LEGAL CHANGE OVER FIFTY YEARS

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Some day, some child born in a marvellous year
Will learn the trick of standing upright here.
Alan Curnow

Charles Brasch said that a nation comes of age when it begins to live in the light of an imaginative order of its own.[1] Transposing this from the realm of the imagination to the legal realm, one may fairly claim that a nation comes of age as a polity when it begins to live in the light of a legal order of its own. How far can this be said of New Zealand law in the late 1980s?

One can of course be quite certain that Brasch was not contemplating the throwing away of our inheritance of the past, from Greek drama to nursery rhymes to Polynesian myths. And an indigenous legal order neither requires nor admits dispensing with our heritage of the common law and free political institutions, or European legal and philosophical traditions. What it might suggest is a greater self-confidence, the end of a legal cringe corresponding to Phillips' "cultural cringe". It might imply a willingness to go back to first principles, to be readier to ask our own questions, and to take ideas first-hand rather than through the filter of British acceptance or debate. It could call us to set out on the arduous voyage of discovering how to accommodate the Maori as well as the European-British dimension in the legal system.

In 1956 an article appeared in the New Zealand Law Journal — then almost the sole New Zealand outlet for legal writing — with the title "Law Reform in New Zealand".[2] It professed to be "a cursory survey of one aspect of the still unwritten history of New Zealand law". The conclusion was that our history since 1840 had been marked by judicial conservatism and alternate apathy and vigour by the legislature. While on the whole our inherited law had been succesfully adapted to the needs of a rapidly developing and mobile society, this process had been hampered by an excessive regard for English precedent.

With the passage of a generation and the establishment of a permanent Law Commission charged with keeping the law of New Zealand under review and to make recommendations for its development and reform[3] a revisiting of this theme may be timely. Were the perspective and the conclusions valid, and if they were how far do they remain valid today? To explore this, however, 1956 is not a satisfactory starting point. A point of departure that is both more useful and symbolic was the appointment of H.G.R. Mason as Attorney-General and Minister of Justice in 1935, the appointment of a advisory officer (Norman Butcher) in the Department of Justice in 1936 and the creation of a Law Revision Committee in 1937.

This article looks at the machinery, policies and nature of legislative law reform since then. It deals only briefly with the course of case law and the role of the judiciary, a role that in the last 15 years or so has been more

[1] "Landfall", Dec. 1954.
[2] [1956] N.Z.L.J. 72.
[3] Law Commission Act 1985 s.5(1).

constructive and autonomous. Nor does it touch on educational and academic changes that have done much to create an ambience receptive to reforms. The law course has been transformed from the status of a "glorified night school" to a full-time and respected discipline. A number of law reviews provide a home for indigenous legal writing of high quality. Partly in consequence the practising profession is itself less stodgy and more open to innovation.

At the threshold it is well to define key terms. Since reform usually implies some improvement, it can be a highly subjective concept. This is obvious in social and moral areas. For example some would see the homosexual law reform legislation of 1986 as sensible and overdue reform, some as inadequate tinkering, and some as making bad law. A similar range of judgments exists with much less emotional topics. Did the contracts legislation of the 1970s alter the law for better or for worse?

This article is concerned with legal change, and patterns of legal change, irrespective of whether they are desirable. Law reform is thus used in a neutral sense. But a question remains. All legislation is law, and since all legislation changes the law in some way, it might be concluded that law reform includes all legislation. This would seem to give law reform a wider ambit than is either customary or useful. Nonetheless it seems closer to the truth than to identify it with changes in "lawyers' law", an elusive and chameleon-like creature. The term seems to suggest that some legislation is of relevance only to lawyers and contains no political or social policy. If that applies to any legislation, it is only a tiny fraction. In an address on "The Legal Theory of Law Reform"[4] Geoffrey Sawer drew a distinction between lawyers' law and social administration. He admitted that law reform might involve policy, but only that policy which society was willing to leave mainly to lawyers. This is really tautology. The interplay of law and politics cannot be escaped. As good an example of lawyers' law as might be found — legal liability for wandering stock — became in New Zealand a completely political matter.[5]

The question is not academic. On the connotation we give to law reform will depend the appropriate machinery to bring it about and judgments about the amount and effectiveness of law reform at a particular time.

I. STRUCTURES

It is impossible to make sense of our law reform machinery except in the context of Westminster government as it has developed in New Zealand.

Everyone knows that parliament is the legal source of new law, and in recent years its select committees have played an important and increasing role in fashioning the details of legislation. But with few exceptions it does not initiate law reform or any other legislation. The successful private members' bill is rare, though it may prod a government into taking up a topic.[6] The initiative lies with the government, which with most measures of law reform means the Minister of Justice. For the last 50 years he[7] was advised by a

[4] (1970) 20 U. Toronto L.R. 183.

[5] See The Law Relating to Liability for Animals: Report of Torts & General Law Reform Committee 1975. That report has never been implemented.

[6] The exceptions have mostly related to conscience issues: Adult Adoption Information Act 1986; Homosexual Law Reform Act 1986. A true exception was the Evidence Amendment Act 1977 (evidence in rape cases) sponsored by Mr. McLay.

[7] No woman has yet been appointed as Minister of Justice.

series of committees and what can only be called a Clayton's Law Revision Commission. In addition some far-ranging changes have originated in the reports of Royal Commissions, notably the Royal Commission on Personal Injury in New Zealand (the Woodhouse Report) and the Royal Commission on the Courts. However, the principal source of advice throughout that time has probably been the Department of Justice. The Department has played a central and crucial role in New Zealand law reform, both as an originator and processor.[8] It is from the Department that the great majority of succesful proposals have directly or indirectly emanated.

Nevertheless, whatever the department wanted or did, the pace and character of law reform have depended upon the various Ministers of Justice. It has often been pointed out that most law reform is not politically glamorous and seldom appeals in terms of votes. Unless the Minister of the day has been enthusiastic for reforming the law, politically effective, and influential with his Cabinet and Caucus colleagues, law reform has languished.

Thus Rex Mason accomplished much during his first term of office (1935-49), although within a rather narrow area of law and in most cases by copying what had been enacted in England. He was greatly handicapped by antipathies between him and the most powerful Ministers.[9] Ralph Hanan had all the required qualities, and the 60s were something of a golden age for law reform in New Zealand. His immediate successors lacked some (or in the case of Sir Roy Jack all) of them. Law reform was at a low ebb in the years 1970-75, with the outstanding exception of the accident compensation scheme, which followed a different route. The state of affairs attracted a good deal of criticism from lawyers.[10] Much of this however was in terms of the machinery and the reports of committees, and was thus somewhat beside the point. Mr Thomson and Mr McLay were able to accomplish far more within the same structure.

Alongside and working in tandem with the department from 1937 to 1965 was the Law Revision Committee, with the Attorney-General and Minister of Justice as chairman. Its members included parliamentarians, lawyers in private practice, academics, and the heads of the legal departments of government, but (except formally and for a short time) no judges.[11] Its formation was inspired by the English Law Revision Committee set up by Lord Sankey in 1934. Its mode of operation was however very different, and interestingly (though unintentionally) its structure bore a close resemblance to the New York and California Law Revision Commissions, allowing for the different constitutional setting in America. Particularly in its earlier years the committee inspired some important and useful reforms. Nor was it altogether unwilling

[8] See generally G.S. Orr, "Law Reform and the Legislative Process" (1977) 10 V.U.W.L.R. 391. It is remarkable that in 1969 Sir Alexander Turner in "Changing the Law" (1969) 3 N.Z.U.L.R. 404 took 8 pages to describe the sources of law reform without mentioning any government department.

[9] See, inter alia, J.L. Robson, *Sacred Cows & Rogue Elephants*. Govt. Printer. 1987.

[10] e.g. *Law Reform — The Poor Relation* (Auckland District Law Society Pacific Issues Committee 1976); David B. Collins "Law Reform: a New Procedure for New Zealand", [1976] N.Z.L.J. 441.

[11] When the Law Revision Committee was set up in 1937 the then Chief Justice (Sir Michael Myers) was invited to become a member. He accepted, but never attended after the first meeting and in 1944 expressed surprise that he continued to receive agendas. But he never formally resigned.

to respond to bolder initiatives.[12] Some of its defects sprang from its large and unwieldy membership[13] — it tended to grow by a process of accretion, and hardly any members were ever replaced. Three of the original 1937 members remained when it ended in 1965. It met two or three times a year for a day; it never produced reports or gave reasons for its recommendations. And inevitably its approach was limited by the essentially colonial outlook of most New Zealand lawyers of the day.

In 1966 the committee was replaced by a so-called Law Revision Commission[14] and four (later five) standing law reform committees. A report to the Secretary for Justice in 1964 had proposed setting up the latter but not the former. The Secretary, however, advised the Minister that the new system should incorporate this additional tier[15]; partly in an attempt to reconcile the members of the old committee to its demise, they were all metamorphosed into members of the commission for an initial term. However, departmental advice ensured that the standing committees were directly appointed by and reported to the Minister. They were not subcommittees of the commission.

For the first time a Supreme Court judge accepted membership, the Chief Justice nominating Sir Alexander Turner. This choice was not an ideal one and the commission was much too large from the start to function well.[16] Altogether, the commission was an unhappy experiment. It was not so much a body in search of a role as a body unwilling to accept the role that it was asked to play. As the Minister and his department saw them, its functions were to overview, initiate and recommend on policies and priorities. This offered possibilities of the commission developing into a really worthwhile body. What most of its members wanted was exactly what it could not do effectively — revise and pass detailed judgment on the work coming from the standing committees. At best, this would have meant substantial delays. It would have required the commission to make itself as knowledgeable as each of the committees on every topic. And officials feared, not entirely without reason, that the trend would be to drag back the bolder proposals that the committees might make.[17]

The Commission was replaced in 1975 by a Law Reform Council with a smaller membership and more modest purposes. It comprised the chairmen of the five law reform committees, the Solicitor-General, the Secretary for Justice and Chief Parliamentary Counsel under the Minister's chairmanship. The objective was to co-ordinate the work of the committees and to discuss problems and issues that the committees had in common. Even so, it was a rather laboured body. It did inaugurate the review of inherited legislation that has become the Imperial Laws Application Bill. But otherwise it proved difficult to draw up agendas that would usefully occupy members for even the half day a year that the council met.

[12] For example one of the more interesting pieces of legislation it sponsored was the Fencing Amendment Act 1955 relating to the problem of trees affecting neighbouring residential property. It did very useful work on the subject of encroachment and was responsible for the 1958 reform of the law concerning payments made by mistake and for the Perpetuities Act 1964.

[13] By 1965 the Committee had 19 members.

[14] There is no document constituting the Law Revision Commission, still less any formal instrument of the Governor-General. The Minister of Justice simply announced that he had decided to set a Commission up and the membership; and everything followed from that.

[15] See *The Law in a Changing Society*, p. 23.

[16] The Commission never had fewer than 16 members.

[17] For a tempered account of the Commission's early years, see J.L.Robson, op.cit.

Opinions will differ on just how succesful were the five standing law reform committees. One or two of them in the first years had a dismal record; their reports were superficial and perfunctory and their recommendations pussyfooting. The quality of most reports improved radically later on. These reports often took in a range of comparative law. And most of the committees were willing to take innovative approaches. Their principal weaknesses were the sometimes long delays between a reference and the report, and the inability to cope with topics that were wide or that required substantial extra-legal research.

By 1986 the great majority of the committees' reports had been implemented. The resultant body of legislation is substantial. They accounted however for only a minor part of legislative law reform over the years of their existence, and it is hard to see how with their constitution and resources they could have done much more.

It is too early to say anything of the Law Commission. As a full-time and independent body with oversight over the whole of the law the commission is capable of doing much more, and more coherently and speedily, than was possible in the past. The references the Minister has given it are wide and ambitious, and certainly beyond the capacity of any previous body. Despite its quasi-English dress[18] its creation opens the way to the development of New Zealand law in a broader and more principled way than hitherto.

II. Principles And Tendencies

New Zealand legislators and those who advise them are essentially pragmatic. Indeed one common weakness in many reforms made at all stages of our history may lie exactly in a resistance to conceptual thinking and to working from basic principles, although it has become common (both in New Zealand and elsewhere) for acts to contain a succinct statement of their objects and purposes, either in the long title or in a special section.[19] The body of legislative law reform even over a short period has been so diverse and so much a response to particular defects and evils perceived that it is not easy to identify much general doctrine. However, it is tempting to try to do so.

One notable characteristic of changes in New Zealand, especially those departing from English law, has been a concern for individual as well as general justice. The writer regards this as a much more salient feature than the "egalitarianism" seen by John L. Ryan in his article "The New Zealandness of New Zealand Law".[20] It has informed much legislation from at least 1900.[21] It has much to do with the frequent giving of discretions to the courts, either expressly or by implication. This is particularly common and widely accepted in family law, but is far from confined to this branch. Limitation periods have almost customarily been qualified by a discretionary power in the courts to extend them. In the last 20 years the device has been used freely in contracts legislation beginning with the Minors Contracts Act 1969 and in this context

[18] Some of the language of the (New Zealand) Law Commission Act 1985 is very close to that of the United Kingdom Act of 1965. Almost uniquely in the Commonwealth, both bodies are called "Law Commissions".

[19] e.g. for New Zealand the Matrimonial Property Act 1976, the Official Information Act 1982 and the Law Commission Act 1985.

[20] (1972) 1 Anglo-American L.R. 204.

[21] When the Testators Family Maintenance Act was passed.

has been strongly criticised as well as defended.[22]

The fact is that the trend exists, and it seems almost to have become an axiom that hard cases make for discretions. It is also true that on the whole New Zealand courts have managed sometimes sweeping and vague discretions with success and general approval. One conspicuous exception was the matrimonial property legislation of 1963 and 1968. The failure here, epitomised by the Court of Appeal's majority decision in *E.* v. *E.*[23] may perhaps be attributed to the distaste of many of the judges for the philosophy underlying that legislation. The Matrimonial Property Act 1976 was in one aspect a reaction to this. It does however retain numerous discretions.

One may wonder, however, if the reluctance of the courts to develop law governing the exercise of particular discretions has always corresponded with the intentions of those who framed them. This point was made by Professor R. Sutton at a discussion at the AULSA meeting in 1980.[24] He may have had in mind Cardozo's famous article "A Ministry of Justice".[25] Cardozo saw as an important purpose of statutory law reform to rescue the courts from an impasse into which a course of decisions had led them and enable them to resume the process of principled development in accord with the genius of the common law. This has not usually happened in New Zealand.

Another theme is loss distribution. The outstanding modern example is of course the Accident Compensation Act. But it stands by no means alone. The policy lies behind a number of occupational licensing statutes that sometimes indemnify purchasers and create a fidelity guarantee fund to support it. And there are other instances where those preparing legislative proposals have asked who is best able to insure against the loss in question and thus spread it.[26] Interestingly the same policy has been explicitly stated by the courts as a basis for their decisions, e.g. Woodhouse J. in *Bowen* v. *Paramount Builders (Hamilton) Ltd.*[27] and Richardson J. in *Gartside* v. *Sheffield Young & Ellis*[28].

A sufficient number of statutes have enacted a change-of-position ground for relief to argue that this also is an accepted if not consistently applied doctrine. The first example is s.94B of the Judicature Act, a 1958 amendment whereby relief against recovery of payments made under a mistake may be denied if the recipient was in good faith and has so altered his position in reliance on the validity of the payment that the court considers it inequitable to grant relief to the claimant. Several similar provisions were enacted in the 1960s relating to the following of trust property. A provision almost identical with the 1958 Act is s.44(4) of the Matrimonial Property Act 1976. The Contracts (Privity) Act 1982 in s.5 enacts a change-of-position test of the right of the parties to a contract to withdraw a benefit conferred on a third party.

But generally it is perhaps more valid to talk about preoccupations rather than doctrines or principles informing law reform legislation. A consistent theme of the last 25 years has been the relationship between the public authorities and the individual. One objective has been to limit or curb the state's powers.

[22] See J.F. Burrows, "Statutes & Judicial Discretion" (1976) 7 N.Z.U.L.R. 1 and "Contract Statutes: The New Zealand Experience" (1983) Statute Law 76.
[23] [1971] N.Z.L.R. 859.
[24] See [1980] N.Z.L.J. 379.
[25] (1921-22) 35 Harvard L.R. 113.
[26] e.g. Carriage of Goods Act 1979.
[27] [1977] 1 N.Z.L.R. at 51.

In this current there have of course been counter eddies, such as the National Development Act 1979 (now repealed). An opposite trend has been the seemingly inexorable extension of police powers against the citizen. But the period has seen really significant constitutional legislation in the Parliamentary Commissioner (Ombudsman) Act 1962, (revised and extended to local authorities in 1975) and the Official Information Act 1982. The process would be carried much further if the proposed Bill of Rights were enacted. In a more minor key statutory rights of entry onto private property have been standardised and limited, and the rights of those who appear before commissions of inquiry clarified. In this area there has occurred a significant interplay between parliament and the courts. Not only have the courts taken advantage of and freely developed the new statutory remedy of judicial review in numerous decisions, including the very New Zealand case of *Finnigan* v. *New Zealand Rugby Football Union*.[29] They have greatly restricted the scope of public interest immunity,[30] and applied a statute by analogy as a source of public policy.[31] In something of the same vein, although of far greater potential importance, is the historic decision in *New Zealand Maori Council and Latimer* v. *Attorney-General and Another*,[32] which enshrines the Treaty of Waitangi at the heart of public policy.

Another longstanding tradition at least until quite recently has been that of regulatory legislation intended to protect those open to exploitation. This was certainly one aim of a host of occupational licensing statutes and of the somewhat timid consumer legislation such as the Hire Purchase Act 1971 and the Layby Sales Act 1971. Current philosophies are weakening this typical philosophy. A less happy aspect of the tradition was a propensity to over-legislate. There was a belief that the remedy for any social evil was to throw an act at it, a faith that legislation could solve or ameliorate all social problems, usually by creating some new administrative apparatus or new criminal offences.

III. The Patriation Of New Zealand Law

At a deep level the history of New Zealand law over the last 30 years or so is the story of legislative (and in a more modest degree judicial) emancipation from the stunting shadow of English law. The oaks have been thinned out, the totaras are growing tall. British statutes and recommendations for legislative changes in the common law have become simply one of many resources for the New Zealand reformer. As recently as the 1950s politicians and lawyers instinctively looked to England for precedent, and especially in the traditional areas of common law were reluctant to legislate except in the wake of English legislation. "Has this been done in England?" was a frequent response from ministers confronted with a suggestion for reform. It is true that an inclination to resort unduly to English precedent lingers in some places. But it is no longer powerful. The shift in habits of thought has been profound. It can be narrowed down to a relatively few years.

[28] [1983] N.Z.L.R. 394 at 419.

[29] [1985] 2 N.Z.L.R. 181, 190.

[30] See e.g. *Environmental Defence Society* v. *South Pacific Aluminium Ltd.* [1981] 1 N.Z.L.R. 153.

[31] The Official Information Act 1982 in *Fletcher Timber Ltd.* v. *Attorney-General* [1984] 1 N.Z.L.R. 790.

[32] (1987) 6 N.Z.A.R. 353.

A like attitude flourished in the constitutional sphere. In 1931 New Zealand political leaders wished to have no truck with the legal autonomy offered by the Statute of Westminster. They ensured that it was not to apply to New Zealand until further notice, which at least one statesman (Sir Francis Bell) hoped would be never. In this respect the statement by the Right Honourable Mr Palmer[33] that failure to adopt the statute before 1947 was a case of constitutional inertia seems inaccurate. It was not inertia; it was at least for some years outright hostility to the purpose of the statute.

The strength of this policy of aligning New Zealand with English law in many branches can hardly be exaggerated. It is admirably illustrated in the Explanatory Note to the bill that became the Companies Act 1933.

> The Imperial Act on which this bill is founded is not above criticism . . . This criticism might be taken to suggest that the Imperial model can be improved upon. . . . But the view taken by the Advisory Committee . . . is that we should as far as possible adopt the *verba ipsissima* of the Imperial Act. Any attempts at improvements in language or arrangement would in large measure defeat the ultimate purpose of the bill — that there should in this department of law be uniformity within the British Commonwealth and that the decisions of English courts should be as applicable in New Zealand as in England. If the criticisms of the Imperial Act . . . prove to be well-founded and substantial they will inevitably be followed by amending legislation in England, and it will then be a simple matter for the New Zealand Legislature in its turn to adopt those amendments. This view has the support of the responsible officials of the Imperial Board of Trade.

Admittedly company law is a subject where at least arguably a measure of uniformity is advantageous. But the essentially reactive character seen as appropriate for law reform generally in New Zealand, even by so independent a thinker as Mason, comes out clearly in his address at the first meeting of the Law Revision Committee in 1937. He referred to the appointment of the English Law Revision Committee, and added

> It would not be enough for us in New Zealand to adopt in toto the recommendations of that committee or merely to transcribe into our statute book such English legislation as embodies them. It will be necessary for us to consider to what extent English reforms are applicable in New Zealand, *although as a rule it will be desirable to adopt them as far as possible so that our general law may conform with that of England.*[34] (Emphasis added)

This, he said, would ensure that New Zealand derived full benefit from English cases and textbooks. (It is surprising how often what might be called the textbook argument for and against reform was put forward at this period.) At a procedural level Mason suggested that action on English reports ought generally to be deferred until there had been an opportunity to peruse such legislation as might have been introduced in England. This carried at least

[33] *"Unbridled Power"* (2nd ed) p.2.
[34] *"Evening Post"* 26 August 1937.

a presumption that if legislation was for any reason not enacted in England nothing would be done in New Zealand. There is no reason to think that Mason did not correctly gauge the state of legal and political opinion at the time.

The repeal of s.4 of the Statute of Frauds is a classic case study of the intense conservatism of the legal profession and its colonial outlook. The repeal of s.4 and of the analogous s.4 of the Sale of Goods Act was recommended by the English Law Revision Committee in 1939, although a minority favoured retaining writing for contracts of guarantee. It was not followed by legislation there. In 1948 the New Zealand committee took up the topic. After considering a report from Professor J. Williams of Victoria University College, the committee intimated that it favoured the repeal of the sections except in relation to contracts for the disposition of land (not covered by the English report) and contracts of guarantee. The New Zealand Law Society was horrified. It declared itself hotly opposed to any change both on the merits and because it felt that New Zealand should in this field lag behind England. The council of the society resolved to take every possible step to resist repeal or amendment. The Law Revision Committee promptly dropped the matter. A later report in England by the reconstituted Law Reform Committee was to the same effect as Professor Williams'. The New Zealand committee, however, was now unwilling to do anything until legislation was passed in the United Kingdom. This happened in 1954. The New Zealand government promptly introduced a similar bill. It was now supported by the district law societies and became law with no opposition.[35]

In 1950 New Zealand enacted a Limitation Act modelled very closely on the Limitation Act 1939 (United Kingdom). One of its provisions provided a specially short period for actions against the Crown and public authorities and required notice of intention to sue to be given within a month of the breach. The abolition of the corresponding privilege in Britain had already been recommended by the Tucker Committee in 1949.[36] Notwithstanding this, the New Zealand parliament followed the 1939 rules. The United Kingdom parliament gave effect to the Tucker report in 1953; New Zealand followed in 1962.

A related phenomenon was the readiness to overthrow a New Zealand line of statutory development in favour of a change made much later in the United Kingdom. The Crown Proceedings Act 1950 exemplifies this. Before 1947 the New Zealand law governing actions against the Crown,[37] though far from perfect, was vastly better than the English law which largely preserved the Crown's historic immunity from suit. The United Kingdom parliament enacted a comprehensive Crown Proceedings Act in 1947. It was convoluted in drafting, replete with qualifications and often less than wholehearted in substance. Rather than building on and completing the reforms made in New Zealand from 1877 on, a virtual clone of the United Kingdom act was enacted.

The reform of the law of domicil has an interesting history. A bill was introduced in 1960. Its primary object was to abolish the doctrine of a married woman's dependent domicil, but it had other provisions. The bill was killed by the vehement opposition of the Law Society, expressed as a desire to

[35] Contracts Enforcement Act 1956.
[36] Cmd. 7740.
[37] Principally the Crown Suits Act 1910.

move in step (or at least in consultation) with Australia and of course the United Kingdom. The project was revived in the 1970s. It was then discovered that the United Kingdom had abolished the dependant domicil of married women without consulting or even informing New Zealand. Officials here then took the lead and fashioned comprehensive legislation in concert with the Australian States.[38]

The reluctance to change in many fields of law except in the train of United Kingdom legislation was never absolute. It was much weaker in public law and on topics where a strong social content was present or where the common law was undeveloped or irrelevant. Family law was a notable instance. But even here there was occasionally a mindless adhesion to English practices.

There is the case of the "discretion statement" in divorce. In England as recently as 1965[39] it was a discretionary bar to divorce that "the petitioner during the marriage had been guilty of adultery". The granting of a divorce was at the court's discretion although the ground had been proved. This was the foundation for the "discretion statement" whereby the petitioner admitted his or her own adultery and prayed the court to exercise its discretion favourably. The equivalent statutory provision disappeared in New Zealand in 1898; s.32 of the Matrimonial Proceedings Act 1963 and its predecessors required the court in the absence of certain named bars to grant a decree. Nevertheless the practice of requiring a discretion statement was imposed here. In *Jones* v.*Jones*,[40] F.B. Adams J. approved the "salutary practice" of discretion statements, presumably on the footing that confession is good for the soul. The practice, contrary to explicit legislation but following an English practice that was appropriate there, endured until it was removed in undefended cases by a 1972 Practice Note.

In what might be called the traditional areas of common law English changes were almost routinely adopted after 1935. Except perhaps for the testamentary promises legislation of 1944 and 1949 independent reform was interstitial or in small details. Thus the Statutes Amendment Act 1937 reversed the result of the decision in *Rose* v.*Ford*[41] and excluded the recovery of damages for pain and suffering or loss of expectation of life in an action for the benefit of the estate of a deceased person. And the Defamation Act 1954, which otherwise followed recent English legislation almost exactly, abolished the libel/slander distinction for civil purposes. In the late 50s there were several more important instances of independent action: — the Simultaneous Deaths Act 1958, the Judicature Amendment Act 1958 (payments under a mistake of law) and several minor amendments to the Wills Act. But in 1962 the United Kingdom Occupiers Liability Act 1957 was adopted in its entirety, without any consideration being given either to possible alternative approaches or to its extension to trespassers — a matter on which the existing law was quite as uncertain and untidy.

The turning point occurred while Ralph Hanan was Minister of Justice in the 1960s. Hanan was a liberal by temperament, an iconoclast and desirous of building a reputation as an innovator and reformer. He appeared to have little or no sentimental attachment to Britain, unlike many of his

[38] Domicile Act 1976.
[39] Matrimonial Causes Act 1965 (UK).
[40] [1957] N.Z.L.R. 463.
[41] [1937] A.C. 826.

contemporaries. With some notable exceptions[42] he was more interested in achieving a body of reform than in just what those reforms were. While of course he did not put forward proposals he did not agree with, Y or Z might have served his ends just as much as X, which is what was actually done.

This climate was conducive to going ahead without too much concern whether the change had been made in England, or indeed anywhere. The most explicit statement of the new philosophy was in Hanan's booklet *"The Law in a Changing Society"* (1965). This had been enthusiastically prepared by his departmental officers, some of whom had long been extremely frustrated by the constant tendency to test reform proposals by the litmus of English legislation. The key passage reads

> A more fundamental cause (of the inadequacy of law reform) is the view that important changes in the common law should not normally be made except in accordance with changes that have taken place in England. This is not good enough and does not seem compatible with our needs status or resources. The most fitting attitude, it may be suggested, is to retain the utmost respect for the principles of justice and wisdom that underlie the common law but no longer to test proposed changes by the measure of English law. Reforms in the content of the law ought not to have to await reform made in England, nor should English reforms necessarily be copied in New Zealand.[43]

Of course much more profound influences than the philosophy of a minister and his officials were at work. The steady growth of a sense of nationality has had its effect in numerous facets of New Zealand life. The defence revolution of 1942 must have had a deep though delayed effect. So too have changed patterns of trade. And negatively the cold shock of British decision to seek to enter the Common Market forced some fairly basic attitudinal changes.

The 1965 statement has in some degree set the theme for much legislation of the last 20 years. Quite apart from departmentally inspired reforms, which have for example altered the whole landscape of family law, a close examination of the reports of the various law reform committees illustrates a far greater autonomy of thought than before. One may take the traditional field of contract law. Of the substantial legislation here, none was primarily derived from British sources, except perhaps for the Unsolicited Goods and Services Act 1975. Australian precedents influenced the Layby Sales Act 1971, the two Insurance Law Reform Acts 1977 and 1986, the Hire Purchase Act 1971 and the Contracts (Privity) Act 1982, and American experience fortified the law reform committee in its proposals on the last of these. The rest, while not ignoring comparative law, were essentially the result of applying original thought to the law as it operated in New Zealand.

Reviving the pattern of the late 19th century, it is indeed now common for law reform legislation to be influenced by a variety of sources. Thus from Scandinavia have come the Ombudsman, compensation for property loss caused by escaping prisoners, and some basic principles of the Matrimonial Property Act 1976. The separation legislation of 1968 was virtually a translated

[42] Compensation for criminal injuries, legal aid and perhaps above all the abolition of the status of illegitimacy were dear to his heart.

[43] *"The Law in a Changing Society"* p.20.

paraphrase of the *Giftermalsbalk*, the Swedish Marriage Code. The United States inspired the legislation on recovery of payments made under a mistake of law and on simultaneous deaths, and the language of the Status of Children Act. Australian influences can be found in a good deal of the contracts and commercial law legislation and the Residential Tenancies Act 1986.

New Zealand statute law has thus become much more national in its character. As a counterpoint, however, international obligations have had an important and increasing influence on legislation, particularly in the field of human rights. This is itself a product not only of a greater awareness of and response to international opinion, but of the post-war enlargement of the subject matter of multilateral conventions. Many of these have impinged on domestic law to a degree previously unknown outside specialist areas such as aviation and labour law. The Race Relations Act 1971 is an example. One of its purposes expressed in its title is to implement the International Covenant on the Elimination of All Forms of Racial Discrimination. The Human Rights Commission Act 1977, although it anticipated New Zealand's ratification of the United Nations Convention on the Elimination of All Forms of Discrimination against Women, is manifestly influenced in part by the principles of that treaty. And the 1980 legislation[44] against retrospective criminal and penal liability was related, as the parliamentary debates made clear, to the obligations imposed by the International Covenant on Civil and Political Rights. One example outside the field of human rights is the Aviation Crimes Act 1972, whose purpose was to give effect to a number of international conventions.

IV. Towards a New Zealand Common Law

The liberation of legislative reform from an excessive deference to English example has been parallelled more circumspectly by the courts in their decisions over the last fifteen years.

An extreme example of "legal cringe" from an earlier period is *Barker* v. *Barker*[45] in 1924. Here a full court of five judges rejected a line of earlier New Zealand cases because of a decision of a divisional court in England,[46] despite the view of at least two judges that it was unsatisfactory in principle. The issue was whether persistent and unjustifiable refusal of sexual intercourse while a couple were living together could constitute desertion. Contrary to the New Zealand cases the English court held that it could not. Salmond J. simply accepted *Jackson's* case as authoritative. Herdman J. asserted

> It is best in New Zealand that we should endeavour to decide contests in the divorce court upon principles that, as far as our statute law will permit, are in unison with the principles acted on in the English courts.

This notwithstanding that the statutory grounds for divorce in New Zealand were very different from and much more liberal than in England.

In 1956 it could not unfairly be said that the primary policy concern of the New Zealand courts was to avoid any divergences from the common law as it developed in England. And this continued to be true for some time.

[44] Criminal Justice Amendment Act 1980, s.2.
[45] [1924] N.Z.L.R. 1078.
[46] *Jackson* v. *Jackson* [1924] P.19.

There were stirrings, for instance in the case of *Corbett* v. *Social Security Commission*,[47] but for the most part decisions showed essentially derivative thinking and a narrow application of precedent.

The occasional contortions of the courts in their efforts to keep in line with the latest gospel from London had almost a comic aspect. In *Re Rayner*[48] the judgments of the Court of Appeal indicated that it would reverse its own prior decision in order to follow *Young* v. *Bristol Aeroplane Co.*[49] which held that the (English) Court of Appeal could *not* reverse its prior decision. Later cases[50] left that issue open, and in *Howley* v. *Lawrence*[51] a majority of the court rejected the application of *Young*'s case, despite the dicta of the Privy Council in *Attorney-General* v. *Reynolds*.[52]

In *Union Steamship Co.* v. *Ramstad*[53] the issue was whether tax should be taken into account in assessing damages for personal injury. There was a diversity of prior judicial views in other jurisdictions. Typically for the times the Court of Appeal engaged in weighted precedent counting, and as Sir Robin Cooke has said, the exercise was essentially one of conformity. Six years later the House of Lords in *British Transport Commission* v. *Gourley*[54] reversed the earlier English cases that the New Zealand court had followed, observing (unaware of *Ramstad*) that they had not been generally followed in the Commonwealth. Having read *Gourley*, the New Zealand Court of Appeal in *Smith* v. *Wellington Woollen Manufacturing Co. Ltd.*[55] departed from its own prior decision in order to follow the House of Lords, as it considered itself bound to do. But in *North Island Wholesale Groceries Ltd.* v. *Hewin*[56] the court declined to apply *Gourley* to damages in contract. It considered that the *Smith* decision was per incuriam in treating a New Zealand court as bound to follow a decision of the House of Lords. While this savours of hindsight it neatly illustrates the much changed landscape of New Zealand judicial precedent.

In *Jorgensen* v. *News Media (Auckland) Ltd.*[57] indeed the court declined to follow the decision of the English Court of Appeal in *Hollington* v. *F. Hewthorn & Co. Ltd.*[58] and held that a certificate of conviction was admissible evidence of guilt in a subsequent defamation action. But that was a matter of adjectival law, said the same court in *Ross* v.*McCarthy*,[59] and it followed the House of Lords decision in *Searle* v. *Wallbank*[60] despite differences in the legal and factual background and that some other jurisdictions had not accepted it.[61] A principal reason was that the New Zealand courts even before

[47] [1962] N.Z.L.R. 878.
[48] [1948] N.Z.L.R. 455.
[49] [1944] K.B. 718.
[50] e.g. *Preston* v. *Preston* [1955] N.Z.L.R. 1251.
[51] (1986) 6 N.Z.A.R. 193.
[52] [1980] A.C. 637.
[53] [1950] N.Z.L.R. 716.
[54] [1956] A.C. 195.
[55] [1956] N.Z.L.R. 491.
[56] [1982] 2 N.Z.L.R. 176.
[57] [1969] N.Z.L.R. 961.
[58] [1943] 1 K.B. 587.
[59] [1970] N.Z.L.R. 449.
[60] [1947] A.C. 341.
[61] Notably Canada — *Fleming* v. *Atkinson* [1954] 18 D.L.R. 81. The law of Scotland also is apparently different — see *Gardiner* v. *Miller* [1967] S.L.T. 29.

Searle v. *Wallbank* had taken the same view, notably in *Miller* v. *O'Dowd.*[62] But *Miller* was itself based on an English decision, *Heath's Garage Ltd.* v. *Hodge*[63] and other cases.

Having regard to the general body of case law one cannot be too scathing about *Ross* v. *McCarthy*. What can be said is that the Court of Appeal showed itself as decidedly unadventurous.

The break came with *Bognuda* v. *Upton & Shearer Ltd.*,[64] where both North P. and Woodhouse J. specifically stated that although entitled to great respect House of Lords decisions did not bind the New Zealand courts. Substantively the court declined to follow *Dalton* v. *Angus*[65] and held that a landowner excavating his soil owed a duty of care not to damage his neighbour's adjacent wall.

Since then, and notably under the presidencies of Sir Owen Woodhouse and Sir Robin Cooke, the Court of Appeal has shown a much less inhibited approach to precedent and a greater readiness to use judicial reasoning to determine and develop the law. Some of its recent judgments e.g. *O'Connor* v. *Hart*[66] have however fallen foul of a conservatively minded Privy Council.[67] In addition, the court has created for itself an important constitutional role, seen most dramatically in *New Zealand Maori Council* v. *Attorney-General.*[68] In doing so it has been prepared to use extrinsic materials to interpret a statute in a way that would have astounded most lawyers even 20 years ago.[69]

V. Judgments And Prospects

The objective of the original Law Revision Committee was to bring and keep the law up to date. This can serve as a definition of law reform policy ever since. What has happened is that ideas of what is needed to achieve this have enormously enlarged. Part of this process has been intellectual — the emancipation of our statute law from an excessive conformity with English precedent, and at the same time its accomodation to the standards of world opinion as crystallised in international conventions. Another aspect has been the reconstitution of the machinery for reform, first by setting up a part-time Commission and five standing committees, and now by establishing a full-time Law Commission. The Department of Justice, through what is now its Law Reform Division, has been a major part of the structure and hopefully will continue to be so.

By any practical standard, legal changes since 1960 have been impressive both in amount and in character. The courts system has been extensively reorganised, there have been major constitutional reforms (the Ombudsman, freedom of information and the final patriation of the constitution), the remedy of judicial review has been introduced, family law has been almost completely rewritten,

[62] [1917] N.Z.L.R. 716.
[63] [1916] 2 K.B. 370.
[64] [1972] N.Z.L.R. 741.
[65] (1881) 6 A.C. 740.
[66] [1983] N.Z.L.R. 280.
[67] [1985] A.C. 1000.
[68] (1987) 6 N.Z.A.R. 353.
[69] Judges of the Court of Appeal have given a number of addresses indicating the temper and policy of the present Court. See for example Sir Ivor Richardson "The Role of an Appellate Judge" (address to AULSA in 1980) and Sir Robin Cooke "Divergences — England, Australia, New Zealand" [1983] N.Z.L.J. 297.

legislation has altered an appreciable part of the law of contract, the action for personal injury has been replaced by a statutory compensation scheme, a large body of anti-discrimination law has been created, the criminal code has been revised, there have been a number of imaginative efforts (without great success) to cope with crime through criminal justice legislation. A legal aid system, albeit very imperfect, has been established. In the judicial sphere the Court of Appeal (itself belatedly reconstituted in 1957) no longer seeks as an overriding objective to conform to the latest English decisions and has begun to make a significant contribution to the development of the common law. Indeed, we may be witnessing the beginning of the "nationalisation" of that law. The present President of the Court of Appeal was able to say in 1983 that it was no longer rationally arguable that there is only one common law. "Heroically loyal judicial efforts have failed to hold back the inevitable tide of disparity".[70] And after nearly 150 years there are signs that the Treaty of Waitangi will be placed at the heart of public policy.

One can hardly assert that this record shows absence of will for radical change. But big issues remain. The language of statutes and their interpretation are only now, with the establishment of the Law Commission, being taken up. Despite useful reforms (for instance the Securities Act 1978, the virtual abolition of the ultra vires rule and the 1980 changes in the rules for directors' liability) the modernisation of commercial law has lagged badly. The contract law reforms are open to criticism as piecemeal, incomplete and sometimes at odds with one another. Little has been done to face issues of privacy. We are far from an environmental law that will efficiently and effectively reconcile public interest and private gain. Attempts to improve real access to the law have been timid and peripheral in their effect. The courts can hardly be free to shape the law in ways most appropriate to New Zealand circumstances until the right of appeal to the Privy Council is ended.[71] If there is to be effective restraint on the powers of an executive that controls parliament, this can only come (in the writer's view) from the adoption of a Bill of Rights. It is very doubtful if the informed community is yet ready to accept such a break from a rather simplistic tradition.

When *not* to legislate is a lesson we may still have to learn. Both the present Minister of Justice and his immediate predecessor have suggested that good law reform may mean less rather than more legislation.

The labour of aligning the law with the needs and values of the community has been exacerbated by the extraordinarily rapid technical, social and philosophical changes that characterise the contemporary world. New questions arise and old questions change. Expectations and ways of thinking have profoundly altered under the impact of the movement of ideas such as feminism. Solutions that seemed satisfactory only a few years ago are now condemned as irrelevant. And while some new concepts and directions are likely to be permanent, others (and it is not always easy to decide which) are likely to be transient. Changes in the law must therefore always tend to be delayed reactions to a current situation.

Conversely there has grown an obsessive, vociferous and essentially anti-rational fundamentalism that seeks to enforce its standards on all. The path

[70] [1983] N.Z.L.J. 297.

[71] At the New Zealand Law Conference in October 1987, the Attorney-General and Minister of Justice announced the intention of ending appeals to the Privy Council before 1990.

of the law reformer will hardly become easier in this climate. It is compounded by the continued illiberalism of much of New Zealand society. This has for instance impeded family law and criminal justice reform, and has in fact put the clock back in the latter field, where much energy and time are spent in defending minor advances against demands for retribution often masquerading as deterrence.

Over the last fifty years our law has largely ceased to be colonial, and has become in effect a national law within the common law system. The "harmonisation" of some aspects of New Zealand and Australian law, notably commercial law in areas of CER policies wil be a gloss on this but is unlikely to affect its broad validity. But New Zealand law remains monocultural, and the overriding question for the coming decades is whether it can respond to the nature and needs of a bicultural polity. A signpost has already been given in the direction to the Law Commission in making its recommendations to take account of te ao Maori (the Maori dimension).[72] This has a very wide potential application. And in the public law field several recent statutes have contained a provision giving a degree of overriding force to the principles of the Treaty of Waitangi.[73]

To accommodate our law to the principles and implications of the cultural partnership underlying the Treaty of Waitangi and endorsed by the Court of Appeal in the *New Zealand Maori Council* case will not be easy, nor can it be speedily accomplished. It will require hard thinking, a respect for values not derived from the parent tradition of the pakeha, and some perhaps considerable shifts in the accepted wisdom of liberals as well as traditionalists. It is indeed a new net that will go fishing.

[72] Law Commission Act 1985, s.5(2)(a).
[73] e.g. Conservation Act 1987, s.4.