes civil and political

rights like the right to political participation. The indivisibility of these rights must be obvious to those who are poor in our nation.

I agree also with the International Council on Human Rights when they say that “blatant and covert discrimination on grounds of race remain entrenched in almost all societies on the planet” – and that includes New Zealand.

As one example of how the problems here mirror those everywhere on this earth, the lives of New Zealand’s women reflect those of other women in every culture and society in the world. If you want to see the effects that structural economic reforms have had on women, for instance, if you want to see what casualisation of labour means in New Zealand, then walk through any commercial building at 7.00 in the evening.

See the Pacific Island women cleaning up after the men and women who work there during the day. Talk to any of them to find out how many part-time jobs they have. Ask if their husbands/partners are in work and can or will look after the children. Ask about their health – what is striking is the number who do not go to the doctor or who, like a woman cleaner where my sister works, has emphysema, a life expectancy of five years, and a reluctance to tell her husband because her income is vital for the support of their primary school-age children.

Talk to women in massage parlours, especially those from overseas. Then tell me that, because women hold the top jobs in New Zealand, there is no suffering or discrimination faced by women in New Zealand.

And what is most striking about these examples is the classic connection between race and sex. In New Zealand, as in most parts of the world, to be a woman and a member of an indigenous community and/or a minority ethnic group, is to guarantee maximum discrimination. Yes, human rights are indivisible, and we have plenty of room to improve in New Zealand.

While I do not have the time here to explore the complexities of the questions surrounding “globalisation”, I would assert that the economic sphere cannot be separated from the more complex fabric of social and political life. We must not see the economic life of our nation as distinct from that of our citizens. “The economy” is not a concept detached from human existence. It does not have a life of its own.

I believe that, to thrive, any economy must have a foundation beyond economic values, there must be deeper shared values and institutions to

support those values – we must be committed to broader and more inclusive social purposes.

I do not see this commitment to breadth and compassion and diversity as hindrances on our growth and prosperity – quite the contrary. I shall once more return to Mary Robinson’s vision for the twenty-first century. She asks us to remind ourselves of what is truly possible:

Instead of allowing diversity of race and culture to become a limiting factor in human exchange and development, we must refocus our understanding, discern in such diversity the potential for mutual enrichment, and realise that it is the interchange between great traditions of human spirituality that offers the best prospect for the persistence of the human spirit itself. For too long such diversity has been treated as a threat rather than a gift.

#### *4. Cultural Relativism*

What of that other contentious theme in international human rights debates, “cultural relativism”? Can that really be an issue in New Zealand? I would say that it too offers important insights here at home.

First, it is not all rosy in our garden. Violence against women and girls is a constant and sickening theme. We are horrified by bride burnings in Pakistan and India, female genital mutilation in parts of Africa, and the religious-inspired criminalisation of abortion in Chile which results in women dying from botched abortions or being imprisoned because they sought medical help.

We condemn the widespread rape of women and girl children in countries in conflict, and deplore the selling of girl children as slaves in payment for family debts, as occurs in Africa and parts of Asia and of the Pacific.

But when women from other countries read the statistics of abuse in New Zealand – rape, sexual abuse of women and girls, incest, hospitalised or murdered women and children – they too are horrified. In this context, there are two comments I want to make about violence against women. Such violence is universal: every country finds different ways to subjugate and physically dominate women and children. Further, there are some fundamental standards, and we do not score highly. What we in New Zealand find shameful but almost normal violence, the stuff of the daily papers here, causes shudders in other countries. We should sit in judgment on the appalling violence elsewhere, but we must also acknowledge and work to change the situation of women and children here.



Secondly, let us remind ourselves that we are not an homogenous people. We have heard these statistics before, but they bear re-hearing in the context of whether the questions about “cultural relativity” of human rights have any salience here.

Thirty years ago, just fewer than 90 percent of New Zealanders were descended from European immigrants, about 8 percent had Māori ancestors, and the remaining two or three percent of us had forebears who came from elsewhere, mostly from the Pacific and Asia.

These days, about 70 percent of New Zealanders are of European descent, 15.5 percent of us have Māori ancestry, the rest being of Pacific or Asian ethnic origin, or part of the remaining four percent who are not officially categorised.

And demographers predict that, thirty years from now, a little more than 60 percent of New Zealanders will have European ancestry, just under 19 percent of us will be of Māori descent, and 20 percent of us will have family ties with the Pacific, Asia, the Middle East, or Africa – from everywhere, really.

So we have some basic questions, things we used to take for granted but which need re-examining. “Who are we, as New Zealanders?” is one vague but immensely important one. Another is “How should we or might we define our national identity, what we stand for?” And “What expectations may we legitimately have of each other, as fellow citizens and what are our standards of behaviour – as between citizen-to-citizen and state-to-citizen relationships?”

The answers are already different from what they were, say, thirty years ago, and will surely continue to evolve. The answers have to reflect that our national identity is, and always will be, a work in progress.

But we do have a national identity? I disagree strongly with people who say that we don't. Who are we? We are the people of this land. This is our place to stand, our *Turangawaewae*.

We are the people who know what a mountain beech forest smells like in the summer time, and how Rotorua smells all the time. We know what manuka honey and Bluff oysters taste like. We love whitebait or mutton-birds or kina. We know and love the sounds of the sea.

We know how a Foveaux Strait gale can sometimes be so frigid that a local sports team could be named the Southern Sting, and how a Wellington Northwester can bully you. We are indeed the people who, in the words of the Split Enz song, have known four seasons in one day.

We are the people who know what an iwi and a whanau are, and have at least a vague idea of how to define mana, and perhaps mauri. We are the people who know why John Clarke and Billy T James and the Topp Twins are so funny.

We are the only people who have grown up to have a good idea of how wonderful a place this is, our small fragment of Gondwanaland; how much it has been altered and damaged by human settlement; and we are becoming increasingly aware of how much has to be done to preserve the fraction of the original wonder that remains.

On occasion, we have led the world in introducing such things as universal adult suffrage, and the design and implementation of social safety nets. We are regarded with astonishment internationally, because women hold so many influential positions.

We are sometimes proud and sometimes ambivalent about our bi-culturalism. Redress of past wrongs, much applauded internationally, can cause arguments about the meaning and purpose of the Treaty of Waitangi.

We were anti-apartheid. We are anti-nuclear. And we really bridle at criticism, real or imagined, if it comes from outsiders.

We are rebellious when we think other countries are trying to tell us what to do or how to be, or outsiders are trying to tell us what to think. We are still collectively young enough that all too many of us attempt to make up for perceived slights or feelings of powerlessness by resorting to violence.

And if the people whom we feel may have slighted us are beyond our reach, or if we are unwilling or feel unable to take charge of our lives, to empower ourselves, we may visit that violence on members of our own families. Like adolescents, many of us drink too much and that leads to violence in the home and outside it, and too much loss of young lives on the roads.

We are still collectively young enough that we can become angry at any disagreement with our views, choosing not to discuss or to reconcile the differences themselves, but to attack the holders of views that diverge from our own. This is most damaging when Māori and Pakeha talk past each

other. Much public debate in New Zealand, on a whole range of topics, is marred when arguments about ideas turn into quarrels between people.

And that is where I return, from this little sidetrack, to the question of cultural relativity – I think that we have some distance to go in learning tolerance. Tolerance is not a feature of human history or of many contemporary societies. It does not usually occur on its own accord but needs to be encouraged and respected. Part of New Zealand's future as we mature as a society will be to develop tolerance and learn to be secure enough to celebrate our diversity, as well as what we all hold to be precious in New Zealand. And to challenge what is wrong.

## VI. CONCLUSION

I have no doubt that in New Zealand there continues to be real commitment to human rights, even if we do not always use that language. I am proud of our human rights history, and I will be among those who continue to work to improve our own human rights and to improve the lot of others in this little inter-connected world of ours. I will join those working to create a shared future, one based on a celebration of our common humanity, and our common humanity in all its diversity.

*Nō reira, tēnā koutou, tēnā koutou, tēnā koutou katoa.*

# CONDITIONAL GIFTS AND FREEDOM OF TESTATION: TIME FOR A REVIEW?

BY NOEL COX\*

## *1. Introduction*

The purpose of the succession project, begun by the New Zealand Law Commission in 1993, is to develop a Succession Act to provide for all succession matters in one statute. The project is also designed to simplify the law, to ensure that will-makers' wishes are better carried out, and to take account of the diversity of New Zealand families.<sup>1</sup> The major aspects of the project are testamentary claims,<sup>2</sup> the succession to Māori ancestral property,<sup>3</sup> and wills and administration of estates.<sup>4</sup> The present article relates in part to testamentary claims, the subject of a report published by the Law Commission in August 1997.<sup>5</sup>

Whilst the common law was not as permissive as is commonly believed, from the eighteenth to the twentieth century freedom of testation was the norm. Yet the common law still allowed testators to impose various conditions upon their legatees and beneficiaries. This meant that gifts might be dependent upon the performance of certain conditions, or the non-fulfilment of others.<sup>6</sup>

---

\* LLM PhD (Auckland), Barrister of the High Court of New Zealand, Lecturer in Law, Auckland University of Technology.

<sup>1</sup> The project commenced with the approval of the Minister of Justice. See "Succession Law: Testamentary Claims" (discussion paper) (1996) NZLC PP24 vii.

<sup>2</sup> These are presently covered by the Law Reform (Testamentary Promises) Act 1949, Family Protection Act 1955, Matrimonial Property Act 1963 ("Succession Law", supra note 1). A plain language summary accompanied the discussion paper, "What should happen to Your Property when You Die?" (1996) NZLC MP1.

<sup>3</sup> "The Taking into Account of Te Ao Maori in Relation to Reform of the Law of succession: A Working Paper" (1996) NZLC MP6.

<sup>4</sup> The Wills Act 1837 (7 Will IV & 1 Vict c 26) (UK), Administration Act 1969; "Wills Reforms" (1996) NZLC MP2; "Succession Law: A Succession (Wills) Act" (report) (1997) NZLC R41.

<sup>5</sup> "A Succession (Adjustment) Act" (1997) NZLC R39.

<sup>6</sup> A gift or donation is the voluntary and gratuitous transfer of any property from one person to another. It may be conditional but, condition apart, is not revocable nor terminable. Acceptance is presumed unless dissent is signified, but a gift may be rejected when the donee becomes aware of it. The title to the subject of gift must be

A testator<sup>7</sup> might, by will, dispose of any or all of his property to whomsoever he wished, creating any such interests as the law allowed in any part thereof, such as outright gifts, gifts subject to conditions, options, and life or other terminable interests. But since the early part of the twentieth century the court may, under statutory authority, make provision for the maintenance of a dependant not otherwise adequately provided for.

In New Zealand today, the statute law intervenes in the testamentary freedom of a deceased to bequeath his or her property to whomsoever the deceased wishes. But statute law does not intervene with respect to lifetime gifts, nor does it regulate testamentary freedom to impose conditions on bequests, unless such conditions are held to infringe the duty to provide for dependants enshrined in the Family Protection Act 1955. The courts have limited scope for regulating the exercise of this testamentary freedom. But should this discretion perhaps be extended by statute?

The common law rules which govern testamentary dispositions were developed in a social environment markedly different to that found today. For similar reasons that have motivated the review of the law relating to Māori ancestral property,<sup>8</sup> it may be questioned whether the common law now adequately reflects the nature of twenty-first century New Zealand society. Yet the common law is flexible, and does ultimately reflect the society of which it is a product. Whether legislative intervention is necessary, or whether the courts should be left to develop the law, will depend upon the degree to which the law is seen as being out of step with societal needs and expectations.

In this article the rules governing testamentary gifts are examined in the light of the proposals from the Law Commission for a Succession Act. It is suggested that it might be desirable for a new Succession Act to cover testamentary freedom to impose conditions, and that the law governing conditional gifts be otherwise brought up to date.

Before examining conditional gifts it is necessary to examine the wider question of testamentary freedom. Considerations of public policy which influence the regulation of conditions by the courts are assessed. The distinctions between conditions precedent and subsequent are evaluated, in particular in respect of the effect of void conditions, uncertainty, and illegal

---

transferred in whatever way is necessary for the kind of property concerned. A gift may be made *inter vivos*, or, on death, by will or *donatio mortis causa*.

<sup>7</sup> Testator is to be taken as including a testatrix where appropriate.

<sup>8</sup> *Supra* note 3.

and repugnant conditions. Specific examples of categories of gifts, including those to intended husbands and wives, restraints on alienation, restraints of marriage, gifts inducing separation of spouses, and conditions affecting parental duty, are examined. Conditions restricting freedom of religion, and conditions affecting freedom to impose conditions as to race, are also reviewed. In the conclusion, the appropriateness of some statutory regulation of the current general freedom to impose conditions on testamentary gifts is assessed in the light of the changed societal circumstances prevailing since most of these common law principles were established.

## 2. Testamentary Freedom

Until the turn of the nineteenth century, New Zealand, along with other common law jurisdictions, allowed generally unfettered testamentary freedom. This was in contrast to the practice followed in the civil law jurisdictions,<sup>9</sup> where the Roman law inheritance denied testators the freedom enjoyed under the common law.<sup>10</sup> Scotland was also influenced by the civil law tradition. Many non-European legal systems also restricted the freedom to bequeath one's estate solely as one wished.<sup>11</sup> The limitation of testamentary freedom was also encouraged by the Church, which sought to protect the rights of those owed a moral duty of support.<sup>12</sup> In general, this limitation took the form of a requirement that a given proportion of a deceased's estate should pass automatically to the nearest relatives.

---

<sup>9</sup> In France and Germany succession (*succession* or *Erbschaft*) to an estate (*patrimoine* or *Vermögen*) is controlled by various rules designed to protect the close family of the deceased. In France the free estate (*la quototé disponible*) only may be alienated. *La réserve héréditaire* is reserved to the close family (Code Civil art 913). In Germany, the *Pflichtteil* is the legal entitlement of the family (Law BGB, ss 1922ff).

<sup>10</sup> Much was to be found in Roman law as to conditional gifts, and Bracton made use of that learning to explain the effect of the various modes of enjoyment which could be prescribed by the will of the parties (Holdsworth, William, *A History of English Law* (3rd ed, 1923) ii, 263-264).

<sup>11</sup> In the East there was an elaborate succession law. In Muslim countries, in particular, there was a minute fractional division of estates (Maine, Sir Henry Sumner, *Early Law and Custom* (1890) 125-144).

<sup>12</sup> Succession to an intestate's chattels was put on an entirely different basis to that of realty, owing to the fact that, as early as Glanvil, the ecclesiastical courts had acquired jurisdiction in this field. The basis of this jurisdiction was the claim of the bishop to a share of the goods, called the "dead part" for charity when the deceased had not made a will.

As an example, in Scots law even today, if a deceased man leaves a widow and children, the widow is entitled to a one-third share in the whole of the moveable estate,<sup>13</sup> and the children are entitled to another one-third share equally between them.<sup>14</sup> If he leaves a widow but no children, or children but no widow, the *jus relictæ* or *legitim* is increased to a one-half share of the net moveable estate.<sup>15</sup> The remaining portion is known as the dead's part. A surviving husband and children have comparable rights in the wife's estate. The dead's part is the only portion of which the testator or testatrix can freely dispose. Legacies and bequests are payable only out of the dead's part. All debts are payable out of the whole estate before any division.<sup>16</sup>

Anciently, the position in England was not dissimilar.<sup>17</sup> Glanvill noted that one-third of a deceased's chattels passed to his heir, one-third to his wife, and one-third as he wished.<sup>18</sup> Magna Carta referred to this provision,<sup>19</sup> as did Bracton.<sup>20</sup> In a Christian world, the "dead man's part" was taken to apply to the property which had to be spent for the benefit of his soul and which, accordingly, the Church received. The common law courts early gave petitioners the writ *de rationabili parte bonorum* to allow widows and children to recover their "reasonable parts".<sup>21</sup> But the evolution of the separate secular and religious courts in the twelfth and thirteenth centuries led to testate and intestate succession to personalty coming within of the jurisdiction of the ecclesiastical courts.<sup>22</sup> These courts were motivated by

---

<sup>13</sup> Her *jus relictæ*, broadly analogous to personalty in the common law. Such rights are now subject to prior statutory rights.

<sup>14</sup> Their *legitim*.

<sup>15</sup> *Buntine v Buntine's Trustees* (1894) 21 PL 714; 1 SLT 592.

<sup>16</sup> The doctrine of legal rights in 1964 replaced the former rules of courtesy and *jus relictæ* for widowers, and *terce* and *jus relictæ* for widows. These rights are for heritable and moveable property respectively, and are broadly equivalent to real and personal property. Children remain entitled to *legitim*, as more distant relatives have since 1968 (Succession (Scotland) Act 1964 (UK); Law Reform Miscellaneous Provisions) (Scotland) Act 1968 (UK) s 3, sch 1, paras 3-5).

<sup>17</sup> Generally, for English law, see *Dyke v Walford* (1846) 5 Moo PCC 434; 13 ER 557; Holdsworth, William, *A History of English Law* (5th ed, 1942) iii, 550.

<sup>18</sup> Glanvill, Ranulf de, *Treatise on the Law and Custom of the Realm of England* (ed & trs GD Hall, 1993) vii, 5, 4.

<sup>19</sup> Chapter 26.

<sup>20</sup> Bracton, Henry de, *On the Laws and Customs of England* ('*Henri de Bracton de Legibus et Consuetudis Angliæ*') (ed GE Woodbine, trs SE Thorne, 1968) fol 60.

<sup>21</sup> Blackstone, Sir William, *Commentary on the Laws of England* (ed E Christian, 1978) ii, 492; Coke, Sir Edward, *Coke upon Littleton* (reprinted 1979) 176b.

<sup>22</sup> *Scott v Tyler* (1788) 2 Dick 712; 21 ER 448.

religious (and moral) considerations to a much greater extent than the common law courts, and indeed administered a distinct system of law.<sup>23</sup>

In England the bishop remained the natural administrator of one-third of a deceased's personalty, at least on intestacy,<sup>24</sup> until the passage of the Court of Probate Act 1857 (UK)<sup>25</sup> abolished the testamentary jurisdiction of the ecclesiastical and other courts, and set up the Court of Probate. However, whilst the Church courts remained responsible for this area of law, over time the freedom to bequeath all one's personal property as one saw fit became prevalent.<sup>26</sup> The parts scheme thus became limited to succession on intestacy. To a large extent this evolution reflected an increasing belief in free choice. It also reflected the declining moral and religious influence of the Church, whose courts no longer looked exclusively to the canon and civil laws but increasingly looked to the common law for guidance.<sup>27</sup>

Before 1600 the province of Canterbury (except Wales and London) came to permit complete freedom of testation for personalty, whereas the province of York adhered to the old parts system until 1692-1703.<sup>28</sup> Freedom of testation was not universal in England until 1724, when it was extended to the City of London,<sup>29</sup> after a long process of gradually expanding application.

The right to bequeath real property also grew. Although the right to alienate land was never absolutely denied, feudalism imposed strict limitations.

---

<sup>23</sup> This was of predominantly canon and civil law origin, though not uninfluenced even in the earliest times by the developing common law in the king's courts (*Caudrey's Case* (1591) 5 Co Rep 1a; 77 ER 1).

<sup>24</sup> Intestacy was rare, at a time when to die unabsolved was avoided if humanly possible. This led to a general belief that to die without a will was wrongful (Holdsworth, *supra* note 17, at iii, 535). The Statute of Distributions 1670 (22 & 23 Chas II c 10) (Eng) governed intestacy of personalty till the 20th century.

<sup>25</sup> 20 & 21 Vict c 77.

<sup>26</sup> See Cox, "The Influence of the Common Law on the Decline of the Ecclesiastical Courts of the Church of England" *Rutgers Journal of Law and Religion* (forthcoming).

<sup>27</sup> *Ibid.*

<sup>28</sup> Wills Act 1692 (4 Wm & Mar c 2) (Eng); Wills Act 1703 (2 & 3 Anne c 5) (Eng). For the parts system generally, see *Kemp v Kelsey* (1722) Prec Ch 594, 596, per Lord Macclesfield, LC.

<sup>29</sup> City of London Elections Act 1724 (11 Geo I c 18) (GB) s 17. Wales received the new statutory scheme in 1695 (Wills Act 1695 (7 & 8 Wm III c 38) (Eng)).



However, with the decline in the economic importance of feudalism, alienation became more easily available.<sup>30</sup>

Historically, testamentary freedom had often been more the exception than the rule. But legal fictions were developed early to allow the conveyance of property. Land could always be held in tail. But social pressure to lessen the application of inalienability of realty led to the development of the distinction between the legal and the equitable estate and the use.<sup>31</sup>

An express power to devise land by will was created in 1540-42, largely in response to the effect of the Statute of Uses 1535,<sup>32</sup> largely because this Act was mistakenly believed to have prevented wills of land, by abolishing the distinction between the legal and the equitable estate.<sup>33</sup> All land held by common socage,<sup>34</sup> two-thirds of land held by tenure in chivalry, an "estate of inheritance",<sup>35</sup> or any other modified fees other than fees tail,<sup>36</sup> might be devised by will.<sup>37</sup> After the abolition of the military tenures in 1660,<sup>38</sup> there were no more restrictions on the power to devise, except for entailed lands.

The principle of freedom, though long in coming, perhaps reflected the spirit of the times better than did the more restrictive system which was a survival

---

<sup>30</sup> Pollock, Sir Frederick and Maitland, FW, *The History of English Law before the time of Edward I* (2nd ed, 1898) ii, 17-18.

<sup>31</sup> Holdsworth, *supra* note 17, at 424-427, 438-439.

<sup>32</sup> 27 Hen VIII c 10 (Eng).

<sup>33</sup> Sir Robert Megarry, "The Statute of Uses and the Power to Devise" (1941) 7 Cambridge LJ 354. This did not abolish the right to devise land which had been acquired by means of uses, though it was intended to do so (*Wild's Case* (1599) 6 Co Rep 16b, 17a ("to abolish these and other abuses and horrors")). One indirect consequence of the Statute of Uses 1535 was the Pilgrimage of Grace, the Catholic rebellion (Froude, Anthony, *History of England from the Fall of Wolsey to the Death of Elizabeth* (1856-70) iii, 91, 105, 158).

<sup>34</sup> Socage, called by Pollock and Maitland the great residuary tenure, was the most common non-military tenure (Pollock and Maitland, *supra* note 30, at i, 294). All land in New Zealand which has been granted by the Crown is held by free and common socage (commonly called freehold tenure).

<sup>35</sup> This term is defined by the statute itself as "a fee simple only" (Wills Act 1540 (32 Hen VIII c 1) (Eng)). However, it was explained judicially as including determinable fees (*Cowper v Frankline* (1616) 3 Bulst 184, per Dodderidge J and Coke CJ; *Cassandra's Case* (*Vernon v Gatacre*) (1566) Dyer 253a).

<sup>36</sup> Wills Act 1540 (32 Hen VIII c 1) (Eng); Wills Act 1542 (34 & 35 Hen VIII c 8) (Eng).

<sup>37</sup> Wills Act 1540 (32 Hen VIII c 1) (Eng).

<sup>38</sup> Tenures Abolition Act 1660 (12 Chas II c 24) (Eng).

of feudalism. Feudalism itself had collapsed as an economic system from the fourteenth century, and lost the bulk of its legal significance in 1660.<sup>39</sup> New Zealand inherited the newer system of succession, with its emphasis on the sanctity of the testators perceived intention- rather than the rights of the deceased's heirs, in 1840.<sup>40</sup>

As a reaction to the perceived injustice of the unrestricted freedom of bequest which was the norm in the nineteenth century, the New Zealand Government resolved to adopt the principle of allowing a discretion to the courts where testamentary freedom had been misused. In 1900 the Testators Family Maintenance Act was passed by Parliament.<sup>41</sup> This Act, and its successors, the Family Protection Act 1908 and 1955, were designed to give courts the statutory jurisdiction to remedy cases where testators had failed to make provision for the proper maintenance and support for those persons to whom they owed a moral duty of support.<sup>42</sup> Giving a wide discretion to the courts may not be appropriate when there is no longer a commonly accepted social norm.

Testamentary freedom is restricted by various legal safeguards designed to prevent the testator or testatrix improperly denying provision for relatives. The entire field of testamentary conditions remains, however, common law. No statute regulates conditional gifts.<sup>43</sup> Largely the product of late nineteenth and early twentieth century judgments, the law on conditional gifts is heavily influenced by the tradition of freedom during which it was largely developed. Thus, limitations are comparatively few, and restricted mainly to questions of practicality of interpretation and application. Even where public policy considerations are more clearly present, the prevailing attitude remains predominantly in favour of testamentary freedom.

---

<sup>39</sup> Ibid.

<sup>40</sup> English Laws Act 1858 (21 & 22 Vict no 2) (UK).

<sup>41</sup> See Wiren, "New Zealand Family Provision Legislation" (1929) 45 LQR 378. New Zealand's lead was soon followed in Australia (Testators Family Maintenance Act 1912 (3 Geo V No 7) (Tasmania)) and Canada (Married Women's Relief Act 1910 (c 18) (Alberta)). In England, the equivalent Act was not passed until 1938 (Inheritance (Family Provision) Act 1938 (2 & 3 Geo VI c 45) (UK), now replaced by the Inheritance (Provision for Family and Dependents) Act 1975 (UK)).

<sup>42</sup> Family Protection Act 1955, s 4(1).

<sup>43</sup> The Domestic Actions Act 1975 has altered the pre-existing law as to the return of engagement rings; *Jacobs v Davis* [1917] 2 KB 532 (the implied condition that it would be returned); *Cohen v Sellar* [1926] 1 KB 536 (could not recover if that party had refused without legal justification to marry).

Whether society is prepared to see greater intervention in the freedom to impose testamentary conditions is uncertain. But, as an analogy, it is important that the courts have always regarded the Family Protection Act 1955 in the light of changing societal norms. Since that Act was passed, newer legislation on human rights and race relations,<sup>44</sup> and reforms to the Matrimonial Property Act 1976, would suggest that greater intervention in the field of testamentary gifts is a distinct possibility. For the common law still allows us to deny property to our heirs on the basis of considerations of sex, race, marital status or religion.

### 3. Public Policy

The history and policy behind the control which is exercised by the courts over those conditions which a donor has imposed on the enjoyment of their gift is long and complex.<sup>45</sup> Policy decisions are found under the heads of illegality, public policy and uncertainty. They are by no means absent from the differences in the treatment of conditions precedent and subsequent. Both illegality and uncertainty reflect public policy as the courts have interpreted it. Underlying the whole edifice however is the dichotomy of belief in the need for testamentary freedom and public policy factors requiring the intervention of the courts in individual cases.

The courts are also reluctant to change long-established rules affecting testamentary dispositions even under the ambit of public policy. The courts are reflecting social sensitivity surrounding the dead. The judges have great difficulty in expounding what precisely is public policy in such case.<sup>46</sup> Generally speaking, testators may attach any condition that they like to a gift under a will, in the same way that donors may attach any conditions that they wish to a gift while living.

Some restrictions imposed by the courts have a less overt element of public policy than others. For example, where in a gift of real or personal property a condition is attached which is inconsistent with and repugnant to the gift, the condition is wholly void and the donee takes the gift free from the

---

<sup>44</sup> Human Rights Act 1993, replacing the Race Relations Act 1971.

<sup>45</sup> Parry, "Uncertainty and conditional gifts" (1982) 126 Sol Jo 518, 518.

<sup>46</sup> *Re Wallace, Champion v Wallace* [1920] 2 Ch 274 (CA) (a gift of the testator's residue, to "either or both of my said sons who shall have acquired the title of baronet or other title superior thereto" with a gift over equally between the "British Treasury and the Treasury of British India", held to be a condition precedent and to be valid).

condition.<sup>47</sup> These rules may be justified on the presumed intention of the testator or testatrix that the gift prevail.

Perhaps even more important is the desire, on economic and social grounds, to encourage the free circulation of property, in much the same way that mortmain<sup>48</sup> was from late mediæval times the subject of legislative regulation. A total restraint on the alienation of an absolute interest in property during a certain period is invalid.<sup>49</sup>

Although the justiciability of conditions was confined to conditions precedent and subsequent, and void conditions, the courts were required to make what can only be described as value judgments or public policy decisions. Thus a condition cannot be repugnant to the estate granted.<sup>50</sup> If the condition is that the donee commit a crime, or tends towards the commission of some act prohibited by law, it is void and the donee takes the gift free from the condition.<sup>51</sup> The public policy justification is clear in these cases, even where the prohibited act is not intrinsically morally wrong.<sup>52</sup> In *Re Neeld* Upjohn LJ said:

To establish that a condition is void on the grounds of public policy, it must be shown that it will have a tendency to produce injury to the public interest or good or to the common weal.<sup>53</sup>

---

<sup>47</sup> *Byng v Lord Strafford* (1843) 5 Beav 558, 567; *Re Cockerill, Mackaness v Percival* [1929] 2 Ch 131 (devise subject to a condition that a named corporation should have the option of purchasing the devised land at a price fixed in the will if the devisee should desire to sell within twenty years after the testator's death- option held void and the devisee entitled to sell as he pleased).

<sup>48</sup> The holding of land by a corporation in perpetual or unalienable tenure.

<sup>49</sup> *In re Rosher, Rosher v Rosher* (1884) 26 ChD 801 (devise to testator's son with a provision that if the son should desire to sell in the lifetime of the testator's wife the testator's wife should have the option of buying at the price fixed in the will and the property should be first offered to her either in whole or in part, with a proportionate price if only part offered, and as to other devised properties if the devisee should desire to let them for more than three years the testator's wife should have the option of renting them herself at a rent fixed in the will- restrictions held repugnant and void).

<sup>50</sup> *Earl of Arundel's Case* (1575) 73 ER 771; *Re Dugdale, Dugdale v Dugdale* (1888) 38 ChD 176.

<sup>51</sup> *Mitchel v Reynolds* (1711) 1 Pr Wms 181; 24 ER 347.

<sup>52</sup> *Malum prohibitum* not *malum in se*.

<sup>53</sup> *Re Neeld, Carpenter v Inigo-Jones* [1962] Ch 643, 680.

Different tests for certainty of conditions precedent and conditions subsequent were approved by the House of Lords in *Blathwayt v Lord Cawley*<sup>54</sup> on the basis that a greater degree of certainty is required for conditions subsequent. This is because where a condition subsequent fails the donee takes the gift free from the condition, while with a condition precedent the entire gift will fail (unless it was *malum prohibitum* or impossible). Since the courts prefer to construe a disposition in such a way as to prevent its failing, a more liberal test of uncertainty is applied to conditions precedent than to conditions subsequent.

#### 4. Conditions Precedent and Subsequent

Testators (or donors) may attach any condition that they choose to a gift. Depending upon the circumstances, a conditional gift may be subject to conditions either precedent or subsequent. A condition precedent is one that is to be performed before the gift takes effect.<sup>55</sup> A condition subsequent is one to be performed after the gift has taken effect, and, if the condition is unfulfilled, will put an end to the gift.<sup>56</sup> That is, there is a divesting of the gift. Whether a particular condition is precedent or subsequent is a matter of construction. The courts prefer to find a condition subsequent, because even if the condition is void the gift is generally still good.

An interest upon condition subsequent arises where a qualification is annexed to a conveyance or gift, whereby it is provided that, in case a particular event does or does not happen, or in case the grantor or grantee does or omits to do a particular act, the interest shall be defeated. This must be distinguished from a condition precedent, where the qualification provides that the interest will not commence until the occurrence of the event.<sup>57</sup> Sometimes a condition precedent must be implied. In *Re London University Medical Sciences Institute Fund*<sup>58</sup> a testator bequeathed £25,000 to "the Institute of Medical Sciences Fund, University of London". The fund was started by voluntary contributions. The legacy was held subject to an implied condition precedent that the particular purpose for which it was given be practicable. If the gift is capable of subsequent defeat it is a condition subsequent.

---

<sup>54</sup> [1976] AC 397; [1975] 3 All ER 625 (HL).

<sup>55</sup> *Errington v Errington and Wood* [1952] 1 KB 290.

<sup>56</sup> *Egerton v Earl Brownlow* (1853) 4 HL Cas 1; 10 ER 359.

<sup>57</sup> Cheshire, GC and Burn, EH (eds), *Modern Law of Real Property* (13th ed, 1982) 345.

<sup>58</sup> [1909] 2 Ch 1.

Examples of conditions subsequent include a grant to trustees of fee simple on condition that if the land granted shall ever be used for other than hospital purposes, it shall revert to the heirs of the grantor;<sup>59</sup> a devise of fee simple to the council of a school on condition that the council shall publish annually a statement of payments and receipts;<sup>60</sup> a devise of land to J “on condition that he never sells out of the family”;<sup>61</sup> a devise to A for life provided that he “makes the mansion-house his usual common place of abode and residence”;<sup>62</sup> and a devise to A for life on condition that he assumes the name and arms of the testator within twelve months.<sup>63</sup> In all these cases there vests in the grantor, the heirs and assignees, a right to resume title, the exercise of which right determines the interest of the grantee.

There is also a fundamental distinction between limitations upon condition and determinable limitations (or interests). It is necessary to distinguish between a limitation properly so called, and a condition.<sup>64</sup> A limitation is a form of words which creates an interest and denotes its extent by designating the event upon which it is to commence and the time for which it is to endure. The determining event is incorporated in the limitation so that the interest automatically and naturally determines if and when the event happens. It marks the utmost time for which the interest can continue.

Such limitations are in two forms. A direct limitation marks the time of determination by denoting the interest created (in real property, the size of the estate). This is done in familiar terms such as “for life”, or “in fee simple”. A determinable limitation gives an interest for one of the times possible in a direct limitation, but also denotes some event that may determine the interest during the continuation of that time. Thus, with a grant “to A and his heirs, tenants of the manor of Dale”, the determining event is incorporated in, and forms an essential part of, the whole limitation, and if the estate expires because the tenancy of Dale is no longer in A’s family, it is none the less considered to have lasted for the period originally fixed by the limitation.

---

<sup>59</sup> *Re Hollis’ Hospital Trustees and Hagues Contract* [1899] 2 Ch 540.

<sup>60</sup> *Re Da Costa* [1912] 1 Ch 337.

<sup>61</sup> *Re Macleay* (1875) LR 20 Eq 186.

<sup>62</sup> *Wynne v Fletcher* (1857) 24 Beav 430; 53 ER 423.

<sup>63</sup> *Re Evans’s Contract* [1920] 2 Ch 469; see “Names and Arms Clauses and Law of Arms in the common law courts” (Winter 1999) vol XIII (NS) no 188 *The Coat of Arms, the Journal of the Heraldry Society* 167-172.

<sup>64</sup> Cheshire and Burn, *supra* note 57, at 346.

A condition subsequent may be distinguished from a conditional limitation that it resembles by virtue of the fact that the interest does not automatically end. Thus a gift of income to continue while the donee maintains a particular house is a variety of condition subsequent, because it is a continuing condition which may be brought to a premature end. It is possible however to have a limitation of an interest which is not a condition subsequent, as with a gift until marriage, with a gift over on marriage. The happening of the marriage is not a condition subsequent. The interest only lasts until marriage and there is nothing to take it beyond that event. Words which are merely descriptive of the person who is to take, or forming a qualification, are not conditions. An example is *Re Allen*,<sup>65</sup> where the gift was “to the eldest of the sons” of the testator’s nephew, “who shall be a member of the Church of England and an adherent of the doctrine of that Church”. Similarly, a transfer to grandsons “who shall at the time be actively engaged in farming”, was not a condition subsequent but “words or description or qualification or as a condition precedent”.<sup>66</sup> To be a condition subsequent there must be a continuing interest.

A condition specifies some event, which, if it takes place during the time for which an interest continues, will defeat that interest. If the terminating event is an integral and necessary part of the formula from which the size of the interest is to be ascertained, the result is the creation of a determinable interest. But, if the terminating event is external to the limitation, the interest granted is an interest upon condition subsequent, where the grant is subject to an independent proviso that the interest may be brought to a premature end if the condition is fulfilled.<sup>67</sup> “While”, “during”, “as long as”, and “until” are indicative of determinable limitations. “Provided that”, “on condition that”, “but if”, and “if it happens that” are usually conditions subsequent. Thus a gift “to a woman for life, but if she remarries then her life interest shall cease” is a condition, while a gift “to a woman during widowhood” is a determinable limitation.<sup>68</sup>

The rule against perpetuities applies equally to conditions subsequent and to a possibility of reverter arising on the grant of a determinable interest. It must apply for each successive limitation.<sup>69</sup> It is concerned not with the duration of the interests, but with their commencement.<sup>70</sup> While a condition

---

<sup>65</sup> *Re Allen, Faith v Allen* [1953] 2 All ER 898.

<sup>66</sup> *Re Cowley* [1971] 1 NZLR 468 (CA).

<sup>67</sup> Pettit, PH, *Equity and the Law of Trusts* (5th ed, 1984) 61.

<sup>68</sup> Cheshire and Burn, *supra* note 57, at 347.

<sup>69</sup> Megarry, Sir Robert and Wade, HWR, *The Law of Real Property* (4th ed, 1975) 238.

<sup>70</sup> Hayton, DJ (ed), *Underhills' Law Relating to Trusts and Trustees* (13th ed, 1979) 40.

subsequent that is void is totally cancelled and the gift takes effect as if the condition had not been imposed, with a determinable interest the gift fails altogether if the possibility of reversion is invalidated.<sup>71</sup> This is because with the condition subsequent the interest has already commenced.

Although the fundamental distinction between conditions subsequent and conditions precedent is well established, it is not free from difficulties.<sup>72</sup> In many cases the same condition may be a condition precedent in one context, and valid, and a condition subsequent in another context, and void.<sup>73</sup> Thus a condition referring to “a person professing the Jewish faith” will be valid if a condition precedent, but void if a condition subsequent.<sup>74</sup>

It is not clear that there is any real distinction between the two situations, or that the distinction ought to be maintained. There is much to be said for maintaining known and settled principles of law. But surely this is not necessarily so where uncertainty or confusion results.

### 5. Effect of Void Conditions

If a condition is void, it depends on the nature of the gift and the nature of the condition whether the gift is also void. The general rule is that, where a condition precedent is void, a devise or gift of land fails.<sup>75</sup> Valid conditions are severable from invalid,<sup>76</sup> though only if valid and void limitations are not so intermixed as to vitiate the whole settlement.<sup>77</sup> However with conditions subsequent the initial gift is good and the donee takes an absolute interest free from the invalid condition.<sup>78</sup> Thus a gift though vested on condition that it was not to be enjoyed until an age later than majority took effect freed

---

<sup>71</sup> *Re Moore, Trafford v Maconochie* (1888) 39 ChD 116 (the condition was limited to a married woman while she is living apart from her husband: void as the husband and wife were living together at the time of the testator's death).

<sup>72</sup> *Scott v Rania* [1966] NZLR 527 (CA).

<sup>73</sup> *Re Abraham's Will Trust* [1967] 2 All ER 1175.

<sup>74</sup> Parry, *supra* note 45, at 519.

<sup>75</sup> *Egerton v Earl Brownlow* (1853) 4 HL Cas 1; 10 ER 359 (a limitation to the devisee for life with remainder to the heirs male of his body subject to the condition that if he should die without “having acquired the title of Duke or Marquis of Bridgewater” the gift to the heirs was to go over).

<sup>76</sup> *Garland v Brown* (1864) 10 LT 292; *Re Hepplewhite's Will Trusts* (1977) *The Times* 21 January 1977.

<sup>77</sup> *Re Abraham's Will Trust* [1967] 2 All ER 1175.

<sup>78</sup> *Re Lockie, Guardian Trust and Executors* [1945] NZLR 230; *Re Croxon, Croxon v Ferrers* [1904] 1 Ch 176; *Re Hayes' Will Trusts* [1954] 1 WLR 22.



from the condition.<sup>79</sup> This is justified on the grounds that in the first case the property has failed to vest, while in the second it is the divesting which fails.

With gifts of personalty however a different position has arisen. In the case of a condition subsequent the legatee takes the gift free from the condition, as for realty.<sup>80</sup> For a condition precedent the gift normally fails as with realty. But, where the condition was originally impossible,<sup>81</sup> or was rendered impossible by operation of the law before the date of the will,<sup>82</sup> the bequest is good and freed from the condition.<sup>83</sup> This will be so also if the condition was made impossible by the act or default of the testator or court,<sup>84</sup> or is illegal as involving *malum prohibitum*. If however the performance of the condition is the sole motive, or its impossibility was unknown to the testator, or the condition which was possible has since become impossible by Act of God or where it is illegal as involving *malum in se*, the gift and condition are void.<sup>85</sup>

The difference between *malum in se* and *malum prohibitum* is not very precise and has been subject to much judicial criticism and confusion.<sup>86</sup> It has been criticised as obsolete and inherently unsound. All commentators agree on its existence in the law of wills, but it has not been the subject of very extensive judicial review in modern times.<sup>87</sup>

*Malum in se* seems to mean some act that is intrinsically and morally wrong, which justifies invalidating the gift. It must tend to provoke or further the doing of some unlawful act, or to restrain or forbid someone from doing his or her duty. *Malum prohibitum* on the other hand offends against a rule of

---

<sup>79</sup> *Saunders v Vautier* (1841) Cr & Ph 240; 41 ER 482 (“If the circumstances are such as that the gift is to be immediately separated from the rest of the property, and the income is at once given to the beneficiary, and when and so soon as he attains the named age the corpus is given him and the accumulations are given him, then the Court ceases to regard the gift as a contingent gift and holds it to be a vested gift”).

<sup>80</sup> *Poor v Mial* (1821) 6 Madd 32; 56 ER 1001.

<sup>81</sup> *Lowther v Cavendish* (1758) 1 Eden 99; 28 ER 621.

<sup>82</sup> *Re Thomas's Will Trusts* [1930] 2 Ch 67.

<sup>83</sup> *Re Elliott, Lloyds Bank v Burton-on-Trent Hospital Management Committee* [1952] All ER 145.

<sup>84</sup> *Darley v Langworthy* (1774) 3 Bro PC 359, 1 ER 1369; *Re Turton, Whittington v Turton* [1926] Ch 96.

<sup>85</sup> *Re Moore, Trafford v Maconochie* (1888) 39 ChD 116.

<sup>86</sup> *Re Piper, Dodd v Piper* [1946] 2 All ER 503, 505 per Rome J.

<sup>87</sup> Delany, “Illegal Conditions Precedent and legacies of Personalty” (1955) 19 Conv 176, 177.

law but is not wrong in itself.<sup>88</sup> Where a gift of personalty contains several conditions precedent, some of which are valid, some invalid, these conditions can be separated to preserve the gift as far as possible.<sup>89</sup>

The Court in *Re Piper*<sup>90</sup> held that a condition precedent that a child should not reside with his father was *malum prohibitum* but not *malum in se*. Thus, although the condition was void, the bequest stood, as it was a gift of personalty. Rome J adopted the statement of the law in *Jarman on Wills*:

The civil law, which in this respect has been adopted by courts of equity, differs in some respects from the common law in its treatment of conditions precedent; the rule of the civil law being that where a condition precedent is originally impossible, or is illegal as involving *malum prohibitum*, the bequest is absolute, just as if the condition had been subsequent. But where the performance of the condition is the sole motive of the bequest, or its impossibility was unknown to the testator, or the condition which was possible in its creation has since become impossible by Act of God, or where it is illegal as involving *malum in se*, in these cases the civil agrees with the common law in holding both gift and condition void.<sup>91</sup>

*Re Piper* is a good illustration of the confusion in the law of testamentary conditions. The condition was *malum prohibitum* because it was calculated to separate parent and child, which was contrary to public policy. But, logically, separating parent and child should be *malum in se*, as morally wrong.<sup>92</sup>

It was in the criminal law that the origin of the distinction between *malum prohibitum* and *malum in se* arose. The earliest reference is in a judgment of Fineux CJ in 1496.<sup>93</sup> In that case a distinction was drawn between those things which the king prohibited for his personal convenience, and those offences against the “eternal law” or the common law. Only the former could

---

<sup>88</sup> Pettit, *supra* note 67, at 172.

<sup>89</sup> *Re Hepplewhite's Will Trusts* (1977) *The Times*, 21 January 1977.

<sup>90</sup> [1946] 2 All ER 503.

<sup>91</sup> Sanger, C (ed) *Jarman on Wills* (7th ed, 1930) ii, 1443, 1444.

<sup>92</sup> Morris, “Notes on recent cases 2: Will cases” (1947) 11 Conv 218.

<sup>93</sup> (1496) YB Mich 11 Hen VII f. 11 p 135.

be dispensed with by the king. The Bill of Rights swept away the suspending power of the Crown,<sup>94</sup> but the rule survived.<sup>95</sup>

Today the distinction between a thing bad in itself and a thing bad only because it is prohibited by law forms no part of the criminal law, and survives only in law relating to conditions in wills of personalty. The survival of this rule has been widely criticised. As early as 1674, Vaughan CJ said: "I think that rule hath more confounded men's judgments on that subject, than rectified".<sup>96</sup> His Honour took the view that the distinction was an invalid one, as no act is legally *malum* unless forbidden by some law. As has been suggested by Delany, the logical course would be to treat a condition as inoperative in every case (and validating the legacy) or apply the rule in cases of realty (and avoid the legacy in all cases). However, the latter course, by treating the legacy as void, assumes that the condition is valid.<sup>97</sup>

With gifts of personalty certain conditions may also be void as made *in terrorem* (as an idle threat to induce compliance).<sup>98</sup> These however only apply to conditions against disputing a will and in restraint of marriage.<sup>99</sup>

A limitation following one that is void for remoteness under the perpetuity rule is itself void.<sup>100</sup> Thus a picture given to A for life, then to B for life, then to C for life, then after C's death to the first and every other son "then living" of A successively for their lives, then to B and C's sons in the same way, is void. The limitation to B's sons is void for remoteness, since "then living" meant living at the death of the last son of A and not living at the death of C. All subsequent limitations including the ultimate gift are void for remoteness since to be valid the interest would have to vest within the limitation period.<sup>101</sup>

<sup>94</sup> However, the Bill of Rights 1688 (1 Will III & Mary sess 2 c 2) abolished the dispensing power only so far as "it had been assumed and exercised of late".

<sup>95</sup> The Bill of Rights 1688 (1 Will III & Mary sess 2 c 2) abolished the suspending power completely. The title, preamble, s 1 as amended by s 62 of the Juries Act 1825, and s 2 are preserved in New Zealand law by the Imperial Laws Application Act 1988.

<sup>96</sup> *Thomas v Sorrell* (1674) Vaugh 330; 124 ER 1098.

<sup>97</sup> Delany, *supra* note 87, at 181.

<sup>98</sup> *Dudley v Gresham* (1878) 2 LR Ir 442.

<sup>99</sup> *Rhodes v The Muswell Hill Land Co* (1861) 29 Beav 560; 54 ER 745.

<sup>100</sup> Morris, *supra* note 92, at 392.

<sup>101</sup> *Re Backhouse* [1921] 2 Ch 51.

Cases have however held that the ultimate limitation will be good if it is not dependent on the void limitation. Decisions since 1936 have extended this exception, which is based on the perceived intention of the donor. The intention will be found in the words of the testator. It is assumed that the gift is intended to take effect unless displaced by a valid exercise of a preceding power of appointment. If the power is invalid, then the result is that the interest is never displaced.<sup>102</sup>

Limitations which follow void limitations may be classified as vested (which will always be safe from the perpetuities rule); contingent but independent (ultimate gift succeeds); and contingent but dependent (ulterior gift fails).<sup>103</sup> The only authority (excluding dicta) for holding that a prior remote limitation always leads to voidness of the ultimate gift is an unreserved judgment of a court at first instance.<sup>104</sup> It may be that to hold a vested limitation following a void limitation to be valid in all cases would be the best approach as representing the likely intention of the testator.<sup>105</sup>

A gift to trustees of a fee simple “on condition that it shall always be used for the purposes of a hospital only” gives the grantor’s successors a right of re-entry. The remainder is void if infringing the perpetuity rule.<sup>106</sup>

All subsequent vested limitations are valid and all subsequent limitations affected by the contingency are void, but there is no clear test for those cases where the limitation is not specifically subject to the same contingency as the prior void limitation. The question of contingency in general precedes the problem of ulterior limitations. There is a legal presumption that interests following a contingent interest in a regular unbroken series are subject to the same contingency.<sup>107</sup>

The courts have proven willing to develop different principles for realty and personalty, for conditions precedent and subsequent. It depends on the nature of the gift and the nature of the condition whether the gift is void if the condition is void. These rules preserve what might be seen as an artificial distinction between realty and personalty. Worse, when even the courts have difficulty at times distinguishing between conditions precedent and

---

<sup>102</sup> Morris, *supra* note 92, at 406.

<sup>103</sup> Megarry and Wade, *supra* note 69, at 240.

<sup>104</sup> *Re Backhouse* [1921] 2 Ch 51.

<sup>105</sup> Morris, *supra* note 92, at 409-410.

<sup>106</sup> Megarry and Wade, *supra* note 69, at 247.

<sup>107</sup> Kiralfy, “Vested Interests Remote for Perpetuity” (1950) 14 Conv 148.

subsequent, it is possible that having different rules govern each causes undue problems, and is overly technical.

### 6. Uncertainty

The rules governing certainty draw a distinction between the degree of certainty which is required for a condition subsequent and that required for a condition precedent. A stricter degree of certainty is required for conditions subsequent than for conditions precedent.<sup>108</sup> Conditions do not fail for uncertainty merely because they lack clarity of expression. In such cases it is the responsibility of the courts to endeavour to construe the meaning in the light of the ordinary canons of construction.<sup>109</sup> A condition will not necessarily fail simply because it is uncertain whether it is certain enough.<sup>110</sup> It is only when a meaning cannot be properly ascribed to language used that it fails for uncertainty.<sup>111</sup>

The test for certainty for a condition subsequent remains as propounded by Lord Cranworth in *Clavering v Ellison*:

where a vested estate is to be defeated by a condition on a contingency that is to happen afterwards, that condition must be such that the court can see from the beginning, precisely and distinctly, upon the happening of what event it was that the preceding vested interest was to determine.<sup>112</sup>

This test was approved and applied by the Privy Council in *Sifton v Sifton*.<sup>113</sup> In that case “so long as she shall continue to reside in Canada” was held to be not certain enough. Lord Romer distinguished between uncertainty of expression, and uncertainty of application. The former were void in all cases, the latter could be resolved by extrinsic evidence. This was reaffirmed in the House of Lords in *Clayton v Ramsden*.<sup>114</sup> In this case, “not of the Jewish faith” was held to be void because it was a question of degree, and the testator had failed to give any indication as to what degree of faith was required. Lord Cranworth’s test of “precisely and distinctly” was rephrased as “with the greatest precision and in the clearest language”.

---

<sup>108</sup> *Blawhway v Lord Cawley* [1976] AC 397; [1975] 3 All ER 625 (HL). But see *Trustees of the Church Property of the Diocese of Newcastle v Ebbeck* (1960) 104 CLR 394.

<sup>109</sup> *Re Neeld, Carpenter v Inigo-Jones* [1962] Ch 643, 675, per Upjohn LJ.

<sup>110</sup> *Re Boulter, Capital and Counties Bank v Boulter* [1922] 1 Ch 75.

<sup>111</sup> *Re Viscount Exmouth* [1883] 23 ChD 158, 166.

<sup>112</sup> (1859) 7 HL Cas 707; 11 ER 282.

<sup>113</sup> [1938] AC 656.

<sup>114</sup> [1943] 1 All ER 16.

Thus, conceptual or linguistic uncertainty and evidential uncertainty are to be distinguished. A condition is uncertain when it may, as a matter of semantics, be incapable of interpretation, or being capable of interpretation leaves doubt as to its application to the facts of the case.<sup>115</sup> The courts “will hold a condition subsequent void if its terms are such that ... it cannot be clearly known in advance or from the beginning what are the circumstances the happening of which will cause the divesting or determining of the gift or estate”.<sup>116</sup> This is a rigorous test.

A less stringent test was earlier used in *Re Sandbrook* (“with reasonable certainty”).<sup>117</sup> In *Re Hanlon*, Eve J said that “it must reasonably have been known” that the conduct would result in forfeiture.<sup>118</sup> In *Re Neeld*, Evershed MR said it “must be capable at once of a clear and easy answer”.<sup>119</sup> There was no need however for the language to be “of so exactly precise a character” that no question could ever sensibly arise on the actual facts. The modern approach may well be to reduce the strictness of the condition subsequent test,<sup>120</sup> and thereby allow conditions to survive which would otherwise fail.

Other examples of conditions which have been found to be insufficiently certain include “associated, corresponded or visited with my present wife’s nephews or nieces”,<sup>121</sup> “have social or other relationship with” a named person,<sup>122</sup> and “to provide a house for”.<sup>123</sup> By contrast, a condition which was found to be sufficiently certain was “taking up permanent residence in England”.<sup>124</sup>

Conditions precedent are not subject to the strict rule that is applied to conditions subsequent.<sup>125</sup> For conditions precedent the leading authority is *Re Allen*.<sup>126</sup> The gift there was to the eldest son of the testators’ nephew, “who shall be a member of the Church of England and an adherent of the

---

<sup>115</sup> Butt, “Testamentary Conditions in Restraint of Religion” (1977) 8 Sydney LR 400.

<sup>116</sup> *Re Allen, Faith v Allen* [1953] 2 All ER 898 at 907 per Evershed MR.

<sup>117</sup> *Re Sandbrook, Noel v Sandbrook* [1912] 2 Ch 471, 477 per Parker J.

<sup>118</sup> *Re Hanlon, Heads v Hanlon* [1933] Ch 254.

<sup>119</sup> *Re Neeld, Carpenter v Inigo-Jones* [1962] Ch 643.

<sup>120</sup> Butt, *supra* note 115, at 400.

<sup>121</sup> *Jeffreys v Jeffreys* (1901) 84 LT 417.

<sup>122</sup> *Re Jones* [1953] Ch 125.

<sup>123</sup> *Re Brace* [1954] 1 WLR 955.

<sup>124</sup> *Re Gape’s Will Trusts* [1952] Ch 743.

<sup>125</sup> *Re Balkind* [1969] NZLR 669.

<sup>126</sup> *Re Allen, Faith v Allen* [1953] 2 All ER 898 (CA).

doctrine of that Church". The testator (a King's Counsel) died in 1908. As a condition precedent (or more correctly as a description or qualification), performance necessarily preceded vesting, and it will only fail if it is impossible to give the condition any meaning at all or it involves repugnancies or inconsistencies in the possible tests that it postulates. The court held that this condition was sufficiently certain.

There is no need for the court to be able to determine in advance the precise circumstances upon which the condition will operate. Even if the condition is conceptually uncertain it will be valid if someone can establish that they satisfy the requirements. Because the condition need not be in a conceptually certain form there will be instances where trustees or executors will have no way of knowing whether a claimant satisfies the requirement or not.<sup>127</sup> The condition will be sufficiently certain if there is at least one person of whom one can say with certainty that it is included. This will be true even though there are others of whom it may be impossible to say whether or not they qualify.

The House of Lords in *Blathwayt v Lord Cawley*<sup>128</sup> approved the different tests. A greater degree of certainty is required for conditions subsequent. This is justified on the basis that where a condition subsequent fails the donee takes the gift free from the condition, while with a condition precedent the entire gift will fail (unless it was *malum prohibitum* or impossible). Since the courts prefer to construe a disposition in such a way as to prevent its failing, a more liberal test of uncertainty is applied to conditions precedent than to conditions subsequent.

This distinction was criticised by Lord Denning in *Re Tuck's Settlement Trusts*.<sup>129</sup> Sir Adolf Tuck, Bt, had created a settlement which was to pay its income to the baronet for the time being, "so long as he shall be of the Jewish faith and shall be married to an approved wife". An "approved wife" was defined in the settlement trust as "a wife of Jewish blood by one or both parents and who has been brought up in and has never departed from and at the date of her marriage continues to worship according to the Jewish faith." The Court of Appeal decided that the provision was in substance a condition precedent and therefore not void, although the words used had tended to

---

<sup>127</sup> Parry, *supra* note 45, at 519.

<sup>128</sup> [1976] AC 397; [1975] 3 All ER 625 (HL).

<sup>129</sup> *Re Tuck's Settlement Trusts, Public Trustee v Tuck* [1978] 1 All ER 1047.

imply a condition subsequent. The court asserted the correctness of *Re Allen*,<sup>130</sup> though it did not endorse the precise test of validity.<sup>131</sup>

The existence of different tests as to uncertainty for precedent and subsequent conditions was criticised by Lord Denning MR as unsound. The conceptual and evidential distinction also worked to defeat the intent of the testator. The High Court of Australia has held that the certainty required for conditions precedent is the same as for conditions subsequent.<sup>132</sup> The decision of the House of Lords in *Blathwayt v Lord Cawley*<sup>133</sup> however has stronger precedent value for New Zealand courts, and would appear to be founded on a stronger line of authority.

The effect of having two different tests for certainty means that a condition will be certain or uncertain merely because it is a condition precedent or a condition subsequent. As *Re Tuck's Settlement Trusts*<sup>134</sup> shows, the courts will hold a condition to be precedent rather than subsequent despite the words of the will or deed, so as to give effect to what they perceive is the donor's intentions and to prevent the working of an injustice. The distinction is explicable but perhaps illogical. The policy objective of giving effect to the donor's intentions, and of enabling executors and trustees to administer estates without the need for recourse to the courts, would seem to raise doubts about the justification for a separate, more liberal test for conditions precedent.<sup>135</sup>

Judged by the principles of certainty in *Morice v Bishop of Durham*,<sup>136</sup> the *Re Allen*<sup>137</sup> test of certainty is inadequate because it allows compliance in virtually every case of conditions precedent. The original policy objective of the certainty requirement was that every private trust had to have sufficient controls over the trustees to prevent them from misapplying trust property. As a result the courts required a high degree of certainty of objects.<sup>138</sup>

---

<sup>130</sup> *Re Allen, Faith v Allen* [1953] 2 All ER 898 (CA).

<sup>131</sup> McKay, "Re Barlow and the certainty of objects rule" [1980] 44 Conv 263, 277.

<sup>132</sup> *Trustees of the Church Property of the Diocese of Newcastle v Ebbeck* (1960) 104 CLR 394 per Dixon CJ.

<sup>133</sup> [1976] AC 397; [1975] 3 All ER 625 (HL).

<sup>134</sup> *Re Tuck's Settlement Trusts, Public Trustee v Tuck* [1978] 1 All ER 1047.

<sup>135</sup> Parry, *supra* note 45, at 520.

<sup>136</sup> (1804) 9 Ves Jun 399; 32 ER 656.

<sup>137</sup> *Re Allen, Faith v Allen* [1953] 2 All ER 898 (CA).

<sup>138</sup> McKay, *supra* note 131, at 269.



In *Re Gulbenkian's Settlements*<sup>139</sup> the House of Lords rejected the test of certainty of objects for trust powers and *Re Allen*<sup>140</sup> was distinguished. The House did not however discuss the propriety of the test for conditions precedent.<sup>141</sup> The test adopted asked "was it possible to say with certainty whether any individual was or was not a member of the class of beneficiaries".<sup>142</sup> The House in *McPhail v Doulton*<sup>143</sup> assimilated the test for certainty of objects in discretionary trusts with that for powers.

It has been suggested<sup>144</sup> that the test used in *McPhail v Doulton*<sup>145</sup> must be preferred to that in *Re Allen*<sup>146</sup> to give proper weight to policy considerations. In the former case the question was asked "was it possible to say with certainty whether any individual was or was not a member of the class of beneficiaries." *McPhail v Doulton*<sup>147</sup> concerned a discretionary trust however, and where there are conditions precedent there is rarely any discretion. Indeed the courts have been quick to deny any discretion for the trustees to interpret a condition without recourse to the courts. However *Re Coxen*<sup>148</sup> provides uncertain authority for the contention that there may be vested in trustees the power to make a decision binding on the parties as to whether or not the events have occurred which will cause the condition to operate.

The absence of a discretion alone may be reason for extending *McPhail v Doulton*<sup>149</sup> into the law of conditional gifts. Where there is no discretion the courts should be more ready to restrict the trustees by requiring that a harder standard of proof be reached. However, although the House of Lords rejected the test of certainty of objects for trust powers in *Re Gulbenkian's Settlements*,<sup>150</sup> *McPhail v Doulton*<sup>151</sup> preceded *Blathwayt v Lord Cawley*.<sup>152</sup>

---

<sup>139</sup> [1970] AC 508.

<sup>140</sup> *Re Allen, Faith v Allen* [1953] 2 All ER 898 (CA).

<sup>141</sup> McKay, *supra* note 131, at 263.

<sup>142</sup> *Re Gulbenkian's Settlements* [1970] AC 508, followed in *Re Beckbessinger* [1993] 2 NZLR 362 (HC).

<sup>143</sup> [1971] AC 424 (HL).

<sup>144</sup> McKay, *supra* note 131, at 272.

<sup>145</sup> [1971] AC 424 (HL).

<sup>146</sup> *Re Allen, Faith v Allen* [1953] 2 All ER 898 (CA).

<sup>147</sup> [1971] AC 424 (HL).

<sup>148</sup> *Re Coxen, McCallum v Coxen* [1948] Ch 747.

<sup>149</sup> [1971] AC 424 (HL).

<sup>150</sup> [1970] AC 508.

<sup>151</sup> [1971] AC 424 (HL).

<sup>152</sup> [1976] AC 397; [1975] 3 All ER 625 (HL).

There may not be sufficient reasons why this authority should be rejected in favour of the earlier, especially as the question of conditions precedent was not considered. Even if *Re Allen*<sup>153</sup> is incorrect, and there is some argument that it is not consistent with earlier authorities,<sup>154</sup> its test has been approved by the House of Lords. There may be some advantage to a uniformity of tests between discretionary trusts, trust powers and conditions precedent, but it is not certain that *McPhail v Doulton*<sup>155</sup> applies also to fixed trusts.

*Re Barlow's Will Trust*<sup>156</sup> brought the test into contention again. This held that the test is not limited to issues of certainty of conditions precedent, but is in some circumstances the appropriate criterion for assessing the validity of the beneficiary. This view would however appear inconsistent with *Re Gulbenkian's Settlements*<sup>157</sup> and *Re Baden's Deed Trusts (No 2)*<sup>158</sup> and merely makes the picture more unclear than ever.<sup>159</sup> Barlow died in 1975 leaving her collection of paintings to trustees who were authorised to sell them at the 1970 valuation to those who qualified as "friends of mine".

Both the *Re Gulbenkian's Settlements*<sup>160</sup> ("was it possible to say with certainty whether any individual was or was not a member of the class of beneficiaries") and *IRC v Broadway Cottages Trust*<sup>161</sup> ("was it possible to completely ascertain the entire range of beneficiaries") tests were inappropriate. The will comprised a series of individual gifts, each requiring its own individual test of certainty.<sup>162</sup> In *Re Barlow's Will Trust*<sup>163</sup> the judge applied *Re Allen*:<sup>164</sup> "was it possible to say of one or more persons that he or they undoubtedly qualify even though it may be impossible to say of others whether or not they qualify". The will satisfied this test.

---

153 *Re Allen, Faith v Allen* [1953] 2 All ER 898 (CA).

154 McKay, *supra* note 131, at 280.

155 [1971] AC 424 (HL).

156 [1979] 1 All ER 296.

157 [1970] AC 508.

158 [1973] Ch 9.

159 McKay, *supra* note 131, at 263.

160 [1970] AC 508.

161 [1955] Ch 20.

162 McKay, *supra* note 131, at 264.

163 [1979] 1 All ER 296.

164 *Re Allen, Faith v Allen* [1953] 2 All ER 898 (CA).

### 7. Illegal and Repugnant Conditions

Where there is a gift of real or personal property and a condition is attached which is inconsistent with and repugnant to the gift, the condition is wholly void and the donee takes the gift free from the condition.<sup>165</sup> The same rule applies if the condition is that the donee commit a crime, or tends towards the commission of some act prohibited by law.<sup>166</sup> Repugnancy is a remnant of scholasticism, which has spread over three branches of law: conditions in gifts, arbitration and clogging an equity of redemption. It has proven in all three cases to be irrational and inconvenient. It may tend to mask public policy, and it has been suggested that it would perhaps be better to discard it in favour of a more overt test of public policy.<sup>167</sup> It may be that in this area, if in none other, the common law may have fallen out of alignment with social standards and expectations. However there is at least room for genuine repugnancy.

Repugnancy may be either genuine or spurious. Of the first type are those documents that contain mutually inconsistent provisions.<sup>168</sup> Documents must be read as a whole and effect must be given to that part calculated to carry out the real intention of the party. Where the real intention is undiscoverable the rule of thumb is used, but it must first have been impossible to harmonise the whole of the document. The first words in a deed and the last words in a will shall prevail,<sup>169</sup> and any other gifts will be void for uncertainty. It is difficult however to reconcile this rule with the professed desire to give effect to the real intention of the donor.

The second type of repugnancy (spurious) are those cases in which the gift is accompanied by a condition which is contrary to the interest given. Thus in *Mildmay's Case* "it was resolved, that if a man makes a gift in tail, on condition, that he shall not suffer a common recovery, that this condition is repugnant to the estate-tail, and against the law".<sup>170</sup> There are certain incidents inseparable from particular estates, and grantors are not permitted to give the estate without giving the incidents as well.<sup>171</sup> Certain restrictions

---

<sup>165</sup> *Byng v Lord Strafford* (1843) 5 Beav 558, 567; 49 ER 694; *Re Cockerill, Mackaness v Percival* [1929] 2 Ch 131.

<sup>166</sup> *Mitchel v Reynolds* (1711) 1 Pr Wms 181; 24 ER 347.

<sup>167</sup> Glanville Williams, "The doctrine of Repugnancy- Conditions in gifts" (1943) 59 LQR 343.

<sup>168</sup> *Ormerod v Riley* (1865) 12 Jur (NS) 112.

<sup>169</sup> *Doe d. Leicester v Biggs* (1809) 2 Taunt 109.

<sup>170</sup> (1605) 6 Co Rep 40a; 77 ER 511.

<sup>171</sup> Glanville Williams, *supra* note 167, at 345.

are allowed, however, although the justification for this is unclear as they are equally repugnant to the gift. The rule works very much like public policy. A condition that beneficiaries deal in a certain manner with the proceeds of the sale of land was repugnant.<sup>172</sup>

Conditions are not void for impossibility if the condition is only highly improbable, or because it is out of any human power to ensure its performance.<sup>173</sup> Performance of a condition precedent that is made impossible by the act or default of the testator is excused as regards personalty but not realty.<sup>174</sup> Conditions that are contrary to public policy will be held to be void. A condition will be void if there is a tendency to conflict with the general interest of the community, even though it will not necessarily do so.<sup>175</sup>

Historically the most common examples of conditions that have been found to be either illegal or contrary to the policy of the law include incitement to commit a crime,<sup>176</sup> to live apart from wife,<sup>177</sup> and those conditions which are in general restraint of marriage.<sup>178</sup> It is also contrary to public policy to settle one's own property on oneself until bankruptcy, so as to avoid the claims of the official assignee.<sup>179</sup> The distinctions between different types of illegal conditions are important when it is remembered that the validity of the gift depends upon the *malum* rule.

Some examples may be given to show how the courts have dealt with different situations over time. In 1853 it was held that a condition which required the beneficiary to acquire a peerage was contrary to public policy, but only after great conflict of opinion in the House of Lords.<sup>180</sup> The decision turned upon the legislative rights and duties of peers, so baronetcies, which have no such duties, were distinguished.<sup>181</sup> It would follow that knighthoods and other honours can also be distinguished,

---

<sup>172</sup> *Lucas v Goldie* [1929] NZLR 29.

<sup>173</sup> *Egerton v Earl Brownlow* (1853) 4 HL Cas 1; 10 ER 359.

<sup>174</sup> *Re Turton, Whittington v Turton* [1926] Ch 96.

<sup>175</sup> *Egerton v Earl Brownlow* (1853) 4 HL Cas 1; 10 ER 359, 181, per Lord Truro.

<sup>176</sup> *Mitchel v Reynolds* (1711) 1 P Wms 181, 24 ER 347; *Shrewsbury v Hope Scott* (1859) 6 Jur (NS) 452, 456.

<sup>177</sup> *Re Moore, Trafford v Maconochie* (1888) 39 ChD 116; *Re Caborne, Hodge and Nabarro v Smith* [1943] Ch 224.

<sup>178</sup> *Jones v Jones* (1876) 1 QBD 279; *Re Hewett, Eldridge v Illes* [1918] 1 Ch 458.

<sup>179</sup> *Mackintosh v Pogose* [1895] 1 Ch 505; *Re Wombwell* [1921] 125 LT 437.

<sup>180</sup> *Egerton v Earl Brownlow* (1853) 4 HL Cas 1; 10 ER 359.

<sup>181</sup> *Re Wallace, Champion v Wallace* [1920] 2 Ch 274.

although stipulations regarding these might be thought to be equally contrary to public policy to allow a condition which required the beneficiary to acquire a title. In the light of changed attitudes to public life it is probable that a court would less favourably receive such a condition today.

Conditions which forbid entry into military or naval service, have also been held to be void.<sup>182</sup> Public policy in this case is the maintenance of the military forces of the Crown rather than the prevention of any private wrongs. As such, it would appear less liable to fall victim to changing social norms.

Names and arms clauses, which required the beneficiary to adopt the surname and coat of arms of the testator, were for a time after 1945 held to be contrary to public policy.<sup>183</sup> This was generally on the ground that, in the case of a married woman being the beneficiary, the taking by her of another's surname might lead to dissension between husband and wife. There was also some difficulty with certainty.

In 1962 however the Court of Appeal overruled many previous decisions and held that the conditions were not contrary to public policy.<sup>184</sup> It may be that the actual public policy, which the courts had in mind, was the protection of a patriarchal nomenclature. Certainly the recognition of the lawfulness of such conditions can be seen as a recognition of changing social conditions. It is no longer seen as conducive to marital dissension to require a beneficiary to take the name and arms of a testator. This shows that, in the field of illegal and repugnant conditions at least, the courts are alive to changing social conditions, and are able to mould the common law accordingly.

A condition requiring a woman, whether single or married, to bear the testator's surname was held to be contrary to public policy as coercive and quasi-punitive.<sup>185</sup> The rationale for this rule would appear suspect in the light of the change of judicial attitude towards names and arms clauses. It would appear not to be good law now in the light of the observations of Upjohn J in *Re Neeld*.<sup>186</sup>

---

<sup>182</sup> *Re Beard* [1908] 1 Ch 383.

<sup>183</sup> *Re Fry* [1945] 1 Ch 348. See "Names and Arms Clauses", supra note 57, at 167-172.

<sup>184</sup> *Re Neeld, Carpenter v Inigo-Jones* [1962] Ch 643.

<sup>185</sup> *Re Fry* [1945] 1 Ch 348.

<sup>186</sup> *Re Neeld, Carpenter v Inigo-Jones* [1962] Ch 643.

Conditions in restraint of religion are not as such contrary to public policy.<sup>187</sup> This is so even in cases involving charitable trusts.<sup>188</sup> The courts are more willing to interfere with testamentary freedom of choice because it is thought that these conditions do not have a coercive or quasi-punitive effect. Nor is family dissension induced, because religious belief is personal to the individual.

It is doubtful as to how far, if at all, the requirements of public policy could invalidate conditions in wills tending to restrict the trade of a beneficiary.<sup>189</sup> The encouragement of grandsons to become farmers was not contrary to public policy. Indeed it was regarded as a worthy aim.<sup>190</sup> Clearly the encouragement of an illegal or immoral activity would be void, but whether the courts can and should make judgments in other cases is uncertain.

### 8. Gifts to Intended Husbands and Wives

At common law the parties to an agreement to marry could bring an action for breach of promise of marriage.<sup>191</sup> This included the recovery of property given to the intended spouses. The Domestic Actions Act 1975 has altered the pre-existing law as to the return of engagement rings.<sup>192</sup> Property disputes arising out of failed agreements to marry are dealt with in such a way as to return the parties to the position that they would have been in but for the agreement.<sup>193</sup> The assigning of responsibility for breaking the agreement no longer has any legal significance. There was no common law presumption that wedding presents were the joint property of both spouses.<sup>194</sup> The common law presumption was that gifts originating from the husband's family and friend were intended for the husband, and that gifts originating from the wife's family and friends were intended for the wife.<sup>195</sup>

---

<sup>187</sup> *Lysaght v Edwards* (1876) 2 ChD 499; *Re Sutcliffe* [1982] 2 NZLR 330.

<sup>188</sup> Cheshire and Burn, *supra* note 57, at 354.

<sup>189</sup> *Cooke v Turner* (1846) 15 M & W 727, 735; *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd* [1968] AC 259, 328, per Lord Pearce.

<sup>190</sup> *Re Cowley* [1971] NZLR 468.

<sup>191</sup> As is shown, in a humorous way, in Sir Arthur Sullivan's opera, *Trial by Jury* (1875).

<sup>192</sup> *Jacobs v Davis* [1917] 2 KB 532 (the implied condition that it would be returned); *Cohen v Sellar* [1926] 1 KB 536 (could not recover if that party had refused without legal justification to marry).

<sup>193</sup> Section 8(3).

<sup>194</sup> *Young v Burrell* (1576) Cary 54; 21 ER 29.

<sup>195</sup> *Samson v Samson* [1960] 1 All ER 653; 1 WLR 190 (CA).

The nature of the gift may supply evidence of the donor's intention.<sup>196</sup> A gift to a fiancé who was dying was absolute and not conditional on marriage. The gift was not recoverable by the donor after her death.<sup>197</sup> When a man gave jewels to a woman during courtship and in contemplation of marriage, he was entitled to recover them if the match was broken off.<sup>198</sup> Where gifts were made to introduce one party to another with a view to possible marriage, there was no such right to restitution.<sup>199</sup>

Because of the Domestic Actions Act 1975 the scope of judicial discretion in actions arising from breakdowns in intended marriages has been reduced. The legislative approach is to place the parties in the position that they would have held but for the agreement, in line with the philosophy of the Matrimonial Property Act 1976. In that legislation also the discretion of the courts to do justice on the facts has been reduced. A statutory requirement to return the parties to their former positions may not always do justice to the parties.

#### 9. Restraint on Alienation

A total restraint on the alienation of an absolute interest in possession during a certain period is invalid.<sup>200</sup> A condition cannot be repugnant to the estate granted.<sup>201</sup> Partial restraints are permitted however. Thus there is no objection to a limitation which takes effect so as to defeat a particular alienee,<sup>202</sup> to a condition that the donee shall not alienate a reversionary interest<sup>203</sup> or to a condition that the donee shall not alienate to a particular person or class of person.<sup>204</sup> Property can be given on condition that another is not alienated, as this does not interfere with the donee's power to alienate the property given.<sup>205</sup>

---

<sup>196</sup> *M'Donald v M'Donald* 1953 SLT 36 (Sh Ct).

<sup>197</sup> *Emery v Morgan* (1938) 33 MCR 15.

<sup>198</sup> *Oldenburgh's Case* (1676) 1 Freeman 213; 89 ER 151.

<sup>199</sup> *Robinson v Cumming* (1742) 2 Atk 409; 26 ER 646, LC.

<sup>200</sup> *In re Rosher, Rosher v Rosher* (1884) 26 ChD 801.

<sup>201</sup> *Earl of Arundel's Case* (1575) 73 ER 771; *Re Dugdale, Dugdale v Dugdale* (1888) 38 ChD 176.

<sup>202</sup> *Re Johnson, ex parte Matthews* [1904] 1 KB 134.

<sup>203</sup> *Re Porter, Coulson and Capper* [1892] Ch 481.

<sup>204</sup> *Doe d. Gill v Pearson* (1805) 6 East 173; 102 ER 1253.

<sup>205</sup> *Caldy Manor Estate Ltd v Farrell* [1974] 3 All ER 753; 1 WLR 1303 (CA).

The Property Law Act 1952<sup>206</sup> allows the court to remove a restraint upon alienation either wholly or partly where it appears to be for the benefit of the persons subject to any restraint. This provision allows a proviso that property shall not be sold during the life of the beneficiary, or pass by bankruptcy or be seized, attached or taken. This applies however only to children, grandchildren, and spouses.<sup>207</sup>

Conditions which are void include a restraint on alienation to anyone other than one person,<sup>208</sup> and to anyone other than one or more of a small and diminishing class of persons.<sup>209</sup> A grantor of fee simple cannot enforce a condition that the grantee shall always let the land at a definite rent or cultivate it in a certain manner, as this would be incompatible with that complete freedom of enjoyment, disposition and management that the law attributes to ownership of such an estate.<sup>210</sup> Where a gift is absolute in the first instance, a restraint on the power of leasing is void on the same principle as is a restraint on alienation.<sup>211</sup>

After an absolute gift, a proviso of forfeiture on bankruptcy or alienation is void,<sup>212</sup> but a gift of income may be made conditional upon determination in the event of an attempted alienation or bankruptcy.<sup>213</sup> It is not permissible to include with a grant of a life interest a condition that the property shall not be liable to seizure for debt,<sup>214</sup> so as to avoid one of the incidents to which all absolute interests are subject, namely, liability for debts. A gift over of what the donee of an absolute interest in the asset or income does not dispose of, is of necessity void.<sup>215</sup> This is true at least of gifts by will, and probably also applies to gifts by deed or instruments in writing *inter vivos*. A condition that a donee shall not alienate during a particular time, such as the life of a certain person<sup>216</sup> or during his or her own life,<sup>217</sup> is void.

---

<sup>206</sup> Section 33(4).

<sup>207</sup> *Re Hardley* [1977] 1 NZLR 161.

<sup>208</sup> *Muschamp v Bluett* (1617) J Bridg 132; 123 ER 1253.

<sup>209</sup> *Re Brown, District Bank Ltd v Brown* [1954] Ch 39.

<sup>210</sup> *Cheshire and Burn*, supra note 57, at 349.

<sup>211</sup> (1884) 26 ChD 801.

<sup>212</sup> *Brandon v Robinson* (1811) 18 Ves Jun 429; 34 ER 379; *Metcalfe v Metcalfe* [1891] 3 Ch 1 (CA).

<sup>213</sup> *Brandon v Robinson* (1811) 18 Ves Jun 429; 34 ER 379.

<sup>214</sup> *Graves v Dolphin* (1826) 1 Sim 66; 57 ER 503.

<sup>215</sup> *Watkins v Williams* (1851) 3 Mac & G 622; 42 ER 400.

<sup>216</sup> *Egerton v Earl Brownlow* (1853) 4 HL Cas 1; 10 ER 359.

<sup>217</sup> *Corbett v Corbett* (1888) 14 PD 7 (CA).



A determinable limitation, such as a grant of a life interest to X until he or she attempts to alienate the gift or becomes bankrupt, is perfectly valid as it is not repugnant to the (limited) interest granted.<sup>218</sup> A gift “to X for life or until he becomes bankrupt” is not the same as a gift “to X for life on condition that if he becomes bankrupt his interest shall determine”.

A restraint on alienation to anyone other than one or more of a small class which is likely to increase is good. In *Re Macleay*,<sup>219</sup> a case where land was devised “on the condition that he never sells out of the family”, Jessel MR held that this did not infringe the rule against total restraint upon alienation because it bound only the devisee personally, it applied only to sales and not other modes of alienation, and within the family even sales were permissible. The family was construed as meaning “blood relations”, and comprehended many persons. This judgment was somewhat critical of *Attwater v Attwater*<sup>220</sup> and was itself the subject of criticism in *Re Rosher, Rosher v Rosher*.<sup>221</sup> *Re Brown, District Bank Ltd v Brown*<sup>222</sup> declined to follow *Re Macleay*,<sup>223</sup> distinguishing that case on the basis that in *Re Brown* the limitation was to four or five named persons.

The principle that underlies the cases on alienation is that the donor cannot take away indirectly by a condition the incidents of the estate given.<sup>224</sup> This is true also where the subject of the gift is for life only. This doctrine has been criticised on the basis that the invalidity should be based on public policy rather than repugnancy to the interest given.<sup>225</sup> Whether this is a valid criticism or not is unclear, as it has been argued that repugnancy merely acts as a cover for public policy in any case.

The tendency in modern cases has increasingly been to curtail the extent to which the dead hand of a testator may rule the living.<sup>226</sup> Perhaps the courts are losing sight of the fundamental doctrine of repugnancy, and have unintentionally and unwittingly allowed the necessities of public policy to engraft certain exceptions to the rule against restraints on alienation.<sup>227</sup> It is a

---

<sup>218</sup> *Brandon v Robinson* (1811) 18 Ves Jun 429; 34 ER 379.

<sup>219</sup> (1875) LR 20 Eq 186.

<sup>220</sup> (1853) 18 Beav 330; 52 ER 131.

<sup>221</sup> *In re Rosher, Rosher v Rosher* (1884) 26 ChD 801.

<sup>222</sup> [1953] Ch 39.

<sup>223</sup> (1875) LR 20 Eq 186.

<sup>224</sup> *Re Dugdale, Dugdale v Dugdale* (1888) 38 ChD 176, 182.

<sup>225</sup> Glanville Williams, *supra* note 167, at 343.

<sup>226</sup> Sir Robert Megarry, “Note on *Re Macleay*” [1954] 70 LQR 15, 16.

<sup>227</sup> Cheshire and Burn, *supra* note 57, at 350.

mistake to see restraint on alienation as merely an aspect of public policy, as repugnancy ought to be a ground for voiding a condition.

### 10. Restraint of Marriage

The rules governing restraint of marriage present some difficulty. Distinctions are drawn between partial and general restraint, and personalty and realty. Perhaps more importantly, it might be questioned whether principles which were largely evolved during the nineteenth and early twentieth centuries, when marriage was still the principal basis for family life, remain valid today. Formal legal marriages (though still prevalent) are not universally regarded as necessary, and tend to be of shorter duration than formerly.

A condition that is in total restraint of marriage is void per se as regards personalty. For realty however total restraint is void only if there is an intention to promote celibacy or an intention to restrain marriage (rather than this being merely the effect).<sup>228</sup> Where the purpose is to provide for a person while he or she is single, or to benefit the subject in whose favour the gift over is made, it is effective.<sup>229</sup> This is equally so whether the gift is by deed or will.<sup>230</sup>

A condition in partial restraint of marriage is prima facie valid,<sup>231</sup> and in the case of personalty, unless there is an explicit gift over on marriage, or the gift is so made that it is revoked by the marriage, it is treated as *in terrorem* and is therefore valid.<sup>232</sup> The *in terrorem* doctrine does not apply to gifts of realty,<sup>233</sup> so a condition in partial restraint of marriage can result in the estate being determined to the benefit of the residuary beneficiary.<sup>234</sup> The position is not clear for joint gifts of personalty and realty,<sup>235</sup> and, though the presumption in favour of conditions being valid still applies, the *in terrorem* rule probably does not apply. Thus conditions in partial restraint of marriage will be valid but gifts of realty and personalty will probably be void.

---

<sup>228</sup> *Jones v Jones* (1876) 1 QBD 279 (DC).

<sup>229</sup> *Re Hewett, Eldridge v Illes* [1918] 1 Ch 458.

<sup>230</sup> *Re Whiting's Settlement, Whiting v De Rutzen* [1905] 1 Ch 96 (CA).

<sup>231</sup> *Clayton v Ramsden* [1943] 1 All ER 16.

<sup>232</sup> *Gillet v Wray* (1715) 1 P Wms 284; 24 ER 390; *Re Nourse, Hampton v Nourse* [1899] 1 Ch 63.

<sup>233</sup> *Jenner v Turner* (1886) 16 ChD 188, 196 per Bacon VC.

<sup>234</sup> *Re Bathe* [1975] Ch 377.

<sup>235</sup> (1878) 2 LR Ir 442.

Gifts intended to determine on marriage are perfectly valid,<sup>236</sup> as they are not intended to prevent marriage. A gift conditional on the beneficiary not marrying a person born in Scotland or of Scottish parents,<sup>237</sup> or who was not to profess the Jewish religion and not born a Jew,<sup>238</sup> is valid. Neither would now be seen as consistent with the principles underlying the Human Rights Act 1993.

A condition that a beneficiary should take “and for so long as she shall not enter into a de facto relationship” (determination at the sole and absolute discretion of trustees),<sup>239</sup> a condition subsequent, was void as “de facto” lacked the requisite degree of definition and certainty.<sup>240</sup> The conceptual difficulty was not removed by giving the power of decision to trustees. This would avoid difficulties with evidential uncertainty however. The condition was not contrary to public policy. This was perhaps because, when the precedent was set in 1986, “de facto” relationships were far from uncommon. Their status is currently the subject of legislative attention with a view to strengthening the respective rights of the parties to a degree analogous to that of marriages properly so called. But such a gift would remain void as a condition subsequent, though not a condition precedent, for uncertainty.

### 11. Gifts Inducing Separation of Spouses

Conditions encouraging the separation or divorce of spouses have been held to be void as contrary to public policy.<sup>241</sup> The effect of each case however has to be carefully considered. Trusts made in contemplation of future separation are void as they may have the effect of encouraging this.<sup>242</sup> A condition that a woman should live apart from her husband was held *contra bonus mores* and therefore void.<sup>243</sup> It has been held that a condition

<sup>236</sup> *Morley v Rennoldson, Morley v Linkson* (1843) 2 Hare 570; 67 ER 235.

<sup>237</sup> *Perrin v Lyon* (1807) 9 East 170; 103 ER 538.

<sup>238</sup> *Hodgson v Halford* (1879) 11 Ch 959.

<sup>239</sup> *Re Lichtenstein; Lichtenstein v Lichtenstein* [1986] 2 NZLR 392.

<sup>240</sup> The condition was “for so long as she remains my widow and for so long as she shall not enter de facto relationship”.

<sup>241</sup> *Re Caborne, Hodge and Nabarro v Smith* [1943] Ch 224; *Re Johnson's Will Trusts, National Provincial Bank Ltd v Jeffrey* [1967] Ch 387; 1 All ER 553.

<sup>242</sup> *Re Moore, Trafford v Maconochie* (1888) 39 ChD 116; *Marquess of Westmeath v Marchioness of Westmeath* (1830) 1 Dow & Cl 519; 6 ER 619.

<sup>243</sup> *Wren v Bradley* (1848) 2 De G & SM 49; 64 ER 23.

precedent which was intended to promote the divorce of the testator's son from his wife was *malum prohibitum*.<sup>244</sup>

Where separation with immediate effect has been agreed upon, any consequential arrangements would not be invalid.<sup>245</sup> Where the parties are already separated, a condition may be valid as providing for maintenance, unless there is evidence that the object was to induce the spouse not to return to his or her former partner.<sup>246</sup> The case which established this last point has however been the subject of criticism on the basis that it disregarded the rule that the law looks to the general tendency of the disposition and not to the possibility of public mischief occurring in the particular instance.<sup>247</sup>

In *Re Caborne*, Simonds J observed that

The contention, on the one hand, being that such a condition is against public policy, and, therefore, void, I received, on the other hand, the usual warning against the court attempting to define the policy of the law, but I do not think that I set up any new head of public policy, or urge that "unruly horse" from its measured gait, if I re-assert the sanctity of the marriage bond and with it the importance of maintaining the integrity of family life, and, therefore, denounce and declare void a provision which is designed or tends to encourage an invasion of that sanctity.<sup>248</sup>

The public policy in these cases is simply the desire to maintain the integrity of the family. The social situation has altered somewhat since the time most of these cases were decided, and it may be questioned whether it is appropriate for the courts to restrict the freedom of testamentary disposition in this way. On balance it would appear that the active undermining of spousal relationships ought not to be approved by the courts, whatever the contemporary frequency or durability of marriages.

## 12. Conditions Affecting Parental Duties

A condition that is designed to separate a parent from his or her child, even where the parents are divorced, will be held void as *malum prohibitum* and contrary to public policy.<sup>249</sup> So will be a condition designed to interfere with

---

<sup>244</sup> *Re McBride* (1980) 107 DLR (3d) 233.

<sup>245</sup> *Wilson v Wilson* (1848) 1 HLC 538; 9 ER 870; *Vansittart v Vansittart* (1858) 2 De G & J 249; 44 ER 984.

<sup>246</sup> *Re Lovell, Sparks v Southall* [1920] 1 Ch 122.

<sup>247</sup> *Re Caborne, Hodge and Nabarro v Smith* [1943] Ch 224, per Simonds J.

<sup>248</sup> *Re Caborne, Hodge and Nabarro v Smith* [1943] Ch 224.

<sup>249</sup> *Re Piper, Dodd v Piper* [1946] 2 All ER 503.

the performance of parental duties.<sup>250</sup> The operation of the latter principle was restricted however by *Blathwayt v Lord Cawley*.<sup>251</sup> Not every condition that in any way might affect or influence the way in which a child is brought up, or in which parental duties are exercised, will be void. The condition must be designed to deter the parent from performing his or her parental duties. As with conditions tending to separate spouses, each case has to be carefully considered on the facts. This distinction is doubtless motivated by the realisation by the courts that the degree of control exercised by parents over their children is much less than it was in Victorian times.

A condition that grandchildren would receive property on condition that they lived with their mother if she and their father lived separately was void as tending to restrict parental duty.<sup>252</sup> Equally void was a condition whereby grandchildren were to forfeit property if they were under the control of their father,<sup>253</sup> and one that was directed against children living abroad.<sup>254</sup>

### 13. Conditions Restricting Freedom of Religion

Particular problems surround the determination of the certainty of religious conditions. These conditions are generally now held to be sufficiently certain, but the question is not entirely free from doubt. They are not contrary to public policy, however, and it is in this regard that they might clearly come to conflict with contemporary attitudes.

It was not until the 1930s that the question arose as to the certainty of the religious test. Until then a long line of cases had assumed that religious conditions were sufficiently certain, both conceptually and evidentially. These decisions approved conditions such as “educated ... in the Protestant religion according to the rites of the Church of England”,<sup>255</sup> “who does not profess the Jewish religion or not born a Jew”,<sup>256</sup> “a member or adherent of the Roman Catholic Church”,<sup>257</sup> “be of the Lutheran religion”,<sup>258</sup> and “in the

---

<sup>250</sup> *Re Borwick, Borwick v Borwick* [1933] Ch 657.

<sup>251</sup> [1976] AC 397; [1975] 3 All ER 625 (HL).

<sup>252</sup> *Re Morgan* (1910) 26 TLR 398.

<sup>253</sup> *Re Sandbrook, Noel v Sandbrook* [1912] 2 Ch 471.

<sup>254</sup> *Re Boulter, Capital and Counties Bank v Boulter* [1922] 1 Ch 75.

<sup>255</sup> *Clavering v Ellison* (1859) 7 HLC 707; 11 ER 282.

<sup>256</sup> *Hodgson v Halford* (1879) 11 Ch 959.

<sup>257</sup> *Re Carleton* [1909] 28 NZLR 1066.

<sup>258</sup> *Patten v Toronto General Trusts Corporation* [1930] AC 629 (PC).

Protestant faith”.<sup>259</sup> In none of these cases was it argued that the condition was void for uncertainty.<sup>260</sup>

In the 1930s a series of cases cast doubt on the certainty of conditions in restraint of religion. In *Re Borwick*,<sup>261</sup> Bennett J held void for uncertainty a condition that a beneficiary not “be or become a Roman Catholic or not be openly or avowedly Protestant”. This was on the basis that infants below the age of discretion are not in law capable of choosing their religion, at least so far as their present or future property rights may be affected by their decision. The decision could be interpreted as based on the uncertainty of the words used. Answering a question on the adherence to a religion required an assessment of facts for which the court was without guidance. A condition requiring that a person “become a convert to the Roman Catholic religion” would therefore be valid, as it requires of necessity the performance of certain definite acts.<sup>262</sup>

However, in *Clayton v Ramsden*,<sup>263</sup> “of the Jewish faith” was held to be uncertain, not merely of expression, but of operation, though in a dissenting speech Lord Wright thought that “faith” was not unclear, and was a question of fact easily proven. The testator had failed to indicate what degree of observance was sufficient. *Clayton* was followed by *Re Lockie*<sup>264</sup> (“remain a Protestant”; “adhere to the Protestant faith”), *Re Biggs*<sup>265</sup> and *Re Myers*<sup>266</sup> (“contracting marriage outside the Jewish faith”), as well as *Re Allen*<sup>267</sup> (“who shall be a member of the Church of England and an adherent to the doctrine of that Church”).

In all of these cases there was some lack of precision in distinguishing between uncertainty of expression and uncertainty of operation. The former was void in all cases, the latter could be resolved by extrinsic evidence. In *Re Tegg*<sup>268</sup> “at all times conform to and be a member of the Established Church of England” was uncertain, because “members” was certain, but “at all times

---

<sup>259</sup> *In Re Gunn* [1912] 32 NZLR 153.

<sup>260</sup> Butt, *supra* note 115, at 400.

<sup>261</sup> *Re Borwick*, *Borwick v Borwick* [1933] Ch 657.

<sup>262</sup> *Blathwayt v Lord Cawley* [1976] AC 397; [1975] 3 All ER 625 (HL).

<sup>263</sup> [1943] 1 All ER 16.

<sup>264</sup> *Re Lockie*, *Guardian Trust and Executors* [1945] NZLR 230, 239-246.

<sup>265</sup> *Re Biggs*, *Public Trustee v Schneider* [1945] NZLR 303, 307.

<sup>266</sup> *Re Myers*, *Perpetual Trust Estate and Agency Co of New Zealand v Myers* [1947] NZLR 828, 834.

<sup>267</sup> *Re Allen*, *Faith v Allen* [1953] Ch 810.

<sup>268</sup> *Re Tegg*, *Public Trustee v Bryant* [1936] 2 All ER 879.

conform to” was uncertain. It may be that *Clayton*<sup>269</sup> rested at least in part on the policy consideration that testators ought not to be allowed to control from the grave the marriage partners and religious convictions of their beneficiaries.<sup>270</sup>

The House of Lords revisited the question of the certainty of religious conditions in *Blathwayt v Lord Cawley*<sup>271</sup> (“be or become a Roman Catholic”). Their Lordships distinguished *Clayton*<sup>272</sup> by restricting its application to conditions requiring adherence to the Jewish faith, and declined to extend it to other religions. The conditions in *Clayton* and *Re Borwick*<sup>273</sup> were composite ones. Lord Wilberforce did not feel himself obliged, or indeed justified, in extending the conclusion reached in *Clayton*.<sup>274</sup> Thus that case did not lay down any general principle that all conditions subsequent relating to religious belief were void for uncertainty. It was a particular decision expressed in a particular way about one kind of religious belief or profession.<sup>275</sup>

In *Blathwayt v Lord Cawley*, Lord Wilberforce thought that as to public policy, despite the Race Relations Act 1968 (UK) and the European Convention of Human Rights 1950, it was not proper substantially to reduce freedom of testamentary disposition. His Lordship noted that “discrimination is not the same thing as choice, it operates over a larger and less personal area, and neither by express provision nor by implication has private selection yet become a matter of public policy”.<sup>276</sup>

*Re Tuck’s Settlement Trusts*<sup>277</sup> the English Court of Appeal further restricted the effect of *Clayton v Ramsden*.<sup>278</sup> A condition providing for forfeiture on the ground of failure to adhere to “the Jewish faith” was valid despite the latter case, because of the vesting in someone the power to decide whether or not the beneficiary has failed to adhere to the Jewish faith. This will only work however if there is no uncertainty of expression in the phrase “the Jewish faith”, which is perhaps questionable.

---

<sup>269</sup> [1943] 1 All ER 16.

<sup>270</sup> *Clayton v Ramsden* [1943] AC 320, 325 per Lord Atkin, 332 per Lord Romer.

<sup>271</sup> [1976] AC 397; [1975] 3 All ER 625 (HL); *Re Sutcliffe* [1982] 2 NZLR 330 (followed).

<sup>272</sup> [1943] 1 All ER 16.

<sup>273</sup> *Re Borwick, Borwick v Borwick* [1933] Ch 657.

<sup>274</sup> [1943] 1 All ER 16.

<sup>275</sup> Butt, *supra* note 115, at 400.

<sup>276</sup> [1976] AC 397, 426.

<sup>277</sup> *Re Tuck’s Settlement Trusts, Public Trustee v Tuck* [1978] Ch 49 (CA).

<sup>278</sup> [1943] 1 All ER 16.

Between 1943 (*Clayton v Ramsden*)<sup>279</sup> and 1978 (*Re Tuck's Settlement Trusts*),<sup>280</sup> there was some relaxation by the courts of their views of uncertainty. But this had the effect of rendering conditions based on religious belief less likely to fail. This was despite the tendency over this period to be less tolerant of religious discrimination, in whatever form. Since 1978 human rights legislation in both the United Kingdom and New Zealand has raised further questions about the underlying correctness of this approach.

#### 14. Conditions Affecting Freedom of Race

It would appear that it is not contrary to public policy to discriminate on the ground of race alone.<sup>281</sup> The Human Rights Act 1993 and the preceding Race Relations Act 1971 however make discrimination on the ground of race unlawful. Section 21 of the former Act prohibits discrimination on the grounds of sex, marital status, religious belief, ethical belief, colour, race, ethnic or national origins, disability, age, political opinion, employment status, family status, and sexual orientation. Specifically, discrimination on any of these grounds is unlawful in the fields of employment, education and accommodation. The Act does not however directly affect the freedom of testamentary disposition.

The view of Lord Wilberforce in *Blathwayt v Lord Cawley*<sup>282</sup> that, despite the Race Relations Act 1968 (UK) and the European Convention of Human Rights 1950, it was not proper substantially to reduce freedom of testamentary disposition, would appear to be equally applicable in New Zealand. There is reason to believe however that the courts will recognise that legislative provisions against discrimination have been greatly extended since the early 1970s, both in New Zealand and the United Kingdom.

Public policy should perhaps require the courts to give judicial recognition to changed perceptions of what is acceptable in social relations. That this would mean that private selection would become a matter of public policy must act as the greatest restraint upon any judges who sought to hold that testators should not have left their estate to their descendants who “be or become a Roman Catholic”. The difficulty is that relatively few of these conditions ever reach the courts, thereby denying the courts the opportunity to reconsider the matter.

---

<sup>279</sup> [1943] 1 All ER 16.

<sup>280</sup> *Re Tuck's Settlement Trusts, Public Trustee v Tuck* [1978] Ch 49 (CA).

<sup>281</sup> Cheshire and Burn, *supra* note 57, at 354.

<sup>282</sup> [1976] AC 397.



### 15. Conclusion

Whilst statutory provisions as to testamentary claims, the succession to Māori ancestral property, and wills and administration of estates, are being reviewed with the intention of introducing a new Succession Act, testamentary freedom to impose conditions upon gifts remains. Some difficulties have arisen due to the piecemeal way in which the law has developed. In the light of the fact that there are now certain areas where the common law sits uneasily with statutory provisions, it would be appropriate to examine the whole field of conditional gifts.

The effect of void conditions, and the tortuous field of uncertainty, may perhaps be left to the courts to resolve, but the field of illegal and repugnant conditions is intimately concerned with questions of public policy, and should be considered in that light. For a single example, it is doubtful as to how far, if at all, the requirements of public policy could invalidate conditions in wills tending to restrict the trade of a beneficiary.<sup>283</sup> Such decisions may properly be referred to Parliament for guidance.

Similarly, in the field of restraint on alienation, the tendency in modern cases has increasingly been to curtail the extent to which the dead hand of a testator may rule the living.<sup>284</sup> It is submitted that the courts are losing sight of the fundamental doctrine of repugnancy, and have unintentionally and unwittingly allowed the necessities of public policy to engraft certain exceptions to the rule against restraints on alienation.<sup>285</sup>

The public policy in the cases of gifts inducing separation of spouses is simply the desire to maintain the integrity of the family. But the social situation has altered somewhat since the time when most of these cases were decided, and it may be questioned whether it is appropriate for the courts to restrict the freedom of testamentary disposition in this way. The courts are reluctant to change long-established rules affecting testamentary dispositions even under the ambit of public policy.

Perhaps most importantly, while we retain the right to confer benefits upon whomsoever we wish whilst alive, then why not enjoy this right when one is deceased? Should Parliament intervene where the courts are reluctant to tread? That is ultimately its responsibility. But the common law has proven

---

<sup>283</sup> See *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd* [1968] AC 259, 328.

<sup>284</sup> Megarry, *supra* note 226, at 16.

<sup>285</sup> Cheshire and Burn, *supra* note 57, at 350.

itself quite capable of changing to meet contemporary requirements, and it is not to be supposed that the common law has lost this ability.

# GREAT ELUCIDATIONS: THE INTERPRETATION OF REVENUE STATUTES IN NEW ZEALAND

BY THOMAS GIBBONS\*

Statutory interpretation is more an art than a science. While certain “rules” or “canons” exist, it is difficult to know exactly how these will be applied in a given case. This article examines the various approaches to statutory interpretation, particularly in regard to revenue statutes. It considers historical and contemporary approaches in the light of various common law and statutory directives. The article shows that there is little consistency or consensus on how revenue statutes should be interpreted, but offers some guidelines for future courts performing this task.

## I. STATUTORY INTERPRETATION IN GENERAL

### *1. The Need to Interpret Statutes*

New Zealand is a Westminster democracy that crudely applies the doctrine of separation of powers. This doctrine requires that the legislature enacts laws, the judiciary applies them, and the executive administers and enforces them. There is a simple reason for this division of functions: the elected legislature cannot pass a law for every situation as it arises. Rather, the legislature establishes general rules to guide and regulate behaviour among the population as a whole. The judiciary steps in to resolve particular disputes involving particular people. They take the general rules enacted by the legislature and apply them to specific situations.

However, since these rules (or laws) are written as general guidelines, their application necessitates an intermediate step. When judges apply statutes, they must also interpret them. This is one of the most important tasks in judicial work. The New Zealand Law Commission noted in 1990 that, of 119 recent reported cases, legislation was “central” in 75 of them, and only 27 did not concern statutory matters at all.<sup>1</sup> Furthermore, as Lord Diplock has observed, “the words [of a statute] mean whatever they are said to mean by a majority of the members of the appellate committee dealing with the case”.<sup>2</sup>

---

\* LLB Honours student, University of Waikato.

<sup>1</sup> NZLC R17, 1-2.

<sup>2</sup> *Carter v Broadbeer* [1975] 3 All ER 158, 160.

Statutes, then, are given meaning by the courts, and this in turn suggests that all statutes require some kind of interpretation.

## 2. *Traditional Approaches to Interpretation*

Despite statutory interpretation being such an important part of judging, there is little consensus on *how* statutes should be interpreted. Many approaches have been described and discerned, and it is best to begin with the three traditional “canons” or “tools” that scholars say have guided interpretation in the past.

The first of these is the literal rule. This requires that words be given their natural or ordinary meaning, and emphasises “the paramountcy of the statutory text”.<sup>3</sup> The second is the golden rule. This allows judges to depart from the literal rule to avoid inconsistency or absurdity.<sup>4</sup> The third is the mischief rule, which, when meaning is unclear, involves construing statutes so as to cure the mischief which the statute sought to remedy.<sup>5</sup>

Despite the fact that the mischief rule can be dated back to the sixteenth century,<sup>6</sup> “far too much” of statutory interpretation before 1900 strictly followed the literal rule.<sup>7</sup> Since then, however, the purposive approach (a relation of the mischief rule) has become the standard approach towards the interpretation of statutes. Under the purposive approach, the words of the legislation are read in their fullest context, and with a view to giving effect to the purpose of the legislation.<sup>8</sup>

## 3. *New Zealand and the Purposive Approach*

New Zealand has had an Act to guide the interpretation of statutes since 1888. The relevant provision of the 1888 Act was later re-enacted (virtually unchanged) as the celebrated s 5(j) of the Acts Interpretation Act 1924, which reads:

Every Act, and every provision or enactment thereof, shall be deemed remedial, whether its immediate purport is to direct the doing of anything Parliament deems to

---

<sup>3</sup> Burrows, *J F Statute Law in New Zealand* (2nd ed, 1999) 108.

<sup>4</sup> Lee, “A Purposive Approach to the Interpretation of Tax Statutes” (1999) 20(2) *Statute Law Review* 124, 125.

<sup>5</sup> *Ibid*, 125-126; Burrows, *supra* note 3.

<sup>6</sup> *Heydon's Case* (1584) 3 Co Rep 7a; 76 ER 637.

<sup>7</sup> Burrows, *supra* note 3, at 116.

<sup>8</sup> Burrows, *supra* note 3, at 118.

be for the public good, or to prevent or punish the doing of anything it deems contrary to the public good, and shall accordingly receive such fair, large, and liberal construction and interpretation as will best ensure the attainment of the object of the Act and of such provision or enactment according to its true intent, meaning, and spirit.

Section 5(j) says that *every* statute should be “deemed remedial”, and receive a “fair, large, and liberal” interpretation in accordance with its “true intent, meaning, or spirit”. These words appear to demand that every statute be interpreted purposively. They certainly do not allow a strict literal meaning to be applied if such an interpretation would go against the intention behind the relevant Act.

The Acts Interpretation Act 1924 and s 5(j) were repealed in 1999 and replaced by the Interpretation Act 1999 and s 5(1). The latter Act is considered in more detail later in this article. It should be remembered that, given the language of s 5(j), all judicial decisions on the interpretation of New Zealand statutes between 1888 and 1999 were supposed to follow its directions. As Thomas J recently stated in *R v Pora*, “it needs to be emphasised that canons of construction are Judge-made”,<sup>9</sup> and so should be “subservient to the purposive approach”.<sup>10</sup>

## II. THE INTERPRETATION OF REVENUE STATUTES

### 1. *Special Interpretation Rules for Revenue Statutes?*

It is a reasonably common belief among statutory commentators that, traditionally, revenue statutes were interpreted strictly against the state.<sup>11</sup> There is some evidence that this is true. In *Warrington v Furbor*, Lord Ellenbrough CJ remarked that “where the subject is to be charged with a duty, the cases in which it is to be attached ought to be fairly marked out”.<sup>12</sup> Further, in *R v Winstanley*, Lord Wynford stated that “if there is any doubt about these words, the benefit of the doubt should be given to the subject”.<sup>13</sup>

<sup>9</sup> *R v Pora* [2001] 2 NZLR 37, 68.

<sup>10</sup> At 69.

<sup>11</sup> See Richardson, “Appellate Court Responsibilities and Tax Avoidance” (1985) 2 *Australian Tax Forum* 3, 4; Lee, *supra* note 4, at 126 and 132; Burrows, *supra* note 3, at 130.

<sup>12</sup> *Warrington v Furbor* (1807) 8 East 242, 245; 103 ER 334, 335; cited by Williams, “Taxing Statutes are Taxing Statutes: The Interpretation of Revenue Legislation” (1978) 41 *Modern Law Review* 404, 409.

<sup>13</sup> *R v Winstanley* (1833) 1 CJ 434, 445; 148 ER 1492, 1496; cited *ibid*, at 410.

One commentator<sup>14</sup> dates the notion that revenue statutes should be interpreted more restrictively than other statutes to the 1869 decision of *Partington v A-G*, where Lord Cairns stated:

[T]he principle of all fiscal legislation is this. If the person sought to be taxed comes within the letter of the law, he must be taxed .... On the other hand if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free however apparently within the letter of the law the case might otherwise appear to be.<sup>15</sup>

Lord Cairns commented only 10 years later that the principle of strict interpretation for revenue statutes “probably meant little more than ... [that] the taxpayer had the right to stand on a literal interpretation of the words used”.<sup>16</sup> Lord Cairns seems to be suggesting that revenue statutes should be interpreted on the words used, rather than strictly against the state in all cases. Given that the literal rule was the most common method of interpretation for *all* statutes before 1900, Lord Cairns’ statements can be seen primarily as a product of their times.

## 2. *Special Rules for Revenue Statutes in New Zealand*

While a literal interpretation for the interpretation of revenue statutes dates back to the nineteenth century in England, Sir Ivor Richardson has suggested that it became the standard method throughout the Anglo-Commonwealth after World War One.<sup>17</sup>

Richardson’s date is accurate in the New Zealand context. In the 1919 case of *McNab v Commissioner of Taxes*, the Supreme Court commented that “[a] taxing act is the last class of statute in construing which departure from the plain and literal meaning should be allowed”.<sup>18</sup> This approach was adopted regularly in the ensuing years,<sup>19</sup> and in 1960 the Court of Appeal made similar comments in *CIR v Lilburn*:

---

<sup>14</sup> Vinnelot, “Interpretation of Fiscal Statutes” [1982] *Statute Law Review* 78.

<sup>15</sup> *Partington v A-G* (1869) LR 4 HL 100, cited *ibid*, at 78.

<sup>16</sup> *Pryce v Monmouthshire Canal and Railways Cos.* (1879) 4 App Cas 197, 202-203, cited *ibid*, at 79-80.

<sup>17</sup> Richardson, *supra* note 11, at 5.

<sup>18</sup> *McNab v Commissioner of Taxes* [1919] NZLR 267, 275.

<sup>19</sup> See *Timaru Herald Co Ltd v CIR* [1938] NZLR 978; *South Island Motor Union Mutual Association v Fire Service Council* [1952] NZLR 163; and *Laws NZ*, “Statutes”, para 185.

A revenue statute must be construed strictly, and the subject is not to be taxed unless the language of the statute clearly imposes the obligation ... and in the case of reasonable doubt the construction most reasonable to the subject is to be adopted.<sup>20</sup>

These comments do not quite reach the extent of the remarks by some English judges in the 1940s,<sup>21</sup> but they make it clear that s 5(j) was not considered relevant to the interpretation of revenue statutes. This is, of course, despite the fact that s 5(j) demands that *every* statute be deemed remedial.

The case of *Mangin v CIR* illustrates how a seemingly clear statement on how revenue statutes should be interpreted can conflict with s 5(j). First, the Court stated that the words are to be given their ordinary meaning, and that they are not to be given some other meaning simply because their object is to frustrate legitimate tax avoidance devices.<sup>22</sup> Secondly, the Court adopted the judgment of Rowlatt J that:

one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used.<sup>23</sup>

Thirdly, the Court said that, the object of the construction of a statute being to ascertain the will of the legislature, it may be presumed that neither injustice nor absurdity was intended; and that if a literal interpretation would produce such a result, and the language admits of an interpretation which would avoid it, then such an interpretation may be adopted. Fourthly, the Court said that the history of an enactment and the reasons which led to its being passed may be used as an aid to its construction.<sup>24</sup>

---

<sup>20</sup> *CIR v Lilburn* [1960] NZLR 1169, 1175-1176.

<sup>21</sup> See eg *Russell v Scott* [1948] AC 422, 433, per Lord Simonds: "the subject is not to be taxed unless the words of the taxing statute unambiguously impose the tax upon him"; and *Mosley v George Wimpey & Co Ltd* [1944] 2 All ER 135, 137, per Macnaghten J: "From the very foundation of the Courts of the common law at Westminster it has always been the duty of His Majesty's judgment to protect the subject from exactions by the Crown".

<sup>22</sup> Cf Turner J's (albeit dissenting) judgment in *Marx v Commissioner of Inland Revenue* [1970] NZLR 182, 208, that moral precepts are not applicable to the interpretation of revenue statutes.

<sup>23</sup> *Cape Brandy Syndicate v Inland Revenue Commissioners* [1921] 1 KB 64, 71, per Rowlatt J, approved by Viscount Simons LC in *R v Canadian Eagle Oil Co Ltd* [1946] AC 119; [1945] 2 All ER 499).

<sup>24</sup> *Mangin v CIR* [1971] NZLR 591, 594.

The judgment of Rowlatt J adopted above has been described by Professor John Prebble as “possibly the most cited explanation of the restrictive approach to interpreting tax statutes in English jurisprudence”.<sup>25</sup> There is, continues Prebble, a conflict between this statement and s 5(j) that is “not just apparent but real”:<sup>26</sup> the restrictive and purposive approaches cannot be reconciled. It is worth noting, though, that in the 1994 case of *Alcan v CIR* the Court cited the passage from *Mangin* with approval, with McKay J adding that all statutes, whether revenue or otherwise, should be interpreted under the same basic approach.<sup>27</sup>

In *CIR v International Importing Ltd*, Turner P explicitly considered s 5(j) in relation to the interpretation of revenue legislation. He noted that this provision was “normally of little material assistance” in the construction and interpretation of revenue statutes.<sup>28</sup> He was certainly correct in the sense that it had been little used in the past. His views also correspond with those of Professor Burrows, who has noted that one of the problems with s 5(j) is that, despite the language of the provision, not all statutes are really capable of being deemed remedial, and that revenue statutes are in this category.<sup>29</sup> With this in mind, it is easy to see why few judges have followed the advice of Anthony Molloy, who noted that s 5(j) was the “obligatory starting point” for the interpretation of revenue statutes, and that the Land and Income Tax 1954 (forerunner to the 1976 and 1994 Acts) was no exception.<sup>30</sup>

### 3. Ivor Richardson and a New Approach

Sir Ivor Richardson, the current President of the New Zealand Court of Appeal, taught taxation law at Victoria University and was counsel in a number of major revenue cases before his appointment to the bench. He has also adjudicated in a number of cases in this area, and his taxation expertise has been invaluable in moving the New Zealand jurisprudence away from a restrictively literal approach.

In the case of *Lowe v CIR*, Richardson J observed that “[o]ur interpretation of the paragraph must turn on the scheme and language of the statutory

---

<sup>25</sup> Prebble, “The Interpretation Provisions in the New Zealand Income Tax Act 1994” (1999) 30 *VUWLR* 49, 51.

<sup>26</sup> *Ibid*, 53.

<sup>27</sup> *Alcan v CIR* [1994] 3 *NZLR* 439, 443.

<sup>28</sup> *CIR v International Importing Ltd* [1972] *NZLR* 1095, 1096.

<sup>29</sup> Burrows, *supra* note 3, at 140.

<sup>30</sup> Molloy, A P *Molloy on Income Tax* (1976) 1.



provision giving the words their ordinary meaning in their context”.<sup>31</sup> This “scheme and language” approach is an interesting one, but the notion of “context” seems tacked on. Indeed, Richardson J’s statement seems fairly unhelpful in light of the previous cases discussed. The scheme and language of a statute are obviously important in its interpretation. Richardson J is not providing guidelines of any general use.

*Lowe* is interesting, however, because the “scheme and language” approach represents an interim stage in Richardson J’s developing interpretation jurisprudence. The next case examined will show that, with the “scheme and language” approach, Richardson J was halfway towards a major interpretation directive.

In *Challenge Corporation v CIR*, statutory interpretation was an important issue. The relevant section 99 was in an “uneasy compromise” with other sections of the Income Tax Act 1976. In the Court of Appeal, Richardson J went beyond *Lowe*, and stated:

[T]he twin pillars on which the approach to statutes mandated by section 5(j) of the Acts Interpretation Act 1924 rests are the scheme of the legislation and the purpose of the legislation. Consideration of the scheme of the legislation requires a careful reading in its historical context of the whole statute, analysing its structure and examining the relationships between the various provisions and recognising any discernable themes and patterns and underlying policy considerations.<sup>32</sup>

The “scheme and purpose” approach is not unique to New Zealand. In the English case of *Ramsey v IRC*, Lord Wilberforce noted that:

The subject is only to be taxed on the clear words, not on the intendment or equity of an Act. Any taxing Act of Parliament is to be construed in accordance with this principle. But what are clear words is to be ascertained on normal principles. Those words do not confine the courts to literal interpretation. There may, indeed should, be considered the context and *scheme* of the relevant Act as a whole and its *purpose* may, indeed should, be regarded.<sup>33</sup>

It is submitted that the scheme and purpose approach provides a helpful guideline for the interpretation of revenue statutes. It avoids the “traditional” strictly literal interpretation, as well as the overly-purposive section 5(j).

---

<sup>31</sup> *Lowe v CIR* [1981] 1 NZLR 326, 342.

<sup>32</sup> *Challenge Corporation v CIR* [1986] 2 NZLR 513, 549 (CA). Note that similar comments were made extra-judicially by Richardson, supra note 11.

<sup>33</sup> *Ramsey v IRC* [1981] 2 WLR 449, 456 (emphasis added).

While paying regard to both approaches, it brings them together and avoids the problems that a heavy dependence on either can create.

### III. CURRENT STATUTORY DIRECTIVES

#### *1. The Income Tax Act and Interpretation*

This article has thus far considered the interpretation of three main pieces of New Zealand revenue legislation: the Land and Income Tax Act 1954, the Income Tax Act 1976, and the Income Tax Act 1994. The 1994 Act is today our primary concern, as it has superseded the previous two Acts.

One of the reasons that the 1976 Act was replaced by the 1994 Act was that the former was poorly structured, a problem exacerbated by the need for repeated amendment.<sup>34</sup> The 1994 Act is considered by some a large improvement in terms of both structure and drafting,<sup>35</sup> though it was never intended to make substantive changes to the law.<sup>36</sup> Two features of the 1994 Act are particularly notable. The first is the alphanumeric section referencing system, which helps accommodate new amendments as well as providing a tidier structure. The second is the presence of purpose and interpretation provisions at the beginning of the Act.

Section AA1 of the Act reads:

AA1 The main purposes of this Act are

- (a) to impose tax on income;
- (b) to impose obligations in respect of tax;
- (c) to set out rules to be used to calculate the tax and to satisfy the obligations imposed.

Section AA3(1) reads:

AA3(1) Principle of Interpretation

The meaning of a provision of this Act is found by reading the words in context and, particularly, in light of the purpose provisions and the way in which the Act is organised.

Section AA1 in particular has been the subject of criticism from a number of scholars. Some have commented that it is "of no perceivable help in

---

<sup>34</sup> Burrows, *supra* n 3, at 73.

<sup>35</sup> Keith, "The Need to Rewrite Tax Legislation" (1997) 3 NZJTL 96, 100-101.

<sup>36</sup> Nannestad, "Reading the 1994 tax legislation" (1995) 1 *NZ Tax Planning Report* 5.

interpretation”,<sup>37</sup> and that it is “meaningless”.<sup>38</sup> Professor Prebble has stated that on its face it is “so obvious as to be redundant”.<sup>39</sup>

The references to both “purpose” and “organisation” are curiously analogous to Richardson J’s “scheme and purpose” approach, but, while AA3(1) goes beyond section 5(j) in requiring that words be read in context (rather than simply demanding a purposive-type approach), it also promises more than it achieves.<sup>40</sup> As this article moves onto a discussion of the Interpretation Act 1999, it will become clear that s AA3(1) provides little of use beyond existing principles, and, as a guideline to interpretation, has largely been ignored.

## 2. The Interpretation Act 1999

The impact and role of section 5(j) on the interpretation of revenue statutes have thus far been of considerable importance to this article. However, in 1999 this section was repealed and replaced by section 5(1) of the Interpretation Act 1999. Section 5(1) reads:

5. Ascertaining meaning of legislation - (1) The meaning of an enactment must be ascertained from its text and in light of its purpose.

Though the new Interpretation Act had been in gestation for a number of years,<sup>41</sup> there was little alteration between the Law Commission’s draft and the actual Act. Rupert Glover has suggested that neither is there much variance in the approach of the courts between section 5(j) and the new section 5(1). Looking over the first few months of the new section, he commented that “[e]arly indications are that this new provision ... will not be treated as materially different from the earlier section”.<sup>42</sup> It appeared “likely” that jurisprudence on section 5(j) would remain “a canon for the courts” in relation to section 5(1).<sup>43</sup>

So what has happened with section 5(1)? In *R v Rongonui*, Thomas J stated that while section 5(1) appeared to add “little or nothing” to section 5(j), “there is no doubt that the change in wording was introduced to emphasise

---

37 McKay, “Interpreting Statutes – A Judge’s View” (2000) 9 Otago LR 743, 749.

38 Nannestad, *supra* n 36.

39 Prebble, *supra* n 25, at 55.

40 *Ibid*, 62.

41 NZLC, *supra* n 1.

42 Glover, *R Acts Interpretation* (1991) 1-91.

43 *Ibid*, 1-92.

to the Courts the importance of the *purpose* of a statutory provision in arriving at its meaning”.<sup>44</sup> In *Warner v United Kingdom*, Nicholson J used case law on section 5(j) to back up his application of section 5(1).<sup>45</sup> Elias CJ and Tipping J in *R v Pora* mentioned section 5(1) but did not suggest that it had wrought any great changes to methods of interpretation.<sup>46</sup>

This kind of approach has generally been followed for the interpretation of revenue statutes as well. In *Vela Fishing v CIR*, Penlington J stated some “agreed” principles of interpretation, but section 5(1) was not discussed beyond a brief mention.<sup>47</sup> In *Newman v CIR*; *Holdsworth v CIR*; *Hair v CIR*, Smellie J used the new section as an aid to interpretation, but made no suggestion that it would bring any major changes to existing interpretation methods.<sup>48</sup> In *CIR v Auckland Harbour Board*, the Privy Council briefly considered the issue. Their Lordships noted that the Interpretation Act required a “liberal construction” of the relevant provision, in the “context of the general scheme” of the legislation, and “in the purposive spirit” as prescribed in *Challenge Corporation*.<sup>49</sup>

These cases and others<sup>50</sup> suggest that Glover’s commentary above is correct: section 5(1) will be treated similarly to the earlier provision. Indeed, section 5(1) may well be ignored in the interpretation of revenue statutes just as section 5(j) has been in the past.

#### IV. A RECENT CASE EXAMPLE

The recent case of *CIR v BNZ Investments* sheds light on this point. This case hinged on the interpretation of section 99 of the Income Tax Act 1976. Section 99 is an anti-avoidance provision, and, in simple terms, it makes arrangements that have the purpose or effect of avoiding income tax void against the Commissioner of Inland Revenue.<sup>51</sup> The Commissioner may then adjust the assessable income of the relevant person to balance this avoidance.<sup>52</sup>

---

<sup>44</sup> *R v Rongonui* [2000] 2 NZLR 385, 431 (emphasis added).

<sup>45</sup> *Warner v United Kingdom* [2001] 1 NZLR 331, 337.

<sup>46</sup> *R v Pora* [2001] 2 NZLR 37, 41.

<sup>47</sup> *Vela Fishing Ltd v CIR* (2000) 19 NZTC 15885, 15892. *Mangin* (as cited in *Alcan*) was described in some detail, however (at 15892-15893).

<sup>48</sup> *Newman v CIR*; *Holdsworth v CIR*; *Hair v CIR* (2000) 19 NZTC 15666, 15685.

<sup>49</sup> *CIR v Auckland Harbour Board* (2001) 20 NZTC 17008, 17011.

<sup>50</sup> See eg *Case V4* (2001) 20 NZTC 10045, 10053.

<sup>51</sup> Income Tax Act 1976, s 99(2).

<sup>52</sup> Income Tax Act 1976, s 99(3).

The Court of Appeal delivered three separate judgments. The dissent of Thomas J is, for our purposes, the most interesting. Thomas J saw the main issues in the case as:

essentially questions of statutory interpretation. The sole objective must be to give effect to Parliament's intent. For this purpose, the Court is required to examine the text of the section in light of its purpose, the scheme of the statute and, as far as it can be gleaned, the legislative policy. The resulting answers can be said to represent Parliament's intent.<sup>53</sup>

Thomas J's references to both "purpose" and "scheme" indicate a nod towards Richardson J's comments in *Challenge Corporation*. The reference to "the text of the section in light of its purpose" is, in turn, an allusion to section 5(1). Thomas J seems quite comfortable combining these approaches. Overall, he was adamant that the courts needed to take "a purposive approach to section 99",<sup>54</sup> and that even in tax statutes, "[t]he purposive approach is to prevail".<sup>55</sup>

The majority of Richardson P, Keith and Tipping JJ reached a different conclusion in finding that section 99 had not been breached. It is significant that they too took a purposive approach in that they looked at the "function" of section 99 and at the Legislature's intentions.<sup>56</sup> This kind of "restrictive-purposive" approach taken by the majority highlights the fact that "purposive" can mean different things to different people. Even within one case, it can lead different judges to very different results.

## V. CONCLUSION

Law as a discipline looks both backwards and forwards. I have examined how revenue statutes have been interpreted in the past. How should judges interpret them in the future?

It is submitted that, in line with the judgment in *Alcan*, revenue statutes should be interpreted in the same way as other statutes. Thomas J commented in his dissent in *BNZ Investments* that there are "a baggage of judicial rules" in relation to tax matters, and noted that "[l]egalistic

---

<sup>53</sup> *CIR v BNZ Investments Ltd* (2001) 20 NZTC 17103, para 61.

<sup>54</sup> *Ibid*, para 90.

<sup>55</sup> *Ibid*, para 117.

<sup>56</sup> *Ibid*, para 41. This majority judgment was delivered by Richardson P. It is interesting to note that he makes no mention of the "scheme and purpose" approach taken in *Challenge Corporation*.

requirements and suppositions overlay the plain task of statutory interpretation”.<sup>57</sup> There is a need to abandon this baggage.

The “scheme and purpose” approach taken by Richardson J in *Challenge Corporation* should also be considered. Judges should begin with the words in their context and with an eye towards purpose. Relevant legislation points us in this direction as well. Section 5(1) of the Interpretation Act 1999 provides a statutory mandate to consider the text in the light of the purpose. Section AA3(1) takes a similar approach.

By combining section 5(1), *Alcan*, and the “scheme and purpose” approach, judges required to interpret revenue statutes in the future need not be hindered by the traditional restrictive reading. The interpretation of revenue statutes can be modernised and brought into line with current methods of interpretation for statutes in general.

Professor Prebble has noted that inculcating a fully purposive approach to the interpretation of revenue statutes would require a “fundamental change on the part of the courts”.<sup>58</sup> This kind of fundamental change is perhaps unlikely, given the history of courts’ interpretation, and the majority opinion in *BNZ Investments* seems to bear this out. While it recognised the importance of the Legislature’s intentions, the majority were not prepared to make this kind of “fundamental change”. Thomas J, on the other hand, was more comfortable with revenue statutes being interpreted in the same way as other statutes.

It is suggested that the approach of Thomas J is to be preferred. In line with both statute and case law, a restrictively literal approach is now outdated. However, the restrictive-purposive approach of the majority in *BNZ Investments* seems to revert to the special rules that guided the interpretation of revenue statutes in the past. It is submitted that the meaning of a tax statute be ascertained from its text, in the light of its purpose, and with *Alcan* and *Challenge Corporation* in mind.

---

<sup>57</sup> Ibid, para 63.

<sup>58</sup> Prebble, supra n 23, at 56. Note that Prebble himself prefers a more purposive interpretation for revenue statutes than is currently taken by the courts (at 62).

# NO RIGHTS WITHOUT RESPONSIBILITIES? THIRD WAY AND GLOBAL HUMAN RIGHTS PERSPECTIVES ON CITIZENSHIP

BY PAUL HAVEMANN\*

## 1. Introduction

Third Way thinking is informed by recognition of the impacts of globalisation, the emergence of the Risk and Network societies, reflexive modernisation, and detraditionalisation. Third Way politicians and intellectuals have made much of the need to modernise political, economic and cultural institutions and processes in the face of these revolutionary changes yet have mostly neglected to concretise ideas about citizenship rights and obligations. To combat exclusion, poverty and authoritarianism this article calls for the modernisation of citizenship based on a “Human Rights Way”.

## 2. *The Third Way: Modernisation of Subjecthood or of Citizenship?*

Intellectuals on both the Right and Left,<sup>1</sup> with the notable exception of Anthony Giddens,<sup>2</sup> consistently revisit the theme that there is little new or utopian in the Third Way, and critiques of the Third Way now abound.<sup>3</sup>

In early 1999 the Prime Ministers of Britain and Germany provided the critics with plenty of ammunition in a manifesto: “Europe: The Third Way/Die Neue Mitte”. Blair and Schroeder begin encouragingly enough with the assertion that “(f)airness and social justice, liberty and equality of opportunity, solidarity and responsibility to others” are “timeless values”.

The word “liberty” almost never appears again in the document, as Ralf Dahrendorf pointed out shortly after the manifesto was released. He notes with apparent approval that “equality” is dispensed with as a goal and replaced by social inclusion and justice. Dahrendorf likens much Third Way governance to the “Singapore model” in its authoritarian tendencies. He

---

\* Professor of Law, School of Law, University of Waikato

<sup>1</sup> See Halpern (ed), “The Third Way: summary of the NEXUS online discussion” at URL [www.netnexus.org/library/papers/3way.html#Background](http://www.netnexus.org/library/papers/3way.html#Background) 27/5/98.

<sup>2</sup> Giddens, *A Beyond Left and Right: the future of radical politics* (1994), *The Third Way: the renewal of social democracy* (1998), and *The Third Way and its Critics* (2000).

<sup>3</sup> See Barkan, “The Third Way / Die Neue Mitte” (2000) *Spring Dissent* 51-65 and Giddens (2000) *supra* note 2.

cites the rise of law and order politics, the split between rowing and steering in the new public management, the proliferation of “quangos”, and the internationalisation of decision-making at the level of undemocratic and unaccountable bodies such as NATO, the IMF, and the EU Council of Ministers. I would add the OECD and WTO.

In their Third Way manifesto, Blair and Schroeder make only a fleeting reference to the need to shape a society with equal rights of men and women. This reference occurs in the context of combating crime, social disintegration and drug abuse, and in recognition of changing gender roles and life expectancy and consequent pressure on social security systems. They also suggest that safety on the street should be a civil right<sup>4</sup> (sic) and, ominously, that there should be no rights without responsibilities. Otherwise, there is virtually no articulation of the content of Third Way citizenship in terms of human rights.

Anthony Barnett, founding director of Charter 88, the UK group promoting the case for a written constitution and Bill of Rights for Britain, is highly critical of the current Blairite version of the Third Way.<sup>5</sup> He critiques the strong centralising, conservative and incrementalist tendencies of some of its leaders (Straw, Mandelson, and Irvine). Barnett decries the “corporate populism” that is providing the ideological spin to capture New Labour’s navigational coordinates, as it steers between the consensus politics which led to and sustained the Keynesian Welfare State (KWS) and the conviction politics which drove the Thatcherite revolution down the path to market fundamentalism. The problem he identifies is that New Labour has attended to the overwhelming feeling of a need for change, while retaining its predecessors’ relatively authoritarian mode of governance and preoccupation with productivism. Barnett describes the result as the “modernisation of subjecthood”.

This “modernisation of subjecthood” seems not only to involve de-emphasising ideas about a free society in the form of liberty (civil and political) rights, but also to consign economic, ecological, social and cultural rights to the back burner.

I argue that, if the specific content of citizenship rights continues to be neglected in Third Way political thought, this omission will constitute the fundamental flaw in the architecture of Third Way governance, and that the Third Way ought to be about the modernisation of citizenship. A basic

---

<sup>4</sup> Barkan, *supra* note 3, at 54.

<sup>5</sup> Barnett, “Corporate control” (1999) February *Prospect* 24-29.



project for progressives must be to ask how Third Way politics contribute to this. Part of my answer is that, for renewal of radical politics in late modern times, the state and supra-state entities must work actively with civil society to respect, fulfil and protect all human rights as citizenship rights.

Giddens makes a number of brief and skeletal suggestions in support of a human rights-based approach to the modernisation of citizenship.<sup>6</sup> These are very much at a macro and global level, leaving the implications for micro and local applications yet to be addressed. For instance, Giddens supports Sen's "capabilities" approach to measuring development progress based on civil and political freedoms as well as rights to health and education and other human rights. In this framework, as in the one I advance, human rights are basic, not superstructural luxuries. In the context of the redefinition of state sovereignty being brought about by globalisation, Giddens identifies the salience of the growth of the rights of the individual in international law, a body of law in which states have hitherto been the prime subjects. He promotes the idea that the EU can take a lead in animating transnational codes and modes of human rights-based governance for the sustenance of a global cosmopolitan regime.<sup>7</sup> So far, so good, on the intellectual front.

### *3. The Third Way: Learning from which Experience?*

I confess to misgivings about the depth and breadth of commitment of Third Way European politicians to a human rights-based approach to modernising citizenship. These doubts were confirmed by a section in the manifesto entitled "Learning from Experience". It consists of an analysis of the KWS project which echoes New Right fundamentalism<sup>8</sup> far more than it articulates an auto-critique of the centre left from the centre left. For instance, we are told that the lessons not to be repeated derive from the experiences that:

- social justice was confused with equality of outcome;
- social spending became the way social justice was measured;
- collective interests were unduly privileged over individual achievement, success, the entrepreneurial spirit and responsibility and community spirit;
- rights must be accompanied by responsibilities;

---

<sup>6</sup> Giddens (2000), *supra* note 2, at 130, citing with approval Sen, *A Development As Freedom* (1999).

<sup>7</sup> Giddens (2000), *supra* note 2, at 161-2, citing with approval Held, *D Democracy and the Global Order* (1995).

<sup>8</sup> See Pierson, *C Beyond the Welfare State* (1991).

- governments' ability to secure growth and jobs was unduly exaggerated;
- wealth was under-valued;
- weaknesses of markets were over-stated; and
- "community spirit" was subordinated to universal social safeguards.

In a 2000 *Dissent* piece, Joanne Barkan has critically annotated the "Europe: The Third Way/Die Neue Mitte" manifesto. She makes a telling point that:

many people argue that universal safeguards (such as health care) foster solidarity and build a cohesive citizenry. So what is meant by community spirit here?<sup>9</sup>

Surely, we learnt more than a decade before the manifesto came out that the Fordist class compromise was a relatively short-lived settlement that served to deliver some trophies of class struggle, and that the KWS was also profoundly functional to capital and economic growth while it lasted.<sup>10</sup> Among the lessons to be avoided, should not Third Way politicians also, or instead, have listed the atrocities wreaked on citizens by market fundamentalism?

Jeff Faux's 1999 *Dissent* piece "Lost on the Third Way"<sup>11</sup> lists flaws in the Clinton version:

- the US Third Way is primarily a rationalisation for a political compromise *between* left and right;
- Clinton's 1994 strategy was simply "to take an essentially conservative programme and repackage it for liberals" so that the Democratic Party's base has "shrunk to those whose politics is driven by fear of the Republicans";
- under Clinton's Third Way, Wall Street dominates American politics more than ever, and social investment in health care and the social safety net have further deteriorated;
- by joining the Right's attack on government, Third Way-ers have in fact undermined public support for investment in the public sector and demoralised it as well;

---

<sup>9</sup> Barkan, *supra* note 3, at 53.

<sup>10</sup> Therborn, "Welfare States and Capitalist markets" (1987) 30 (3/4) *Acta Sociologica* 237; Lipietz, A *Towards a New Economic Order: Post-Fordism, Ecology and Democracy* (1992); and Esping-Andersen, G *Three Worlds of Welfare Capitalism* (1990).

<sup>11</sup> Faux, "Lost on the Third Way" (1999) *Spring Dissent* 75-76.

- Third Way-ers, it must be conceded, do stress that rebuilding efficient as well as compassionate government is an important element in the reconstruction of social democracy;
- Clinton's Third Way has narrowed focus from the governance of society to the governance of the public sector; the issue of poverty has become the issue of managing welfare; the issue of health care has become the issue of Medicare and Medicaid budgets; and the issue of the redistribution of income and wealth has become the issue of the distributional impact of government spending;
- the Third Way does not therefore constitute the sought-after vehicle for the "alliance of progress and justice". Instead, this way merely lowers the public's expectation of governments' capacity to deliver either progress or justice.

Robert Reich, Clinton's former Secretary of Labor, also saw little promise in the Clintonite version of the Third Way. In an article in *The American Prospect*,<sup>12</sup> he cites its perilous path, its lack of a natural constituency, and the inescapable and banal dilemma USA Third Way-ers (practical idealists) pose for themselves: how to liberate market forces while easing the transition for those who would otherwise fall behind. He concludes that Third Way leaders must broker a new social contract between those who have been winning and those who have been losing in the US prosperity stakes. The Bush Administration will no doubt follow the Clinton path further to the right: after 11 September 2001, patriotism has been increasingly militarised and given respectability.

Reich urges a new "patriotic" communitarianism on us. This sounds like revived Fordism without the collective memory of World War Two to legitimate it, or possibly a slogan for the particular US version of the workfare state with a tincture of nationalism masquerading as patriotism thrown in to make it palatable to Americans.

In the diagram below, adapted from Giddens' diagram,<sup>13</sup> the Third Way paradigm is contrasted with its immediate predecessors:

---

<sup>12</sup> Reich, "We are all Third Wayers Now" (1999) March/April *The American Prospect* 46-51.

<sup>13</sup> Giddens, "After the left's paralysis" *New Statesman* 1 May 1998.

Paradigm attributes	Keynesian Welfare State	New Right	Third Way
Hegemonic ideology	Class politics of the Left	Class politics of the Right	Modernising movement of the Centre
Market ethos	Old mixed economy	Market fundamentalism	New Mixed economy
Governance ethos	Corporatism: state dominates civil society	Minimal state	New democratic state
Ethos of national identity	Internationalism/jingoism/populism	Conservative nationalism/jingoism/populism	Cosmopolitan nation / globalism
Welfare ethos	Cradle-to-grave welfare state	Residual welfare safety net	Social investment state

Some prescient academic analysts<sup>14</sup> classify the conception of the state exemplified in the political practice of Third Way politicians as that of a Schumpeterian Welfare State (SWS). The SWS differs markedly from the KWS ideal. The basis for both belonging to and governance of KWS was social contract citizenship, consisting of a universally enjoyed bundle of political freedoms, civil rights, civic obligations and social rights. Official discourse was social solidaristic and tried to call up notions of radical, egalitarian, cooperative and emancipatory communitarianism.

In contrast, in the SWS or workfare-welfare state, local and global market imperatives prevail. The process of a modernising subjecthood demands new fealty and homage to the market. Citizens are transformed into stakeholders (some of them shareholders, all of them consumers) whose individualised “stake in the action” is underwritten by the state only so long as they perform a set of duties, principally to earn a living in order to support themselves and their dependents. The space between citizen/subject and state is hollowed out and replaced by the market.<sup>15</sup> Official discourse continues to be based on social contractarian solidarity but tends to conservative communitarianism tempered by moral authoritarianism on the

<sup>14</sup> Dean, H and Melrose, M *Poverty, Riches and Social Citizenship* (1999) 102-105, citing Jessop, “The transition to Post Fordism and the Schumpeterian workfare state” in Burroughs, R and Loader, B (eds), *Towards a Post Fordist Welfare State?*(1994); and Gray, “Hollowing Out the Core” *The Guardian*, 8 March 1995.

<sup>15</sup> Havemann, “Social Citizenship, Re-commodification and the Contract State” in Christodoulidis, E (ed) *Communitarianism and Citizenship* (1998) 134.

one hand and competitive individualism on the other. This still closely resembles a New Right societal paradigm

I think it is important to try to distinguish between the Third Way as an intellectual project and the manifestations of the Third Way in the political arena, for the time being anyway. So, before trashing the Third Way, one must remind oneself that the concept may offer more space than New Right market fundamentalism ever did for progressive politics. Andrew Gamble and Gavin Kelly, for instance, suggest that the Third Way combines “new and heterodox ideas ... which recognise that there has been a sharp break in political continuity which may render many former political certainties obsolete”.<sup>16</sup>

This theme is also central to Giddens’ utopian realist articulations of the shape of radical politics in the future<sup>17</sup> as well as his more pragmatic recent writings.<sup>18</sup> Giddens’ Third Way blueprint embodies what are for me largely unexceptional values such as:

- equality
- protection of the vulnerable
- freedom as autonomy
- no authority without democracy
- cosmopolitan pluralism

#### *4. Philosophic Conservatism<sup>19</sup>*

While I appreciate much of the utopian Third Way idea, I would criticise its failure to articulate adequately rights-based citizenship and its related tendency to promote the workfare state. Giddens listed “No rights without responsibilities” as one of the values of the Third Way. This principle has already been co-opted into the hegemonic ideology of the workfare state. For instance, we find it used in a passage entitled “Learning from Experience” in the manifesto I referred to earlier. The context in which it is used is specially revealing:

Too often rights were elevated above responsibilities, but the responsibility of the individual for his or her family, neighbourhood and society cannot be offloaded onto

---

<sup>16</sup> Halpern, *supra* note 1, cited 25 May 1998.

<sup>17</sup> Giddens (1994), *supra* note 2.

<sup>18</sup> Giddens (1998) and (2000), *supra* note 2.

<sup>19</sup> Giddens (1998), *supra* note 2, at 65-66.

the state. If the concept of mutual obligation is forgotten, this results in a decline of community spirit, lack of responsibility towards neighbours, rising crime and vandalism, and a legal system that cannot cope.<sup>20</sup>

Solidaristic but opaque and, for a long while now, highly contested, notions of “community spirit”, “the family”, and “the neighbourhood” are invoked. Even the spectre of lawlessness is subtly coupled with ideas about “rights without responsibilities”. The workfare state is premised on the modernisation of subjecthood based on new obligational, rather than rights-based, settlements. The language remains contractarian—for instance a “contract with the people”, a “bond of trust”, a “contract with America” - but, as with most contracts, rights flow to the powerful and responsibilities from the powerless. We ought also to remember that an obligational discourse, couched in the language of duties and hostile to rights talk, framed some of the attack on the KWS from both left and right.<sup>21</sup>

It is unsettling when Giddens also argues that a “prime motto” of the new politics ought to be *no rights without responsibilities* - though he says that it is highly important that social democrats stress that this applies not just to welfare recipients but to everyone.<sup>22</sup> Giddens’ version of *no rights without responsibilities* stresses the universality of the application of the principle to the rich, to corporations and to politicians, as well as to the poor as a term of the new social contract. Furthermore, he locates responsibility in government to enforce rights and responsibilities in terms of the need for those who profit from social goods to give back to the community.<sup>23</sup>

In Giddens’ most utopian work (1994) he argues that *responsibilities* are the clue to agency in implementing an agenda for radical politics. He says that in late modern times providentialism must be disavowed and responsibility assumed. He is careful to contrast responsibility with duty. Duty is imposed, whereas responsibility is assumed. Responsibility involves the reasoned and voluntary assumption of commitments to take on risk and to promote positive values such as the sanctity of life, universal human rights, the preservation of species, and care for present and future generations.<sup>24</sup>

<sup>20</sup> Barkan, *supra* note 3, at 53.

<sup>21</sup> Ignatieff, “Citizenship and moral narcissism” (1989) 60 (1) *Political Quarterly* 72; Parry, “Welfare state and Welfare society” (1985) 20(3) *Government and Opposition* 290; Twine, F *Citizenship and Social Rights: The interdependence of self and society* (1994); Roche, M *Rethinking Citizenship: welfare, ideology and change in modern society* (1992).

<sup>22</sup> Giddens (1998), *supra* note 2, at 65-66.

<sup>23</sup> Giddens (2000), *supra* note 2, at 52.

<sup>24</sup> Giddens (1994), *supra* note 2, at 20-21.

Giddens is defining *rights and responsibilities* differently from welfare politicians, who conflate rights with welfare benefits. Their project seems to be the modernisation of subjecthood. For me, in contrast, the modernisation of citizenship must be based on the principle: *no duties without rights*.

Italian left democrat Michele Salvati reminds us of the historical evolution of variants of Third Way politics since the nineteenth century. Emancipatory politics has come about before from a blending of liberalism and socialism. He suggests that socialism's contribution to progressive realisation of the welfare state came from Marxism's focus on material conditions leading towards the welfare state. The KWS project came about for creating the material social, economic, cultural and political conditions that have to underpin civil and political and social rights for all citizens.<sup>25</sup> Such rights were not a medium for creating these conditions; they were an affirmation of these fundamental entitlements and the commitment to sustain them. Third Way politics again ought to be about creating the material conditions for citizenship through the state, civil society and supra-national modes of cosmopolitan governance.

Giddens' Third Way implicitly, and occasionally explicitly, rests on a set of state- and supra-state-derived individual and social rights. In Giddens' schema, government has an active role on behalf of citizens to promote the Third Way values cited above, through a programme involving:

- structurally responding to globalisation;
- expanding the public sphere;
- re-asserting the effectiveness of government in the face of markets;
- democratising democracy; and
- practising active risk management.

In contrast, in the Third Way manifesto, rights are conceived of in narrow terms and locked onto correlative duties in the labour market. This narrow conception of rights reflects a very narrow conception of the project of renewing social democracy which can hardly be said to show a new way or Third Way beyond left and right. There can be little doubt that in late modern times there is a most urgent need to promote good governance. Good governance, above all, means respect for human rights. Institutionalising respect for human rights will involve bringing the state back in to eradicate local and global polarities of wealth and poverty and to reverse the ever accelerating processes of ecocide and social exclusion.

---

<sup>25</sup> Salvati, "The Third Way? A View from Italy" (1999) *Spring Dissent* 82.

Achieving these aims depends on recognising entitlements in terms of human rights - doing social justice according to rights, rather than dealing with unmet needs according to when the state can afford it.

### 5. *Social Exclusion in Late Modern Times*

In the emerging workfare state era the term “social exclusion” has replaced poverty and taken on much of the ideological “work” it did. As Ruth Levitas points out, in official discourse the meaning of “social exclusion” seems confined to exclusion from the labour market process and wage relationship and thus normalises the adverse effects of the capitalist societal paradigm. Without an acknowledgment of the material conditions of poverty, the term “social exclusion” may further obscure the poverty and inequality that it should illuminate. Some social exclusion analysis tends toward “victim blaming” by characterising exclusion in terms of the subjective experience of the poor.

However we speak of poverty or social exclusion, the spectre of exclusion and poverty is easily exploited by workfare state rulers. They use it to separate workers from the reserve army of labour, subjects from citizens, the one third excluded from the two thirds included (or whatever the local inclusion/exclusion ratio), and North from South.<sup>26</sup>

Euro-American Third Way states seldom, if ever, articulate the logic of human rights or the modernisation of citizenship as inclusive and emancipatory elements of their programmes. Presumably, such talk would frighten the electorate and the money markets by sounding again like the “spend and borrow” KWS we have “learned from experience” to eschew.

The failure of Euro-American Third Way governments to articulate local policy in terms of the rights-based approach to modernising citizenship can be contrasted with the growing use of a “human rights approach” to development in the South.<sup>27</sup> Suffice it to say that late modernity<sup>28</sup> is characterised by many “negative signs” in the form of a plethora of inter-related global “bads”, each with its own local pathologies, and a few “goods”. Gross asymmetries of power, grossly unequal life choices, the fatal

---

<sup>26</sup> Levitas, “The concept of social exclusion and the new Durkheimian hegemony” (1996) 46, 16(2) *Critical Social Policy* 7, 19, cited in Dean and Melrose (1999), *supra* note 14.

<sup>27</sup> See the DFID White Paper on the *Elimination of World Poverty: a Challenge for the 21st Century* (1997).

<sup>28</sup> Giddens (1994), *supra* note 2, at 100-102.



neglect of basic human needs<sup>29</sup> and rights, and radically unequal political opportunities remain the fundamental dimensions of late modernity. There is an abundance of indicators of exclusion and polarity, almost all of them signalling fundamental breaches of human rights and deficits in the opportunity to participate as a citizen.

David Held's term "nautonomy" well describes the constellation of conditions of powerlessness embedded in the dystopian reality of late modern times. Such powerlessness derives from socially, politically and economically conditioned patterns of asymmetrical life chances.<sup>30</sup> At the heart of the condition of nautonomy lie polarities of wealth and poverty, as well as social exclusion. Globally, most people are denied the capacity to have any participatory agency in structuring their destiny; consequently, the idea of making rights for such people conditional on their fulfilling responsibilities, in Giddens' terms - let alone conditional on the imposition of duties - is absurd. For Giddens, Third Way politics must assist citizens to navigate through the major revolutions of our time: globalisation, and transformation in personal life and our relationship to nature.

Combating nautonomy, poverty and social exclusion ought to be a fundamental element of Third Way politics and the modernisation of citizenship. A basic focus of Third Way political thought and action ought to be on the bundle of rights and responsibilities associated with actualising citizenship. The absence or denial of these rights signals most clearly a state of nautonomy. It is therefore surprising how little attention rights and the revival of social citizenship get in Third Way discourse from politicians and intellectuals.

The practice of citizenship involves asserting and enjoying access to the life choices legitimated and codified as human rights; it also involves fulfilling responsibilities based on the principle "from each according to his or her ability; to each according to his or her need and sometimes merit". Citizenship critically involves engagement in participatory political processes that contribute to the actualisation of rights and the performance of the responsibilities constituting the status of citizen.

I have drawn on Held's identification of key sites of power (and powerlessness) and types of rights to highlight the centrality of rights to create and sustain the capacity for autonomously making life choices:

---

<sup>29</sup> See Doyal, L and Gough, I *A Theory of Human Need* (1991).

<sup>30</sup> Held, D *Democracy and the Global Order* (1995) 171 and 191-212.

Sites of Power	Types of Rights and Spheres of responsibility
Body	Health rights and responsibilities
Self	Knowledge, Access and Informational rights and responsibilities
Intimacy	Relational and Individual rights and responsibilities
Nature	Ecological and Inter-generational rights
Welfare	Social rights and responsibilities
Culture	Cultural rights and responsibilities
Governance	Civil, Legal and Political rights and responsibilities
Market	Economic and Developmental rights and responsibilities
Coercion	Pacific and Restorative rights and responsibilities

The politics of modernising citizenship must continue to preserve and promote basic yet fragile civil and political rights for the democratising of democracy; as well, a number of problems must be addressed in entirely new and robust ways:

- the adverse material conditions created by turbo-capitalist globalisation in the market and workfare state-type governance require that the promotion of positive material conditions be enshrined in social, economic,<sup>31</sup> development and cultural rights;
- the ordering of nature, now determined by practices that manufacture ecocidal risks, must be replaced by conditions for a sustainable ecology reflected in the protection of ecological rights and the recognition of inter-generational and precautionary responsibilities, for instance with respect to the biotechnology revolution;
- reflexive self-identity must be enhanced, not limited by the growth of informational black holes in the Network society. Rights of access to information and communication technologies, information, knowledge, and opportunities to generate knowledge, must become paramount concerns for the democratisation of democracy in both North and South. A cyber commons is needed as an alternative to the increasing concentrations of power in the increasingly commodified Web.

---

<sup>31</sup> Kenny, T *Securing Social Rights Across Europe* (1997) exemplifies this approach thoroughly; see especially Hunt, P *Reclaiming Social Rights* (1997).

### 6. Social Citizenship: The Human Rights Way to Modernising Citizenship

Since World War Two an “ethic of humanity”<sup>32</sup> has steadily permeated the international governance area. There is broadening and deepening global consensus on what constitute basic human rights and that these are intrinsic to good governance<sup>33</sup> and development.<sup>34</sup> International Human Rights law-based “charters of rights” and their domestic equivalents now define and codify a minimum list of civil, political and social rights of citizens. The international Bill of Rights (UDHR, ICCPR and ICESCR) and other instruments notably in the European Union set the precedent in terms of aspirational standards for the rights required by everyone to realise his or her life choices. There has been an enormously high level of “symbolic” formal ratification by states of the international human rights’ instruments making up the international Bill of Rights. The human rights embodied in these instruments have been summarised as follows:

access to legal remedies	own property
asylum from persecution	participation in cultural and political life
education	presumption of innocence
equal protection of the law	protection against racial/religious hatred
food, clothing and housing	protection against arbitrary arrest/detention
free trade unions	protection against (arbit) expulsion aliens
freedom from cruel/inhuman punishment	protection against debtor’s prison
freedom of assembly and association	protection against <i>ex post facto</i> laws
freedom of movement and residence	protection against slavery and torture
freedom of thought, conscience, religion	protection of minority culture
health care and social services	protection of privacy, family and home
human centred development	recognition as a person before the law
humane treatment on detention/prison	rest and leisure
independent and impartial judiciary	self determination
life, liberty and security of the person	social security
marry and found a family	special protection of children
nationality	work, under favourable conditions <sup>35</sup>

<sup>32</sup> Heelas, “On things not being worse and the ethic of humanity” in Heelas, P et al (eds) *Detraditionalisation* (1996) 200-222; and Robertson, “Mapping the Global condition” in Featherstone, M (ed) *Global Culture: nationalism, globalization and modernity* (1990) 15-30.

<sup>33</sup> See Steiner, H J and Alston, P (eds) *International Human Rights in Context* (2000).

<sup>34</sup> UNDP, *Integrating Human Rights with Sustainable Human Development* (1998).

<sup>35</sup> *The Economist* “Human Rights Law” 5 December 1998 9. This listing draws on the thinking of US scholar and antagonist of justiciable social rights Jack Donnelly in his

Britain's New Labour Government is presently far more eloquent, upfront and forceful about the place of human rights in its vision for the development of the South than it was in the manifesto for the governance of the North. Clare Short, UK Minister for International Development, recently issued a consultation piece entitled "Human Rights for Poor People" (2000) that does contain very sound strategies for modernising citizenship for all people. Indeed, the paper expresses what I think should be core principles for the modernisation of citizenship:

All peoples are entitled to all human rights. These rights include economic, social and cultural rights, such as rights to the highest attainable standard of health and education, as well as civil and political rights such as rights to life and liberty. All these rights share characteristics of indivisibility and universality. Participation, inclusion and obligation are identified as ... the three operational principles which apply to the achievement of all human rights for all.<sup>36</sup>

The principle of participation is defined as enabling people to claim their human rights to participate in, and have information about the decision-making processes that affect their lives. The principle of inclusion involves promoting all rights for all people to create inclusive societies in which people are encouraged to fulfil their duties to their communities. The principle of obligation involves strengthening state institutions and policies to ensure that obligations to protect and promote human rights are fulfilled. Duties seem to be understood as responsibilities in Giddens' sense. Obligations seem to be understood as duties flowing from the powerful to the powerless, empowering them to make claims on governments that they fulfil their duties.

In advancing the need for a much more substantial emphasis on human rights in Third Way discourse, I am deeply conscious that rights discourse is not unproblematic in any context, North or South. Ideological conflict exists, for instance, over whether the idea of individual human rights is not cultural imperialism and in collision with Asian values, and about whether social and economic rights ought to be regarded as justiciable human rights at all. Legal, civil and political rights enjoyed a central place in American-

---

*International Human Rights* (1998). See also Donnelly, "In search of the Unicorn: the jurisprudence and the politics of the right to development" (1985) 15 *California Western Int LJ* 482.

<sup>36</sup> DFID *Strategies for Achieving International Development Targets: Human Rights for Poor People* (2000). See [www.difd.gov.uk](http://www.difd.gov.uk) under "What we do" followed by strategy papers, following the report by Hauserman, *J Rights and Humanity: a human rights approach to development* (1998).

dominated international human rights talk until the end of the Cold War, while social and economic rights were seen as the preoccupation of communist regimes. In spite of resistance from many governments and agencies, the idea that social and economic rights deserve parity of esteem with other types of rights is now gaining a little ground - ground that Third Way politics must build on for modernising citizenship in the North, South, and globally. UN Secretary General Kofi Annan sums it up:

the combination of underdevelopment, globalisation and rapid change poses particular challenges to the international human rights regime. ... [T]he pursuit of development, the engagement with globalisation, and the management of change must all yield to human rights imperatives rather than the reverse.<sup>37</sup>

The UN Development Program's latest Human Development Report (2000), entitled *Human Rights and Development*, adopts a similar approach to DFID by deliberately locating human rights and development as parts of a common vision and purpose. The report's themes are inclusive democracy, extending state-centred obligations and quantifying measures for promoting accountability. Most importantly, it stresses that the eradication of poverty is the central challenge for human rights, not just a development goal.

Philip Alston (a contributor to the UNDP 2000 report) and the Human Rights Council of Australia argue against attempts to use innocuous "motherhood and apple pie" euphemism - terminologies such as good governance, human security, human dignity, and human wellbeing - as a strategy for introducing human rights surreptitiously.<sup>38</sup> They warn that such a strategy dilutes the human rights standards, perpetuates a welfare model of development based on neediness, and undermines the hard-won post-1948 consensus reflected in the International Bill of Rights 'that all peoples are entitled to all Human Rights and that all these rights share characteristics of indivisibility and universality'. I entirely support this defence of rights talk.

Alston castigates IGOs (International Governmental Organisations) such as the World Bank, the UNDP, the UN Social Summit, and agencies such as

---

<sup>37</sup> *Report of the Secretary-General on the Work of the Organization*, UN doc A/54/1 (1999), para 275, cited in Alston, "The 'Not-a-cat Syndrome': Re-thinking Human Rights Law to meet the needs of the Twenty First Century", online *Proceedings of the Progressive Governance in the 21st Century*, European University Institute, November 1999.

<sup>38</sup> Human Rights Council of Australia Symposium Papers - A Human Rights Approach to Development (1999) 3/ 33 and 4-8 /33 (at URL [www.ozmail.com.au/hrca/symposium.htm](http://www.ozmail.com.au/hrca/symposium.htm))

the OECD for ignoring human rights in their programme and policies. He is equally hard on some NGOs such as World Vision, CARE and Amnesty for their slow response to the human rights agenda and their failure to accept that social and economic rights' dimensions are basic to their agendas. He contrasts these with OXFAM's consistency and clarity in this regard. He concludes by suggesting that work to operationalise the human rights agenda must be practical. Human rights must be explicitly affirmed in government, IGO and NGO policy and programmes. Accountability benchmarks and mechanisms must be put in place. Given that judicial remedies are remote and impractical, other mechanisms, on the ground, must be found to articulate the human rights entitlement claims that are part of the modernisation of citizenship.

### *7. Conclusion*

Until the material conditions produced by exclusion, poverty and authoritarianism are addressed, Third Way politicians in the North may not progress beyond New Right "business as usual", and Third Way intellectualising will remain mere obscurantism. The modernisation of citizenship requires widespread acceptance of certain principles by intellectuals, politicians, IGOs (notably the World Bank and IMF), NGOs, state governments, the WTO, NAFTA, APEC, leaders in civil society, and transnational corporations (TNCs). These principles are that:

- there be no duties without rights;
- all people are entitled to all human rights;
- human rights include economic, social and cultural rights, such as rights to the highest attainable standard of health and education, as well as civil and political rights such as rights to life and liberty; and
- all human rights share characteristics of indivisibility and universality.

# THE EXTENSIVE POWERS OF THE COMMISSIONER OF INLAND REVENUE IN ASSESSING AND COLLECTING TAX DEBTS

BY JOEL MANYAM\*

## I. INTRODUCTION

Taxation law, which includes a regulation of the wide ranging powers of the Commissioner of Inland Revenue (CIR), is largely perceived as a specialist area with its own unique rules. It however shares an important attribute with other areas of law such as administrative law, constitutional law, industrial law and criminal law.<sup>1</sup> This shared attribute is that, like these other areas of law, taxation law forms a significant part of public law. The law of taxation seeks to regulate the relationship between the state and the citizen as far as the impost and collection of tax revenues are concerned.

The Privy Council identified three features which earmarked a “tax”. These were that a tax was compulsory, that this compulsory levy was for public purposes, and that there was legal sanction for the exaction of the impost.<sup>2</sup> These attributes were later adopted by Latham CJ of the High Court of Australia as being of general application in determining when an exaction of money would be characterised as a tax. A tax in his view was “a compulsory exaction of money by a public authority for public purposes, enforceable by law, and not a payment for services rendered”.<sup>3</sup>

The interface between state and citizen in taxation gives rise to a heightened sense of tension and indeed conflict for at least two reasons. First, there is a glaring and substantial imbalance in the power and resources between state and citizen in the taxation relationship. The state, through its agent the

---

\* Senior Lecturer in Law, Univesity of Waikato. The writer wishes to acknowledge with gratitude the assistance of Grant Henderson with an earlier draft of this article.

<sup>1</sup> As stated by Judge Learned Hand in *Moore v Mitchel* 30 F 2nd 600, 604 (1929): “Revenue laws fall within the same reasoning; they affect a state in matters as vital to its existence as its criminal laws”.

<sup>2</sup> *Lower Mainland Dairy Products Sales Adjustment Committee v Crystal Dairy Ltd* [1933] AC 168, 175.

<sup>3</sup> *Matthews v Chicory Marketing Board (Vic)* (1938) 60 CLR 263, 276.

Commissioner of Inland Revenue (CIR)<sup>4</sup> and his Department,<sup>5</sup> can bring a vast amount of power to bear on the hapless citizen. These powers include the ability to require taxpayers or their advisers to supply information about the taxpayers' liability for any tax. The information can also be required to be supplied for the purposes of administering and enforcing the Inland Revenue Acts<sup>6</sup> or for the purpose of carrying out any function lawfully conferred on the Commissioner. This power to have information supplied can be done simply by a statutory notice to this effect<sup>7</sup> or by application for a court order<sup>8</sup> legally obliging the taxpayer or its advisers to supply this information. In the event of failure to comply with the court order, the taxpayer will be in contempt of court. Alternatively, the taxpayer can be prosecuted for the offence of failing to comply with a section 17 statutory notice.<sup>9</sup> More pervasive is the Commissioner's power to enter business or private premises to obtain information about a taxpayer's affairs.<sup>10</sup> The Commissioner is also empowered to require a person to attend and give evidence on oath before the Commissioner or any officer of his Department.<sup>11</sup> There is also power for the Commissioner to hold an inquiry before a District Court Judge for the purpose of obtaining information.<sup>12</sup>

In essence, therefore, through a combination of measures where either information is supplied by the taxpayer or compulsorily and proactively acquired by the Commissioner, extensive information can be obtained about taxpayers. The Commissioner's pervasive powers to gather information are often resented because of the time and expense incurred in complying with them.<sup>13</sup>

The second reason for tension between the taxpayer and the Commissioner arises because of the intrinsic nature of taxation where the private property

---

<sup>4</sup> A creature of statute in terms of s 6A (1) of the Tax Administration Act 1994 (TAA). Hardie Boys J, in *Knight v C of IR* [1991] 2 NZLR 30, 42 observed that "the Commissioner is a statutory officer".

<sup>5</sup> Tax Administration Act 1994, s 5.

<sup>6</sup> Outlined in the schedule to the TAA.

<sup>7</sup> Section 17.

<sup>8</sup> Section 17A.

<sup>9</sup> Section 17A(4).

<sup>10</sup> Section 16.

<sup>11</sup> Section 19. For further comment see McClay, "Section 19 inquiries" (July 2001) 3 New Zealand Tax Planning Report 22.

<sup>12</sup> Section 18.

<sup>13</sup> See comments by Lord Templeman in *New Zealand Stock Exchange v CIR* (1991) 13 NZTC 8147, 8151 in respect of third parties who are served with s 17 notices.



rights of the citizen must succumb to encroachment by the state. The nature of taxation is a legally sanctioned right of expropriation by the state of what has hitherto been legitimately acquired private property or wealth by the efforts of individual or corporate taxpayers. The challenge for the taxpayer therefore is legitimately to minimise the state's entitlement to his or her private wealth, as articulated by Lord Tomlin:

Every man is entitled if he can to order his affairs so as that the tax attaching under the appropriate Act is less than it otherwise would be. If he succeeds in ordering them so as to secure this result, then however unappreciative the Commissioners of Inland Revenue or his fellow taxpayers may be of his ingenuity, he cannot be compelled to pay an increased tax.<sup>14</sup>

A more illustrative and vivid portrayal of this competing right of the state to private wealth were the comments of Lord President Clyde that:

No man in this country is under the smallest obligation, moral or other, so as to arrange his legal relations to his business or to his property as to enable the Inland Revenue to put the largest possible shovel into his stores. The Inland Revenue is not slow – and quite rightly – to take every advantage which is open to it under the taxing statutes for the purpose of depleting the taxpayer's rocket. And the taxpayer is, in like manner, entitled to be astute to prevent, so far as he honestly can, the depletion of his means by the Revenue.<sup>15</sup>

Despite the very long and powerful arm of the Commissioner to interfere in the lives of private citizens, there are legal rules about how the law creates the liability for taxation. These rules set out how this pre-existing liability is quantified and a tax debt created, whereby the citizen becomes liable to make payment. Where there is default in paying the debt when it falls due, the Commissioner has a number of options for enforcing the payment of this debt.

This article seeks to examine specifically the legal issues regarding the creation of the liability for taxation under New Zealand law, the legal process of assessment and its effect in giving rise to a tax debt payable by the taxpayer, the consequences of the taxpayer defaulting in payment of the debt and options available to the Commissioner to enforce payment, recent public and other criticism of the Commissioner's powers to assess and

---

<sup>14</sup> *Inland Revenue Commissioners v Westminster* [1936] AC 1, 19-20.

<sup>15</sup> *Ayrshire Pulman Motor Services and D M Ritchie v The Commissioner of Inland Revenue* (1929) 14 Tax Cases 754.

collect debts in an expeditious fashion, and the prospect of more proactive use of the statutory notice procedure to collect tax debts.

## II. THE LIABILITY FOR TAXATION UNDER NEW ZEALAND LAW

McCarthy J, in the Court of Appeal decision in *Reckitt & Colman v Taxation Board of Review* agreed with the argument of counsel for the respondents, Richardson (now Richardson P of the Court of Appeal), in respect of the general scheme of Inland Revenue Acts.<sup>16</sup> This was that liability for tax is imposed by the charging section in the case of income tax by the governing Act. It is the Act itself which imposes, independently, the obligation to pay. This cardinal principle has been reaffirmed by the Court of Appeal in subsequent decisions, namely, those of *Lowe v CIR*,<sup>17</sup> *C of IR v Lemmington Holdings Ltd*,<sup>18</sup> *C of IR v NZ Stock Exchange*, *C of IR v National Bank of NZ Ltd*,<sup>19</sup> *Brierley Investments Ltd v C of IR*,<sup>20</sup> *CIR v Canterbury Frozen Meat Company Ltd*<sup>21</sup>, and *BNZ Finance v Holland*.<sup>22</sup> Section AA 1(a) of the Income Tax Act 1994 (ITA 1994) provides that one of the main purposes of the Act is to impose tax on income, thus confirming that the Act creates the charge for tax.

## III. THE ASSESSMENT PROCESS AND THE CREATION OF A TAX DEBT

### 1. *The Legal Process of Assessment*

The pre-existing liability is quantified by the Commissioner and section 92 of the Tax Administration Act 1994 imposes a duty on the Commissioner to make assessments on the following basis:

From the returns made under sections 33, 34, 36 to 39, 41 to 44, 63, 79, and 80 and from any other information in the Commissioner's possession the Commissioner shall in and for every year, and from time to time and at any subsequent time as may be necessary, assess the taxable income and income tax liability of the taxpayer and the tax payable by the taxpayer.

---

<sup>16</sup> [1966] NZLR 1032, 1045.

<sup>17</sup> [1981] NZLR 326, 344.

<sup>18</sup> (1982) 5 NZTC 61268, 61272.

<sup>19</sup> (1990) 12 NZTC 7259, 7262.

<sup>20</sup> (1993) 15 NZTC 10,212, 10214.

<sup>21</sup> (1994) 18 TRNZ 645, 650.

<sup>22</sup> (1997) 18 NZTC 13156, 13160.

In *C of IR v NZ Stock Exchange*, Richardson J commented on the provisions in the then equivalent of sections 16-19 of the TAA for the furnishing of information, the inspection and production of documents, and the holding of inquiries, all designed to facilitate access by the Commissioner to information.<sup>23</sup> The eliciting of such information was to provide a basis for exercising the function of making assessments against taxpayers. The process which the Commissioner must adhere to in making an assessment was the subject of the Court of Appeal decision in *Canterbury Frozen Meat Company Ltd.*<sup>24</sup> An assessment is essentially the making of a judgment by the Commissioner of the amount on which tax is payable and the amount of the tax. Richardson J in the *Canterbury Frozen Meat* case provided a useful summary of his conclusions on the meaning of assessment when he commented as follows:

An assessment is the quantification by the Commissioner of the statutorily imposed liability of the particular taxpayer to tax for the year in question. The making of an assessment, including an amended assessment, requires the exercise of judgment on the part of the Commissioner in quantifying that liability on the information then in the Commissioner's possession. It involves the "ascertainment" of the taxable income and of the resulting tax liability just as it does under the Australian definition of "assessment" which uses the expression ascertainment ....

The making of an assessment determines the indebtedness of the subject to the Crown. That liability is unqualified. Sanctions are provided for failure to pay. It follows that a decision which is tentative, or provisional, or subject to adjustment, or conditional does not reflect the statutory scheme. In short, to constitute an assessment for income tax purposes the decision of the Commissioner must be definitive as to the liability of the taxpayer at the time it is made, and final subject only to challenge through the objection process.<sup>25</sup>

Once an assessment has been made it is conclusively deemed and taken to be correct and its validity cannot be disputed except in proceedings on objection to the assessment under Part VIII or a challenge under Part VIIIA of the TAA.<sup>26</sup>

---

<sup>23</sup> *Supra* note 19, at 7262-3.

<sup>24</sup> *Supra* note 21.

<sup>25</sup> *Ibid*, 655. This was reaffirmed by the Court of Appeal in *C of IR v New Zealand Wool Board* (1999)19 NZTC 15476, 15,488-15,489.

<sup>26</sup> Section 109 TAA. The administrative law remedy of judicial review may be available to challenge the validity of the process by which an assessment was made.

Under the Australian statutory scheme, in all cases, the service of a notice of assessment is the occasion of liability, “the levying of the tax”.<sup>27</sup> As observed by the majority judgment in *Deputy Commissioner of Taxation v Harkin*, “under the Income Tax Assessment Act the liability of the taxpayer does not come into existence until there has been an assessment by the commissioner of the tax payable and notice of that assessment has been given by the commissioner to the taxpayer”.<sup>28</sup> The High Court of Australia had also concluded that a notice of assessment was essential to the existence of an assessment in *F J Bloemen Pty Ltd v F C of T*.<sup>29</sup>

New Zealand’s position is distinctly different from the Australian position, as very recently confirmed by the Court of Appeal in *Hyslop v C of IR*.<sup>30</sup> The issue on appeal in *Hyslop* was whether failure to give the taxpayers notice of the grounds of assessment invalidated the assessment. The essence of the Court of Appeal decision was that, while the then equivalent to section 111(1) of the TAA 1994 required that the notice of assessment be given to the taxpayer “as soon as conveniently may be after an assessment is made”, the omission to give such notice will not invalidate the assessment in terms of section 111(6). This reinforced the provisions of the then equivalent of section 114 of the TAA 1994 which provides that the validity of an assessment is not affected by failure to comply with any statutory provision in either the TAA 1994 or the ITA 1994. Accordingly, the New Zealand statutory scheme made it clear that it was the assessment that quantified the indebtedness, the validity of which remained unaffected in the absence of notification of such assessment being conveyed to the taxpayer through any of the avenues in section 14 of the TAA.

## 2. An Assessment For Tax and Tax Indebtedness

Once a taxpayer is notified of an assessment for tax, the notification also stipulates a due date by which the tax owing is to be paid. On the expiry of the due date for payment, the debt then becomes not only owing to the Commissioner but also one in respect of which enforcement action can be taken for its recovery.<sup>31</sup> It is useful to make the distinction between on the

---

<sup>27</sup> *Batagol v FC of T* (1963) 9 AITR 207, 214, per Kitto J.

<sup>28</sup> (1959) 100 CLR 566, 573.

<sup>29</sup> 81 ATC 4280.

<sup>30</sup> (2001) 20 NZTC 17,031. This was followed recently in *C of IR v Dandelion Investments Ltd* (2001) 20 NZTC 17,293, 17,296, per Tompkins J.

<sup>31</sup> An identical view was expressed by Gibbs CJ in the High Court of Australia decision of *Clyne v DFC of T* 81 ATC 4429 regarding the due date for payment and indebtedness when he said: “At the latest when tax is assessed it becomes a debt due to

one hand the creation of a tax debt by making an assessment and issuing due notification of it, and, on the other, taking enforcement action in good time that recovers the debt.

### 3. *The Consequences of Taxpayer Default and Enforcement Options*

As noted by Richardson J in *Canterbury Frozen Meat Co Ltd*, “sanctions are provided for failure to pay”.<sup>32</sup> The recent report of Parliament’s Finance and Expenditure Committee of its Inquiry into the Powers and Operations of the Inland Revenue Department (chaired by Peter Dunne and hereinafter referred to as the “Dunne Report”), highlights the consequences in these terms:

If the debt remains unpaid and there is no prospect of immediate payment, the department needs to consider management options available to it. Although the department’s preference is to recover debt by voluntary payment in full, recovery can also be by way of voluntary time payment (for example, an instalment arrangement), or by compulsory deduction. If a taxpayer is in financial difficulty the department can, in limited circumstances, provide relief from debt by way of write-off, cancellation or remission.<sup>33</sup>

Section 7A of the TAA provides the Commissioner with a wide-ranging power to take securities in respect of the performance of tax obligations. Section 3 defines “security” for the purposes of section 7A to mean a security given to the Commissioner to secure the performance of a tax obligation, and includes a mortgage or charge or other encumbrance over, or pledge of, an asset or right and a guarantee or indemnity. Where securities become inadequate or insufficient, the Commissioner is empowered to call for additional or substitute securities. The Commissioner can require that securities be transferred into the name of the Commissioner and be held until such time as a tax obligation or obligations are performed. There is also provision in section 7A(1)(e) for enforcement of the security where the taxpayer defaults in the performance of a tax obligation.

---

the Crown although it is not payable until the later date specified in the notice of assessment” (at 4432 RHC).

<sup>32</sup> *Supra* note 21, at 655.

<sup>33</sup> Inquiry into the powers and operations of the Inland Revenue Department, *Report of the Finance and Expenditure Committee* (October 1999) 15.

#### IV. CRITICISM OF THE COMMISSIONER'S POWERS TO ASSESS AND ENFORCE TAX DEBTS

##### 1. *The Dunne Report*

The Commissioner and his Department appear to have recently come under sustained criticism for not properly assessing or efficiently collecting tax debt. The Report of the Commission of Inquiry constituted to inquire into certain tax matters (the Davison Commission) – a highly publicised Commission of Inquiry known as “the Winebox Inquiry” – highlighted criticism of the manner in which large corporate tax debts had been assessed. While the Report substantially vindicated the Commissioner’s conduct in respect of matters dealt with in the Report, the findings of the Report were substantially overturned by the Full Court of the High Court in *Peters v Davison*.<sup>34</sup>

Further criticism was made of the way in which the enforcement powers of the Commissioner had been employed both in terms of the options embarked on and their effectiveness. Before making its adverse findings, the Dunne Report found that, while the Commissioners powers were considerable, they were appropriate and their rationale was explained as follows:

While the Commissioner’s powers are extensive, we consider that, by and large, these powers are appropriate for the role the Commissioner is required to undertake. The department is bound to enforce compliance on the part of all taxpayers. Not to do so would seriously damage the integrity of the tax system and undermine the system of voluntary compliance. The extent of the Commissioner’s powers is necessary to ensure that reluctant taxpayers meet their obligations. Those powers ensure that taxpayers who willingly pay their tax are not disadvantaged or required to pay a disproportionate share of the tax burden.<sup>35</sup>

However, in its findings on how effectively these wide powers had been used in the collection of tax debts, the Dunne report was critical. The Department was urged to become involved in collecting outstanding tax at an earlier stage than was the case. Under the Department’s then current policies and procedures, recovery action was being instigated when any realistic chance of recovery had long passed. The report noted that in many cases the first contact with the taxpayer for tax arrears was “several months

---

<sup>34</sup> (1999) 19 NZTC 15,391.

<sup>35</sup> Supra note 32, at 6.

after the due date has passed".<sup>36</sup> If the emergence of tax debt was recognised early, there was a better chance of recovery from the Department's perspective and the matter would be more manageable from the taxpayer's perspective before the imposition of late payment penalties and use of money interest (UOMI) caused small debts to become much higher and beyond the ability of the taxpayer to meet.<sup>37</sup>

The Dunne Report then commented on specific management options for tax debt taken by the Department and their effectiveness. These options were bankruptcy action in the case of individual taxpayers and liquidation proceedings in relation to corporate taxpayers.

In respect of bankruptcy proceedings, the report noted that in the period 1 July 1998 to 30 June 1999, the department had referred 1000 individuals for bankruptcy and 995 companies for liquidation. Worth noting was that, in 44 percent of those cases, proceedings were subsequently withdrawn as either the debt was paid in full or arrangements were entered into whereby the debt would be paid over a period of time. The report specifically commented on the effectiveness of the use of bankruptcy proceedings in collecting debt when it said:

Many bankruptcy proceedings could be avoided if the department became actively involved in taxpayers' affairs sooner rather than later, to halt the growth of debt. By the time the department does get involved the debt is so large the department has no other choice but to bankrupt.<sup>38</sup>

While the department acknowledged that bankruptcy and liquidation proceedings were debt management options of last resort, it appeared that bankruptcy action was embarked upon when the debt became unmanageable for the taxpayer. Thus it seems that bankruptcy action was pursued as a means of stopping the continuing rapid escalation of debt rather than as an effective debt collection option. There is a suggestion albeit implied in those comments that the bankrupt's estate usually falls far short of being able to

---

<sup>36</sup> Ibid, 15.

<sup>37</sup> Ibid. A recent example of such rapid escalation of debt is illustrated in *Re Hunter, ex parte C of IR; Re Collins, ex parte C of IR* (2000)19 NZTC 15,722, where the initial debts totalled about \$50,000. The payment which was anticipated was \$200 per month, or \$2,400 per year. Robertson J further commented as follows: "In the meantime, late payment penalties were accruing at the rate of 10% every 6 months which is at least \$10,000 per year and very quickly a great deal more than that as the late payment penalties compounded" (at 15,726).

<sup>38</sup> Supra note 32, at 18.

meet any realistic portion of the substantial tax indebtedness. At best perhaps is the prospect of collection of a portion of the preferential amounts of goods and services tax (GST) or Pay As You Earn (PAYE) taxes.

As far as liquidations were concerned, the Report was critical of the statutory preference the department had under section 312 of the Companies Act 1993 and the seventh schedule to that Act. It appeared as if, in addition to having its claim for preferential tax debt paid, it was also in addition to the core debt being paid interest and penalties which did not enjoy the same preferential status as the core debt. The overall consequence was that the Commissioner through his department was obtaining payments which were more than his legal entitlement. This increased claim was being met at the expense of claims by the remaining pool of unsecured creditors who were left with very little if anything of the company's assets from which to have their residual amounts of the company's indebtedness met.

The resonant theme of the Dunne Report, in respect of the Commissioner's tax debt collection efforts, appears to be that the timely pursuit of debt is crucial. There were submissions made to the Dunne Committee, notably by Price Waterhouse Coopers, which suggested that the Department should adopt approaches similar to trading banks and put in place prompt follow-up procedures for overdue debts. The Dunne Report commented that a follow-up system had to be put in place but one which was far more sophisticated than the one for banks in terms of early action for recovery. This was because of the peculiar feature of tax debt which faced the accumulation of late payment penalties and UOMI, causing it to spiral out of control much quicker than in the case of non tax debts.

## *2. Judicial Criticism of Tax Administration by the Commissioner*

It appears therefore that the Commissioner and his department have come under concerted pressure to act early. This is in addition to criticism for delay in the Department's performance in respect of other matters by Judge Willy as the Taxation Review Authority (TRA) in the decision in TRA Case No 93/013. Furthermore, the Court of Appeal in its decision in *Union Steamship Co of New Zealand Ltd v C of IR* criticised the Commissioner for a 21-year delay before a tax dispute finally arrived for a hearing at the High Court.<sup>39</sup>

---

<sup>39</sup> (1996) 17 NZTC 12,630, 12,631, per Blanchard J. More recently, Robertson J, in *Re Hunter; ex parte C of IR; Re Collins; ex parte C of IR* (2000) 19 NZTC 15,722 commented on the manner in which the Commissioner and his department dealt with



It is suggested that, in view of such sustained criticism of the Commissioner in regard to his functions of assessing and collecting tax debts, he should become pro-active in collecting debt at a much earlier stage. This may well occur through the use of a highly effective but less-known power of collection, namely, compulsory deductions. The compulsory deductions may be effected by the Commissioner through his departmental officers serving a statutory notice under section 157 of the TAA.

## V. TAX DEBT COLLECTION USING STATUTORY NOTICE PROCEDURE

### 1. Introduction

The powers to collect tax debts under section 157 place the Commissioner in a distinctly privileged position vis-a-vis other creditors. An ordinary creditor, in seeking to enforce collection of a trade debt for instance, would first seek to obtain a Court judgment for the debt usually in the District Court. The creditor, having obtained judgment, would then need to obtain a garnishee order from the Court which would enable a garnishee notice to be served on a third party namely a creditor of the debtor. The effect of serving this notice on the third party would be to have it pay the judgment creditor direct rather than the judgment debtor to which it is ordinarily indebted. Thus, in a very common example where this procedure is used to great effect, if a tenant owed rent, the landlord, having obtained a garnishee notice in the manner described, would serve the garnishee notice on the tenant's employer or other creditor. This would have the effect of ordering the employer to pay a portion of the tenant's salary or wages directly to the landlord to offset rent arrears. Section 157 achieves an identical result but without the Commissioner having first to obtain judgment. Simply arriving at an assessment for a tax debt, and waiting for the expiry of the due date for its payment specified in the notice of assessment, are all that is required before a section 157 garnishee notice can be served on a creditor of the taxpayer.<sup>40</sup>

---

the taxpayer, as follows: "There is no doubt that bureaucratically things could and should have been done better" (at 15,732).

<sup>40</sup> It was this ambit of the power that perhaps prompted Gibbs CJ of the Australian High Court to comment in respect of the equivalent provision in Australia as follows: "However the section is obviously designed to confer exceptional powers on the Commissioner to facilitate the collection of tax" (*Clyne v DFC of T* 81 4429, 4433).

## 2. The Provisions of Section 157

Section 157 contains 10 subsections. Subsection (1) provides that, where the taxpayer has made default in paying any income tax or penalty to the Commissioner, the Commissioner may by notice in writing require any creditor of the taxpayer to make deductions from amounts owing to the taxpayer. The creditor will then be required by virtue of the notice to pay the amounts to the Commissioner.

Where the notice relates to deductions from salary, subsection (3) provides that the amount deducted cannot be more than the greater of \$10 per week or the lesser of either 10% per week of the income tax owing or 20% of the wages or salary payable. There is provision in subsection (4) for the Commissioner to revoke such notice at any time. There are procedural matters in subsection (5), namely, that any notice so given must have a copy of it issued to the taxpayer. The rationale is that the taxpayer must be kept informed of the fact that a notice was served on a creditor of the taxpayer, so that the taxpayer can respond if need be. There is no time frame specified in which the taxpayer must be served a copy, the statutory requirement merely being that such must be done “forthwith”. This would usually be either at the time of service on the creditor of the taxpayer debtor or shortly thereafter. Subsection (6) requires the creditor to send the taxpayer debtor a written statement attesting to the fact that a deduction was made and the reason for it.

Subsections (8) and (9) provide that, where a notice is served on an ordinary creditor of the defaulting taxpayer or a bank, the moneys that may be held by them for the taxpayer are, from the point of service, deemed to be held in trust for the Crown and recoverable from the creditor or bank as if they were income tax payable by the debtor.<sup>41</sup>

---

<sup>41</sup> In the early decision in *R v Norfolk County Council* (1890) 60 LJQB 379, 380-381, Cave J explained the meaning of deem as follows: “generally speaking, when you talk of a thing being deemed to be something, you do not mean to say that it is that which it is to be deemed to be. It is rather an admission that it is not what it is to be deemed to be, and that, notwithstanding it is not that particular thing, nevertheless, for the purposes of the Act, it is to be deemed to be that thing”. Lord Radcliffe in the House of Lords’ decision in *St Aubyn & Ors v A-G* [1951] 2 AllER 473 at 498 further observed as follows: “the word ‘deemed’ is used a great deal in modern legislation. Sometimes it is used to impose for the purposes of a statute an artificial construction of a word or phrase that would not otherwise prevail. Sometimes it is used to put beyond doubt a particular construction that might otherwise be uncertain. Sometimes it is used to give

### 3. Case Law Commentary on the Application of section 157

There appear to date to have been at least six reported decisions on the application of section 157 and its predecessor section 400 of the Income Tax Act 1976 (ITA 1976). The earliest decision in *Anzamco Ltd (in liq) v Bank of New Zealand*,<sup>42</sup> and the most recent decision in *Hieber v C of IR*,<sup>43</sup> were ones where the issues in dispute concerned whether the statutory procedures for serving an effective statutory notice had been followed.

In *Anzamco*, the company sold farm land for a profit of more than \$3 million and the Commissioner's assessment for income tax of \$623,417 was owing by the company. Shortly thereafter the company went into voluntary liquidation. The liquidator objected to the assessment. In addition, on 22 March 1982, the liquidator placed \$935,500 of the company's funds on a term deposit with the Bank of New Zealand Hamilton North Branch. The liquidator, who had sole control of the money, undertook to hold the amount claimed under the assessment until final determination of the objection. This was done to cover the contingency of the Commissioner succeeding in the objection proceedings.

On 25 August 1982, the liquidator was informed by the Bank of New Zealand, Hamilton Branch, which was separate and distinct from the Hamilton North Branch, that a section 400 notice had been served. The notice required payment to be made of about \$629,000 by 31 August 1982. At the date of the High Court hearing, almost two months after the bank had been served, neither the company nor the liquidator had been served a copy of the notice pursuant to section 400 (6) (section 157 (5)).

The Commissioner was criticised for acting rather arbitrarily in using the statutory notice procedure, for two reasons. First, objection proceedings had been set in train to hear the objection to the tax assessment. Secondly, the actions were taken in complete disregard of deliberate measures taken by the liquidator to hold a lump sum at the Hamilton North Branch in order to meet the contingency of having to pay the whole of the assessed amount in the event of the Commissioner's success at the objection proceedings.

---

a comprehensive description that includes what is obvious, what is uncertain and what is, in the ordinary sense, impossible".

<sup>42</sup> (1982) 5 NZTC 61249.

<sup>43</sup> (2000) 19 NZTC 15716. The High Court decision in *Highfield v C of IR* (2000) 19 NZTC 15,609, although it involved a s 157 notice, did not analyse or discuss any aspect of the provisions in s 157, as there was no need to do this.

One of the grounds on which the applicant sought to have the notice set aside was that an inappropriate form had been used inconsistent with what section 400 authorised. Barker J upheld this ground on the basis that the wording of the notice did not meet the statutory test. The notice contained a direction to the bank to deduct a percentage amount from sums payable to the taxpayer. The statutory authorisation had been to direct the deduction of an amount and not a percentage amount.

The Commissioner was accordingly found to have been in breach of the statutory provision as he had made a demand on the bank which he was not authorised to make. It may be argued that the Commissioner failed on a mere technicality, namely through inappropriate wording of the notice, however such a breach was sufficiently serious to invalidate the notice because “[s]ince an attachment order interferes with the rights of the subject, the legislation authorising it must be followed strictly”.<sup>44</sup>

The notice was also sought to be impugned on the basis that it was addressed to the wrong branch of the bank, namely the Hamilton branch, when it should have been the Hamilton North branch. Barker J held that such defect in the notice was not sufficient on its own to invalidate the notice. Furthermore, the notice was sought to be invalidated on the basis that a copy of it had not been served on either the company or its liquidator as was statutorily required. Barker J expressed the view that service was no empty formality as service of a copy provided the taxpayer with an opportunity to contest the notice.<sup>45</sup> As indicated earlier, the provisions of section 157 (5) do not specify a time frame within which a copy of the notice ought to be served on the taxpayer, except to state that it must be done “forthwith”. Barker J opined that the timeframe should be such time by which the garnishee is directed to pay the amount to the Commissioner.

Other than issues of form and procedure for serving such notices, Barker J addressed wider issues of the propriety of issuing such notices in particular circumstances. It seemed pointless in his view to issue the notice when there

---

<sup>44</sup> Supra note 35, at 61255.

<sup>45</sup> Contrast this requirement of notification after the notice is served with the taxpayer’s argument in *Woodroffe v DFC of T* 2000 ATC 4656. In response to the argument Mansfield J commented that the decision to issue a s 218 notice [equivalent to a s 157 notice] is not one of which advance notice is required to be given to the proposed recipient of the notice or to others whose money is to be the target of the notice (at 4657). Emmett J in *FC of T v Macquarie Health Corporation Ltd & Ors* 98 ATC 5214, 5237, observed that a notice under s 218 is normally given without the knowledge of the relevant taxpayer, and often against the taxpayer’s wishes.

were funds being held to satisfy the full amount of the Commissioner's assessment in the event that this was warranted. Furthermore, even if the defects in the notice were rectified by a fresh valid notice being served, such later notice would be unreasonable in the circumstances where an amount in excess of the Commissioner's claim had been secured to meet it.

#### *4. Use of a Section 157 Notice When Tax Assessment is Disputed*

Finally, the issue arose as to the interpretation to be given to the then equivalent of section 128 (1) and 138I(1) of the TAA (section 34 of the ITA 1976). The question was whether the Commissioner had an unfettered discretion to pursue recovery action using the statutory notice procedure when the taxpayer had embarked on the process of contesting the assessment through the case stated procedure. Barker J's response to this important question was that the former section 34 was silent on the Court's jurisdiction to stay recovery, when in the circumstances it would clearly be unjust to allow the notice to take effect before case stated proceedings had run their course.

In essence section 34 provided that, where an assessment was being contested before the TRA or the Courts, the tax in dispute was split into deferrable and non-deferrable components. The non-deferrable tax had to be paid to the Commissioner while the deferrable amount would not be paid pending resolution of the dispute. This was despite the fact that both amounts were owing pursuant to a valid assessment. The intervention of legal proceedings contesting the correctness of the assessment allowed this partial dispensation to the taxpayer, but only in respect of the deferrable amount.

This issue of the interrelationship between recovery action and the appropriateness of such action when a tax assessment was being disputed in the course of objection proceedings before a court arose for comment by Blanchard J in *Miller v C of IR*.<sup>46</sup> Although they were made in the context of bankruptcy proceedings that were being pursued by the Commissioner in respect of non-deferrable tax, the Judge's comments are equally relevant when recovery of non-deferrable tax is being pursued using the statutory notice procedure. Blanchard J's instructive comments were as follows:

Section 34(2) (b) [section 128(1) and section 138I(1) of the TAA] provides that the obligation to pay and the right of the Commissioner to receive any tax, not being deferrable tax, "shall not be suspended by any objection, appeal or case stated, made

---

<sup>46</sup> (1993) 15 NZTC 10,187.

or requested under this Part of this Act". So the Commissioner is able to pursue the taxpayer against whom an assessment has been made while a case stated remains outstanding under Part III [now Part VIII of the TAA] and can obtain judgment against the taxpayer, levy execution and, at least in theory, bankrupt the taxpayer if the non-deferrable tax remains unpaid. The Commissioner is in the process of taking such steps against the Millers and the O'Neils who say they are quite unable to pay and are in danger of being bankrupted.<sup>47</sup>

Towards the end of his Honour's judgment, indications were given of the Court's view of the propriety of the Commissioner's conduct in taking enforcement action in respect of non-deferrable tax, pending conclusion of objection proceedings. These comments would equally apply in cases where a statutory notice were used as the instrument of enforcement. His Honour's more salient comments were as follows:

Nevertheless, it does not follow that the Commissioner would be justified in enforcing his post-assessment right to non-deferrable tax under s 34 [section 128 and section 138I of the TAA] pending the conclusion of the objection procedures, except in such a way as may be necessary or prudent to protect the position of the revenue.

.... The Commissioner is by s 34 given very large and unusual powers and, where the fate of an objection is not clearcut, the Commissioner should use those powers sparingly. Seizure and certainly sale of assets may often be unjustified. The Commissioner ought also to proceed cautiously in the bringing of bankruptcy proceedings, particularly if security can be obtained or there is some other means of ensuring that available assets can be preserved until objections are determined. It would be cruel and inappropriate if a citizen should without good cause be made bankrupt by an agency of the State when ultimate liability for the debt in question has not been determined and, indeed, may be found not to exist. The Courts will lean in favour of protecting a taxpayer where the Commissioner's powers are being used excessively.<sup>48</sup>

It would be reasonable to infer that, when His Honour made reference to "seizure of assets", the rubric of the phrase could also extend to moneys that are "seized" pursuant to a section 157 notice. In cases where objection or challenge procedures are taking their course, the Commissioner should instead, and where feasible, seek security over other assets of the taxpayer, such as for example taking a security under section 7A of the TAA over a taxpayer's house or other property.

Certainly the approach of Barker J in *Anzamco* on the use of a section 157 notice to enforce payment of non-deferrable tax, and the approach of

---

<sup>47</sup> At 10,193 LHC.

<sup>48</sup> *Supra* note 46, at 10,206 RHC.

Blanchard J in *Miller v C of IR* on the use of bankruptcy proceedings also to recover non-deferrable tax, seem to have a consistent approach. This is that such enforcement action is unwarranted where some other available asset can be taken as security or is indeed offered as security for the debt until challenge proceedings have been determined. There also seems to be an implication in both judgments that this cautious approach is warranted to safeguard the taxpayer's interest, pending ultimate resolution of the Commissioner's tax assessment. The Courts seem willing to take this approach where either the taxpayer's conduct is exemplary and directly protects the Commissioner's interest as in *Anzamco*, or as a minimum the taxpayer has not actively sought to prejudice the Commissioner's interest in any way as is illustrated in *Miller v C of IR*.

However, the Courts appear quite willing to enforce directly the Commissioner's statutory right to non-deferrable tax where the taxpayer's actions give the appearance of tax evasion or there is a real risk that the taxpayer will dissipate its assets in a bid to frustrate the Commissioner's efforts to seek payment of assessed tax. This strict approach seems to have been evident in the most recent decision to consider section 157, namely, *Hieber v C of IR*.<sup>49</sup> This case involved Mr Hieber an individual New Zealand taxpayer as the first applicant, a trust as the second applicant in which Mr Hieber was a trustee, a partnership between him and the trust as the third applicant, and a property-owning company controlled by Mr Hieber as the fourth applicant. As a result of investigations into Mr Hieber's affairs, the Commissioner concluded that Hieber had systematically sought to defraud the New Zealand Revenue using an overseas company that he controlled. The result of the investigation led to tax assessment notices being issued for millions of New Zealand dollars. When the Commissioner suspected that assets were being dissipated to frustrate the effect of the assessments, he successfully applied ex parte for a charging order over a property owned by Hieber and, as a second measure, served section 157 notices on the tenants of a commercial complex in respect of the rental payments that they normally paid to the second and third applicants as owners and managers of the properties.

The argument against the section 157 notices was in respect of their validity. This was that the notices could be valid only in cases where a taxpayer had defaulted in paying income tax for which it had become liable. The further and essential argument was that, where an assessment for tax was subject to challenge proceedings pursuant to Part VIIIA of the TAA that sought to

---

<sup>49</sup> (2000) 19 NZTC 15716 and discussed in detail in Henderson, "Threshold Challenge to S157" (July 2000) 3 New Zealand Tax Planning Report 23.

challenge its correctness, no liability existed until such time as the liability pursuant to those proceedings had been finally determined. The Court responded to the argument by invoking the provisions of section 109 of the TAA which deems an assessment to be correct unless determined otherwise in objection proceedings under Part VIII or challenge proceedings under Part VIIIA. The statutory presumption of correctness of an assessment under section 109 was, in Laurenson J's view, conclusive of final liability for the assessed tax.

The Commissioner, being conscious of the fact that dispute proceedings would be filed by the taxpayer, limited the sums subject to the section 157 notices to half of the tax assessed which was the non-deferrable amount. The non-deferrable amount was subject to an express statutory provision in section 138I of the TAA which made it payable to the Commissioner despite the fact that challenge proceedings were in train. Laurenson J was in no doubt that section 138I of the TAA was clear that, in dispute proceedings in relation to an assessment, 50 percent of the disputed tax had to be paid nonetheless, even though liability had not been finally resolved. Thus, a combination of section 109 which deemed an assessment to be correct and section 138I which made 50% of that deemed liability payable, was sufficient to have met the threshold requirement for the validity of a section 157 notice.

##### *5. Use of Section 157 To Attach Amounts Not Subject To Tax Assessments*

The recent High Court decision in *Singh v C of IR*<sup>50</sup> is perhaps the first of its kind in New Zealand in that it allows the Commissioner to retain excess amounts obtained under a section 157 notice where an expected assessment is very likely to be made of a taxation liability in the future. Such amounts can be retained where the Commissioner expects that, due to pending litigation, the taxpayer will be assessable for a future tax liability, which the retained amounts will to some extent satisfy. The decision in *Singh* appears to accept that a section 157 notice can be issued once there is an assessment giving rise to a tax debt. However, if the tax debt reduces to a sum that is less than the amount obtained pursuant to the notice, there is no obligation on the Commissioner to refund the balance to the taxpayer.

In *Singh*, the applicant prepared and filed income tax returns for others. He claimed false refunds in his own returns and also in returns prepared and lodged on behalf of his clients. He retained all the falsely obtained refunds. On 4 November 1992 the Commissioner issued default assessments in

---

<sup>50</sup> (1999) 19 NZTC 15,050.



relation to the false refunds and also imposed additional tax. The applicant objected to the assessment and a case stated was set for hearing before the Taxation Review Authority (TRA).

On 4 November 1994, the Commissioner served section 400 notices on various bank accounts under the applicant's control and thereby seized just under \$87,000. On 12 December 1994, the Commissioner amended the original tax assessment which reduced the tax owed by the applicant. The applicant objected to this assessment also and asked for the dispute to be determined by the TRA. The applicant requested the Commissioner to refund him the difference between the amount in the second tax assessment and the \$87,000 seized under the section 400 notice. This request was declined by the Commissioner and duly communicated to the applicant by letter dated 28 February 1995. On 8 June 1995 the applicant was convicted on 66 charges of filing false returns of income. On 6 July 1995 the applicant was convicted on six charges of theft in relation to tax refunds made to his clients who were duly entitled to them. As a consequence of the criminal convictions for offences under the Crimes Act 1961 and ITA 1976, which were essentially for acting dishonestly, the applicant was assessed for a substantial amount in penal tax. The applicant commenced judicial review proceedings against the Commissioner's decision not to refund the balance that arose after the second assessment had been made.

Of interest in *Singh* is that what the Commissioner held as surplus funds appeared to include the whole amount of the assessments in dispute and not only the non-deferrable sums, as had so far been the issue in relation to *Anzamco*, *Miller v C of IR* and *Hieber*. In this respect *Singh* appears to have broken new ground. Laurensen J in his judgment makes the significant point that, when the applicant was notified on 28 February 1995 that his request for a refund would not be met, the Commissioner's investigation had reached a point where 67 informations had been laid against the applicant alleging that false returns had been filed. The crucial point was that:

as at 28 February 1995, the respondent had not only determined a clear picture of the applicant's tax liability, but he had also good reason to believe that the liability would be substantially increased by the imposition of penal tax if it was subsequently found that the applicant had, in fact, filed false returns in respect of his own affairs.<sup>51</sup>

The above comments amply demonstrate the very close nexus that must exist between the surplus funds retained and a related future though

---

<sup>51</sup> At 15054 RHC.

impending tax liability. The impending liability must be very directly linked to the basis for obtaining the surplus funds in the first place. Any other nexus between existing funds and a general future liability would not suffice. It has to be as close as in *Singh* where the assessments related to the refunds falsely claimed and section 400 notices were served to meet assessments for such refunds. The surplus moneys from issuing the section 400 notices could be held in order to meet future assessments for penal tax which were to be raised as a direct consequence of such deceptive conduct.

The other rationale for entitlement to hold such surplus funds would be where the impending assessments will almost certainly exceed the surplus held, thereby nullifying any practical usefulness of making the refund. As observed by Laurensen J:

The important point to note, as I see it, is that the balance of the monies held by the respondent as at the date of his decision, of approximately \$40,000, were less than the total liability finally established of approximately \$105,000. In fact all the monies obtained pursuant to the s 400 notice have been allocated by the respondent in part payment of the above sum.<sup>52</sup>

Having so closely circumscribed the circumstances where surplus monies so obtained can be retained, it appears that Laurensen J was mindful of the injunction by Barker J in *Anzamco* that since a notice interferes with the rights of the subject the legislation must be strictly construed.

#### *6. A Section 157 Notice and Other Fiduciary Relationships*

The High Court decision in *King v Leary*<sup>53</sup> dealt with the issue of how wide a construction could be given to the obligation to pay money which was clearly identifiable as an “amount payable” as the phrase is defined in section 157(10). Thus, the Court had to decide whether the primary obligation to pay as between payer and payee could be extended to charge all persons who in any paying capacity had control of funds which were to pass to the taxpayer.

The facts in *King v Leary* illustrate that the notice can be used by the Commissioner as a potent instrument for collecting unpaid taxes. The section 400 notice was issued at the same time as the default assessment was issued which created the debt. The notice was issued to the defendant solicitor and taxpayer. After the notice was issued, the defendant as trustee

---

<sup>52</sup> Supra note 42, at 15054.

<sup>53</sup> (1988) 10 NZTC 5067.

of the taxpayer's family trust received a cheque from the trust. Part of the amount represented by the cheque was paid out to the taxpayer by the defendant acting in his capacity as trustee, pursuant to instructions from the taxpayer's father who was settlor of the family trust. The Commissioner alleged that the payment to the taxpayer by the defendant solicitor was a clear breach of section 400, and brought a prosecution action under the then equivalent of section 157A of the TAA (s 400 (9)(a) of the ITA 1976). The prosecution action was first heard in the District Court which decided that the funds had been held by the defendant on account of the family trust. When the money was paid out to the taxpayer, the amount was not payable by the defendant to the taxpayer, as was required by section 400, because the trust was the payer and not the defendant solicitor who was merely acting on instructions. Since the trust was the payer, the moneys so held were impressed by that trust. The Commissioner appealed by way of case stated to the High Court. Counsel for the Commissioner argued that, having regard to the authorities, the phrase "to be made from any amount payable by him to a taxpayer" (in the then equivalent to section 157 (1) (a)) had always been wide enough to override contractual relationships, fiduciary relationships and the relationship between a trustee and beneficiary.

Heron J agreed with submissions made by counsel for the Commissioner that a much wider meaning was intended of the obligation to pay. Heron J agreed with the finding of the District Court that it was indeed correct to say that the amount in question was certainly one which was payable by the trust to the taxpayer but the obligation to pay was not restricted merely to this primary obligation to pay. His comments were as follows:

The same amount was also "payable" by the solicitor to the taxpayer. He held monies on behalf of his client, the trust, but they became payable by him to the taxpayer on receipt of instructions from the trust. I think the section was not designed to confine itself to the primary obligation to pay, recognising only the ultimate relationship between the payer and payee. It was I believe designed to charge all persons who in any paying capacity had control of funds which were to go to the taxpayer. I think that is consistent with the practical interpretation that the words "payable" and "paid" have received and the policy of the section designed, once default has occurred, to intercept funds and cut across other obligations, whatever they may be, except where otherwise provided by statute.<sup>54</sup>

---

<sup>54</sup> At 5073. It appears that s 157(10)(6) in defining "amount payable" gives effect to the decision in *King v Leary* by including amounts which are payable by a person as a trustee.

### 7. Section 157 and Statutory Priorities

The comments towards the end of Heron J's judgment above suggest that a statutory notice cannot frustrate what statute may have already prescribed as the priority in which payments ought to be made. The statutory notice will take effect subject to any prior charges such as a mortgage, as illustrated in the High Court decision in *Murphy v New Zealand Newspapers Ltd*.<sup>55</sup>

In *Murphy*, the plaintiff solicitor, acted for the mortgagee in a mortgagee sale. After the realisation of proceeds from the sale, the mortgagee's claims were met in full. There was, however, a surplus of funds left over after the mortgagee's claims were satisfied, and efforts were made to contact the mortgagor with a view to paying over the surplus to the mortgagor in accordance with section 104 of the Property Law Act 1952 (PLA 1952). These efforts proved unsuccessful and the solicitor prepared to follow the procedure prescribed by the PLA 1952 and Land Transfer Act 1952 (LTA 1952), whereby the surplus moneys, being *bona vacantia* (unclaimed), would be paid to the Crown. Before the solicitor could embark on this procedure, he was served with a section 400 notice in respect of tax arrears owed by the mortgagor. Shortly after receiving the Commissioner's statutory notice, he was served with a charging order by a creditor of the mortgagor. The plaintiff solicitor sought a declaratory judgment as to whether the sums had to be paid in total to the Crown because they were *bona vacantia*, or alternatively whether the Commissioner's and creditor's claim had to be satisfied first.

Holland J responded to the competing claims on the basis of a construction of the statutory provisions. First, the provisions of section 104(1) were couched in mandatory terms when outlining the priority that had to be adhered to in dealing with the proceeds of a mortgagee sale. The priority was as follows: payment of expenses in facilitating the sale; meeting the claims of the first mortgagee; meeting the claims of subsequent registered mortgages and charges; and finally, paying any surplus to the mortgagor. In contrast to section 104(1) were the provisions in section 104(2) and section 102A of the PLA 1952, which were directory or discretionary in nature. Section 104(2) provided that, where the mortgagor could not be found, the surplus may be paid to the Secretary to the Treasury. Section 102A(2) provided that, where any surplus money from a mortgagee sale could not be paid to a mortgagor because he could not be found, the proceeds may be paid to the Crown by remitting them to the Secretary to the Treasury.

---

<sup>55</sup> (1982) 5 TRNZ 876.

Holland J placed a great deal of importance on the differing statutory wording which meant that, in the event of the mortgagor not being found, the mortgagor did not lose his right to the surplus funds and so the funds could not automatically go to the Crown. If it was intended that, on the mortgagor not being found, the mortgagor had lost his entitlement to the surplus and that it should be paid to the Crown, then it would have been a simple matter for sections 102A and 104(2) of the PLA 1952 to say so.

Simply because the mortgagor could not be found meant that, up until the moneys were paid over to the Crown, the mortgagor was still entitled to the surplus. Holland J then made reference to the Unclaimed Moneys Act 1971 to support his view that inability to find the mortgagor did not mean that the mortgagor automatically lost entitlement to the surplus funds. Under the Unclaimed Moneys Act 1971 (UMA 1971) there were many instances where the mortgagee would have had to retain the money for six years before repaying the residual amount to the Crown. The effect of provisions such as sections 102(A)(2) and 104(2) was simply to relieve a mortgagee from retaining unclaimed moneys for extended periods of time. After unsuccessful efforts had been made at locating the mortgagor, the moneys could be paid to the Crown.

On the facts in *Murphy*, this meant that, since the moneys had not been paid over to the Crown, the mortgagor was still entitled to the surplus. Accordingly, the amounts claimed under the section 400 notice and the charging order could be met, although for practical reasons the full amount of the claim under the charging order could not be met in full as there were insufficient funds.

There are other significant points that arise from the facts in *Murphy*, although not discussed in the judgment. Of interest is how *Murphy* illustrates that a Commissioner's notice will take effect subject to equities provided for by other statutes. Holland J as a first step identified the mortgage as one provided for by the LTA 1952.<sup>56</sup> It was implicit that the priority for the disbursement of funds under a mortgagee sale had to be followed as prescribed by the LTA and the Commissioner's notice could not cut across such a pre-determined statutory priority. This seems clearly to be the case and cannot be affected by how early in time the Commissioner serves a statutory notice.

The chronology in which the events occurred in *Murphy*, from the Commissioner's tax recovery point of view, would appear to be irrelevant

---

<sup>56</sup> At 878.

only in regard to prior statutory priorities but very relevant in respect of subsequent claimants. The sale of land occurred on 1 September 1981. After commission had been deducted the balance of the deposit totalling \$2,315.20 was received by the plaintiff solicitor on 16 September 1981. On 4 September 1981, the solicitor received a section 400 notice requiring payment of about \$365 in tax arrears owing by the mortgagor. On 12 October 1981, the solicitor was served a charging order for a debt of just under \$7000 owed by the mortgagor to New Zealand Newspapers Ltd as the first defendant. The plaintiff deposed on 29 October 1981 that the total surplus moneys held from the mortgagee sale was \$4762.63.

The very early action taken in serving the notice as early as 4 September was pivotal in securing the Commissioner's position, as 38 days later a charging order was served for an amount far in excess of the surplus funds available. Had the charging order been served before the Commissioner's notice, it appears that, not only would the full amount claimed under the charging order not be met, but the Commissioner by being second in time would have no funds to meet his claim. Thus, early action made the Commissioner's enforcement action quite effective. Both *Murphy* and *King v Leary* are models of how swiftly and effectively the Commissioner can in fact use the statutory notice procedure.

There is another aspect regarding the promptness with which the Commissioner served the statutory notice. The promptness was material in securing payment to the Commissioner, assuming that there were no other creditors besides the Commissioner. Even if there were other creditors, the Commissioner can still secure a prospect for payment where he is either first in time as in *Murphy*, or, even where the Commissioner is not first in time, other creditors' claims are not so large as to defeat any practical gain that the Commissioner may have in the surplus funds. The promptness was advantageous because it meant that, while the mortgagor was technically still entitled to the surplus, in terms of section 400/section 157 there was an "amount payable" in terms of section 157(10)(a) to which the notice could effectively attach. Had there not been prompt service of the notice, there would have been a real risk of the solicitor paying the money over to the Treasury, as he would not have been required to hold it for say six years as under the Unclaimed Moneys Act 1971 before paying it to the Crown. Once he had discovered that the mortgagor could not be found, he could have at that point paid the money over to the Treasury as indeed he was entitled to under the relevant provisions of the PLA 1952.

If the notice had been served after the solicitor had paid it to the Crown, then the Commissioner's notice though valid would have had no effect as there

would be no “amount payable” which would make the notice effective. In other words, once the amount was paid over to the Crown as unclaimed moneys or surplus moneys, the prospect of effectively using a statutory notice becomes redundant. It may be argued that the futility was only in respect of the effectiveness of the notice and not in the overall effect of the Crown ultimately receiving the money. It would appear that this argument may be partially valid. While it may close the avenue for an effective notice, the Crown receives the money as unclaimed or surplus money that the mortgagee or other creditor of the mortgagor has not claimed. Technically the Commissioner as an agent of the Crown would still have a tax debt owing. The net result is that the Treasury as one agent of the Crown gets the whole lot. However, if there had been a promptly served statutory notice, the Commissioner would have had the tax debt met and any balance (if any) would go to the Crown. Alternatively, if there were creditors other than the Commissioner as in *Murphy*, then assuming there were sufficient funds, the Commissioner’s debt would be satisfied while the balance of the surplus would go to satisfy the other creditors in which case no residual sum is available for the Treasury as the other Crown agent.

This raises a further point which flows on from Heron J’s comments in *King v Leary* that a section 157 notice cuts across other obligations, except where otherwise provided by statute. It could be said that *Murphy* takes matters further than *King v Leary* in that in *Murphy* there were two statutes, namely the ITA 1976 and the PLA 1952, which each sought to claim moneys for the Crown albeit by different agents of the Crown. Holland J resolved the matter on a technicality based on an issue of statutory construction of the relevant provisions of the PLA 1952 only. It appears that it is implicit in Holland J’s reasoning that, despite the technical approach he adopted in resolving the issue, there is a particular effect. This is that the Crown cannot claim entitlement to all money as unclaimed sums under one statute when a claim is made under another statute by another Crown agent. In other words, the statute which claims the surplus or any part of it as a debt to the Crown must be given precedence over the statute that merely allows the surplus to be paid to the Crown for want of any claimant to the surplus. It was this argument that the Attorney-General in *Murphy* did not appreciate.

This argument is a very logical one and has a great deal of merit. The wider policy underpinning this argument is that any surplus is payable to the Secretary to the Treasury only when there are no claims being made on it prior to it being paid to the Treasury. In other words, it must in fact be an amount which is *bona vacantia*. If there are claims, then the amount logically cannot be treated as a surplus which may be paid to the Crown, for only sums which no one is entitled to or does not claim an entitlement to are

payable to the Crown as unclaimed moneys. This principle seems to underpin the Unclaimed Moneys Act 1971 in that so far as moneys are unclaimed they logically may be paid to the Crown. This demonstrates that the Attorney-General should fail when he seeks to claim money as payable to the Crown when there are prior claimants as happened in *Murphy*.

The argument that the Attorney-General cannot claim moneys that are the subject of a claim by another Crown agent is not merely academic. It can have significant implications for the Commissioner using the statutory notice procedure. The notice procedure has been discussed in relation to income tax debts. However, there is an identical notice procedure in the Goods and Services Tax Act 1985 (GST Act),<sup>57</sup> the Student Loan Scheme Act 1992,<sup>58</sup> the Gaming Duties Act 1971<sup>59</sup> and the Child Support Act 1991.<sup>60</sup>

Furthermore, under the Accident Insurance Act 1998,<sup>61</sup> the Commissioner can serve as the statutorily appointed agent for the collection of premiums. Under this Act the Commissioner is similarly empowered to use the statutory notice procedure under that Act to collect outstanding premiums.<sup>62</sup>

The implications of the decision in *Murphy* appear to be that, provided that the notices are served before any surplus is paid to the Treasury, the notices are valid and effective. The notices if served promptly have the potential of collecting a range of revenues, and such collection cannot be defeated by any claims that the surplus must be paid to the Treasury.

#### 8. Section 157 and Sums Payable in the Future

Another practical point worth noting is that a notice can attach moneys that in the future become an “amount payable”. The notice does not become invalid merely because once served there is no amount then held by either a bank or a creditor in favour of the taxpayer. This is envisaged by section 157(1)(a) and (b) as well as by section 157(10)(b) and (c)(ii). The notice subsists until money becomes credited to the taxpayer at a future date.

---

<sup>57</sup> Section 43.

<sup>58</sup> Section 46.

<sup>59</sup> Section 12L.

<sup>60</sup> Section 154.

<sup>61</sup> Section 316.

<sup>62</sup> Section 313. Also of note are s 46 of the Accident Compensation Act 1982 and s 130 of the Accident Rehabilitation and Compensation Insurance Act 1992 (both repealed), and which were the then statutory notice equivalents to s 313 of the 1998 Act.



The Australian equivalent provision in section 218(1) of the Income Tax Assessment Act 1936 (ITAA 1936) is similar to New Zealand's in that it also refers to the prospect of amounts being subject to the notice which are "accruing" or may become due to a taxpayer. Fox J in *Huston & Anor v DFC of T* expressed the view that, when issuing a notice under section 218 of the Australian Act, the Commissioner was not confined to situations in which there was, at the time of service of the notice, money due and payable by any person to the taxpayer or which otherwise at the time satisfied one of the paragraphs of section 218.<sup>63</sup> His Honour proceeded to comment that:

A notice can be issued under sec 218 which may have only a prospective application. I do not mean, in putting the matter that way, to suggest that the Commissioner, if challenged, must establish that at some time one of the paragraphs will apply, but rather that he is by the section enabled to issue a notice even if it may apply only to circumstances arising in the future, as between garnishee and taxpayer.<sup>64</sup>

The Federal Court of Australia in *Re Edelsten; Donnelly v Edelsten*,<sup>65</sup> referred to this future liability by the debtor when it noted that the words "any money, may become due" are "apt, in the context, to refer to an identifiable sum payable upon a contingency".<sup>66</sup> Thus, there was a strong intimation that future amounts which become payable, on their coming into existence, may come within the purview of section 218.

The decision in *Re Edelsten; Donnelly v Edelsten* was appealed against by the Deputy Federal Commissioner of Taxation to the Full Federal Court. The Full Federal Court decided the appeal in its decision in *Deputy Federal Commissioner of Taxation v Donnelly & Ors* which is recognised as the leading case on section 218.<sup>67</sup> The Full Federal Court examined the issue of the extent to which section 218 affected sums of money which became owing to the taxpayer in the future.

Von Doussa J of the Full Federal Court agreed with comments of Burchett J in the Federal Court decision that the words "any money ... may become due" in section 218(1)(a) were apt in context to refer to an identifiable sum payable upon a contingency.<sup>68</sup> Von Doussa J, however, opined that, if the conditions of section 218(1) did not exist when a notice was issued, this did

---

<sup>63</sup> 83 ATC 4525.

<sup>64</sup> At 4531 LHC.

<sup>65</sup> 88 ATC 4958.

<sup>66</sup> At 4965.

<sup>67</sup> 89 ATC 5071.

<sup>68</sup> Cited at supra note 65.

not mean that the notice was then and forever null and incapable of taking effect in the future should the contingent provisions of section 218(1) later come into existence. The notice would simply not be binding at the time when it was given. The effect of a notice served in such circumstances was expressed as follows:

In my opinion a notice may be given prospectively under sec 218. When this is done, no obligation is imposed on the third party unless or until circumstances arise between the third party and the taxpayer which bring into existence an identifiable debt owing to the taxpayer, whether payable forthwith, or on a fixed date, or on a contingency. The principles which apply to the assignment of future property do provide a helpful guide. Equity fastens upon the future property to make the assignor a trustee of the legal right of ownership for the assignee when the property comes into existence and when it is identifiable as property meeting the description of the assignment .... Until identifiable property comes into existence there is no subject matter in respect of which the assignment can operate. Likewise, in the case of a prospective notice given under sec 218, until there is an identifiable sum of money owing to the taxpayer by the third party the conditions of the section are not met. It is the coming into existence of the identifiable debt which crystallises the obligation on the third party to pay to the Commissioner the “money” referred to in sec 218 (1) and provides the measure of the obligation which is imposed by the notice. If for any reason circumstances do not arise after the giving of the notice where “money” answering the description in sec 218 (1) comes into existence, no obligation is ever imposed on the third party to make any payment to the Commissioner. Where “money” does come into existence later, only at the point in time when it does so is an obligation imposed on the third party.<sup>69</sup>

Lockhart J agreed with the conclusion of von Doussa J on this point, that a notice may be given under section 218 which is prospective in the sense that it may operate with respect to debts that are not brought into existence until after the date of service of the notice.<sup>70</sup> Furthermore, Lockhart J acknowledged that the specific point on the prospective effect of a notice had not been argued before the Full Federal Court, but accepted that his conclusion must be correct and was also supported by the language of the section which had the phrases “or may become due” and “or may subsequently hold”. Hill J, the third member of the Court, concurred.<sup>71</sup>

This approach was confirmed by Brennan J in the High Court of Australia decision in *Clyne v DFC of T* when he said:

---

<sup>69</sup> Supra note 67, at 5080 RHC.

<sup>70</sup> Ibid, 5076 LHC.

<sup>71</sup> Ibid, 5094 LHC.

when a notice is given pursuant to the section, it takes effect according to its tenor. The third person is immediately bound to comply with it, though his obligation is not to be discharged until some later time.<sup>72</sup>

Thus, a notice which seeks to attach amounts payable to the taxpayer in the future does not entitle the Commissioner to require a debtor of the taxpayer to pay the amount owed to the taxpayer before the debt becomes payable.<sup>73</sup> The notice on being served is dormant and operates as if it were a floating charge so that as soon as the debt comes into existence the charge created by the section 157 notice crystallises. There is no provision for any time limit that any notice stays effective for, as once it is issued, it takes effect until such time as a notice of revocation is issued by the Commissioner.

Although there is no New Zealand decision that articulates the prospective effect of a notice as in Australia pursuant to the Full Federal Court decision in *Donnelly & Ors*,<sup>74</sup> it could be argued that *Murphy* implicitly recognised that this was the case in its result. It could be argued that the chronology of the events in *Murphy* strongly suggest that the Commissioner was successful only because he had served a notice which could only have had prospective effect. In *Murphy*, although the sale had occurred on 1 September 1981, the balance of the deposit was not received by the solicitor until 16 September 1981. The Commissioner's notice was served on 4 September 1981 and was prospective in effect, but crystallised on 16 September when the solicitor finally received the balance of the proceeds of the deposit.

---

<sup>72</sup> 81 ATC 4429, 4442 RHC.

<sup>73</sup> This was confirmed in the High Court of Australia decision in *Clyne v DFC of T* 81 ATC 4429, with Brennan J saying: "But the third person cannot be required to pay the Commissioner before the money becomes due and payable; the notice does not accelerate the time for payment" (at 4442). Mason J, who provided the leading judgment in *Clyne v DFC of T*, also said as follows: "and it cannot be that the Commissioner can by notice require a debtor of a taxpayer to pay the money which he owes to the taxpayer before the debt, as between the debtor and the taxpayer, has become payable" (at 4436 LHC).

<sup>74</sup> More recently in *DFC of T v Conley and Ors* 98 ATC 5090, Tamberlin J of the Full Federal Court commented: "Thus a s 218 notice can be given when no money is presently due to the taxpayer but where it may become due and where it may be held by the recipient on account of the taxpayer" (at 5092 RHC).

## VI. EXCLUSIONS FROM THE AMBIT OF SECTION 157

1. *Statutory Exclusions*

The definition of “amount payable” in section 157(10) specifically does not include money in an account that is a Home Lay-By Account under the Post Office Act 1959, a Home Ownership Account under the Home Ownership Savings Act 1974, a Farm Ownership Account under the Farm Ownership Savings Act 1974, or a Fishing Vessel Ownership Account under the Fishing Vessel Ownership Savings Act 1977.

It appears that the saving of the above categories of accounts from the effect of section 157 notices is based on public policy grounds designed to facilitate the ownership of homes, farms and fishing vessels. It is worth noting that the Australian equivalent to section 157 does not contain such exempt accounts and neither does section 224 of the Canadian Income Tax Act which is the equivalent provision.

2. *Section 157 and Joint Accounts*

The issue has arisen of whether joint accounts can be attached. The principle under ordinary banking law is that a garnishee order will not be effective on joint accounts. The judgment of Pollock B, in *Beasley v Roney*, is an early articulation of the principle that:

the debt owing by a garnishee to a judgment debtor which can be attached to answer the judgment debt must be a debt due to the judgment debtor alone, and that where it is only due to him jointly with another it cannot be attached.<sup>75</sup>

In *Hirschhorn v Evans*,<sup>76</sup> a judgment debtor and his wife had a joint account with the appellant bank, on which account either of them could draw. A garnishee order was made on this account in respect of a debt owed by the husband. The Court of Appeal held that a joint account with a bank, even if owned by a husband and wife, could not be attached under a garnishee order in respect of a debt by one of the joint owners. Slessor LJ articulated the majority view of the Court in opining as follows:

I think that one has to look at the account as a whole, and, looking at the account as a whole, I think that it is in the nature of a joint account on which the bank are liable to both parties jointly, and, consequently, the garnishee order is misconceived in stating

---

<sup>75</sup> [1891] 1 QB 509, 512.

<sup>76</sup> [1938] 3 All ER 491.

that the bank are indebted to the said judgment debtor in the sum there stated, whereas, in reality, they are indebted to the judgment debtor and to his wife jointly.<sup>77</sup>

In Canada, the Court of Appeal in *Banff Park Savings and Credit Union Ltd v Rose*<sup>78</sup> held that a joint bank account could not be attached under a garnishee order on the same reasoning.

This being a consistent principle in banking law as far as a garnishee order is concerned, the question arises whether there is any change in its application in the case of statutory notices issued in respect of tax debts. Both Australia and New Zealand are consistent in their approaches in that the principle of banking law just discussed also applies in the case of statutory notices and tax debts.

The issue was considered in the Supreme Court of New South Wales decision in *DFC of T v Westpac Savings Bank Ltd & Ors*.<sup>79</sup> There was a bank account in the joint names of three taxpayers on which the Commissioner served a section 218 notice, for the taxation liability that each had incurred separately in their own individual right. Bryson J followed the reasoning of Slesser LJ in *Hirschhorn v Evans* that it is in the nature of a joint account that the bank is jointly liable to both parties. However, Bryson J was not content to base his reasoning only on Slesser LJ's in *Hirschhorn v Evans*. His Honour commented that section 218 proceeded on the basis of distinctness of obligation of the taxpayer, and of entitlement of the taxpayer. This in His Honour's view accorded "with the personal and several nature of the obligations to pay tax which the legislation lays on taxpayers".<sup>80</sup>

It would be quite incongruous with the statutory scheme if the legislation created a situation where one person or one person's assets came under an obligation for payment of tax levied on some other person, which would precisely be the effect if a joint account could effectively become subject to a section 218 notice. As submitted by the first defendant, if Parliament intended to override the law as settled in *Hirschhorn v Evans*, "there would be a need for express language".<sup>81</sup>

---

<sup>77</sup> At 496.

<sup>78</sup> (1982) 139 DLR 3d 769.

<sup>79</sup> 87 ATC 4346.

<sup>80</sup> *Ibid*, 4352 RHC.

<sup>81</sup> *Ibid*.

In New Zealand the High Court considered the effect of a section 157 notice on a joint account in *C of IR v ANZ Banking Group (New Zealand) Ltd.*<sup>82</sup> This was pursuant to a practice of the Commissioner of applying deduction notices to a joint account if the signatory was “either or”. The Commissioner assessed the husband for approximately \$141,000 in income tax. The husband and wife had a joint account, and the Commissioner served a notice on the Bank thereby demanding payment of all monies in the joint account. The question Ellis J had to determine was whether the monies in the joint account were “payable in relation to the taxpayer”. Following Slesser LJ in *Hirschhorn v Evans*, he held that the monies were not payable to the taxpayer without the wife’s authority, as the bank was jointly indebted to both the husband and the wife and not to the husband exclusively. Accordingly, the Bank was entitled in its actions to disregard the notice.

Although the Commissioner failed in his bid in *C of IR v ANZ Banking Group (New Zealand) Ltd* to attach a joint account using a section 157 notice, he does have the power to deduct money from joint bank accounts for debts under the Child Support Act.<sup>83</sup>

The Commissioner is quite entitled to use a section 157 notice to seize money in a term investment even before its maturity date. Money in investment portfolios can also be seized, such as superannuation schemes, however the Commissioner accepts that he cannot by serving a notice on a bank account put a taxpayer into, or further increase, an existing overdraft.<sup>84</sup>

The position regarding a statutory notice and a current account is contrary to banking law. The law has long established that the relationship of banker and customer in respect of a current account is one where the bank is merely a debtor of the proprietor of the current account, and on this basis as a matter of law cannot be said to hold money on account of such person.<sup>85</sup> However, unlike the position with respect to joint accounts, section 157(10)(c) specifically overrides this general principle of banking law pertaining to current accounts. In the definition of “amount payable” where the person is a bank, it includes money, including interest on that money, which is on current account.

---

<sup>82</sup> (1998) 18 NZTC 13,643.

<sup>83</sup> Section 155. Also note s 86D of the Social Security Act 1964 which contains an identical provision for attaching joint accounts.

<sup>84</sup> (August 1999) 11 *Tax Information Bulletin* No 7, 5.

<sup>85</sup> *Foley v Hill* (1848) 11 HLC 28 (9 ER 1002); *Joachimson v Swiss Bank Corporation* (1921) 3 KB 110.

## VII. FRUSTRATING THE EFFECT OF SECTION 157

1. *Diverting Funds Before Receipt By Third Party*

From the discussion thus far, a notice can be frustrated if a taxpayer holds his or her funds in a joint account. Certainly from the comments by Von Doussa J in *Donnelly*,<sup>86</sup> it is clear that the obligation on the third party to comply with the notice does not arise till the “money” comes into existence. So although these comments in *Donnelly* were in respect of the validity of a prospective notice, it will despite being valid not have an effect on the third party until funds actually arrive in the custody or control of the third party. This means that, once a notice is served and in terms of section 157 (5) a taxpayer is notified, there does not appear to be any impediment statutory or otherwise from enabling a taxpayer to frustrate the notice. One way in which it may be frustrated would be to assign future payments to another person or that other person’s account for valuable consideration in disregard of notices served under section 157. Alternatively, instalments payable under a loan by a debtor to a taxpayer’s bank can on instructions be made payable to another bank or person as agent of the taxpayer. In the case of a bank for instance it appears that the taxpayer can instruct prospective creditors of the taxpayer paying money not to pay it to a particular bank but to re-route the payments through another bank. On the basis of *Anzamco*,<sup>87</sup> it would not be sufficient to have funds merely diverted to another account in another branch of the same bank. It would have to be an entirely different bank or third party such as a credit union or building society to which funds have to be diverted.

However, the diversion, if it is to occur, has to occur before the funds reach the third party subject to the notice. Once the funds which are subject to a prospective notice arrive in the custody of this third party, any subsequent attempts to divert the funds through an assignment for instance will have no effect, as clearly illustrated by the High Court of Australia decision in *Clyne v Deputy Federal Commissioner of Taxation*.<sup>88</sup> The facts in *Clyne* were that, on 9 July 1979, the Commissioner served an income tax assessment on the taxpayer for the year ended 30 June 1979. The tax owing was assessed at \$118,436. The assessment notice stated that the tax was due and payable on 8 August 1979. On 10 July 1979, the Commissioner gave notices under section 218 of the Australian Act (similar to section 157) to a branch of the Commonwealth Trading Bank where the taxpayer held interest-bearing deposits of \$70,000 which matured on the following dates: \$10,000 on 21

---

<sup>86</sup> Supra note 67, at 5080 RHC.

<sup>87</sup> Supra note 42.

<sup>88</sup> 81 ATC 4429.

September 1979; \$25,000 on 9 April 1980; and \$35,000 on 20 April 1980. The notices required the bank to hand over the \$70,000 to the Commissioner in part payment of the taxpayer's tax liability when the deposits matured at various dates after 21 September 1979. On 4 September 1979, the taxpayer, by deed, assigned the deposits to the second appellant as security for future advances and gave notice of the assignment to the bank. There were a number of issues that were raised as a consequence of the notices being served, but the one of direct relevance was whether the taxpayer was correct in his argument that the subsequent assignment of the right to the deposits operated to defeat the notices. Gibbs CJ answered this argument as follows:

Subsequent actions by the taxpayer cannot render the requirement nugatory or ineffective. ... However, once the notice is given, it operates to prevent any subsequent dealing with the money which will prevent compliance with the notice when the time for compliance arrives. An assignment made by the taxpayer after the date of the notice will be ineffective to relieve the person to whom the notice is given of his statutory obligation to pay the money to the Commissioner. Notwithstanding the assignment, the money will be "due" at the time when it would have become payable to the taxpayer if it had not been for the subsequent assignment whose effect is to be ignored.<sup>89</sup>

Brennan J articulated his response to the taxpayer's argument saying:

Between the time when the notice is given and the time when the obligation is to be discharged, the third person is not at liberty to pay to the taxpayer the money falling within the terms of the notice; the third party is obliged to retain it in order to discharge the obligation to pay the money to the Commissioner in compliance with the requirement expressed in the notice .... The giving of the notice thus affects the rights of the taxpayer who, once the notice is given, is statutorily divested of his right to payment of the whole or a part of the money specified in the notice ... an obligation to obey the assignor's direction cannot prevail over an earlier statutory requirement to pay the money to the Commissioner.<sup>90</sup>

For New Zealand purposes, the comments in *Clyne* would apply but with one additional significant difference. This is that on service of the notice by virtue of section 157 (8) the money subject to the notice is deemed to be held in trust for the Crown. In other words, service of the notice creates a proprietary interest and so the Commissioner's right to payment

---

<sup>89</sup> At 4433RHC-4434 LHC. Mason J agreed saying: "The effect of imposing the obligation is to make it unlawful for the recipient to pay the moneys to anyone but the Commissioner after service of the notice" (at 4440 RHC).

<sup>90</sup> At 4442-4443.



distinguishes him from a garnishor of a debt who obtains no proprietary interest in the debt owing to the judgment debtor. Consequently, any attempt to divert or assign moneys subject to the notice is tantamount to breach of trust but more seriously an act of theft or misappropriation as it is inconsistent with the Crown's deemed proprietary interest. This is all the more reason why, if any action is to occur to frustrate the operation of a notice, it occurs so as to prevent money coming into the hands of the third party in the first place so as to avoid the property becoming Crown property.

## 2. Effect of Bankruptcy And Discharge From Bankruptcy

Another way in which a section 157 notice can be frustrated is by the taxpayer becoming bankrupt and subsequently being discharged from bankruptcy. On being discharged, no amount of tax is thereafter due and the consequence of a notice served prior to bankruptcy in such circumstances is that it will lapse.

The effect of a statutory notice served in such circumstances is not such as to be able to attach amounts due to the taxpayer after being discharged from bankruptcy. The taxpayer's status on being discharged is as if he or she has no prior debts, whether tax debts or other debts. Accordingly, a notice served prior to bankruptcy does not survive even so as to remain dormant through the bankruptcy only to crystallise and attach debts or amounts owing to the taxpayer after being discharged from bankruptcy. This seems to be the position pursuant to a decision of the Australian Full Federal Court in *DFC of T v Government Insurance Office*.<sup>91</sup>

In *DFC of T v Government Insurance Office*, notices of assessment of income tax were issued on 3 April 1986. On 1 July 1986 the taxpayer commenced civil proceedings against a third party, namely, Government Insurance Office ("GIO"). On 3 October 1986 the Deputy Commissioner served a section 218 notice requiring the GIO to pay to the Commissioner so much of any moneys that may become due as a consequence of the litigation to the taxpayer up to the amount of \$52,499.82. On 14 July 1987 the taxpayer became bankrupt on his own bankruptcy petition. On 15 July 1990 the taxpayer was discharged from bankruptcy and on 13 August 1991 the taxpayer obtained judgment against the GIO for the sum of \$10,793 plus costs. The Full Federal Court by majority held that the notice served prior to bankruptcy did not survive the bankruptcy and discharge from bankruptcy so as to attach the judgment amount. Being discharged from bankruptcy meant that the status of the taxpayer had radically changed whereby he was

---

<sup>91</sup> 93 ATC 4901.

completely absolved from his prior indebtedness. It therefore followed that action for the recovery of prior debts would not subsist on the taxpayer's discharge from bankruptcy.

### 3. *Accounts Denominated In Foreign Currency*

Another avenue in which a notice can be frustrated is when it is served on accounts denominated in foreign currency. If the notice demands a New Zealand dollar amount but the bank account is denominated in US dollars, there is an absence of uniformity in the unit of account. The Full Federal Court of Australia in *DFC of T v Conley & Ors*,<sup>92</sup> considered this very question in the context of a section 218 notice served to attach \$67,242,842.05 in accounts with the National Australia Bank which were denominated in United States dollars. The Court held that the Australian Act recognised the necessity for money to be expressed in terms of a unit of account. The unit of account for the Act was Australian currency and an assessment made under the Act had to be expressed in Australian currency. If section 218 was intended by the legislature to apply to foreign currency, there would be an expectation of some indication of the time and method of conversion to Australian currency to be contained in the Act. However, no such mechanism existed. The lack of a conversion mechanism created anomalies, especially in cases where the debt due to the taxpayer which formed the subject of the section 218 notice was not presently payable. A significant lapse of time, between the time of service of a notice and the time when money becomes payable, could result in significant fluctuations in the relevant exchange rate. This could result in significant differences between the amount of foreign currency calculated and the amount of tax owing by the taxpayer. Emmett J, who provided the leading judgment in *Conley*, articulated some of these difficulties as follows:

The difficulties as to the time at which a conversion calculation is to be made in order to determine how much of foreign currency is attached by a notice under section 218 indicates, in my opinion, that foreign currency is not intended to be the subject of such a notice. The absence of any indication in section 218 itself that it was intended to apply to foreign currency and the absence of any mechanism for conversion ... reinforces the conclusion that foreign currency is not intended to be the subject of a notice under section 218.<sup>93</sup>

---

<sup>92</sup> 98 ATC 5090. (A more detailed discussion of the decision in *Conley* is by Bolwell, "When money is not money" (July 2000) 3 New Zealand Tax Planning Report 21).

<sup>93</sup> At 5099-5100.

These same difficulties also arise under section 157 and the reasons outlined by Emmett J would apply in frustrating the effect of a section 157 notice on accounts denominated in foreign currency.

#### 4. Successful Objection or Challenge of an Assessment

Other circumstances in which a notice could be frustrated is where a taxpayer objects to or challenges an assessment and such objection is allowed either in proceedings before the TRA or the High Court. This necessarily raises the issue of an assessment being issued and a notice also being served close in time so as to deprive the taxpayer of its rights effectively to object to or challenge the assessment.

It appears that the taxpayer will be given the chance successfully to object to or challenge the assessment rather than have such a right forfeited by a statutory notice. This certainly is being advocated by the cautionary comments of Burchett J in *Edelsten v Wilcox & Anor*<sup>94</sup> that:

Section 218 [equivalent to section 157] must, I think, be seen as part of the whole scheme of the Act for the collection and recovery of tax, which of course, includes rights of objection and appeal. It is a strong power designed to protect the revenue but it was not intended to subvert the principle which has been established at least since Magna Carta, that a citizen's property should not be subject to arbitrary seizure. It cannot have been contemplated that the power should be used to negate the rights to contest assessments contained in the Act by the complete wiping out of a business of a taxpayer who is genuinely pursuing avenues of appeal.<sup>95</sup>

This last point raises another matter which may have been largely implied up to this point and that is the relationship between an assessment and a section 157 notice. The notice follows from the assessment, and the notice itself does not create the indebtedness for a tax liability. As stated by Hill J:

section 218 [equivalent to section 157] could not operate to impose a tax. Section 218 is properly to be characterised as a law to facilitate the recovery of tax initially due and owing, rather than as a law imposing some new tax.<sup>96</sup>

A number of consequences flow from this relationship between an assessment and a section 157 notice which are not expressed in the provisions of section 157 and which therefore need to be determined

---

<sup>94</sup> 88 ATC 4484.

<sup>95</sup> At 4494 RHC–4495 LHC.

<sup>96</sup> Supra note 91, at 4913 RHC.

pursuant to this relationship. Section 157 is silent on its effect in the event that tax no longer becomes payable because for instance its effect is frustrated for the reasons just discussed. In such circumstances does the section envisage that the third party in receipt of the notice must still make payment to the Commissioner of tax no longer payable, or must the recipient pay only where tax is properly payable? It would follow that, if the section 157 notice takes life from the assessment, then it cannot still be used to demand payment where the assessed debt has been dealt with. So, if the assessment has been successfully challenged or objected to or the assessed debt has been cleared through a discharge from bankruptcy, the section 157 notice suffers the same fate in that it too is neutralised or lapses. If the section 157 notice is however seen as creating a debt in its own right which is still payable, although in terms of the assessment there is no tax properly payable, a preposterous situation arises. This is because a taxpayer would still be required to make payment to the Commissioner only then to reverse the effect of this by seeking to recover an amount that was wrongly paid. This could not have been the intention of Parliament.<sup>97</sup>

## VII. CONCLUSION

As observed by Richardson J in *Controller and Auditor-General v Davison*,<sup>98</sup> the imposition and operation of taxes is a public governmental activity. The learned judge went further to state that, more importantly, the due imposition and collection of taxes is fundamental to the functioning of government.<sup>99</sup> Tax is imposed by the Income Tax Act 1994 and the Commissioner's role is to quantify and collect the tax that is found to be owing. Bingham LJ in *R v Board of IR ex parte MFK Underwriting Agencies*<sup>100</sup> summarised this as common knowledge that the Revenue is a tax-collecting agency, not a tax-imposing authority.

It is the act of the Commissioner in assessing the tax which determines the indebtedness of the subject to the Crown. The assessment for tax is the statutory judgment of the liability of every taxpayer which the Commissioner has a legal obligation to make and in respect of which he does not have a general dispensing power.<sup>101</sup> It is perhaps because taxation and the collection of taxes are pivotal to the functioning of government that tax debts appear to be subject to a unique regime. The regime is unique both

---

<sup>97</sup> *DFC of T v Government Insurance Office* 93 4901, 4912 RHC.

<sup>98</sup> [1996] 2 NZLR 278, 303.

<sup>99</sup> At 306.

<sup>100</sup> [1990] 1 All ER 91, 110.

<sup>101</sup> *Brierley Investments Ltd v CIR* (1993) 15 NZTC 10212.

in terms of how the debt is arrived at and in the way in which it can be collected.

The Commissioner's powers to collect taxes, simply using the statutory notice procedure prescribed by section 157, would appear to place him in a privileged position not enjoyed by other creditors. Simply having made an assessment, and given the taxpayer a due date for payment, allows enforcement to commence after the expiry of the due date. As noted by Casey J in *Brierley Investments Ltd v C of IR*,<sup>102</sup> it cannot be an abuse of power for the Commissioner to collect taxes when they are properly due. The unique powers enabling the Commissioner to collect tax debts pursuant to section 157 do not require prior notification to the taxpayer before being used. For, as Mansfield J said in *Woodroffe & Anor v DFC of T*, in respect of the Australian equivalent:

In my view, such an intention is clearly evidenced by section 218 itself. Its object is to secure the payment of taxation liability. It would frustrate the fulfilment of that object if such advance notice were required to be given, which might facilitate the movement of the funds the subject of the proposed notice.<sup>103</sup>

Use of the notice procedure by the Commissioner may become more prevalent, not only because of recent criticisms of the Commissioner's actions in collecting tax debts, but also in the drive to shore up the actual annual tax take by Government.

The exercise of the power can come as a rude shock to many a hapless taxpayer, primarily because of the stealth with which it is used. The best insurance against the exercise of such an invasive power is to ensure that, not only are taxes paid, but more importantly that they are paid when they fall due.

---

<sup>102</sup> At 10214.

<sup>103</sup> 2000 ATC 4654, 4657.



H. G. R. Mason

# HENRY GREATHEAD REX MASON KC CMG: AN OUTSTANDING LAW REFORMER

BY DEREK ROUND\*

Rex Mason, Attorney-General and Minister of Justice in the first and second Labour governments (1935-1949 and 1957-1960), made possibly the greatest contribution of any politician to law reform in New Zealand in the twentieth century. This article will review Mason's early life and career, his first period as Attorney-General, his later political career including his second period as Attorney-General, and his involvement in the sensational Mareo poison case.

## *1. Early Life and Career (1885-1935)*

Rex Mason was born in Wellington on 3 June 1885, the son of Harry Brooks Mason, a compositor at the Government Printing Works and for a time on the staff of Hansard, who had come to New Zealand from Cape Town. His mother, Henrietta Emma Rex, an Australian, helped form the Women's Social and Political League in 1894 and was vice-president when women got the vote. She also taught many Wellingtonians ballroom dancing before World War One.

Mason was educated at Clyde Quay School, then at Wellington College where he was Dux in 1902. He won a junior national scholarship, and a Victoria Scholarship instituted by Premier Richard John Seddon. Mason graduated MA with honours in mathematics from Victoria University in 1907, and then LLB.

The future Attorney-General worked in law firms in Wellington and Eltham before opening a practice in Pukekohe in 1911. He was later joined in practice in Auckland by his brother Spencer who later became president of the Auckland District Law Society. Mason was elected Mayor of Pukekohe in 1915 and during his four years as mayor schemes for electricity, roading and water supplies were inaugurated.

---

\* Author and journalist, former editor, New Zealand Press Association. I am grateful to Hon Justice Anthony Ellis, who acted for Mason when he was in private practice, to Rt Hon Jonathan Hunt MP, who succeeded Mason as MP for New Lynn, and to the staff of the Manuscripts Section of the Turnbull Library. I am particularly grateful to the New Zealand Law Foundation for a grant which enabled me to write this profile of Mason, one of a series on lawyer-politicians to be published as *Lawyers in the House*.

In 1912 Mason married Dulcia Martina Rockell and they had two sons and two daughters. Mason and his wife were Theosophists, vegetarians and teetotalers.

Joining the Labour Party after it was founded in 1916, Mason stood for the Manukau seat in 1919 when Sir Frederick Lang retained it for the Massey Government. In 1922 and 1925 he unsuccessfully contested the Eden seat against Sir James Parr, although Mason only narrowly lost in 1922.

The Reform Party had held Eden for 30 years but Mason, then aged 40, managed to win the seat for Labour at a by-election in 1926 following Parr's appointment as High Commissioner in London, defeating Sir James Gunson who called for three cheers for the new member. Mason had fought the campaign on policy and not personal lines, Gunson said. The Reform vote had been split by the independent (former Reform) candidate Ellen Melville, giving Mason a slim majority of 441.

Mason's win in Eden gave Labour 13 MPs in Parliament, making it the official Opposition. Wellington's *Evening Post* commented in an editorial: "To the Labour Party, which is stronger in the theory than in the practice of government, the accession of Mr Mason should be of special value". Mason was to represent Eden and its successors, Auckland Suburbs, Waitakere and New Lynn for 40 years.

Mason was soon working on law reform and in 1929 succeeded with a private member's Bill - the Marriage Amendment Bill - which allowed the marriage of a man and the niece of his deceased wife or of a woman with the nephew of her deceased husband. It was passed after ten minutes in committee "with rounds of applause".

In the previous two years only two other private members' Bills had reached the Statute Book - T K Sidey's Summer Time Bill and Sir John Luke's Music Teachers' Registration Bill.

In 1930 Mason had two Bills passed. One allowed local bodies the option of choosing between two systems of voting at elections, striking out names or marking names with a cross. The other Bill repealed a superfluous provision where a local body was required after a poll to give the Valuer-General a complete valuation roll after the system of rating on unimproved value had been adopted.

Mason clashed with Labour leader Harry Holland during one debate when Holland tried to curtail discussion. Mason retorted - "with some warmth",



according to a newspaper report - that there was nothing some members so much resented as being told to be quiet when they wanted to speak.

In 1928 Mason sent a telegram to Holland in Westport. It read:

I submit that undue publicity is being given to Samoa as a political issue and that the Tories will use it to divert attention from the unfavourable opinion in New Zealand domestic policy. I most strongly urge that every reference to Samoa is providing the Government with a battleground where the issues are too complex for us to make great headway and that the political fight should be confined to the domestic battlefield where victory is certain.

Mason's clearly angry leader wrote to him from Greymouth as soon as he received the telegram, telling him he was "amazed" to get it:

Of course you are quite entitled to your opinion, but I do not think you or I or any other member of the Party are entitled to send such messages by telegram. That is the way to furnish the Tories with ammunition. Please do not send further communications by wire A letter will reach me in 24 hours or a little more.

Holland reprimanded Mason that he had wrongly addressed the telegram to Westport instead of Greymouth and that he (Holland) had to pay full rates on the readdressed message. Holland added: "The contents of your wire will be public property over Westport and Greymouth by this time - and that fact doesn't help the movement". When Mason received the letter - which was signed "yours fraternally" - he wrote back saying that he was sorry that Holland was out of pocket and enclosed some stamps to cover the charges.<sup>1</sup>

In 1930 Mason introduced the *Divorce and Matrimonial Causes Amendment Bill* which established an important legal principle giving domicile to a wife whose husband was out of the country. This became the model for laws that were adopted in other parts of the Commonwealth to help women whose marriages with servicemen from other countries had disintegrated. Mason explained that women had married American sailors when the United States fleet was in New Zealand. The sailor sailed away and that was the last his bride heard of him. Women in this position could not get a divorce in New Zealand because New Zealand law, like the law of many other countries, recognised domicile as giving jurisdiction. The New Zealand wives were recognised as having an American domicile. They had never been out of

---

<sup>1</sup> Mason Papers.

New Zealand and yet had no status in a New Zealand court. Mason's Bill gave recognition to the independent existence of the woman.<sup>2</sup>

Mason was active in local body affairs while he was an MP and served on the Auckland Transport Board from 1931 to 1939, chairing it from 1935 to 1939. He narrowly failed to win the Auckland mayoralty in 1932.

Elected president of the Labour Party in 1931, Mason was a member of the party's policy committee and worked on policy for the 1935 election. Labour MP Jonathan Hunt, Mason's successor in New Lynn, said that this policy consolidated Labour's shift away from socialism towards laying the groundwork for a welfare state in New Zealand and reflected Mason's social democratic rather than socialist principles.<sup>3</sup>

Mason wanted all New Zealanders over 55 to be paid decent pensions and advocated that welfare benefits should be paid to the unemployed and incapacitated, producers should receive a fair income, all employees should have full pay during two weeks annual holiday, and essential public works should go ahead.

Mason was interested in monetary reform and in the 1931 election campaign helped Captain Harold Rushworth, president of the Country Party, who had strong social credit views. Mason told Walter Nash's biographer, Sir Keith Sinclair, that he helped to write Rushworth's election material.<sup>4</sup> Labour did not put up a candidate against him in the Bay of Islands seat.<sup>5</sup>

Between 1932 and 1935 Labour credit reformers were active in Parliament, in caucus and at the Labour Party conference. Mason introduced several private member's Bills aimed at stabilising prices.

Keith Sinclair described Mason and fellow Labour MP Frank Langstone as being to some degree converts to Major C H Douglas's Social Credit ideas which had been gaining supporters in New Zealand since the early 1920s. Sinclair observed rather unkindly that Langstone, who was to become a cabinet minister, acquired his economic experience running the railway refreshment rooms at Taumarunui.

---

<sup>2</sup> (1930) 224 NZPD 309.

<sup>3</sup> *Dictionary of New Zealand Biography* (1998) volume IV 341.

<sup>4</sup> Sinclair K, *Walter Nash* (1976) 292.

<sup>5</sup> Rushworth was to become a leading campaigner for Eric Mareo's release.

Mason believed that the Depression resulted from bankers deliberately restricting the volume of money in circulation. He argued that it was necessary to stabilise internal purchasing power and price levels which were more important than overseas reserves. He believed that a central bank should issue interest-free credit so that the amount of money in circulation was the same as in more prosperous years. Superannuation, pensions, public works and payment of a bonus to all producers to raise their income to the average before the Depression should be financed from interest-free credit.

But Labour's finance spokesman, Walter Nash, who was to become Minister of Finance, retorted that there was no more dangerous philosophy than the idea that the issue of credit would overcome their problems. Nash's orthodox view prevailed. It was said that Mason never forgave Nash, and was even said to detest Nash.<sup>6</sup>

## *2. Period as Attorney-General (1935-49)*

With Labour's sweeping victory in the 1935 general election, Mason became Attorney-General and Minister of Justice. At the first caucus after the election, Mason moved that Prime Minister Michael Joseph Savage should be sole selector of the cabinet, and this was accepted.

Mason's fellow monetary reformer, Frank Langstone, was also in cabinet and the new MPs included a number of reformers. But Mason, Langstone and fellow minister David McMillan did not carry enough weight in cabinet to try to introduce credit reform policies.

Mason received a letter of congratulations on his cabinet post from fellow law student Fred de la Mare, a Hamilton barrister and solicitor. "Your party is indeed lucky having you for the job. Absolute integrity is the prime qualification for justice", he said. Kathleen Billens wrote from Palmerston North: "It has always been one of my wishes to know a great man. So please always keep a little corner in your heart for me". Justice (later Sir Arthur) Fair, who was to be the trial judge in the first Mareo trial, told Mason: "I am sure you will find the work interesting and congenial, and that you will also find your time very fully occupied".

Wasting no time, Mason in 1936 introduced a major Law Reform Bill which removed various anomalies and modernised New Zealand law. The Bill dealt with the survival of causes of action after death, accident compensation charges on insurance monies, the capacity, liabilities and property of

---

<sup>6</sup> Sinclair, *supra* note 4, at 380.

married women and liabilities of husbands, and liability of employers to employees for negligence caused by fellow employees.

The Chairman of the Statutes Revision Committee, F W Schramm MP (and lawyer), reporting the Bill back from the committee, commended Mason for introducing it. "It has the approval, generally speaking, of legal practitioners in New Zealand and will aid in the administration of justice and give justice to many people who have hitherto been refused it owing to the technicalities of the law", he said.<sup>7</sup>

In 1937 Mason established the Law Revision Committee which was to be responsible for major reforms. He served on it and the succeeding Law Revision Commission continuously for 38 years. At a meeting of the Commission in 1969, National Attorney-General Ralph Hanan said that Mason (and fellow long-serving member Sir Wilfred Sim QC) had made a "Herculean" contribution. Mason continued to be active on the Law Revision Commission after his retirement from Parliament and in 1969 presented a report on the strata title system in New South Wales after a visit to Sydney.

Mason's private secretary at the outbreak of World War Two was a 27-year-old lawyer, Dr Martyn Finlay, fresh out of the London School of Economics and Harvard Law School, who was to become Attorney-General in a later Labour government. Recalling the first informal law reform committee that Mason set up, Finlay said: "With Rex's crusading spirit they got through a phenomenal amount of material". But the impetus for law reform slowed as the country found itself at war and other issues took priority. "I think Mason's work on law reform was greatly underrated - including by me", Finlay said 60 years later.<sup>8</sup>

From 1940 to 1947 Mason had Education, previously held by Fraser, added to his other portfolios and was also Minister of Native Affairs. Working closely with the Director of Education, Dr Clarence Beeby, he saw the matriculation examination abolished and the secondary school curriculum reformed. At the time of his retirement, he said that he was pleased with the improvement in Māori housing during his term as Minister of Native Affairs.

As Attorney-General, Mason was involved in the issue of flogging. In 1941, while Fraser was overseas and Nash was acting Prime Minister, the

---

<sup>7</sup> (1936) 247 NZPD 236-239.

<sup>8</sup> Interview, The Hon. Dr Martyn Finlay QC, December 1998.

Executive Council recommended remitting a sentence of flogging on four prisoners in Mt Eden. The Governor-General, Sir Cyril Newall, was reluctant to sign the Government recommendation and wanted it to announce legislation to abolish flogging. Nash was reluctant to acquiesce in the Governor-General not accepting advice but was half inclined to agree to his terms if the Government did oppose flogging.

Fraser cabled that on no account should Cabinet accept the Governor-General's refusal to act on ministerial advice. But Fraser, too, hesitated and thought that perhaps the Government should not press the point. With an election pending the decision might be misunderstood. On this occasion, one of the rare times the Governor-General did not act on ministerial advice, the Cabinet backed down. Mason announced that flogging would be abolished and the Governor-General signed the recommendation to remit the sentence.<sup>9</sup>

Mason took silk in 1946 and was called to the Inner Bar with Solicitor-General Herbert Edgar Evans before the Chief Justice, Sir Michael Myers. King's Counsel C H Weston, W J Sim and P B Cooke with 80 members of the Bar attended the ceremony in Wellington's Supreme Court. Myers CJ said that he thought it doubly appropriate that Mason should carry with him to the Peace Conference, about to be held in Paris, all the prestige attached to the position of King's Counsel. The Governor-General, Sir Bernard Freyberg, sent a handwritten note to wish him "Godspeed" on the peace mission and congratulated him on his appointment as "King's Council". He also wrote to thank Mrs Mason for a jar of marmalade she had sent to Government House.<sup>10</sup>

In 1946 Mason led the New Zealand delegation to the Paris Peace Conference, held to tackle some of the many European problems left from the war. New Zealand found itself chairing a sub-commission of the Hungarian Commission to deal with a Czech proposal to expel many of the 200,000 Hungarians within the borders of southern Czechoslovakia. New Zealand had the decisive vote following a two-two split in the five-member sub-commission and proposed a compromise solution which received the support of the conference. Prime Minister Fraser called this a "real achievement".

At the end of the 11-week conference Mason noted that it had failed to reach agreement on any of the principal problems referred to it by the Council of

---

<sup>9</sup> Sinclair, *supra* note 4, at 204.

<sup>10</sup> Letters, Mason Papers.

Foreign Ministers, but he cautioned that it would be a mistake to take a pessimistic view as to solutions eventually being found. New Zealand believed that many of the difficult problems of post-war treaties would be better solved in the United Nations rather than by the Council of Foreign Ministers, but this view had not been accepted.<sup>11</sup>

New Zealand supported an Australian proposal to establish a European Court of Human Rights but this was rejected by 15 votes to 4 after the Soviet chief delegate to the United Nations, Andrei Vyshinsky, described it as “infantile”. He asked: “Why not a world court?” Mason proposed a European Court of Human Rights as a branch of the United Nations Economic and Social Council, but this was rejected too.

New Zealander Geoffrey (later Sir Geoffrey) Cox, covering the conference for the *London News Chronicle* reported: “In this battle the New Zealand delegation has played somewhat the same role as the New Zealand Division in the desert - that of a small, independent-minded shock force willing to take on anybody”.<sup>12</sup>

Despite some strong words around the conference table, Mason and the High Commissioner in London, Sir William Jordan, with the Secretary of External Affairs, Alistair (later Sir Alistair) McIntosh, were guests of Vyshinsky and Soviet Foreign Minister V M Molotov at luncheon at the Russian Embassy and toasts were exchanged. Vyshinsky had been notorious as public prosecutor in the 1936-38 state trials which removed Stalin’s rivals. Molotov’s “no” became a byword at meetings of the United Nations and in the Council of Foreign Ministers. Khrushchev was to call him a “saboteur of peace” and sent him as Ambassador to Outer Mongolia.

Mason was obviously a thoughtful man. After the Peace Conference he continued to send food parcels and soap to people he met there who were experiencing hardship under post-war austerity. He even sent one of his suits to a French diplomat who had fallen on hard times.

After the 1946 general election the Labour caucus formally re-elected the cabinet. Fraser put forward ten names and other members nominated five more. Nash and Lands Minister Jerry Skinner received most votes, 10 each. To what has been described as Fraser’s surprise and embarrassment,

---

<sup>11</sup> Mason Papers.

<sup>12</sup> Cox, Rhodes scholar, foreign correspondent, intelligence officer New Zealand Division World War II, and New Zealand representative Pacific War Council, was attached for a time as adviser to the New Zealand delegation.

Hastings MP E L Cullen beat Mason for a seat at the cabinet table. But he continued to administer his portfolios and was re-elected to cabinet a few months later.

### 3. *Later Career (1949-66)*

Labour was defeated in 1949 but Mason continued to live in Wellington and travelled to Auckland for electorate meetings. He was described as an energetic MP in opposition, speaking on a variety of subjects including law reform and monetary policy.

Known as the “Father” of New Zealand’s decimal currency system, Mason waged a sometimes lonely battle to get legislation through Parliament. He introduced a private member’s Decimal Coinage Bill eight times, persisting with the idea until decimal currency was eventually introduced in 1967. “My first interest in the decimal system was simply as a country solicitor who couldn’t always get staff,” he said. “I had to do a great deal of accounting work myself and I soon learned that the £ s d system tended to cause mistakes. This meant that books were harder to balance and a lot of time was wasted”. But, modest about his own role in the change to decimal currency, he pointed out that the idea was nothing new and had been mooted in England in Stuart times. New Zealand’s Associated Chambers of Commerce had called for the introduction of decimal currency “away back,” he said in a 1967 interview.<sup>13</sup> With the introduction of accounting machines, office procedures were being hampered by the sterling system. Mason was inclined to see the change as inevitable rather than the result of his own persistence.

From 1950 to 1955 Mason introduced his decimal currency Bill each year - twice in 1951, before and after the “snap” election - but never managed to get it before a select committee. Then in 1956 the New Zealand Numismatic Society petitioned for currency reform and Mason’s Bill was referred to the same committee which heard the petition. The committee’s recommendation made further progress towards decimalisation possible.

“It was never a party issue and there was never any attempt to make it one”, Mason said. “Many members on the (National) Government side spoke in favour of my Bills and Mr (Charles) Bowden as Associate Minister of Finance was very helpful to me”. With National’s defeat in 1957, moves to get decimal currency suffered “a bit of a setback because the Labour Government had more pressing financial questions to worry about”, Mason

---

<sup>13</sup> *Evening Post* 4 January 1967.

said. But the impetus was there and the Decimal Currency Bill eventually came before Parliament as a Government measure. Veteran political correspondent and editor of *The Dominion* Jack Young, writing after Mason's death, said: "Some of New Zealand's most beneficial laws have in the first place been sponsored by backbench members of Parliament with sufficient perspicacity to be a jump ahead of public opinion and the torpid political somnolence of the Government of the day".<sup>14</sup>

Another Bill of Mason's was the Property Law Amendment Bill which became the Property Law Amendment Act of 1951. Mason told Parliament that the Bill's primary purpose was to state the law in better terms, to make it more accessible and understandable. Its aim was to correlate the provisions of the Land Transfer Act and the Property Law Act. "We have the two systems of law and the question often arises as to where we should look for a certain provisio", Mason explained. Sometimes there was a discrepancy between the provisions of the two Acts. The law should be written so that it was easy to find, with a simple proposition expressed only once and in the proper place.

Apart from anything else, the Bill made life a little easier for law students because it abolished the legal anachronism of "estate tail" - a type of holding used in England to ensure family estates passed from generation to generation. It had been included in New Zealand's land laws when it was a young colony but, thanks to Mason, law students no longer had to spend their time learning about it.<sup>15</sup>

Mason's Bill was a major legislative measure modifying conveyancing procedure. After he piloted it "unmolested" through the committee stages of the House of Representatives, he was greeted with loud applause from both sides. It was seen as a triumph for Mason and for the rights of private members - the first time in the history of New Zealand Parliamentary government that a private member had been able to get a public Bill of such magnitude through Parliament.

Jack Young wrote in *The Dominion* at the time:

Scholarly and studious, Mr Mason has always been at home with these abstractions and obscurities of the law that are so incomprehensible and mystifying to the layman. His oral explanations of them often seemed to his listeners and fellow

---

<sup>14</sup> *The Dominion* 3 April 1975.

<sup>15</sup> (1951) 296 NZPD 1405-7.



members to be almost incoherent, but there are few who can express themselves on paper with greater clarity and simplicity.<sup>16</sup>

Mason was easily elected to Cabinet after the 1957 election and took on the Health portfolio as well as being Attorney-General and Minister of Justice. In 1957 Mason introduced the Crimes Bill, consolidating and amending the criminal law which had not been done in New Zealand since the end of the last century. It was made available to the public and referred to Sir George Finlay who had been a senior puisne judge. Judges and others were consulted on the Bill's provisions and on amendments which might be suggested. Mason reintroduced it in 1959 and it was referred to the Statutes Revision Committee which had Finlay's report. The committee heard representations from the New Zealand Law Society, churches, universities, the Council for Civil Liberties and other organisations and individuals.

Speaking in the 1961 debate on the Bill, which had been reintroduced by the new National government, the then Deputy Prime Minister, John (later Sir John) Marshall, said that when Mason introduced the Bill in 1959 he had been unfairly and inaccurately accused of wanting to amend the law to permit homosexual acts between consenting males. What he had, in fact, proposed was that such acts should be dealt with merely as indecent assaults and carry a lighter penalty. Marshall said that Mason had been unfairly accused of wanting to adopt the recommendations of the Wolfenden Report on homosexuality in England which was not the case.<sup>17</sup>

Mason joined Labour MPs and some National members, including Attorney-General Ralph Hanan and backbencher Robert (later Sir Robert) Muldoon, in voting to defeat the provision in the Bill retaining capital punishment for murder. Murderers sentenced to death had always been reprieved under Labour governments.

Mason's dislike of Nash, evident in Mason's early career, continued over the years. In 1953 he was one of the MPs behind an abortive coup to remove Nash (then 71) as leader. Described as remnants of the credit reformers of the 1930s caucus, they included Mason and fellow ministers Bill Anderton and Arnold Nordmeyer. Mason went to see Nash and told him that a number of members had complained to him about the leadership of the party, that he had consulted others, and that he thought that a majority wanted another leader. Nash wrote in a memo after the meeting with Mason:

---

<sup>16</sup> *The Dominion* 10 December 1951.

<sup>17</sup> (1961) 328 NZPD 2688-2693.

I stated that he had approached the members to ensure what he had always desired - my resignation. He said that was incorrect - he had a great respect for myself personally but that the party would do better under some other leader ... After a lengthy conversation I advised him that I would deal with the representations in my own way.<sup>18</sup>

The following year Angus McLagan MP moved a vote of confidence in Nash in caucus. Mason moved as an amendment that they should fix a date for the election of the party leader. This was carried as a substantive motion which was seen as a rebuff for Nash but the caucus immediately supported McLagan's confidence vote unanimously. The Party and caucus came out in support of Nash who received resolutions of support from Party branches throughout the country. The rebels sadly misjudged the situation and never had more than six votes including Mason, Nordmeyer, Phil Connolly, Anderton, Fred Hackett and Warren Freer. At a caucus four months later, Michael Moohan nominated Nash as leader and Freer nominated Nordmeyer. Nash won and Skinner, the only nominee, became deputy.

Rex Mason appeared a gaunt, rather austere figure as he strode the corridors of Parliament House in the early 1960s. Unlike other MPs, he rarely attended Press Gallery social functions and journalists seldom ventured beyond the office of his efficient secretary, Eileen Mansfield, in the old wooden building, formerly Government House, which was pulled down to make way for the Beehive.

Under the leadership of Nordmeyer and then the much younger Norman Kirk there was a growing feeling in the Labour Party that younger members were needed. Mason, by then in his 80s, was the last surviving member of the 1935 Labour Government and retired in 1966. He was the Father of the House, having been a member continuously since 1926.

#### *4. The Mareo Case*

Throughout his two terms as Attorney-General Mason worked under the shadow of the sensational 1936 Mareo poison case. Mason, ironically, would have led the prosecution for the Crown if New Zealand had followed the English practice of the Attorney-General leading the prosecution in poison trials. In fact, he believed Mareo was innocent of the murder charge.

Mareo, 45 at the time of his trial, was an accomplished Auckland musician and conductor who was born in Sydney, the son of a music professor, and who went to Berlin at 13 to further his musical studies. Later, in England, he

---

<sup>18</sup> Sinclair, *supra* note 4, at 292.

lived with a woman who died from tuberculosis. There were two children, Betty and Graham.

Returning to Sydney, Mareo met Thelma Trott, an attractive university graduate who was a musician and actress. They toured in theatrical companies in Australia and New Zealand and married in Wellington. Also in the Ernest Rolls Show which toured New Zealand in the early 1930s was a New Zealand dancer, Freda Stark. After the show disbanded, the Mareos lived in Auckland with Eric's children Betty and Graham, who had joined them from boarding school.<sup>19</sup> Stark, who also lived in Auckland, was a frequent visitor to the Mareos.

Evidence was to be given at Mareo's trial that Freda Stark spent a lot of time in bed with Thelma at the Mareo home and it appeared clear that they were lovers. Mareo and his wife, it was alleged, had a no-sex pact, and the court was told Thelma had said that she would commit suicide if she ever found that she was pregnant.

On Sunday, 15 April 1935, Thelma Mareo, 28, died in Auckland Hospital after being taken there from her home in a deep coma. Five months later, Eric Mareo was arrested and charged with murdering his wife by giving her veranol, a sleep-inducing drug, in a cup of hot milk that he had prepared.

Mareo's trial opened in the Auckland Supreme Court on 17 February 1936, before Justice Fair. AH (later Sir Alexander) Johnstone KC and V N Hubble appeared for the Crown; and Mareo was represented by Humphrey O'Leary KC (later Sir Humphrey O'Leary, Chief Justice) and Trevor (later Sir Trevor) Henry.

There was intense public interest in the trial, with women queuing at the door leading to the women's gallery. The *Auckland Star* reported that an All Black was in the public gallery one day and that members of the visiting MCC team were also there. The all-male jury was given an afternoon off to watch the MCC play Auckland.

Mareo, who pleaded not guilty "in a firm and ringing voice", was smartly dressed in a blue striped suit and "looked exceptionally well when he came through the trap-door into the dock, a deep sun tan showing that he had

---

<sup>19</sup> Betty Mareo later died while her father was in prison, and Graham, an officer in a British regiment, was killed fighting in France.

spent much of his time in the open at Mount Eden after his arrest”, the *Auckland Star* told its readers.<sup>20</sup>

The Crown made much of Mareo’s relationship with a young Auckland University graduate, Eleanor Brownlee, who was his music pupil, acted as his secretary and was working with him on the scenario for a film, *Plume of the Arawas*. She also laundered his white ties and waistcoats because Thelma Mareo could not get the starch right, but Brownlee denied that there was anything improper in their relationship. The defence was to argue strongly that no motive had been established for Mareo killing his wife. Freda Stark, the chief witness for the prosecution, gave evidence that Mareo and his wife had a good relationship before his death.

The Crown case was that Thelma Mareo had been under the influence of veranol on the Saturday morning before her death, that Mareo had made her a drink of hot milk containing veranol on the Saturday night, and that she had gone into a coma leading to her death. Freda Stark was in the house during much of the time and Graham Mareo was there part of the time.

The defence argued there was no evidence that Mareo put veranol in the milk and that Thelma could have taken the fatal dose herself. Freda Stark testified that she had not seen Thelma take the veranol.

In his summing-up at the end of the nine-day trial, Justice Fair said that the first question was: “Did Thelma Mareo die as the result of veranol poisoning?” and that the second was: “Was her death caused by veranol administered by the accused with the intention of killing her?” The jury had to be convinced that the facts excluded the reasonable possibility of the poison being given to her by a person other than the accused, that the evidence excluded the possibility of it being given by misadventure or accident, and that it excluded the possibility of suicide by Mrs Mareo.

The jury returned nearly four hours later with a verdict of guilty with a strong recommendation for mercy. Asked if he had anything to say before sentence was passed, Mareo with a “clear, deep and ringing voice”. replied: “Nothing to say against it. Only it seems to me, after the evidence, which has been most just in every way, and after the judge, His Honour’s direction to the jury, that their verdict is a travesty of justice. Nothing more”.

---

<sup>20</sup> *Auckland Star* 17 February 1936.

Justice Fair, speaking slowly and with obvious emotion, put on the black cap and sentenced Mareo to “be hanged by the neck until you are dead”.<sup>21</sup> A heart-broken 17-year-old Graham Mareo was comforted by counsel and friends and a pale-faced Freda Stark walked through a side exit.

After reports of the trial appeared in Australian newspapers, several theatrical people who had known the Mareos on the stage came forward with evidence of Thelma’s past drug-taking and drinking. The Court of Appeal refused a new trial, but one was ordered after an application to the Governor-General in Council in which Mason, as Attorney-General, was involved.

The second trial opened on 1 June 1936 before Justice Callan. Vincent (later Sir Vincent) Meredith led for the Crown, with O’Leary again appearing for Mareo. The evidence was similar to that of the first trial, but the defence made more of testimony that Thelma Mareo had regularly taken drugs and threatened suicide. But again Mareo was found guilty, sentenced to death and put in the condemned cell. O’Leary wept when the verdict was announced.

Auckland barrister Peter Williams QC, who believed that Mareo was not guilty of murdering his wife, suggested that the prejudiced atmosphere of the trial contributed to Mareo’s fate. Rumours about Mareo’s affairs - most of them probably false - were rife in Auckland and the puritanism of some jurors in the jury box was notorious.<sup>22</sup>

Mareo’s death sentence was commuted to life imprisonment under the policy of the new Labour Government for which Mason was responsible. He had become involved in the case at an early stage when, immediately after being sworn in at Government House, he had to discuss with the Solicitor-General, H H Cornish, the briefing of Johnstone to conduct the prosecution in the first trial in Meredith’s absence.<sup>23</sup> From then on the Mareo file was regularly on Mason’s desk, with a succession of letters and petitions for Mareo to be released. Among Mason’s papers after his death was a recommendation to Cabinet with his signature to appoint a commission of three judges to inquire into the case. For whatever reason, this was not done.

The case against Mareo had been influenced, it was felt, by the allegation he had shown callous indifference in not calling a doctor to his wife earlier.

---

<sup>21</sup> *Auckland Star* 27 February 1936.

<sup>22</sup> *8 O’Clock* 20 February 1971.

<sup>23</sup> Meredith was manager of the All Blacks on their tour of Britain.

The allegation largely rested on Stark's evidence and this conflicted with the evidence of other witnesses. There was evidence that Stark visited the Mareos two days before Thelma's death and that Eric and Thelma Mareo had invited her to stay. It seemed most improbable, it was argued, that if Mareo had conceived the idea of murdering his wife, he would have invited her best friend to be at the place where he was going to murder her.

Dr Philip Patrick Lynch, consultant pathologist to the New Zealand Police for three decades, said in his memoirs that a good deal of uneasiness followed Mareo's trials and conviction. "The medical evidence in the case given by the experienced Auckland pathologist, Dr Walter Gilmour, had caused some uneasiness in the minds of many persons with a direct interest in the trial," he said.<sup>24</sup>

Mareo's friends went to some trouble to get reports from overseas on medical aspects of the case. One of these was from Sir William Wilcox, principal consultant toxicologist to the Home Office, who was consulted in 1941, not long before his death, and made a detailed report. He said he did not think it at all likely that another dose of veranol had been taken on the Saturday night at the time that the cup of hot milk was alleged to have been given to Thelma Mareo. The pscho-neurotic state and mental breakdown from which she had suffered during the last few weeks of her life had led to her taking barbitone to relieve her symptoms, and the mental unbalance resulting from this was associated with her taking a large fatal dose which caused her death. Wilcox concluded: "If Thelma Mareo had access to veranol the drug was in my opinion self-administered as is so commonly the case in fatal cases of veranol poisoning".<sup>25</sup>

Dr Lynch, who had not been involved in the Mareo trials, in a report to the Justice Department, disputed Wilcox's finding. He was not convinced that Thelma was a veranol addict, as Wilcox appeared to have assumed, or that she was a confirmed alcoholic, as Wilcox suggested. Her nervous and worried condition was explained by her husband's association with Eleanor Brownlee and her doubts about his fidelity, Lynch said. There was no evidence that Mrs Mareo had purchased veranol or had it in her possession. Lynch's view was that Freda Stark's evidence was of critical importance and could only be tested by seeing and hearing her as she gave evidence. Meredith had told him that he was convinced that she was a truthful witness. Lynch concluded that the guilty verdict was justifiable.

---

<sup>24</sup> Lynch, PP *No Remedy for Death: Memoirs of a Pathologist* (1970) 118-119.

<sup>25</sup> Report by Sir William Willocox, Mason Papers.

When Mason was working on a book on the Mareo case in the 1970s, he dictated notes on a 1913 case involving veranol, the only case of veranol poisoning at the time. A woman had periods of delirium and semi-coma and could not be aroused. A veranol bottle was found concealed under her mattress. Her doctor refused to let her have more veranol and, with a strong purgative and regular nourishment, she made a speedy recovery. Mason said:

On reading that case I could not assume that someone or other in a house must have given a woman veranol merely because it is not known that she had taken it herself. And nor could one demand that anyone in the house should account for a patient dying of veranol on pain otherwise of being hanged for the patient's murder.<sup>26</sup>

In 1942, another petition was presented to Parliament calling for an inquiry into the Mareo case. Petitioners included Bruce Rainsford, Auckland manager of McDuffs department store, J A Cronin, a physician, Professor Ronald Algie, former Dean of the Auckland Law School and later Sir Ronald Algie, speaker of the House of Representatives, surgeon Douglas (later Sir Douglas) Robb, and T S Fleming, a solicitor. There was also a petition from the New Zealand Musicians' Union. O'Leary addressed the Statutes Revision Committee, which dealt with the petition. Johnston represented the Crown and Meredith also appeared. Wilcox's report was presented to the committee of which Mason was a member.

After discussion, National MP William (later Sir William) Bodkin moved and National MP Walter (later Sir Walter) Broadfoot seconded a motion that the committee had no recommendation to make, and this was agreed to. Once again the hopes of Mareo and his supporters were dashed.

In 1943 Mason wrote to Justice Callan, the second trial judge, asking if he could see him about the case. Callan J agreed to see him, and they met in Callan J's chambers in Auckland. After the meeting, Callan J wrote to Mason saying that he was personally not convinced that Mareo was guilty of murder, but he accepted that there was evidence on which the jury could reach such a verdict.<sup>27</sup>

The Court of Appeal in 1946 said that Callan J's summing-up was "certainly not unfavourable to the prisoner", but pointed out that he had put it to the jury "quite plainly" that it was possible for it to find a verdict of

---

<sup>26</sup> H G R Mason tapes NZ Oral History Archives, Library of New Zealand.

<sup>27</sup> Letter, Callan J to Attorney-General, 24 June 1936 (Mason Papers, Alexander Turnbull Library).

manslaughter (if, for example, Mareo, under the influence of veranol himself, had given it to his wife without intending to kill her).<sup>28</sup>

Mareo's second trial in 1936 resulted from the Governor-General's power to order a new trial after a petition for the Crown's clemency had been submitted. The Court of Appeal at the time had both civil and criminal jurisdiction, but Mason said years later its powers were so constricted in its criminal proceedings as to justify counsel saying to him that "there is no such thing as a real criminal appeal". The ordering of a second trial in 1936 was a rare decision and Mason said he could think of only one other case in 14 years. It was only by the Criminal Appeal Act 1945, for which Mason was responsible, that the powers of a court of criminal appeal were conferred on the Court of Appeal.

In 1946 Mareo's lawyers applied under the new Criminal Appeal Act for leave to appeal against conviction on the grounds that it was unreasonable on the basis of existing evidence and new medical evidence. The application was dismissed, the Court of Appeal saying that no additional facts had been discovered since the trial. Mareo's lawyers went to the Court of Appeal again asking for his conviction to be quashed on the grounds that the second trial conviction was unreasonable, that Freda Stark's evidence differed from the first trial and differed from what she had told the police, and that new medical evidence refuted the medical evidence given at the first two trials.

The Court of Appeal, presided over by the Chief Justice, Sir Michael Myers, and comprising Justices Blair, Kennedy and Finlay, dismissed Mareo's appeal. In its judgment, the court said that it took into consideration the fact that Mareo had not given evidence at his trials which could not be commented on at the time.

He now complains, in effect, that the jury drew wrong inferences. There was, however, evidence upon which it was competent for the jury to draw those inferences .... If it be now suggested that other inferences might be drawn than those which were in fact drawn by the jury with regard, for example, to the accessibility of the concealed veranol, the possibility of Mrs Mareo having obtained it from the place of concealment, the possibility of there being tablets of veranol in the bedroom available to Mrs Mareo without any fault or connivance on the part of Mareo, these and other matters to which we have not considered it necessary to refer, were all matters which the evidence of Mareo himself could have helped to explain.<sup>29</sup>

---

<sup>28</sup> *R v Mareo (No 3)* [1946] NZLR 660, 674.

<sup>29</sup> *Ibid.*



During his nearly 13 years in Mount Eden Prison, Mareo was described as a model prisoner. But he was a very different figure from the man who had earlier conducted the orchestra for the *Duchess of Danzig* in an Auckland theatre. The prison chaplain, the Rev George Morton, wrote:

It seemed impossible that the handsome, impeccably-dressed figure that had bowed so gracefully before the clapping audience could bear any relation to the coarsely-clad prisoner who played the jail organ. [He] in my opinion was not the type who could cold-bloodedly plan a murder. He was too artistic, too temperamental, too fundamentally honest.<sup>30</sup>

Mareo was eventually released on 11 May 1948, and wrote to Mason from the Wellington home of the son of Captain Rushworth, one of his strongest supporters throughout the long years of his imprisonment:

You will be surprised to receive a letter from me but while I am in Wellington ... I would be very happy if you could make an appointment, any time at your convenience, for me to call upon you so that I may have the privilege of personally thanking you for all that you have done for me. Although I have no knowledge of why I was so unexpectedly granted my release from Mt Eden prison I am certain that in some way I owe this great happiness, at least in part, to your efforts on my behalf and, believe me, I am inordinately grateful, more than I can ever express in words.

Mareo told Mason that he had completely severed connection with the name "Mareo" and changed his name by deed poll to Curtis. He asked Mason to remember his name was now Eric Curtis, ending his letter: "I remain yours sincerely and gratefully Eric Curtis" with Curtis underlined three times.<sup>31</sup>

One of Mareo's active campaigners while he was in prison was Gladys Andreae, who had been head masseuse at Auckland Hospital for many years. Mareo was taken there by a warder for physiotherapy over a period of about five months. "I know that you also believe him innocent, but I gather that your official position makes it difficult for you to act against the opposition you probably encounter all round," she wrote to Mason. Not long after Mareo walked out the gates of Mount Eden, he and Gladys Andreae were married. Eric Curtis died on 25 November 1960.

Freda Stark, Thelma Mareo's lover and principal witness against him, died in an Auckland resthome in March 1999. Obituaries recalled that in the

---

<sup>30</sup> Harcourt, Melville *A Parson in Prison, A Biography of the Rev George Edgar Moreton* (1942) 293.

<sup>31</sup> Letter, Mason Papers.

1930s and 1940s she had danced in public in little more than a G-string and gold paint which she said “kept me warm”. Auckland film producer Peter Wells wrote of her death: “...somehow with Freda you never got behind the mask. There was always another layer of mystery there - almost a reticence. I think she needed such inner strength to survive the scandal of the 1930s, that while she recovered and went on to live a fantastic life, some part of her died. And that part was the woman she loved most in the world, Thelma”. Freda Stark’s ashes were to be placed on Thelma’s grave. Her niece, Diane Miller, described Freda Stark as a “stylish lady”.

Mason’s views about her were rather different. During the 1961 debate in Parliament on the Crimes Bill which ended capital punishment, he spoke in some detail about the Mareo case and pointed out that mistakes could happen in convictions. “I am pointing out that we can obtain a conviction though the basis is not there”, he said. “An innocent man can be convicted”. Mason said that there was “clear, inescapable perjury” committed by Stark. He called Stark and Thelma Mareo “sexual perverts”.<sup>32</sup>

When he was working on his planned book on the Mareo case, Mason in 1971 wrote to Eleanor Brownlee, who had been Mareo’s friend and helper and was now married and living in Auckland, seeking her help in checking facts within her knowledge:

The whole affair imposed on me a great and prolonged strain for I never could see the matter as the prosecution did. I could see much of the truth but only since I have decided to write have I appreciated the most completely decisive point. Dr Lynch’s book gives a story quite contrary to fact and to uncontradicted trial evidence. I am strongly impelled to tell the true story as quickly as I can. I have all the essentials of it. There will be no mystery left.<sup>33</sup>

Brownlee, who apparently knew Mason’s daughter, wrote back to him urging him to “let the matter be”. She told him: “As things stand, reopening the affair could bring a reprieve to noone but will almost certainly for a number of people be a cause for unpleasantness and distress”.<sup>34</sup>

---

<sup>32</sup> (1961) 328 NZPD 2693-8.

<sup>33</sup> Mason Papers. Ironically, there was some mystery left. Mason did not complete his book, and tapes of material he dictated to his typist are incomplete.

<sup>34</sup> Correspondence, Mason Papers.

## 5. Conclusion

Prime Minister Keith Holyoake, speaking in 1966 at the valedictory sitting of Parliament, said of Mason: "I cannot ever remember a clash occurring between us over the thirty-odd years I have sat opposite the honourable, venerable and highly respected member... I have never known him to do a small or mean thing". National MP Ernest Aderman recalled: "I found him accommodating and helpful and I found in him an integrity, a straight forwardness and ability which more and more matched my conception of what a statesman should be and my appreciation of him grew with the years". Kirk, Leader of the Opposition, in what many saw as a less-than-gracious speech, farewelled Mason in three sentences. Not a word was said about his huge contribution to law reform.<sup>35</sup>

At a civic farewell in New Lynn, Mason was praised as a self-effacing man who avoided personal fanfare. He had always been meticulous in attending to his constituents' problems or local body affairs and combined a keen intellect with a warm understanding of human nature. As a tribute, the children's section of the New Lynn Library was named the Rex Mason Wing.

Mason was to be honoured with the award of the CMG, but Jack Young wrote in *The Dominion* after Mason's death: "To say the least of it it was scurvy recognition of a great Parliamentarian and reflects little credit on those responsible for it. It was paltry and contemptuous in the extreme".<sup>36</sup> Mason had served in Parliament with Young's father, Sir James Young, a former minister of health.

In retirement, Mason continued his work as a member of the Law Revision Commission and also spent many hours working on the Mareo case. In 1967 Mason was honoured by his old university, Victoria, with the degree of Doctor of Laws honoris causa. Presiding at the ceremony was Victoria University's Chancellor, Dr Philip Patrick Lynch. Resplendent in their academic gowns, they epitomised in a sense the case of Eric Mareo - one man believed he was guilty; the other was convinced he was innocent.

Rex Mason died in Wellington on 2 April 1975, aged 89. He was survived by his elder son, Brian, and his daughters, Mrs Jack Hutchings, and Miss Ruth Mason. *The Dominion* said in an editorial:

---

<sup>35</sup> (1966) 349 NZPD 3565.

<sup>36</sup> *The Dominion* 3 April 1975.

He was a notable New Zealand politician for the reason that he had convictions and the courage of them and was no party-line prattler in the House. He gave Labour teams of his time an intellectualism and a dignity that helped them immensely. He served his country well.<sup>37</sup>

To many he had been the conscience of the Labour Party.

In *Portrait of a Profession*, the centennial book of the New Zealand Law Society, he was remembered as one of New Zealand's outstanding reforming Attorneys-General.<sup>38</sup>

---

<sup>37</sup> Ibid.

<sup>38</sup> Cooke, R B (ed) *Portrait of a Profession, The Centennial Book of the New Zealand Law Society* (1969) 107.

# CLOSE CORPORATIONS IN SOUTH AFRICA: A VIABLE OPTION FOR NEW ZEALAND SMALL BUSINESS CORPORATE LAW?

BY MICHAEL SPISTO\* AND HELEN SAMUJH\*\*

## I. INTRODUCTION

The authors in this article examine the legislation that is applicable to the governance of small businesses in South Africa and New Zealand. In this regard the South African Close Corporation Act 69 of 1984 and the New Zealand Companies Act of 1993 are considered. The major characteristics and features in each Act are identified and discussed from a practical point of view. The two legal systems are seen to be vastly different with respect to the legislation that is applicable to small businesses. Whilst the Close Corporation Act contains only 83 sections and four short schedules, the New Zealand Act is more burdensome with some 397 sections and nine rather long schedules. The authors suggest that law reformers in New Zealand take cognisance of the South African Close Corporation Act as a way forward to encourage small business development.

This article is largely styled in a survey format, which serves to highlight and analyse the advantages of adopting a Close Corporation system for New Zealand. There are other articles in existence that explore and academically debate in detail the advantages and disadvantages of having Close Corporations. However, this article was written with the intention to provide readers with a very clear and focused description and analysis of the similarities and differences in the New Zealand and South African legislation in so far as the treatment of small businesses in these countries are concerned. We believe that the South African model of Close Corporations should be considered more closely in New Zealand because:

New Zealand...has too much company law ... (and since) the foundation of company law is contractual ... (it is necessary) to pare away the unduly complex and verbose overlay to recover the underlying contractual principles. This would produce

---

\* BSc, LLB, LLM (Cape Town), Attorney of the High Court of the Republic of South Africa, Lecturer in Commercial Law, University of Waikato.

\*\* BCom (Hons) (Otago) MEd (New England), Chartered Accountant, Senior Lecturer in Accounting, University of Waikato.

simpler, shorter company law which would generate significant economic gains, especially for small and medium sized enterprises ...<sup>1</sup>

Additionally, whereas the 1993 New Zealand Companies Act had regard to the Canadian Corporations Acts in its formulation,<sup>2</sup> South Africa was the one country that decided to follow Gower's proposals of a new legal form for small businesses. Hence, the South African Close Corporations Act 69 of 1984 was created and, in this way, provided a new legal form, which many would argue has had a great success story. Furthermore, between 1985 and 1993 alone, 288,020 Close Corporations were registered in South Africa as compared with only 61,559 private companies.<sup>3</sup>

We believe that, by focusing clearly on the above issues, this article will enhance greater understanding and acceptability by readers in New Zealand and elsewhere in so far as the advantages pertaining to the South African Close Corporation model are concerned. We hope that this will encourage and invite further "critical thought on legal developments relating to New Zealand".<sup>4</sup>

## II. CLOSE CORPORATIONS AND THE SOUTH AFRICAN CLOSE CORPORATIONS ACT 69 OF 1984

### 1. Introduction

Judith Freedman notes that

There is a strong intuitive case for the creation of a new legal form through which small businesses in the United Kingdom could operate. The view is widely held that our companies legislation, fashioned with the public, quoted company in mind, is of a length and complexity which is wholly inappropriate to the small private company.<sup>5</sup>

S J Naude notes further that

---

<sup>1</sup> Goddard, "Company Law Reform-Lessons from the New Zealand Experience" (1998) 16 *Company and Securities Law Journal* 235, cited in (1998) 10 *Corporate Law Electronic Bulletin* 25-26 at <http://cclsr.law.unimelb.edu.au/bulletins>.

<sup>2</sup> Law Commission, "Company Law Reform and Restatement" Report No 9 (1989) Chapter 1, paragraph 32, 9.

<sup>3</sup> Freedman, "Small Businesses and the Corporate Form: Burden or Privilege?" (1994) 57(4) *Modern Law Review* 555, 578-579.

<sup>4</sup> Spiller, "Editor's Introduction" (1999) 7 *Waikato Law Review*.

<sup>5</sup> Freedman, *supra* note 3, at 555-584.

The aim is to provide a simpler and less expensive legal form for the single entrepreneur or few participants, designed with a view to his or their needs and without burdening him or them with legal requirements that are not meaningful in his or their circumstances. This accords with the new awareness of the socio-economic and political importance of small business.<sup>6</sup>

With regard to South African corporate law, a major advancement took place with the enactment of the Close Corporations Act 69 of 1984 that came into effect on 1 January 1985. On this date South African corporate law took a very large leap forward in providing for the needs of small entrepreneurs. This is because, in South Africa, it had been recognised for some time that small businesses form the major part of the South African business communities and thus the “very backbone of the free market system”.<sup>7</sup>

The objectives of the Close Corporations Act were to provide a much simpler and less expensive legal form for the small business which consisted of a single member or a small number of members, but at the same time afford the members the advantages of separate legal personality, which is not found in other small business forms such as partnerships or sole proprietorships. The Close Corporations Act also came into its own by allowing small entrepreneurs the opportunity to dispense with the need for them having to follow the Companies Act 61 of 1973, which had become increasingly complex and burdensome and, for the most part, was not relevant to small businesses. This was largely due to the fact that the said Companies Act had been developed to deal with the needs and problems encountered by the much larger public or private corporations. The alternative possibility of adding further rules into the said Companies Act to regulate the running of small businesses was considered unacceptable.<sup>8</sup> This was because it would only exacerbate the problem by increasing the overall complexity of the said Companies Act. Thus, it is submitted that HS Cilliers et al are correct when they say that the “Companies Act had in effect become inappropriate for the needs of the *bona fide* small undertaking” and therefore “that the legal formalities have become too onerous” for them.<sup>9</sup>

However, it was recognized that the development of small businesses needed to be enhanced. This is said to be something which

---

<sup>6</sup> (1983) De Rebus 332, 333, as cited by Gibson, JTR et al *South African Mercantile & Company Law* (7th ed, 1997) 437.

<sup>7</sup> Venter (1984) JJS 110, as cited by Cilliers, HS et al *Corporate Law* (2nd ed, 1992) 568.

<sup>8</sup> Cilliers, *supra* note 7, at 569.

<sup>9</sup> *Ibid.*

is highly desirable in a country with growing numbers of unemployed. The close corporation is a very suitable vehicle for this purpose as it can cater for the unsophisticated and also the highly sophisticated businessman alike.<sup>10</sup>

It is significant to note that the introduction of the said Close Corporations Act has not, in any way whatsoever, affected the said Companies Act in its application to public and private companies or to any other legal form. The said Close Corporations Act applies only to close corporations and to no other form of legal entity.

Thus, it is important to emphasise that, although companies and close corporations are similar in so far as they both have separate legal personality distinct from the members with their own rights and obligations,

[close] corporations are much less rigidly controlled and the rules are much simpler. The complexities of company law are not easily understood by the layman and they seem unnecessarily involved for suitability to enterprises carried on by one member or relatively few members.<sup>11</sup>

### *2. Significant Features of a Close Corporation: An Overview*

Due to the ever-increasing awareness of the socio-economic and political significance of small businesses, as explained above, the legal forms and requirements found under the Close Corporations Act are very much simpler and less burdensome than under the Companies Act. This has been widely appreciated and accepted in the South African corporate environment, as there are, at present, a huge number of legal entities, which have been created as close corporations. It is fairly obvious that this form of incorporation has arguably succeeded in being considered as nothing less than a South African breakthrough in the corporate and legal environment.

### *3. Distinct Legal Personality and Number of Members*

The close corporation is a juristic person and has a legal personality distinct from its members. This means that the close corporation has itself the right to sue, but can also be sued. Thus, in terms of the Act, it is accorded the capacity and powers of that of a natural person.<sup>12</sup> It enjoys perpetual succession and therefore its legal existence is not affected by any changes in its membership. The member or members, minimum of one and maximum

---

<sup>10</sup> Ibid, 570.

<sup>11</sup> Gibson, *supra* note 6, at 457.

<sup>12</sup> Close Corporation Act No 69 of 1984, s 2(4).



of ten,<sup>13</sup> have limited liability with regard to the debts of the close corporation. This is contrary to the situation in private or public companies where the numbers are limited to fifty members or unlimited respectively. Furthermore, juristic persons may generally not be members of a close corporation and a close corporation may not be a subsidiary of a company. However, close corporations can hold shares in a company.

#### *4. Formalities, Registration and Incorporation*

The formation, administration and operation of a close corporation are subject to a minimum number of formalities and the members are subject to a minimum number of duties.<sup>14</sup> Every member of a close corporation may participate equally in the management of the business and represent it. Because no provision is made for the appointment of directors, there is no division, as with companies, between the providers of capital and management. Thus, there is no prescribed annual general meeting and, for the most part, decisions can be made and agreements reached between the members simply on the basis of informal consultation. It is important to note that a close corporation can be identified very easily due to the fact that it has, as part of its name, the abbreviation of "CC" in English (or "BK" in Afrikaans for "beslote korporasie").

With regard to the registration of close corporations (which is a far simpler process than when registering companies), anyone intending to form the same must compile a founding statement in the prescribed form and lodge it in triplicate with the Registrar of Close Corporations in Pretoria.<sup>15</sup> The Registrar is then required, on payment of the prescribed fee, to register the founding statement in the register, assign a registration number to the close corporation, and certify that it has been incorporated. No further documents are required, including the memorandum and articles.<sup>16</sup>

The following particulars are required to be noted in the founding statement that has to be set out in one of the official languages and signed by or on behalf of every person who is to become a member of the close corporation upon its registration:

- (a) the full name;
- (b) the principal business to be carried on;

---

<sup>13</sup> Section 2(1).

<sup>14</sup> Cilliers, *supra* note 7, at 571.

<sup>15</sup> Close Corporation Act No 69 of 1984, s 13.

<sup>16</sup> Section 14.

- (c) the postal address and the address of any office to which communications may be sent;
- (d) the full name and identity number of each member;
- (e) the size, expressed as a percentage, of each member's interest in the corporation;
- (f) particulars of the contribution of each member to the corporation whether it be money, property (corporeal or incorporeal) or services rendered;
- (g) the name and postal address of a qualified person or firm who has consented in writing to be appointed as accounting officer for the close corporation; and
- (h) the date of the end of the financial year of the corporation.<sup>17</sup>

### 5. *Interests of Members*

With regard to members' interests, it is important to note that these interests are *not* shares, as in the case of a company, because close corporations do not have share capitals. Thus, no shares are issued, and consequently, every person who is to become a member upon incorporation must make some contribution to the corporation as noted above. Every member will then be issued with a certificate signed by or on behalf of every member confirming the said interest.<sup>18</sup> More than one member cannot hold such member's interest jointly.<sup>19</sup>

Any member may apply to court for an order that any member shall cease to be a member on any of the following grounds where there is:

- (a) permanent incapacity as a result of unsound mind or for any other reason in the carrying on of the affairs of the business;
- (b) conduct which may have a prejudicial effect on the business;
- (c) conduct affecting the relationship with other members so as to render it impossible for other members to carry on that business;
- (d) a just and equitable ground to remove the member.<sup>20</sup>

### 6. *Internal Relations*

Members *may* agree, at any time, to enter into a written association agreement that governs the internal relationships between all the members

---

<sup>17</sup> Section 12.

<sup>18</sup> Section 31.

<sup>19</sup> Section 30(2).

<sup>20</sup> Section 36.

*inter se* and the corporation.<sup>21</sup> The association agreement must be signed by or on behalf of each member. In addition, a 75% majority vote (that is, 75% of members' interests), is required where there is either:

- (a) a change in the principal business;
- (b) a disposal of the whole, or of substantially the whole, undertaking;
- (c) a disposal of all (or the greater portion of) the assets;
- (d) an acquisition or disposal of immovable property.<sup>22</sup>

A close corporation must keep the association agreement at its registered office where any member may inspect and make copies of it.<sup>23</sup> Additionally, other persons have generally no rights of inspection. Thus, the doctrine of constructive notice does not apply in the case of close corporations.<sup>24</sup> Furthermore, unlike in the case of companies, no person dealing with a close corporation is deemed to have knowledge of any particulars simply by virtue of the fact that it has been stated in the association agreement. The same principle applies to the founding statement or other documents registered by or lodged with the Registrar and governed by sections 16 and 17 of the Close Corporation Act. In this case, however, third parties would be privy to rights of inspection.

### 7. Disqualifications

The following persons are disqualified from taking part in the management of the close corporation:

- (a) any person under legal disability, except:
  - (I) a married woman, whether subject to the marital power of her husband or not;
  - (II) a minor who has attained the age of 18 and whose guardian has lodged a written consent for the minor to participate;
- (b) save under authority of the court:
  - (I) an unrehabilitated insolvent;
  - (II) a person removed from an office of trust as a result of misconduct;
  - (III) a person who at any time has been convicted of theft, fraud, forgery, or uttering a forged document, perjury, an offence under the Corruption Act 94 of 1992 or any offence involving dishonesty or in connection with the formation or management of a company or close corporation and has a result

---

<sup>21</sup> Section 44(1).

<sup>22</sup> Section 46(b).

<sup>23</sup> Section 44(2).

<sup>24</sup> Section 45.

been sentenced to imprisonment for at least 6 months without the option of a fine;

(c) a person subject to an order of court under the Companies Act and disqualified from being a director of a company.<sup>25</sup>

### 8. *Fiduciary Duties*

Members owe their fiduciary duties to the close corporation as a separate legal person and not *inter se*.<sup>26</sup> However, the association agreement can be a useful device to record the fiduciary duties that shall exist between the members themselves. Unlike in the case of a partnership and a company, where the scope of the statutory duties is not clearly settled and stated, the Close Corporation Act was devised so as to be as simple and clear as possible on many aspects of corporate governance, including the issues relating to the fiduciary duties of members *vis-à-vis* the close corporation. To that end, section 42 of the act governs the fiduciary position of its members. Thus, a member must:

(a) act honestly and in good faith and in the best interests of the close corporation and avoid any material conflict of interests with those of the close corporation: this means that the member must neither derive any personal benefit from the close corporation nor compete in any way with the corporation in its business activities. There would not be a breach of fiduciary duty where details have been furnished to all the members regarding a potential conflict of interests, but where they nevertheless allow a breach to result by all of them approving it in writing. The members may also ratify a breach once it has occurred, provided that ratification thereof is accompanied once again by the written approval of all the members in the close corporation.<sup>27</sup> A member who has breached a fiduciary duty would be liable to the close corporation for any loss suffered as a result thereof or for any economic benefit derived by the member as a result of the breach.<sup>28</sup>

(b) act with the degree of care and skill that may be reasonably expected from a person with that knowledge and experience, failing which the member shall be liable to the close corporation for any loss caused as a result of the said negligence. However, breaches thereof may also be ratified by the written approval of all the members.<sup>29</sup>

---

<sup>25</sup> Section 47(1).

<sup>26</sup> Section 42(1).

<sup>27</sup> Section 42(4).

<sup>28</sup> Section 42(3).

<sup>29</sup> Section 43.

The complex system of derivative actions found in company law is not applicable to close corporations. Instead, a very simple type of derivative action is provided by section 50 of the Close Corporation Act in terms whereof a member or former member would be liable to a close corporation for any contribution or for any breach of a fiduciary duty or for negligence where any other member has instituted proceedings on behalf of the close corporation having notified all the other members of the intention to do so.

### *9. Meetings of Members*

Any member of a close corporation may call meetings of members but, unlike companies, there are no compulsory meetings which have to be called. Proxies are not permitted and thus only persons present in person may vote at a meeting.<sup>30</sup> Three-fourths of the members present in person at a meeting shall constitute a quorum.

### *10. Loans to Members*

Whereas in the case of a company, which may not give financial assistance to any person for the acquisition of shares in itself,<sup>31</sup> a close corporation may acquire members' interests from other members and may certainly give financial assistance to members for them to acquire interests therein.<sup>32</sup>

### *11. Accounting and Disclosure*

Accounting records are required to be kept at the place or places of business in one of the official languages of South Africa. These must fairly present the state of affairs and business of the close corporation and thereby explain the transactions and financial position of the business.<sup>33</sup> In terms of this section of the Act, the record must include the following details:

- (a) records showing the assets and liabilities of the close corporation, the contributions from the members, undrawn profits, revaluations of fixed assets and the amounts of loans to and from members;
- (b) a register of fixed assets which indicate the respective dates of any acquisitions or disposals and the cost or consideration thereof respectively, depreciation (if any), and, where any assets have been revalued, the date of the revaluation and the revalued amounts thereof;

---

<sup>30</sup> Section 48.

<sup>31</sup> Companies Act 61 of 1973, s 38.

<sup>32</sup> Close Corporation Act No 69 of 1984, s 52(2).

<sup>33</sup> Section 56.

- (c) records containing entries from day to day of all cash received and paid out in detail which is sufficient to enable the nature of the transactions and names of the parties, except with cash sales, to be identified;
- (d) records of all goods purchased and sold on credit, including services received and rendered, in detail which is sufficient to enable the nature of those goods and services and the parties to the transactions to be identified;
- (e) statements of the annual stocktakings and records to enable the value of stock at the end of the financial year to be determined; and
- (f) vouchers supporting entries in the accounting records.<sup>34</sup>

Furthermore, these accounting records have to be kept in such a manner so as to provide adequate precautions against falsification and to facilitate the discovery of any falsification.<sup>35</sup> The accounting records have to be open at all reasonable times for inspection by any member of the close corporation.<sup>36</sup>

A close corporation must also fix a date in each year as to when its financial year (annual accounting period) will end.<sup>37</sup> Furthermore, the duration of each financial year of a close corporation shall be twelve months as set in section 57(1)(a), except within the first financial year of the close corporation, where the financial year commences on the date of registration and ends on the date fixed which must not be less than three and not more than fifteen months after the date of registration.<sup>38</sup>

The members of a close corporation shall, within nine months after the end of every financial year of the close corporation, prepare annual financial statements in one of the official languages of South Africa for the year in question.<sup>39</sup> These have to include a balance sheet and an income statement with any notes attached.<sup>40</sup> The annual financial statements of a close corporation must conform to generally accepted accounting practice and also fairly present the state of affairs of the close corporation as at the end of the financial year.<sup>41</sup> It must also disclose separately the aggregate amounts at the end of the financial year of the contributions by members, undrawn profits, revaluations of fixed assets and the amounts of loans to and from

---

<sup>34</sup> Section 56(1).

<sup>35</sup> Section 56(3).

<sup>36</sup> Section 56(4).

<sup>37</sup> Section 57(1)(a).

<sup>38</sup> Section 57(4)(a).

<sup>39</sup> Section 58(1).

<sup>40</sup> Section 58(2)(a).

<sup>41</sup> Section 58(2)(b).

members.<sup>42</sup> It must be in agreement with the accounting records so that compliance with section 58 is made possible and that an accounting officer may report to the close corporation without him having to refer to subsidiary accounting records and vouchers, although the accounting officer may still do so.<sup>43</sup> The report of the accounting officer is attached to the annual financial statements.<sup>44</sup>

The close corporation is not required to have an annual audit as with a company unless this is a requirement of any association agreement. Every close corporation must appoint an accounting officer in accordance with the provisions of the Act.<sup>45</sup> With regards to the qualifications of the said accounting officer in a close corporation, no person shall be permitted to hold such office unless that person is a member of a recognised profession which:

- (a) requires, as a condition of membership, its members to have passed examinations in accounting and related fields of study, which would be a sufficient qualification, in the opinion of the Minister, for the accounting officer to perform his or her duties; and
- (b) has the power to exclude from its membership any persons found to be guilty of negligence in the performance of their duties or of conduct, which is discreditable to their profession; and
- (c) has been named by the minister by notice in the Government Gazette in terms of section 60(2) of the Act, which notes that the Minister may, from time to time, publish by notice in the Government Gazette, the names of those professions whose members would be qualified to perform the duties of an accounting officer.<sup>46</sup>

The consent in writing by all of the members is required before any member or employee of the close corporation may be appointed as accounting officer.<sup>47</sup> An accounting officer of a close corporation shall at all times not only have a right of access to the accounting records and to all the books and documents of the close corporation, but also to have a right to require from members such information and explanations as is considered necessary for the performance of duties as accounting officer.<sup>48</sup>

---

42 Section 58(2)(c).

43 Section 58(2)(d).

44 Section 58(2)(e).

45 Section 59(1).

46 Section 60(1).

47 Section 60(3).

48 Section 61.

Within three months of the completion of the annual financial statements, the duties of an accounting officer are to:

- (a) determine whether the annual financial statements are in agreement with the accounting records of the close corporation;
- (b) review the appropriateness of the accounting policies represented to the accounting officer as having been applied in the preparation of the annual financial statements;
- (c) report to the close corporation in respect to (a) and (b) above;
- (d) describe the nature of any contravention of a provision of the Act that he or she may become aware of;
- (e) state that he or she is a member or employee of the close corporation where this is the case, or is a firm of which a partner or employee is a member or employee of the close corporation;
- (f) report by certified post to the registrar if, at any time, the officer knows, or has reason to believe, that the close corporation is not carrying on business or is not in operation and has no intention of resuming such operations in the foreseeable future;
- (g) report any changes in the founding statement during the financial year, which have not been registered or that the liabilities of the close corporation exceed its assets at the end of the financial year or that the annual financial statements indicate incorrectly (or has reason to believe) that the assets of the close corporation exceed its liabilities at the end of the financial year.<sup>49</sup>

## *12. Piercing the Veil of the Close Corporation*

It has been noted above that members have limited liability in respect of the debts of the close corporation. In the case of companies, the Companies Act<sup>50</sup> is silent as to when the corporate veil should be lifted. Lifting the corporate veil with companies has largely been developed in court where case decisions have, through time, increased the number of categories that could be used to hold directors liable for debts incurred by their companies. This, of course, is inadequate and what the Companies Act really needs here is a provision which sets out the circumstances under which a court would be allowed to pierce the veil. The Close Corporation Act has achieved this admirably and has thus codified the piercing of the veil where there has been a gross abuse of juristic personality.<sup>51</sup>

---

<sup>49</sup> Section 62.

<sup>50</sup> Companies Act 61 of 1973.

<sup>51</sup> Close Corporation Act No 69 of 1984, s 65.



Thus, a court is, in terms of this provision, and unlike in the case of companies, *expressly* given the power to pierce the veil of corporate capacity in the case of close corporations. That is, whenever a court, on application by an interested person or in any proceedings in which a close corporation is involved, finds that the incorporation of the close corporation or any act done by or on behalf of it, constitutes a gross abuse of the juristic personality of the close corporation as a separate legal entity, the court may declare that the close corporation is not deemed to be a juristic person in respect of specified rights, obligations or liabilities of itself or of specified members or other persons, and may consequently give such further orders as it deems fit so as to give effect to the said declaration.

### *13. Personal Liability*

The Close Corporation Act contains almost no criminal sanctions and seeks to be self-regulatory.<sup>52</sup> This is achieved through various sections of the Act that impose personal liability on members and other persons for the debts of the close corporation when the Act has been contravened.

Persons may be jointly and severally liable for the debts of the close corporation as follows:

- (a) where the name of the close corporation is being used without the abbreviations of “CC” or “BK”, any member responsible for or having authorised or knowingly permitted the omission, would be liable to any person who is unaware that the transaction in question involved a close corporation;
- (b) where any member fails to make a contribution as required by the Act, that member would be liable for all of those debts incurred from the date of registration to the date of contribution;
- (c) where a juristic person or a trustee of an *inter vivos* trust purports to hold the interests of a member, directly or indirectly, such person or its nominee would be liable for the debts of the close corporation for the period during which such contravention occurs;
- (d) where a close corporation effects payment for the acquisition of the interests of a member in circumstances that contravene the Act, every member at the time would be liable for those debts incurred prior to payment; this excludes the member who is aware of the payment but who can prove that he or she took all reasonable steps to prevent the payment;

---

<sup>52</sup> Cilliers, *supra* note 7, at 626.

- (e) where a close corporation gives financial assistance for the acquisition of the interests of a member in circumstances which contravene the Act, the rule as noted in (d) above would apply *mutatis mutandis*;
- (f) where a person takes part in the management of the business of the close corporation while disqualified from doing so in terms of section 47(1)(b) or (c), that person would be liable for every debt of the close corporation incurred as a result of the said participation in its management;
- (g) where there has been no accounting officer appointed in the close corporation for a period of six months, every person who was a member of the close corporation during this period and aware of the vacancy, and who was still a member after this period had expired, would be liable for every debt of the close corporation incurred during the period of the said vacancy.<sup>53</sup>

With regard to the liability that may exist for reckless or fraudulent carrying-on of business of the close corporation, this is provided for by section 64 of the Act. This states that:

- (a) a court may, on the application of the Master, a creditor, a member or a liquidator, declare that any person who was knowingly a party to the carrying on of the business of a close corporation recklessly, with gross negligence or with the intent to defraud or for any fraudulent purpose shall be personally liable for all or any of the debts or other liabilities of the close corporation as the court may deem fit;
- (b) a court may give such further orders as it considers proper for the purpose of giving effect to the declaration and enforcing that liability;
- (c) every person who is knowingly a party to the carrying on of the business in any such manner would be guilty of an offence.

The cardinal difference in practice between this provision and section 424 of the Companies Act is that the members themselves in a close corporation are subjected to personal liability, whilst, in a company, the directors (and not the shareholders) would be at risk. The rationale for this is that, whilst the members of the close corporation are responsible for the carrying on of the business in it, the directors would have that responsibility in a company.

If a close corporation were deregistered while having outstanding liabilities, all members at the time of deregistration would be jointly and severally liable for such liabilities.

---

<sup>53</sup> Close Corporation Act No 69 of 1984, s 63.

Furthermore, members and employees of the close corporation or any other person acting on behalf of it, can be personally liable for the debts of the close corporation where, for example, cheques, notices, invoices, receipts or any other documents issued by the close corporation do not state both the full name and registration number of the close corporation.<sup>54</sup> Such persons would be liable only if the close corporation fails to pay.

#### *14. Payments to Members*

A close corporation may distribute net income to its members only if it is solvent and sufficiently liquid. Any distribution in breach of these requirements may be claimed by the close corporation from its members. Thus, in terms of the Act:

- (a) any payment to a member by the close corporation, arising out of his or her membership, may only be made if, after such payment is made, the assets of the close corporation, fairly valued, exceed all of its liabilities *and* if the close corporation is able to pay its debts as they become due in the ordinary course of business *and* if such payment will in the particular circumstances not in fact render the close corporation unable to pay its debts as they become due in the ordinary course of business;
- (b) any payment to a member in his or her capacity as a creditor of the close corporation or for remuneration for services rendered as an employee or officer of the said close corporation or for repayment of a loan or of interest thereon or payment of rental is not included within these restrictions;
- (c) the term “payment” includes the delivery or transfer of property.<sup>55</sup>

It is important to note that the interests of the members can comprise the following:

- (a) contributions by members as noted above;
- (b) surplus on the revaluation of fixed assets; it is sound practice to distribute the available net proceeds out of a realised capital profit;<sup>56</sup>

---

<sup>54</sup> Section 23(2).

<sup>55</sup> Section 51.

<sup>56</sup> Cilliers, *supra* note 7, at 636. The authors further state that unrealised capital profit which results from a revaluation should be distributed to members only when there is certainty that the solvency and liquidity of the close corporation would not be affected and that therefore the requirements of section 51 of the Act have been met. This is in accordance with the guidelines set out by the South African Institute of Chartered Accountants in the *Close Corporations Auditing and Accounting Guide* (41.10 fn note 10 on Statements and Guides of the SA Institute of Chartered Accountants).

(c) undistributed (retained) income or undrawn profits.<sup>57</sup>

The shareholder's equity in a limited company is, however, more formally structured as follows:

(a) the issued share capital comprising shares at nominal value and the share premium account;

(b) the non-distributable reserves comprising the capital redemption reserve fund;

(c) the distributable reserves comprising the general reserve, the reserve for increased replacement costs of the plant and the unappropriated (retained) income.<sup>58</sup>

Thus, the basic approach followed by the courts is that the issued share capital of a limited liability company constitutes the capital fund on which creditors of the company can rely for the satisfaction of their claims. Thus, the capital fund consists of contributed or paid-in shareholders' equity as contrasted with accumulated shareholders' equity comprising both non-distributable and distributable reserves.<sup>59</sup> On the other hand, the part of the members' contributions, which form part of the members' interests in a close corporation, is almost equivalent to the contributed or paid-in shareholders' equity with regard to a company.<sup>60</sup>

### 15. *Criminal Liability*

Although there has been heavy emphasis on decriminalising corporate wrongdoing with the introduction of the Close Corporation Act, there are still eleven sections that create criminal offences.<sup>61</sup>

In terms of section 82(1) of the Act, penalties can be imposed on a close corporation or a member or officer of the close corporation for the following offences:

(a) a contravention of section 52 (prohibitions of loans and furnishing of security to members and others by the close corporation), or section 56 (accounting records), or section 64 (liability for reckless or fraudulent carrying-on of business of the close corporation), a fine not exceeding

---

<sup>57</sup> Close Corporation Act No 69 of 1984, s 58(2)(c).

<sup>58</sup> Cilliers, *supra* note 7, at 634.

<sup>59</sup> *Ibid.*

<sup>60</sup> *Ibid.*

<sup>61</sup> *Ibid.*, 629.

R2000.00 or imprisonment for a period not exceeding two years, or to both such fine and such imprisonment;

(b) a contravention of section 58 (annual financial statements), a fine not exceeding R1000.00 or imprisonment for a period not exceeding one year, or to both such fine and such imprisonment;

(c) a contravention of section 20 (order to change name), or section 22 (formal requirements as to names and registration numbers), or section 22A (improper references to incorporation in terms of the Act), or section 23 (use and publication of names), or section 47 (disqualified persons regarding management of the close corporation), a fine not exceeding R500.00 or imprisonment for a period not exceeding six months, or to both such fine and such imprisonment; and

(d) a contravention of section 16 (keeping of copies of founding statements by close corporations), or section 41 (publication of names of members), or section 49 (unfairly prejudicial conduct), a fine not exceeding R100.00 or imprisonment for a period not exceeding three months, or to both such fine and such imprisonment.

In addition to the penalties that the court may impose as noted above, the court may order the close corporation, its members, officers or any other persons to perform an act within such period that the court may deem fit.<sup>62</sup>

### *16. Comparison with Partnerships and Business Trusts*

Partnerships in South Africa comprise a minimum of two members, but no more than twenty members. A partnership does not exist as a separate legal person and therefore the partners are liable for the debts of the partnership and consequently own the partnership estate.<sup>63</sup>

Any change in the membership of the partnership will result in its dissolution. This is not the case in a close corporation. While a fiduciary relationship exists between the partners *inter se*, members in a close corporation owe their fiduciary duties to the close corporation itself. In addition, although a partnership must submit a joint tax return, the individual partners will be taxed individually. The close corporation, however, is taxed as a separate entity on the same scale applying to companies<sup>64</sup> and thus certain tax benefits would apply.

---

<sup>62</sup> Close Corporation Act No 69 of 1984, s 82(2).

<sup>63</sup> Cilliers, *supra* note 7, at 572.

<sup>64</sup> *Ibid.*

As a result of the unsuitability of the company form for smaller businesses, business trusts have become popular.<sup>65</sup> The business trust does not have separate legal personality, but the number of beneficiaries is not limited to ten or to natural persons as with a close corporation. This is something that needs to be considered when deciding which business form is the appropriate one in the circumstances.

### *17. Conversion of Companies into Close Corporations and visa versa*

It is possible to convert a company into a close corporation<sup>66</sup> and a close corporation into a company<sup>67</sup> provided that the requisite procedures are followed as set out in each section. The details governing each provision extend further than the purview of this article. Suffice to say that the stated intention of the legislature was to provide a simple, less expensive and more flexible legal form for small businesses, and, at the same time, afford them the advantages of separate legal personality.<sup>68</sup> Thus, in order to promote the formation of close corporations, one of the provisions of the Close Corporation Act was to permit the conversion of existing companies into close corporations.

The acceptance of this concept is evident by virtue of the large number of close corporations, both new and converted from a company, which have been formed to date.

## III. SMALL BUSINESSES AND THE NEW ZEALAND COMPANIES ACT OF 1993

### *1. Introduction*

It would be expected that one of the aims of any piece of commercial legislation is that it be 'user friendly'; that is, easily understood and easily applied by those who operate their businesses based on its provisions. The numerous textbooks and loose-leaf binders which interpret Acts of Parliament affecting business bear testament to the reality that this is not in fact the case.<sup>69</sup>

---

<sup>65</sup> Ibid.

<sup>66</sup> Close Corporation Act No 69 of 1984, s 2.

<sup>67</sup> Companies Act 61 of 1973, s 29C.

<sup>68</sup> Cilliers, *supra* note 7, at 569.

<sup>69</sup> Watson, "Coleman v Myers under the Companies Act 1993" (1995) 1(3) New Zealand Business Law Quarterly 168.

The main objective underpinning company law must be to facilitate legitimate business activity.<sup>70</sup>

Company laws are in large part enabling in that they provide the process for the creation of companies, their operation and termination.<sup>71</sup>

One of the assumptions underlying the work of the Law Commission, in preparing the Companies Act of 1993, was that company law should be simple and cheap yet “flexible enough to meet the needs of diverse organisations”.<sup>72</sup> To this end company law was designed to cover all company forms, and the distinction between private and public companies was abandoned.

The most significant differences between the new Companies Act of 1993 and the Companies Act of 1955 can be stated as follows:

- (a) the abolition of the concepts of par value and the nominal value of shares;
- (b) the expression in the statute of a standard form of a company constitution;
- (c) the provision of more detailed statements regarding the duties and powers of directors;
- (d) the reform of the rules about share capital and the abolition of the doctrine of the maintenance of capital; and
- (e) the provision of greatly simplified liquidation rules.<sup>73</sup>

Trading in its own shares by a company was allowed for the first time in New Zealand. Under special rules, a company is allowed to repurchase its own shares, provided that the company is allowed to do so by its own constitution. A solvency test was introduced to maintain sufficient assets for the company to pay its debts as they fall due. Thus, the legal concept of capital was removed.

From an accountant’s perspective, three major changes were implemented. These are the abolition of par value, the implementation of the solvency test and the ability to buy back shares previously issued by the company itself. The abolition of par value considerably reduced the accountability required when dealing with transactions in shares. The extensive body of law (both

---

<sup>70</sup> Ellis, “Company Law in the 1990” in Farrar, J H (ed) *Contemporary Issues in Company Law* 5.

<sup>71</sup> Law Commission, *Company law reform and restatement* Report No 9 (1989) 2.

<sup>72</sup> *Ibid*, 4.

<sup>73</sup> *Ibid*, 1-2.

taxation and company law) that had been enacted over the years, with respect to the recording and application of the share premium reserves and discounts on the issues of shares, was almost overnight made redundant. The ease of recording seemed almost unbelievable since shares were issued and recorded as paid up for the amounts so paid.

The solvency test was seen by some as a radical move by the New Zealand law reformers. However, many supported the move because it was perceived to reflect commercial reality in that nothing should be distributed to shareholders unless “those who have priority (creditors) are protected”.<sup>74</sup> Whilst many Commonwealth jurisdictions reformed their corporate laws many times over the past 50 years, New Zealand had its one major reform in 1993. The Companies Act of 1993 has been described as “a momentous event”.<sup>75</sup>

The Companies Act of 1993 came about as a result of extensive research and consultation on company law. “A once-in-a-generation overhaul”<sup>76</sup> of the legal environment in which companies operate took effect on 1 July 1994. The Law Commission was charged with advising the Minister of Justice “on ways in which the law of New Zealand can be made as understandable and accessible as is practicable”.<sup>77</sup> One of the major themes of the reform was to make company law clearer and more intelligible for present and potential users.

The Act brought about great changes to the New Zealand business scene. It was expected that it would become easier to form and manage a company. Moreover, directors would be made more responsible and accountable for the activities of a company. Simplification was the order of the day. An example, which has a direct bearing on this article, is the removal of the distinction between public and private companies. Thus, the provisions governing small, medium and large businesses alike would be legislated for under just one Act.

The legislature in New Zealand did consider whether special legislation should be enacted to cover the circumstances of closely held companies. They noted that “closely held companies are expressly provided for in the

---

<sup>74</sup> Comments reported as made by Elizabeth Hickey in Fallow “Companies Act: a radical revamp”, *Waikato Times*, 18 February 1994, 15.

<sup>75</sup> Grantham, “When does unanimous consent not have to be unanimous?” (1995) 191 *New Zealand Business Law Quarterly* 42-45.

<sup>76</sup> Fallow, *supra* note 74, at 15.

<sup>77</sup> Law Commission, *supra* note 71, at 30.



United States of America”, and that Australia in 1988 had introduced the Close Corporations Bill.<sup>78</sup>

Under the CER (Closer Economic Relations) agreement with Australia, New Zealand and Australia agreed to move towards harmonisation of their laws. However, this is one significant example whereby each country has chosen to take a different path. Australia has retained the distinction between private and public companies. In Australia, a private company is a company which is owned by two to fifty people or entities, and the company name ends with Proprietary Limited (in its abbreviated form, cited as Pty Ltd). A public company in Australia is owned by five or more persons or entities, and the company name ends with Limited (in its abbreviated form, cited as Ltd). Share transfers are usually restricted for a proprietary company, whereas the shares of a public company are usually readily transferable.

Despite the decision to keep the distinctions between the public companies and the proprietary companies in Australia, the New Zealand legislature concluded that:

We have considered also the benefits of harmonisation with Australian law, ... there is little benefit to be obtained from harmonisation because the nature of closely-held corporations is such that they are less likely to have trans-Tasman trade or securities concerns.<sup>79</sup>

With the advent of the internet, e-commerce, global trading and the increasing access to international markets via the worldwide web, the aforementioned conclusion may no longer be valid or applicable.

With regard to the appropriateness of the provisions relating to private and public companies in New Zealand and other close corporation legislation, the Law Commission in New Zealand surmised that “the main objectives of any close corporation law are to provide flexibility”.<sup>80</sup> It would appear that the Law Commission believed that the Companies Act of 1993 (in draft at that stage) would be sufficiently flexible and that the requirement for a company to have at least one director (in terms of section 150) would not be sufficiently onerous to justify a separate Bill to cater for closely held corporations. It appears that the Commission further believed that a small company could tailor its individual constitution to specify the terms necessary to reflect the company’s special needs or preferences within the

---

<sup>78</sup> Ibid, 56-57.

<sup>79</sup> Ibid, 57.

<sup>80</sup> Ibid, 56.

broad framework of the legislation being developed. Hence, the legislature decided to enact only one Act to cover all classes or types of companies.

## *2. Significant Features of the New Zealand Companies Act of 1993: An Overview*

Small and medium sized enterprises (SMEs) play a key part in the increase in commercial activities in New Zealand. SMEs are more predominant in New Zealand than in many other countries. They account for a high proportion of employment in New Zealand relative to other countries. They dominate the business scene in terms of numbers and contribute significantly to employment and the economy of the nation.

SMEs constitute the majority of all enterprises in New Zealand: 85% of New Zealand enterprises employ five or less full-time equivalent staff whilst 96% of enterprises employ 19 or fewer staff.<sup>81</sup> Thus, New Zealand is predominantly a nation of small enterprises, and more small enterprises are emerging annually. The number of SMEs (0-19 staff) increased 30.9% between 1994 and 1998. However, small firms (0-5 staff) have shown the greatest growth, with the number of enterprises increasing 35% between 1994 and 1998.

Statistics reveal that:

- (a) SMEs account for 42% of all employees, and small firms account for 24%; and
- (b) SMEs contribute 33% of the economy in terms of sales and other income, and small firms contribute 17%.
- (c) births and deaths among small firms have increased 142% and 126% respectively over the last decade; these increases account for 95% of the total increase in enterprise dynamics in the economy.

Many of the small businesses use the company structure. The total number of registered companies in New Zealand in 1999 was 222,655 (206,775 in 1998). During 1999 new company registrations were 29,179 (up 22%). During the same period 942 companies went into liquidation and 264 into receivership. Clearly company formation was popular and the number of companies being formed has increased. The number of companies listed on the New Zealand Stock Exchange has remained fairly static at around 220

---

<sup>81</sup> These figures exclude most of agriculture and some industries within business, community, recreational and personal services, which include many SMEs and economically insignificant enterprises.

companies for many years. Only approximately 0.1% of New Zealand companies are listed on the nation's stock exchange. Therefore, the majority of companies in New Zealand are SMEs and predominantly private in nature.

Even by international comparison, SMEs form a significant component of the New Zealand economy. SMEs are not wealthy. They cannot afford expensive litigation or registration costs. In 1997 the average profit for small firms was only \$57,000 compared to an average of \$6.7 million for enterprises employing 100 or more full-time employees.<sup>82</sup> The owners are also constrained by the amount of time and money that they can invest in searching for information and assistance. It is important to the economy and the owners of these small businesses that their structure is appropriate for their needs.

The Act in its introduction states as one of its main purposes:

To reaffirm the value of the company as a means of achieving economic and social benefits through the aggregation of capital for productive purposes, the spreading of economic risk, and the taking of business risks; ...<sup>83</sup>

Many sections of the Act are arguably not relevant to the needs of small businesses. Furthermore, it could be argued that the Act is still too cumbersome and complicated. As a result, this provides much work for accountants and lawyers (and others) at a relatively high expense to clients who own small businesses and who have neither the time nor the ability to comprehend the legalities and formalities contained in the 397 sections comprising the Act.

The company formation is often recommended by accountants as the best structure for a business in New Zealand where there is more than one owner. Upon the incorporation of the SME, each owner usually contributes capital into the business in return for being allocated a number of shares. However, there is now no statutory minimum capital required under the Act. Thus, in reality, the owners do not have to inject any capital (cash or assets) into the business, but can provide funds by way of a loan to the business. This practice is recommended because, as profits accumulate, the business is able to pay off the loan(s) without bringing about any taxation implications for the owners. The formation of companies is further enhanced in the case of

---

<sup>82</sup> Statistics from the 1998 Annual Enterprise Survey conducted by Statistics New Zealand.

<sup>83</sup> Introductory statement to the Companies Act 1993.

SMEs, with five or fewer shareholders, as a result of their ability to register themselves under the Income Tax Act of 1994 as a Loss Attributing Qualifying Company.<sup>84</sup> The qualifying company is able to transfer losses for tax purposes to the shareholders of the company so as to offset any individual income in much the same way as is allowed in a partnership. It is not the purpose of this article to examine the taxation implications of the company structure.

### 3. *Distinct Legal Personality and Number of Members*

“A company is born as a hollow legal shell”<sup>85</sup> but is a legal personality separate from its owners. Directors are appointed to manage the resources that are drawn from creditors and shareholders for trading purposes.

At least one shareholder and one director are required.<sup>86</sup> This enables a true one-person company to be formed. No upper limit is placed on the number of shares that can be issued. Prior to current legislation, many small companies were formed with just two shareholders in terms of a system where one shareholder would generally hold 99% of the requisite shares.

### 4. *Formalities, Registration and Incorporation*

The essential requirements to form a company are simple. That is to say, a name, a share, a shareholder and a director are all that is required.<sup>87</sup> The shareholders may or may not have limited liability. No constitution is required for a company.<sup>88</sup> If a company does not have a constitution, then the provisions of the Act will prevail.<sup>89</sup> Ross argues that the constitution provided by the Act would not be suitable for most companies.<sup>90</sup>

If a company at any time wishes to have its own constitution, then this is a relatively simple matter of passing a special resolution (without having to argue this change in court), provided that a 75% majority vote can be attained.<sup>91</sup> The constitution, once formulated and agreed upon, has to be

---

<sup>84</sup> Income Tax Act of 1994, ss HG 3, HG 4 and TAA s 37, as cited in CCH New Zealand Master Tax Guide 2000, 730.

<sup>85</sup> Ross, M, *Corporate Reconstructions: strategies for directors* (1999) 65.

<sup>86</sup> Companies Act 1993, s 10.

<sup>87</sup> Section 10.

<sup>88</sup> Section 26.

<sup>89</sup> Section 28.

<sup>90</sup> Ross, “Re-registration - seeking commonality” (1993) Accountants’ Journal 28.

<sup>91</sup> Companies Act 1993, s 32.

delivered to the Office of the Registrar of Companies in Wellington for registration.

### *5. Interests of Members*

Owners of a company hold shares that represent their interest. Under the Act, shares are viewed as entitlement to benefits, such as dividends and voting rights. These entitlements are set out in section 36, but may be altered either in accordance with the provisions set out in the Act or by way of the company's constitution.<sup>92</sup>

Since shareholders have no direct roles in the management of the company, there are no provisions for their removal.

### *6. Internal Relations*

Internal relations are governed by a company's constitution that was previously provided for in the Memorandum of Association and Articles of Association under the 1955 Companies Act. The constitution can at any time be altered, adopted or revoked by special resolution that requires a 75% majority vote. Furthermore, the directors must not enter a major transaction unless it is first approved by at least 75% of the company's shareholders.<sup>93</sup>

### *7. Disqualifications*

Any person can be a shareholder of a company, but certain persons are disqualified from becoming directors of a company. Directors can be disqualified under section 151 of the Act or removed in accordance with the provisions of its constitution.<sup>94</sup>

The following persons are disqualified from becoming directors:

- (a) those under 18 years of age;
- (b) undischarged bankrupts;
- (c) those prohibited under sections 382 (persons prohibited from managing companies), 383 (court may disqualify directors) or 385 (registrar may prohibit persons from managing companies) of the same Act; and

---

<sup>92</sup> Section 36(2).

<sup>93</sup> Section 129.

<sup>94</sup> Section 156.

(d) those who do not have the qualifications required under a company's own constitution.<sup>95</sup>

### 8. *Fiduciary Duties*

Directors' responsibilities are set out in detail in the Act (unlike in the 1955 Act where the duties of directors were not codified). The duties in the current Act explicitly include a number of duties such as:

- (a) to exercise care, diligence and skill, which a reasonable director would exercise;
- (b) to act in good faith and for the benefit of the company;
- (c) to exercise powers for a proper purpose;
- (d) not to use confidential information for private benefit; and
- (e) not to allow the company to continue trading while the company is insolvent.<sup>96</sup>

For a small business the increased responsibilities of directors may therefore deter potential directors from using the company business form. Thus, although directors are given full power to manage companies, any breach of these duties could expose them to personal liability.

### 9. *Meetings of Members (Shareholders)*

Annual meetings must be held each year unless 75% of the voting shareholders agree, by resolution, that an annual meeting is not necessary. However, special meetings must be held upon the request of not less than 5% of the voting shareholders.<sup>97</sup> A quorum for any meeting is achieved when those persons present and proxies held represent the majority of the voting power of the company.<sup>98</sup>

### 10. *Loans to Members (Shareholders)*

Companies are permitted to provide financial assistance to shareholders to purchase shares from the company or from other shareholders.<sup>99</sup> These provisions could be quite helpful for a small business when one shareholder wishes to be released from his or her shareholding.

---

<sup>95</sup> Section 151(2).

<sup>96</sup> Section ss 131 to 149.

<sup>97</sup> Section ss 120 to 122.

<sup>98</sup> First schedule 4(2).

<sup>99</sup> Sections 76 to 80.

### 11. Accounting and Disclosure

Part XI of the Act refers to accounting records and their audit. Only two sections (194-195) refer to the accounting records, whilst twelve sections (196-207) relate to the auditor and the auditing process. The lack of specific directions on accounting records can be explained because the Act relies on the provisions of the Financial Reporting Act of 1993, which covers all reporting requirements for entities reporting to its members. In section 194 (c), of the Companies Act, the directors are given the responsibility to see that the financial statements “comply with section 10 of the Financial Reporting Act”.<sup>100</sup> The Financial Reporting Act in turn provides detailed guidance on the preparation of financial statements and on the content on the auditor’s report.

The Financial Reporting Act of 1993 required, from 1 July 1994, issuers of securities, companies and some public sector entities to report on financial matters. Company financial reporting requirements are found in the Companies Act of 1993, the Financial Reporting Act of 1993 and the Securities Act of 1978. It has been noted:

Corporate reporting obligations in New Zealand are extensive and complex. They recognise the rights and needs of legitimate external users seeking information that helped them understand how a company has performed and is positioned.<sup>101</sup>

Good corporate governance is linked intimately to a good financial reporting system.<sup>102</sup> Thus, entities covered by the Financial Reporting Act are required by the same to comply with “approved reporting standards” (currently named the Financial Reporting Standards or FRS) as issued by the Accounting Standards Review Board (ARSB). The Financial Reporting Act provides strong incentives for complying with the FRS by allowing a court to impose fines to a maximum of \$100,000 per director for non-compliance.

In order to reduce the requirements on some small companies two concessions are available:

---

<sup>100</sup> Section 10 of the Financial Reporting Act obliges the directors of every reporting entity to prepare financial statements within five months after the balance date of the entity or within a shorter period after the end of its financial year or balance date.

<sup>101</sup> J Todd and J Harvey in the foreword to *Annual Report Presentation: Price Waterhouse Holdings (NZ) Limited* (1997).

<sup>102</sup> Lowenstein, “Financial transparency and corporate governance: you manage what you measure” (1996) 96 *Columbia Law Review* 1335.

- (a) where shareholders unanimously agree, the exempt company has nine months from balance date in which to prepare its financial statements. Normally, companies have to prepare their statements within five months of the end of the financial year and an audit of those statements is mandatory.
- (b) these companies need not appoint an auditor where all shareholders unanimously pass a resolution that one should not be appointed. This resolution will remain binding until the next annual meeting takes place.

Certain companies are exempt from the provisions of the Financial Reporting Act of 1993 in terms of section 2(1). Exempt companies currently are those that:

- (a) have total assets not over \$450,000; and
- (b) have turnover not over \$1,000,000; and
- (c) are not a subsidiary of another company; and
- (d) do not have subsidiaries of their own.<sup>103</sup>

Most SMEs will be exempt companies and the reporting requirements for them are much less onerous than for those companies that do not qualify for the exemptions. Exempt companies are required to prepare three statements. These are a position statement, a statement of performance and a statement of other information. Furthermore, the directions for the preparation of the same are contained in the Financial Reporting Order of 1994. Somewhat surprisingly, the financial statements of exempt companies do not have to comply with generally accepted accounting practice (commonly referred to by accountants as GAAP)<sup>104</sup> or give a true and fair view.

## *12. Piercing the Veil of the Company*

The veil of the company upon incorporation is designed to protect shareholders and directors from responsibility for acts done in the name of the company. The view is that a properly incorporated company should be able to rely on limited liability that comes with incorporation. However, if the company is found to be merely a sham or providing a facade to cover its true purpose, and this is proven in court, then the principle of limited liability can be set aside. Thus, in New Zealand, the courts are prepared to reveal the substance of underlying transactions that may not otherwise be transparent without lifting the corporate veil. It has been noted:

---

<sup>103</sup> The dollar limits are altered from time to time by Order in Council.

<sup>104</sup> GAAP refers to the approved financial reporting standards endorsed by the Financial Reporting Standards Board or, in absence of any standard, those practices having approval of the New Zealand Institute of Chartered Accountants.



It is dangerous to interpret even recent pieces of legislation literally, especially if that interpretation will cause injustice, since New Zealand Courts are willing to do judicial gymnastics to ensure their interpretation of statutes will achieve justice in the individual case.<sup>105</sup>

### *13. Personal Liability*

The company is a separate legal entity and therefore any liability is limited to company assets and any unpaid portion of the agreed share price. The shareholders are not liable for any company debts beyond the amount that they agreed to pay for the shares. However, directors may find that external investors, before any loans are made to the Company, frequently require personal guarantees to be undertaken by them.

However, should directors breach their fiduciary duties, the courts may pierce the corporate veil and hold them personally liable for any debts incurred as a result of this breach.

### *14. Payments to Members*

Profits can be distributed to the shareholders as salaries or dividends from tax paid profits, or left in the company as retained earnings. A company may distribute its surplus (net income) to its members only if it is solvent. Any distributions to shareholders are subject to the solvency test.<sup>106</sup>

The solvency test was introduced to maintain sufficient assets for the company to pay its debts as they fall due. The legislation set out in section 4(1) of the Act comprises two tests that are required to be passed before a distribution to shareholders can be made. The two tests are:

- (a) the company is able to pay its debts as they become due in the normal course of business; and
- (b) the value of the company's assets is greater than the value of its liabilities, including contingent liabilities.

Thus, the legal emphasis is on what remains in the company rather than what is removed.

More flexibility has been provided in that companies can reduce capital and make distributions provided that the solvency test is applied (and passed) so

---

<sup>105</sup> Watson, *supra* note 69, at 168.

<sup>106</sup> Companies Act 1993, s 52.

that creditors interests are protected. However, directors can arguably see the solvency test as an onerous requirement.

### *15. Criminal Liability*

The Act incorporates reference to other Acts dealing with crimes, as in the section relating to qualifications of directors. In addition, throughout the Act and in sections 373 to 386 in particular, offences and penalties with respect to the dealings of a company are outlined. The intention appears to be that directors, and sometimes their delegated persons, should not be able to use the limited liability provisions to avoid responsibility.

The increased accountability and responsibilities of directors under this Act have been extensively argued elsewhere<sup>107</sup> and have been “blamed” as being responsible for the large increase in insurance protection costs for directors to cover activities that the directors may have undertaken in the course of their duties for a company.<sup>108</sup>

### *16. Comparison with Other Business Forms*

The main business forms available to small business owners in New Zealand are: sole trader, partnership, trust and company.

A sole trader is an unincorporated business form owned by a single person who receives all the profit and incurs all the liabilities. A problem with this business form is that the business does not have a separate legal form from the owner and thus the owner rather than the business is subject to taxation. Furthermore, the owner is liable for all business debts.

A partnership in New Zealand is formed by private agreement by two or more persons as co-owners of a business. In the absence of any agreement between the partners on how to run the business, the partners will be bound by the provisions as stated in the Partnership Act of 1908.

---

<sup>107</sup> Dugan, “Variation of Directors’ Duties under ss 131, 133 and 137 of the Companies Act 1993” (1997) *Companies and Securities Law Bulletin* 96-100; and Crombie and Samujh, “Negative Messages as strategic communication: a case study of a New Zealand company’s annual executive letter” (1999) 36(3) *Journal of Business Communication* 229-246.

<sup>108</sup> Spisto, “D and O insurance for directors and officers – what is this and is it a viable option in South African law? (1996) 29 *CILSA* 61 – 70.

The partnership is not a separate entity. Thus, its profits are taxable in the hands of the individual partners and this is so whether those profits are distributed or not. Furthermore, the partnership property is owned in common by the individual partners. Since it is not a separate legal entity, the death or withdrawal of one partner will terminate the partnership, unless there are special conditions contained in the partnership agreement to ensure continuity of the business. Similarly, if a new partner is to be admitted to the partnership, the old partnership is to be dissolved and a new one begins.

A further problem with this business form is that a partner is responsible for and liable to pay the entire debts of the partnership, including other partners' shares of the debt, if the other partners are insolvent. Additionally, each partner acts as an agent of the firm. Therefore, if one partner has implied or express authority to act for the partnership, then all the partners would be bound by any contract that is entered into.

A trust is an arrangement giving legal title to property to another as a trustee. The trustee controls and maintains the property for designated parties (beneficiaries). Family trusts are commonly used in New Zealand to protect the assets of small business owners. However, the restrictions of the assets, and the need to protect those assets, can curtail the activities of the trustees. For the more entrepreneurial and risky types of business, the trust structure would not seem appropriate.

A further problem facing the sole trader, partnership and trust is the need for them to consider under which Act they are to be governed with regard to their financial reporting. For example, the trust and partnership may find that they are bound to comply with the FRS if they prepare general-purpose financial reports, whilst at the same time being exempt from the provisions of the Financial Reporting Act.

#### IV. CONCLUSION

A comparison has been made between two different legal systems in so far as corporate law is concerned. The two legal systems, the South African and the New Zealand systems, have been seen to be vastly different in many ways with respect to the legislation that is applicable to small businesses and their development. In this article, the major characteristics and features unique to each system have been discussed and analysed. It is evident from the discussions that neither system is absolutely perfect and that each system has attempted to overcome its own difficulties by enacting legislation, which may be unique to its own country's principles and values.

However, the authors suggest that the South African Close Corporation Act, although not perfect, is an excellent piece of legislation for governing the development of small businesses. A close corporation is defined by the South African Act as having no more than ten members. The main reason why this Act works so well is because the formation, administration and operation of a close corporation are subject to a minimum number of formalities. This succinct and concise piece of legislation has been widely appreciated and accepted into the South African corporate environment. The proof of this can be easily found in the fact that a huge number of legal entities in the form of a close corporation have been established and registered in South Africa since the Act was enacted in 1985. The aim of the Act was to provide a simple and inexpensive form of business for a single member or for a few members without including the very burdensome and complicated procedures and legal requirements that are present in the South African Companies Act. At the same time, the close corporation is unlike a partnership, sole trader or trust in that it is accorded the full status of a juristic person with a legal personality distinct from its members.

If one now compares this with the status quo in New Zealand with regard to small businesses, it is evident that the New Zealand Companies Act of 1993 contains nearly 400 sections and nine schedules. This is so whether one is dealing with a closely held company with a maximum of generally around 20 members or shareholders, or a publicly listed company with a capacity for an infinite number of members or shareholders. It can therefore be well argued that the many sections in the New Zealand Companies Act are neither relevant nor appropriate to the needs of small businesses, especially if those small businesses comprise only a few members of family or friends. As a result, in order to comply with all the regulations and procedures, small businesses become easy prey to accountants and lawyers who can charge exorbitant rates. Thus, the real question that needs to be asked is whether it is really necessary to have burdensome and complicated legislation of this nature to regulate small businesses, especially for those companies that comprise only a few members. Is it not unnecessary to expect that a small business in New Zealand should have to be subject to the same rules and regulations that a large company is subject to? The South African Close Corporation Act is proof that less legislation for small businesses works well and is the way forward. What then may be the reason or reasons inhibiting the New Zealand legislature from embarking upon this route and thereby easing the corporate protocol procedures for small businesses? Would it be too much of a task for the legislature to overhaul and amend the legislation again when this was done only in 1993? Does the New Zealand Law Commission still believe that the Companies Act of 1993 is sufficiently flexible and that its numerous sections and schedules are not sufficiently

onerous to justify a separate Act for small businesses even for those that are made up of a very few members? Does the New Zealand Law Commission further believe that small businesses could still appropriately tailor their individual constitutions so as to specify the terms necessary to reflect the special needs of their company, and to achieve this without being obliged to use the accounting or legal profession at a cost which may be horrendous and unnecessary if the Act was not so detailed and burdensome?

Another point worthy of consideration is that the South African Close Corporation Act does not allow shares to be issued amongst the members, as close corporations do not have share capital. Instead, each member receives an interest and the amount of that interest is determined by the respective contribution that that member makes. This is a much simpler system than issuing shares and receiving a dividend. Simply, the members' interests are expressed as a percentage and, upon the close corporation making a profit, that member will be entitled to receive that percentage of the profits.

Furthermore, a court in terms of the provisions of the Close Corporation Act, and unlike the case of both South African and New Zealand companies, is expressly given the power to pierce the veil of corporate capacity. Thus, whenever a court finds that there has been a gross abuse of the juristic personality of the close corporation as a separate legal entity, the court may declare that the close corporation is not a juristic person and hold the member or members personally liable for the debt or debts of the close corporation.

Thus, a codification of the rules governing the lifting of the corporate veil has simplified and clarified the position as to when corporate abuse is unacceptable. There are no express provisions in the New Zealand Companies Act which permit a court to pierce the veil. However, the court will use its discretion to set aside the principle of limited liability in cases where there has been a proven abuse of the corporate device.

In summation, the authors highly recommend that the New Zealand law reformers take cognisance of the South African Close Corporation Act. The authors agree with the view that small businesses often have a

complex legal structure imposing unnecessary and unperceived legal costs ...  
(Furthermore) (t)he only effective means ... for small businesses is the creation of a

simple corporate form ... the small business person could then opt to achieve virtually all of the benefits of incorporation but without all of the burdens".<sup>109</sup>

Consequently, simplification and clarification of legislation is the way forward as it encourages small business development and growth. The South African Close Corporation Act has proven itself as something of a masterpiece. It has encouraged small business development throughout South Africa. It has, on the whole, been very successful in encouraging small business development amongst all of its peoples and has contributed as well to national wealth. Is this not what New Zealand needs as well?

---

<sup>109</sup> Hicks, "Corporate Form: Questioning the Unsung Hero" (1997) *Journal of Business Law* 329, 306-330.

# EEO FOR MĀORI WOMEN IN MĀORI ORGANISATIONS

BY LINDA TE AHO\*

## I. INTRODUCTION

This article contemplates reasons why Māori women do not feature in the “top jobs” within certain Māori organisations, as well as strategies for positive change. It promotes EEO<sup>1</sup> as a useful tool to address the imbalance that places women in unnaturally subordinate positions within Māori organisations and Māori society generally.

Raukawa Trust Board<sup>2</sup> applied to the EEO Contestable Fund<sup>3</sup> to fund a project that aimed to develop an EEO resource for the Board in its role as an employer (the parent project). While the parent project concentrated on issues about the employment, work conditions and career development of Māori women in Māori organisations particularly in the Tainui rohe,<sup>4</sup> it has also produced a separate resource that is broad enough to be useful for other Māori organisations as employers.<sup>5</sup>

This article is both a report of the parent project and an analysis of some of the research data collected.<sup>6</sup> It promotes a broad, positive view of EEO and advocates the advantages of EEO for Māori organisations as employers; and

---

\* Lecturer in Law, University of Waikato.

1 Equal Employment Opportunities.

2 A charitable trust established in 1987 primarily to promote and develop the social and economic advancement of the Trust's beneficiaries, the descendants of the Raukawa iwi (tribe). The Trust operates from its offices in Tokoroa. Raukawa is affiliated to the Tainui waka confederation and is closely associated with many iwi through the Kingitanga (King movement).

3 A fund established upon the repeal of the Employment Equity Act. The fund is intended to help with the promotion of business benefits of equal employment opportunities to employers throughout New Zealand.

4 The Tainui rohe (tribal region) is situated in the central North Island, according to the following tribal saying: Mokau ki runga, Tamaki ki raro, Mangatoatoa ki waenganui, Ko Pare Hauraki, Ko Pare Waikato. Mokau is the southern boundary, Tamaki the northern boundary. Mangatoatoa is in the centre, and Pare Hauraki and Pare Waikato are eastern and western landmarks.

5 Te Aho, L *A Guide for Employers on: Equal Employment Opportunities (EEO) for Māori Women in Māori Organisations* (July 1999).

6 The writer was involved in the project as a coordinator and researcher.

the valuable contributions Māori women make to society, and, in particular, to the work place.

## II. EQUAL EMPLOYMENT OPPORTUNITIES AND THE LANGUAGE OF EEO

I begin by setting out possible meanings of EEO and by sketching the surrounding legal landscape. Certain provisions of the Human Rights Act 1993 and the New Zealand Bill of Rights Act 1990 that provide for measures to ensure 'equality', overarch more specific legislation that prohibits 'discrimination'. It is argued that the failure to apply the measures contained in the more general rights-based Acts, coupled with the lack of specific employment legislation making EEO mandatory in the private sector, are key causes of the entrenched unemployment and underemployment of Māori women.

EEO can have the following various meanings:

1. a fundamental ideal encompassing concepts of fairness and justice that our society values;<sup>7</sup>
2. an outcome depicted by a workplace where individuals have access to equal opportunities in all aspects of employment such as recruitment, development, promotion, and reward; where all persons are able, should they choose, to reach their full potential regardless of gender, ethnicity, age, disability, sexual orientation, or family circumstances; and/or,
3. a plan of action that firstly identifies unfair discrimination in the workplace and then provides for the development of strategies to counteract such discriminatory practices.

This article adopts the meaning of EEO proffered by the Working Group on EEO, that is:

A systematic, results-oriented, set of actions that is directed towards the identification and elimination of discriminatory barriers that cause or perpetuate inequality in the employment of any person or group of persons; and is further directed to redress the effects of past discrimination on disadvantaged groups so as to bring those disadvantaged groups to the level of the advantaged.<sup>8</sup>

---

<sup>7</sup> Wilson, "Equal Pay and Equal Employment Opportunities 1972 – 1997: where to from here?" *Closing the Gap: Proceedings of the Forum on Equal Pay* (1997) 5.

<sup>8</sup> Wilson, M *Towards Employment Equity: Report of the Working Group on Equal Employment Opportunities and Equal Pay* (1988) 9-10.



This definition incorporates all of the meanings of EEO outlined above, and it emphasises the need for EEO practices to be *proactive* and *affirmative*.

EEO is based on the principle that people have a right to fairness and equitable treatment in society. It is based on the assumption that talent, ambition, skill and potential can be found in all people. But, it also recognises that some people are discriminated against on the basis of their membership of a particular group.

EEO is not necessarily about members of the so-called target groups of EEO (for example Māori and women) striving for *equality* or *sameness*. Rather, it recognises and values diversity, and emphasises the *importance of people*. It is also about the pursuit of *equity* or *fairness*.<sup>9</sup>

This article proposes that these meanings and explanations of EEO are consistent with certain Māori world views and core values including tino rangatiratanga (self-determination).<sup>10</sup>

### III. THE LEGAL LANDSCAPE

#### 1. *The Public Sector*

The public sector is the main arena in which EEO operates. The law requires Government Departments and State Owned Enterprises to act as good employers. That requirement, in turn, imposes legal obligations upon employers in the public sector to adopt equal opportunities policies and programmes.

For example, the State Sector Act 1988 requires chief executives of Government Departments to develop EEO policies and programmes and to report annually on the extent to which each Department was able to meet the EEO programme for that year.<sup>11</sup>

In addition, the State Owned Enterprises Act 1986 requires State enterprises to operate as successful businesses and to that end be good employers.<sup>12</sup> A “good employer” is one who operates a personnel policy containing

---

<sup>9</sup> Ibid, 9.

<sup>10</sup> See the discussion in Part VI below.

<sup>11</sup> State Sector Act 1988, ss 56, 58 and 60.

<sup>12</sup> State Owned Enterprises Act 1986, s 4.

provisions generally accepted as necessary for the fair and proper treatment of employees in all aspects of their employment.<sup>13</sup>

Such a policy must include provisions requiring an equal opportunities programme; and the impartial selection of suitably qualified persons for appointment.<sup>14</sup>

## *2. Discrimination Generally*

There is no legal obligation upon private sector employers to adopt equal employment opportunities policies. However, there is an overarching legal obligation on the part of all employers not to discriminate against employees on the grounds specifically stated in the Human Rights Act 1993 and adopted in the Employment Relations Act 2000.

Under section 22 of the Human Rights Act it is unlawful for an employer, where the employee is qualified for work of any description, to discriminate by reason of any of the prohibited grounds of discrimination. Those grounds are set out in section 21 and are “sex, marital status, religious or ethical belief, colour, race, ethnic or national origins, disability, age, political opinion, employment status, family status, and sexual orientation”. The Employment Relations Act 2000, section 105, adopts precisely the same prohibited grounds.

Despite this overarching prohibition against discrimination, both the Human Rights Act 1993 and the New Zealand Bill of Rights Act 1990 specifically provide for and allow for measures to ensure “equality”. Section 73(1) of the Human Rights Act allows for the development of specific recruitment programmes for occupations where target groups, like Māori women, are under-represented. That section provides as follows:

### 73. Measures to ensure equality—

(1) Anything done or omitted which would otherwise constitute a breach of any of the provisions of this Part of this Act shall not constitute such a breach if—

(a) It is done or omitted in good faith for the purpose of assisting or advancing persons or groups of persons, being in each case persons against whom discrimination is unlawful by virtue of this Part of this Act; and

(b) Those persons or groups need or may reasonably be supposed to need assistance or advancement in order to achieve an equal place with other members of the community.

---

<sup>13</sup> Section 4(2).

<sup>14</sup> Section 4(2)(b) and (c).

### *3. The New Zealand Bill of Rights Act 1990*

Section 19(1) of the New Zealand Bill of Rights Act 1990 confirms the fundamental right to freedom from discrimination on the grounds set out in the Human Rights Act. Section 19(2) is similar in form and effect to section 73 of the Human Rights Act. Section 19(2) stipulates that measures taken in good faith for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination do not constitute discrimination.<sup>15</sup>

### *4. International Obligations*

Both the Human Rights Act and the New Zealand Bill of Rights Act reflect New Zealand's international obligations to provide equal employment opportunities and equal treatment in terms of work conditions. Those obligations are set out in a series of United Nations human rights instruments that New Zealand has ratified and adopted such as the 1979 United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), ratified by New Zealand in 1984.

The fact that there is little public awareness of these conventions, combined with the repeal of the Employment Equity Act 1990 and the continued lack of a legal obligation upon employers in the private sector to adopt EEO policies, is seen as a breach of those obligations.<sup>16</sup>

### *5. The Employment Equity Act 1990 (repealed)*

A remarkable aspect of the history of EEO legislation in this country is the fate of the short-lived Employment Equity Act which was both enacted and repealed in 1990. The Act had broken new ground in that it legally required all organisations with 50 or more employees to have an EEO programme, and provided for a penalty system to encourage compliance.

It was explicit under the Employment Equity Act that EEO programmes were to be directed at "redressing the effects of past discrimination so as to bring disadvantaged groups to the level of the advantaged".<sup>17</sup>

---

<sup>15</sup> See infra note 26 and associated discussion.

<sup>16</sup> McGregor, "Breaching the Convention: New Zealand's International Obligations" in Sayers, J and Tremaine M (eds) *The Vision and the Reality* (1994) 28.

<sup>17</sup> Wilson, supra note 8, at 10.

The Act, lasting only months, was repealed by the incoming National Government determined to reduce state intervention in the labour market. The repeal of the Act has been described as an example of how the fundamental restructuring of New Zealand's economic and social system has had the effect of reasserting the dominance of patriarchy on women.<sup>18</sup>

Whether EEO ought to be voluntary or compulsory is a controversial matter. One perspective is that compulsory EEO is unnecessary because it is in the commercial interests of employers to promote EEO and enjoy the benefits of a diverse workforce.<sup>19</sup> Yet, in 1987, the Human Rights Commission had reported to the Royal Commission on Social Policy that ten years of voluntary EEO had produced no measurable results, and argued that structural change in the composition of the workforce would come about only if EEO were to be made compulsory.<sup>20</sup> Overseas and local experience confirms that legislation is the most effective means of achieving equal opportunities in the workplace.<sup>21</sup>

The current economic climate still emphasises voluntarism and free markets as opposed to state imposed compulsion. There is little likelihood that EEO will be made compulsory in the private sector in the short term, nor has the Labour-led coalition signalled any intention to legislate for EEO in the private sector.

#### IV. MERIT AND MEASURES TO ENSURE EQUALITY

##### *1. The Merit Principle*

The "merit" principle assumes that the most able and deserving individuals will move into the top decision-making positions, irrespective of issues such as ethnicity or gender. The principle is grounded upon the liberal philosophy that all individuals are born equal. This principle forms a major part of EEO programmes in New Zealand. Potentially, the merit principle poses

---

<sup>18</sup> Wilson, "The Inaugural Women's Law Lecture" in *Women's Law Conference Papers* (1993) 317-318.

<sup>19</sup> Knowles, "Women and Work", paper presented at the conference *Women at Work: Issues for the 1990s*, seminar, held at Victoria University, Wellington, 1993, cited by Briar, "Tracing the Patterns: The Development of EEO Policies in New Zealand and Overseas" in Sayer and Tremaine, *supra* note 16, at 31.

<sup>20</sup> Human Rights Commission, "Affirmative Action for Women in Employment" (1987), paper submitted to the Royal Commission on Social Policy, cited in Briar, *ibid*, 32.

<sup>21</sup> Skiffington, "In Search of Employment Equity" [1998] *Employment Law Bulletin* 26.

significant problems for Māori women, particularly if construed in a narrow way.

First, the merit principle carries an assumption that, if Māori women do not move up the occupational hierarchy, it is because they lack the capability.<sup>22</sup> Yet this does not take into account past discrimination which precluded target groups like Māori women from having the opportunity to acquire training and experience or to demonstrate their potential. Further, the skills that women, and particularly Māori women, have acquired, such as organisational skills, fluency in te reo Māori and knowledge of tikanga, are undervalued. On a wider interpretation of the concept of merit, these skills would be valued more.

By way of example, an interesting point that arose about merit during the project was the question of whether Māori organisations that have preferential recruitment policies for beneficiaries, or Māori, are acting consistently with EEO. There is a strong argument that employing the best person for the job, on the basis that that person is better able to provide certain services or has a better understanding of needs because, say, she is of the same iwi, is employing on merit.

This is because merit is contextual. It reflects the values of the evaluators. Yet, in most cases, it will not be Māori women who set the criteria for merit.<sup>23</sup>

A classic illustration of the possible negative consequences occurred at a training seminar. Participants were asked to construct a job description for a hypothetical vacancy, a marketing manager for an iwi Trust Board. Participants then considered who might make up the appointment panel and why. Finally, two personal profiles of hypothetical applicants were distributed. The first hypothetical applicant, Kimiora Pai, was a mother of five aged 38. Her personal profile revealed that she was well known in the community for being a good organiser, particularly when organising food for large hui (gatherings) and major fundraising events for her children's schools and sports teams. Upon leaving school, Kimiora had worked in a hotel as a cook and continued to work part-time for the hotel while carrying out the main care-giving duties for her children. Though Kimiora had no formal tertiary qualifications, while working for the hotel she completed the examinations and practical tests for her chef's ticket. Kimiora was fluent in

---

<sup>22</sup> Briar, *supra* note 19, at 32-33.

<sup>23</sup> Narraway and Rani, "Implementing Equal Employment Opportunities (EEO) Policy in the Workplace" *Women's Law Conference Papers* (1993) 89,93.

te reo Māori and well versed in tikanga Māori. She affiliated to the Trust Board.

We called the second hypothetical applicant Tama Rangatahi. He held a Bachelor of Management Studies and a Masters Degree in Commercial Law. While able to understand some Māori, Tama was unable to speak the language. He was fluent in Japanese and had recently returned after a year spent in Japan on a work exchange programme working in the Japanese stock exchange. Tama was 25 years of age.

The seminar participants in the workshop were asked to identify the relevant skills and attributes that each applicant would bring to this job. The first group that was asked to report back was headed by a strong and outspoken kaumatua. This group considered that while Kimiora was a good wife and mother, she had “no skills” relevant to the job!

It was reassuring to hear that other participant groups identified that Kimiora would bring to the job organisational skills, knowledge of the community and an ability to network, a mature outlook, a demonstrated ability to upskill and te reo Māori.

## 2. *Anti-discrimination*

“Anti-discrimination” is based on the merit principle. Examples of anti-discrimination measures are ensuring that target groups such as Māori and women are part of job interview panels, making sure that advertisements are worded appropriately, providing for an EEO coordinator in the workplace, and ensuring that childcare facilities are provided. These measures may help to remove formal barriers against the selection and promotion of individuals, and are a major component of EEO in New Zealand.

Any legislation, policy or programme that concentrates upon anti-discrimination *alone* will have limited effectiveness for Māori women. When applying for jobs or promotion, they would continue to be disregarded because they lack qualifications that they had been denied the opportunity to acquire. The focus of these kinds of measures is on the individual, rather than on Māori women as a group. This can cause difficulties. For example, when a complaint of discrimination is made, the responsibility to prove that discrimination has occurred is on the individual. And she is usually powerless when compared with the perpetrator. Furthermore, discrimination

would have to occur before action could be taken. So, the measures do little to *prevent* discrimination from occurring.<sup>24</sup>

### 3. Affirmative Action

A complementary approach that employers ought to consider incorporating into any programme that is to improve the position of Māori women in the workforce is affirmative action. Affirmative action aims to break down the effects of past discrimination. It focuses on systems rather than individuals. It is proactive rather than reactive and aims for greater equity in outcomes. Affirmative action embraces the concept of “positive discrimination”. This concept would provide temporary assistance to disadvantaged groups by, for example, preferential hiring and focussed up-skilling of Māori women until they are more fairly represented in higher level positions and could compete on an equal footing. Opponents, however, would criticise such measures as amounting to reverse discrimination and undermining the “merit” principle.<sup>25</sup>

The ill-fated Employment Equity Act had incorporated aspects of affirmative action. EEO programmes were to be directed towards redressing the repercussions of past discrimination so as to bring disadvantaged groups to the level of the advantaged. In order to reduce resistance to the legislation, the “merit” principle was retained. Even so, the Act was repealed.

### 4. The *Amaltal* Case

The *Amaltal* case<sup>26</sup> signals caution to Māori organisations, however, and provides an example of the resistance to affirmative action in this country. The *Amaltal* decision is the only one where section 73 of the Human Rights Act 1993 (as well as its forbears and other similar provisions in other statutes) has been the central issue. Nelson Polytechnic ran fishing cadet courses. Under a contract with the Education and Training Support Agency (ETSA), the Polytechnic reserved four places out of 14 for Māori or New Zealand resident Pacific Islanders in one such course, and all of the places in a second course.

An applicant who was not of Māori or Pacific Island descent applied for the fishing cadet course and was rejected. Proceedings were brought by the

---

<sup>24</sup> Briar, *supra* note 19, 33-36.

<sup>25</sup> *Ibid*, 36-40.

<sup>26</sup> *Amaltal Fishing Company Ltd v Nelson Polytechnic* [1996] NZAR 97.

Amaltal Fishing Company which operated a deep-sea fishing operation out of Nelson. The company claimed that the Polytechnic's actions in reserving places for Māori or Pacific Islanders breached the Race Relations Act 1971, the Human Rights Commission Act 1977 and the Human Rights Act 1993. In effect the Polytechnic did not defend the proceedings. The proceedings fell to be determined on the evidence of the plaintiff company. Consequently, the Complaints Review Tribunal found the claim proved, subject to the defendant being able to establish a defence under section 73 of the Human Rights Act 1993. To establish a defence the Polytechnic was required to show that:

- (i) the thing done (that is, the reservation of places in the first course or all places in the second course for persons within the target group) was done in good faith; and
- (ii) the thing was done for the purpose of assisting or advancing persons or groups of persons of a particular race (that is, Māori or New Zealand resident Pacific Islanders); and
- (iii) those persons or groups of persons need, or may reasonably be supposed to need, assistance or advancement in order to achieve an equal place in the community.<sup>27</sup>

The Tribunal accepted Amaltal's acknowledgment that the Polytechnic satisfied the first two limbs.

As to the third limb, the Tribunal said that its task was to look at the aspirations of the particular target group and

...determine whether, on the balance of probabilities, those persons need or might reasonably be supposed to need, assistance or advancement in order to achieve an equal place with other members of the community with similar aspirations (i.e. young persons outside the target group who either wish to undertake the fishing cadet course or to make careers for themselves in the fishing industry).<sup>28</sup>

The Tribunal found this task difficult given the extremely limited evidence before it. The defence was not made out.

Declarations were made preventing the defendant from repeating the breaches of the Human Rights legislation. But the orders were framed in such a way that it was left open for the Polytechnic to reserve places for members of the target group in any courses in the future providing that it

---

<sup>27</sup> Ibid, 115.

<sup>28</sup> Ibid.



complies with the requirements of section 73 of the Human Rights Act 1993.

The Tribunal thus spelled out the Polytechnic's independent obligations to establish that target groups needed the special measures afforded by the Human Rights legislation. It was not enough simply to rely upon the argument that Government Policy providing funding for courses for Māori and Pacific Island students was sufficient evidence of such need.

It must be said that the guidelines in *Amaltal* were made without the benefit of full submissions and cannot be considered definitive. However, the decision signals that Māori organisations who wish to employ special measures under section 73 of the Human Rights Act (or similar provisions) must be able to provide their own evidence that the special measures meet the requirements of section 73. General indicators of socio-economic conditions being worse for Māori women than for the rest of society may not be sufficient to meet the requirements for need. Indicators of disadvantage would have to relate to the applicant's need for the particular position being advertised.

To summarise, there is no legislation that requires EEO in the private sector in this country. Ideally, employment equity needs to be prioritised via statute. In the meantime, the EEO legislation currently in force in New Zealand still focuses on anti-discrimination measures and incorporates the merit principle. This is so, even though the Human Rights Act 1993, the New Zealand Bill of Rights Act 1990 and International Conventions specifically allow for affirmative action and positive action as measures to ensure equality.

These measures are being ignored, or interpreted strictly, at the expense of the status of Māori women. The statistics relating to Māori women's participation in the labour force, when compared with others, continue to be appalling. This is an unnecessary state of affairs, given that it is lawful to take specific measures to help individuals or groups covered by the prohibited grounds of discrimination, if they need help to achieve an equal place with other members of the community.

Māori organisations must be bold and consider adopting affirmative action policies if their employment policies are to be meaningful for Māori women. It is also imperative that a wider interpretation of the concept of what constitutes merit be adopted in such policies and promoted in the community.

## V. WĀHINE MĀORI

Māori women face unique challenges within Māori organisations and Māori society generally. How has colonisation impacted on tikanga and kawa (accepted ways of doing things, customs)? Why is there a perception that Māori women have become unnaturally subordinate in Māori society?

This project has provided a timely opportunity to reiterate the strength of Māori women and the valuable contributions that they can make to Māori society and Māori organisations. Nevertheless, gloomy statistical information continues to illustrate the multifaceted disadvantage of Māori women when competing in the labour market. These statistics are a constant reminder of the need for empowerment of Māori women, and it is suggested that EEO might be a useful tool to help do this.

*1. EEO and Tino Rangatiratanga*

Tino rangatiratanga or self-determination is guaranteed to Māori under the Treaty of Waitangi. Many Māori hold the view that it is for them to determine what their responsibilities are and to interpret their responses to situations in terms of their own way of doing things. This is the approach that many Māori organisations take with respect to social services, training, health and other areas of development and local government issues.

There is a danger that Māori organisations might see EEO as yet another invasive, non-Māori construct and therefore shun it in the name of tino rangatiratanga.<sup>29</sup>

While overseas and local experience confirms that legislation is the most effective means of achieving equal opportunities in the workplace,<sup>30</sup> Māori organisations, like many other private sector organisations, would be likely to oppose compulsory EEO in the name of tino rangatiratanga.

*2. Tikanga and Kawa and the Impact of Colonisation*

The maintenance of tikanga and kawa is often cited as an exercise in tino rangatiratanga. However, research suggests a perception that women are discriminated against on the basis of illogical reliance upon tikanga and kawa. For example, if Māori women are seen as ineligible for certain leadership or management roles for reasons related to kawa or tikanga, then

---

<sup>29</sup> See Part VI for an example of this.

<sup>30</sup> Skiffington, *supra* note 21.

it is possible that, in some circumstances, the way tino rangatiratanga is being exercised can actually disadvantage Māori women.

There is now a wealth of research verifying that, before 1840, Māori women were significant leaders, organisers and nurturers at both whānau (family) and hapū (sub-tribal) level. There are countless examples of Māori women who were explorers, poets, composers, chiefs and warriors, heads of families, founding tupuna or ancestors of various hapū and iwi (tribes), their accomplishments recorded in waiata (songs) and whakatauaki (sayings, proverbs).<sup>31</sup>

Much has also been written about the *complementary* nature of the roles of men and women prior to colonisation.<sup>32</sup> Neither gender was necessarily superior to the other. Māori women certainly had rangatiratanga, and at times it was superior to the authority of men.

In addition, Māori women had rights over land and resources. Unlike her Pākehā counterpart, her rights would not become her husband's property if she married. Thus, the traditional role of Māori women was inconsistent with the colonial culture in which power and authority were the domain of males.<sup>33</sup> There are many examples of how Māori adopted or "internalised" colonial values, or how these values were imposed, and how various tikanga and kawa and ways of doing things changed as a consequence. Examples can be found in Māori Land Court records. Hohepa quotes an example from 1891 of men challenging, on the basis of gender, the right of women to be trustees on a Māori land block.<sup>34</sup> As a result of this form of assimilation, Māori women became unnaturally subordinate in Māori society.<sup>35</sup>

---

<sup>31</sup> Songs, sayings and proverbs are often essential records of the oral tradition of the indigenous Māori of New Zealand. See Smith, "Māori Women Discourses, Projects and Mana Wāhine" in Middleton, S and James, A (eds) *Women and Education in Aotearoa* (1992) 35; Sykes, A "How are Māori Women doing 100 Years Later?" *Women's Law Conference* (1993) 161-162; and Jahnke, "Māori Women in Education" in Te Whaiti, P, McCarthy, M and Durie, A (eds) *Mai i Rangiatea: Māori Wellbeing and Development* (1997).

<sup>32</sup> Mikaere, A "The Balance Destroyed: The Consequences for Māori Women of the Colonisation of tikanga Māori"(unpublished thesis, University of Waikato, 1995); and Barlow, C *Tikanga Whakaaro: Key Concepts in Māori Culture* (1991) 148-9.

<sup>33</sup> Hohepa, P and Williams, D "The Taking into Account of Te Ao Māori in Relation to Reform of the Law of Succession" (A Working Paper) (1996) 29-30.

<sup>34</sup> Ibid.

<sup>35</sup> For more examples, see Law Commission *Justice: The Experiences of Māori Women* Report 53 (1999) chapter 2.

Research participants in the parent project reaffirmed the ability, ambition, intelligence, talent and skills of Māori women. They retold the strengths of many female role models who were and/or continue to be organisers and leaders in their own whānau and hapū.

But despite these known strengths and capabilities, the perception exists that Māori women are discriminated against on the basis of illogical reliance upon tikanga and kawa. For example, Māori organisations may consider Māori women to be unable to lead or be placed in certain management positions within organisations because, as women, they will not be able to whaikōrero.<sup>36</sup> The inability to whaikōrero becomes more important than other qualifications, skills and talents that may be more critical to the job. This is a classic example that reflects the extent to which tikanga and kawa can be used to exclude possible candidates from contributing effectively to an organisation.<sup>37</sup>

Kathie Irwin has canvassed this issue of women's speaking rights on the marae.<sup>38</sup> She argues that it is a misunderstood and abused issue of our culture because the role of orator is seen by many as having the most mana. And, because of this misconception, women are regarded as secondary to men.

Some iwi have transferred this concept to the boardrooms of companies and trust boards. And women have been precluded from participating.

Annie Mikaere of Ngati Raukawa ki te Tonga has written of a recent conversation that she shared with a close male relative.<sup>39</sup> The relative expressed his view that their iwi would never allow a woman to take on a leadership role such as that of CEO of their iwi runanga. The comment was not made with any degree of approval, it was stated simply as a matter of fact. Mikaere then expressed her bewilderment about the implications of such a statement, as illustrated by the following extract:

---

<sup>36</sup> Whaikōrero, or rehearsed speeches performed during ceremonies, often contain important records of history and tradition.

<sup>37</sup> Māori Women's Welfare League, *Equal Employment Opportunities (EEO) Project* (1997) 10-11.

<sup>38</sup> Irwin, "Towards Theories of Māori Feminisms" in Du Plessis, R (ed) *Feminist Voices* (1992) 18.

<sup>39</sup> Mikaere, "Colonisation and the Imposition of Patriarchy: A Ngati Raukawa woman's perspective" (1999) 1 *Te Ukaipo* 34, 47.

How could it possibly be that no women, no matter how well qualified, could expect to win a top management position within an essentially Pākehā vehicle, an incorporated society, simply because it was our iwi runanga?

If [the male relative] is correct, this is a prime illustration of what Kathie Irwin has described as “people taking a tikanga which relates to the marae atea, and transferring its cultural power to another location in which it has no meaning”.<sup>40</sup>

A popular view on this issue is that women do not speak on the marae because they have other significant roles such as being child bearers. Not speaking on the open marae during powhiri (formal welcome ceremonies) is a mark of respect for a woman’s reproductive role, not because she is of lesser status.

### *3. Whakapapa*

Another interesting point that emerged from the interviews relates to the role of whakapapa (genealogy or relatedness) and leadership or management qualities.

Whakapapa may indeed be an important factor in terms of leadership capabilities. But there are other qualifications, skills and talents that may be more critical to a particular job. Whakapapa ought not to be used to *exclude* possible candidates from contributing effectively to an organisation.

### *4. EEO Māori and EEO Women – A Double Disadvantage? Issues of Empowerment*

Despite some improvements in the participation of women in education and employment, the social and economic outcomes for Māori women continue to fall well below those of men and non-Māori women.<sup>41</sup>

In the context of discussing Māori women and the health system, Mikaere and Milroy argue that the disempowerment of Māori women is two-fold. Not only do they belong to an indigenous population that has been colonised, but also they have been colonised by a society with an oppressive tradition of entrenched patriarchy.<sup>42</sup>

---

<sup>40</sup> Ibid.

<sup>41</sup> Mikaere and Milroy, “Māori Women and the Health System” in *Women’s Law Conference Papers* (1993) 263, 265.

<sup>42</sup> Ibid.

This disempowerment, they argue, has meant that “Māori women are, by and large, prevented from perceiving themselves as controllers of their own and their families’ destinies”.<sup>43</sup>

In the context of EEO, Māori women are thus members of two target categories. The aims and aspirations of the various EEO groups are different. Māori generally have focused upon economic and political self-development for all Māori (tino rangatiratanga and mana motuhake). Women, on the other hand, have concentrated on equal representation in all spheres of work activity. It is not known how Māori women prioritise their aims and aspirations in terms of EEO.

To analyse the intersectionality of race and gender is highly complex, and not attempted in this work. This type of analysis in relation to employment issues is being undertaken overseas. For example, Rose M Brewer analyses the “simultaneity of oppression” of Black women in terms of race, class and gender.<sup>44</sup> In setting out some insights on Black feminist theorising, Brewer describes the tendency in a good deal of the research on Black experience in relation to employment issues to centre on the:

dynamics of either race or gender which translates into discussions of white women or Black men. Dismissing intersections of race and gender in such autonomous analyses conceptually erases African-American women.<sup>45</sup>

Brewer emphasises the need for a more robust and holistic understanding of African-American life. A similar need exists in relation to understanding the realities of being a Māori woman.

The following facts are reproduced from *Māori Women in Focus*, a joint publication of Te Puni Kokiri and the Ministry of Women’s Affairs, published in April 1999. The facts contain some gloomy statistics that illustrate this dual disadvantage that Māori women face when competing with others in the labour market, and they highlight the need for the empowerment of Māori women.

1. There has been a notable improvement in the participation of Māori women in education. The number of Māori women enrolled in tertiary

---

<sup>43</sup> Ibid.

<sup>44</sup> Brewer, “Theorizing Race, Class and Gender – The new scholarship of Black feminist intellectuals and Black women’s labor” in James, SM and Busia, APA (eds) *Theorizing Black Feminisms* (1993) 13.

<sup>45</sup> Ibid, 18.

education has increased dramatically, more than doubling over the last eight years.

2. The Māori female population is relatively young: 36% of Māori women are under 15 years.

3. Māori women tend to have their children at a younger age than non-Māori women, and so have quite different patterns of participation in tertiary education and the labour force.

4. Māori are over-represented in the unemployment figures. They also make up the majority of low-skilled and low-paid workers. Māori are highly concentrated in industries that are sensitive to economic peaks and troughs (for example, manufacturing).

5. Women are generally less likely to be in paid employment than men are. Women tend to move in and out of the labour force and to change their hours of work as family commitments allow and as the supply of jobs fluctuates.

6. Māori women are particularly vulnerable to unemployment. In 1996 the unemployment rate for Māori women was 19% compared with 7% for non-Māori women.

7. Māori women continue to be more likely to work in less skilled occupations than their non-Māori counterparts. This may reflect the combined effects of the greater tendency of young Māori women to leave school with fewer qualifications, their earlier childbearing patterns, and their later entry into full time employment.

8. Māori women are more likely than non-Māori women are to undertake unpaid work outside the home. Māori women have continued to be at the forefront of Māori social and cultural development despite the social and economic challenges that they have faced. Māori women continue to be a major driving force behind te kōhanga reo, kura kaupapa Māori and other Māori development initiatives. In addition, they have been actively involved with the growth in Māori programmes and service provisions to Māori communities.

These facts illustrate that Māori women are almost three times more likely to be unemployed than are non-Māori women. And when Māori women are employed, they are more likely to be employed in lower skilled occupations than are non-Māori women.

Further, the statistics indicate that women continue to be the main caregivers and nurturers of our young and will continue to perform the vast majority of the unpaid household work whilst having to compete in the paid labour force with men who are often recipients of those services.

In addition to these findings, research has revealed evidence that supports the contention that Māori women often tend to undervalue their contribution.<sup>46</sup> Some Māori women feel incapable of doing certain jobs because they believe women cannot do the job as effectively as men can.<sup>47</sup> So, a lack of self-esteem and empowerment are factors impeding the progress of Māori women to higher-level positions.

These findings in relation to Māori women demonstrate a clear need for education programmes, employment programmes, and/or self-esteem programmes aimed at empowering Māori women. Given that a large proportion of the Māori female population is now under 18 years of age, these programmes could be aimed at secondary schools.

Historically, EEO has focussed on challenging entrenched attitudes, perspectives, practices and behaviours which have evolved out of prejudice and bias rather than cultural mores.<sup>48</sup> As a strategy, EEO can be a useful tool for empowering women. Disempowerment has resulted largely because of misguided and misused assumptions about the roles of Māori women today. Consequently, Māori women have been precluded from contributing to their full potential within Māori organisations.

## VI. EEO AND WHAKAARO OR TIKANGA MĀORI

### *1. Māori Concepts*

The principles that underlie EEO, such as the pursuit of fairness and equity, and the recognition and acknowledgment of people, complement certain whakaaro or tikanga Māori. Yet, very few of the organisations that participated in the project have formal EEO policies in place, despite the responses making a clear case for the relevance and indeed necessity for such policies. The research process also revealed a somewhat limited view of EEO as it relates to Māori and consequently the need for better education about the possibilities that EEO has for Māori organisations.

---

<sup>46</sup> Ibid.

<sup>47</sup> See *infra* note 110 and associated discussion of possible reasons for this lack of confidence.

<sup>48</sup> Māori Women's Welfare League, *supra* note 37.



First, there is the concept of tikanga. In my view, both the word and the concept of “tikanga” are derived from the base word “tika”. Tika means right or correct. So, tikanga represents doing what is right or appropriate in the circumstances. It is a dynamic concept not a codified set of rules.<sup>49</sup> Many themes and concepts of tikanga are universal, but the specific expression of them varies from iwi to iwi.<sup>50</sup> I will offer examples of tikanga specifically expressed from my perspective.<sup>51</sup>

Secondly, there is the concept of whānaungatanga. Generally, the Māori world was primarily concerned with human and divine relationships. A fundamental purpose of Māori “law” was to maintain relationships of people to their environment, their history and each other.<sup>52</sup> Mana derived from how one is able to connect to another iwi.<sup>53</sup> Māori culture is often celebrated for its emphasis on the importance of people and whānaungatanga.

Thirdly, there is the concept of aroha. Aroha can be translated as love or compassion and is the basis for peaceful co-existence. It is strongly linked to whānaungatanga.

Well-known examples of whakatauaki or ancestral sayings that illustrate these concepts are:

*Kotahi te kohao o te ngira  
E kuhu ai te miro ma, te miro  
whero me te miro pango  
There is but one eye of the needle,  
through which the white, red and black threads must pass*

This whakatauaki is attributed to Potatau Te WheroWhero and reiterates the importance of unity. The eye of the needle is said to represent God.

*He aha te mea nui o tenei ao?  
He tangata, he tangata, he tangata!*

---

<sup>49</sup> Waitangi Tribunal *Muriwhenua Land Report* (Wai 45, 1997) 21.

<sup>50</sup> Rangihau, “Being Māori”, in *Te Ao Hurihuri Aspects of Māoritanga*, 190; and Stokes, E “Māori Research and Development A Discussion Paper”, prepared for the Social Sciences Committee of the National Research Advisory Council (1985) 9.

<sup>51</sup> Mikaere, *supra* note 32, at 4. Mikaere emphasises the importance of developing theories and tools of development from an “own culture” perspective.

<sup>52</sup> Waitangi Tribunal, *Muriwhenua Land Report* (Wai 45, 1997) 21.

<sup>53</sup> Justice Durie, presentation at Te Hunga Roia Māori 1999, based on his discussion with Sir Monita Delamere, kaumatua.

*What is the most important thing in this world?  
It is people!*

This more universal and, it is suggested, self-explanatory saying is commonly heard throughout Māoridom in song and oratory.

## *2. Narrow View of EEO and Māori*

Responses to surveys and interview questions reveal a perception amongst the Māori that participated in the project that EEO is relevant to Māori only where the employers are Government Departments and SOEs (and therefore seen as Pākehā) and employees are Māori. The purpose of EEO Māori is misunderstood to be limited to Pākehā employers, ensuring that Māori are fairly represented. This is not surprising given that much of the literature about EEO Māori that has been published is written about the public sector.

In particular, there is much criticism of EEO for obscuring the obligations of public sector organisations under the Treaty of Waitangi, or for “lumping” Māori together with other “target groups”.<sup>54</sup>

Conversely, some writers do see EEO Māori as a useful tool to advance Māori because public sector organisations can relate more easily to the language of EEO than to the Treaty.

This issue may not be directly relevant to Māori organisations, except to illustrate the narrow focus of the literature about EEO Māori and the misunderstanding about EEO that seems to exist in the Māori community.

## *3. Problems and or Limitations of EEO Māori*

While there are perceived problems and limitations of EEO as it relates to Māori, it can fulfil a positive purpose amongst Māori.

One perceived limitation of EEO is that rangatahi (youth) is a disadvantaged group in the employment environment, as are people who belong to a low socio-economic class, and people who lack education. These issues are highly relevant to the disparities that exist between Māori and non-Māori, though none of these groups are separate target categories of EEO.

---

<sup>54</sup> See eg Doherty, J “EEO – The Māori Perspective” in Sayers and Tremaine, *supra* note 16, at 257, and Tremaine, “Different Ways of making a Difference: EEO Māori and Tino Rangatiratanga in Public Sector Organisations” in Sayers and Tremaine, *ibid*, 72.

Admittedly, recent statistical information continues to tell the depressing tale about unemployment for all Māori. However, the statistics relating to the employment status of Māori women are particularly appalling.<sup>55</sup> The development of EEO policy that incorporates affirmative action for the benefit of Māori women is an important incremental step in the larger process of addressing the wider issues of unemployment that face all Māori.

Another perception, though not common, is that there is no “wairua Māori” or “Māori spirit” in EEO. It is a Pākehā construct and therefore irrelevant to Māori. Yet, as noted above, EEO is consistent with Māori concepts of whānaungatanga, the importance of people and the recognition and acknowledgment of difference. Māori organisations do not have to use the *language* of EEO. Indeed, many organisations have adopted other terms such as ‘managing diversity’. Māori organisations may consider some other term more suitable – a term that would encompass a desire for equity, fairness, inclusiveness, and acknowledgment of difference.

As an exercise in tino rangatiratanga, Māori organisations can adapt, expand and mould EEO to make it work for them. Of particular need, however, is EEO for Māori women.

## VII. METHODOLOGY AND RESEARCH DESIGN

Although there may be no generally agreed theory about appropriate methodology for Māori research, some common guidelines as to appropriate frameworks for such research have been written about extensively elsewhere.<sup>56</sup>

From the outset I sought to design the research project to incorporate features of methodology appropriate for what I determined to be Kaupapa Māori research.

Linda Smith recounts a description of Kaupapa Māori research, which description incorporates principles that I have used as a basis for this research. Kaupapa Māori research is research which is “culturally safe”, which involves the “mentorship of elders”, which is culturally relevant and

---

<sup>55</sup> See *supra*, Part V.

<sup>56</sup> Milroy, “Māori Women and Domestic Violence: the Methodology of Research and the Māori Perspective” (1996) 4:1 *Waikato Law Review* 58, 60; Smith, L. *Decolonising Methodologies, Research and Indigenous Peoples* (1999); and Te Awakotuku, *N He Tikanga Whakaaro: Research Ethics in the Māori Community: A Discussion Paper* (1991).

appropriate while satisfying the rigour of research, and which is undertaken by an appropriate Māori researcher.<sup>57</sup>

Important features of methodology that were adopted in this research process are referred to where appropriate. Such features include a personal approach,<sup>58</sup> both in the follow up of the questionnaires sent out to Māori organisations and in the interview process. As well, appropriate researchers<sup>59</sup> were selected to carry out the information gathering. Their skills had to include a knowledge of te reo Māori me ona tikanga, particular to Waikato and Raukawa. This writer agrees with the view that researchers ought to be accountable to interviewees and the people being studied generally.<sup>60</sup> As part of that accountability, the valuable contribution of the research participants needed to be acknowledged and some form of practical outcome produced from the research that provides the people studied with something in return.

### *1. Questionnaires for Māori Organisations*

A bilingual questionnaire was sent out to eleven Māori organisations with a covering letter which was followed up by personal contact.

The term “Māori Organisation” in the context of this research means a special legal regime to conduct business or operations for community or communal purposes, or that has some significant connection with communal purposes or interests.<sup>61</sup> Obvious examples are iwi authorities charged with managing resources owned by and to be used for the benefit of iwi or hapū. Other organisations that fall into this category include private companies registered under the Companies Act 1993 and charged with creating wealth for the benefit of iwi or hapū.

Other common forms in and through which much Māori business is conducted are Māori Trusts and Māori Incorporations. Māori Trusts include those under the Te Ture Whenua Māori Act 1993 and those still operating

---

<sup>57</sup> Smith, *ibid*, 184, citing Irwin, “Māori Research Methods and Practices”, in (Autumn) 28 *Sites* 27.

<sup>58</sup> See Milroy, *supra* note 56, at 61.

<sup>59</sup> *Ibid*, 63.

<sup>60</sup> *Ibid*, 61; and see also Smith, *supra* note 56, at 191.

<sup>61</sup> An adaptation of a description of a Māori economy in Mfodwo, K *The Political Economy of Treaty of Waitangi Settlements: Aspects of Policy Issues and Research Agenda* (1996) 29-30.

under the Māori Trust Boards Act 1955.<sup>62</sup> Māori incorporations are legal entities with full legal personality as bodies corporate. Each organisation represents a defined group of people. For example, Trusts represent beneficiaries, whereas limited liability companies are accountable to their shareholders. The key determinant as to what constitutes a Māori organisation for the purpose of this research has been an organisation's capacity as an employer of Māori.

Māori organisations that participated include those both with large economic bases as well as relatively small economic bases; and those that are tribal and pan tribal. They include iwi runanga, trust boards, private companies that manage Māori resources, and urban Māori authorities. Two kōhanga reo and an "iwi radio station" also participated.

In essence, the following issues were addressed in the questionnaire and survey package that were sent out to these organisations:

1. the make-up of employees of Māori organisations;
2. what EEO policies, if any, various Māori organisations have in place;
3. what general comments top level managers had about EEO, and
4. consent, confidentiality and privacy.

Some interesting comparisons emerged from the responses to the questionnaires. And the information presented a general picture about Māori organisations as employers.<sup>63</sup>

A key successful factor of the parent project was the willing participation of those selected Māori organisations, and the valuable information gathered from them.<sup>64</sup> There was a danger that Chief Executive Officers (CEOs) and managers of Māori organisations would balk at completing the questionnaire. First, they are extremely busy. Secondly, one of the research goals is to identify possible reasons for the lack of women in management positions within these organisations. This carried the obvious risk that these organisations could be perceived as discriminatory. This kind of information is particularly sensitive in this era of increased public scrutiny of Māori organisations.<sup>65</sup>

---

<sup>62</sup> This Act is currently being reviewed.

<sup>63</sup> See Part VIII below for a fuller discussion.

<sup>64</sup> Only one organisation that was invited to participate did not return a completed questionnaire.

<sup>65</sup> Dramatic illustrations of such scrutiny include the inquiry into Aotearoa Television Network in 1996. Other examples are the inquiry into the operations of the now

The success in securing completion of the questionnaire exercise was largely (if not solely) dependent upon existing personal networks between the project coordinators and the managers or CEOs of the various organisations. This illustrates the importance of adopting appropriate principles of methodology such as research by Māori for the benefit of Māori, using a personal approach when seeking sensitive information, and choosing an appropriate person to seek the information.<sup>66</sup>

## 2. Interviews

The interviews that were conducted during the research process canvassed a range of perspectives of Māori women. The interviews examined such issues as tikanga and/or kawa regarding the role or status of women in Tainui, the depth of knowledge about EEO amongst women in Tainui, and perceptions about tikanga and kawa generally. The discussions that transpired were often inspirational. Some of the interesting findings have been incorporated into this work below.

The interviews were divided into two categories: wahine rangatahi and wahine pakeke or kuia.<sup>67</sup> The interviews of wahine pakeke and kuia were conducted largely in te reo Māori. In order to do this, it was necessary for the interviewer to have an expertise in te reo as well as an expertise in interviewing techniques specifically relating to oral history.<sup>68</sup>

The interview participants were personally selected because they represented a diverse range of backgrounds and perspectives. Some had acted in the role of employer; some are or were employees of Māori organisations. Some had been involved in the development of EEO Policy. Others had no formal knowledge of EEO. Ultimately, 18 women were

---

dissolved Tainui Māori Trust Board following a series of *National Business Review* articles; and, most recently, the media foray regarding the reported financial woes regarding the administration of the Waikato Raupatu Settlement Assets.

<sup>66</sup> Royal, *C Te Haurapa: An Introduction to Researching Tribal Histories and Traditions* (1992) and Smith, *supra* note 56, at 183-193.

<sup>67</sup> Wāhine rangatahi refers to younger women. In our interviews we classified women between the ages of 20 and 40 as wāhine rangatahi. Wāhine pakeke refers to more mature women, and kuia are elderly women. We classified wāhine pakeke and kuia to be those over the age of 40.

<sup>68</sup> Pania Papa, also of Raukawa and Waikato descent, conducted these interviews.

interviewed.<sup>69</sup> The women that participated are not necessarily representative of all Māori women, or even Māori women in Tainui. They were not intended to be so. Rather, the information gathered from the interviews provides a montage of different perspectives of Māori women who affiliate to the Tainui waka. The information sought related to how behaviours and attitudes about the role of women in Māori society generally, and in Māori organisations, might impact on EEO in the workplace where the employer is a Māori organisation. This information enhanced what little information was gathered in the literature review.

A primary objective of the interviews was to collect important data for analysis. A second yet significant objective was to provide a forum to discuss, and therefore raise awareness about, EEO issues and how the role of women in Māori society is perceived.

### *3. Interview Format*

Because we were drawing upon human resources, a thorough process was undertaken to ensure that the interview format was culturally and ethically appropriate. Initial drafts of an information sheet, consent form and questionnaire were prepared and sent to a suitable project consultant for quality assurance advice. The same drafts were also the subject of an application for approval by the Research Ethics Committee of the School of Law, University of Waikato.

Substantial thought had gone into designing the questionnaire, which had been intended as a prompt for discussion. Nevertheless, a few of the research participants considered the questionnaire to be leading or confusing, particularly in relation to the unfamiliar language of EEO.

### *4. Dilemmas of conducting this research*

A dilemma emerged during the interview process. It became clear that the interviewers were in a vulnerable position. The research seemed to challenge accepted practices and perspectives of some of our fellow tribal members. As researchers, we had to ask ourselves whether the benefits of seeking answers to probing questions, intended to contribute to the advancement of our iwi and particularly the women in our iwi, outweighed the fear of becoming branded as troublemakers.

---

<sup>69</sup> 22 women had been approached initially. Only one declined to participate. Difficulties in scheduling mutually suitable times prevented the other interviews from taking place.

The parent project was questioning whether Māori women enjoy equal employment opportunities within Māori organisations such as tribal runanga (councils) and companies that manage tribal resources. Māori organisations in Tainui are predominantly managed and governed by Māori men. This project sought to expose any need for those Māori organisations, as employers of Māori women, to have appropriate EEO policies.

Tainui tribal administration systems are unique in Māoridom. Historically, the Tainui Māori Trust Board has been an overseer of tribal administration. This Board was dissolved as a requirement of the Waikato Raupatu Settlement Act 1995.<sup>70</sup> The Board has been succeeded by a framework of trusts and other corporate bodies overseen by Te Kauhanganui, a form of tribal council.<sup>71</sup> The Board has been inextricably linked to a form of leadership, the Kingitanga or king movement, originally modelled on the English monarchy. Dedicated tribal members continue to instil in our children an intense and lifelong commitment to the Kingitanga.

A number of interview questions were designed to appraise the perspectives of Tainui women as to the role or status of women in the Tainui rohe. Why are there virtually no women in top-level management or governance positions within Māori organisations in the Tainui rohe? To what extent are women perceived to be secondary to men and not eligible for management or governance roles on grounds of tikanga and kawa? To what extent are the tikanga and kawa that we espouse to be our traditional and customary way of doing things a product of colonisation? Are our women stopped from progressing in the name of tikanga and kawa?

Such questions were perceived by a few tribal members as threatening. One kuia believed that any reference to the Kingitanga and Kahui Ariki in the questionnaire was altogether inappropriate, in that it was somehow questioning the role of the Kahui Ariki or the Kingitanga. As noted above, there is one school of thought that the Kauhanganui and the Kingitanga are inextricably intertwined. Another is that the operations of the Kauhanganui are quite separate from the Kingitanga.

Two of the wahine rangatahi specifically sought further verbal assurances about confidentiality (despite written assurances in the interview package

---

<sup>70</sup> Waikato Raupatu Settlement Act 1995, s 28.

<sup>71</sup> Te Kauhanganui had its first meeting in August 1999. It is made up of 183 members being 3 members elected from each of the 61 beneficiary marae of the Waikato Raupatu Settlement. A management committee of 12 has been appointed whose functions seem to be similar to those of the outgoing Board.



sent beforehand) so that they felt safe to speak freely. Yet, others welcomed the opportunity openly to challenge perceptions and practices.

The dilemma demonstrated how both the researchers and some of the participants experienced an internal conflict between a commitment to our iwi and a desire to expose anomalies of accepted perceptions and practices.<sup>72</sup> Reactions to the interview questions prompted me to explore the dilemma of the young Māori women researchers who were involved in asking such troublesome questions.

The situation was uneasy for a time. It forced me to look closely again at the methodology of the research project and whether anything more could have been done to conduct the research in a way that was perceived to be safe and beneficial to the researchers, subjects and end users. For the later interviews it was essential to explain the research questions more clearly before the interview and stress that the interview questionnaire was nothing more than a prompt for discussion.

This writer felt safe enough, given the support of the Raukawa Trust Board and the history of active participation by my wider whānau in tribal hui and affairs. These were critical factors in terms of the relationships between researchers and research participants.

Further, the combination of the ethics approval process and the quality assurance process, both of which involved Māori and non-Māori input, provided a degree of confidence that comes with two separate objective assessments of the interview format.

However, the dilemma highlighted the importance of using appropriate methodology from the outset.

### *5. Acknowledging Contributions*

All of the women who participated in the project made valuable contributions to the project. To recognise that contribution, the research team commissioned a Māori woman artist<sup>73</sup> to provide ipu tāonga (pottery vessels) as koha (gifts) to present to the research participants at the

---

<sup>72</sup> This aspect of the research project became the subject of a paper "The Dilemmas of Conducting Research that Challenges Accepted Practices and Perspectives of a Tribal Administration System" that the writer presented at the Feminist Law Conference, Sydney, February 1999.

<sup>73</sup> Raheera Porou of Ngati Porou and Ngati Ranginui.

conclusion of the project, together with a brief summary of the general findings from the research. The intention to do this had been expressed in the Ethics Approval Process. The notion may well have raised the eyebrows of committee members grounded in Western university research principles. Proponents of such principles do not approve of “payment” for research participation. However, the rationale for presenting koha to research participants was to reiterate the importance of giving something back, of reciprocity, of personal contact and a long-term commitment to those participants and the project.

#### *6. The Desire to Produce Practical Outcomes*

The publication of the *Guide for Employers* that was produced from the parent project fulfilled a desire<sup>74</sup> for the research to have created a positive and practical outcome for those who had been the subject of the research. One Māori organisation who received a complimentary copy of the Guide commented that it was “wonderful to see this kaupapa in a useful form” and requested more copies for that organisation’s managers and separate trusts.

#### *7. Presentation Skills*

The presentation to the Board was made by way of an interactive workshop rather than simply a lecture on EEO. Presenters, then, were required to draw on knowledge of te reo Māori and an ability to communicate interactively with a diverse range of participants.

To summarise, this project created positive and practical outcomes for Māori women in the workplace. The conscious effort to engage principles that are commonly recognised as necessary for this type of kaupapa Māori research provided a measure of protection for the researchers against certain dynamics that emerged during the journey of the research, which might otherwise have become culturally unsafe.

### VIII. EMPLOYMENT POLICIES AND PRACTICES OF MĀORI ORGANISATIONS

Increasingly, more iwi are shifting their focus from asset return to asset administration, bringing about a growing need to analyse the ways in which iwi assets and resources are being managed and the impact of management models within those entities on the status of Māori women.

---

<sup>74</sup> Both for the writer and for the interview participants.

registration tend to ignore or undervalue equitable doctrines. In this book the doctrines are placed at the heart of the text, and are investigated prior to the sections on the Torrens system and priorities in legal title. They are clearly explained and illustrated with examples of their benefits in practice and their limitations.

The chapters on registration of interests in land come right at the end of this book and it is stated that these chapters are intended to complete the picture of property law by explaining the effect of registration of property rights. The final chapter deals with the Torrens system as it has developed in Australia, with considerable reference to the themes and topics dealt with in the earlier parts of the book. This has the effect of tying the whole book together in a complete package, and it is a very satisfying conclusion.

My only wish is that the author had included the Torrens system as it applies in New Zealand. If that had been the case this book would become compulsory reading in any Land law course I teach.

SUE TAPPENDEN\*

---

\* Lecturer in Law, University of Waikato.

Some interesting points emerged from the responses to the question of whether EEO was relevant to Māori organisations. The first relates to preference for beneficiaries in employment policy. Other points provide interesting justifications for Māori organisations to adopt EEO policy.

## 2. *Preference for Beneficiaries*

There is a tendency for some Māori organisations to provide preferential recruitment programmes for beneficiaries or iwi affiliates where applicants are similar in experience, skill and qualifications. Some cited Crown funding agency requirements as their justification for doing so.

Some Māori organisations indicated a desire to have preferential policies but thought that this was against the law. Others did not want preferential policies simply because they thought that this was against the law. Yet New Zealand law does allow for the development of specific recruitment programmes for occupations where “target groups” are under represented.<sup>76</sup>

## 3. *Public Image – Being Seen to Act Fairly*

Another interesting point to emerge from the responses relates to how Māori organisations are perceived by their beneficiaries or key stakeholders. One organisation commented that:

EEO is more about being seen to do the right thing by our own people rather than a particular preoccupation with the notion that we are intrinsically sexist, ageist or homophobic. EEO is a process that assists us to maintain a level playing field and eliminate notions of nepotism and or distrust in ourselves.

The research disclosed a perception amongst Māori that Māori organisations, particularly iwi runanga and trust boards, lack consistent and fair employment procedures; and that there is too much opportunity for nepotism to occur. Having an EEO policy can provide certainty by giving clear and consistent guidelines to managers and others who might be involved in recruitment. This, in turn, provides some degree of protection for boards of trustees and directors. The issue of protection is important in this age of increased public scrutiny of Māori organisations. Māori organisations cannot afford exposure to risk. The recent spate of newspaper reports about the administration of the Waikato Raupatu Settlement

---

<sup>76</sup> *Supra*, Part II.

proceeds (often referred to as “Tainui”) provides a dramatic example of this exposure to risk.<sup>77</sup>

#### *4. Public Image – Competitive Edge*

An issue that is related to how a Māori organisation is perceived by its own beneficiaries or stakeholders is how *clients* perceive that organisation. For better or for worse, these organisations are now operating in a world of increasing competition.<sup>78</sup> The EEO Trust has tried to persuade private sector organisations to adopt EEO policies by emphasising that EEO can give them a competitive edge.

This has attracted a caution that by emphasising the language of “managing diversity”, the emphasis on business efficiencies may distract from the “fundamental commitment to the justice concerns of the EEO tradition”.<sup>79</sup> Nevertheless, it is more likely than not that prospective clients, particularly Crown agencies, would find a Māori organisation that has EEO policy more attractive to work with as a business partner. This is significant, given that many Māori organisations rely heavily on contracts with Crown agencies.

#### *5. Staff Turnover*

It is equally important that staff are more likely to be attracted to workplaces that provide EEO. Māori organisations cannot afford to lose good staff members with the ensuing costs of staff turnover.

The jobs that women do in Māori organisations reflect wider community trends relating to women and employment. For example, figures published in *Panui* by the Ministry of Women’s Affairs in August 1997 confirm that women work mainly in two industries. First, they are most likely to work in clerical and service jobs. Secondly, women are the “carers” in society. More women work in areas of community, social and personal services than in any other industry.

The responses of the Māori organisations to questions about the jobs women do in those organisations reflect this wider trend. The chief executive

---

<sup>77</sup> See eg *Waikato Times*, 29 and 31 January and 9 February 2000, and *The Dominion*, 18 January 2000.

<sup>78</sup> See below for a discussion of how this has disaffected Māori and particularly Māori women.

<sup>79</sup> Humphries, M *EEO and the ‘Management of Diversity’ A Cautionary Tale* (1997).

officers, managers, directors of companies and trustees of trust boards are predominantly male. There are a few notable exceptions.

At the time that the information for the parent project was gathered, all but one of the Māori organisations within the Tainui rohe that participated in the project were managed at CEO/General Manager level by a Māori male. The exception was a kōhanga reo who had Māori women as the two most senior employees.

Outside of Tainui, one of the organisations was (and is still currently) being managed at CEO level by a Māori woman. Since that time, another organisation has employed a Māori woman CEO.

At governance level, Māori men dominated every Māori organisation that participated in the project. Generally, no more than 20% of the trustees and company directors were women. The most common scenario was to have one or two women sitting on boards of 8-10 trustees or directors. One organisation exceeded the 20% ratio. Of its trustees, 3 were Māori women.

Significantly more Māori women reach the higher ranks of employment in the areas of social services, health and kōhanga reo.<sup>80</sup> Some organisations have emphasised the need for a better balance of women and men in order to be more effective in these fields. According to the Māori organisations that participated, the main reason for the imbalance is that more women apply for positions in these areas.

On this point, one organisation summarised its position as follows:

It is fair to say that the employment of women and men varies relevant to industry. For example, in terms of our Parents As First Teachers programme we have 11 employees, all of whom are women. In terms of our Health interface, out of the 15 people managing and acting as clinicians in our Health unit, three are male. These three males include two doctors and one of the senior coordinators of our Health management group.

A kōhanga reo that responded to our survey offered the following reasons why Māori women seem to dominate the higher positions within kōhanga reo generally:

---

<sup>80</sup> A kōhanga reo (language nest) is a preschool centre that focuses on reinforcing the use of Māori language.

[K]o te nuinga o nga hunga mahi Kōhanga Reo ko a tatou wahine. Ko ratou tonu te tuara i nga Kōhanga Reo. E toru nga whakaaro mo tenei take. 1. Pohehe te nuinga o tatou he mahi wahine tenei ara te tiaki kohungahunga. 2. Tukino tamariki. E matakū ana nga Kōhanga Reo pea te tuku mahi ki nga tane na tenei ahuatanga. Heoi ano me ki he uaua ake o nga tane te whai mahi i roto i te Kōhanga reo. 3. I tenei wa ko te tane tonu te mea whai moni ahakoa tokomaha hoki o ou tatou wahine e mahi ana. Na tenei ahuatanga ka kore hiahia i tenei mahi na te iti o te moni te hunga nei ka whiwhi.

My translation of this statement is as follows:

The majority of employees in Kōhanga Reo are our women. They are indeed the backbone of Kōhanga Reo. There are three possible explanations for this. 1. Many mistakenly think that caring for our young children is women's work. 2. Abuse of children. It may be that Kōhanga Reo are scared to employ men because of the potential for abuse. In any event, it seems that it is more difficult for men to gain employment in Kōhanga Reo. 3. At this time it seems as though our men are still seeking better wages, even though many of our women are working. Because of this, many men do not wish to work in Kōhanga Reo due to the modest wages available.

A different organisation had similar comments to make about financial rewards in the context of social services. The manager of an iwi social services unit within a large Māori organisation confirmed how difficult it is to compete with Government Departments that have the resources to attract and recruit suitably qualified staff. Then, it was noted that:

...it is very difficult to attract male employees primarily because generally men are not qualified in this area and/or will not or cannot afford to work for Iwi ...

The Guide to Employers that was produced from the parent project does not suggest token placements of Māori women or Māori. Rather, it advocates that Māori organisations take the time consciously to scrutinise employment practices and seek ways to address the imbalance that exists in Māori organisations regarding Māori women.

To summarise, some Māori organisations are so under-resourced that they are in survival mode. While they acknowledge that EEO for Māori women is important, they have not seen it as a high priority. Many organisations do not have any formal employment policies and/or practices. And very few have an EEO policy in place. In other organisations, the key focus is profit making. EEO is not mandatory, and very few have EEO policies in place. As a result, the chief executive officers, managers, directors of companies, and trustees of trust boards are predominantly male. Māori women continue to be channelled into the areas of clerical, service, and caregiving jobs.

## IX. THE PEOPLE WHO GOVERN AND MANAGE MĀORI ORGANISATIONS

In this final part I consider possible reasons why Māori women are over-represented in certain positions in Māori organisations but do not feature as chief executive officers, managers, directors, and trustees. This includes a deliberation of the traits of some of the men who sit at the helm of these organisations.

Smaller, less affluent Māori organisations, and/or those organisations that have as their primary focus the social advancement of iwi or beneficiaries, face many competing demands. While the parent project indicated that they are enthusiastic about EEO in theory, in reality it is an area that is not a high priority and is therefore neglected. The people in charge lament that they lack the resources of time and money to implement EEO. Survival is the priority. It is easy to understand and sympathise with this viewpoint. However, if Māori organisations are truly committed to the well being of Māori women, they *must* make EEO a priority.

In recent times iwi authorities have preferred to use the company structure for wealth creation. How are Māori women placed in these organisations?

This article proposes that some of the problems that Māori women are experiencing in relation to employment are a result of “corporate warriors”<sup>81</sup> mimicking an exploitative corporate culture.

An example of how an iwi organisation uses the corporate structure for wealth creation comes from the administration framework for the Waikato Raupatu Settlement proceeds. The tribe’s leaders face a cumbersome range of expectations: from providing educational grants, to negotiating with the Crown for the settlement of further claims under the Treaty of Waitangi, to managing complex commercial enterprises. As noted above, the Waikato administration has adopted a framework of trusts and other corporate bodies to administer assets from the Waikato Raupatu (land confiscation) settlement.<sup>82</sup> Separate companies have been established to manage the commercial aspects of the Waikato Administration Framework’s operations.

These companies are registered under the Companies Act 1993 and are commonly viewed as separate cells to create benefits for the tribe.<sup>83</sup> In most

---

<sup>81</sup> See below for an explanation of the meaning of this term.

<sup>82</sup> I will refer to this as the Waikato Administration Framework.

<sup>83</sup> This was the view espoused by the late Sir Robert Mahuta in “Inside Story”, Waikato Times, 20 May 1997.



cases the company passes financial benefits on to a shareholding trust. The trust's board of trustees, in turn, is concerned with the distribution of that wealth in a manner that is appropriate for the iwi. In other words, the commercial activities of the tribe are not an end in themselves but a means to an end - that is, the development and enhancement of our people socially, culturally, spiritually and financially.<sup>84</sup>

There is an expectation gap that exists between what some people perceive as appropriate corporate behaviour and what corporations actually do, and it has been argued that this is because corporations have abdicated their social responsibility.<sup>85</sup>

We have become a market driven society as a result of the past decade of Government policy that promotes strict profit maximisation. Advocates of pure neo-liberal economic theory argue that the only obligations corporations have are to make profits for their shareholders.

### *1. The Effects of Economic Restructuring*

Margaret Wilson has argued that the repeal of the Employment Equity Act 1990 is an example of how the fundamental restructuring of New Zealand's economic and social system has had the effect of reasserting the dominance of patriarchy on women.<sup>86</sup>

Recently, Jane Kelsey has analysed the consequences of this economic restructuring, and she argues that those hardest hit are those "that already had the least".<sup>87</sup> Included, of course, are Māori and women. Kelsey had this to say about the consequences for women:

Women's economic role had traditionally been marginalised, as orthodox economics refused to recognise the productivity of unpaid household work, undervalued their participation in the paid workforce, took them for granted as community workers and volunteers, and penalised them for being dependent on men and/or the state.<sup>88</sup>

---

<sup>84</sup> Parata, R "Priorities for Māori Development: Māori Investments for the Future" (paper Delivered at Te Hui Whakapumau: Māori Development Conference at Massey University, 1994) 4-5.

<sup>85</sup> Corcoran, "The Corporation as Citizen and as Government: Social Responsibility and Corporate Morality" (1997) 2:1 FJLR 53.

<sup>86</sup> Wilson, *supra* note 18.

<sup>87</sup> Kelsey, J *The New Zealand Experiment* (1997) 271.

<sup>88</sup> *Ibid*, 285.

Further, Kelsey summarises that:

Māori were the most marginal of the marginalised. Having been systematically stripped of the resources that guaranteed their economic, cultural and spiritual well-being, Māori were reduced to an underclass in their own land.<sup>89</sup>

An expectation gap between what might be seen as appropriate corporate behaviour and actual corporate behaviour certainly exists in relation to Māori companies that manage iwi or hapū assets. Māori have extremely high expectations of their corporations. The assets are seen as either tāonga tuku iho (treasures passed down from generations of ancestors - particularly in relation to land) or crucial for the benefit of unborn generations.<sup>90</sup>

## 2. “Corporate Warriors”

The term *corporate warrior* has been adopted to describe the Māori managers and directors (primarily male) who dominate the companies that manage iwi resources. The word warrior connotes a desire to retain a distinctive Māori element about the way in which these companies operate. However, the prefacing word, corporate, marks the priority that these directors place on achieving efficiency and profitability as is required in the “real world” of the market place.<sup>91</sup>

A frightening notion is that these corporate warriors hide behind these corporate structures while they copy the exploitative behaviour of their non-Māori counterparts.<sup>92</sup> As a consequence, women as well as the environment suffer. And these were aspects that were so celebrated in traditional Māori society that they were said to be worth dying for, as evidenced by the following whakatauaiki (saying).

He wahine, he whenua, e ngaro ai te tangata.  
By women, by land, men are lost.

---

<sup>89</sup> Ibid, 283.

<sup>90</sup> See eg *Waikato Times*, 29 January 2000, page 6.

<sup>91</sup> Seuffert, N “Treaty of Waitangi Settlements and Globalisation in New Zealand: Colonisation’s next wave” (unpublished draft article); Te Aho, W and L “Corporate Management of Natural Resources. Legal Issues and Practical Realities Regarding Corporate Management of Natural Resources and the Impact on Indigenous Beliefs and Values” in *Legal Developments in the Pacific Island Region* (proceedings of the 3rd Annual Conference, 2000,)166.

<sup>92</sup> Te Aho, *ibid*, 169-171.

### 3. Hypothetical Example

I have set out elsewhere a discussion of how a focus on profit making can be exploitative of the environment.<sup>93</sup> One example that I often use is that of a company established as a commercial entity to manage fishing quota allocated to an iwi under the national Māori fisheries settlement (often referred to as the Sealords Deal). When exercising powers or performing duties, directors of the company must act in good faith and what the director believes to be in the “best interests of the company”.<sup>94</sup> The test is subjective, being based on what the director actually believes. In considering the interests of the company, it appears to be acceptable for the directors to look to the future of the company and the interests of future shareholders. The company may therefore carry out acts which have no short-term benefit for the company but which will be to its benefit in the long term.<sup>95</sup> Nevertheless, in my experience, directors seem to judge that acting in the best interests of the company means acting in the best *commercial* interests of the company.<sup>96</sup>

A local hapū on the shores of a Harbour complains of a decrease in the availability of kaimoana (seafood) that they traditionally gather. The hapū believes that the decrease is caused by an increased presence of commercial fishing vessels in the Harbour. The company’s cashflow has been low for the past few months and the company really needs the vessels in the Harbour to bring in good catches. The local hapū has requested that the company respect a rahui<sup>97</sup> in the harbour. What should the director do, be the director Māori or Pākehā? To insist on fishing in the name of the best commercial interests of the company would be an illustration of how a focus on profit maximisation conflicts with the concept of kaitiakitanga, a core value of guardianship of natural and physical resources in our environment.<sup>98</sup>

I use this example to illustrate how Māori men mimic the behaviours of those who have been criticised by Māori as oppressive. A further example of

---

93 Ibid.

94 Companies Act 1993, s 131.

95 Watson, et al *The Law of Business Organisations* () para 12.01.

96 See Corcoran, *supra* note 85.

97 A suspension of fishing for a specified period of time, usually to allow for rejuvenation of a species.

98 The concept of kaitiakitanga has been enshrined in the Resource Management Act 1991, ss 2 and 7(a).

this comes from the widespread criticism of Māori negotiators following major Treaty of Waitangi Settlements.

Sir Tipene O'Regan and the late Sir Robert Mahuta were both involved in the settlement negotiations of their respective iwi, Ngai Tahu and Waikato, as well as the negotiations relating to the "Sealords Deal", the settlement of the commercial Treaty fishing rights for all Māori (even those who did not sign). Nan Seuffert has traced the one-sided, oppressive and corporate nature of these state-initiated settlement "deals", and argues that the state has contributed to the construction of the likes of Mahuta and O'Regan as "corporate players in the global marketplace".<sup>99</sup>

Conveniently, Seuffert summarises the criticism levelled at Mahuta and O'Regan,<sup>100</sup> citing references to them as being "middle-aged, media addicted men ... [with a] tendency ... to mimic the behaviours of government that have been roundly criticised by Māori".<sup>101</sup> They have also been tagged as the "Business Brown Table" as a reflection of the Business Round Table.<sup>102</sup> Seuffert goes further to suggest that the knighting of both O'Regan and Mahuta are signals of their acceptance by the dominant culture.<sup>103</sup> A series of recent newspaper articles indicate that a similar kind of criticism has been directed at the men who have been in powerful management and governance positions within the Waikato Administration Framework.<sup>104</sup>

While many of these criticisms have come from Māori women, it is interesting to note a theme that emerged from the interviews with kuia and pakeke. Discussions of the behaviour of these corporate warriors were not characterised by anger. Rather, our kuia and pakeke felt aroha or compassion for Māori men. One pakeke stated:

I think there are some issues with our Māori men. There are men who hold views, they have been colonised more so than our Māori women, and I think it's because they've been exposed in that whole employment area for much longer than we have. We have tended to look after our marae, being able to nurture and maintain more strongly our Māoriness, ... that's not to put men down, but I think that historically, they have been badly colonised, and have had some really bad role models ...

---

<sup>99</sup> Seuffert, *supra* note 91.

<sup>100</sup> *Ibid.*, 14.

<sup>101</sup> Parata, H, "Te Roopu Wāhine Māori Toko I te Ora", Speech to Māori Women's Welfare League, National Conference (Ikaroa, 8-12 May 1994) cited in Seuffert, *ibid.*

<sup>102</sup> Seuffert, *supra* note 91.

<sup>103</sup> *Ibid.*

<sup>104</sup> *Supra* note 77.

The theme was so prominent that Pania Papa, the researcher who interviewed the kuia and pakeke, composed a song that reflected this aroha of Māori women for Māori men.<sup>105</sup> An excerpt from the song is as follows:

Ka pupu ake te aroha,  
 kua memeha to mauri ora  
 Tu ake ra koe me to mana,  
 he mana rangatira!  
 Compassion overwhelms me  
 when I think of how much you have  
 carried through the years  
 It is time now to stand with pride  
 It is indeed a chiefly pride

It is fair to say that many of the younger women interviewed were somewhat less patient. One interviewee stressed the need for more transparent processes in Māori organisations. She noted that if she had to work again in a Māori organisation (which she was reluctant to do) she would be less polite. She would not take as much cognisance of “cultural games” played in the name of “tikanga and kawa for no other reason than personal agendas and gains”.

On the other hand, it is interesting to note that some of the interviewees wondered whether, in fact, many Māori were well aware of the abilities of Māori women. It was posited by participants that perhaps some Māori men exclude powerful Māori women from the workplace because they feel threatened by having to compete with them.

#### *4. Becoming Like the Oppressor*

One possible explanation why indigenous peoples generally (including Māori women and men) internalise oppressive values, comes from the seminal work of Paulo Freire. He theorises about how the oppressed individuals and peoples of the world might struggle for their liberation from those that “oppress, exploit and rape by virtue of their power”.<sup>106</sup> He argues that the oppressed internalise the image of the oppressor and adopt his guidelines. The oppressed are caught in a contradiction “in which to *be* is to

---

<sup>105</sup> Pania Papa is the tutor and leader of Rangimarie, the cultural group who performed this song at the recent Aotearoa Māori Traditional Performing Arts Festival at Turangawaewae, February 2000.

<sup>106</sup> Freire, P *Pedagogy of the Oppressed* (1997) 26.

*be like, and to be like is to be like the oppressor*".<sup>107</sup> Freire argues further that the oppressed tend themselves to become oppressors, or "sub-oppressors". Thus, liberation can only come once the oppressed discover themselves to be the "hosts" of the oppressor, and then determine to exorcise themselves of oppressive values and behaviour.<sup>108</sup>

I hasten to add that I do not aim to (and cannot) oversimplify Freire's complex theories in a few short excerpts. I have drawn out some brief references in an attempt to illustrate how Freire's theories might be applied to the plight of Māori (the oppressed) striving for liberation from the oppressive coloniser. That the process of colonisation in this country has been oppressive for Māori, must surely be beyond doubt.<sup>109</sup>

Using Freire's analysis, it could be said that some Māori men, in particular, the corporate warriors, have become like the oppressive coloniser. In this article I have attempted to demonstrate that the internalising of views about speaking on the marae, the narrow application of the merit principle, and the practice of hiring people in their own image, are examples of this type of behaviour that has been detrimental to Māori women.

### *5. Underestimating the Potential of Māori Women*

I noted above that research revealed evidence that supports the contention that Māori women seem to lack confidence in their own ability. Freire argues that, at a certain point,

'self-depreciation' is another characteristic of the oppressed, which derives from their internalisation of the opinion the oppressors hold of them. So often do they hear that they are good for nothing, know nothing and are incapable of learning anything ... that in the end they become convinced of their own unfitnes.<sup>110</sup>

---

<sup>107</sup> Ibid.

<sup>108</sup> Ibid, 30.

<sup>109</sup> See Seuffert, "Colonising Concepts of the Good Citizen, Law's Deceptions, and the Treaty of Waitangi" in (1998) 4:2 *Law Text and Culture* 69-104. See also Mead, "Decolonisation and identity: The bridge to Unite or Divide women, Women and Leadership Power and Practise". Mead argues that the process of colonisation continues to be oppressive.

<sup>110</sup> Freire, *supra* note 106, at 46.

Further, at some point the situation of oppression changes. The oppressed seek to prove to the oppressor that they do have the capability, and consequently, they become exploited!<sup>111</sup>

In the context of Māori organisations, some Māori males have adopted the values of the colonial oppressor that disparage the abilities of women generally. Applying Freire's analysis to the subject of this article, if Māori women are continuously led to believe that they cannot do a job as effectively as a man, at some point they become convinced that it is true. To the extent that Māori men propound such views, they are at least partially responsible for both the lack of confidence that some Māori women have in themselves, and the exploitation of others.

It is difficult to determine the extent to which Māori men contribute to women's lack of faith in themselves in the context of Māori organisations. When asked why there appeared to be a lack of women in the most senior positions within Māori organisations, those who responded on behalf of Māori organisations cited the lack of appropriate qualifications, and therefore lack of merit, as the reason.

For example, one organisation made the following statement:

We have had senior female management CEO positions. Unfortunately although they were given the opportunity their qualifications and management skills and human relations ability caused their stay to be rather short.

Another organisation commented that:

The nature of our work activity requires specific work skills that are in short supply currently at the level necessary to function in our business.

Admirably, the Māori organisation that offered the latter response also advised that it had commenced a "cadetship" programme with university graduates. The programme aims to provide a nursery to start graduates out in the "real world" by assisting in "developing the capability to be employed as senior specialists in finance and marketing and in the specific industry knowledge and skill". At the time of information gathering, all participants in the cadetship were male.

One organisation expressed its views about the importance of merit in the following terms:

---

<sup>111</sup> Ibid.

[W]ith respect, it does not really matter how much flesh one has hanging off one's chest or the end of one's tummy. What it comes down to really is merit and performance. It does not come down to who you are related to, how well you are related to them or how superior their whakapapa is. Our [organisation] will rise and fall on merit and merit alone.

These responses illustrate the way in which Māori organisations have endorsed the “merit” principle and the underlying assumption that Māori women do not move up the occupational hierarchy because they lack the necessary skills and capability. I have argued earlier that such strict application of the merit principle poses significant problems for Māori women.<sup>112</sup>

I have discussed above the finding that many Māori women tend to undervalue their potential for certain jobs. However, it must be said that there were many women who felt quite confident of their ability to lead and or manage Māori organisations. Nevertheless, it was the view of one research participant that, while she was more than capable of being the chairperson of the board of trustees, or the CEO, she also felt that it would be more acceptable to the outside world if such positions were held by men.

A different dilemma affects Māori women who have reached the highest echelons within Māori organisations. It is interesting to note that some of the interview participants, both rangatahi and pakeke, wondered whether, in fact, many Māori men were well aware of the abilities of Māori women. It was posited that perhaps some Māori men exclude powerful Māori women from the workplace because they feel threatened by having to compete with them.

In early 1999, when the last few interviews were being conducted, Pam Corkery announced publicly that she was leaving Parliament because it was “not a nice place to be”.<sup>113</sup> At the time of that announcement, I could not help but see an analogy between these women and Māori women who had, at some time, held CEO/General Manager or other senior positions within Māori organisations, and who had contributed to the parent project.

These Māori women told of the “power games” that were often played by some of the men involved at governance level, and often felt that the “culture” of the organisation was not supportive of them as women. This was particularly the case when a senior female disagreed with or

---

<sup>112</sup> *Supra* note 22 and associated discussion.

<sup>113</sup> Corkery was one of the three high profile women who opted to leave Parliament, the others being Christine Fletcher and Deborah Merris.



contradicted a senior male trustee, director or chairperson. For example, one participant recalls a hui being relocated to a marae in order to prevent her from being able to speak, and on another occasion being told that she had not been “brought up properly” when she contradicted the view of the chairperson. These were not isolated incidents; there are other examples that have not been recounted in the interests of anonymity.

This is perhaps another reason why we see so few Māori women at the head of Māori organisations. It is not because they are incapable, but because some feel that they can make better use of their capabilities, and/or that their capabilities may be valued more in other places. There seems to be a general perception that the accountability demands of working for iwi make life difficult for all employees of Māori organisations. However, for all of the reasons set out above, I submit that the climate within Māori organisations is more oppressive for Māori women than for Māori men.

To summarise, one reason for the lack of Māori women in the most senior management and governance positions in Māori organisations is that those in charge have embraced the ideology of market driven economics and are mimicking a culture that continues to exploit, and in particular exploits Māori women. Such behaviour is uncharacteristic of a more authentic Māori culture that celebrated the role of women.

## X. CONCLUSION

Much more work needs to be done in order to create more positive possibilities for Māori women in the workplace. Though EEO is not mandatory for Māori organisations, it would be beneficial for women, not least Māori women, if employment equity were prioritised by statute.

In the meantime, however, there are mechanisms within the legislative framework of EEO, including rights to adopt “measures to ensure equality”. These mechanisms must be interpreted broadly and promoted in the community in order to ensure employment equity for Māori women. If they are not, the statistics relating to Māori women’s participation in the labour force, when compared with others in this country, will continue to be appalling.

The parent project has shown that Māori organisations do recognise the merits of EEO programmes. However, there has been little appreciation that the principles that underlie EEO complement certain whakaaro and tikanga Māori. Also, many Māori organisations have not been aware of and

accordingly have not taken advantage of the economic benefits that EEO can bring to an organisation.

The plight of Māori women is unique. They face a two-fold disadvantage when competing in the paid workforce. This article contends that EEO can be used as a tool to mitigate this disadvantage.

This article also links the lack of employment equity for Māori women in Māori organisations with the effects of colonisation upon the traditional roles of Māori women. It also seeks to dispel some incorrect assumptions about the roles of Māori women today and how such assumptions have unnecessarily precluded women from contributing to Māori organisations.

Many Māori organisations are under-resourced and struggling to survive, and so do not prioritise EEO. Others are headed by “corporate warriors” who seem to model behavioural traits of an exploitative corporate culture. I acknowledge that these people must balance finely their traditional (reconstructed or otherwise) obligations with the more modern pressures of the market. In the end, this article does not suggest token placement of Māori women or Māori. Rather, it advocates that the people in charge of our Māori organisations, and they are predominantly Māori men, must scrutinise the management models and employment practices that they are choosing to adopt. They must design and implement strategies to address the employment inequities that continue to disaffect Māori women in Māori organisations.

# READING HATE SPEECH FROM THE BOTTOM IN AOTEAROA: SUBJECTIVITY, EMPATHY, CULTURAL DIFFERENCE

BY CATHERINE LANE WEST-NEWMAN\*

## I. INTRODUCTION

The starting point for this encounter between hate speech and free speech is Franz Fanon's description of black alienation in a world of whiteness.

I had to meet the white man's eyes. An unfamiliar weight burdened me. In the white world the man of colour encounters difficulties in the development of his bodily schema ... I was battered down by tom-toms, cannibalism, intellectual deficiency, fetishism, racial defects.... I took myself far off from my own presence .... What else could it be for me but an amputation, an excision, a haemorrhage that splattered my whole body with black blood?<sup>1</sup>

This "agonising performance of self images"<sup>2</sup> signals the pain and complexity of psychic identification in settings of cultural alienation. It is both a source of and evidence for what I shall argue in this article. That is that, while scholars and commentators (either deliberately or unthinkingly) restrict themselves to the conceptual repertoire of liberal legal discourse, debates about using law to suppress and to deter racially hateful speech cannot recognise the bitter significance of hate speech and the nature of the injuries it inflicts.

Since I shall argue against the claim that hate speech should (or can) be defined as a socially and culturally neutral phenomenon,<sup>3</sup> I will not offer a formal definition, but it will be useful to indicate broad parameters of meaning.<sup>4</sup> The term "racially hateful speech" is intended here to signify

---

\* MA (London), MA, PhD (Auckland), Senior Lecturer in Sociology, University of Auckland. My thanks to Jane Kelsey, Ruth Butterworth and Grant Huscroft for comments on versions of this article and to the students who explored these ideas with me.

<sup>1</sup> Bhabha, H *The Location of Culture* (1994) 42 quoting Fanon, *Black Skins White Masks* (1986) 10-12.

<sup>2</sup> Ibid.

<sup>3</sup> Delgado calls this "perverse neutralism": "Are Hate-Speech Rules Constitutional Heresy? A Reply to Steve Gey" (1998) 146 U Penn L R 865, 878.

<sup>4</sup> The following definitional elements are drawn from Brison, "The Autonomy Defense of Free Speech" (1998) 108 *Ethics* 312. She presents a "disjunctive definition of hate

incidents of face-to-face vilification in the form of physical or verbal behaviour that stigmatises or victimises an individual on the basis of his or her race or ethnicity<sup>5</sup> and that creates an intimidating, hostile or demeaning environment.<sup>6</sup> A further dimension of definition may be drawn from the characterisation of hate speech as a kind of group libel that vilifies and harms the reputation of individuals or groups on the basis of their race or colour.<sup>7</sup>

Critical legal theory seeks to uncover alternative accounts of how law works. It looks to demystify, dissect and deconstruct that which the liberal legal model of law assumes; to render problematic that which has been most taken for granted. In that tradition this article deconstructs<sup>8</sup> a recent authoritative analysis of the relationship between provisions relating to “free speech” in the New Zealand Bill of Rights Act 1990 and in the Human Rights Act 1993, and introduces some alternative ways of looking at the

---

speech” and her purpose, like mine, is to capture, as a class of ideas, most of what has been called “hate speech” in the legal literature. As Brison notes, such a formulation would probably not be acceptable in US legislation.

- 5 Stanford University hate speech code quoted in Lawrence, “If He Hollers Let Him Go: Regulating Racist Speech on Campus” in Matsuda, M et al (eds) *Words That Wound: Critical Race Theory, Assaultive Speech, and the First Amendment* (1993) 67.
- 6 University of Michigan policy on discrimination and discriminatory harassment. See Brison *supra* note 4. The Stanford and Michigan codes were both struck down by court decision. Much of the US debate over legislating against hate speech takes place in the context of local and university campus ordinances; neither federal nor state governments offer legislative challenges to the First Amendment. This means that the US situation is fundamentally different from that of New Zealand, Australia, Canada, the United Kingdom, Germany, the Netherlands, Denmark, and France.
- 7 This concept was established in *Beauharnais v People of the State of Illinois* 343 US 250 (1957) 251. Here the US Supreme Court upheld an Illinois group libel law. Although there is debate about the status of that decision after *New York Times Co v Sullivan* 376 US 254 (1964), for my purposes it is the concept rather than its current legal status that is significant.
- 8 In the sense of taking apart piece by piece rather than anything more grandly in the style of Jacques Derrida. Another article, currently under construction, looks at the silences and dangerous supplements of free speech discourse.

freedom of insult and expression.<sup>9</sup> The conventional framing of an even handed balance between protecting democracy (an abstract concept) and protecting the people's feelings (allocated a similar quality of abstraction) masks the very significant difference that exists between ideas and experiences. My attempt to highlight this difference leads me to adopt an approach which (following critical race theory) looks to the perspective of those at the bottom.<sup>10</sup> This leads me to suggest that the legal deadlock implicit in arguments that frame the issue through abstract notions of rights and freedoms might be thought around (if not broken) by adopting an alternative conceptual repertoire, drawn from sociological thought, that includes empathy, subjectivity, and cultural difference.

## II. THE SOCIAL CONTEXT

Although there has been ethnic diversity in Aotearoa New Zealand since British settlement, refusal to recognise the Treaty of Waitangi as a legally binding document<sup>11</sup> has meant that the country governed itself as a mono-cultural white entity.<sup>12</sup> In the 1970s, Pacific Island people invited from

---

<sup>9</sup> It may be noted here that Stanley Fish, to whom I shall return later, claims that free speech is the name that we give to our own preferred point of view: *There's No Such Thing as Free Speech and it's a Good Thing Too* (1994).

<sup>10</sup> See Matsuda, "Looking to the Bottom: Critical Legal Studies and Reparations" in Matsuda, M *Where is Your Body?* (1996). This idea also appears in Williams, P *The Alchemy of Race And Rights* (1991). The term Critical Race Theory has been adopted by a group of United States law professors who are theorists and activists devoted to increasing understanding of the issues of race in law. Among the most prominent thinkers are Patricia Williams, Mari Matsuda, Kimberle Crenshaw, Derrick Bell, Charles Lawrence III, and Richard Delgado. Many more graduate students and professors are also contributing to this persuasive body of analysis. See Crenshaw (ed), *Critical Race Theory: the key writings that formed the movement* (1995). There is also a growing body of work focused on the relationship between Māori and law. See eg Jackson, "The Treaty and the Word: The Colonization of Maori Philosophy" in Oddie, G and Perrett, R (eds), *Justice, Ethics & New Zealand Society* (1992); Tauri, "Indigenous Justice or Popular Justice? Issues in the Development of a Maori Criminal Justice System" in Spoonley, P et al (eds) *Nga Patai* (1996); Tauri, "Explaining Recent Innovations in New Zealand's Criminal Justice System: Empowering Maori or Biculturalising the State" 32 *Aus and NZ Jnl of Criminology* 2, 153; Milroy, "The Maori Fishing Settlement and the Loss of Rangatiratanga" (2000) 8 *Waikato L R* 63.

<sup>11</sup> In 1877 Justice Prendergast in the case of *Wi Parata v Bishop of Wellington* (3 NZ Jur (NS) SC 72) declared the Treaty of Waitangi to be "a simple nullity".

<sup>12</sup> Kelsey, "Legal Imperialism and the colonisation of Aotearoa" in Spoonley, P et al *Tauīwi: Racism and Ethnicity in New Zealand* (1984); and Sharp, *A Justice and the*

Samoa, Tonga, and Fiji, to augment the labour force added diversity, but government immigration policy still strongly favoured citizens of Britain and the white Commonwealth as the preferred migrants.

In 1987 New Zealand abandoned the practice of limiting entry to migrants from specified countries of origin and replaced it with a system of points given for desired characteristics.<sup>13</sup> The resulting increase in ethnic diversity has brought more public racial confrontation and visibly hardening xenophobia. At the same time, significant government efforts to honour the Treaty of Waitangi and to recompense Māori tribes for past confiscations and compulsory purchases of land have triggered resentment and resistance in many “white” New Zealanders.<sup>14</sup>

The practice of managing race relations through the state funded and controlled Office of the Race Relations Conciliator was New Zealand’s response to obligations consequent on signing the International Convention on the Elimination of All Forms of Racial Discrimination. Under the Human Rights Act 1993 (which replaced earlier legislation) the Race Relations Office is authorised to hear complaints of racial discrimination measured against legally defined prohibitions which include restrictions on certain kinds of speech.<sup>15</sup> At the same time, the Bill of Rights Act 1990 contains a guarantee for freedom of expression and this is perceived by some to make controls on racist speech legally inappropriate, if not constitutionally improper. In the American legal system there is little that is more taken for granted than the sanctity of free speech, protected in the First Amendment to the Constitution, and interpreted by the Supreme Court. Recently, strong

---

*Maori* (1990). In spite of some softening in this position in *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, 673, where the Treaty was found to be a solemn compact in which “the Crown sought legitimacy from the indigenous people for its acquisition of sovereignty and in return it gave certain guarantees”, Kelsey’s description still applies.

<sup>13</sup> Greiff, S (ed) *Immigration and National Identity in New Zealand* (1995).

<sup>14</sup> Scott, S *The Travesty of Waitangi* (1995) and Round, D *Truth or Treaty?* (1998) reflect this point of view.

<sup>15</sup> Article 20 of the *International Covenant of Civil and Political Rights* states that “Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law”. Signatories to the International Convention for the Elimination of All Forms of Racial Discrimination are bound to declare “an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin”.

arguments for the sanctity of free speech, no matter what the cost, have also been raised in New Zealand.

In the conventions of liberal legal scholarship this disjunction between laws made in response to different social imperatives is cast in the form of a contest between two competing principled demands - freedom and equality. Beneath this framing of what is at stake lies a bedrock of liberal legal assumptions, "truths" about the nature of law and about the relationship between law and racism. Alternative scholarly accounts of this relationship, however, argue that two foundational principles of liberal legality - equality and universality - actually import racism into law while simultaneously claiming to oppose it. Fitzpatrick argues that because the liberal world-view of law privileges it as a form of universalistic ordering that transcends material life, law may simultaneously be complicit in the perpetuation of racist beliefs and values and yet claim "innocence" of racist particularity through that same universality.<sup>16</sup>

This may explain why the uncomfortable question of racism has mostly been ignored in local legal publications. Possibly practitioners, scholars, and academics are unaware that there is a problem, perhaps they believe that expressions of racist hatred are not the law's business. There is really no way of knowing. Nevertheless racism is a significant part of the New Zealand social fabric; a flaw in the weave that, in particular moments of violence, abruptly tears apart comfortable illusions of mutually respecting citizenship.<sup>17</sup> It is therefore within that social context that any debate about the desirability of restricting racially hateful speech will inevitably take place.

In the following discussion I identify three positions which may be taken about the desirability of enforcing legal restrictions on the public utterance of racial hate speech. These are: first, the claim that the virtues of free speech in a democratic society are so great that even speech promulgating racial hatred deserves protection (which I describe as law school orthodoxy);

---

<sup>16</sup> "Racism and the Innocence of Law" in Fitzpatrick, P and Hunt, A (eds), *Critical Legal Studies* (1987) 119. The context for these observations is a discussion of appeals about discrimination in employment under the Race Relations Act 1976 in Britain. See also Peller, "Race Consciousness" in Danielson, D and Engle, K (eds) *After Identity: A Reader in Law and Culture* (1995) 67.

<sup>17</sup> Instances of racially focused public violence are regularly reported in the newspapers. Two high profile ones in 1998 involved an attack on a Nigerian man walking with his family in a Christchurch beach suburb and shots fired into the house of an elderly Chinese couple in an Auckland suburb.

second, proposals to restrict speech that actively fosters racial hatred and injury (described as law school unorthodoxy); and, finally, some alternative (and explicitly sociological) concepts for evaluating the desirability of restrictions on racial hate speech.

### III. "FREEDOM FOR THE THOUGHT WE HATE": LAW SCHOOL ORTHODOXIES

Argued and justified with varying degrees of sophistication, the orthodox defences of free speech claim that the benefits of open expression outweigh all potential dangers and damage. Those who argue that law must ensure freedom of expression, even for hate speech in its most extreme forms, do so both by asserting the values to be achieved through unlimited speech and by adducing reasons why prohibitions must be avoided. Pro-speech arguments declare the importance of a market place of ideas for the proper functioning of democratic government. In this perspective the best way to deal with the negative effects of harmful speech is, according to Justice Louis Brandeis, with "more speech". Free speech is conceived as a "public right" whose purpose is to protect the ability of people as a collectivity, through rich public debate, to decide their own fate.<sup>18</sup> It is said to offer the value of individual autonomy experienced in self-actualization through speech.<sup>19</sup> At the extreme it has even been claimed that "offensive graffiti and race hatred are often the only means of self expression of some sections of the community".<sup>20</sup>

Arguments against suppressing hate speech include the slippery slope claim that, once any suppression is allowed, the next suppression may be of precisely that speech which minorities, for example, would want to have heard. It is further asserted that controls on freedom of expression prevent or deter valuable political debate and even that they encourage state control of

---

<sup>18</sup> Fiss, *O Liberalism Divided: Freedom of Speech and the Many uses of State Power* (1996). See also Robert Post's articles including "Meiklejohn's Mistake: Individual Autonomy and the Reform of Public Discourse" (1993) 64 *Univ of Colorado L Rev* 1109, and "Liberalism Divided: Freedom of Speech and the Many Uses of State Power: Book Review" (1997) 19 *Mich LR* 6, 1517.

<sup>19</sup> A detailed analysis of autonomy defences of free speech as they are employed in arguments against restricting hate speech is given in Brison, *supra* note 4, at 312. She concludes that "none of them yields a defense of free speech that precludes restrictions on hate speech".

<sup>20</sup> Katsigiannis, "Opponents to Legislation Against Incitement to Racial Hatred" (1985) 118 *Civil Liberty* 27.



ideas which is itself a form of mind control<sup>21</sup>(a version of the slippery slope argument). Absence of proof that laws prohibiting racist abuse and harassment ever achieve their intended effect and the need to expose race hatred as a disease so that treatment (through education) can be provided are also claimed. Government suppression of hate speech is also said to deprive members of the target group of “important if distressing knowledge”.<sup>22</sup>

Amongst the most visible supporters of the pro-speech position in New Zealand has been Grant Huscroft who, in an essay collection designed to serve as a law school text,<sup>23</sup> asserts that the benefits of free expression guaranteed in section 14 of the Bill of Rights Act are threatened by the controls on hate speech enacted in the Human Rights Act 1993 and in New Zealand defamation law. I shall argue here that his central focus on discussing and defending freedom of expression through a standard United States First Amendment constitutional position<sup>24</sup> may have drawn him to overstate the significance of First Amendment jurisprudence for New Zealand and to underestimate the benefits which derive from preventing overt expressions of racial hatred in this society.<sup>25</sup>

Huscroft’s discussion is explicitly grounded in his perception that New Zealand citizens take freedom of expression far too lightly. Neither the legal profession nor the general public appear troubled that their law has a history of limiting freedom of expression.<sup>26</sup> When compared with American expectations of freedom of expression, we just do not measure up. American

---

<sup>21</sup> Gey, “The Case Against Postmodern Censorship Theory” (1996) 145 *University of Pennsylvania Law Review* 193.

<sup>22</sup> Hill, “Pauline Hanson, Free Speech and Reconciliation” (1998) 10 *Jnl of Australian Studies*, quoting from a discussion by Flahvin “Can Legislation Prohibiting Hate Speech be Justified in the Light of Free Speech Principles?” (1995) 16 *University of NSW L J* 2, 327.

<sup>23</sup> Huscroft, G and Rishworth, P (eds) *Rights and Freedoms: the NZ Bill of Rights Act 1990 and the Human Rights Act 1993* (1995).

<sup>24</sup> “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and petition the Government for a redress of grievances” (the First Amendment, US Constitution, adopted 1791). See Emerson, T Haber, D and Dorsen, N *Political and Civil Rights in the United States* (4th ed, 1976) Volume I.

<sup>25</sup> Downing makes similar points about “first amendment absolutism” in the United States context: “‘Hate Speech’ and ‘First Amendment absolutism’ discourses in the US” (1999) 10 *Discourse & Society* 2, 175.

<sup>26</sup> Huscroft, *supra* note 23, at 171.

awareness that “like most rights, freedom of expression often comes at a high price - the requirement that they tolerate expression they may find intolerable”,<sup>27</sup> is adversely contrasted with New Zealand laws that allow politicians and public figures to take defamation actions; publication bans and name suppression in judicial proceedings; prior restraints on the press; and censorship in various artistic media.

At the heart of his discussion of freedom of information in New Zealand is the assertion that, since section 14 of the Bill of Rights Act 1990 guarantees freedom of expression, we must now look to reforming both the law of defamation and the Human Rights Act 1993 because both are well established limitations on such freedom. He declares that “both have the effect of chilling the discussion of matters of public interest and concern, and neither establishes limitations on freedom of expression which can be justified”.<sup>28</sup> Huscroft states that section 14 was not created out of a local vision of free speech but rather by wholesale adoption of American principle, theory and debate.<sup>29</sup> Attempts to generate local debate were substantially ineffective, and so the justification for section 14 rests on theories developed in a quite different social and political environment. He takes this as evidence of the dangerous public lack of concern for freedom of expression in this society. He gives thoughtful consideration to the fact that there are inherent difficulties in rights’ arguments based on experiences in other jurisdictions and notes that “rights and freedoms are valued and enjoyed in different ways by different peoples in different contexts”.<sup>30</sup> But, ultimately, this does not lead him to conclude that First Amendment jurisprudence, developed in quite different social circumstances, might simply not resonate here: that in Aotearoa equality might well count as a higher moral value than freedom.

Huscroft argues that defamation laws are about choosing between personal reputations and the needs of political discourse. He believes that, currently, New Zealand courts are biased in favour of the needs of personal

---

<sup>27</sup> *Ibid*, 172.

<sup>28</sup> *Ibid*, 173. Section 14 reads: “Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form”.

<sup>29</sup> He cites the influence of Justice Brandeis’ belief in expression as a means of individual fulfillment, Professor Meiklejohn’s theory of democratic self governance, Justice Holmes’ “the best test of truth is the power of the thought to get itself accepted in the competition of the market” and Professor Thomas Emerson’s emphasis on community stability (*ibid*, 174).

<sup>30</sup> *Ibid*, 174.

reputation.<sup>31</sup> His position on the appropriate reach of defamation law is directly relevant to the question of protection against hate speech because, in Huscroft's analysis, defamation and racist hate speech are two sides of the same coin - defamation of individuals and defamation of groups. And so it is argued that section 61

**Racial disharmony** – It shall be unlawful for any person ... to publish or distribute written matter which is threatening, abusive or insulting, or to broadcast by means of radio or television words which are threatening, abusive, or insulting .. [or to use such words] in any public place ... being matter or words likely to excite hostility or bring into contempt any group of persons in or who may be coming to New Zealand on the ground of colour, race, or ethnic or national origins.

and section 131

**Inciting racial disharmony** – Every person commits an offence and is liable on summary conviction to imprisonment for a term not exceeding 3 months or to a fine not exceeding \$7000 who, with intent to excite hostility or ill-will against, or bring into contempt or ridicule, any group of persons in New Zealand on the ground of the colour, race, or ethnic or national origins of that group of persons ....

of the Human Rights Act 1993 constitute an inappropriate contradiction of section 14 of the Bill of Rights Act 1990. They represent a basic conflict between freedom of expression and prohibitions on racist expression. The Human Rights Act provisions can be successful only by preventing the expression of thought which the legislature has condemned, but any such suppression offends against the protection of pure free speech. For a free speech devotee there is only one way to go: undo the race relations legislation and get rid of the Race Relations Office.<sup>32</sup>

The problem with this position is that it neglects a significant aspect of the New Zealand situation. To understand the local context it is important to ask

---

<sup>31</sup> Huscroft's argument that the law of defamation offends because it works to protect powerful politicians but adds no benefit to the lives of ordinary people (187) may have been somewhat undercut by the decision in *Lange v Atkinson* [2000] 3 NZLR 385; (2000) 5 HRNZ 684.

<sup>32</sup> He is not, of course, alone in arguing that the work done by the Race Relations Office might be better handled through a different administrative format. See *Re-Evaluation of the Human Rights Protections in New Zealand: Report for the Associate Minister of Justice and Attorney General Hon Margaret Wilson*, October 2000. My concern is with his rejection of legislative controls on racial hate speech, rather than his doubts about the current mechanisms for implementation of those controls.

why the Bill of Rights Act was enacted as an ordinary statute and not protected against alteration by a simple majority in Parliament. Why is it “simply a tool of interpretation for the courts”<sup>33</sup> and “an important brake on Parliament”,<sup>34</sup> and not the higher law “constitutional sledge-hammer”<sup>35</sup> that was originally proposed. Sir Geoffrey Palmer, the force behind this legislation, describes the journey to the enactment of the legislation as “a long and tortuous one” and notes that the proposal to give courts power to strike down legislation was “stoutly resisted”.<sup>36</sup> Local debate revealed serious misgivings about the appropriateness of an entrenched bill of rights for Aotearoa New Zealand.<sup>37</sup> In declining to give the overriding status of supreme law to the local Bill of Rights and enacting it instead as ordinary legislation, the New Zealand government was deliberately creating a fundamentally different arrangement from that of the United States. The Bill of Rights Act 1990 protects freedom of expression. It also protects freedom from discrimination. The Human Rights Act, three years later, names specific prohibitions against discrimination, thereby indicating that in New Zealand society these are seen as specific areas of concern. Clearly then they must fall within the ambit of the reservations provided in section 4 of the Bill of Rights Act. In a narrowly legalistic reading freedom of expression provisions in the two countries may appear to be substantially the same; but the social and legal contexts are not.

Huscroft’s arguments against sections 61 and 131 of the Human Rights Act 1993 rest on a claim that the conflict between freedom of expression and prohibitions on racist expression is fundamental and irreconcilable: the success of these laws depends entirely on how effectively they can prevent the expression of thoughts which the legislature has decided to suppress. But, as he observes, from a civil liberties standpoint, the whole purpose of freedom of expression is to protect *unpopular* points of view. What the community likes (presuming that community and legislators think alike) will

---

<sup>33</sup> Hazell, “The Rights to Fit the Bill” (1997) 126 *New Statesman* 4 July, 24.

<sup>34</sup> Palmer, G and Palmer, M *Bridled Power* (1997) 264.

<sup>35</sup> *Ibid*, 264.

<sup>36</sup> *Ibid*, 266.

<sup>37</sup> In a speech made to the Policy Conference on Human Rights held in Wellington on 27 May 1989, Geoffrey Palmer said that submissions to the Select Committee indicated that “many members of the public were nervous about it. They were wary in particular of the power it would have given to the judiciary. They appeared to be concerned about what they perceived as a transfer of power from their elected representatives to judges who are appointed to office. Another concern ... was that an entrenched statute was perceived as locking the rights enunciated in it into a particular timeframe since there would be restraints on Parliament changing it in the future”.

not require protection anyway. Carl Cohen notes that, for First Amendment defenders, “The freedom to say ‘nasty, vicious, wrongheaded, and downright evil’ things is regarded as essential for the functioning of a vital democracy”.<sup>38</sup> For Huscroft, “Everyone must be free to express his or her opinion regardless of how worthless or odious it may be thought to be”.<sup>39</sup> And so he recommends, for New Zealand, the US Supreme Court finding that hate speech should be protected along with other forms of expression. To preserve the First Amendment freedoms, there must be “freedom for the thought that we hate” as well as that which we support.<sup>40</sup>

Clearly, such assertions are at risk of appearing unduly dismissive of those who bear the burden of the racist’s freedom. In acknowledging this, Huscroft provides the familiar set of practical justifications for allowing unlimited speech that have been rehearsed in the First Amendment debates. These include claims that laws limiting freedom of expression are hard to enforce, that they give racists free publicity and even martyrdom through court actions, and that they serve to drive racist expression underground where it cannot be countered by education. There is certainly some substance to parts of these arguments. Court hearings may provoke wide publicity for racist arguments (even when deploring them) and education is likely to have wider-reaching outcomes than the punishment of selected offenders. Arguably, though, these are reasons for countering racism with a variety of strategies rather than arguments against the desirability of controlling racial hate speech.

The ideological position represented throughout this discussion is, of course, that of libertarianism. A premium is placed on free expression conceived of as an almost absolute human right and the cornerstone of democracy. This is because all freedoms are seen to depend on the right of every citizen to dissent from government. Constraints are found to be justified only where unrestricted freedom of expression poses an immediate danger to that citizenry. Because this “citizenry” is conceived as an homogeneous entity, designation of groups for special protection is impermissible. Any legislation specifically prohibiting expressions of racial or any other kind of hate directed against members of designated groups is defined as bad law. Only expressions dangerous to the (universal, collective) “public order” might conceivably be restrained.

---

<sup>38</sup> Cohen, “Free Speech and Political Extremism: How Nasty Are We Free To Be?” (1989) 7 *Law and Philosophy* 263.

<sup>39</sup> Huscroft, *supra* note 23, at 193.

<sup>40</sup> *Ibid*, 193, quoting Holmes J in *United States v Schwimmer* (1929) 105 L. Ed 2d 342, 360.

Huscroft represents the arguments of American First Amendment legal orthodoxy. But he only briefly notes a counter ideological position still argued from within American law schools. This is a set of egalitarian arguments which give priority to rights of equality, dignity of the person and racial harmony, and accept that “reasonable limits” on freedom of expression may be required to safeguard these rights. Such arguments come out of developments in socio-legal scholarship often described as critical legal studies and their own critical offshoot - critical race theory.

#### IV. CRITICAL RACE THEORY: LAW SCHOOL UNORTHODOXY

Scholars who adopt the critical legal studies position believe that law is, among other things, a method of oppressing certain categories of people while advancing the interests of others. To substantiate this claim, they draw on conceptions of hegemony, domination, legitimacy and consciousness to reveal how oppression occurs. Those who describe themselves as critical race theorists use, and advance, some of the insights from the critical legal studies position in order to show that laws may be racist in effect and that legal systems in many places effectively contribute to the oppression of minority racial groups.<sup>41</sup>

One of the main philosophical areas of contest between liberal-legalism and critical theory engages the question of what is “true” or what shall count as “truth”. In the human sciences modernist thought assumes that truth is accessible to all human subjects through the operation of reason; once the nature of human beings and their situation has been discovered, society can be organised in a manner that is most suited to human nature. Post modern critique demonstrates that the modernist project has represented particular interests and had potentially harmful consequences both for those who are made the objects of, and those whose circumstances are excluded from, study.<sup>42</sup> When the world is conceived with reason and truth as the ultimate measurements of reality, this effectively excludes alternative realities and viewpoints. A claim out of post modern thought rejects any possibility of ultimate truth, and turns instead to an investigation of language and the ways in which it is used to justify certain positions. New questions become

---

<sup>41</sup> An influential example of critical legal studies writing appears in the collection of essays by Kairys, D (ed) *The Politics of Law A Progressive Critique* (revised ed, 1990). Critical race theory collections include Matsuda, M, Lawrence, C, Delgado, R and Crenshaw, K (eds) *Words That Wound* (1993), and Crenshaw, supra, note 10.

<sup>42</sup> For an extended discussion of the relationship between modernism and post-modernism in the social sciences see Rosenau, P *Post-Modernism and the Social Sciences* (1992).

meaningful. How, for example, do the situations of certain categories of people correspond to the creation of those categories by others?

Liberal legal justification of the legal system is characterised by claims about the separation of law from other forms of social control and the presentation of rules as objective and as the only legitimate normative mechanism.<sup>43</sup> Together these produce (with apparent objectivity) the perception that law really serves the (imaginary) totality of all people in society. Critical legal studies thought sets out to provide empirical demonstrations of the many ways in which this is not so. It also sets out to uncover the ideological nature of the law; how the creation and maintenance of legal categories serves to exclude other ways of thinking and imagining alternative social arrangements. The language of law generates an impression of legal categories as conceptual and social facts rather than as human creations, variable and available for change.<sup>44</sup>

Although the enabling conditions of critical race theory lie in the epistemological diversity of post-modern thought, and writers in this field draw on a range of post modern methods and strategies, some essentially modernist elements remain. Its creators locate it within the experience of racial groups (conceived as historically specific and always identifiable), subordinated both by and through the experience of racism - directly by racial slurs and threats and indirectly by systemic structural discrimination. The possibility of opening up previously incontestable truths and assumptions to intense scrutiny, criticism, and reinterpretation makes a post modern intellectual position particularly fitted to revealing underlying, even hidden, narratives of liberal-legalism. But the political project of emancipation as conceived by critical race theorists depends also on modernist metanarratives.<sup>45</sup> In their various ways Derrick Bell,<sup>46</sup> Mari

---

<sup>43</sup> Hunt, A *Explorations in Law and Society* (1993).

<sup>44</sup> See, eg, Freeman, "Antidiscrimination Law: The View From 1989" in Kairys, *supra* note 41; Gabel "The Phenomenology of Rights Consciousness and the Pact of the Withdrawn Selves" (1984) 62 *Texas Law Review* 1563-1599; Feinman and Gabel "Contract Law as Ideology", Kairys, *supra* note 41; Klare "Law-Making as Praxis" (1979) 40 *Telos* 123.

<sup>45</sup> Lyotard, J *The Postmodern Condition: A Report on Knowledge* (1984). In the term "metanarrative", Lyotard encapsulates the idea of "appeal to a higher, universal, domain of thought ... as a way of validating knowledge" (Davies, M *Asking The Law Question* (1994) 226).

<sup>46</sup> *Faces at the Bottom of the Well: The Permanence of Racism* (1992).

Matsuda,<sup>47</sup> Patricia Williams,<sup>48</sup> Charles Lawrence III,<sup>49</sup> and Angela Harris<sup>50</sup> all argue that reason and truth, and rights and freedoms, are essential to their struggle for substantive equality in American society. That is, their claims for justice are based in an appeal to (universal) shared values within the political community.

Within these parameters critical race theorists have offered a new jurisprudence of hate speech.<sup>51</sup> They take the view that “interests of equality and dignity might sometimes justify limits on what may be said”.<sup>52</sup> These writers point out the difference between formal equality constituted through abstract measures (and guaranteed by a colour blind constitution), and substantive equality which takes into account the lived experience of individuals whose subjectivity is constituted in and through racism in their everyday world. Delgado describes the hate speech controversy as “the *Plessy v Ferguson* of our age” where the issues are “seen as a contest of rights through a kind of perverse neutralism” in which

The white ... insists on the freedom to say whatever is on his mind. The black or brown insists on the right not to hear what is on the white’s mind when that takes the form of a vicious racial slur. One interest balanced against another, one emanating from one part of the Constitution (the First Amendment), the other from a different part (the Fourteenth Amendment) – seemingly a perfect standoff.<sup>53</sup>

And he believes that, as in the case of *Plessy*, history will tell us which represents the more compelling moral interest.

---

47 “Looking to the Bottom, Critical Legal Studies and Reparations” (1987) 22 Harvard Civil Rights-Civil Liberties Law Review 401; “When the First Quail Calls: Multiple Consciousness as Jurisprudential Method” (1989) 11 Women’s Rights Law Reporter 7.

48 Supra note 10.

49 “The Id, the Ego and Equal Protection: Reckoning with Unconscious Racism” (1989) 39 Stanford LR 317.

50 “Race and Essentialism in Feminist Legal Theory” (1990) 42 Stanford LR 581.

51 Matsuda et al, supra note 41; Delgado, “Epithets and Name-Calling” (1987) 17 Harvard Civil Rights-Civil Liberties LR 301; Matsuda “Language as Violence v Freedom of Expression: Canadian and American Perspectives on Group Defamation” (1989) 37 Buffalo LR 337; Delgado, supra note 3; Williams “Spirit-Murdering the Messenger: The Discourse of Fingerprinting as the Law’s Response to Racism” (1987) 42 University of Miami LR 127.

52 Delgado, supra note 3, at 865.

53 Ibid, 878.



Critical race scholars argue that racial hate speech should attract civil<sup>54</sup> or criminal<sup>55</sup> sanctions.<sup>56</sup> Their carefully crafted proposals scrupulously require the least possible interference with speech freedoms, they frame their proposals through concepts drawn from First Amendment jurisprudence (for example, Matsuda's "fighting words" formulation),<sup>57</sup> and most proposals for hate speech regulation are limited to the control of face-to-face insults between individuals. They do not generally propose controls on the more comprehensive issues of hate speech in books or in speeches to crowds.

But, not surprisingly, since they are legal scholars steeped in notions of the power and importance of individual freedom (whatever that may mean) and the United State Constitution as both a necessary and sufficient condition of democratic society (whatever that may mean), these scholars allow too much weight and power to their conception of the law. Ultimately, this is still analysis based in United States rights' thinking. And this, inevitably, circumscribes their ability to escape the conceptual seesaw where principles of liberty and equality forever balance in opposition.<sup>58</sup> It is because their arguments appear to be enmeshed in an over-determined confrontation that I can claim that law school unorthodoxy is as effectively trapped in this binary as the law school orthodoxy it seeks to overturn.

For me, the strength of the critical race theorists' position lies in their insistence on holding at the heart of all analysis the reality experienced by

---

54 Delgado, "Words That Wound: A Tort Action for Racial Insults, Epithets, and Name Calling" in Matsuda et al, supra note 41.

55 Matsuda "Public Response to Racist Speech: Considering the Victim's Story" in Matsuda et al, supra note 41.

56 Much of the United States debate on the regulation of hate speech revolves around proposals and attempts to regulate such speech on university campuses. In New Zealand this has not been an issue – certainly I am unaware of any proposals for campus speech codes or of claims that they are needed.

57 Supra note 55. "[C]arefully drafted regulations can and should be sustained without significant departures from existing first amendment doctrine. The regulation of racist fighting words should not be treated differently from the regulation of garden-variety fighting words, and captive audiences deserve no less protection when they are held captive by racist speakers" (2380).

58 Delgado writes of the "seemingly perfect standoff" of one interest (the First Amendment) balanced against another (the Fourteenth amendment) (supra note 3). He believes that "history will have no trouble telling us which interest is more morally significant". Yet he still places constitutional interpretation at the heart of his defence of "the view that interests of equality and dignity might sometimes justify limits on what may be said".

the targets of hate speech. And so I believe that Mari Matsuda gets to the heart of the matter when she writes that

The victims' experience reminds us that the harm of racist hate messages is a real harm to real people. When the legal system offers no redress for that real harm, it perpetuates racism.<sup>59</sup>

It is my doubt about the will and capacity within the law and legal thought (orthodox and unorthodox) to get beyond the limitations of constitutional ideology that leads me to explore the sociological ideas introduced in my next section.

#### V. BEYOND FREEDOM AND EQUALITY: FROM ABSTRACTION TO CONTEXT – CAN WE GET THERE FROM HERE?

It is neither new nor unusual, of course, to claim that legal scholars are at risk of tunnel vision in relation to the inner workings of legal doctrine and dogma; sociologists and socio-legal scholars have been saying so for years.<sup>60</sup> From within legal academia, Frederick Schauer has written that typical United States discourse concerning the First Amendment frequently appears to consist of a viewpoint held tenaciously in the face of significant contrary evidence – which puts it nearer to ideology than to reason.<sup>61</sup> Stanley Fish writes of the presence of pure assertion and blind faith in First Amendment discourse.<sup>62</sup> David Kairys dissects the ideological aspects of free speech in the United States to conclude that what now exists is a “recast version of freedom of speech” that serves “to validate and legitimize existing social and power relations and to mask a lack of real participation and democracy”.<sup>63</sup> He argues that, while originally it was struggles and achievements in the labour and civil rights movements which gained the recognition of free speech in the US, these achievements have been “falsely redefined as a set of preexisting natural rights whose essence and history are legal rather than political”;<sup>64</sup> that courts and lawyers have turned a fine practice into an unequally applied set of dogma. John Downing, analysing what he calls “First Amendment absolutism”, finds “undercurrents of

---

<sup>59</sup> Matsuda, *supra* note 41, at 50.

<sup>60</sup> Carol Smart, Alan Hunt, Roger Cotterrell, Duncan Kennedy, David Kairys, and many others.

<sup>61</sup> Schauer, “The First Amendment as Ideology” in Allen, D and Jensen, R (eds) *Freeing the First Amendment: Critical Perspectives on Freedom of Expression* (1995).

<sup>62</sup> *Supra* note 9.

<sup>63</sup> “Freedom of Speech” in Kairys, *supra* note 41, at 265.

<sup>64</sup> *Ibid*, 264-265.

nationalistic boastfulness and naivete” in contemporary First Amendment discourse. In a few briskly argued pages, he exposes a number of common claims in defence of the First Amendment<sup>65</sup> to some hard sociological evidence. The result leads him to warn that excessive deference inside and outside the US to the First Amendment as “a historical high-water mark of discursive freedom” has led to a refusal to confront its “dangerous implications” for the growth of hate speech, and this in turn has deterred the production of strategies to combat its role in developing situations of ethnic hatred in many parts of the world.

So, what would it look like to introduce some sociological concepts and evidence into the standoff where freedom of speech as the greater good always triumphs over hate speech as the lesser evil?<sup>66</sup>

In a well-known essay on the fate of antidiscrimination law in the hands of the United States Supreme Court, Alan Freeman<sup>67</sup> draws a distinction between recognising discrimination only where a perpetrator can be identified to carry the blame, and seeing it through the eyes of the victim who knows what she or he has experienced, whether or not the causation is known. It is this notion of seeing from a victim’s point of view that I want to explore in discussing a third perspective on racial hate speech. And so, although I have rejected critical race theory’s excessive reliance on thinking through liberal legal categories, I want now to use what I see as critical race theorists’ most significant contribution on this issue. This contribution is the insistence that racism is significant and deeply embedded in many if not all societies, and that this is central to the lives of those who fall into the racialised categories, who are the victims of racism.<sup>68</sup> This insistence is linked to the insight, framed as a claim, that subjective experience of racism must be a central part of the normative source of laws about freedom of expression. And this requires “[l]ooking to the bottom - adopting the perspective of those who have seen and felt the falsity of the liberal promise ...”<sup>69</sup>

Such a task may, I believe, be advanced through a careful and thoughtful use of three concepts which are not usually central in discussions of free speech

---

<sup>65</sup> See text accompanying footnotes 18 to 22 *supra*.

<sup>66</sup> The form of this description comes from Downing, *supra* note 25, at 176.

<sup>67</sup> Freeman, “Antidiscrimination Law: The View From 1989” in Kairys, *supra* note 41.

<sup>68</sup> For an extended examination of the nature and function of racism see Goldberg, D *Racist Culture: Philosophy and the Politics of Meaning* (1993). See also Williams, P *Seeing a Colour-Blind Future: the paradox of race* (1997).

<sup>69</sup> Matsuda, *supra* note 10.

and racial insult. I have already indicated that the first of these is subjectivity; the other two, empathy and cultural difference, can be used, I think, to expand our understanding of the realm of subjectivity and its significance in relation to claims that freedom from racial insult cannot be essential to democratic society. They do this by advancing the level of discussion from the formal abstractions of “freedom” and “equality” to the experiential context where subjectivity, empathy, and cultural difference have their place.

### *1. Subjectivity*

This article began with Fanon’s cry of psychic pain and dislocation. That is because his writings so clearly illustrate my claim that subjective experience is essential to normative claims to justice for victims of hate speech. Forty years later, many writers of colour observe that among the greatest destruction caused by hate speech is the loss or rejection of one’s own identity.<sup>70</sup> This claim might be illustrated from the many published examples cited in this article, but I want instead to make my argument by returning to Huscroft’s commentary on the New Zealand legislation and adding a counterpoint that reads in subjectivity as a central, not peripheral, element.

Huscroft argues his claim that New Zealand law contains threats to the freedom of expression through two parallel (and by implication, equal, equivalent or similar) strands. Defamation and hate speech become two sides of the one coin - each an injury to individuals which is experienced under particular social and political conditions. Because the discussion of defamation comes first, it establishes the tone and parameters for the discussion of hate speech. Defamation is about individual reputation and its principal effect is on public and/or powerful private figures who, implicitly, have more reputation to lose.<sup>71</sup> Huscroft argues that one of the few ways in which ordinary people can have a voice and an effect may well be through attacking politicians in robust debate. Therefore, he argues, New Zealand

---

<sup>70</sup> See Delgado, “Words That Wound: A Tort Action for Racial Insults, Epithets, and Name Calling” in Matsuda et al, *supra* note 41, especially at 90-96; Lawrence, “The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism” (1987) 39 *Stanford LR* 317; Williams, “On Being the Object of Property” (1988) 14 *Signs* 5. In New Zealand, Mihi Edwards has documented her experience as a young Māori woman in a racist Pakeha world in *Mihipeka: the early years* (1990), and *Mihipeka: time of turmoil* (1992).

<sup>71</sup> It is not clear how reputation may be quantified to argue that some people have more of it than others.

defamation laws improperly protect the powerful. If this were indeed so then I would not have any argument with that part of his analysis. (In fact the formulation fails to recognize that those without power still need protection against defamation in the work place. The jobs of the non-powerful and poor can also rest on reputation, even if they cannot afford expensive court actions to protect it).

But, when the second half of the discussion is constructed, it is already framed to be read within the notion of reputation. This means that expressions of racial hatred, which are designed to create fear and self-loathing in their targeted victims and to recreate and reiterate an unequal relationship of dominance and oppression, become simply a matter of “group reputation”. One consequence of this choice of focus is that section 63 of the Act appears only in a footnote. The section, which deals with racial harassment, is a frequently invoked source of claims against hate speech, and cannot be subsumed under a “defamation” rubric. The principal beneficiaries of this section so far have been Māori women who make up over half of the 70 to 100 complainants each year.<sup>72</sup>

Although Huscroft notes that the civil libertarian position of total freedom of expression, no matter how odious, may seem unduly dismissive of those who bear the burden of the racist’s freedom he nevertheless thinks that the practical justifications are convincing.<sup>73</sup> In short, we must have what Justice Holmes described as “freedom for the thought that we hate”. But who in fact are “we”? Kim Scheppele has pointed out that the “we” of legal theory and practice inevitably produce a “they” who are outside the privileges and protections of legal meaning.<sup>74</sup> Theirs are the experiences that the law does not hear, cannot value. Many writers have demonstrated how women and members of various minority groups, including those constituted by race or ethnicity, regularly form the legal “they”. It is one thing to hate the thought in an abstract and principled way; it is quite another to experience, each day, such thought in action.

---

<sup>72</sup> Personal communication from Peter O’Connor, Office of the Race Relations Conciliator.

<sup>73</sup> These are difficulties of enforcement, publicity for racists in courts, driving racism underground where it cannot be countered by education, the dangers of the slippery slope of state control, the dangers of excess breadth of prohibition chilling good, democratically healthy speech, and the lack of proof that such laws work.

<sup>74</sup> Scheppele, “Foreword: Telling Stories” (1989) 87 Michigan LR 2073.

A recent complaint under the New Zealand race relations legislation<sup>75</sup> came from a woman who for months had been greeted by a work mate each morning as she joined the factory production line with “Hullo, you black bitch”. What she wanted was simple - for him to stop doing it and to apologise. I may hate the thought; but neither I nor Huscroft nor Holmes (even more so) will ever have to experience it. And this is why, again, I would call into question Huscroft’s description of the critical race theory project as an “attempt to put a human face on the problem of racism”.<sup>76</sup> The more I reflect on this phrase, the more it disturbs me. Here is law’s “we” - never part of a minority, oppressed only by the pains of professional life. Racism has no face other than a human one. Those who feel it in their bodies and their minds do not experience an abstract concept. There is evidence that severe or protracted exposure to racist abuse (face to face and in popular culture) can cause physical sickness including high blood pressure, sleep disturbance, tremors, and early death.<sup>77</sup> Drucilla Cornell, asserting the corporeal nature of hate speech, refers to Toni Morrison’s description of racist taunts “instilling a feeling of ugliness which attaches to the skin and eats into the body”.<sup>78</sup>

The racialising of individuals through hate speech inflicts deep internalised psychic injury that may have significant consequences for their life chances;<sup>79</sup> none of this is readily accessible to the legal system. It is not like

---

75 Human Rights Act 1993, s 63. The outcome of this case raises interesting issues of equality and social consequence. A defamation action in court (which would presumably have been beyond her financial reach) would have involved a large claim for damages. Firing the co-worker would have solved the immediate problem but would also probably have sent out into the community an individual with racist attitudes exacerbated as he blamed his victim for the outcome.

76 Huscroft, *supra* note 23, at 194. “Arguments by those favouring legislative prohibitions on racist expression attempt to put a human face on the problem of racism, focusing on concerns about the effect racist expression has on minorities”.

77 Delgado, *supra* note 70; Matsuda, *supra* note 55.

78 Unpublished lecture quoted by Richardson, “‘A Burglar in the House of Philosophy’: Theodor Adorno and Drucilla Cornell and Hate Speech” (1999) 7 *Feminist Legal Studies* 3, 4.

79 An experiment by Greenburg and Pyszczynski demonstrated the power of ethnic hate speech to have a negative influence on how observers judged the target of that speech. “White participants returned lower evaluations of a Black debater’s skill after hearing a confederate describe him in ethnically derogatory terms when that Black debater had lost the debate. This finding suggests that exposure to ethnic slurs can cue prejudiced behaviour in observers” (Cowan and Hodge, “Judgments of Hate Speech: The Effects

a defamed politician being exposed to healthy dissent and critique for the good of the general polity. But coupling the two distorts how we are invited to think about the hate speech issue. It invites us into what Stanley Fish calls “the fiction of a world of weightless verbal exchange”.<sup>80</sup> And this in turn leads directly to the predictable claim that victims of hate speech are simply being “oversensitive”. And indeed the discussion does reach this point. The run of complaints to the Race Relations Office reported in the press suggests that many complaints are concerned with the relatively trivial, “inappropriate jokes, insensitive comments”. One can only ask “trivial to whom?”

Similarly, it is claimed that the legislation gives great scope for unintentional insult - insensitivity on the one side, oversensitivity on the other.<sup>81</sup> In a breathtaking leap into point of viewlessness we are told that “[i]nsult can also occur despite the absence of any objective insult”.<sup>82</sup> This leads me to wonder what an objective insult might look like. Would it be tested by consensus among the target group or the perpetrator’s group? Because, of course, racist insults are by definition insults to a group and not simply to an individual. When, as regularly happens in New Zealand, a Polynesian present where Polynesians in general are being racially denigrated is told by the abusers that of course he or she is different and they are talking about all the rest, this does not, strangely enough, make him or her feel better. Huscroft appears to feel that the definitional question is adequately answered by the House of Lords which has said that, while there can be no definition of insult, “an ordinary sensible man knows an insult when he sees or hears it”.<sup>83</sup> But that of course makes it harder still, since we now have the problem of deciding what an “ordinary sensible man” might look like - compounding the “race” issue with a gender one.

This question of objectivity and subjectivity in racially related insults was addressed by Greig J, in *Zdrahal v Wellington City Council*, though not in the context of the Human Rights Act.<sup>84</sup> When Mr Zdrahal painted two swastikas on the outside wall of his house and lit one at night with a spotlight, two neighbours who could see the signs from their property

---

of Target Group, Publicness, and Behavioral Responses of the Target” (1996) 26 *Journal of Applied Social Psychology* 355, 356).

<sup>80</sup> *Supra* note 62.

<sup>81</sup> Human Rights Act, s 61 prohibits words considered likely to cause hostility or contempt, regardless of the speaker’s intention.

<sup>82</sup> Huscroft and Rishworth, *supra* note 23.

<sup>83</sup> *Cozens v Brutus* [1973] AC 854, 862, quoted in Huscroft, *supra* note 23, at 205.

<sup>84</sup> [1995] 1 NZLR 700.

complained to the Wellington City Council. One claimed that the signs were objectionable and offensive because of their anti-semitic nature; the other saw the signs as clear racist provocation and as related to derogatory verbal comments Zdrahal had made to him about his Chinese background. The Council issued an abatement notice under the Resource Management Act 1991, and the Planning Tribunal upheld the abatement notice. Zdrahal appealed to the High Court on several grounds including a claim that the swastikas were not objectionable enough to have an adverse effect on the environment and that the abatement notice breached his freedom of expression under the New Zealand Bill of Rights Act 1990.

In dismissing, the appeal Greig J rejected a claim that the Tribunal had made an improperly subjective decision as to whether the swastika was offensive and objectionable. He said the Tribunal has been correct in finding that rather than the neighbours being hypersensitive, their views were “reflective of the opinions of a significant proportion of the public”. He then he made a point that lies close to the heart of what I have been arguing here:

In a sense the decision in matters such as this is and must be subjective because it is what is perceived by the ears or the eyes and its effect on the individual and his personal wellbeing. Offensiveness or objectionability cannot be measured by a machine or by some standard with arithmetical gradations. It is a matter of perception and the interpretation of that perception in the mind.<sup>85</sup>

However, he drew from it the formulation that, in a case like this, it is the task of the Tribunal to “transpose itself into the ordinary person, representative of the community at large, and so decide the matter”. In trying both to recognize subjectivity and to re-embed it in something more objective,<sup>86</sup> he was drawn to invoke not only the subjective view of those most directly affected but also the subjective view of “ordinary persons, members of the public”. And that reinstates the problem of representation in a culturally and ethnically diverse society. Nevertheless what has been recognized here is that even objectivity has a subjective dimension; social context matters:

It is the people in their surroundings or environment, not the objects and substances in them, which are affected by swastikas or other things which can only be perceived

---

<sup>85</sup> At 708.

<sup>86</sup> There is abundant evidence (much of it presented by feminist legal theorists) that discomfort with subjectivity is deeply embedded in liberal legalism. See eg the work of Robin West, Martha Fineman, Martha Minow, and Carol Smart.



by the eye and have an effect, depending upon their meaning and connotation in the culture, the knowledge and the experience of the perceivers, the people.<sup>87</sup>

Supporters of the “more speech” position believe that racist expression is best answered by anti-racist expression so that in the free marketplace of ideas the best may rise to the surface and the worst sink without trace. But when this idea is tested in the rough and tumble of everyday social and political life where racism and economic inequalities are firmly entrenched, then a number of flaws appear. First, there is the difficulty of finding empirical evidence that the cream of liberal tolerant ideas actually does prevail in modern western societies.<sup>88</sup> On the contrary, it has been persuasively argued by critical race scholars that members of minority groups have great difficulty in getting their point of view heard,<sup>89</sup> and that, even if this were not so, because the purpose of racial hate speech is to invoke fear in its targets, the most sensible response to threats against one’s group is to become as silent and invisible as possible to keep out of harm’s way.<sup>90</sup> There is also a problem here with the distribution of costs. What of the feelings of those whose identities form the battleground for this healthy exchange of ideas? Might they not get damaged in this “healthy” process. Again, of course, this is an issue of subjectivity and whether or not there is a conceptual framework that makes it possible to frame and require serious answers to such questions. Empathy is a part of that framework.

---

<sup>87</sup> Supra note 84, at 708.

<sup>88</sup> Outbreaks of ethnically motivated violence in the United States and in New Zealand testify to the power and tenacity of white supremacism.

<sup>89</sup> See Kairys, supra note 41, and (in relation to women and speech) Jensen and Arriola, “Feminism and Free Expression: Silence and Voice” in Allen, D and Jensen, R (eds) *Freeing the First Amendment: Critical Perspectives on Freedom of Expression* (1995) 195.

<sup>90</sup> In a discussion that ultimately rejects the “silencing” arguments, Wojciech Sadurski also mentions the proposition that, when legally unrestricted hate speech is present, it devalues the views of its victims by diminishing their credence (to racists, including those who have been persuaded to that position by the hate speech) and thereby reduces the value attached to the stigmatized victims’ own views (“On ‘Seeing Speech Through an Equality Lens’: A Critique of Egalitarian Arguments for Suppression of Hate Speech and Pornography” (1996) 16 *Oxford Journal of Legal Studies* 713, 714).

## 2. Empathy<sup>91</sup>

Self-knowledge (in the form of subjectivity) and empathy are mutually constructive. Unless the insights from that knowledge are read with empathy by those to whom they are directed it is useless to emphasise the importance of subjectivity. Only empathy might elicit a focused and thoughtful hearing for personal revelations of black subjectivity by those who enjoy the benefits of existence in an unmarked category of whiteness.<sup>92</sup>

The concept of empathy is slippery and imprecise; it resists simple definition; it tumbles too easily into facile sympathy (“Oh I do know just how you feel”). At its heart is the notion of understanding the feelings of another person. The mechanisms of empathy are not clearly known and its absence is probably more easily detected than its presence. I may say that “I know how you feel” but you and I can share no more than a comfortable fiction of mutuality.<sup>93</sup> Nevertheless, human beings continue in life and in writing to attempt this synthesis of knowing. Patricia Williams, when she describes the “spirit-murder” of racist abuse, is reaching out to communicate

---

<sup>91</sup> Jurgen Habermas includes the quality of empathy in his account of the new developing sense of what it meant to be human, which he says characterises the institutionalisation of the public sphere in the early modern era. The family provided the structural underpinnings of the private sphere, and at the same time “provided a crucial basis for the immanent critique of the bourgeois public sphere itself, for it taught that there was something essential to humanness that economic or other status could not take away” (Calhoun, *C Habermas and the Public Sphere* (1992) 11). Contemporary literature (like Richardson’s *Pamela*) reinforced this “sense of humanness”. “The relations between author, work, and public changed. They became intimate mutual relationships between privatized individuals who were psychologically interested in what was ‘human’, in self-knowledge, and in empathy” (Habermas, *J The Structural Transformation of The Public Sphere* (1989) 50).

<sup>92</sup> Patricia Williams comments on the way in which whiteness is seldom seen as “race”. She reads as “one of the more difficult legacies of slavery and of colonialism” the way in which racism maintains its grip through the process of “the ‘exnomination’ of whiteness as racial identity”. “Whiteness is unnamed, suppressed, beyond the realm of race. Race has nothing to do with whites” (*Seeing a Colour-Blind Future* (1997) 4-5). (The term ‘exnomination’ is credited to “media expert John Fiske”).

<sup>93</sup> Cynthia Ward is doubtful that it is ever possible for empathy to bring us closer together and quotes philosopher R M Hare’s doubt: “if all the properties of the situation in which I had to imagine myself, including the properties of the person in whose shoes I was putting myself, were so unlike those of myself and my present situation, would it any longer be *me*?” (“A Kinder, Gentler Liberalism? Visions of Empathy in Feminist and Communitarian Literature” (1994) 61 *University of Chicago L R* 929, 939).

the pain, helplessness, and anger of the moment so that those who have not personally felt the damage might yet begin to imagine it in relation to themselves.<sup>94</sup> Empathy is about emotion and imagination; it is not rational and it will always be silenced (made meaningless) by the language of reason. And so it is alien to conventional legal discourse.

Empathy cannot prescribe what should be done or how to do it, but it does signal moral choice and the necessity of care for others.<sup>95</sup> Arne Johan Vetlesen defines empathy as “the specific cognitive-emotional precondition of moral capacity”,<sup>96</sup> and many writers, whether or not they concede it a place in legal practice, note its moral significance. Lynn Henderson, in an influential plea for greater recognition of empathy’s place in the legal process, describes it as a window to feelings that “reveals moral problems previously sublimated by pretensions to reductionist rationality”.<sup>97</sup> She identifies three aspects of empathy: feeling another’s emotion; imaginative understanding of another’s experience or situation; and (possibly but not necessarily) action to ease the pain of another. But she also notes psychological research showing that people feeling the distress of others may block their own distress reaction to this by withdrawing, or by rationalising non-action by rules or limits.<sup>98</sup> And it has also been found that we are most likely to empathise with people who are most similar to ourselves.<sup>99</sup> Indeed, this underpins Delgado’s sceptical look at the possibility of white empathy working to the advantage of a black American underclass. He says that “[t]he poorer and more wretched blacks become, the less white people will empathize with them”.<sup>100</sup> Empathy, for him, is a highly limited quality which reduces over time: “Empathy is least useful where we need it most. When inequality is deep and structural, empathy declines”.<sup>101</sup> And in relation to the US legal system he observes that:

---

94 *The Alchemy of Race and Rights* (1990).

95 Henderson, “Legality and Empathy” (1987) 85 Mich L R 1574, 1653.

96 “Why Does Proximity Make a Moral Difference?” (January 1993) 12 *Praxis International* 383, quoted in Bauman, *Z Postmodern Ethics* (1993) 143.

97 Henderson, *supra* note 95, at 1576.

98 Quoting Hoffman, “The Development of Empathy” in Ruston, J and Sorrentino, R (eds) *Altruism and Helping Behaviour: Social Personality and Developmental Perspectives* (1981) 41, 44, 54-55.

99 Stotland, Sherman, and Shaver, “Empathy and Birth Order” in Henderson, *supra* note 95, at 1584.

100 Delgado, “Rodrigo’s Eleventh Chronicle: Empathy and False Empathy” (1996) 84 *California L R* 61, 77.

101 *Ibid.*

Legal empathy is even rarer and less trustworthy than other kinds. Law carves up your story, serves it up to an uncomprehending judge, atomizes our claim, and sparks real resistance when it tries to do something – as it does every century or so.<sup>102</sup>

But, at least in relation to New Zealand, I do not share Delgado's pessimism.<sup>103</sup>

Those who have written about empathy in a legal context have tended to focus almost entirely on judges. Some feminist scholars have argued that judges need, along with more extensive life experiences, qualities of empathy so that they may understand more clearly the ways in which the world is different for those who are not white, male, or middle class. Some have even argued that judges who are women might be expected to be more empathetic.<sup>104</sup> One consequence of this focus has been a rush by defenders of the liberal legal paradigm to reject empathy as either inappropriate in a legal setting or too hard to apply.<sup>105</sup> Judges and empathy should not be thought of together, the argument goes, because this runs directly counter to what judges are expected to do in a court hearing.<sup>106</sup> If all stories (people's accounts of what they thought happened to them) were given equal value in court, then the ordering of interests which is inherent to the judicial process could not happen.

It seems to me that this argument collapses two steps into one. Might not a good judge try to listen to all stories with empathy and then still decide which account she found to be the most convincing? A request to be more open to the stories of those who are "other" to oneself is not a requirement to reject the need for judgment or even for neutrality, but is a call for the widening of emotional and intellectual horizons.

---

<sup>102</sup> *The Price We Pay: The Case Against Racist Speech, Hate Propaganda and Pornography* (1995) Lederer, L and Delgado, R (eds) 95.

<sup>103</sup> Cooke P's judgment in *NZ Maori Council v Attorney General* (supra note 12) seems to offer some hope.

<sup>104</sup> See eg Boyle, "Sexual Assault and the Feminist Judge" (1985) 1 *Canadian Journal of Women and the Law* 93. She argues that a feminist judge would use the collective experience of women and share and analyse her own experience. See also, Justice Bertha Wilson, "Will Women Judges Really Make a Difference?" quoted in Graycar, R and Morgan, J *The Hidden Gender of Law* (1990) 413.

<sup>105</sup> Richard Posner states that "the internal perspective – the putting oneself in the other person's shoes – that is achieved by the exercise of empathetic imagination lacks normative significance" (*Overcoming Law* (1995) 318).

<sup>106</sup> Massaro, "Empathy, Legal Storytelling, and the Rule of Law: New Words, Old Wounds" (1989) 87 *Mich L R* 2099.

Empathy cannot, of course, replace judgment in legal proceedings.<sup>107</sup> But I still want to argue that empathy is valuable for framing the discussions of legal theory and principle that underpin both legislation and what happens in courts. More specifically, I believe that empathy is required to create the kind of effective communication crucial to understanding the meaning and significance of context in situations of racial hate speech.

### 3. Cultural Difference

The third element of my proposed conceptual enrichment of the way in which we think about freedom, equality and racist hate speech involves another large idea which is also the subject of debate and varying interpretations. And so I have chosen to frame this discussion through describing particular instances where cultural difference might be said to matter, before moving to a more general consideration of what is signified by my use of the phrase.

During an All Black rugby tour of South Africa in the late 1990s, public attention was aroused in New Zealand by a South African commentator referring to a “coconut tackle”. Since, locally, “coconut” is a term of derogation used against Pacific Island people (and not used lightly or inconsequently) it took some time for the realisation that in South Africa, as in the United Kingdom, coconut is sometimes used as a slang term for head. Hate speech in South Africa will not necessarily look the same as hate speech in New Zealand either to victim or perpetrator. This is not so say that such misunderstandings show the whole issue to be either vexatious or trivial, but rather to argue that, without cultural context, understanding may be difficult or impossible.

Critical race theorists have demonstrated how when colour or race determines one’s experience of life, certain human behaviours will have particular cultural meanings. For example, the meaning of a burning cross, placed on the front lawn of a family home in the United States, will be strongly determined by whether that family is black or white.<sup>108</sup> Defenders of untrammelled public speech often quote the children’s rhyme that “sticks and stones may break my bones but names will never hurt me”, and it is

---

<sup>107</sup> And a “slippery slope” argument could claim that support for it opens up a fundamental challenge to liberal legalism that extends far beyond this subject area.

<sup>108</sup> *RAV v St Paul* 112 S Ct 2538 (1992). But note that, although the City of St Paul attempted to prohibit such behaviour, the US Supreme Court found the city ordinance unconstitutionally broad; the burning cross was found to be a viewpoint within the free marketplace of ideas.

undoubtedly true that Pakeha New Zealanders are more afraid of insults against the person than of insults to reputation. But many New Zealanders are not Pakeha. In Samoan culture there is a deep-rooted belief, expressed in proverbs, that actions are unimportant and soon forgotten but that words last forever: rocks can turn to sand and be washed away but words live on (ua pala le ma'a ae le pala le upu). Another Samoan proverb likens insult to the barbs of stingrays that remain, causing pain and poisoning their victims, long after the stingray has gone.<sup>109</sup>

When colour and "racial" identity determine one's experience of life, and/or when one's culture sees a particular relationship between language and injury that is not that of the dominant culture, then the injury of racial insult is different. The potential significance of cultural difference in a legal context has been seen in attempts by individual judges to recognise what has been called a "cultural defence" in some criminal cases.<sup>110</sup> More specifically, on the question of racial insult, a complaint against a newsarticle article containing a number of jokes about Australians was dismissed on the basis that it was "robust banter and leg pulling" (*Neal v Sunday News Auckland Newspaper Publication Ltd*). But the Tribunal indicated that the article "might well have offended against [the Act] had it been directed at a different race or ethnic group". Was the Tribunal then working from the contextual knowledge that these "insults" were not messages of racial inferiority directed at an historically oppressed group?<sup>111</sup>

Although Huscroft sees that "rights and freedoms are valued and enjoyed in different ways by different peoples in different contexts",<sup>112</sup> he does not read this as a justification for determining complaints in relation to the social and cultural context of each objectionable utterance. Instead, he argues, citing *Neal v Sunday News Auckland Newspaper Publication Ltd*, that the Human Rights Act is bad law because contextual difference evidently did make a difference to the way that this complaint was decided. This is

---

<sup>109</sup> My thanks to Dr Cluny Macpherson, who confirmed my knowledge of this, supplied the words, and told me that there is also a Māori proverb of similar substance.

<sup>110</sup> *Police v S & M* (1993) 11 FRNZ 322, [1993] DCR 1080; and *R v Matafeo* (1996) 14 CRNZ 276.

<sup>111</sup> Note also *Skelton v Sunday-Star Times*, where the Complaints Review Tribunal found that publishing the word "pakeha" instead of "Pakeha" did not amount to racial harassment or insult or bringing a group of New Zealanders into contempt. The Tribunal held that "the views of the very sensitive are not the appropriate yardstick by which to measure whether something is insulting under s 61(1)(a) of the Human Rights Act 1993" (Decision 12/96).

<sup>112</sup> Huscroft and Rishworth *supra* note 23, at 174.

entirely consistent with a position that focuses on the consequences of such speech for some amorphous “public good” rather than on individuals and their subjective experience of racism. And this in turn is a product of approaching controls on hate speech in terms of the potential danger that they posed for unlimited free expression.<sup>113</sup>

An interesting insight into the two points of view can be drawn from the report of the Court of Appeal decision in *Awa v Independent News Auckland Limited*. In deciding that publication of the description of Mr Awa as “Billy’s ‘body snatching’ Uncle Bill Awa” constituted fair comment/honest opinion, Richardson P, Gault, Keith and Blanchard JJ opined in obiter that:

[Mr Hassall] was contending that a fair minded New Zealander must recognize the significance of Māori custom; that critical comment which does not do so is incapable of being fair comment. We reject that as firmly as we would reject a submission that a fair minded New Zealander cannot criticize non-Māori customs or behaviour. One race is entitled to comment adversely and even narrow mindedly on the practices of another save as prohibited by statutes, for example the Human Rights Act 1993. The exercise of this right may sometimes be a cause of discomfort for many New Zealanders. They may reasonably consider that it is detrimental to race relations and that a degree of restraint would be preferable. However, provided that comment is factually based and expresses a genuinely held opinion rather than being mere invective, ... the insensitivity of the comment does not deprive it of that protection if it was made honestly. That the jury or the Judge may personally disagree is an irrelevant consideration. If it were otherwise freedom of expression, a right affirmed by s 14 New Zealand Bill of Rights Act 1990, would be seriously in jeopardy.<sup>114</sup>

But in the same case Thomas J, while concurring in the outcome, wrote (with regret) a separate opinion to disassociate himself from this paragraph. He was motivated to do this, he said, because he believed that “some sort of qualification [should stand alongside it] reminding us that the law is not the be all and end all”.<sup>115</sup>

Thomas J noted that the comment in the article was not about Māori custom relating to the burial of dead persons; it was about Mr Awa’s behaviour and therefore the observations in the paragraph might be seen as “unnecessary, if

---

<sup>113</sup> Ibid, 205.

<sup>114</sup> (1997) 4 HRNZ 288, 293. The “Billy” in question was Billy T James and the subject of the story the events surrounding his funeral. The presence of judicial empathy would surely have precluded this paragraph.

<sup>115</sup> At 296.

not gratuitous". Thomas J then moved to his central concern. This was that the observations were capable of being perceived as "an endorsement of public comment of a culturally or racially insensitive kind, providing the comment does not infringe the letter of the law"; and that it might even be read as "exhortatory."<sup>116</sup> In explanation of this position, he said that the boundaries of law - the law of defamation and the provisions of the Human Rights Act 1993 - should not be taken as the definitional standard of responsible publishing in a bicultural nation. He continued:

Communications which are irresponsible, mischievous, of bad taste, crude or hurtful may be published without crossing the boundaries of the law, but this does not make them compatible with a socially essential objective such as racial harmony. Statutory provisions such as s 61 of the Human Rights Act recognize such an objective, but they cannot legislate it into existence ... New Zealand is one nation made up of two peoples. ... History, and the population imbalance in this country, means that the European culture is the dominant culture and the Māori culture and language is in jeopardy of being submerged or engulfed. ... Yet, the two peoples, both the European and the tangata whenua, must necessarily strive to live and work together in common accord. . it is an area in which feelings and emotions are inescapable .... If there is to be a solution in which the two peoples inhabit this country in harmony and dignity as equal citizens, mutual respect for and understanding of each other's cultures is imperative.<sup>117</sup>

These two versions of the proper relationship between law, speech, and ethnic relations encapsulate the difference that I have been describing between simply privileging First Amendment law (in this case section 14 of the Bill of Rights Act) and taking a sociologically informed approach that gives due weight to the significance of social and cultural context in the production of racially insulting speech.

There have been no systematic attempts in New Zealand to find formulae to define what does and does not constitute hate speech. Complaints under the Human Rights Act are determined on an individual and ad hoc basis and the grounds for decision are not reported. No general analysis of the principles which guide or can be derived from the rulings has been undertaken either within the Race Relations Office or by academics. One way of beginning to separate the trivial from the significant in complaints might be to draw on ideas about subjectivity, empathy and cultural difference to understand what racist hate speech looks like "from the bottom".

---

<sup>116</sup> At 295.

<sup>117</sup> At 295.



## VI. BEYOND FREEDOM AND EQUALITY : HOW MUCH IS AT STAKE?

Stanley Fish describes why my proposal to look to context in determining what constitutes hate speech which will not be protected is not, epistemologically at least, really radical at all. Declaring that speech never exists outside of historical and social context, Fish argues that “free speech is the name we give to verbal behaviour that serves our substantive agendas”. And so with one stroke he simultaneously asserts that meaning is always socially constructed and that such construction is always politically inflected: “abstract concepts like freedom, rights, and free speech don’t have any ‘natural’ content but are filled with whatever content and direction one can manage to put into them”.<sup>118</sup> Talk of “free speech” is not the description of a real or possible condition, but only the expression of a hope that it might be possible to free ideas from the political and ideological conditions of their existence. Limitations on speech are always made in relation to a defining and assumed purpose, and they are inseparable from community membership. Courts classify speech and assign value to particular kinds; they do not protect “speech” as an abstract (contentless) entity.<sup>119</sup>

Reading through a Fish-eye lens, Huscroft’s argument against restrictions on racial hate speech can be seen to work by envisioning “speech” as pure and without context (like “the speech we hate”) and then “stripping particular speech acts of the properties conferred on them by contexts”.<sup>120</sup> The notion that the damage of hate speech can somehow be undone by more speech assumes that the mind of the hearer can be wiped clean by the next utterance, even, perhaps, that insults can be reversed and returned to sender.<sup>121</sup> In Samoan society insults have long-term damaging consequences for the target; they live on in the minds of those who heard them and are passed in turn to their descendants. Oral cultures preserve knowledge through remembered stories.<sup>122</sup> Racial insults live in the minds of those subjected to them, that is part of how relations of racial domination and subordination persist.

---

<sup>118</sup> Supra note 9, at 102.

<sup>119</sup> Ibid, 106.

<sup>120</sup> Ibid, 109.

<sup>121</sup> Judith Butler explores the possibilities of doing just this in *Excitable Speech, A Politics of the Performative* (1997). The potential for successful subversion of abusive terms seems to be greater in the case of hate speech directed at the sexuality of individuals (which is her particular focus) than of racial hate speech.

<sup>122</sup> Again, my thanks to Cluny Macpherson.

Phrases like “freedom of speech” and “the right of individual expression” obscure the brute fact that speech is political; a prize for contestation. There are several kinds of speech that the United States Constitution does not protect.<sup>123</sup> These are not “natural” immutable phenomena, they are the result of definitions produced and refined in a political context. To reveal that the decision to protect or not to protect hate speech is simply another political decision of the same order removes the pretence that there is or ever was “free speech”. Perhaps freedom of expression, even in its First Amendment home, is less certain, more imagined than the scholarly and political position which Huscroft represents would have it.

## VII. LAST THOUGHTS

What has concerned me in this article is not that freedom of expression should be defended as a good but the claim that it is an incontrovertible good, to be protected at all costs.<sup>124</sup> When the free speech in question is also speech that carries a message of racial hatred, then I think that there is a serious problem. Given the extensive history of European racism against people of colour and an extended history of privilege which has allowed me, and others like me, to own whiteness as an unmarked and unracialised benefit, it could hardly be otherwise.

The effect of racism directed at particular ethnic or “racial” groups is to create, over time, systemic inequalities which ensure that members of some groups inevitably will bear an unequal weight of racism and racist abuse. Therefore it can be argued that they are owed protection from this unequal burden. Critical race theorists have proposed differential treatment within the law for victims of racist speech.<sup>125</sup> Their proposals have been countered

---

<sup>123</sup> Delgado points out that the First Amendment protects some forms of speech like social vituperation “but not others such as libel, official secrets, fighting words, and disrespectful words uttered to a judge or other authority figure” (supra note 100, at 83). Examples of speech the courts have found unprotected (or less protected) are words posing a “clear and present danger that they will bring about the substantive evils that Congress has a right to prevent” (*Schenck v United States* 249 US 47 (1919)); “fighting words” (*Chaplinsky v State of New Hampshire* 315 US 568 (1942)); obscenity (*Miller v California* 413 US 15 (1973)); and false advertising and advertising of harmful, but legal, products or activities (Brison, supra note 4, at 315).

<sup>124</sup> This claim typically comes with modifying disclaimers that of course some speech (unspecified) should not be protected but then proceeds to write of “speech” universal.

<sup>125</sup> Matsuda’s proposal to criminalise racist hate speech includes a suggestion that greater value be given to the victim’s story than to First Amendment interests or to the

by claims that the universalising precepts of law demand that all be treated the same, that the law be colour blind. Any control of hate speech which effectively could better the position of those who are most injured by its effects would have explicitly to recognise and respond to structures of subordination constructed through racial and ethnic difference. And that, “colour blind law” cannot do.

In the United States the preference for formal freedom over substantive equality has served to justify refusals to ban racist hate speech. Thus the problem there is framed as one of conflicting constitutional principles. In New Zealand the difficulties have been more practical than principled. Clearly, since the largest number of complaints under the Race Relations Act currently are made under section 61 and are made by male Pakeha who complain about Māori,<sup>126</sup> it might reasonably be assumed that the practical problems of framing truly effective legislation and an institutional infrastructure for hearing complaints and providing remedies have not yet been solved.

Should we then accept Huscroft’s position that current prohibitions on racial hate speech are bad law and that all New Zealanders would be better off without them?<sup>127</sup> I think not. I have suggested that in Aotearoa New Zealand the debate about free speech and hate speech is too important to leave in the realm of lawyers and legal knowledge. The debate should also be informed by practical sociological knowledge. The ideas of subjectivity, empathy, and cultural differences can help us to focus on what is at stake in this discussion, and to avoid entrapment in First Amendment discourse which owes more to ideology masquerading as abstract legal principle and debate than might at first appear.

The present difficulties in making the legislation work where it is most needed would be better addressed by developing an effective jurisprudence of race relations informed by knowledge from the social sciences than by giving up on legislative protection for racial minorities and allowing the injuries of racist hate speech to flourish. Such a jurisprudence would grant

---

promoter of racial hatred. This involves procedural weighting rather than an appeal to empathy.

<sup>126</sup> Personal communication, Peter O’Connor, Race Relations Office.

<sup>127</sup> It should be noted that Huscroft is arguing that sections 61 and 131 of the Human Rights Act 1993 establish limitations on the right to freedom of expression which cannot be justified because, among other things, they stifle political discussion and do not allow defences such as truth. He is upholding the importance of section 14 of the New Zealand Bill of Rights Act 1990; he does not defend racial hate speech as such.

less weight to formal abstract principles of freedom and equality and more weight to subjective experience in context. Recognizing that instances of racist hate speech will put claims of free expression and equality into conflict, it could provide a more richly nuanced view of the interests involved. Perhaps, when the abstract principles are of the order of claiming to know an insult when the reasonable man sees one, this might even count as progress.<sup>128</sup>

---

<sup>128</sup> *Supra* note 83 and accompanying text. Ultimately these proposals may be too optimistic. If racism and inequality are indeed built into the very foundations of liberal legalism, then the question of how cultural and ethnic diversity can flourish in a climate of mutual respect in Aotearoa New Zealand may be beyond the capacities of legal knowing. But we won't know unless we try.

# WAIKATO LAW SCHOOL'S BICULTURAL VISION – ANEI TE HUARAHĪ HEI WERO I A TATOU KATOĀ: THIS IS THE CHALLENGE CONFRONTING US ALL

BY LEAH WHIU\*

## I. INTRODUCTION

Since 1984, New Zealand has undergone what Jane Kelsey refers to as “the New Zealand experiment”,<sup>1</sup> where first a Labour Government,<sup>2</sup> and then the 1990 National Government,<sup>3</sup> “applied pure economic theory to a complex, real-life community, with generally cavalier disregard for the social or electoral consequences”.<sup>4</sup> In contrast to the anti-community nature of the government’s structural adjustment programme, Māori collective activism was in a resurgent period as characterised by the following events:

the Land March of 1974, Waitangi Day protests from 1971, the occupation of Bastion Point (1978) and of Raglan Golf Course (1978), the disruption of the Springbok Rugby Tour (1981), te Kohanga Reo (1982), the Māori Education Development Conference (1984), the Māori Economic Development Conference (1985) and Kura Kaupapa Māori (1986).<sup>5</sup>

Meanwhile, at the University of Waikato (the “University”), various discussions during the 1960s-1980s, amongst the Hamilton legal profession, academics and University management, had coalesced in the formation of a Law School Establishment Committee (the “Committee”).<sup>6</sup> This Committee was to consider the viability, resourcing, character and philosophy of a law school to be established at the University. The name of the Committee’s report, Te Matahauariki, provided an appropriately spiritual starting place for the Committee’s development of the unique philosophy of Waikato Law School (the “Law School”). The Committee reported that:

---

\* Ngatihine, Ngapuhi; BSc, Dip Tchg (Auckland); LLB(Hons), LLM(Hons) (Waikato); Lecturer in Law, University of Waikato.

1 Kelsey, J *The New Zealand experiment - A World Model for Structural Adjustment?* (2nd ed, 1997) 1.

2 The Labour political party in New Zealand has historically been associated with socialist, left-wing policies.

3 The National political party in New Zealand has historically been associated with liberal, right-wing policies.

4 Supra note 1, at 1.

5 Smith, L *Decolonizing Methodologies - Research and Indigenous Peoples* (1999) 109.

6 Wilson, “The Law School: A New Beginning” in Goldring, J, Sampford, C, and Simmonds, R (eds) *New Foundations in Legal Education* (1998) 195-197.

Te Matahauriki conveys in a literal sense, the horizon where earth meets the sky; in a practical sense, a meeting place of people and their ideas and ideals; in a spiritual or metaphysical sense, aspiring towards justice and social equity. It alludes to a philosophy which reflects concerns that humans have for each other. It aspires to an environment of participation, of challenge, debate, and justice in the world as it was, as it is, and as we want it to be. ...

New Zealand is a society that needs not only more lawyers but lawyers who must respond to the needs and concerns of people in a bicultural society. ... the Law School provides the opportunity to give meaning to the notion of a partnership of good faith that is central to the Treaty of Waitangi. ... A Law School will provide a meeting place where the work of its staff and students and its dialogue with the wider community will enable the metaphysical sense of Te Matahauriki to become a living reality.<sup>7</sup>

Out of the tumultuous economic and political environment of the 1980s, the Law School was established. Despite the neo-liberal underpinnings of the structural adjustment programme, not only was the University expanding to develop a Law School, but the philosophy guiding that School into being was imbued with notions of social justice, partnership and biculturalism.<sup>8</sup>

With such aspirations, it was not surprising that the Law School would become a site of struggle for the wider indigenous peoples' project of self-determination. In her discussion of an agenda for indigenous research, Linda Smith clearly enunciates the goal and processes involved in such a project:

The agenda is focused strategically on the goal of self-determination of indigenous peoples. Self-determination in a research agenda becomes something more than a

---

<sup>7</sup> Report of the Law School Committee, *Te Matahauriki* (1988) 1.

<sup>8</sup> See the *University of Waikato School of Law Handbook* (2001) 4, where the current Dean, Professor David Gendall, states: "In addition, the School aims to give meaning to the notion of partnership that is central to the Treaty of Waitangi. The School of Law provides, through its curriculum, research activities and its own structures, both a reaffirmation and a professional extension of the University's commitment to biculturalism. It is a goal of the School to be in the forefront of the development of a new bicultural legal philosophy". Also, see the University Charter in the *University 2001 Calendar* (2001) 59, where clause 1.2 states: "The University/Te Whare Wananga o Waikato seeks: To create and sustain an institutional environment in which ... the educational needs of Māori people are appropriately catered for outside a formally constituted whare wananga, Māori customs and values are expressed in the ordinary life of the University, and the Treaty of Waitangi is clearly acknowledged in the development of programmes and initiatives based on partnership between Māori and other New Zealand people".

political goal. It becomes a goal of social justice which is expressed through and across a wide range of psychological, social, cultural and economic terrains. It necessarily involves the processes of transformation, of decolonization, of healing and of mobilization as peoples. The processes, approaches and methodologies - while dynamic and open to different influences and possibilities - are critical elements of a strategic research agenda.<sup>9</sup>

This project considers various critical elements of the Law School's attempts to develop a legal education which reflects the philosophy outlined by *Te Matahauariki*, and in particular the bicultural vision. In part two I briefly introduce some background to this project and situate myself before developing the theoretical bases for this research.

Part three discusses the local and national political contexts in which the Law School has developed. In particular, it considers the detrimental impact of the government's structural adjustment programme, and the University's restructuring plan.

Part four critiques a number of articles written by the foundation Dean, Margaret Wilson, about tino rangatiratanga, the Treaty of Waitangi and the Law School's bicultural objective. This critique demonstrates that the foundation Dean's approach is at best a tinkering with the status quo, and at worst it reflects acceptance of the unitary colonial state, its constitutional arrangements and institutions, and its disregard for Māori claims to self-determination.

Finally, in part five, I gather together some of the possible solutions or steps in the various processes of working towards a legal education that contributes to the wider project of self-determination of indigenous peoples and, in so doing, begins to fulfil the bicultural vision.

## II. BACKGROUND AND THEORETICAL BASES

### 1. Background to this Project

This article follows on from a research project initiated by Ani Mikaere and Stephanie Milroy<sup>10</sup> in 1993 which was "intended to gather information on the employment and status of Māori law graduates from Waikato Law

<sup>9</sup> Supra note 5, at 116.

<sup>10</sup> Ani Mikaere and Stephanie Milroy were both foundation Māori academic staff members at Waikato Law School. Ani, of Ngati Raukawa ki te Tonga who left the Law School in March 2001 was a Senior Lecturer, and Stephanie, of Tuhoe and Te Arawa, is a current Senior Lecturer at Waikato Law School.

School”.<sup>11</sup> This project was conducted by Makere Papuni-Ball,<sup>12</sup> and formed the basis for two Masters of Laws theses. One was written by Makere Papuni-Ball who “examines the first Waikato Māori Law Graduates’ experiences at law school and [their] employment choices”,<sup>13</sup> and reveals the devastating consequences for the Māori students of a Law School, ill-prepared to meet the expectations of one of its significant client groups.<sup>14</sup> The other thesis written by Stephanie Milroy focuses on “the whole issue of biculturalism in the Law School”.<sup>15</sup>

The theses of Papuni-Ball and Milroy demonstrate that, while the Law School was established with a vision of biculturalism, that vision is still largely aspirational, and that Māori students and staff of the Law School are still subjected to racism and intolerance of Māori and Treaty of Waitangi issues at worst or bare politically correct tolerance of those issues at best. In the context of the establishment of a Law School with an avowed commitment to biculturalism, this reality for some Māori students and staff has been the source of concern, distress and not surprisingly criticism and challenge. This project responds to those concerns, and contributes to the challenges of building a truly bicultural vision.

## 2. *Situating Myself*

The impetus for this project is somewhat connected to my own internal dichotomised experience of being a graduate of Waikato Law School, and a recently employed current staff member.<sup>16</sup> Upon return to the Law School in 1999 as a lecturer, I was once again personally, and now professionally, confronted with the issues of realising and/or working towards what this Law School has referred to since its inception as the bicultural objective. Previously as a student of this Law School I had contributed to the

---

<sup>11</sup> Milroy, S *Waikato Law School: An Experiment in Bicultural Legal Education* (unpublished LLM thesis, Waikato Law School, 1996) 1.

<sup>12</sup> Makere was a student who was part of the first intake of Māori students, and was employed as a research assistant. Her iwi affiliations are Ngati Porou and Te Whakatohea.

<sup>13</sup> Papuni-Ball, M *The Realities of Māori at Law School* (unpublished LLM thesis, Waikato Law School, 1996) i.

<sup>14</sup> Ibid.

<sup>15</sup> Supra note 11.

<sup>16</sup> I graduated with an LLB (Hons) in 1995 and after my return as a staff member in 1999 I completed an LLM (Hons) in 2001. This article is part of a research project completed in partial fulfilment of the LLM degree.



“bicultural discourse” in my involvement with Te Whakahiapo,<sup>17</sup> participation in classes and courses, and in sharing my experience as the sole Māori woman student in a fourth year course, “Woman, Law and Policy”.<sup>18</sup>

As a student, I fervently took up the role of constructive critic in the context then, as now, that I strongly believed that the Law School was the most likely law school in Aotearoa to offer an opportunity for Māori law students to engage in a meaningful<sup>19</sup> legal education. By that, I mean that I had anticipated a legal education that would actively and deliberately centre and normalise Māori whakaaro, aspirations, dreams, traditions and kaupapa. This education would be one where we would not have to deal with the usual, day-to-day, ignorant racism that generally permeates discussions relating to the Treaty of Waitangi and issues that are often loosely referred to as “Māori issues”.

As a staff member, I have consciously and deliberately taken up the challenge of contributing to the development of a meaningful legal education for Māori at this institution. It is the transformative potential of a bicultural legal education that has attracted me to this law school as a student, teacher and researcher. It is our quest to realise that potential, and live into it, that constantly engages me. Linda Smith captures the nature of this commitment:

The reality of our struggle is that we are caught in crises which will engage our minds and energies for all our lives. Permanent and ongoing, this struggle is an unwritten condition of belonging to an indigenous and colonised ethnic minority.

---

<sup>17</sup> Te Whakahiapo is the Māori Law Students' Association.

<sup>18</sup> Whiu, “A Māori Woman's Experience of Feminist Legal Education in Aotearoa” (1994) 2 Waikato Law Review 161.

<sup>19</sup> See Monture-Angus, P *Thunder in my Soul - A Mohawk Woman Speaks* (1995) 91, where she notes that “I would argue that numerical equality *may* only be one of the relevant goals [for Aboriginal education]. Equality of numbers alone will not be enough. Numbers cannot act as an indicator of the meaningfulness of the educational experience. It is against this single criterion, meaningfulness, that the greatest inequality has been perpetuated against Aboriginal Peoples. ... Education is a significant gatekeeper to the opportunities we are able to access. This is the first way in which education can be defined as meaningful. ... It is in this second way of defining meaningful education, as a tool of cultural survival and as a means of reaffirming the validity of Aboriginal culture, that the worst injustices have been committed against Aboriginal Peoples and our distinct cultures”.

Because of the permanent nature of the struggle there will always be a need for Māori people generally to contest issues of relevance to Māori survival.<sup>20</sup>

This project is very much an insider's critique and challenge. It is shared partially to highlight the ongoing nature of the challenge of building a bicultural legal education and jurisprudence. It is also shared to focus attention upon some of the difficulties and possibilities of such a journey so that we can continue to progress the broader vision of liberation from oppression.

#### (a) Indigenous Research Agenda

First, in "privileg[ing] indigenous concerns, indigenous practices and indigenous participation as researchers and researched",<sup>21</sup> this project is firmly located in a wider indigenous peoples' project of self-determination and survival. Linda Smith has noted that:

While rhetorically the indigenous movement may be encapsulated within the politics of self-determination it is a much more dynamic and complex movement which incorporates many dimensions, some of which are still unfolding. It involves a revitalization and reformulation of culture and tradition, an increased participation in and articulate rejection of Western institutions, a focus on strategic relations and alliances with non-indigenous groups.<sup>22</sup>

Smith has developed a model for an indigenous research agenda which uses the metaphor of ocean tides.<sup>23</sup> She identifies "four directions ... - decolonization, healing, transformation and mobilization - [which] represent processes",<sup>24</sup> and "[f]our major tides ... represented ... as: survival, recovery, development, self-determination".<sup>25</sup> The four major tides are the "conditions and states of being through which indigenous communities are moving".<sup>26</sup>

This project is primarily concerned with focussing attention and discussion upon the various processes, conditions and states which we as indigenous people are journeying through, particularly in the context of developing and engaging with the Law School's bicultural journey.

---

<sup>20</sup> Smith, "Māori Women: Discourses, Projects and Mana Wahine" in Middleton, S and Jones, A (eds) *Women and Education in Aotearoa 2* (2nd ed, 1997) 50.

<sup>21</sup> *Supra* note 5, at 107.

<sup>22</sup> *Ibid*, 110.

<sup>23</sup> *Ibid*, 116.

<sup>24</sup> *Ibid*.

<sup>25</sup> *Ibid*.

<sup>26</sup> *Ibid*.

(b) Transformative Theory of Action

The second theoretical basis for this research is Paulo Freire's transformative theory of "dialogical cultural action"<sup>27</sup> which presents some of the elements of a theory of action by which the oppressed may free not only themselves from the dehumanising effects of oppression, but also the oppressor.<sup>28</sup> The emancipatory nature of this theory parallels the aims and aspirations of this project.

This project has always been seen as part of a wider project of celebrating our survival and contributing to the self-determination goal of the indigenous peoples' project. It was also a clear and understandable expectation of Māori students that the Law School, with its self-pronounced commitment to biculturalism, must be committed to an emancipatory or liberating theory and practice of education. Freire has explained that such a theory must:

come, however, from the oppressed themselves and from those who are truly with them. By fighting for the restoration of their humanity, as individuals or as peoples, they will be attempting the restoration of true generosity. Who are better prepared than the oppressed to understand the terrible significance of an oppressive society? Who suffer the effects of oppression more than the oppressed? Who can better understand the necessity of liberation? It will not be defined by chance but through the praxis of their quest for it, through recognizing the necessity to fight for it.<sup>29</sup>

(c) Feminist Critique of how Knowledge is Valued

The third theoretical framework that underpins this research project is the feminist critique of the western model of knowledge. Margaret Davies and Nan Seuffert contend that:

Western knowledge has traditionally been built upon the premise that knowledge can be "objective", meaning that it emanates from the object, and that the identity of the human subject who knows is irrelevant to the knowledge itself.<sup>30</sup>

---

<sup>27</sup> Freire, P *Pedagogy of the Oppressed* (1972) 135.

<sup>28</sup> Ibid, 21.

<sup>29</sup> Ibid, 22.

<sup>30</sup> Davies and Seuffert, "Situated Knowledges, Identity Politics, and Policy Making" in *Diminished Responsibility The Changing Role of the State, Papers Presented at the 1996 Annual Conference of the Australasian Law Teachers' Association 2* (1996) 566.

They suggest three approaches to valuing knowledge. The first approach is taken from Donna Haraway's work,<sup>31</sup> where she suggests that "we might value knowledge claims that *explicitly acknowledge location*, rather than valuing the traditional claims of unsituated objectivity".<sup>32</sup> The second approach is based on feminist standpoint epistemology as developed by Haraway and Sandra Harding amongst others.<sup>33</sup> Davies and Seuffert state that:

Feminist standpoint epistemology argues that members of oppressed groups who engage in struggles against oppressors produce "truer" knowledge than members of the oppressor groups. This is because in order to survive, the oppressed group must understand the dimensions of the oppressive discourse and practices, as well as their own position in it.<sup>34</sup>

The third approach for valuing knowledge follows on from the "situated knowledge" approach. Davies and Seuffert argue that:

As all knowledge arises within a particular location, in an unequal society all knowledge will be implicated in challenging or upholding inequalities. Knowledge that challenges existing inequalities should be valued over knowledge that perpetuates inequalities, or that assumes that there are no existing inequalities. Valuing knowledge because it has a strategic usefulness - because it helps us to make sense of the world and provides us with a way to move forward - explicitly recognises the connection between knowledge and politics.<sup>35</sup>

I am firmly located in this project, as I have explicitly discussed in the preceding section. Further, underpinning this project is an explicit acknowledgement and recognition of the inequalities that exist in New Zealand and global societies as a result of various oppressive practices such as colonisation, patriarchy and class. This project explicitly challenges the inequalities and the legitimacy of the basis of those inequalities that continue to subjugate and marginalise Māori and women in particular.

All three of these theoretical frameworks have informed the conceptualisation and development of this project. There are parallels across

---

<sup>31</sup> Haraway, D *Simians, Cyborgs, and Women* (1991) 191.

<sup>32</sup> *Ibid.*

<sup>33</sup> *Supra* note 31, at 193-196; Harding, S *Whose Science? Whose Knowledge?* (1991) 139-142; Hartstock, "The Feminist Standpoint: Developing the Ground for a Specifically Feminist Historical Materialism" in Harding, S (ed) *Feminism and Methodology* (1987).

<sup>34</sup> *Supra* note 30, at 567.

<sup>35</sup> *Ibid.*, 568.

all three models. For instance, each model has a core belief in the emancipation of oppressed groups, be they indigenous peoples, other oppressed peoples, or women; and all three provide models for direct action and transformation of oppressive practices.

### III. CONTEXTS FOR THIS PROJECT

#### *1. The Impact of the Government's Structural Adjustment Programme*

Despite the change from the first past the post electoral system to the mixed member proportional representation system, and a new government in 1996, it is not surprising that very little has changed in producing a more accountable, responsive and representative government. Kelsey explains that this is due in large part to the reality that since the economic reforms begun in 1984 by the Labour government, key elements of the structural adjustment programme were designed to outlast a shift in political power and have been systematically embedded against change.<sup>36</sup> These elements include:

- sale of state assets and operations;
- the deep infiltration of foreign capital;
- the binding commitments to free trade under the GATT/World Trade Organisation;
- dismantling the institutional structures of the welfare state; and
- dispersing former government functions, powers and funds across a wide range of public, quasi-autonomous and private agencies.<sup>37</sup>

Incorporating these changes into legislation, together with the common law protection of the “inviolability of private property rights ... [as against any] ... reassertion of collectivism”<sup>38</sup> by (say) indigenous peoples or the state, have played key roles in erecting further barriers to change.

The impact of the government's radical structural adjustment programme has been particularly devastating for those “who already had least”.<sup>39</sup> As Kelsey observes:

---

<sup>36</sup> *Supra* note 1, at 1-2, 384-385.

<sup>37</sup> *Ibid.*

<sup>38</sup> *Ibid.*, 354.

<sup>39</sup> *Ibid.*, 271.

The traditionally marginalised had been joined by growing numbers of newly poor. The social structure was severely stressed. Hundreds of thousands of individuals, their families and communities had endured a decade of unrelenting hardship.<sup>40</sup>

Not surprisingly, “Māori were the most marginal of the marginalised”.<sup>41</sup> Women generally also shared the burden of the structural reforms,<sup>42</sup> along with the elderly,<sup>43</sup> and children and families.<sup>44</sup>

Whether the negative impact of the government’s structural adjustment programme on Māori and women had a direct influence on the development of the Law School’s philosophy is uncertain. However, that philosophy underscored the entrenched inequalities of those groups, particularly Māori and women, who had been further marginalised by the government’s economic and structural reforms, and attempted to address those inequalities with its focus on contextualism and biculturalism. That the National government withdrew the establishment funding for the Law School only two months before the beginning of the 1991 academic year<sup>45</sup> is particularly revealing. Margaret Wilson’s analysis of this event is that:

... 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.<sup>46</sup>

## 2. *Waikato University’s Restructuring Plan - Challenging the Vice-Chancellor’s decision*

Upon arriving at Te Whare Wananga o Waikato early in 1999, I walked into a University and a Law School in structural upheaval, with the Vice-Chancellor having just recently announced his restructuring conclusions.<sup>47</sup>

---

<sup>40</sup> Ibid.

<sup>41</sup> Ibid, 283.

<sup>42</sup> Ibid, 285.

<sup>43</sup> Ibid, 287.

<sup>44</sup> Ibid, 289.

<sup>45</sup> Wilson, “The Making of a New Legal Education in New Zealand” (1993) 1 *Waikato Law Review* 14-15.

<sup>46</sup> Ibid, 16.

<sup>47</sup> Gould, B *Memorandum to all members of Management Forum - Restructuring* 20 January 1999. After a preliminary consultation process, the Vice-Chancellor had concluded that the current structure of seven schools would be reduced to four faculties. One of the proposals was that the School of Law would merge with the

Out of this uncertainty emerged several strategies for active opposition to the Vice-Chancellor's ill-considered restructuring process and proposals. The Association of University Staff of New Zealand Incorporated, Professor Margaret Wilson, Professor Wharehuia Milroy and Linda Ward together filed an action against the University and the Vice-Chancellor claiming that:

... the Vice-Chancellor has misconceived his powers, and has no such authority as he has asserted; [and] ... that in administrative law terms, the consultation which took place was not adequate.<sup>48</sup>

In that case, Hammond J found that:

the Vice-Chancellor and the Council had no power to implement a decision to reduce the University of Waikato from seven Schools of Study to four Schools without that proposal for restructuring having first been referred by the Council to the Academic Board, and the Academic Board having tendered its views on the issue to the Council. The ultimate decision would be for Council.<sup>49</sup>

Since the High Court judgment on 31 March 1999, the Vice-Chancellor appealed Hammond J's decision "that only the university's council had the power to revamp the university's seven schools into four super faculties".<sup>50</sup> It was reported that "[h]e appealed because Justice Hammond's decision had left other vice-chancellors and the tertiary education sector uncertain of the law and powers of university chief executives".<sup>51</sup> Subsequently, the University Council "passed a resolution saying it did not support appealing a court ruling which stopped the restructuring in its tracks".<sup>52</sup> Finally, in November of 1999 the Vice-Chancellor decided against appealing Justice Hammond's decision stating that "while the High Court ruling had made his job harder, there was now no point in appealing".<sup>53</sup>

Meanwhile, various meetings throughout the management structure of the University and its Schools took place to address the effects, if any, of

---

School of Management to form a Faculty of Law and Management under the leadership of the current Dean of the Management School.

<sup>48</sup> *The Association of University Staff of New Zealand Incorporated & Ors v The University & Ors*, unreported, High Court, Hamilton, 31 March 1999, CP 12/99, Hammond J, 19.

<sup>49</sup> *Ibid*, 38.

<sup>50</sup> Inglis, "University vice-chancellor lodges appeal", *Waikato Times*, 29 June 1999, 3.

<sup>51</sup> *Ibid*.

<sup>52</sup> Beston, "Gould contract queried as row erupts over legal battle", *Waikato Times*, 8 July 1999, 1.

<sup>53</sup> Inglis, "Vice-chancellor won't appeal ruling", *Waikato Times*, 25 November 1999, 3.

Hammond J's decision. The outcome for the Law School at this stage is that it will remain a stand alone, autonomous unit and will be encouraged to make administrative savings.

### 3. *The Kirikiriroa Declaration*

Over the same period, the Māori community of the University held several hui to discuss the implications of the Vice-Chancellor's restructuring process and proposals for Māori. At one of those hui, on 18-19 March 1999, at Kirikiriroa Marae, the Declaration of Kirikiriroa<sup>54</sup> was developed by the attendees (who comprised over 150 students, staff and others associated with the University), who resolved to be known as Te Whakaminenga. The Declaration sets out the collective understanding of Te Whakaminenga, that Te Tiriti o Waitangi "represents the affirmation of Māori tino rangatiratanga, ultimate authority, in Aotearoa".<sup>55</sup> It further states that:

[Te Whakaminenga] recognise[s] that the Crown and its agents presently operate on the basis of an incorrect understanding of Te Tiriti o Waitangi, namely that the Crown, in exercising Kawanatanga holds ultimate authority and that Māori tino rangatiratanga is subject to that overriding authority. ... [Te Whakaminenga] hereby state our commitment to working towards the reinstatement of our collective understanding of Te Tiriti o Waitangi.<sup>56</sup>

One of the outcomes of that hui was the formation of two working groups. One group was charged with working out an action plan to progress Te Whakaminenga's resolution that there should be two governing bodies, a Māori Council and the University Council, and two Vice-Chancellors. The other group was charged with developing an action plan to address the need for more effective educative programmes which would progress the reinstatement of Te Whakaminenga's collective understanding of Te Tiriti o Waitangi. The work of Te Whakaminenga is ongoing throughout the University and the various schools and faculties.

### 4. *The Law School's Survival in these Contexts*

In such highly political local and national contexts, and with the national policy shift from ethical values, social responsibility and moral leadership to principles of fairness, efficiency, self-reliance, greater personal choice, realism, and change movement,<sup>57</sup> the Law School's survival is perhaps a

---

<sup>54</sup> Declaration of Kirikiriroa Te Whakaminenga, 18-19 March 1999.

<sup>55</sup> Ibid.

<sup>56</sup> Ibid.

<sup>57</sup> Supra note 1, at 272.



testament to the tenacity, political acumen and commitment of its foundation Dean and staff. While the Law School has survived, questions about the development of its founding bicultural objective have been a necessary element of holding the Law School accountable, and, in doing so, shaping the future development of that objective. The next part of this article explores the role of the foundation Dean in shaping the Law School's bicultural vision.

#### IV. THE FOUNDATION DEAN'S LEGACY

##### *1. Situating her solutions within a Western-Liberal Paradigm*

From the Law School's inception, Margaret Wilson has played a significant role in the interpretation and implementation of the Law School's "original objectives of a professional, contextual and bicultural legal education".<sup>58</sup> Over nine years, Wilson's published discussion of, in particular, issues concerning the bicultural objective, the Treaty of Waitangi, and tino rangatiratanga, have revealed her underlying acceptance of the legitimacy of the unitary colonial state, its constitutional arrangements and its flagrant disregard for Māori claims to self-determination.

This acceptance is apparent in her discussion of "Māori political representation, under the New Zealand mixed member proportional representation system (MMP), as an expression of tino rangatiratanga".<sup>59</sup> In this article, Wilson discusses the "possibilities and limitations of MMP as a site for struggle for the recognition of tino rangatiratanga".<sup>60</sup> First, she asks:

If the principles on which the new MMP system was founded are the incorporation of diversity within the formal institutions of political decision-making, and if the expectation of the need to negotiate and mediate political decision-making through forming a consensus is fulfilled, it may be possible to construct a site that is willing to look at tino rangatiratanga on its own terms, that is, as a source of authority separate and distinct from the authority of Parliament.<sup>61</sup>

From reading this analysis, the following questions arise: where would that site be constructed?; who would construct it?; and whose paradigm would it be based on and in? Is it possible to "look at tino rangatiratanga on its own

---

<sup>58</sup> Supra note 45, at 17.

<sup>59</sup> Wilson, "The Reconfiguration of New Zealand's Constitutional Institutions: The Transformation of Tino Rangatiratanga into Political Reality?" (1997) 5 *Waikato Law Review* 17.

<sup>60</sup> Ibid.

<sup>61</sup> Ibid, 26.

terms” within the formal (read in Western-Liberal) institutions of political decision-making?

Wilson begins to address some of these questions when she discusses the approach of the 1986 Royal Commission on Electoral Reform to the issue of effective Māori representation and observes that:

The Commission’s approach avoided the issue of *tino rangatiratanga* in terms of a competing sovereignty, because it affirmed that there was only one sovereign, Parliament. ... Māori political representation was therefore constructed in terms of the European/Pākehā political experience. Although the Commission correctly analysed the weaknesses of the existing system for Māori political representation, it provided a European/Pākehā solution.<sup>62</sup>

Here she acknowledges the culturally-defined and culturally-specific approach taken by the Royal Commission which inevitably leads to the Western-liberal ideological position that there can only be one sovereign, Parliament. However, in her own conclusion, Wilson makes exactly the same mistake in claiming that the site of struggle for the recognition of *tino rangatiratanga* can be provided by Parliament. She concludes that:

The developments under MMP have highlighted the fragility of the recognition of the claim of Māori under the Treaty of Waitangi to *rangatiratanga*. However difficult the current political conditions for advancing the claim, I argue that it is a claim which is on the political agenda, and it is one that will eventually have to be dealt with. If Māori separate political representation can survive the current coalition government, Parliament can provide the site for the development of a process through which the Māori concept of sovereignty, *rangatiratanga*, can be given practical expression. Both Māori and European/Pākehā will have to work on their understandings of the concept of sovereignty, and the nature of the citizenship that flows from a mutual recognition of two people’s right to sovereignty within one country occupied by them both.<sup>63</sup>

Wilson does acknowledge the National Māori Congress submission in support of the retention of separate Māori representation as a “practical example of an attempt to construct the right to *rangatiratanga* *within* the context of a parliamentary democracy”.<sup>64</sup> On this basis it could be argued that, likewise, she is also situating her discussion of *rangatiratanga* *within* the same context. However, further reading and analysis of her previous articles demonstrate that the process of situating her discussion, analysis,

---

<sup>62</sup> Ibid, 29.

<sup>63</sup> Ibid, 34.

<sup>64</sup> Ibid, 31.

and solutions *within* the context of a Euro-centric, Western-derived paradigm is her *modus operandi*.

Wilson also situates herself as a “political realist”.<sup>65</sup> This tactic effectively masks her own conservatism and adherence to the status quo with these benchmark, white, male<sup>66</sup> notions of rationality, practicality and realism. By implication, views and approaches that may lead to the outcome of challenging the legitimacy of the unitary, colonial state and its constitutional arrangements are situated as politically unrealistic, impractical and irrational.

Ultimately the questions that were raised above (where would that site be constructed?; who would construct it?; and whose paradigm would it be based on and in?) are answered by implication only in the solution proposed by Wilson.

In another article about the constitutional recognition of the Treaty of Waitangi,<sup>67</sup> Wilson:

... argues that the legal recognition of the constitutional status of the Treaty of Waitangi is necessary if Māori are to attain not only reparative justice, in the guise of appropriate compensation for past wrongs, but, just as important, social and political justice.<sup>68</sup>

However, she then goes on to prescribe what this will mean for Māori by stating that:

This form of justice will, however, require Māori to be part of the decisions made by state agencies that affect citizens' rights, obligations and freedom.<sup>69</sup>

This is another illustration of Wilson's preferred solution of the dominant state's accommodation of Māori rather than any real power sharing.

---

<sup>65</sup> Ibid, 26.

<sup>66</sup> Margaret Thornton has defined “benchmark men” as those “who are white, Anglo-Celtic, heterosexual, able-bodied and middle class, and who support a mainstream religion and a right-of-centre politics” in Thornton, “Technocentrism in the Law School: Why the Gender and Colour of Law remain the same” (1998) 36 *Osgoode Hall Law Journal* 369.

<sup>67</sup> Wilson, “Constitutional Recognition of the Treaty of Waitangi: Myth or Reality?” in Wilson, M & Yeatman, A (eds) *Justice & Identity Antipodean Practices* (1995) 1.

<sup>68</sup> Ibid, 4.

<sup>69</sup> Ibid.

Wilson however does suggest that:

... if the treaty is to be taken seriously as the founding constitutional document, then some practical reality has to be given to this assertion. Legal recognition of the treaty's constitutional status would appear to be a necessary first step in that process. Considering the precise nature of the legal expression to be given to the treaty is beyond the scope of this essay.<sup>70</sup>

She then concludes by observing that:

Although including the treaty itself in legislation is unlikely to be supported by those who seek recognition of Māori sovereignty under the treaty, it does seem the most achievable outcome in the foreseeable future. It would have the advantage of enabling the whole issue of Māori sovereignty to be debated in the courts in a variety of circumstances. It would also give the courts an opportunity to judge all legislation against the provisions of the treaty to see if it conformed with its terms. Although such a measure may appear timid in the light of the overwhelming evidence in support of constitutional recognition, it may be the best that can be achieved in the current political environment.<sup>71</sup>

First, once again Wilson has masked her solution with her “practical reality speak” as discussed above. Secondly, while Wilson’s article concerns the basis for recognising the constitutional status of the Treaty of Waitangi, she concludes by suggesting that the Treaty should only be included in legislation. She does not even suggest that such legislation should be entrenched or paramount, as she relies upon her “best that can be achieved” approach.

Most disturbingly, she has again arrived at a solution that does nothing to challenge the legitimacy of the present constitutional arrangements. Instead, her solution actually entrenches those arrangements by suggesting that the Treaty of Waitangi ought to be included in Pākehā law made by Parliament, which will then be interpreted, applied and adjudicated upon by Pākehā courts with predominantly Pākehā judges: notwithstanding that the legitimacy of both institutions is highly contestable and has been consistently contested by Māori. Wilson actually acknowledges this point in noting that “including the treaty in legislation is unlikely to be supported by those who seek recognition of Māori sovereignty”.<sup>72</sup> However, she

---

<sup>70</sup> Ibid, 15.

<sup>71</sup> Ibid.

<sup>72</sup> Ibid. Wilson also discussed the issue of Māori opposition to codification of the Treaty at p 6 where she states that “... Māori have been reluctant to allow the treaty to become part of a legal system over which they have little influence or control. There has been

dismisses that opposition, preferring instead to pursue codification of the Treaty on the basis that it is “the most achievable outcome in the foreseeable future”.<sup>73</sup> This statement begs the questions: while codification of the Treaty may be an achievable outcome, is it a desirable outcome? And for whom? Or is it a further act of containment of Māori claims for tino rangatiratanga?

It is interesting to note that, in both of these articles, Wilson makes and even appears to support arguments made by Māori for self-determination and tino rangatiratanga. However, she ultimately provides a solution that reinforces the status quo with some peripheral tinkering. She does not challenge the underlying legitimacy of the colonial state and its constitutional arrangements. As such, Wilson’s vision provides very conservative and limiting outcomes as demonstrated in the previous two articles. Her solutions are far from radical and fail to grapple with the very difficult issues inherent in discussions of tino rangatiratanga, the Treaty and indigenous peoples’ claims to self-determination. At the heart of this discussion is the central issue of power-sharing and the mechanisms to achieve this, such as resource sharing, a separate Māori parliament, or a Māori veto on decision-making of the present Parliament.<sup>74</sup> Wilson’s omission even to raise these possibilities, let alone discuss them in any substantive way, is revealing, and confirms her acceptance of the legitimacy of the unitary colonial state and its self-derived constitutional arrangements.

---

an understandable fear that the mana (status) of the treaty will be diminished if it is incorporated into a legal system that does not acknowledge their rangatiratanga (authority). This was apparent when an opportunity was provided to incorporate the treaty into the Bill of Rights Act; Māori were reluctant to agree to the treaty becoming part of that act (Kelsey, 1990, 51). A document of such importance and symbolism requires the special legal status often associated with the laws containing the constitution of a country”.

<sup>73</sup> Ibid.

<sup>74</sup> See Wickliffe and Dickson, “Māori and Constitutional Change” (1999) 3 *Yearbook of New Zealand Jurisprudence* 9, for a recent and detailed discussion of models for constitutional change that are based on the Treaty of Waitangi.

However, this self-legitimizing response is an inevitable by-product of what Moana Jackson refers to as the “dialectic of colonisation”<sup>75</sup> whereby “the forces which shape the relationship between indigenous people and the state” are ignored in the process of legitimation of the “status quo as an unchallengeable given”.<sup>76</sup> As Freire points out:

The oppressors, who oppress, exploit, and rape by virtue of their power, cannot find in this power the strength to liberate either the oppressed or themselves. Only power that springs from the weakness of the oppressed will be sufficiently strong to free both. Any attempt to ‘soften’ the power of the oppressor in deference to the weakness of the oppressed almost always manifests itself in the form of false generosity; indeed, the attempt never goes beyond this.<sup>77</sup>

With this conservative, self-justifying reinforcement of the hegemonic political and constitutional institutions, structures and ideology in this country, Wilson’s vision sadly lacks the capacity to conceptualise the potential and develop the reality of either a bicultural country or even a bicultural legal education. This is sad because, as the foundation Dean, Wilson’s impact on the establishment of this Law School has been phenomenal, affecting all aspects of the development of this Law School. It is also sad, because as the current Attorney-General and the Minister in Charge of Treaty of Waitangi Negotiations, Wilson has significant power to influence, develop and address these issues in Aotearoa today. What that means for the progression of Māori claims to self-determination is alarming, but the result will not be surprising given the conservative outcomes that Wilson has developed in her scholarship on these issues.

## 2. *Wilson’s Bicultural Vision*

Wilson’s vision or conceptualisation of what the bicultural objective may mean is partially obscured in her speech at the opening of the Law School, where she warmly acknowledged the generous financial contribution and commitment made by Tainui to the Law School. However, her vision becomes evident in her response to that generous gift, when she said that:

---

<sup>75</sup> Jackson, “Justice and political power: Reasserting Māori legal processes” in Hazlehurst, K (ed) *Legal Pluralism and the Colonial Legacy – Indigenous experiences of justice in Canada, Australia, and New Zealand* (1995) 244.

<sup>76</sup> *Ibid.*

<sup>77</sup> Freire, *supra* note 27, at 21. I thank Stephanie Milroy for her very helpful comments on an earlier draft of this article which highlighted the connection to Freire’s discussion of “false generosity”.

[i]t is now the task of the School to justify that faith within the School. We intend to do that through the graduation of Maaori graduates, undertaking research that will assist the Iwi of the region to pursue their rights under the Treaty, and contributing to the debate on the development of a legal system that reflects the values and aspirations of both Maaori and Pākehā cultures.<sup>78</sup>

Later on in her speech she observes that Māori, women and the unemployed have been marginalised and excluded from decision making, and concludes that “[i]t is time to share the responsibility of power and invite in those previously excluded”.<sup>79</sup>

These statements illustrate two things: first, that Wilson’s vision of how to address the exclusion of Māori, women and the unemployed is confined to strategies of accommodation and reflection of these marginalised groups within the dominant legal and decision-making systems; and secondly, that she assumes that marginalised and excluded groups like Māori and women wish to be “invite[d] in” and wish to develop the present legal system rather than radically transform it.

Once again Wilson delivers a conservative, ‘let’s tinker with the system’ response to fundamentally flawed systemic and institutionalised oppression of Māori and women. That this was considered a sufficient or adequate response to the commitment and financial gift provided by Tainui illustrates Wilson’s conservatism and adherence to the status quo.

### *3. Biculturalism as the Status Quo plus Māori Learning about Māori Issues*

Wilson has been willing to identify and name overt racism in relation to the Law School. For example, she recalls that as the Dean she had received requests for reassurance that the Waikato LLB was of the same standard as that of other law schools, despite the number of Māori students and the Law School’s commitment to develop a bicultural approach to legal education.<sup>80</sup> In response to these criticisms and the questioning of the competency of Māori students, Wilson states that “[t]his is a form of racism and must be condemned”.<sup>81</sup>

---

<sup>78</sup> Wilson, M “Speeches from the Opening of the School of Law” (unpublished speech, Waikato Law School, 1991) 10.

<sup>79</sup> *Ibid.*, 13.

<sup>80</sup> *Supra* note 45, at 19.

<sup>81</sup> *Ibid.*, 21.

Wilson also appears supportive of Māori challenging the legal system, but only in regard to the existing legal system's exclusion of Māori. For instance she states that:

[t]he purpose of [the School's bicultural] approach is to enable students more effectively to challenge the existing legal system's exclusion of Māori, while also enabling them to use the system, where possible, for the benefit of Māori. A difficult task is facing this generation of young Māori lawyers, who must be both proficient users of the system and continually challenging it.<sup>82</sup>

However, these outwardly supportive comments fail to mask Wilson's underlying belief that the Law School's bicultural commitment means little more than adding some Māori component to the present inequitable situation. This belief is apparent in her discussion of "the reconciliation of the demands of professionalism and biculturalism".<sup>83</sup> She concludes that:

It may be that they are irreconcilable, but all the same progress may be made in acknowledging the legitimacy of Māori values and lore in the context of Māori life.<sup>84</sup>

There are two points I want to make about this statement. First, what is suggested by Wilson's statement that the Law School's goals of biculturalism and professionalism are or may be irreconcilable? One reading is that biculturalism is not professional and/or vice versa.

Secondly, why does Wilson only locate the legitimacy of Māori values and lore "in the context of Māori life"? Māori do not require Pākehā to legitimate Māori values for them. What we require is that Māori values, law, aspirations, whakaaro and self-determination are recognised as legitimate and valid *per se*, in the context of Aotearoa. This statement illustrates Wilson's apartheid-like approach to the bicultural commitment.

Further, in response to Māori students' criticism of the Law School's attempts to implement its founding objective, Wilson patronisingly notes that:

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

---

82 Ibid, 21-22.

83 Ibid, 24.

84 Ibid.



School in New Zealand that has seriously attempted to redress the injustices inflicted on Māori.<sup>85</sup>

Wilson's statement that this Law School and University are the only University and Law School in the country seriously to attempt "to redress the injustices inflicted on Māori" is self-congratulatory and demonstrates that Wilson clearly failed to hear those Māori students' criticisms and to take them seriously.

How does Wilson consider that the Law School and the University have seriously attempted to redress the injustices inflicted on Māori? By including Māori content and perspectives, employing Māori staff, and admitting and graduating Māori students? According to whose assessment are the Law School's and University's attempts to be measured? Pākehā or Māori?

Comparing the Law School's and University's bicultural approach to other Law Schools and Universities is totally inappropriate and only reveals the appalling and sub-standard record of those other Law Schools and Universities. With its commitment to provision of bicultural education, this University and this Law School must set a new standard that addresses and reflects the aspirations and concerns of Māori. So it is far from ironic that Māori should criticise this Law School and University, rather in the wider context of Māori and Indigenous Peoples' projects of self-determination, it is to be expected.

Later in the article, Wilson also attempts to explain the Law School's response to an incident in 1991, when two Māori students wrote one question of their Public Law A examination paper in te reo Māori.<sup>86</sup> In her explanation, first Wilson notes that "[b]iculturalism was interpreted as bilingualism by these students".<sup>87</sup> This statement reflects the monocultural and Western-derived pre-occupation with separating and categorising components of an entity. For Māori, te reo Māori is an integral component of who we are and as such it cannot be separated from any consideration of biculturalism.

---

<sup>85</sup> Ibid, 22.

<sup>86</sup> Public Law A is the constitutional law paper and is a compulsory paper for second year LLB students. This was a controversial issue at the time as the Law School and the University did not have a policy or process for dealing with assessment provided in te reo Māori. This particular situation galvanised the University and Law School into action to develop such a policy.

<sup>87</sup> *Supra* note 45, at 22.

Wilson then makes the fatal mistake of attempting to align herself and the Law School with the Māori students and their challenge. She states that:

[i]n essence the differences [between the challenge issued by the Māori students and the Law School's position] 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 ...<sup>88</sup>

Freire has described this phenomenon as cultural invasion. He explains that:

Cultural invasion, which serves the ends of conquest and the preservation of oppression, always involves a parochial view of reality, a static perception of the world, and the imposition of one world view upon another. It implies the 'superiority' of the invader and the 'inferiority' of those who are invaded, as well as the imposition of values by the former, who possess the latter and are afraid of losing them.<sup>89</sup>

Perhaps Wilson's most glaring example of assimilative adherence to the status quo is her joint statement with Anna Yeatman that:

In general, biculturalism may be said to represent some kind of accommodation on the part of white settler (Pākehā) dominance to Māori claims on justice.<sup>90</sup>

While one reading of this joint statement may reflect the authors' perceptions of how biculturalism is considered by the dominant culture in Aotearoa, another reading, which is consistent with my preceding analysis of some of Wilson's other scholarship, is that the authors themselves consider biculturalism to amount to accommodation. This is particularly concerning due to Wilson's significant roles as first the foundation Dean of Waikato Law School and now as the current Attorney-General and Minister in Charge of Treaty of Waitangi Negotiations.

## V. TOWARDS LIBERATION

*He aha te mea nui o te ao?  
He tangata, he tangata, he tangata.*

This whakatauaiki captures the essential component in the future direction and development of the Law School. People will create, contribute to, progress and realise the myriad of aspirations that they seek. At this Law

---

<sup>88</sup> Ibid, 23.

<sup>89</sup> Supra note 27, at 129.

<sup>90</sup> Wilson and Yeatman, supra note 67, at viii.

School, those people are the staff and students who arrive and leave, at different times, in the life of the school. As such, we are the critical part in any successful development and realisation of this Law School's aspirations, including of course, the commitment to provide a bicultural legal education. While this may sound obvious, trite even, it is fundamental and requires unequivocal restatement. As Patricia Monture-Angus has observed in her discussion of Canadian legal education:

it is disappointing to note that change within law faculties appears to rely on the initiative of individual professors and not on the commitment of the institution as an institution.<sup>91</sup>

What the bicultural commitment means explicitly is, as many commentators have documented, a highly contestable concept.<sup>92</sup> However, its contestability is irrelevant and a useful smokescreen for apathy and inaction. For of course, if no-one can explicitly define what exactly this bicultural commitment is or may mean, then how can institutions be held accountable, and their performance of that commitment be measured. In some ways, too much of our energy has been directed to answering the wrong questions, that is: what is biculturalism?; is this Law School bicultural or providing a bicultural legal education?; how can it become bicultural? Whether the project is called bicultural legal education or meaningful education for Aboriginal Peoples is irrelevant. What counts is that we are consciously and deliberately engaged in the struggle for freedom from inequality and oppression for all peoples and groups.

While the bicultural commitment does have many meanings to many people, what is striking is that Māori tend to see the bicultural commitment as indicative of the Law School's commitment to fight alongside Māori for the wider indigenous peoples' goal of self-determination.<sup>93</sup>

Not surprisingly, this means that Māori see this Law School as not just a site for struggle, but also an ally and advocate for Māori self-determination. In contrast, part four has demonstrated that the foundation Dean's conceptualisation of the bicultural commitment means little more than what Graham Smith has described as:

---

<sup>91</sup> Supra note 19, at 114.

<sup>92</sup> See Milroy, supra note 11, at 18-69; and Wilson and Yeatman, supra note 67.

<sup>93</sup> See Linda Smith's description of the indigenous peoples' goal of self-determination at supra note 5 and accompanying text.

*culturalist* [or] ... traditional liberal type intervention strategies such as adding Māori staff, adding Māori dimensions to existing courses, adding tokenistic pedagogical measures such as marae visits.<sup>94</sup>

A glaring gap is revealed between the foundation Dean's conceptualisation of the bicultural commitment and that of Māori as described in research conducted by past and current staff and students.<sup>95</sup> What is to be done about that gap is this Law School's task in its future development and expansion of the bicultural commitment.

### *1. Milroy's Suggestions for Action*

In her landmark thesis, Milroy presents a number of suggestions for action to further the development of the bicultural vision of the Law School.<sup>96</sup> The basis of those suggestions is Ranginui Walker's notion of the:

establishment of kaupapa Māori ... [by increased numbers of Māori staff and students] to achieve genuine social transformation from monoculturalism to biculturalism.<sup>97</sup>

Milroy suggests that this basis must be extended by: ensuring that Māori staff are appointed at higher levels, and that they obtain a "greater share of decision-making power";<sup>98</sup> significant Māori content in all courses; and development of parallel teaching spaces for Pākehā and Māori students, which would facilitate the creation of culturally appropriate pedagogical space and practices for Māori, while at the same time Pākehā (or tauīwi) lecturers could address the issues that arise for Pākehā (or tauīwi) students.<sup>99</sup>

Ultimately, Milroy calls for the establishment of a "kaupapa Māori programme specifically for Māori students, run by Māori staff: education by Māori for Māori".<sup>100</sup> She envisages that such a programme would be

---

<sup>94</sup> Smith, G "Tane-nui-a-rangi's Legacy ... Propping up the Sky ... (Kaupapa Māori as Resistance and Intervention)" a paper presented at the NZARE/AARE Joint Conference (1992) 29.

<sup>95</sup> *Supra* notes 11, 13 and 18, and accompanying text.

<sup>96</sup> *Supra* note 11, at 96-105.

<sup>97</sup> Walker, R "Liberating Māori from Education Subjection" *Matawhanui hui-a-tau* (1991).

<sup>98</sup> *Supra* note 11, at 97.

<sup>99</sup> *Ibid*, 97-99. Also see Mikaere, "Taku Titiro: Viewpoint Rhetoric, reality and Recrimination: Striving to Fulfil the Bicultural Commitment at Waikato Law School" (1998) 3(2) *He Pukenga Korero* 12.

<sup>100</sup> *Supra* note 11, at 99.

developed out of the needs and wants of the Māori students and their communities, and so culturally appropriate decision-making and accountability systems would also need to be developed.<sup>101</sup> Alongside this programme, Milroy identifies the need for “ongoing and intensive research into Māori law and issues which could then be incorporated into the Māori programme”.<sup>102</sup> She considers that such research:

should include researching ways in which the existing law can be transformed into an appropriate system for Māori ... [and] ... the effect of Pākehā law on Māori.<sup>103</sup>

## 2. *Milroy's Action Plan*

To achieve these aims, Milroy proposes an action plan, which is summarised as follows:

1. the Māori staff should form a unit with clearly defined duties such as “admissions to the Law School, liaison with the Māori community, recruitment of Māori students, staff appointments, and the kaupapa Māori research programme”;<sup>104</sup>
2. curriculum content review by the Māori unit should be conducted to “establish the levels of Māori content in the courses”;<sup>105</sup>
3. the Law School should instigate regular data gathering on Māori students’ performance to establish “reasons for drop out or failure”<sup>106</sup> where this occurs;
4. orientation programmes should be established for Māori students “to come to grips with the reality of the Law School as it currently is”,<sup>107</sup> and for Pākehā students to develop their understanding of the bicultural vision of the Law School;
5. the University should provide formal training to Māori and Pākehā staff in Māori language and culture, and where necessary provide teaching or administrative relief to encourage staff to take up this opportunity;
6. the Law School must develop a medium term plan with specific goals and timeframes by which those goals must be met. Such a plan must be developed with the Law School’s communities, and should address:

---

<sup>101</sup> Ibid.

<sup>102</sup> Ibid.

<sup>103</sup> Ibid.

<sup>104</sup> Ibid, 102.

<sup>105</sup> Ibid.

<sup>106</sup> Ibid.

<sup>107</sup> Ibid, 103.

sharing of decision-making powers, resource allocation and the creation of the kaupapa Māori programme for both teaching and research ... [the] barriers to achieving the[se] objectives as well as the strategies for overcoming such barriers<sup>108</sup>

So far steps 1, 3 and 5 have and are being developed or implemented on an either formalised or ad hoc basis, however the Law School is still grappling with steps 2, 4 and 6 and yet to implement any of these in a substantive fashion.

### 3. Further Suggestions

Patricia Monture-Angus has developed an inexhaustive list of ways that Law Schools as institutions can begin to address racism. As this research project has confirmed, racism was identified by Māori staff and students,<sup>109</sup> and also by the foundation Dean, as a significant obstacle in the Māori students' experience of the legal education provided by this Law School. That this is so in a Law School aspiring to provide a bicultural legal education is even more alarming. However, it is a reality that both staff and students must continue to address. For, as Monture-Angus contends:

Law schools must begin to affirm the message that racism will *not* be tolerated in any circumstances or under any conditions. There are a number of ways in which this message can be sent: institutional financial support for 'minority' initiatives, including scholarships (rather than continuously using this type of program as a source of outside funding), immediate academic sanctions against students who engage in racist activity and clear policies which set out these sanctions, careful attention to ensure that so-called special programs do not become ghettoized but are seen as central to the law school program (that is, the formal rejection of the 'missionary' approach to legal education), administrative action (as opposed to the usual inaction including the apology for racist incidents) which supports the perceptions of 'minority' students and professors, the hiring of more 'minority' professors and support staff, an ombudsperson, sympathetic faculty which means a faculty educated on issues of racism, inclusive curriculum development, the reassessment of the admission criteria ... and the inclusion in the law schools of symbols to which we identify.<sup>110</sup>

Monture-Angus also provides a list of other initiatives that address participation issues. They include:

---

<sup>108</sup> Ibid, 104.

<sup>109</sup> Supra notes 11, 13 and 19 for discussion of these issues.

<sup>110</sup> Supra note 19, at 115.

establishment of clinical programs. Existing law clinics should embrace the concerns and desires of local Aboriginal communities. This should be happening in a systematic and formalized way. Further clinical programs could be developed to address the over-representation of Aboriginal people in the criminal justice system .... Issues of self-government from a traditional Aboriginal perspective demand research now and could be incorporated in existing clinical and community programs. Programs in poverty law would also seem to bear a significant relationship to Aboriginal Peoples and the specifics of our experience should be incorporated into these programs.

Graduate studies programs in law need desperately to be developed, and Aboriginal involvement in graduate studies needs to be encouraged.<sup>111</sup>

Some of Monture-Angus' initiatives overlap with the suggestions made by Milroy. Together, these suggestions provide enough ideas to develop a medium-long term plan for the Law School's fulfilment of its bicultural commitment. There are only two aspects of the strategies for liberating action that I wish to emphasise, that is: first, we must develop a medium-term plan for implementation of these strategies; and secondly, we must continue to act with urgency.

## VI. CONCLUSION

In the ideal world, the Law School would attract self-reflexive Māori and Pākehā (or tauīwi) who were actively engaged in oppressed peoples' projects of liberation from oppression. All of these people would be active practitioners of a transformative model of education. They would all be bilingual, and maybe even multi-lingual. In a utopian vision, they would be truly bicultural. The necessary pre-requisites to achieve this utopia are: people; capacity to see the existing inequalities; and commitment to struggle to transform those inequalities.

It is inevitable that Māori must and will lead such a journey in Aotearoa. For, as Freire has pointed out, it is the oppressed who can see and name the oppression, as they have lived it fully. Through this process of seeing the reality of our lives, we must ultimately face the source of oppression with the sole purpose of transforming ourselves, our lives and the fundamental basis of our inauthentic existence.

In part two of this article, I situated myself, to bring to this project who I am. I also briefly outlined three theoretical bases for this article: an indigenous research agenda; transformative theory of action; and feminist critique of how knowledge is valued.

---

<sup>111</sup> Ibid, 116.

In part three, I set the national and local political scene for the establishment and development of the Law School and its founding bicultural objective. At a national level, this section briefly touched upon the key elements of the government's structural adjustment programme and its detrimental impact on Māori and women in particular. At the local level, there have been various challenges to the University's restructuring plans, by the staff and its union who took a successful action to the High Court. Further, the Māori community, Te Whakaminenga, have also issued their wero to the University and are continuing to strategise and develop governance models and processes, and Treaty of Waitangi education programmes, with the ultimate aim of transforming this University from the monocultural institution that it is currently to one which is truly bicultural.

Part four presented my critique of Margaret Wilson's scholarship on the Treaty of Waitangi, tino rangatiratanga and the bicultural objective. I unmasked Wilson's conservative, patronising adherence to the status quo and her limiting vision which fails to challenge the legitimacy of the dominant Western-liberal constitutional, political and legal paradigm. Wilson's bicultural vision was explored and I argued that Wilson adopts an "add-on" approach of status quo plus Māori learning about Māori issues.

Finally, part five gathered together some of the ideas and plans of action developed by Milroy, Monture-Angus and Mikaere for the journey of liberation. I emphasised that what is needed now is, first, a medium term plan for development of the Law School's bicultural commitment, and secondly, action.

Māori students and staff, since the inception of the Law School, have critiqued its attempts to develop the bicultural objective. In doing so, we have engaged in the process of change and action, both of which are necessary for the development of an emancipatory model for education, and, in particular, bicultural education. While this has been painful at times, it was also inevitable in a country intent on suppressing its colonial roots. The bicultural objective is not just a site for struggle, it is symbolic of a much bigger project of transformation and liberation from oppression. As such, despite its many shortcomings, the bicultural commitment and its accompanying challenges continue to provide a way forward.

### *Glossary of terms*

hui (gathering)	wero (challenge)
kaupapa (purpose)	whakaaro (ideas)
taiwi (non-Māori)	whakatāuki (proverb, saying)



## BOOK REVIEWS

AUSTRALIAN COMMERCIAL LAW (Twenty Third Edition), by Clive Turner, Sydney, Law Book Company, 1049pp. New Zealand price \$97.80 plus gst.

Clive Turner's book is a welcome addition for readers seeking more than just a discourse on the traditional areas of commercial law in Australia. The book is a valiant attempt to marshal, in one handy volume, subject matter that the reader would normally find by referring to a number of texts.

Despite the size and detailed contents of the book, the presentation of the commentary is admirable and designed to be user friendly. There is good use of specific cross-referencing throughout the text to topics and page references where related material has been discussed either at a prior or subsequent point in the book. There is a very handy five page glossary at the beginning of p xci of foreign – mainly Latin – terms used in the book. Each of the chapters begins by listing the main headings and page references within the chapter where discussion under the respective headings begins. The headings in the body of the chapter are in bold text. Each main heading in the text is broken down into sub-headings under which the text of each chapter is presented. Straight after the list of main headings at the beginning of each chapter is an introductory paragraph headed "Introduction". These introductions accurately encapsulate what the chapter seeks to convey to the reader. At the end of the text in each chapter is a list of further reading references that includes specialist and in some cases leading texts in the particular area. For example Chapter 21 on 'Bailments' at p 489 refers in its commentary to Professor Palmer's classic text on *Bailments* which is also listed at the end of the chapter in the list for further reading. Also at the end of each chapter, where appropriate, is a list of Internet sites and journal references for access by interested readers.

The book begins with a fairly full introduction to the Australian legal system in the only chapter in Part One. The introduction deals with the essential ingredients of Australia's constitutional and legal system. It discusses subject matter under headings which include the nature of law, the Australian constitutional system, the sources of law, the doctrine of precedent and the hierarchy of courts in the judicial system and finally alternative methods of dispute resolution. To the New Zealand reader, the discussion of Australia's constitutional arrangements and Federal Court system present an interesting contrast. The introductory chapter presents a wealth of useful background material that provides the reader with a context in which the remaining Parts and 31 chapters of the book unfold.

Part Two of the book contains the next 12 chapters and deals with the various elements of contract law. Usually material found in this Part is in a separate specialist contract law text and a commercial law text assumes that a reader of commercial law has prior knowledge of the principles of contract law. However the inclusion of a treatise on contract law in a commercial law text is another hallmark of Clive Turner's book. Not only does Part Two serve the practical purpose of being a ready reference if needed, but has a more deliberate purpose in relation to the central theme of the book which is a discourse on commercial law itself. The author explains the link between contract law and commercial law in the introduction to Part Two as follows:

The law of contract is the basis of commercial law. Much of the law governing the sale of goods, agency, negotiable instruments, insurance, partnerships and so on discussed later in this work concerns the application of general contract principles to specialised areas of commercial law.

Due to the predominantly common law landscape of contract law in Australia, extensive case law is referred to, and a number of decisions are examined in some detail. The discussion of a case is highlighted in bold with a vertical line running parallel to the text of the case in the margin marked with the notation "case" to indicate that an actual case reference is being discussed. This notation is particularly helpful when cases are discussed successively in bold type and can be distinguished from each other by the parallel vertical lines and notation "case" in the margin. It also serves to distinguish the text of the case from the author's commentary. This method, of distinguishing cases that are discussed, flows throughout the book.

Part Three of the book deals with commercial law matters, beginning with Chapter 14 on Agency. This is helpful in understanding Chapter 25 on Insurance, in its discussion of the general principles of agency law in regard to the liability of insurers for their agents and employees. Chapter 15 deals with the law on sale of goods, whether the contract is a commercial contract or a consumer contract and outlining, where appropriate, statutory provisions which imply conditions in consumer contracts.

A chapter on the law of electronic commerce appears as Chapter 16 with a discussion of the Commonwealth Electronic Transactions Act 1999 which came into operation on 24 March 2001. It is on this legislation that New Zealand's Electronic Transactions Bill is largely based. The chapter helpfully discusses issues which include encryption, digital signatures and authentication, electronic banking and privacy as well as data protection initiatives. There is also discussion on conflict of laws and internet jurisdiction.

Chapters 17 to 24 deal with consumer protection, restrictive trade practices, the law in relation to credit, guarantees, bailments, personal and real property, and negotiable instruments. The final and second largest chapter, on the core commercial law component in Part Three, is a 55-page chapter on insurance law and is a reflection of the practical importance of the insurance of risk in commercial transactions.

Part Four of the book contains chapters which deal with partnership and company law. Partnerships and companies are perhaps the most commonly used structures for setting up and engaging in trading operations. The commentary on these two types of business structures, provides a fairly good account – particularly chapter 27 on companies – of the law relating to these business organizations without the reader having to access separate works on partnership law and company law.

Part Five, entitled “Allied Areas of Law” is recognition that commercial transactions occur in a practical context where the law of tort for instance exists to provide redress in cases of unlawful interference with an individual’s property and economic or commercial interests. Trusts today play an increasingly prominent role in the management of commercial affairs. Intellectual property law can no longer be regarded as a field devoid of its direct connections to commercial transactions. Design law which seeks to protect industrial designs, and trade marks law which protects a trader’s individual mark or symbol, are indispensable components of commercial dealings in the modern trading environment. Bankruptcy law is heavily resorted to in the case of partnerships which do not enjoy a separate legal identity and where the partners as individuals are subject to bankruptcy law in the event of insolvency. The need to distinguish the partner’s private personal estate in bankruptcy as distinct from the partnership estate becomes important for the purposes of meeting creditor claims for both categories of estate. Finally, the significance of employment law in modern day business activity is brought into sharp focus in the last chapter in the book.

Overall, the book is very readable and engaging despite its sheer volume, complexity, depth and range of subject matter. There is a sense of lingering reverence at the pace and extent of developments in Australian commercial law. The book will certainly interest Australasian practitioners and scholars wishing to keep abreast of developments across the Tasman in the challenging area of Australian commercial Law.

JOEL MANYAM\*

---

\* Senior Lecturer in Law, University of Waikato.

COMMERCIAL LAW IN PRINCIPLE, by Helen Ryan, Andy Gibson, Sophie Rigby and Gary Tamsitt, Sydney, Law Book Company, 2001. New Zealand price \$60.75 plus gst.

This is the first edition of a most welcome study companion to accompany Clive Turner's *Australian Commercial Law* (hereinafter referred to as the "Turner Text"). Although directly modelled on the Turner Text, this book has sufficient flexibility to enable it to be used with any textbook on commercial law. While the student seeking to excel in the area of Australian law on commercial matters may feel engulfed by the Turner Text, the companion serves as a lifeline. It provides a useful framework for methodically following through the detailed contents of the Turner Text. The companion serves as a sieve enabling the reader to glean the nuggets within each chapter with a view to mastering their application by having to answer practice questions. The singular objective of the companion is to facilitate the learning of commercial law by practically applying its principles. The companion distils the points which students need to focus on, in order to follow and competently deal with commercial law principles.

It is worth noting that the Turner Text, now in its 23rd edition, has for the first time had a companion published. This is indicative of the increasingly significant role of commercial activity and efforts at its regulation. It is also recognition of the growing complexity of the subject matter and the need therefore to assist students seeking to gain mastery of its principles and rules.

This book is a vivid reminder of law as a discipline and an area of study. In order fully to appreciate its operation, its various principles need to be applied to varying fact situations. In this vein, the book serves as an excellent tool for revising for examinations. Thus, at the end of each of the chapters, is a set of practical questions under the title, "Practice Questions", which are designed to facilitate learning by doing or application. The set of "Practice Questions" is then followed by "Answers to Practice Questions" so that each practice question asked is then answered. It is this feature of providing answers to accompany the questions that considerably enhances the value of the book to the student. It provides the student with a degree of choice when assessing his or her level of understanding. Instead of answering all the "Practice Questions" in each set, the student is able to choose particular questions which can be attempted. The responses can then be checked against the answers provided and thus serve as a useful means of self-evaluation.

The book is also useful as an aid in preparing students for lectures and tutorials. For lectures, students are assisted by the summaries at the beginning of each chapter which provide a template for lecture material to follow. Besides the "Practice Questions" and answers provided as helpful aids for tutorial preparation, there is a list of "Tutorial Questions" accompanying most of the chapters. The "Tutorial Questions" are divided between "Discussion Questions" and "Problem Questions". The "Discussion Questions" seek to focus students' attention on the sub-topics raised for discussion. Having captured the students' attention on the subject matter, the book provides "Problem Questions" which directly test their skill and aptitude in answering more engaging questions.

Another distinct strength of the book is its deliberate focus on examination technique. The all-important warning is clearly conveyed that first and foremost students must carefully read the question and understand what is being asked. Having followed this preliminary warning, the student is then introduced to a template for formulating a coherent answer by identifying the relevant facts, law and legal principles, briefly stating the law, applying the law to the facts, and coming to a conclusion. There is also a reminder of the nature of closed-book and open book exams. The skill of answering questions is conveyed within the context of timeliness. The pitfalls of open-book exams are consequently highlighted with the warning to treat them as closed-book exams, using material taken into the exam only to check a candidate's answers after having written answers to the exam questions. This provides help particularly to the distance learner who does not have access to lectures, tutorials or other forms of close interaction with the lecturer, tutor or other students.

Each chapter begins with a list of sub-topics to be discussed, accompanied by the appropriate page reference within the chapter at which they are to be found. This is followed by reference to appropriate reading material which invariably is the correlative chapter in the Turner Text. This direct linkage helps the student in identifying parts of the Turner Text that relate to appropriate portions in the Companion. The appropriate reading reference is then followed by a list of aims for each chapter. This is useful in breaking down material in a chapter into its component parts, thus enabling the reader to focus on smaller and particular aspects of each chapter. This makes the overall understanding of the whole chapter a much more manageable and indeed rewarding task. Each chapter also has a "Guide to Problem Solving" ('the Guide') which comes immediately after the contents of each chapter and immediately before the list of "Practice Questions". The Guide neatly encapsulates the chapter and highlights various aspects of its contents with which the student reader needs to become particularly familiar. So, for

example, in regard to chapter 1, the reader is informed of the constitutional and legal system in Australia. Accordingly, the Guide alerts the reader that questions based on the first chapter in the Turner Text will typically be based on issues such as jurisdiction to legislate, statutory interpretation, case law and dispute resolution.

A distinctive feature of the Guides is the very helpful manner in which they crystallise a large and rather complex body of law in an area by providing a number of salient points. The Guide in Chapter 2 is a prime example. It alerts the reader to the five main types of questions likely to be raised in dealing with any aspect of contract law. These questions provide mental hooks on which the voluminous detail of contract law can be methodically hung. The questions cover whether the plaintiff and the defendant are in a contractual relationship, whether the plaintiff can get damages for breach of contract, whether the plaintiff can “get out” of the contract, whether the plaintiff can end the contract, and whether there are alternative remedies that the plaintiff may pursue. These five points serve as an attempt to encapsulate the law of contract contained in just over a third of the Turner Text. The five points also illustrate the flexibility of the book as a tool for getting a grasp of contract law in other jurisdictions. Contract law generally is laden with its particular concentration of case law, and this five-point construct helps pigeonhole what can otherwise appear as an unwieldy body of case law.

Chapter 2 contains a commendable list of 24 terms or phrases that the reader is most likely to encounter in studying contract law. This is an invaluable feature, especially when the Turner Text proceeds on the premise that a good understanding of commercial law principles demands as a prerequisite a sound grasp of contract law. The use of “terminology sections” is however very rare throughout the book, and is contained in only four other chapters.

The 32 chapters are followed by a table of cases with references to paragraph numbers within the text where they are discussed or referred to. This is followed by a Table of Statutes which outlines relevant Commonwealth and State Statutes. There is also listed the United Kingdom Contracts (Rights of Third Parties) Act 1999. The book concludes with an index containing references made to paragraph numbers rather than to page numbers within the text. The system of page numbering throughout the whole book is in terms of page numbers referable to the number of a particular chapter. Thus, for example, Chapter 25 on ‘Insurance’ begins on page 25-1 and ends on page 25-3.

Another important aid employed in presenting the contents of the book and indirectly the details of the Turner Text is the liberal use of diagrams, flow charts and tables. For example, the introductory chapter provides diagrams on the areas of legislative jurisdiction reposed in the Commonwealth and State Parliaments, the approach to statutory interpretation under the Acts Interpretation Acts., the Australian court hierarchy, and the nature of civil legal proceedings and alternative dispute resolution mechanisms. The immense value in using diagrammatic illustrations or tabulated forms for conveying legal concepts is portrayed by the "Guide to Problem Solving" section in Chapter 7. The Companion does not have any tables or diagrammatic illustrations for Chapter 13 on Restitution, Chapter 26 on Partnership and Chapter 32 on Work Place Relations. Despite this, one is left with the distinct impression that effective use of the Turner Text and Companion, in tandem, leaves little room for any lingering doubts about the contents of any chapter.

The tables and figures serve as ideal resource material for lecturers in contract or commercial law classes. The tables and figures used certainly make this book an attractive teaching aid as well. It is also worth mentioning that additional teaching aids that are available are PowerPoint slides for lectures and a Teachers' Manual that includes answers to problems, supplementary questions and lecture outlines.

The book provides several learning options. Those that find that a mere reading of the Turner Text is sufficient before attempting to answer questions on the particular chapter in this companion can do so. Others who prefer to read relevant chapters in this book, including the visual aids in each chapter in addition to the Turner Text, are also catered for. Still others may, on reading the Turner Text, only wish to examine the diagrams and illustrations in this book as a means of consolidating what they have read.

This book lends itself to the student reader in another most useful way. The Turner Text is voluminous and this companion acutely recognises this by the elaborate degree to which it makes cross-references to the Text. The cross-referencing is manifest on at least three levels. First, there is referencing in various chapters of this book to their counterparts in the Turner Text. Secondly, there is referencing in this book to other chapters within the Turner Text. Finally, there is referencing in chapters in one Part of the Turner Text to another Part of the Text. It is this final type of cross-referencing that closely knits the five Parts into a complete whole considering the voluminous nature of the work. One other welcome form of cross referencing is the mentioning of a case citation in this book and then a reference to the exact page in the Turner Text where it is discussed and on

occasion at some length. Due to the size of the Text, these examples of detailed cross-referencing enhances, in considerable measure, the value of the Text and this companion to the reader.

This book is invaluable as a self-study guide for students seeking to excel in the area of commercial law. Quite detailed subject matter is made manageable, and the focus is one of helping the student to master technique rather than content. This is undoubtedly the singular strength of the book and will be useful to student, lecturer and academic alike.

JOEL MANYAM

A GUIDE TO BUSINESS LAW 2001 (Fourteenth Edition) by Warwick Dowler and Christine Miles, Sydney, Law Book Company, 624 pp. New Zealand price \$89.50 plus gst.

The book's title should serve as a salutary reminder to the serious law student or practitioner that this is not a specialised text book on any of the range of business law topics it seeks to address. The book seems to be aimed primarily at students reading towards a Diploma or Certificate in Business Studies or a Diploma in Accounting that requires a degree of familiarisation with business law concepts and principles. Indeed the Preface states that this is a useful book for business law subjects in courses such as management, advertising, retailing and other business courses. The book is limited in scope in that its discussion of the law is primarily that of the Commonwealth of Australia and the State of New South Wales.

Despite these caveats on its contents, there is much that the book can be commended for, particularly as a guide for first year law students and for the reader with a general interest in law. There are lessons for the academic in the legal aspects covered, and also tips on how to present legal educational material so as to maximise learning and understanding.

There are seven pages devoted to the contents' section of the book which consists of 25 chapters. Each chapter, as listed in the contents, has a main heading which in turn is helpfully broken down into logical sub-headings which serve as valuable signposts to the reader of what may initially be quite unfamiliar subject matter. Consistent with the book's primary focus of aiding students to master exam technique is a nine-page section which follows the contents pages entitled, "Answering legal questions". This section is invaluable for first year law degree students on the types of questions in law exams and how each type should be answered.



Following this preliminary section on exam technique are the 25 chapters of the book. To assist the reader, the text of each chapter begins by re-listing the sub-topics to be discussed and page references within the chapter where the commentary begins. This is followed by a list of learning outcomes listed in bullet point form providing the reader with a sense of focus on what to expect from each chapter. Each chapter concludes with revision questions and model answers, enabling the book to be used as a self-study manual.

After the contents of the last chapter, there is an 11-page glossary of various legal words and phrases which serves as a helpful aid to the student seeking to understand the basics of business law. The glossary is followed by a list of useful contacts and web sites, a table of cases, a table of statutes, and finally the index which has references to appropriate paragraph numbers in the text rather than to respective pages.

Chapter one provides a snapshot of the Australian legal system, discussing its history and continuing evolution. Sources of law are discussed, namely, statute law and judge-made law and the relationship between the two. Also discussed are the principles of statutory interpretation, the doctrine of separation of powers, and international law and the impetus it provided for the landmark decision in *Mabo*. The classification of law into public and private law is discussed and helpfully illustrated by a diagram.

Chapter two continues the introductory theme with the focus being Australia's legal institutions. The reader is introduced to the adversarial nature of court proceedings, the New South Wales justice system and the federal legal system. The doctrine of precedent, the jury system and the legal profession are additional topics introduced to the reader, as well as coverage albeit briefly of the Court system in States and Territories outside New South Wales.

Chapter three contains subject matter much closer to the theme of business law, as it outlines the various types of entities through which trading activities can be conducted. The chapter is an outline of these legal entities and distinguishes between them on the basis of the non-corporate and corporate divide. There is a useful diagram highlighting the non-corporate entities namely sole trader, partnership, trust and unincorporated association.

Chapter four serves as a significant introduction to a core component of the book which is the law of contracts. It provides an overview of the law in this area, aspects of which form the subject matter of subsequent chapters. For the newcomer, the elements required for a valid contract are listed and well

explained. Matters regarding enforceability and validity, discharge of contract, rescission and remedies for breach are usefully commented on.

The six essential elements of contract formation outlined in chapter four, each forms the subject matter of the following chapters. The chapters in fact follow in the order in which the six essential elements have been stipulated and so provide a distinctive thread which links the chapters for the reader. Hence the student reader should not be surprised to discover that chapter five deals with intention, and chapter six with offer and acceptance or agreement to contract. A particular highlight of chapter six at p 118 is the only illustration in it, which is a copy of the actual advertisement which appeared in the London newspaper that ultimately led to the events in the celebrated decision on unilateral contracts in *Carlill v Carbolic Smoke Ball Company* [1893] 1 QB 256.

Consideration is the subject of chapter seven, and capacity to contract is dealt with at the end of chapter eight. Chapter eight mainly deals with the issue of privity of contract and the assignment of contractual rights and liabilities. Real or genuine consent is the subject matter of chapter ten, which deals with matters such as contractual mistakes, misrepresentation, the effects of duress, undue influence and unconscionable conduct. Of considerable use is the diagram on p 199 dealing with the categories of false statement and the consequences which flow from each.

The sixth essential ingredient of legality of purpose is the subject of chapter eleven. Chapters twelve and thirteen conclude the coverage of contractual law matters by discussing the topics of discharge of contract and remedies for breach respectively.

Chapter fourteen introduces the student to the law of torts with coverage of the elements of a tort, intentional torts, the tort of negligence and defences to an action in tort. Defamation is also helpfully discussed towards the end of the chapter. Chapter fifteen introduces the reader to a range of speciality contracts. These include leases, residential tenancies and franchise agreements.

The important business law topic of insurance is dealt with in chapter sixteen which clearly outlines the special features of insurance law. The reader's attention is then drawn to the wide ranging reforms that have been made to insurance practices in Australia as a direct consequence of recommendations made by Australia's Law Reform Commission. There is also commentary on the bodies with oversight of the insurance industry in

Australia. The classification of insurance contracts into indemnity and contingency insurance is brought to the reader's attention.

The law of cheques is the subject of chapter seventeen and the law on sale of goods covered in chapter eighteen. Chapter twenty outlines the law on restrictive trade practices. Important concepts in this area namely those of the market, competition, contracts, arrangements or understandings affecting competition and the misuse of market power, receive fairly good coverage and indeed provide a helpful insight into Australian competition law.

Chapter twenty-one on bankruptcy provides a good discussion of what property comes within the bankrupt's estate, a question which logically must be determined prior to the commencement of its distribution to the pool of creditors. The chapter certainly lends prominence to the whole aspect of bankruptcy and its impact on business law.

Chapter twenty two introduces the reader to the law of agency and deals with the rights and duties of an agent, the liability of agents to third parties and various types of specific agents like mercantile agents.

Chapter twenty three is in essence specific commentary on partnerships. At p 500 is a vivid illustration of a map of Australia divided into Australia's six States and two Territories with their respective Partnership Acts. Unfortunately the map needs updating so as to accurately reflect the fact that since 1997, the Northern Territory has had its own Partnership Act of 1997 and has not been subject to the law of its former administrator, South Australia for almost four years.

The penultimate chapter is a twenty three page discussion of some of the significant intellectual property issues most likely to arise in business transactions. The reader is introduced to the concepts of copyright, designs, patents, trademarks and confidential information with the chapter's emphasis on designs, copyright and confidential information.

The final chapter of the book discusses the importance of the relationship in the workplace between employer and employee as well as important statutory modifications of the relationship. There is coverage of anti-discrimination legislation as well as informative commentary on the industrial system in New South Wales.

The book, as its title suggests, is a guide to the complex and detailed subject matter of business law. It certainly provides a fleeting familiarisation tour through a wide range of topics, shorn of much of the detailed discussion

which a textbook on the area would have contained. Its contents are especially well presented with illustrations designed to capture and retain the reader's interest and attention. The book is accompanied by a Study Guide which students will find invaluable for revision purposes. The book could also serve as a ready reference point on the bookshelves of academics. Those reading the book and desiring a fuller treatment of the subject matter will find the twenty third edition of Clive Turner's book, *Australian Commercial Law*, its ideal companion.

JOEL MANYAM

THE LAW OF PARTNERSHIP IN AUSTRALIA AND NEW ZEALAND (Eighth edition), by Keith L Fletcher, Sydney, Law Book Company, 2001, 383 pp. New Zealand price \$113.40 plus gst.

The concept of partnership has become well established as a vehicle for individuals to carry on an enterprise. A preliminary and significant question when dealing with partnership law is: when can a partnership be said to exist? The leading case of *Cox v Hickman* (1860) 8 HL Cas 268 at 312-313; 11 ER 431 at 449 indicates the test for ascertaining this. This case establishes that a partnership involves a contract by individuals to conduct a trade where the individuals share in the profits and losses of the trading activity and act as agents of each other in conducting such activity.

Keith Fletcher's book is a welcome addition to this area of scholarship and practice. It is a useful book for practitioners, students and academics alike. Its strength is its treatment of partnership law from an Australasian perspective. The book deals with the Acts of the Australian Territories and various Australian States, as well as the New Zealand Act. The book at p xxxvii contains a helpful comparative Table of Partnership Acts of the seven Australian States and Territories as well as the Acts of the United Kingdom and New Zealand. Of much practical use is a 17-page Appendix with a checklist and forms of various Partnership Agreements, as well as a sample Deed of Dissolution.

Part I is an invaluable introduction to the concept of partnership and the distinctive features which single it out from other types of associations like sports clubs and joint ventures. Significantly, the book discusses the important features which distinguish a partnership from a public trading corporation, namely, identification of the individual partners with the firm, unlimited personal liability of partners, non-transferability of a partner's interest, and the right of each partner to participate in management. These

features characterise the participatory model of the partnership structure in contrast to the regimented structure which divides managers and investors in the corporate model.

Part II, being the core of the book, deals with matters covered by the respective Partnership Acts. This Part helpfully discusses topics such as the nature of partnerships, the contract of partnership, fiduciary obligations of partners, partnership property, relations of partners with persons dealing with them, and the technical procedures and effect of dissolution and winding up of partnerships. The chapter on the contract of partnership is one which the student and researcher will find of assistance, especially for the clarity of the commentary contained in the chapter. The book deals with the ever-practical question of the demarcation lines between partnership property on the one hand and private property of each individual partner, and also lucidly explains the significant difference between joint liability and several liability. Of interest in relation to the section on winding up a partnership is the New Zealand Court of Appeal decision in *Sew Hoy v Sew Hoy* [2001] 1 NZLR 391, decided 4 months after the law as stated by the author. The last chapter of Part II deals with what the various Australian Acts term "Limited" Partnerships but which the New Zealand Partnership Act 1908 in its Part II refers to as "Special" Partnerships.

Part III, as the final part of the book, deals with important aspects of partnership law which are not provided for in the respective Partnership Acts. These topics deal with the effect of bankruptcy on both the individual and personal estates of the partners on the one hand and the joint partnership estate on the other. There is also treatment of the technical procedural rules for the commencement of legal proceedings by and against partners in the firm's name. Of relevance here are the respective Rules of Court of the Australian States and the High Court of New Zealand. The final chapter discusses the question of the regulation of firms' names, as for instance where a firm conducts its trade using a name which does not include all of the partners of the firm.

This book certainly provides a much-needed update of this area of law in Australasia. It will certainly prove a useful addition to the bookshelves of those with an interest in the law of partnerships and its development in Australasia.

Joel Manyam

PRINCIPLES OF CRIMINAL LAW, by Simon Bronitt and Bernadette McSherry, Sydney, Law Book Company, 2001, lxxxv and 900 pp, including index. New Zealand price \$137.50 plus gst (softcover).

Authors Simon Bronitt and Bernadette McSherry set themselves “the daunting task of describing criminal laws across every Australian jurisdiction and, wherever possible, challenging these accounts from interdisciplinary vantage points” (p v). The result is some 880 pages of text (excluding the preface, tables of cases and legislation, and bibliography). Notwithstanding the overwhelming nature of the task, Bronitt and McSherry have achieved their aim, and achieved it well.

In fact, the most notable feature of this book is its inclusion of a broad range of perspectives including criminological, feminist, historical, medical, psychological, sociological, and human rights’ viewpoints. This ensures that the book will function well as a text for students and as a reference for anyone with an interest in the broader implications of criminal law.

The book is divided into four parts. Part I is entitled “Theory and Principles”, and Chapter One begins with the sub-heading “What is Theory? And Who Really Cares?”. The authors point out that, beyond the introductory criminal law lecture, theory is usually relegated to individual pursuit for those students who choose to do so. Bronitt and McSherry thus view the resultant chapter as an essay on the value of theory in constructing and reconstructing the criminal law, a distinction that includes both explanatory and normative perspectives. Thus, in “constructing” criminal law, legal positivism is a predominant theory from both the explanatory and normative perspective. In terms of “reconstructing” the criminal law, the authors suggest that the dichotomy between explanatory and normative theory becomes more conflated, with liberalism playing a significant role both in terms of how the law works and how it ought to work.

Bronitt and McSherry’s tendency to foster a discussion of law in context is demonstrated in this chapter by critiquing technocratic models of justice in respect of the decriminalisation of cannabis use. For example, the infringement notices’ schemes for minor drug offences in South Australia and the Australian Capital Territory have resulted in more prosecutions (an unintended consequence) for non-payment of fines.

The authors point out in Chapter Two that “general principles” also perform explanatory and normative functions. The general principles that Chapter Two focuses on are territoriality, fairness, equality, and privacy.

In keeping with the all-encompassing nature of the text, the authors also pay specific attention to the procedural and practical operation of criminal law. In doing so, procedure is not detached from a discussion of the body of criminal law. As the authors point out (at p 79):

Many criminal law courses and textbooks examine process issues in a cursory and descriptive fashion. There is little attempt to examine how legal rules and principles impinge, if at all, on law enforcement practices and trial procedures. Criminal procedure is typically marginal to criminal law, represented as having practical rather than academic significance.

In rejecting this marginalisation, Bronitt and McSherry, using empirical data in support, incorporate process issues within an analysis of the principle of fairness. They canvas the constitutional right to trial by jury and follow this with a discussion of the classification of offences into summary and indictable offences and conclude the section with an analysis of the fair trial principle.

The inclusion of different perspectives becomes particularly apparent at this point. For example, a feminist perspective on the “fair trial” principle points out that the notion of a fair balance between the state and the individual accused is reinforced in legal iconography whereby the scales of justice are held by a woman. Yet there are few female judges, and also a fair balance between the state and the accused excludes, from the notion of justice, the interests of victims, their families and the wider communities.

The principle of equality before the law is also given critical treatment, in the context of indigenous customary law, and mention is made of the potential provided by *Mabo v Queensland (No 2)* (1992) 175 CLR 1 for an argument that indigenous customary law may have survived British occupation. The text also provides a cultural perspective on the notion of “payback”, a concept apparently similar to the Māori concept of *utu*, and discusses the extent to which some jurisdictions recognise “payback” in sentencing decisions.

Part II deals with Justifications and Excuses, canvassing the traditional defences and expanding into areas that are incrementally impacting on the criminal law, for example battered women’s syndrome. The book also provides information that is useful to students but generally not easily accessible through other means. An example is provided by Bronitt and McSherry’s discussion of the traditional legal test for insanity, referred to as the M’Naghten Rules and based upon the case of Daniel M’Naghten. In addition to providing the factual background to this fundamental case in the

study of the defence of insanity, as an aside the text provides a paragraph on the spelling of M’Naghten, a name with which students, lecturers and commentators alike have much difficulty.

The section on mental impairment (which, in terms of New Zealand law, would incorporate insanity and automatism) also deals with an issue currently causing much confusion in mental health and legal systems. In New Zealand, personality disorders are not generally considered to meet the legal test of insanity. Under the Criminal Code Act 1995 (Cth), the definition of “mental impairment” includes “severe personality disorder”. However, as McSherry points out, even though antisocial personality disorder is the disorder most linked to criminal conduct, it should not be associated with mental impairment, on the basis that those with antisocial personality disorders are able to deal with reality and are able to reason. This is interesting in the light of New Zealand’s own experience with criminal offending and antisocial personality disorder, and a further factor to consider is the apparent inability of the mental health system to deal with these types of offenders.

Part III, “Extending Criminal Responsibility”, covers both complicity (derivative or secondary liability) and inchoate crimes (attempts and conspiracy). Part IV deals with specific offences — unlawful killing, offences against the person, sexual offences, property offences, public order offences, and drug offences.

Because of Bronitt and McSherry’s mission to incorporate the social, economic and historical context of criminal law, the book contains perspectives not usually addressed in criminal law texts. For example, Chapter 10 (Unlawful Killing) contains a section on euthanasia. As the authors point out, the debate over voluntary euthanasia became prominent in Australia because of the Rights of the Terminally Ill Act 1995 (NT) (since repealed). However, one suspects that, even had that piece of legislation not contributed to the visibility of the euthanasia issue, the authors would still have included the section in their text, in keeping with their undertaking to be comprehensive and to provide an analysis of law in context.

This comprehensiveness also includes a dedication to integrate more recent issues impacting upon the criminal law. Thus, the chapter on unlawful killing also includes a section on culpable driving, as all Australian jurisdictions excluding the Northern Territory have enacted specific offences relating to driving causing death. Chapter Nine, Offences Against the Person, discusses the public health perspective on HIV/AIDS and grievous bodily harm; the cultural perspective on female genital mutilation; consent



in the context of sadomasochism; and a psychiatric perspective on the relatively new offence of stalking.

In terms of sexual offences, Chapter Nine contains an interesting case study entitled “The Legitimacy of ‘Rough Sex’ in Rape and Indecent Assault Cases” in which the authors point out the inconsistency that it is generally irrelevant in terms of culpability that a victim consents to an assault, yet when a victim is subjected to very serious injury during sex, consent is still an issue that the prosecution must disprove. Case studies such as this demonstrate the utility that this book has in terms of a reference material. Not only does the text contain a discussion of substantive criminal law and analysis, it also contains reference to a wide range of other material. As well as case law, references to journal articles, legislation and other texts feature prominently, allowing the student to “engage independently with the original material” (p v).

The sheer coverage and depth of research might leave students feeling a little overwhelmed at first glance, and the language is quite technical in places. However, by using perspective sections, case studies, “asides boxes”, tables and diagrams, the authors combine form and content to ensure relative ease of reading.

While the text focuses on laws across Australia, its broader jurisprudential and interdisciplinary approach ensures that it also has relevance to the study of criminal law in any jurisdiction.

BRENDA MIDSON\*

HE HINATORE KI TE AO MĀORI: A GLIMPSE INTO THE MĀORI WORLD, Ministry of Justice, Wellington, 2001, 232 pp. New Zealand price \$30 including gst.

Many Māori commentators have in the past criticised the monocultural nature of the justice system and its part in depriving Māori of their land. Since the establishment of the Waitangi Tribunal, the decision of the Court of Appeal in *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 and following cases, and the incorporation of reference to the principles of the Treaty of Waitangi in a number of statutes, the justice system has, by small increments, been prepared to consider Māori

---

\* Lecturer in Law, University of Waikato.

perspectives on justice. Indeed “Māori perspectives on Justice” is the subtitle of this most interesting publication from the Ministry of Justice.

The foreword states that the purpose of the project is to “help develop an understanding of traditional Māori perspectives on justice” (p iii), but does not venture to suggest how that could or should impact on the present criminal justice system. That reticence is understandable. The project is one sponsored by the Ministry responsible for the present system. One need only consider the response of the then Minister of Justice to *Māori and the Criminal Justice System: He Whaipāanga Hou – A New Perspective* by Moana Jackson, which suggested a parallel legal system for Māori which could properly adopt a Māori perspective on justice, to see that any future projects were sure to have boundaries calculated not to arouse too much controversy. However, in engaging in such a project, questions are inevitably raised about the options available for changing the system to take more account of Māori culture and needs. *He Hinatore* is intended to influence policy, not by setting out the options, but by ensuring that we have well-informed policy makers and advisers – by giving them “an understanding of Māori society, tikanga, and behaviour” (p iii). However, changing the system to address Māori needs in appropriate ways needs more than understanding; it also requires the political will and commitment of those who have the power to make such changes, and that depends on where the government’s priorities lie.

Nevertheless, the purpose of the project is in itself a worthy one. The book is divided into three parts. Part One sets out the conceptual basis for the Māori worldview. The discussion of these matters takes seventy-nine pages, and is a distillation of the available literature, the oral tradition and information obtained from kaumatua. The ideas in this section are complex, dealing as it does with Māori perceptions of the inter-relationship between “the spiritual world, the living world and the natural world” (p 9). This involves a consideration of Māori cosmogony, which provides a blueprint for the values by which Māori govern their world. Māori social structures are also described, together with basic values such as mana, tapu, utu and muru.

It was pleasing to see that the most important Māori goddesses were included in this section, as the importance of women in Māori society was consistently underrated by early anthropologists. However, apart from the descriptions of the most significant powers and events in the life of the goddesses, there is no discussion of gender or the role of Māori women in the book. The descriptions of Māori society are gender neutral, thus disguising the gender issues that are very live topics in Māori society today. Clearly it was not part of the brief for the project to set out to correct some

of the misconceptions that Pakeha might have regarding the role of Māori women, but those misconceptions need to be addressed since they materially affect the way in which Māori women are perceived in the justice system. Of course gender issues also need resolution within Māori society, but that is another project.

One other important reservation needs to be noted regarding Part One. A whole library could be devoted to the Māori worldview and, as the project team itself noted, they were “merely scratching the surface” (p v). This should be taken as a very real warning to readers that they are being given only a “glimpse”, as the title to the book says, of the Māori world. A real understanding of Māori life will involve not only reading this book but doing further research and, most importantly, going on to listen to and live with Māori people.

Part Two is a fascinating case study analysis of the practical application of the values and controls described in Part One. Eight examples are given, based on interviews with kaumatua about their personal experiences of living in rural, predominantly Māori communities around World War 2, when Māori communities still strongly espoused “traditional” Māori values. After each story is an analysis of the case in terms of the values displayed in it. These analyses are very useful for tying in the complex and abstract notions discussed in Part One to the practices discussed in Part Two, especially if the reader is unfamiliar with Māori culture and rather confused by the discussion in Part One.

The project team make the point that the way of life portrayed in the case studies “might sound quite foreign” to those not brought up in such close Māori communities (p 85). They go on to say that Māori communities have changed since those times and that different methods of resolution might be used nowadays. It should also be noted that even in the 1940s Māori culture and society had been affected for at least 100 years by contact with settler culture. The influence of Christianity alone had wrought great changes. For example, the followers of Rua Kenana changed a number of Māori customs in line with Rua’s teachings, which had some basis in the Bible. Thus, even at that time there would have been Māori communities who would not have reacted in the way described in the stories. Case study 3 is an example of a woman who was physically abused by her husband for committing adultery. She returned to her people, who then came to extract muru from her abuser’s community. Rather than hand over the offender to the wife’s people, the abuser’s community offered the contents of the local shop to restore balance to the relationship between the communities. That sort of practice would have become unusual even in the 1940s, at least in relation to domestic

violence. The story also illustrates the depth of the changes wrought on Māori society since the 1940s, so that not only are the dispute resolution methods different now, but some of those used in the 1940s would no longer be possible. The methods depended on adherence to a set of values and community structures to make them effective – many Māori have lost some or all of those values and structures.

It would also have been helpful if the case studies had indicated the tribal area where the events in them occurred. Different hapu have their own ways of doing things and the case studies may give the impression that tikanga is the same all over Aotearoa. This is not the case, but those unfamiliar with Māori culture may well be misled into thinking that what applies in one area applies in them all. The underlying values are the same but they are abstract and other general guidance for behaviour - the way those values are evinced in day to day life will naturally differ in different environments.

Part Three is a “Collection of Behaviours, Philosophies, Emotions and Cultural Influences” as captured by a series of whakatauki (proverbs) and kupu (phrases, expressions). The project team’s purpose in this part is to give “an insight into the Māori psyche, both positive and negative forms” (p 143). This section discusses “positive” and “negative” behaviours. These terms may have been used to get away from the idea that some of these behaviours are “good” and some “bad”. If so, they do not work. One must question why, for instance, whakama is seen as a negative behaviour. It certainly means that one feels ashamed or embarrassed, but this may have positive results in terms of character building for the person feeling whakama, and in terms of dispute resolution. Another example is manawa wera, which is also grouped with the negative behaviours. The discussion shows that, whilst it involves insulting challenges, it can also be a way to release pent up emotions. That in turn may have poor results or good results. Certainly in Case Study 3 discussed in Part Two the performance of the manawa wera by the wife’s people alerted the husband’s people to the seriousness of the issue that was being brought for discussion. Possibly the fault with this section lies in that it seems to use the terms without giving the full contexts in which they may be used. That of course would be impossible to do in what is intended to be a “glimpse” of the Māori world. As it is, Part Three reads rather like an extended dictionary. However, it is also good to see these whakatauki brought together in an accessible way.

The book ends with informative and useful appendices which set out the chronology of the project, the terms of reference, the framework of disputes adopted by the team, the analytical framework used on the case studies and

the methodology used to gather the information from kaumatua and experts. The book ends with an extensive and useful glossary.

In conclusion, the book is an interesting introduction to Māori customs and values. Reading the book would not make anyone an expert on Māori – but it is a start. The Māori world is holistic in outlook, something which is very difficult to capture in a book, let alone a book written in a language which is not of the culture. Hopefully the audience to whom the book is addressed will recognise these limitations and enjoy the insights that it gives. Readers should also recognise what a privilege it is to be given such information – the knowledge contained in this book is very precious and not to be approached lightly.

*Ahakoā he iti he pounamu* (No matter how small, it is a treasure).

STEPHANIE MILROY\*

AN INTRODUCTION TO PROPERTY LAW IN AUSTRALIA, by R Chambers, Sydney, Law Book Company, 2001, 524 pp, including index. New Zealand price \$100 plus gst.

The title does not do justice to the wealth of knowledge that is contained in this relatively small book. Although it is aimed at an Australian audience and the cases cited are largely taken from the Australian jurisdiction, there is much more to this book than a simple outline of Land Law that the title might suggest. Its relevance exceeds the boundaries of Australia and the author has succeeded in breaking down barriers that students often perceive to exist between the different “subjects” in law. Robert Chambers describes property law as “an enjoyable and worthwhile subject of study”, and says that “it is a useful way to pull together and build a framework for understanding other areas of law, such as contract and tort” (p4). This theme is continued throughout the text, and the relationships between different, seemingly unrelated, areas of law are explored in such an interesting way that the reader is immediately engaged. The author sets out to create an enjoyable experience and succeeds admirably. He sees the acquisition of a firm understanding of property law as a foundation for the study of areas that can be dry and not readily comprehensible to the student, like trusts and restitution. This book is a great aid to acquiring such an understanding.

---

\* Senior Lecturer in Law, University of Waikato.

Although I believe that the book is primarily aimed at students embarking on the study of law, because of the author's insight into the theory of property law, much of the book is equally useful to students at a later stage in their careers. The main strength of this book is its breadth. It reaches across subject areas and Chambers takes his illustrations and quotations from a wide variety of jurisprudential sources. The themes and topics dealt with are diverse but contained within an integrated whole. For example, as early as chapter 2, the concepts of *in rem* and *in personam* are tackled and explained with a simple, everyday example; but this is immediately followed by a brief analysis of the theory of property rights expounded by Wesley Hofeld. Any illusion that this book is going to be a simple introduction is soon dispelled by the complexity of some of the issues tackled. Chapter 3 examines property rights to such things as living and dead human tissue and information in the context of rights to bodily autonomy and freedom in a democratic society.

Chapter 4 centres the book as an inquiry into the analytical issues that occur in property, rather than a treatise on the justification of Australian society in its method of property distribution or allocation of wealth. However, these issues are acknowledged and the debate is set out for the student who may wish to explore those issues further. This is an illustration of the success of this book. It exposes issues which go far deeper than any introductory book could, and gives the reader the tools with which to explore further. It also makes me pause to ask why the author chose the title he did, since the book does so much more than the title suggests.

In the section dealing with the concept of possession, the relationships between property law and torts, such as trespass, conversion and detinue, are dealt with very successfully. The difference between the right to possession and the control of property as a basis for a competing right are carefully explained and form a cogent basis for the later chapter on estates in land. Similarly, the concept of ownership is dealt with before the student embarks upon an analysis of tenure. This discussion leads quite naturally into a succinct explanation of equitable rights over property, which is in turn followed by chapters on security rights and shared rights. All of these topics are examined using a logical contextual approach, and the author achieves a depth of analysis rare in an introductory text. This is another illustration of the misleading nature of the title.

As a teacher both of Equity and Land Law I was especially impressed by the way in which the doctrines of detrimental reliance, unjust enrichment, constructive trust, restitution and tracing were covered. Too often it seems to me that books aimed at property lawyers in a Torrens system of land

registration tend to ignore or undervalue equitable doctrines. In this book the doctrines are placed at the heart of the text, and are investigated prior to the sections on the Torrens system and priorities in legal title. They are clearly explained and illustrated with examples of their benefits in practice and their limitations.

The chapters on registration of interests in land come right at the end of this book and it is stated that these chapters are intended to complete the picture of property law by explaining the effect of registration of property rights. The final chapter deals with the Torrens system as it has developed in Australia, with considerable reference to the themes and topics dealt with in the earlier parts of the book. This has the effect of tying the whole book together in a complete package, and it is a very satisfying conclusion.

My only wish is that the author had included the Torrens system as it applies in New Zealand. If that had been the case this book would become compulsory reading in any Land law course I teach.

SUE TAPPENDEN\*

---

\* Lecturer in Law, University of Waikato.



# McCaw Lewis Chapman

L A W Y E R S

McCaw Lewis Chapman has a team of partners, consultants, associates and lawyers, who together have the experience and expertise to offer advice in a wide range of areas:

- |   |   |
|---|---|
| <input type="checkbox"/> Agricultural law         | <input type="checkbox"/> Estate planning & administration |
| <input type="checkbox"/> Asset protection         | <input type="checkbox"/> Family law                       |
| <input type="checkbox"/> Banking                  | <input type="checkbox"/> Insolvency law                   |
| <input type="checkbox"/> Commercial & company law | <input type="checkbox"/> Litigation & dispute resolution  |
| <input type="checkbox"/> Construction law         | <input type="checkbox"/> Maori issues                     |
| <input type="checkbox"/> Consumer law             | <input type="checkbox"/> Property law                     |
| <input type="checkbox"/> Criminal & traffic law   | <input type="checkbox"/> Sports law                       |
| <input type="checkbox"/> Employment law           | <input type="checkbox"/> Tax law                          |
| <input type="checkbox"/> Environmental law        | <input type="checkbox"/> Waitangi Tribunal representation |

In keeping with our strong support of the Waikato School of Law, our recruitment of professional staff centres around Waikato School of Law graduates.

**McCaw Lewis Centre, 312 Victoria Street  
PO Box 19-221, Hamilton  
New Zealand**

**Telephone (07) 838 2079  
Email [reception@mlc.co.nz](mailto:reception@mlc.co.nz)  
Facsimile (07) 839 4652**



# THE McCAW LEWIS CHAPMAN ADVOCACY CONTEST

## HARLEY v McDONALD

BY ANTON USHER\*

### I. INTRODUCTION

The essence of this case concerns the ability of the High Court to exercise its discretion, in the interests of the administration of justice, to award costs against a barrister for a breach of duty to the Court.

The appellant, Raylee Patricia Harley (Mrs Harley) acted as counsel for the respondent, Robert McDonald, in proceedings which he brought in the High Court against FAI (NZ) General Insurance Co Ltd (FAI), to recover money which he lost as a result of the collapse of Renshaw Edwards, a firm of solicitors. FAI was Renshaw Edwards' professional indemnity insurer. In the High Court in Auckland, Giles J dismissed the respondent's claim against FAI, with an award of costs against him of \$115,606.06. Following that judgment, the respondent made a formal application for costs against the appellant and his former solicitors (Glasgow Harley). In the High Court, Giles J ordered the appellant and Glasgow Harley to indemnify the respondent, jointly and severally, for an amount of \$65,000 as a contribution towards the costs that he had to pay FAI. The costs order against the appellant was made on the basis that her conduct of the proceedings against FAI amounted to a serious dereliction of her duty to the Court.

### II. SUBMISSIONS FOR THE RESPONDENT

May it please the Court, the submissions for the respondent, in support of the orders of Giles J in the High Court, are as follows:

1. The High Court had jurisdiction to award costs against the appellant.
2. The High Court exercised its jurisdiction to award costs against the appellant properly on the facts properly before it.

---

\* LLB honours student, University of Waikato, winner, 2001 McCaw Lewis Chapman Advocacy Contest. The competitors in the Contest were required to stand in the shoes of either counsel for the plaintiff or counsel for the defendant, and present an argument as at the date of the hearing in the Court of Appeal.

### 1. *The High Court had jurisdiction to award costs*

1.1 The jurisdiction of the High Court to award costs against the appellant derives from the fact that a barrister is an officer of the Court and therefore owes a duty to the Court in the administration of justice.

1.2 Pursuant to section 43 of the Law Practitioners Act 1982, solicitors and barristers are officers of the High Court as they are admitted jointly as barristers and solicitors of the Court.

1.3 High Court Rule 46 confers an overriding discretion on the Court in all matters relating to costs and therefore gives jurisdiction to award costs against a barrister or solicitor. This rule has been construed so as to enable costs to be ordered against counsel. *McGechan on Procedure* states:

(d) The jurisdiction has been exercised only against a party's solicitor, presumably because the solicitor on the record is responsible for the conduct of the proceeding. There seems no reason in principle why it should not extend to counsel.<sup>1</sup>

1.4 The jurisdiction of the High Court to award costs against a barrister or solicitor is also derived from the Court's inherent jurisdiction. The Court in *Accused (CA 60/97) v Attorney-General* stated that:

[t]he High Court derives its general jurisdiction from its status as a superior Court and in particular from s 16 of the Judicature Act 1908 ... Due administration of justice according to law is its cornerstone.<sup>2</sup>

The Court in *R v Moke and Lawrence* stated that:

[t]he Court may invoke its inherent jurisdiction whenever the justice of the case so demands. It is a power which may be exercised even in respect of matters which are regulated by statute or by rules of the Court providing of course, that the exercise of the power does not contravene any statutory provision. *The need to do justice is paramount.*<sup>3</sup>

1.5 The Court's inherent jurisdiction is founded on the principle that barristers and solicitors, as officers of the Court, are "... concerned in the administration of justice [and have] an overriding duty to the court ...".<sup>4</sup>

<sup>1</sup> *McGechan, R McGechan on Procedure* (1985-88) HR46.11.

<sup>2</sup> (1997) 15 CRNZ 148, 151, per Henry J (CA).

<sup>3</sup> [1996] 1 NZLR 263, 267, per Thomas J (CA) (emphasis added).

<sup>4</sup> *Rondel v Worsley* [1969] 1 AC 191, 227, per Lord Reid (HL).

1.6 The jurisdiction exercised by Giles J to award costs against the appellant receives the following highly persuasive judicial support. In *Gordon v Treadwell Stacey Smith*, it was stated that “legal advisers” who misconduct litigation may be ordered personally to pay costs.<sup>5</sup> The term “legal advisers” suggests the Court was not limiting the statement to solicitors only. In the Canadian case *Young v Young*,<sup>6</sup> it was held that Courts possessing inherent jurisdiction might, with caution, properly use that jurisdiction to order barristers to pay costs personally.

1.7 The exercise of the Court’s jurisdiction to award costs against the appellant did not contravene any statute or established principle of law.

1.8 Section 94 of the Law Practitioners Act 1982 permits the Court to exercise its summary jurisdiction over practitioners and to make such order as it thinks fit in respect of the practice of any practitioner, on any reasonable cause shown. Section 94(1) states:

[e]xcept as provided in sections 92 and 93 of this Act, nothing in this Act shall affect the summary jurisdiction of the Court over practitioners; ... the Court shall have full power ... to make such order as it thinks fit respecting the practice of any practitioner, on *reasonable cause shown*.<sup>7</sup>

1.9 In *B v Canterbury District Law Society* it was stated that the Court’s summary jurisdiction, preserved by section 94 of the Law Practitioners Act 1982, is “required, of course, to enable the Court to *regulate the conduct* of practitioners relating to the *conduct of litigation* and their status and responsibilities as *officers of the Court*”.<sup>8</sup>

1.10 It is submitted that the appellant’s serious dereliction of duty to the Court constitutes a reasonable cause shown, pursuant to section 94 of the Law Practitioners Act 1982.

1.11 It is acknowledged that barristers have a level of immunity from civil liability; however, this immunity is confined to claims for civil relief by their client.<sup>9</sup> Accordingly, it is submitted that barristers are not immune from sanctions for a breach of duty to the Court.

---

<sup>5</sup> [1996] 3 NZLR 281, 293, per Blanchard J (CA).

<sup>6</sup> (1993) 108 DLR (4th) 193, 284, per McLachlin J (SCC), by a 6 to 1 majority.

<sup>7</sup> Law Practitioners Act 1982, Part VII – Discipline Within the Legal Profession – Jurisdiction of the High Court and Court of Appeal (emphasis added).

<sup>8</sup> (1997) 11 PRNZ 196, 201, per Thomas J (CA) (emphasis added).

<sup>9</sup> *Rees v Sinclair* [1974] 1 NZLR 180, 186-7, per McCarthy P (CA).

1.12 It is acknowledged that the case of *Orchard v South Eastern Electricity Board*<sup>10</sup> reflects the English position with regard to common law immunity of barristers from an award of costs against them until the enactment of wasted costs legislation.<sup>11</sup> However, this was the position only because barristers were not officers of the Court.

2. *The High Court exercised its jurisdiction to award costs against the appellant properly on the facts properly before it*

2.1 The decision of the High Court to award costs against the appellant can properly rest solely on the appellant's gross dereliction of duty to the Court, arising from her conduct of the trial, about which the appellant has had the opportunity to be heard, and despite the fact her case was of itself hopeless.

2.2 In *Myers v Elman*, Lord Wright said that the Court's jurisdiction to make an order for costs is enlivened where a practitioner has conducted himself or herself in such a manner that the conduct involves "a failure on the part of a solicitor to fulfil his *duty to the court* and to realise his duty to aid in promoting in his own sphere *the cause of justice*".<sup>12</sup>

2.3 The criteria for exercise of the Court's jurisdiction to make an order for costs against a barrister may be determined on the same basis by which solicitors are personally liable for costs in comparable circumstances. Such liability arises upon serious dereliction of duty to the Court. *Myers v Elman*,<sup>13</sup> is the leading authority for this test. This test has also been approved in Australia in *Da Sousa v Minister of State for Immigration, Local Government and Ethnic Affairs*.<sup>14</sup>

2.4 It is submitted that, as an officer of the Court whose role is to assist in the administration of justice, a barrister cannot properly perform that role where he or she is grossly negligent or incompetent. The judgment in *Myers v Elman*<sup>15</sup> is highly persuasive authority for the fact that gross negligence or incompetence on the part of a barrister or solicitor can amount to a serious dereliction of duty to the Court.

---

<sup>10</sup> [1987] QB 565 (CA).

<sup>11</sup> This gave the Court jurisdiction, by statutory power, to award costs against barristers.

<sup>12</sup> [1940] AC 282, 319 (HL) (emphasis added).

<sup>13</sup> *Ibid.* This case was heard prior to the enactment of specific wasted costs legislation in the United Kingdom: see submission 1.12.

<sup>14</sup> (1993) 114 ALR 708 (FCA); see also *White Industries (Qld) Pty Ltd v Flower & Hart (a firm)* (1998) 156 ALR 169 (FCA).

<sup>15</sup> *Supra* note 12, at 304, per Lord Atkin.

2.5 In *De Sousa v Minister for Immigration, Local Government and Ethnic Affairs*, French J regarded the proceedings instituted by the solicitor in that case as reflecting a "... serious failure to give reasonable attention to the relevant law and facts ...", that amounted to a serious dereliction of duty to the Court.<sup>16</sup>

2.6 It is acknowledged that Giles J has considered matters concerning the appellant's conduct that were not confined to her conduct of the trial in question and on which she was not given the opportunity to be heard at the costs hearing. It is submitted that those matters were confined to the appellant's general conduct in relation to the discharge of her obligations to the respondent. It is further submitted that these matters did not affect the decision of Giles J, as evidence properly before His Honour regarding the appellant's conduct of the trial was sufficient to find a gross dereliction of duty to the court.

2.7 The pleadings, the appellant's final submissions, and Giles J's substantive judgment<sup>17</sup> indicate, as Giles J identified,<sup>18</sup> that the respondent's case was advanced on the basis that the summary judgment procured by the appellant against the Renshaw Edwards partners, of itself satisfied the provisions of the Law Reform Act 1936 and was enough to found liability of FAI to pay under their policies of professional indemnity insurance for Renshaw Edwards and a partner Basil Jones.

2.8 In essence, as Giles J identified, the appellant's case did not identify an event that fell within the ambit of an insured peril under the policies. The statement of claim in the summary judgment proceedings alleged a liability to pay a contract debt. Breach of contract was demonstrably not an FAI Policy insured peril. The appellant failed to appreciate this fatal defect, even after it was pointed out to her by Giles J, and advanced no tenable basis for avoiding it.

2.9 Furthermore, as Giles J identified, the appellant was invited by His Honour carefully to reflect upon and reconsider her case in light of her concession as to the application of the doctrine of avoidance for material non-disclosure. The fact that both insurance policies were clearly avoidable for material non-disclosure was or should have been known to the appellant

---

<sup>16</sup> (1993) 114 ALR 708, 713 (FCA).

<sup>17</sup> Unreported, High Court, Auckland, CP 507/96, 11 December 1997.

<sup>18</sup> The following references from Giles J's judgment are taken from *McDonald v FAI (NZ) General Insurance Co Ltd* [1999] 1 NZLR 583, 593-4 (HC).

in the conduct of her case. Despite the invitation of Giles J to reconsider, the appellant elected to proceed.

2.10 On the basis of submissions 2.7 to 2.9, it is submitted that the appellant's conduct in the trial constituted a serious failure to give reasonable attention to the relevant law and facts, which constituted gross incompetence and therefore amounted to a serious dereliction of duty to the Court.

2.11 In summary, the decision of the High Court served the public interest in the administration of justice by holding the appellant accountable for breaching her duty to the Court as a result of her conduct of the trial.

### III. CONCLUSION

In conclusion, for the respondent, it is respectfully submitted that:

1. The High Court had jurisdiction to award costs against the appellant. This jurisdiction derives from the fact that a barrister is an officer of the Court and therefore owes a duty to the Court in the administration of justice. The Court's jurisdiction is specifically derived from High Court Rule 46 and the Court's inherent jurisdiction. Furthermore, the Court's jurisdiction to award costs against the appellant is not curtailed by barristers' immunity from civil liability and is permitted by section 94 of the Law Practitioners Act 1982.

2. The High Court exercised its jurisdiction to award costs against the appellant properly on the facts properly before it. The High Court's decision can properly rest solely on the appellant's gross dereliction of duty to the Court, arising from her conduct of the trial, about which the appellant has had the opportunity to be heard, and despite the fact that her case was of itself hopeless.

Accordingly, the respondent submits that the High Court Judge's order of costs against the appellant should stand and that this appeal be dismissed.

May it please the Court, that concludes the submissions for the respondent.

