

A Sketch from the Blue Train - Non-Discrimination and Freedom of Expression: The New Zealand Contribution

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The human rights scene in New Zealand seethes with activity. International instruments, including but not confined to those which the state has ratified, influence the interpretation and development of the domestic law. International jurisprudence from a wide range of countries is consulted and borrowed from by the Courts, as is appropriate in a small country willing to learn from precedents established in larger jurisdictions. As well there have been distinctive legislative and judicial developments, perhaps most particularly in the field of race relations. Having been asked by the Colloquium organisers to commit my offerings to paper, I will attempt a sketch of some salient features of the scene. The caveat must be entered that the current President of a Court which is decidedly *in medias res* ("part of the action" for those who prefer a contemporary phrase) must be circumspect in writing about controversial matters and unsettled questions. The title reflects the fact that most of what follows was written without recourse to a library on an agreeable train journey from Johannesburg to Cape Town. Accuracy in detail is therefore not warranted.

Freedom of Expression and A Bill of Rights

For more than forty years, since the abolition by unchallenged statute of the Upper House (the Legislative Council), New Zealand has had a unicameral legislature. Parliament consists of the Queen and the House of Representatives. The royal functions have been delegated to a Governor-General appointed on the advice of the Government of the day. In practice the Government has been the successful party in the most recent triennial general election and a two-party contest has been the pattern. There is full adult suffrage, women having been accorded the vote as long ago as 1893: centennial celebrations are underway. A referendum is about to be held on whether proportional representation should be introduced, in order better to provide for minority group representation.¹ The only specific minority representation at present is provided by four Maori seats, for which persons may register as electors. Maori can and do, however, vote and stand for election in other seats, and some have succeeded. The Speaker of the House is the first Maori to have held that office. Black Rod is also a Maori.

In 1990 Parliament enacted by ordinary statute a Bill of Rights. The New Zealand Bill of Rights Act 1990 is not entrenched nor declared to be supreme law. Soundings of public opinion had been thought to show that the community was not ready for those more thoroughgoing changes. The effect of s. 4 of the 1990 Act is that ordinary enactments may override the rights and freedoms affirmed in the Bill of Rights, but the effect of s. 6 is that this will only occur if the legislation is sufficiently explicit:

s. 6. *Interpretation consistent with Bill of Rights to be preferred* - Wherever an enactment can be given a meaning that is consistent with this Bill of Rights, that meaning shall be preferred to any other meaning.

Note the words "can" and "shall" which make s. 6 a key and strong section. "Can" has been held not to cover strained interpretations: the possibility must be reasonably open. Still, the section places in the hands of the Courts a weapon of justice of an effective nature and reach. At the same time, by laying down a rule of interpretation it satisfies the dogma of the sovereignty of Parliament, so dear to Diceyans. The latter may be a dying breed, but that is another story.

The practical operation of s. 6 may be illustrated by contrasting decisions concerning the breath and blood-alcohol testing of motorists. The provisions of the Transport Act authorising these procedures contain no reference to the Bill of Rights. By s.23(1)(b) of the Bill of Rights, everyone who is arrested or who is detained under any enactment shall have the right to consult and instruct a lawyer without delay and to be informed of that right. The Transport Act provides for a roadside breath screening test; if it is positive, the driver is required to undergo at a police station an evidential breath test or a blood test, which may form the basis of a prosecution. It has been held that the operating requirements of this legislative scheme are inconsistent with, and therefore exclude, s. 23(1)(b) of the preliminary roadside stage. But the decision has been otherwise at the police station stage. Before any evidential test is administered the driver must be told of his or her right to legal advice and must be given a reasonable opportunity (telephone consultation is usually enough) of exercising that right. Despite initial misgivings on the part of the prosecuting authorities, the Courts have been told that this law is now working well: often legal advice reassures the driver and leads to co-operation, yet it is also, of course, a safeguard against abuse of police powers.

By s. 3, the New Zealand Bill of Rights Act applies to those who perform public functions, including naturally the judicial branch of the government of New Zealand (as the Courts are described in the section), so the Act necessarily applies in the evolution of the common law. It may require occasional modification of hitherto established common law rules; for, although the Bill of Rights can be overridden by a sufficiently explicit statute, it cannot be overridden by the common law. More importantly, the Bill of Rights may be of prime influence in the shaping of the common law in areas hitherto grey or unexplored. Where any of the rights and freedoms affirmed in Part II and referred to in s. 2 are relevant, the developing common law must be moulded so as to give effect to them. The rights and freedoms are generally declared in terms familiar in international instruments, as is to be expected from the long title of the Act. It is an Act:

- (a) to affirm, protect and promote human rights and fundamental freedoms in New Zealand; and
- (b) to affirm New Zealand's commitment to the International Covenant on Civil and Political Rights.

It would be out of place to detail the rights and freedoms here. Suffice it to mention some of particular significance. Everyone has the right not to be subjected to torture or to cruel, degrading, or disproportionately severe treatment or punishment; and the right not to be

subjected to medical or scientific experimentation without consent. As to the subjects of this Colloquium the directly relevant provisions are in ss. 14 and 19:

s. 14. *Freedom of expression* - 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.

19. *Freedom from discrimination* -

- (1) Everyone has the right to freedom from discrimination on the grounds of colour, race, ethnic or national origins, sex, marital status, or religious or ethical belief.
- (2) Measures taken in good faith for the purpose of assisting or advancing persons or groups of persons disadvantaged because of colour, race, ethnic or national origins, sex, marital status, or religious or ethical belief do not constitute discrimination.

Before returning to those provisions I will continue to note briefly some of the other rights and freedoms.

Everyone has the right to be secure against unreasonable search or seizure, whether of the person, property, or correspondence or otherwise; and the right not to be arbitrarily arrested or detained. The expressions "unreasonable" and "arbitrarily" have been the subject of debate in the Courts. Can a search - for example, a search of a motor car resulting in the discovery of illicit drugs - be reasonable if it is not lawful? Canadian Supreme Court decisions seem to indicate the answer No. We have learnt much from Canada, whose Charter is indeed the document that had the greatest direct influence on the wording of our Bill of Rights. But so far a majority of the New Zealand Court of Appeal have not been prepared to accept the Canadian answer to this question.

So far, the New Zealand cases point to a rather less categorical answer. There may be special circumstances wherein an unlawful search is nevertheless reasonable, as when a police officer catches a glimpse of a partly concealed corpse in a vehicle which he may have no apparent power to search. But at best such cases must surely be rare. To say that the police may reasonably act unlawfully is to set foot on a slippery slope. An alternative solution is to accept that a search is in breach of s. 23(1)(b) of the Bill of Rights yet to allow the results to be admitted in evidence. The New Zealand Courts, not having to wrestle with the Canadian Charter test relating to the bringing of justice into disrepute, have evolved a straightforward rule. *Prima facie*, evidence obtained as the result of a breach of the Bill of Rights should be excluded. Again, only in special circumstances would its admission be fair and right.

The rights of persons arrested or detained under any enactment have already been touched on. The reference "under any enactment" was inserted in the Act to emphasise that in New Zealand there are no common law powers of official detention. The affirmed rights include the right to have the validity of the arrest or detention determined without delay by way of *habeas corpus* and to be released if the arrest or detention is not lawful. Rather curiously, this combination of provisions has caused or permitted some judges to suggest that some kinds

of unlawful public detention, such as detention of a mere suspect for interrogation, are outside the scope of s. 23(1)(b) of the Bill of Rights. The suggestion is that this is not covered because it is neither a formal arrest nor a formal detention under an enactment. If one believes that unlawful detention by the police, purportedly acting in accordance with their powers, is the very kind of thing which a Bill of Rights is intended to guard against, one cannot be attracted to that reasoning. But at least, s. 22, affirming the right not to be arbitrarily arrested or detained, has not been subjected to any restrictive interpretation.

The rights of persons charged with offences are set out at some length. In the main they are on obvious lines. It may be of some interest in South Africa to note that the New Zealand provisions include the right, except in military law offences, to the benefit of a trial by jury when the penalty is imprisonment for more than three months. In any event there is a right to a fair and public hearing before an independent and impartial court; a right not to be compelled to be a witness or to confess guilt; and a right of appeal against conviction and sentence. Natural justice must be accorded by any tribunal or other public authority having the power to make determinations in respect of rights, obligations, or interests protected or recognised by law. The corollary is also affirmed, a right to apply in accordance with law for judicial review of the determination. Finally it may be noted that, with some exceptions, the Bill of Rights applies so far as is practicable for the benefit of all legal persons, as well as for the benefit of all natural persons.

Through the rule of interpretation enshrined in s. 6 quoted above, the Bill of Rights may be said to permeate statute law. Through its paramountcy over other law, as explained above, it may be said to permeate the common law. It cannot rightly be seen as some special and somewhat arcane or foreign phenomenon standing apart from the day-to-day practice and administration of the law. We are slowly but surely learning this approach in New Zealand. It should be, and no doubt is, taught at the most elementary levels in the law schools. In the language being adopted in the Bloemfontein Statement, "In democratic societies fundamental human rights and freedoms are more than paper aspirations. They form part of the law". And, in blending them into the corpus of the law, judges have to learn to rise above any black-letter technique, avoiding what Lord Wilberforce has famously labelled "the austerity of tabulated legalism". In Privy Council judgments often cited, the great British Judges Wilberforce and Diplock have recommended a generous approach to the interpretation or application of broad-textured human rights declarations. It is the generality and character of the declarations that make this approach apt. Whether or not a given declaration is also entrenched in supreme law is beside the point.

Most of the Bill of Rights cases that have come before the New Zealand Courts so far have arisen in criminal proceedings. Hence the unpopularity of the Bill of Rights with some to whom "law and order" policies have a ready appeal. Indeed, after an initial period when many people, including many lawyers, tended to think of the Act as a token and toothless thing, there ensued something of a flood of Bill of Rights points, as criminal advocates came to realise that the Courts were not merely paying lip service to this historic development. It has become necessary to quell this tendency by emphasising that points must be clearly taken at the trial and based on a sufficient evidential foundation, although if such a foundation is established (at a voir dire or deposition hearing, for instance) the onus has been held to fall on the prosecution to negative a material breach on the balance of probabilities. A highly

desirable factor now beginning to reduce the incidence of criminal Bill of Rights cases is a better appreciation by the police and other public authorities of the need for compliance.

But the potential of the Bill is by no means confined to the criminal law, as may be illustrated by two 1993 cases, both still unreported,² encouraging freedom of expression. Both show how the Bill may be used in situations where the law is not clear. In speaking of them it is necessary to be careful, as both came to the Court of Appeal at the interlocutory stage and further proceedings are pending.

In one, an "investigative" television documentary is complained of by manufacturers and distributors of a certain brand of ionisation smoke detectors. They claim, as plaintiffs, that the programme meant that the products contained radio-active material rendering them a major health hazard. The programme included contributions by scientists supporting a conservation cause who appeared to lend some support to the suggestion. It also featured the reactions of members of the public whose concern had been aroused - such as a housewife and mother who said that she had consigned the device to an outside garage or shed: "I would not let my kids near it". The plaintiffs plead two causes of action, malicious falsehood and defamation. In addition to damages for injury to their business and reputation, they seek an order directing the television company to publish a corrective statement.

The defendants moved to strike out the latter prayer on the ground that it is a form of relief not available in the Courts. Certainly it is not alluded to in such standard works as *Gatley on Libel and Slander* and *Salmond on Torts*.

But there is strangely little direct judicial authority on the question in the Commonwealth, and apparently no case containing an examination of it in depth. Various scholars, such as Professor Fleming, favour the introduction of such a remedy. That there seems to be no compelling reason of public policy against it is suggested by the enactment in New Zealand of jurisdiction to order the publishing of corrections in the specific fields of broadcasting (but the complaints of the plaintiffs to the Broadcasting Standards Authority has been stymied by the retort of the defendants that the matter is *sub judice* and that a possible jury trial should not be prejudiced) and misleading trade descriptions (the Commerce Commission may apply to the High Court for an order). On the other hand the press is of course insistent that editorial freedom is sacred. Media attitudes have not changed since in Anthony Trollope's Phineas Finn and Palliser novels, Mr Quintus Slide edited *The People's Banner*.³

The Court of Appeal unanimously took the view that in principle the jurisdiction to grant mandatory injunctions should not be fettered and is wide enough to cover this type of case. One member of the Court of three, however, considered that in this particular case the likelihood of any order being obtained is so slight that the prayer should be struck out. The decision of principle remains; and, while it can be reached without the aid of the Bill of Rights, s. 14 has been invoked in support. As has been seen, the section extends to the right to impart information. Especially if, for example, a programme is shown to be seriously damaging, false and malicious, the section is capable of providing the victim with effective redress in kind. Let it be added that the defences pleaded include the claim that the programme was true, so I am expressing no view about the final outcome.

The other case, *Prebble v Television New Zealand Limited*, goes the other way, showing how the section can be used in aid of the defence. The plaintiff, a former Cabinet Minister, is suing on another 'investigative' television programme. Its theme is alleged to have been that the former Labour Government, moving from its traditional position to a sudden conversion to the prevailing market philosophy, had decided to sell off public assets without a mandate from the electorate; and that the plaintiff in particular had come to support this policy, contrary to his true convictions, in return for donations from business leaders to his party's funds. The defendant is pleading justification, qualified privilege and fair comment. Some one hundred pages of particulars include a number of references to speeches made by the plaintiff in the House of Representatives and other statements which may come under the heading of proceedings in Parliament. On an application to strike out particulars of his claim, the Attorney-General, with the authority of the Privileges Committee of the House, has maintained that to allow them to be investigated in court would be to transgress parliamentary privilege.

As we have been reminded by *Pepper v Hart* in the House of Lords, s. 9 of the Bill of Rights 1689 provides "That the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament". For some time the New Zealand courts have acted on the view now endorsed by the House of Lords that this ancient provision does not prevent a Court from obtaining aid from *Hansard* in appropriate cases in interpreting ambiguous legislation. In the *Prebble case*, however, the Court of Appeal has held that s. 9 does in fact apply. The former Minister's motives for his speeches are being called in question by the defence. The Minister's right to the vital freedom of parliamentary expression is not to be permitted to be cut down by having his motives questioned by such means.

The more difficult point is the consequence for the future of the action. It cannot safely be assumed at this stage that the references to parliamentary debates are not of sufficient moment to the defendant's case to be dismissed as insubstantial or immaterial. Or at least such is the view of the majority of the court. If a defendant is to have one hand tied behind his back in defending his or her comments on statements made within the shelter of parliamentary privilege, the result will be a gross restriction of freedom of speech in a democracy. A solution to the dilemma can be reached without resort to the Bill of Rights, but again s. 14 seems of help. It can be seen as just as important as the long-standing s. 9. The New Zealand Bill of Rights 1990 emphasises everyone's right to freedom of speech; the United Kingdom Bill of Rights 1689, also part of New Zealand law, emphasises the parliamentarian's right to freedom of speech in his own domain. Neither enactment need be seen as totally eclipsing the other.

The solution adopted by the Court of Appeal has been to order that the action be stayed unless and until parliamentary privilege is waived, both by the House as a whole and the plaintiff. This appears to be in accord with such comparatively few precedents as there are in Commonwealth jurisdictions, yet the Privileges Committee has now resolved that it has no power to waive privilege, even (it seems) on a petition for that purpose. Prominent among the reasons given is the need to protect witnesses before parliamentary committees, although it must be observed that neither in argument nor in judgment was there any suggestion in the case that the privilege of a witness could be waived without his or her joining in the waiver. Whether the Committee is right, and whether its view could bind subsequent Houses, does

not matter for present purposes. The present point is simply that the 1990 Bill of Rights and its declarations of principle can be seen, in an area where the law has been uncertain, as of equal influence in working out a solution.

Another caveat remains to be added. Both the recent cases used here as illustrations of the permeating theme are, or may be, under appeal to the Privy Council. In evolving New Zealand law, the New Zealand Courts are still subject to the jurisdiction of their Lordships. The last word on evolution in these two instances could therefore rest with two other participants in the Colloquium.

At any international gathering of lawyers having freedom of speech among the items on the agenda, the *Spycatcher* litigation with its territorial versions is a natural focus of attention. I must therefore not fail to lay claim to the status of a *Spycatcher* old boy, and even to ask whether any other Judge had to write as many as three judgments on the subject?⁴ The stages of the New Zealand litigation, initiated by Her Majesty's Attorney-General, are reported consecutively in [1988] 1 NZLR from page 129 to page 183. At the last stage we declined discretionary leave to appeal to the Privy Council, partly on the ground that the case required the Court to balance the claimed interests of the British Government against the claimed interests of the New Zealand press and public. The approach of a New Zealand Court might be different from (not surely "to" as the headnote says) that of a British Court, and it would have placed the Privy Council in an invidious position if required to determine for New Zealand a clash of interests of that kind.

What we did with the litigation in New Zealand was to recognise that Wright, and others in any national security service, must owe a lifelong duty of confidence to the government of their country. It did not seem to us to matter whether the duty stemmed from statute, equity, the royal prerogative or any other conceivable source. The duty may stem from more than one source, but surely it exists. Nor did it seem to the Court of Appeal, contrary to the opinion of the then Chief Justice at first instance, that in one aspect the case might be characterised as an attempt to enforce in the jurisdiction the penal law of another jurisdiction. The fact that the New Zealand Government had been persuaded to lend support to the action brought by the Government of a country in a sense our progenitor and now our ally was enough to overcome that obstacle; here we differed from the result reached later (not earlier, *pace* Lord Griffiths in [1988] 3 All ER at 655) by the High Court of Australia, who disposed of the case by determining that it was non-justiciable in Australia.

We were not willing nevertheless to rubber-stamp the New Zealand Government's approbation of the British action. The late deeply-respected jurist Dr F A Mann subsequently told me that he thought we had not given enough weight to the wishes and assessments of the two Governments. He is as likely to be right as anyone. The factors turning the scales for us, in refusing first an interim injunction and secondly any permanent relief by way of injunction, account of profits, exemplary damages or otherwise, against the local newspaper which had reproduced extracts from the book published in the London Sunday Times, were twofold. It verged on the absurd to restrain a New Zealand newspaper from reproducing information or alleged information that was already in the international public domain. Moreover, for the purpose of the proceedings in New Zealand (and likewise those in Australia) the British Government formally accepted that the injurious stories in Wright's book were true. I remember the marked impact on our Court when it became clear that so much was conceded.

Breach of confidence by a public servant is a serious and commonly reprehensible step, as all human rights instruments recognise expressly or by implication. Occasionally though - and it may be only very occasionally - the time comes for what Lord Denning called "whistle blowing". Concerned as we were with the New Zealand public interest, not automatically to be identified with the United Kingdom public interest, we had little doubt that the defence that publication was in the public interest had to prevail in the light of the factual concession. Sometimes it is called the iniquity defence, too narrow a description. The circumstances in which the judiciary can properly hold that a Bill of Rights freedom of expression prevails over a Bill of Rights or international instrument recognition of confidentiality as a protected value cannot be encapsulated in a phrase. Like so much else in the law, everything depends on facts and circumstances. The true motives of the media in an exposé or an ostensible one may have to be weighed in deciding the question.

Lord Lester of Herne Hill, and this is the first and possibly a technically proleptic opportunity of having the pleasure of writing that designation, has pointed out that in the *Spycatcher* litigation the New Zealand Court of Appeal did not cite international instruments. That is true. In mitigation one can only say that neither side asked us to, and it was before the era of the New Zealand Bill of Rights. If our judgments needed further support, as Francis Mann thought, we could have found it in that quarter. The point to stress is the one so well made by numbers at the Colloquium. Any restriction of freedom of speech is to be regarded in a democracy with deep suspicion, to be subjected to the closest scrutiny. It is a freedom always entitled to the benefit of the doubt.

All democratic nations contribute to the universal law, slowly but inevitably evolving, as to freedom of speech and other basic human rights. Partly it is that consideration which leads to the doubts already hinted at regarding the retention of a New Zealand appeal to the Privy Council in England, composed essentially as it is of English and Scottish Judges. How can they honestly speak for New Zealand in contributing to an international process? It is asking too much of them, schooled as they are in the belief instinctively that English or Scottish law knows no fellow, to see issues from a South Pacific perspective.⁵ It is asking too much of New Zealand Judges to expect them to fill a role different from that of their British, Canadian and Australian counterparts and contemporaries, to accept a British legal intellectual yoke - much though the leaders of British human rights thought are admired. Legislators and the general public do not understand these truths and are seldom encouraged to understand them by the media. That is but one respect in which faith in the freedom of speech enjoyed and at times exploited by the media is the ultimate fallback position.

Anti-Discrimination Legislation

Long before the 1990 Bill of Rights with its generally-expressed right to freedom from discrimination, New Zealand had specific legislation against discrimination. In recent weeks there has been enacted the Human Rights Act 1993 -

An Act to consolidate and amend the Race Relations Act 1971 and the Human Rights Commission Act 1977 and to provide better protection for human rights in New Zealand in general accordance with the United Nations Covenants or Conventions on Human Rights.

An elaborate piece of legislation of 153 sections plus Schedules, the Act enlarges upon the preceding statute law, an account of which and the leading cases thereunder will be found in *Constitutional and Administrative Law in New Zealand* by Philip Joseph (Law Book Company, Sydney, 1993) 130 et seq. The Act constitutes a Human Rights Commission chaired by a Chief Commissioner (currently an academic lawyer, Margaret Mulgan). Its members include the Race Relations Conciliator and the Privacy Commissioner: the office of the latter, created by the Privacy Act 1993, adds another player to the rather crowded human rights stage in New Zealand. It is largely a response to the power of the computer; the first holder of the office is Bruce Slane, a former President of the New Zealand Law Society and well-known internationally.

The role of the Human Rights Commission is educational in the formation of public and political understanding of human rights issues. There are wide powers of investigation and report. The Act lists prohibited grounds of discrimination and, with sundry exceptions and qualifications, outlaws action based on such grounds in various fields of activity - employment, vocational control, partnership, education, disposal of land and accommodation, access to public facilities, and so forth. Complaints of breaches may be made to the Commission, and those found to have substance are usually settled by the Commission's mediation. Failing settlement, the Commission may bring proceedings before a body of a judicial character, the Complaints Review Tribunal. The Tribunal has extensive powers to grant relief by way of mandatory remedial orders, monetary compensation for loss or humiliation and distress, etc. From its decisions there are full rights of appeal on both fact and law to the High Court, where the proceedings are to be reheard before a Judge sitting with additional members. Finally there is a right of appeal by leave to the Court of Appeal on questions of law. Thus the human rights administrative and adjudicatory machinery is linked to, and in the judicial aspect integrated with, the basic Court structure of the state, a pattern to be found also in other fields in New Zealand.

No doubt the categories of discrimination are never closed, but the draftsman of the 1993 Act (I decline to say "draftsperson") appears to have made something not far from a bid in that direction. Anyone in search of a catalogue might care to consult s.21. Taking into account the numerous specific sub-classifications in a section notable for dotting i's and crossing t's, there seem to be more than fifty prohibited grounds of discrimination. Some of the phraseology is unexpected, and some of the substance striking:

"Ethical belief, which means the lack of a religious belief, whether in respect of a particular religion or religions or all religions"

"Political opinion, which includes the lack of a particular political opinion or any political opinion"

"The presence in the body of organisms capable of causing illness".

Thus s.21 might be called in some respects, and without depreciating its laudable and necessary purpose, discrimination for the connoisseur. But so far the bulk of complaints apparently relate to more familiar discriminatory practices, such as sexual harassment in the workplace or racial intolerance. For the most part the Tribunal has been able to keep its feet on the ground. For instance "robust banter" was found to be not truly insulting to Australians.

Perhaps on the other side of the line was the Tribunal's finding of breaches of the Act by newspapers carrying an advertisement offering a position as a service station attendant, required to pour petrol, to a "keen Christian person". Although the Prime Minister of the day did not fail to take the opportunity of pronouncing the law to be an ass, he did so without expressly drawing to the attention of the people that in this instance what was involved was law enacted by Parliament.

The Waitangi Cases

The present visit to South Africa has underlined that the New Zealand experience in recent years in dealing with the justiciable claims of an indigenous people may not be without some relevance to the problems awaiting a reconstructed Republic. In the newspaper *Business Day*, 7 September 1993, an article from Simon Barber in Washington conveys the views of consultants and officers of the World Bank there; while markets and property rights should be fortified, the *status quo* is economically irrational. Instead of wide-scale, capital-intensive white commercial farms, there should be, according to the argument, a shift towards small-scale farming with black smallholders: farm sizes not exceeding "what one family with a tractor would comfortably manage". It is said that no one aside from the PAC is suggesting expropriation but that, once the ANC is in power, the urban trade unions and the needs of unemployed urban youth should not be allowed to monopolise attention. A rural restructuring will be required. Claims to land both general and specific will have to be adjusted. All this for economically rational rather than racially-based reasons. In any event, Mr Nelson Mandela is reported as having promised that privately-owned land and property would not be seized by an ANC government.⁶

The New Zealand analogy cannot be pressed too closely. The overwhelming predominance of black numbers in South Africa contrasts with a New Zealand situation in which less than 15 *per cent* of the population are Maori, although their growth rate is faster. It is in ideas capable of modification or development, rather than imitation, that the New Zealand developments may possibly be helpful.

The judiciary has a part to play in the just evolution of a diverse yet integrated and functional society. The following account reflects largely the lessons of sitting in a series of cases in the New Zealand Court of Appeal in which the Court was faced, probably as never before, with the need to adjudicate for a society now multicultural - there are many from other South Pacific Islands or of Indian or Chinese extraction - and formed fundamentally by the union of two races, the predominantly British European and the Polynesian Maori. When we had to confront this task virtually afresh and realistically, it was a far cry from the nineteenth century colonial days when Judges could speak of the founding Treaty of Waitangi 1840 as "a praiseworthy device to pacify savages" or "a simply nullity".

As any adjudication in the sphere of race relations is almost sure to be, the answers rendered by the Court of Appeal have been followed by controversy and misrepresentation. The misrepresentation has not been confined to the uninformed; some who have aspired to, and probably deserve, the accolade of statesmanship have been driven to descend. In writing a judgment in this field one is acutely conscious of the risk of misconstruction. One's words have to be chosen carefully. Still, it is hard for anyone writing about a race relations case to

be completely objective. With academic lawyers, for instance, ingrained approaches or pet theories tend to creep in. So it is that, while recognising that there has been much admirable academic and even scholarly writing on the subject, I should prefer those seriously interested in it to read the Court of Appeal judgments themselves before commentaries thereon. To date the main reported judgments are *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (the *lands case*); *New Zealand Maori Council v Attorney-General* [1989] 2 NZLR 142 (the *forests case*); *Tainui Maori Trust Board v Attorney-General* [1989] 2 NZLR 513 (the *coal case*); *Te Runanga o Muriwhenua Inc v Attorney-General* [1990] 2 NZLR 641 (the *fisheries case*); *New Zealand Maori Council v Attorney-General* [1992] 2 NZLR 376 (the *broadcasting case*); and *Te Runanga o Wharekauri Rekohu Inc v Attorney-General* [1993] 2 NZLR 301 (the *sealord case*).

The Treaty of Waitangi 1840 was made between Queen Victoria (by her representative, Captain William Hobson) and numerous Maori chiefs (there were more than 500 signatories eventually). It is a deceptively simple document of only three articles, with introductory recitals and a conclusion. There are English and Maori versions, which do not completely tally. The key features are that the Queen acquires governance or sovereignty and the Maoris become British subjects, but they are guaranteed the full exclusive and undisturbed possession of their Lands and Estates, Forests, Fisheries and other properties so long as it is their wish and desire to retain the same in their possession. If they are disposed to alienate, the Crown has an exclusive right of pre-emption. The Maori text uses "taonga" (treasures) for the other properties, a term which has been held to embrace the Maori language, now under threat of extinction: see the *broadcasting case*.

Regrettably, over the years the pressures of colonial expansion brought with them many breaches of the Treaty, such as acquisition of lands at undervalue or from Maori having no authority from the tribe to sell, the compulsory taking of land or its seizure for alleged rebellion, failure to set aside promised reserves, use of trust land for other purposes, and so forth. The Treaty has always appealed to by Maori complainants as their intended safeguard. At times a more cynical attitude to it prevailed on the European side. For long the ascendant public policy was integration: through intermarriage and assimilation Maori distinctiveness was seen as ultimately disappearing. But in much more recent times the emphasis has shifted to the importance of preserving a flourishing Maori identity and culture, and to raising their socio-economic status.

For long, too, the orthodox view was ascendant that the Treaty was of no legal force or value, unenforceable in the Courts except insofar as it might be incorporated in the law by statute. A Privy Council decision in 1941 was the highwater mark of that approach: *Te Heuheu Tukino v Aotea District Maori Land Board* [1941] AC 308. But that was half a century ago. The years since the second world war have seen a vast general change in international attitudes to the rights of colonised indigenous peoples. New Zealand law, like Canadian and Australian law, has naturally begun to be evolved against a changed background of values and circumstances, and with a changed spirit. There are those who contend that the Treaty must be seen as the foundation document of New Zealand, not only in fact as it undoubtedly was, but in law also: a kind of grundnorm, a political compact as fundamental for our South Pacific country as was Magna Carta for England. The Courts have not yet had to face squarely the profound jurisprudential questions raised by such contentions; and long may that remain the position.

In any event there have now been some very significant recognitions of the Treaty by statute. Especially notable is the Treaty of Waitangi Act 1975 and the amending legislation extending its scope. The Act establishes the Waitangi Tribunal, with a majority of Maori members, whose function is to inquire into and make recommendation to the Crown upon claims submitted by Maori. Policies, acts or omissions of the Crown, and even parliamentary legislation as far back as 1840 may be the subject of claims that Maoris have been prejudicially affected inconsistently with the principles of the Treaty of Waitangi. For the most part the Tribunal's conclusions are recommendatory only, although in strictly limited spheres it may make binding orders. In practice, however, its recommendations have a moral force which cannot be and is not ignored by the Government of the day. The recommendations are not necessarily implemented *in toto* or in the precise manner contemplated by the Tribunal, but they lead to negotiations and sometimes settlements on a major scale. The present government has embarked on a policy of endeavouring to settle all outstanding claims by the end of the century. Possibly this is optimistic, but real progress is being made, real goodwill displayed to practical effect.

In the changes the Courts have had a formative role stemming in part from other legislation recognising the Treaty. The prime example is the State-Owned Enterprises Act 1986, a measure prompted by the prevailing market philosophy and having the immediate object of ensuring the conduct of certain state activities on a commercial basis, with the prospect of ultimate privatisation. The risk that land and other assets held by the Government might pass out of public hands and so become unavailable for satisfying Maori claims led to the insertion of a provision of what was to provide profound effect. It is s. 9.

s. 9. Nothing in this Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi.

What the legislators meant by the "principles of the Treaty" was not defined; it is doubtful whether there was any clear concept in their minds. Necessarily it fell to the Courts to interpret the phrase. The line of cases already cited have turned chiefly on its interpretation and application. In the leading case, the lands case, the analogy of partnership was selected by the Court of Appeal as a sort of shorthand. The Crown and the Maori are seen as partners owing mutual duties of good faith and reasonableness in their dealings. The duties of the Crown extend to providing proper safeguards for Maori claims and remedies for past breaches of the Treaty. The duties of the Maori include reasonable co-operation and loyalty to the Queen and the state.

These may seem generalities, and so they are, but they have had solid and demonstrable practical effect. Perhaps the best illustration concerns sea fisheries. The overfishing by non-Maori interests of traditional Maori fishing grounds, on which they had depended for subsistence, created a situation unforeseen at the time of the Treaty. Accepted as a living instrument, the Treaty had to be applied in a way taking into account the realities of life in present-day New Zealand. In effect the Waitangi Tribunal (which is not strictly a Court) and the Courts produced by their decisions a situation in which it became obligatory on the Government to provide for Maori some reasonable share of national fishing resources. In effect, in the Sealord case, the Court of Appeal approved a pact or deed of settlement between the Government and leading Maori negotiators whereby, by purchase of shares in the leading fishing company and otherwise, the Government provided more than 23 *per cent* of the

fishing quotas for Maori, with a 20 *per cent* share of any new quota issued in future. This is quite a spectacular, yet a just, result; for, although they had legitimate grievances as to past virtual appropriation of their fisheries, the Maori people compose less than 15 *per cent* of the total population.

Let it be repeated that the foregoing pages about the Treaty of Waitangi, like the rest of this paper, are no more than a sketch. The next steps for those wishing to explore the subject further would be to read the decisions to which references have been given and the reports issued by the Waitangi Tribunal recording the results of its extensive and continuing investigations. The whole subject may be in a sense linked with the New Zealand Bill of Rights Act 1990. In providing redress for past injustices the Waitangi decisions may be classified as a form of positive discrimination within the concept of s. 19(2) of that Act.

My colleagues and I have spent much time on Bill of Rights and Treaty of Waitangi cases. It is stretching and anxious work, calling I think for efforts to follow an approach different from that required in, or sufficient for, cases in traditional fields of private law. The reward to be found in these labours is a sense of the worthwhile and probably indispensable contribution that the judiciary and the legal profession can make towards the evolution of more just national and international societies.

Endnotes

1. In November 1993 the referendum resulted in a clear majority for proportional representation, a form of which ("MMP") will now be introduced.
2. See now *TV3 Network Ltd v Eveready New Zealand Ltd* [1993] 3 NZLR 435, and *Television New Zealand Ltd v Prebble* [1993] 3 NZLR 513.
3. Trollope drew a rather odious character, quite without the charm of some editors of the present day, who was nonetheless sincere in his belief that his scandalous "revelations" were in the public interest. One difficulty was that he had ceased to be able to distinguish truth from falsehood.
4. Other old boys at the Colloquium are Lord Browne-Wilkinson, who, when Vice-Chancellor, delivered an early *Spycatcher* judgment in England; President Michael Kirby, who wrote the first majority judgment in the New South Wales Court of Appeal; and Anthony Lester, beside whose record of arguing the case sixteen times my own judicial figure pales into insignificance.
5. The recent judgment of their Lordships in *Attorney-General for Hong Kong v Reid* contains some significant concessions on this point. These are valuable, but they cannot remove the basic problem.

6. Mr Mandela said that the SADF controlled about 40% of the country's land which the ANC would "certainly" use to compensate those who had lost land under apartheid. The prevalence of initials in South African political discourse - other examples are NP, CP, IFP, DP, CP, AZAPO, SACP, TVBC, COSATU, CDOESA, TEC is supposed to have led an irreverent commentator to suggest that the Republic be renamed South Acronym.