THE WAR AGAINST INDECENT PUBLICATIONS

Recent decisions of the Indecent Publication Tribunal have revealed a number of deficiencies and illogicalities in the 1963 legistlation, which has been shown to be yet another military blunder in the "three hundred year war" against obscenity. L. M. Alpert, (52 Harv.L.R, q.v.) in an able and stimulating article, reviewed English and American cases from 1663 to 1936 in which "indecent" publications were considered, and concluded that the courts had failed to produce a commendable or consistent definition of punishable indecency in books or papers. It is suggested that the New Zealand legistlation and decisions on the matter amply confirm this conclusion.

The history of the English cases from *The King* v. *Sir Charles Sedley,* 1 Keble 620 (K.B.1663), to *R.* v. *Hicklin,* L.R. 3 Q.B.360, is confused and often ludicrous. In *Sedley's* case (not concerned with a publication) the defendant "was fined 2000 mark, committed without bail for a week and bound to his good behaviour for a year, on his confession of information against him for shewing himself naked in a balcony, and throwing down bottles (pist in) vi et armis, among the people in Covent Garden, contra pacem and to the scandal of the Government". From this flimsy foundation the law developed in a haphazard fashion until a test for obscenity was finally laid down in a case concerning not a literary work but scurrilous attack on the Roman Catholic Church.

The test laid down in *Hicklin's* case in 1868 was, "whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort may fall". That the work might have been written for an honest and laudable object made no difference, said Cockburn C.J. If a work was obscene, it was obscene, regardless of intent, and no one could break the law even to reach a worthy end.

Legislation was introduced in New Zealand in 1910, which did not fully reproduce the *Hicklin* test. Section 5 of the Indecent Publications Act 1910 reads: In determining whether any document or other matter is indecent within the meaning of this Act, the magistrate shall take into consideration not merely the nature of that document or matter itself, but also the nature and circumstances of the act done by the defendant with respect thereto, and the purpose with which the act was done, and the literary scientific or artistic merit or importance of the document or matter; and no document or matter shall be held to be indecent unless, having regard to these and all other relevant considerations, the Magistrate is of the opinion that the act of the defendant was of an immoral or mischievous tendency.

Section 6: Subject to the provisions of the last preceding section, any document or matter which relates or refers, or may be reasonably supposed to relate or refer to any disease affecting the generative organs of either sex, or to any complaint or infirmity arising from or relating to sexual intercourse, or to the prevention or removal of irregularities in menstruation, or to drugs, medicines, appliances, treatment or methods for procuring abortion or miscarriage or preventing

conception, shall be deemed to be indecent within the meaning of this Act.

These sections were amended in 1954 by s.2 of the Indecent Publications Amendment Act 1954. The magistrate was also directed to consider the classes of persons or age groups amongst whom the matter was likely to be distributed etc., and the tendency of the matter to deprave or corrupt any such persons (i.e. including some of the words used in *Hicklin's* case.) Similarly s.6 was altered by the addition after the word 'conception' of the words "or which unduly emphasises matters of sex, horror, crime, cruelty, or violence". Finally, in 1963, the matters to be considered (by a Tribunal or the Court) were again changed. The Indecent Publications Act 1963, s.2 defined "Indecent" to include "describing, depicting, expressing or otherwise dealing with matters of sex, horror, crime, cruelty, or violence in a manner that is injurious to the public good". s.11 reads: (1) In classifying or determining the character of any book or sound recording the Tribunal shall take into consideration (a) the dominant effect of the book or sound recording as a whole: (b) the literary or artistic merit, or the medical, legal, political, social, or scientific character or importance of the book or sound recording: (c) the persons, classes of persons or age groups to or among whom the book or sound recording is or is intended or is likely to be published, heard, distributed, sold, exhibited, played, given, sent or delivered: (d) the price at which the book or sound recording sells or is intended to be sold: (e) whether any person is likely to be corrupted by reading the book or hearing the sound recording, and whether other persons are likely to benefit therefrom: (f) whether the book or sound recording displays an honest purpose and an honest thread of thought or whether its content is merely camouflage designed to render acceptable any indecent parts of the book or sound recording. (2) Notwithstanding the provisions of subsection (1) of this section, where the publication of any book or the distribution of any sound recording would be in the interests of art, literature, science, or learning and would be for the public good, the Tribunal shall not classify it as indecent. (3) . . . (4) . . . All these alterations show that the legislature is confused and unsure about what matters are important in determining whether or not a publication is indecent. The confusion of the Courts (and now the Tribunal) is no less apparent.

Blair J. in *Sumpter* v. *Stevenson,* [1939] N.Z.L.R.446, 453, concluded that s.5 expressly required that "the purpose for which the act was done" must be considered. "In my view, therefore, the dictum in *Hicklin's* case has no application in New Zealand because our statute makes the intention of the doer of the act, an essential factor." Nevertheless, in *Technical Books* v. *Collector of Customs,* [1957] N.Z.L.R.490, 492, McGregor J. said, "I do not think any assistance can be gained in the present case from considering the purpose for which the act was done or the consideration of the tendency to deprave or corrupt any persons other than in so far as such tendency may be considered in the light of a private individual having possession of such matter . . . . having decided that the photographs are prima facie indecent, before such photographs can be held in law to be indecent it must be shown the act of the defendant . . . . was of an immoral or mischievous tendency. In my view, this question must be decided irrespectively of the intention of the importer." The

question of intention was not explored by the Court of Appeal which held the novel "Lolita" to be indecent under the 1910 Act. (*In re Lolita* [1961] N.Z.L.R.542) However, the Indecent Publications Tribunal (holding the same book not to be indecent under the 1963 Act) said on the question of intention, "If we thought 'Lolita' a pornographic book written to corrupt our decision would be different". (N.Z. Gazette (1965) p.22)

It is difficult to discover the basis on which Cooper J. held in *Clarkson* v. *McCarthy* [1917] N.Z.L.R.624, that the showing of a reproduction of Giorgione's 'The Sleeping Venus' was of an immoral and mischievous tendency. Why it should be indecent when displayed to attract attention for advertising purposes but not necessarily indecent when displayed in an Art Gallery is not clear. Cooper J. acknowledged that there was no attempt to corrupt or deprave, but nevertheless held it was displayed for an improper purpose.

On the question of "an immoral or mischievous tendency", McGregor J. held in *Sumpter* v. *Stevenson* (supra) that certain photographs would tend to deprave or degrade the minds of the importer himself, his guests or persons to whom he might give or lend them. But Stanton J. commented in *Kerr-Hislop* v. *Walton* [1952] N.Z.L.R.267, 270, that Boswell's diary (assuming it to be indecent) would not come within s.5 if the author kept it to himself or within a strictly limited circle of his acquaintance. The degree of difference is not very wide.

In *Kerr-Hislop's* case and the *Technical Books* case, both trial judges expressed their difficulty in laying down any standard or principle by which one can determine whether or not a document has an immoral or mischievous tendency. In the former case, Stanton J. considered a magazine "Laughs". The stories therein (of the type heard every day in smoke-rooms and after dinner speeches) were "indecent judged by real standards as accepted by the average decent citizen". Their publication therefore had an immoral and mischievous tendency. In the *Technical Books* case, McGregor J. agreed with *Galletly* v. *Laird*, 1953, S.C.(J)16, that "the book or picture itself provides the best evidence of its own indecency or obscenity or of the absence of such qualities", and distinguished prima facie indecency and indecency in law. Importing certain nude photographs therefore must be regarded as having a mischievous or immoral tendency in that the photographs themselves would tend to deprave or degrade the mind of a viewer. Why this would be so is never made clear – no scientific evidence is adduced, merely the judge's own opinion.

The Court of Appeal in *In Re Lolita* (supra) examined the effect of the 1954 Amendment of s.6 of the 1910 Act and the combined effect of s.5 and s.6. Gresson P.'s interpretation differed from the majority of the court and it is difficult not to conclude that the majority judgments are themselves inconsistent. Cleary J. said (at p.568), "In so far as undue emphasis on matters of sex and a tendency to deprave or corrupt are expressive of separate notions, then I think the provisions of our Act require that the Court must find both to exist before there can be a finding of indecency". North J. on the other hand said, (at p.559), " . . . . this list of topics [in s.6] is by no means exhaustive and therefore a document which does not fall within s.6 may nevertheless be held to be indecent if it tends to deprave or corrupt persons whose minds are open to immoral

influences". It is submitted that these two statements cannot stand together.

The operation of the Tribunal since 1963 shows that the difficulties of the present Act are no easier to resolve than those apparent in the old legislation. e.g. In the *'Death by Day'* decision, (N.Z. Gazette (1965) p.96), the tribunal declared, "It may appear illogical that the same story might be classified as indecent when published as a 'paper-back' purchasable for a few shillings and yet not warrant that classification in a hard-back cover obtainable for a pound or more. But the way the statute has been framed permits this". Does this mean that persons who can afford to buy an expensive book are less likely to be corrupted than those who cannot? If it is intended to prevent young people from obtaining the book it seems a very haphazard and unreliable method. A number of extracts from the Tribunal's decisions are worth comparing.

(1) *"Close of Play"* etc., case, N.Z. Gazette (1965) p.96. "We were compelled recently in respect of three paper backs to make a general classification of each as indecent because of the impracticability of imposing a restriction on sale to persons under a certain age."

(2) *"Lady Chatterley"* case, N.Z. Gazette (1965) p.535. "Three members . . . . think on a realistic view and having regard to the circumstances existing, namely the unrestricted circulation of the hard-back edition, it would be futile to classify the paperback edition as indecent in the hands of juveniles; that it might indeed operate as an incentive to minors to procure and read the book . . . ."

(3) *"Lolita"* case, N.Z. Gazette (1965) p.22. " . . . . no order restricting circulation to persons above a specified age should be made. . . . . It is conceivable that any book dealing with sex and crime will be harmful in some way to some person. To classify it as forbidden fruit unless it can be effectively kept from him is surely to intensify that risk . . . . the majority do not believe that such a restriction would be fully effective. Parents could not be relied upon to keep copies locked away: nor would all of them think it desirable. Booksellers cannot require production of birth certificates, and by no means all libraries can determine the age of their borrowers by a glance at proffered cards . . . . to impose such a restriction would in many cases result in the creation of a desire to read from unhealthy motives books which taken up and examined by chance would have no depraving or corrupting influence . . . . Nevertheless had we regarded it as desirable for the public good, we should have felt bound to impose a restriction, with whatever misgivings as to its effectiveness."

(4) *"Fanny Hill"* case, N.Z. Gazette (1965) p.809. "We accordingly make a ruling which the Statute permits classifying it as indecent in the hands of persons under 18 years of age though we feel considerable doubt as to how far, if at all, such a classification will have the effect sought. But for what it is worth we classify the book submitted as indecent in the hands of persons under 18 years of age."

These extracts amount to a damning criticism of the statute. First, the misgivings of the Tribunal as to the effectiveness of any age restriction are clearly revealed. The arguments presented in the *Lolita* case are almost incontrovertible, and in fact question the entire efficacy of censorship. Secondly, the 'forbidden fruit' or 'locked cupboard' restrictions merely whet curiosity—examples of this go

back to the garden of Eden, as well as encouraging what may be called "armchair wickedness", e.g. the girl in Dylan Thomas's "Under Milk Wood" who wanted to "sin, and sin until I burst". (At the same time it seems a doubtful proposition that a book may or may not deprave and corrupt depending on the motive with which it is obtained.) Another problem arises. Why should the 'literary or artistic merit' be relevant to the question of whether a book injures the public good. Is a well written book or a well executed picture less likely to cause harm than one with not so much literary or artistic merit? s.11(2) however seems to make the inclusion of s.11(1)(b) a work of supererogation in view of the definition of indecency in s.2. If a publication is "for the public good" how can it ever fall within the definition of indecency?

Of all the provisions of the Act, probably the most curious is s.18 which allows appeals to the Supreme Court. If the legislature set up a literary tribunal because it considered such a body to be better suited than the courts to determine whether publications are "indecent", then the provision for a rehearing by three members of the Supreme Court seems to defeat a main purpose of the Act. Is it not sufficient that the court has inherent jurisdiction to quash ultra vires decisions of the Tribunal under the prerogative writs? One looks in vain for some measure of consistency. It now appears that the Attorney-General can by-pass the Tribunal at whim. (s.29 and s.31.) In the *Lady Chatterley* case two members thought it "a matter of regret that the free circulation of the hardcover edition should have prejudiced the issue, embarrassed the tribunal and made it virtually impossible in a particularly clear instance to invoke the provisions of the statute". Thus the Gilbertian situation has arisen where an appeal was lodged by the Justice Department against the decision of the tribunal that the paperback edition should not be restricted, while, at the same time ,the hardcover edition of the same text is freely available by a fiat of the Minister of Justice.

There is no doubt that the law is in a most unsatisfactory state. Some explanation may be found in an examination of some of the basic axioms on which the law has been based. e.g.—

(1) That some publications are "indecent" or "obscene".

(2) That "indecent publications" are those which—
   (a) have a tendency to deprave or corrupt those who are open to their influence, or,
   (b) have an immoral or mischievous tendency, or,
   (c) are injurious to the public good.

(3) That judges or the members of a literary tribunal are the best persons to determine whether or not publications have this effect.

The basic assumption is that some types of publications harm those who read them. Unfortunately for theory, no evidence exists that such harm is in fact caused. Some surveys that have been done. (see L.M. Alpert, 52 Harv.L.R.40), do not suggest that books deprave or corrupt the reader or injure the public good, but what effect a book dealing with immoral people has on the reader has never been carefully studied. Yet it is this untested, preconceived theory of a cause and effect which forms the basis for the censorship statutes and myriads of essays by judges. Contrary views are held by many. e.g.

L.M. Alpert says "People are moral or immoral, not books!" Stable J. asked in *R.* v. *Martin Secker and Warburg,* [1954] 1 W.L.R.1138, "Is it really books that put ideas into young heads or is it nature?" (at p1140). Also "It is the developed discrimination not the locked cupboard that will provide the remedy against any harm that books will do!" (Indecent Publications Tribunal, N.Z. Gazette (1965) p. 22.) Similarly P. Johnson asks (New Statesman, 14.5.65, p. 758) " . . . . what factual evidence is there that anyone was ever corrupted by a book, a play, or a film? The truth is that men and women are corrupted by their friends. This is a fundamental fact of human nature and nothing can be done about it." (The question here is pertinent but the answer like the answer of the law is merely opinion.)

What is urgently required is an extensive sociological study of the question. A scientific approach should be able to demonstrate or disprove the truth of the basic assumptions and in particular the effect of "indecent" or immoral" publications on readers of different age groups. (See e.g. An experiment on the Effects of Observing Violence (on T.V. and in Films) by L. Berkowitz: 'Scientific American' Vol.210, No. 2.) Until such a study is made, legislators, judges and members of tribunals are stumbling in the dark.

Few would deny, that if demonstrable harm flows from the availability of certain types of books, then society has the right to suppress them. As s.13 of the Wolfenden Report reads "[The function of the criminal law] as we see it, is to preserve public order and decency, to protect the citizen from what is offensive or injurious and to provide sufficient safeguards against exploitation and corruption of others especially those who are specially vulnerable because they are young, weak in mind or inexperienced". (cf. J.S. Mill, "On Liberty", Chapt.1.) Paternalism is a perfectly coherent policy, as H.L.A. Hart points out, ("Law, Liberty and Morality" p.30 et seq.), and the censorship of some publications is evidently warranted should they be found to cause definite appreciable harm among classes of persons. But scientific proof of this proviso should be a necessary prerequisite of such censorship. One does not have to look far to discover judgments of the courts which appeal to prejudice, emotion or outdated morality in support of the assumptions supporting the law but which make no reference to fact. e.g. In *The Police* v. *Armstrong,* 12 M.C.R.37, 38, the learned magistrate had this to say;

"There are several passages in [A Spa Love Affair by Guy de Maupassant] which by reason of an excess of sexual detail can reasonably be termed obscene according to present day English literary standards. If such books are sold indiscriminately and scattered broadcast amongst all sorts and conditions of people, there can be no doubt there would be a deterioration of public morals. Literary hogs would be able to wallow knee-deep in sexual filth. This would tend to generate libidinous desires and these desires not infrequently prove, for their unhappy victims, that broad highway which leads to the mental hospital, the gaol and the premature grave. It is interesting to note that Guy de Maupassant attempted suicide and eventually died under painful circumstances . . . ."

This gem of judicial rhetoric was delivered in 1917 (about the same time that it was possible to hold that the words "It's no damn

use talking to you; any way, you put that bloody calf out of that damn section" are indecent in the modern and popular acceptation of that term, (*Purves* v. *Inglis* (1915) 34 N.Z.L.R.1051.) The passage assumes that 'sexual detail' is filthy, that 'libidinous desires' would be generated and that among the perils facing the reader are insanity, imprisonment and an early (painful) death. No evidence in support of these assumptions is, however, adduced.

When Cooper J. held Giorgione's 'Venus' to be an indecent publication it is unfortunate that he did not have the advantage of Stable J.'s words in *R.* v. *Martin Secker and Warburg,* (supra). "There are some who think with reverence that man is fashioned in the image of God, and you know that babies are not born in this world . . . . dressed up in a frock coat . . . ." Stable J. pointed out the wide variety of opinion on the topic. e.g. The medieval Church believed that sex was sin and that the whole thing was a dirty mistake from beginning to end and some Victorians referred to "legs" as "understandings". Others believe that nothing but mischief results from secrecy and covering-up—the whole thing is just as much a part of God's universe as anything else and the proper approach is frankness; plainspeaking rather than pretence.

Other excerpts from this case are illuminating. What is the function of literature? Does it not provide a mirror to society—the only real guidance we have to how people thought over the ages is in their contemporary literature. "It would not be an assistance if we were led to suppose that in New York no human teenage woman has disabused her mind of the idea that babies are brought by storks . . . . Is the act of sexual passion sheer filth? It may be an error of taste to write about it." Pornography, "filth for filth's sake" should, however, be stamped out. (For another view, see Irving Kristol's Essay in "The Logic of Personal Knowledge".)

Should a sociological study reveal that certain publications if unrestricted would have a definite deleterious effect, then it is submitted the test of a publication should be whether in fact it is likely to cause actual harm to its readers. i.e. If it can be demonstrated by sociologists and psychologists to be subversive of the health, (cf. *John Calder (Publications) Ltd* v. *Powell* [1965] 2 W.L.R.138), or well being of a community or to cause an offensive public nuisance. The existing moral views of the community should stand on their own feet and publications advocating standards which differ from these should be permitted, unless they can be shown to be clearly detrimental. —So also, for example, should studies of criminal behaviour, publications advocating changes in the law; aliter if breaking the law is advocated.

Who then should be responsible for determining what publications harm whom. If the criterion for censoring publications is their probable harmful effect on various classes of readers, it may be asked what qualifications either judges or members of a literary tribunal or the 'average decent minded citizen' have for this task. In the decisions we find the censors floundering out of their depth in an unknown sea—attempting to determine effects which they are not qualified to determine. The task it is submitted is really that of sociologists and psychologists, trained in estimating the effect of environmental factors on various classes of persons.

In conclusion. it is submitted that there has been too much emphasis on tradition in the law and not enough on the scientific evaluation of the concepts involved. Sociological jurisprudence is not a new field but it is not used nearly enough. Little attempt is made to make social investigations a preliminary to legislation as Pound suggested. Too many lawyers are prepared to accept the existing standpoint of the law as *ipsissima verba* on a subject and, ostrich-like, make no attempt to see that the law takes account of social facts.

W. A. McKEAN, B.A., LL.M.,

Assistant Lecturer in Law, University of Otago.