Spirit of reform ...?

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> My definition of a free society is
> a society where it is safe to be
> unpopular.
> Adlai Ewing Stevenson

The Summary Offences Act 1981 became law in New Zealand on 1 February 1982. It is entitled "An Act to reform and restate the law relating to summary offences, and to replace the Police Offences Act 1927 and its amendments". In this paper Janet Lewin deals with the question whether the word "reform" is truly applicable to sections 3 and 4 of the 1981 Act.

I. INTRODUCTION

The focus of this paper is sections 3 and 4 of the Summary Offences Act 1981. These two provisions cover disorderly and offensive behaviour, whether leading to violence or of a less serious nature, as well as sundry language offences; as such they are the primary sections under which demonstrators are arrested. The provisions warrant close examination because freedom of political expression is the cornerstone of any true democracy; it is a freedom which gives the notion of a consensual society, upon which the idea of democracy is founded, some substance.

Section 3D of the Police Offences Act 1927 is the provision to which sections 3 and 4 principally owe their origins.[1] It was the subject of three specific criticisms —
— too much discretion had been invested in the judiciary's hands in determining what constituted an offence in section 3D[2];
— the section produced uncertainty in the law which could discourage the potential protester from utilizing the right of expression of belief to the fullest extent within the law, in that the law itself was uncertain;
— the provision was too readily proscriptive of protest behaviour because of its

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1 Section 3 can also be traced to section 34 of the Police Offences Act 1927 — that of inciting violence, disorder or lawlessness. Section 48 was the section dealing with profane, indecent and obscene language in a public place. "Profane" has been dropped in section 4 of the new Act but indecent and obscene language are included in s. 4(1)(c) and s. 4(2).

2 "Unfettered discretion" is the term used by G. Hall "Identifying Disorderly or offensive Conduct — The Scope of Judicial Discretion Under Section 3D of the Police Offences Act 1927" (1977) 4 Otago L.R. 217.

failure to differentiate between sincere expressions of opinion and mere "rabble rousing" or abusive conduct.[3]

Though distinct, these problems have consequences for each other. The first criticism involves questions as to the appropriate distribution of law-making power between the judiciary and the legislature. The third concerns the proper limits of a public order code and the ability to impart ideas without being criminalized for it; and the second issue is an amalgam of the other two, because the spin-off effect of broad judicial discretion is uncertainty and inconsistency in the law. This causes a "chill"[4] on effective protest action within the limits of the law, which in turn undermines freedom to convey ideas and beliefs without the law unnecessarily penalizing such expression.

II. JUDICIAL LAW-MAKING AND THE CRIMINAL LAW

The summary offences law with which we are dealing has been codified. What does this mean? Section 9 of the Crimes Act 1961 says: "No-one shall be convicted of any offence at common law". That is, only the actions specified by Parliament as amounting to offences justify the intervention of the criminal law. In the face of statutory law the role of a judge is to interpret the statute and apply it to the fact situation before the court.

However, some judges have taken the view expressed by Viscount Simonds in *Shaw* v. *D.P.P.*[5] that a judge can fill in the law given by a statute if it is not adequate.

> Gaps remain and will always remain since no-one can foresee every way in which the wickedness of men may disrupt the order of society . . . if the Common Law is powerless in such an event then we no longer do her reverence.

This was a case where the statutory offence of obscene libel did not apply to the facts before their Lordships; nevertheless they invoked a Common Law offence of "conspiracy to corrupt public morals" in order to fill in the "gaps" they perceived in the law.

The criminal law in New Zealand was codified by the Criminal Code Act 1893. A report by the 1878 Royal Commission into codification of the English criminal law was greatly relied upon as the foundation for the New Zealand Act. The Commission's comments demonstrate the misconceived nature of Lord Simond's view of the judicial powers in the face of an Act of Parliament.[6]

> In bygone ages when legislation was scanty and rare, the powers referred to [that is, a residuary power to superimpose Common Law principles and practice upon legislation] may have been useful and even necessary but that is not the case at the present day. Parliament is regular in its sittings and active in its labours, and if the protection of society requires the enactment of additional penal laws Parliament will soon apply them.

3 K. J. Keith "The Right to Protest" in Keith (ed.) *Essays on Human Rights* (Sweet & Maxwell, Wellington, 1968), 49, 62.
4 Ibid. at 51.
5 [1962] A.C. 220. See Viscount Simonds at 268.
6 *Report of the Royal Commission into Codification of the English Criminal Law* (1878), paras 47-53.

Within the context of section 3D of the Police Offences Act 1927 it will be seen that extensive judicial law-making power arose not because judges considered the section to contain gaps but because Parliament, by the use of broad phrases and open-ended clauses, invested such power in the hands of the judiciary. It is submitted that such an abdication of responsibility by Parliament creates the potential for laws encroaching upon individual liberties without the safeguards attendant on legislation passed by Parliament, such as political debate, select committee proceedings and public scrutiny. The independence of the judiciary — a fundamental notion underlying our constitution — falls by the way-side as the judge not only interprets and applies the law but determines what the law is.

Another important argument against the wide judicial powers conceived of in *Shaw* v. *D.P.P.* being applied within the criminal law context, is possible breach of New Zealand's international obligations. Article 15 of the International Covenant on Civil and Political Rights, ratified by New Zealand in 1978, states:

> No-one shall be held guilty of an offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed.

A breach of this article in relation to section 3D could have occurred in that the provision was phrased in such broad terms as to be meaningless at the outset. An action only became an offence when the judge decided it was so, rather than at the time the action was committed.

An opinion[7] by the Permanent Court of International Justice concerning the constitutionality of certain legislative decrees of Danzig, under Nazi occupation in 1935, summarises the concerns of this paper in relation to judicial law-making in a codified area of law. The legislature of Danzig had passed a decree which said that if there were no penal laws governing an act which according to the "fundamental concepts of penal law and sound popular feeling"[8] should be punished, then it could be so. The International Court held that this article was unconstitutional on the sole basis that as Danzig was a state governed by the rule of law, the law alone could determine and define an offence.[9] The criminal law was not to be applied by analogy in the same way as the Common Law.[10] Fundamental rights such as freedom of expression should not be restricted unless by legislation. And that although the legislature may experience some difficulty in reconciling the interests of certainty or specificity in the law and flexibility so that the law will cover undesirable unforseen circumstances, it should not shift this burden to the shoulders of the judiciary.[11]The legislature's task is to legislate.

7 Permanent Court of International Justice (1935) 35th session. ser. A/B No. 65. *Consistency of Certain Danzig Legislative Decrees With the Constitution of the Free City.* Advisory opinion. p. 41.

8 Ibid. at 45. Article 2: Any person who commits an act which the law declares to be punishable or which is deserving of penalty according to the fundamental conceptions of a penal law and sound popular feeling shall be punished. If there is no penal law covering an act, it shall be punished under the law of which the fundamental conception applies most nearly to the said act.

9 Ibid. at 55.

10 Ibid. at 51.

11 Ibid. at 56.

III. THE EFFECT OF UNCERTAINTY IN THE LAW

The International Court in considering the Danzig decrees raised the issue of the "elusiveness"[12] of such phrases as "deserving of penalty" and "sound popular feeling". We shall see that similar concepts have been used in order to restrict the all-encompassing phrases of "disorderly" and "offensive" by the judiciary in dealing with section 3D of the Police Offences Act 1927.

One of the International Court's most emphatic reasons for restricting the use of judicial discretion in a codified area of law leads into a discussion of the second criticism of section 3D with which this paper deals. That is, lack of certainty in the law for the would-be protester.

The *Danzig* case judges agreed that where courts are given carte blanche to make decisions as to what is "sound popular feeling" and what is "deserving of penalty" uncertainty and inconsistency in the law results:[13]

> . . . a man may find himself placed on trial and punished for an act which the law did not enable him to know was an offence because its criminality depends entirely upon the appreciation of the situation by the judge.

This statement illustrates the primary function of the criminal law — that is, to control action before it happens by laying down the boundaries for lawful activity, rather than to decide that certain actions should be penalised retrospectively. In effect the Danzig decree, in using catchall phrases such as "sound popular feeling", created a situation whereby the judiciary could decide subsequent to an action taking place whether it should be criminalized.

Sir Ivor Jennings in his book *The Law and the Constitution*[14] said somewhat complacently that "English lawyers would repudiate and would rouse public opinion against such a rule as that enshrined in the German law" of Danzig. Sir Ivor wrote his book before the case of *Shaw* v. *D.P.P.*, but perhaps it would not be unreasonable to suggest that he would have been outraged by Lord Simon's "filling in the gaps" in legislation view of judicial functions. And he would be outraged also with a provision such as section 3D which appears to bestow upon a judge almost limitless discretion in determining what is an offence after the activity has occurred. Not only would Sir Ivor display disapproval, but our own statute and case law frowns upon such retroactive legislation. A 1980 amendment to the Criminal Justice Act 1954, section 43B, states that criminal and penal enactments are not to have retrospective effect.

In the case of *Department of Labour* v. *Latailakepa*,[15] concerning that amendment, the court held section 43B was an "absolute bar to the retrospective imposition of criminal liability". That case involved a charge of overstaying concerning a Tongan national. Due to a procedural irregularity when his temporary entry permit expired he was not in breach of the overstaying provisions in the

12 Ibid. at 53.
13 Idem.
14 5 ed., University of London Press, London, 1959 at 52.
15 [1982] 1 N.Z.L.R. 632.

Immigration Act, although later retrospective legislation declared the permit invalid. The judges held that the relevant time for assessing whether an offence had been committed was the time of expiry of the permit, and at that time the Tongan was not in breach of the Act.

Most important was the judges' use of New Zealand's international law obligations in order to bar a finding which would have given effect to retrospective legislation, making the Tongan an overstayer. Richardson J. (at 636) stated:

> In adopting and ratifying the Covenant on Civil and Political Rights the international community has recognised the fundamental right expressed in Article 15 — that no-one should be held criminally liable for an act or omission which did not constitute an offence at the time it was committed.

It would be disappointing and disquieting if sections 3 and 4 of the Summary Offences Act perpetuated the vagueness and therefore retroactive potential surrounding their predecessor, section 3D.

IV. THE NEED FOR LEGISLATION WHICH RECOGNIZES THE RIGHT TO STRONG AND EFFECTIVE PROTEST

The third and final concern of this paper will be that the law governing protest should not too readily emasculate effective expression of belief in favour of protection of public sensibilities. It will be submitted that protest behaviour must be treated in a different way from conduct creating disorder with no other "higher motive in mind" such as bar brawling or football hooliganism.

Within the context of sections 3 and 4 the question emerges whether the sections should trap behaviour which is no serious threat to public order although it may encroach upon the rights of other individuals. What is the proper weight to be given to the sometimes conflicting concerns of public order and freedom of expression and association?

Articles 19 and 20 of the International Covenant on Civil and Political Rights[16] deal with freedom of expression, assembly and association. New Zealand was not in breach of the letter of these provisions with section 3D of the Police Offences Act 1927, in that curtailment of freedom of expression and association could be prima facie justified by the exception clauses in the two articles. That is, the protection of the rights and freedoms of others was a warrant for legislation restricting protest action. But it is submitted that section 3D perhaps breached the spirit and tenor of the covenant in that it was used, as will later be demonstrated, to give suspect priority to less crucial freedoms than the right to protest.

New Zealand in its first report to the International Committee said "freedom of speech is indeed regarded as very important in New Zealand and that legislation touching on it is only passed when a very clear need for it is to be seen".[17] It is contended that in many protest cases brought under section 3D

16 See *Human Rights in New Zealand: The Presentation of New Zealand's Report Under the International Covenant on Civil and Political Rights.* N.Z. Ministry of Foreign Affairs. Information Bulletin No. 6. January 1984, p.55 (Article 19), p.56 (Article 21).

17 Ibid. at 20.

there was not always a "clear need" for the intervention of the criminal law. Are sections 3 and 4 of the new Act any different?

If this view as to the weight the International Covenant accords freedom of expression and association in comparison to protection of the sensibilities of others should be mistaken, then it is submitted the comments of Thomas Jefferson should be used as the standard by which to gauge the success of sections 3 and 4 in recognizing effective protest action:[18]

> The legitimate powers of government [should] extend only to such acts as are injurious to others. It does me no injury if my neighbour is to say there are twenty Gods or no God. It neither picks my pockets nor breaks my leg.

V. BACKGOUND TO SECTIONS 3 AND 4 OF THE SUMMARY OFFENCES ACT 1981

The purpose in giving some background to the 1981 legislation is threefold. It is to demonstrate:
— the anachronistic origins of our present legislation;
— the controversial nature of a minor offences code in that it deals with the 'hot potato' of public order;
— the uneasy compromise arrived at between the old and the new, public order and civil rights concerns in the lead up to the enactment of sections 3 and 4.

The Police Offences Act 1927, predecessor to the present legislation, was a consolidation of the 1908 Act of the same name, and its amendments. This in turn was born out of the 1884 Act, which was an amalgam of the United Kingdom Vagrancy Act 1824, New Zealand General Assembly Acts and Provincial Ordinances.

The archaic mustiness of the 1927 provision is demonstrated by such gems as offences for beating carpets; allowing stallions to serve mares[19] and constructing cess pools — in public! Such concerns are of another age — an anachronism to modern conditions.

Why the lack of activity by the legislature for a much needed up-date of the law? The answer would seem to lie in the potentially explosive character of a minor offences code. A fine line often exists between legitimate individualist behaviour and that which undermines the "public interest" and so should be criminalized.

Public opinion can very readily be polarized on law and order issues which are not as easily recognizable as damaging to societies as the more serious crimes in the Crimes Act. This polarization of views is reflected in the political arena, even among M.P.'s of the same political party. Therefore for a party to legislate could be of ambiguous political advantage in terms of party strength.

18 See D. F. Dugdale "The Statutory Conferment of Judicial Discretion" [1972] N.Z.L.J. 556, 569.
19 Police Offences Act 1927, s.3. w; v; n.

Historian Judith Bassett's study[20] of the National and Labour Party tussles over the issue of public order in the 1960's and 1970's serves to illustrate how tender is the issue of where to draw the line in criminalizing minor offences. The National Government during the 1960s was sensitive to criticism that public order had disappeared with the emergence of "bearded beatniks", "flower children" and anti-Vietnam war protesters. Strong government, rather than concessions recognizing the right to protest, was the order of the day.

In the early 1970's the Kirk Labour Government was continually lambasted by the opposition with accusations of being "soft" on crime. Kirk's election campaign promise to take the "bikes off the bikies" is a manifestation of the political overtones of crime and order.

The 1973 amendment to section 86 of the Crimes Act — the unlawful assembly section — illustrates the delicate balance between public order and freedom of expression. Section 86 criminalizes violence or the provoking of violence against persons or property, but a proviso was added to subsection (1)(b) which curtailed the section's ambit: "Provided that no-one shall be deemed to provoke other persons needlessly and without reasonable cause by doing or saying anything that he is lawfully entitled to do or say".

From a realization that the Police Offences Act 1927 was out of date to deal with public order came a Statutes Revision Committee inquiry, set up on the motion of Dr Finlay, Labour Minister of Justice, in 1973. This committee heard submissions from the public and the Justice and Police departments.

Section 3D was at the centre of dissension between the Justice and Police Departments. The origins of section 3D could be traced to the Vagrancy Act 1886, section 4. It was an offence to:

> Use any threatening, abusive or insulting words or behaviour in any public street, thoroughfare or place with intent to provoke a breach of the peace or whereby a breach of the peace may be occasioned.

In 1924 that section, 3(ee) in the Police Offences Act, was given a substantial "face lift". Two more categories of behaviour were added to the section: "offensive" and "disorderly". And the breach of the peace requirement which had limited the section's scope to violent or potentially violent conduct was scrapped. This was because of the view that abusive and insulting behaviour falling short of a breach of the peace, should be proscribed.[21] 1960 saw another significant change to the character of the section, with the fine being increased from $100 to $500 in order to deal with the problem of drunken and abusive youths in public,[22] and violent motorcycle gang confrontations in the smaller townships. One such occasion was the Hastings blossom festival of 1960 where rioting occurred. Section 3D read:

20 J. Bassett "The Police Offences Act and Social Sanitation 1884-1981" [1981] Recent Law 193, 203.

21 The Hon. Mr. Parr (M.P.), 1924, quoted in J. Park "The Summary Offences Act 1981. ss 3 and 4" paper for Ll.B(Hons.) Victoria University of Wellington, 1982, 2, said " . . . a man can be most abusive and insulting to another person, but unless you can prove intention to provoke actual fisticuffs there is no offence".

22 Bassett, supra n.20 at 202: "rootless aggressive young males".

> Every person commits an offence and is liable to imprisonment for a term not exceeding 3 months or to a fine not exceeding $500, who in or within view of any public place . . . or within the hearing of any persons therein, behaves in a riotous, offensive, threatening, insulting or disorderly manner or uses any threatening, abusive, or insulting words.

At the Statutes Revision Committee hearings the Justice Department argued strongly for reintroduction of the breach of the peace[23] requirement because the section as it stood "scoop(ed) up all sorts of minor troubles".

The provision should be used only to maintain public order. The police however[24] submitted that nuisances where no public order threat was in issue, such as offensive behaviour or language to women and children, who were unlikely to retaliate violently, should remain an offence. The police also voiced concern[25] that conduct such as following a young woman at night would not be an offence if the breach of the peace requirement were re-introduced.

The Committee outlined its guiding principles. The relevant ones for the purpose of this paper are as follows:
— Conduct should not be criminalized unless it causes significant or potentially significant harm to a person or society.[26]
— Order and security are the prime purposes of law enforcement in this area.[27]
— Behaviour which does not harm but is thought of as eccentric, distasteful or indeed immoral, by the majority,[28] Parliament should be slow to proscribe.

The writer supports these guiding principles but submits that the Committee's draft recommendation for four provisions replacing section 3D did not meet with them. The proposals can be viewed as an uneasy compromise between the view of a section only to deal with threats to public order and one that criminalizes dangerous behaviour. Instead of choosing either the Justice or Police Department options, the Committee included elements of both. The result is that the different strands do not sit well together.

The merit of four specific offences to replace section 3D, it was argued,[29] was to remove the "catch all" nature of section 3D, in favour of a greater degree of specificity. Thus broad judicial discretion and a wide, and therefore uncertain, provision would no longer be such a problem.

This can be seen as a breach of the peace requirement in more modern guise. It is even narrower than the pre-1924 breach of the peace wording, in that a specific person must fear violence. Further limitation is placed upon this provision by adding that there must be "reasonable grounds" for the victim's apprehension. Therefore the problem of a hostile audience encountered with a straight breach

23 Statutes Revision Committee *Report on Police Offences Act 1927*, p.12.
24 Idem.
25 *Police* v. *Christie* [1962] N.Z.L.R. 1109. The defendant was charged with disorderly behaviour in following a young woman in the dark.
26 *Report*, supra n.23, at 13.
27 Idem.
28 Idem.
29 *Report*, supra n.23, at 12.

of the peace provision is alleviated. That is, a protester could be charged with a breach of the peace if his or her audience was unruly — rather than because the protester's behaviour was so.

The second proposed provision, was addressing threatening, abusive or insulting words to any person in a public place with intent to alarm, offend or insult such person, or with reckless disregard that his words would probably have that result.

This can in part be viewed as an improvement on section 3D in that the language proscribed has to have been addressed to a specific person. This has been effected by the substitution of "addresses" for "uses". The section is also tighter in that mens rea has to be proved — that is, intent to alarm, offend or insult, or recklessness as to this effect. However, while verbal threats and assault can cause as great a threat to public order and the dignity of the individual as physical actions, it is the writer's submission that the retention of "insulting" is unnecessary. "Insult" more than "threats" and "abuse" is a matter of sensibilities. What insults one individual may be quite acceptable to another, whereas threats and abuse have a more objective quality. It is conceivable that "insulting" could extend to expressions of dissent in a politically charged situation — such as a placard saying "Yanks go home" — where a strong but sincere concern is conveyed. Thus conduct which may be "distasteful . . . to the majority"[30] could be criminalized under this provision.

The third proposed offence was one of persistently following a person in a public place with intent to harass or alarm that person or with reckless disregard that his conduct would probably have that result.

The action aimed at here would not usually result in public disorder, but it is an acceptable proposal in that it, unlike section 3D, aims at a specific mischief. It is also not a matter of niceties and sensibilities but one of protection of a person's integrity. Therefore it fits with the proposition that "order and security are the prime purposes of law enforcement in this area".

But the writer's real concern with the draft recommendations stems from the retention of a clause to cover minor disorder, or offensive behaviour as " . . . a control over misbehaviour in public places which, while not serious, might nevertheless constitute an annoyance".[31] The Committee added that the provision should be drafted in such a way as not to catch the peaceful protester but makes no such attempt in its own draft. Even despite this rider added to the provision, this clause seems to fly in the face of all the Committee's guiding principles. Can "annoyance" be said to cause "significant harm"[32] to people who experience it? It is not entering the field of what the majority find distasteful?[33]

VI. CONTENT OF SECTIONS 3 AND 4

Following the Statutes Revision Committee report, a Bill was not immediately drafted and introduced to Parliament. The Justice and Police Departments con-

30 Ibid. at 13.
31 Idem.
32 Idem.
33 Idem.

tinued their skirmishes for another seven years before the Bill was finally introduced to the House. It was then referred to a select committee to hear public submissions as well as those of the Justice and Police Departments. In the light of the delays, and to-ing and fro-ing between public order and civil rights concerns, it is not surprising that sections 3 and 4 were not as successful as the reforming title to the Act would have suggested. Sections 3 and 4 are set out following, with a brief outline of the changes that have been made.

> 3 Every person is liable to imprisonment for a term not exceeding three months or to a fine not exceeding $1,000 who, in or within view of any public place, behaves, or incites, or encourages any person to behave in a riotous, offensive, threatening, insulting or disorderly manner that is likely in the circumstances to cause violence against persons or property to start or continue.
>
> 4 (1) Every person is liable to a fine not exceeding $500 who —
> (a) In or within view of any public place, behaves in an offensive or disorderly manner; or
> (b) In any public place, addresses any words to any person intending to threaten, alarm, insult, or offend that person; or
> (c) In or within hearing of a public place —
> (i) Uses any threatening or insulting words and is reckless whether any person is alarmed or insulted by these words; or
> (ii) Addresses any indecent or obscene words to that person.
> (2) Every person is liable to a fine not exceeding $200 who, in or within hearing of any public place, uses any indecent or obscene words.
> (3) In determining for the purposes of a prosecution under this section whether any words were indecent or obscene, the court shall have regard to all the circumstances pertaining at the material time; including whether the defendant had reasonable grounds for believing that the person to whom the words were addressed, or any person by whom they might be overheard, would not be offended.

Section 3D has been separated into two provisions. The more serious behaviour of a breach of the peace nature is covered by section 3. Rather than "is likely to cause a breach of the peace" we have "likely . . . to cause violence against persons or property to start or continue". The section, like section 3D, tends to stockpile words with broad meanings which overlap each other. Is it necessary to have both "incites or encourages" and a long string of adjectives such as "riotous; offensive; threatening; insulting" or "disorderly"? However, the breadth of these words is substantially narrowed by the violence or potential violence requirement. The severity of the offence under section 3 is illustrated by the $1,000 fine or 3 months imprisonment. The penalty appears to be somewhat anomalous when actual fighting in a public place in section 7 is given only a $500 fine.

Section 4 does not follow the Statutes Revision Committee's recommendation that it be drafted in such a way as to exclude the peaceful protester. The phrase "behaves in an offensive or disorderly manner" which was used to cover a great variety of actions in section 3D, makes its reappearance in section 4. There has been no attempt in the section to narrow down the application of these words so as to exclude behaviour which is not a threat to public order. The reason for this probably lies in an adoption of the fourth line of the Statutes Revision Committee's draft proposals.

Concerning the "words" part of section 3D, this has been shaped into several language offence clauses. Section 4(1)(b) is a tightly drafted provision in that a particular person has to be addressed and mens rea of intention to offend has to be proved. Recklessness as to that result is not given as an option. However, "any words" are enough to satisfy the section, as long as the user has the necessary intent. Even in section 3D "words" was narrowed down by the fact that they had to be "threatening, abusive or insulting". It is submitted that it is a dangerous precedent for offences to be created by intent alone; that is, without either the words themselves having to be alarming (etc) or the effect intended having to be proved.

In section 4(1)(c)(i) there seems to be no good reason for the different wording from that in section 4(1)(c)(ii) and section 4(2). The words do not have to be addressed to a particular person but they have to be "threatening or insulting". There is no mens rea element of intention, but recklessness as to whether alarm or insult occurs, must be present. In section 4(1)(c)(ii) no mens rea at all is required, but the indecent or obscene words must be addressed to a particular person. Under section 4(2) obscene or indecent words that are used indiscriminately are an offence. This is given a lesser penalty of $200. One wonders why this is the case when the indiscriminate use of threatening or insulting words has the $500 fine. And why should the subsection (3) requirement, of looking at all the circumstances, such as whether the defendant had reasonable grounds for believing that the words would not be overheard or a person offended, just be a concern for the use of indecent or obscene words?

Has the notorious ambiguity, and therefore uncertainty, in section 3D been disposed of by the new section 4? The ambiguity was whether "behaves", according with a more specific and certain interpretation, includes only physical actions; or does it extend to written and spoken words? It will be submitted, in Part VIII below, that section 4, on a reading of the provision alone, has not conclusively laid to rest this uncertainty. This is primarily because the broad problem phrase "behaves in a disorderly or offensive manner" has not been clarified or restricted within section 4(1)(a) but transferred in exactly the same fom in which it existed in section 3D.

Therefore it is argued that section 4 in particular is the battered, uncertain and confusing product of the conflicting concerns for public order and protection of sensibilities on the one hand, and the concern for tighter drafting and civil rights issues on the other. Rather more emphasis has been given to the former interests. The new provisions will be evaluated, in the following discussion, within the terms of reference set in the introduction to this article.

VII. THE ROLE OF THE JUDICIARY

The Statutes Revision Committee had said that section 3D gave a judge such a wide discretion that "he is not merely interpreting the law he is making it".[34] This came about primarily through the use of such vague and potentially broad words as "disorderly", "offensive" and "insulting" and from the lack of any

34 *Report*, supra n.23 at 12.

attempt to narrow down the section by reference to consequences such as a breach of the peace.

The following is an examination of the consequences of such vague drafting, and of the extent to which the problems have disappeared with the new sections.

Melser v. *Police*[35] was the leading case defining, not only offensive or disorderly behaviour, but also insulting words. Turner J. stated that:

> Disorderly conduct is conduct which is d sorderly; it is conduct which, while sufficiently ill-mannered, or in bad taste, to meet with the disapproval of well-conducted and reasonable men and women, is also something more, — it must, in my opinion, tend to annoy or insult such persons as are faced with it — and sufficiently deeply or seriously to warrant the interference of the criminal law.

The difficulty judges have in defining and applying such phrases as "disorderly" is reflected in the rather obvious proposition that "disorderly conduct is conduct which is disorderly". This *Melser* test has been called the "three-pronged approach by most commentators. That is: (1) reasonable people would be annoyed or insulted, (2) the behaviour must be likely to annoy people present, and (3) the insult or annoyance must be serious enough to warrant the intervention of the criminal law.

The courts have had great difficulty with the first prong of the *Melser* test. Some judges have tried to move closer to deciding what is disorderly by formulating the question slightly differently: behaviour "calculated [36]to cause resentment in the right-thinking man" or "a conviction ought not to be entered unless the conduct or behaviour is such that it constitutes an attack on public values that ought to be preserved",[37] or "conduct that in the prevailing circumstances would offend the public conscience" and "would be contrary to the public interest".[38]

These statements, like the Danzig decree enacted by a Nazi regime, in issue before the International Court, are vague and could easily fall prey to a value judgment made by the judge or a majoritarian view of behaviour, which obviously does not hold the right to dissent very dearly. By what criteria are we to decide that one particular set of opinions is "sound popular feeling" or the "public conscience" and other opinions or their method of expression are "deserving of punishment" or an "attack on public values that ought to be preserved"? That such tests are really often a disguise, albeit a subconscious one, for a judge attributing his own values to the situation before him, is suggested by the different findings judges come up with concerning similar fact situations, in disorderly and offensive behaviour cases.

Henry J. in *Police* v. *Christie*[39] found that a youth's behaviour in following a woman home was disorderly. In *Melser* v. *Police,* Turner J. commented[40] that he

35 [1967] N.Z.L.R. 437 at 444.
36 *Derbyshire* v. *Police* [1967] N.Z.L.R. 391, Wilson J.
37 *Police* v. *Christie* supra n.25 at 1113.
38 *Wainwright* v. *Police* [1968] N.Z.L.R. 101,103, Wild C.J.
39 Supra n.25.
40 Supra n.35 at 443.

doubted whether he would have convicted the defendant if the case had come before him.

O'Dea v. *Police*[41] and *Derbyshire* v. *Police*[42] have very similar fact situations, with totally different results.

In *Derbyshire* v. *Police,* a woman was convicted of behaving in an offensive manner when she carried a burning Union Jack on a pole along a road on a university campus as the Governor-General sprang from his car. There was no evidence that the Governor-General had seen the apparition. But Wilson J. in applying the test of "a course of action calculated to cause revulsion in right-thinking persons", while admitting there was some difficulty with the concept "right-thinking", concluded that in this particular case a conviction could be entered. The reason was that "respect for the flag of our fathers, which forms moreover an integral part of our own flag is to be expected in persons of decent instincts regardless of their political opinions". The question arises as to what are "decent instincts". It is obvious that Wilson J. himself had a healthy respect for the "flag of our fathers". But what if, as Professor K. J. Keith points out,[43] a person of decent instincts genuinely considers that New Zealand should not remain a monarchy and chooses as appeared to be the case to burn the flag to express this view"? Is a majoritarian viewpoint the correct gauge by which acts are to be defined as criminal or not?

In *O'Dea* v. *Police* a protester against the British army occupation of Northern Ireland burnt a Union Jack outside the British Consulate where 300 people were present. The judge took a view opposite to that of Wilson J. and held that the defendant should not be convicted. His reason for doing so was that as the audience were all protesters nobody was likely to be upset by the action of the defendant.

While perhaps a more desirable result was reached in this case, from the point of view of someone trying to liberalize the law, it is submitted that the reasoning was not reflecting what should be the real concern of the criminal law. That is, if whether a person is found guilty or not depends on who is, or how many people are, "upset" by the behaviour, the criminal law becomes: (1) a method of enforcement of majoritarian values, (2) a matter of chance as to whether a majority of the public at the time were sympathetic or not, and (3) reliant on a question of sensibilities, "upset" and not substantial harm being the requirement.

Thus with a broad discretion vested in the judiciary to determine what constitutes an offence, the judges experience difficulties and the results are often inconsistent.

One may argue that, granted, judges differ in their application of the "right-thinking person" test, but is not this standard a very useful one at Common Law? The very point is that the test of the "right-thinking person" is a Common Law

41 [1972] Recent Law 264, Mahon J.
42 Supra n.36.
43 Keith, supra n.3 at 63.

test and should not extend to a codified statute where one would expect Parliament to state more objectively what constitutes an offence. Also, whereas in civil litigation two individuals contest with each other, in criminal law the contest is between the individual and the state. Because of the state's power special precautions should be taken to guarantee that arbitrary exercise of that power, that is, arbitrary criminalization of non-conformist protesters, does not occur.

In relation to the second element of the *Melser* test, "tendency to annoy persons present", the application of that principle by the judges seems to have been characterised by confusion. In *Melser* itself, the defence seemed to have the burden of proving that their conduct of chaining themselves to the pillars of Parliament was not "at least likely to cause disturbance to others present".[44]

In *Bos* v. *Police*,[45] a case where anti-Springbok tour protesters ran onto the tarmac at Auckland airport, the judge found that there do have to be persons actually disturbed by the conduct, but that in this case they could be inferred to exist. Actually facing a hostile audience problem is by itself a serious inroad into freedom of political expression if that alone is sufficient to criminalise one's actions, but to be in the business of attributing one's own feelings to those of the audience in question, is fraught with other dangers. When a judge takes for granted that the persons present would have been seriously annoyed then he is really attributing his or her own personal feelings about such a situation to that of the crowd.

McMullin J. in *Rehutai* v. *Police*[46] seems to have applied the *Melser* test somewhat differently again. This was a case under the now redundant section 48 of "obscene language". The judge concluded that the element of serious annoyance to others was not a requirement for an offence to be made out but an aid in determining whether the language was obscene. It was at the judge's discretion whether he held the element to be material.

Professor Keith expressed[47] doubts as to whether this second prong significantly narrows the scope of the section, as he argued that if a judge was likely to find that the "right-thinking person" would be offended, then he would also infer those present would be offended. But as we have seen in the case of *O'Dea* v. *Police* the judge treated it as material that nobody would have been offended in the crowd. Thus the second prong would seem to depend in the effect of its operation in any given case upon the particular appraisal favoured by the judge.

The third element of the test is perhaps the most startling of all. That is, the behaviour has to be serious enough to warrant the intervention of the criminal low. With a codified area of law it should not be necessary for the judge to attempt to restrict the application of the words used, by this statement. Once again the decision to be made by the judiciary is an ill-fitting one — is it the place of an interpreter of the law also to have such power to decide what warrants the law's intervention?

44 Turner P., supra n.35 at 443.
45 [1982] B.C.L. 186.
46 Unreported, Court of Appeal, 26 April 1982.
47 Keith, supra n.3 at 65.

An alternative to the three-pronged approach was enumerated in *Melser* v. *Police* by McCarthy J.[48] He balanced the conflicting freedoms, recognising that no freedom is absolute. While this unfrocks a judge wearing the disguise of the right-thinking person, it may be just as susceptible to problems of wide judicial discretion if there are no further guidelines for a judge. The freedoms the judge considers and the weight he gives to each may not be universally recognized. For example in the *Melser* case the freedom of M.P.'s to entertain state guests without embarrassment, and the right of visitors to pass into Parliament without the sight of protesters manacled to the pillars, even though the visitors were unhindered, was held to be the more important freedom to safeguard. It is the writer's submission that it is for the legislature to make it clear in which circumstances freedom of expression is to be overridden by other freedoms.

The Statutes Revision Committee's finding in 1973 is a good summary of what was hoped for in the new legislation: "As far as possible loosely defined, vague and sweeping offences should be avoided"[49] and "the criminal law should attain its purposes directly rather than by using provisions that have been framed in different situations and for entirely different purposes".[50] Have sections 3 and 4 had the desired effect?

As regards section 3 the improvement in terms of a more specific, less discretionary provision is substantial. The wide language used, "offensive", "insulting" and "disorderly" is narrowed down, as already mentioned, by the requirement of violence or likely violence starting or continuing. However, in section 4(1)(a) "disorderly" and "offensive" behaviour are left in their unadulterated forms. Thus the right-thinking man test, with all its attendant vagueness and leeway for the judiciary, still exists. It is suggested that this is a substantial failure on the part of the legislature in the light of the seven year struggle to achieve provisions doing away with the glaring problems of section 3D, and in the face of the Statutes Revision Committee's acknowledgement of the undesirable nature of the *Melser* test.[51]

It is arguable that in respect of sections 4(1)(b) and 4(1)(c)(i), where intention or recklessness as to causing offence (etc) is required, there is no longer a need that someone actually be alarmed. While this means the judiciary have no longer to grapple with the confusion of applying the second prong of the *Melser* test, it does make the possible extension of the section even broader.

VIII. THE PROTESTER: UNCERTAINTY

Commenting on section 3D, Dr Finlay[52] said that "Any uncertainty in this department of the law is not only unsettling to police and makes their job harder to perform but it is also provocative to protesters and my suspicion that there

48 Supra n.35 at 445.
49 *Report,* supra n.23 at 7-8.
50 Ibid. at 50.
51 Ibid. at 11: "A test based on the views of the 'right-thinking man' is admittedly vague and subjective and this is the basis of criticism, that the section infringes the liberties of the subject".
52 N.Z. Parliamentary Debates, 7 August 1968, para 2234.

may be bias in the law, and I believe that suspicion to be well grounded, is calculated to raise the temperature of debate and dissent".

It has been seen in examining the consequences of wide judicial discretion as a result of vague provisions that consistency can fall by the wayside. It is this inconsistency in interpreting broad phrases such as "disorderly" which can have a "chilling effect"[53] on protest. It can seriously undermine the protesters' effectiveness in that often they do not know whether an action is against the law or not — until the issue is decided before the court. This makes a mockery of section 25 of the Crimes Act 1961 which states "The fact that an offender is ignorant of the law is not an excuse for any offence committed by him".

It would appear from the new section 4(1)(a)'s retention of the phrase "behaves in an offensive or disorderly manner" that the uncertainty as to how far actions have to go before they are criminalised remains. This uncertainty was dealt with in Part VII of this paper.

The writer's principle concern now revolves around the word "behaves". The ambiguity mentioned earlier in the paper is demonstrated by two cases with almost identical fact situations which stand for opposing viewpoints. In *Price* v. *Police,*[54] the judge held that words alone may constitute an offence of "behaves in a disorderly or offensive manner". In that case an elderly man had forced his company and conversation upon two young boys. In *Macdonald* v. *Police*[55] however, where a man followed two girls who were cycling home, and carried on an offensive conversation, it was held that words alone were not sufficient to satisfy the section. It is not submitted that such conduct should be allowed to escape the law's attention, but rather the writer is concerned with the consequences of finding "behaves in a disorderly or offensive manner" to have such a wide catch-all nature. This relates to the earlier concerns mentioned; wide judicial law-making power, uncertainty for the protester, and a provision too easily applicable to protest action.

The ambiguity in section 3D stemmed from squeezing both language and physical actions into one section. The confusion was increased by a long list of adjectives being tossed into the section, without any conclusive indication as to which adjectives attached to actions and which to words.

Certainly it would have been sensible to argue, as did the judge in *Macdonald* v. *Police,* that "or uses any threatening, abusive, or insulting words" suggested that for there to be a language offence the words had to come within one of those adjectives and no others.

But this argument did not stand out as the clear victor — perhaps because of the all-encompassing and overlapping nature of such adjectives as "insulting", "offensive", "disorderly" and "abusive" and "threatening".

53 Keith, supra n.3 at 57.
54 [1965] N.Z.L.R. 108, 109, Haslam J.
55 [1965] N.Z.L.R. 733, 735-736, Barrowclough C.J.

If one looks at section 4, without reference to international law obligations or civil rights concerns, it would seem that Parliament has failed to conclusively lay to rest the ambiguity. The reason for this view is that the phrase "behaves in a disorderly or offensive manner" has been transferred to section 4 without any attempt to clarify or restrict its scope.

Several contextual arguments can be made to support either view of the word "behaves". Arguments which could be made in favour of spoken and written words being included within the ambit of section 4(1)(a) are as follows:

"Behaves", according to dictionary definitions and ordinary usage, has a broad meaning. The seventh edition of the Concise Oxford Dictionary states that "behaves" includes "moral conduct, treatment shown towards others". Relying upon this inclusive definition words, spoken or written, are clearly covered.

Protest action by its very nature often involves simultaneous use of words and actions which cannot be easily or sensibly separated. For example, a demonstrator may wave a placard and shout slogans while marching down the street. Each action is inextricably linked to the other. The words used give colour and meaning to the actions, and vice versa. Therefore it would be unnatural to separate out such words and actions into distinct provisions where apart from each other they may be harmless or meaningless.

One may suggest that section 4(1)(b) and (c) only provide for spoken or oral language, and if section 4(1)(a) were only to include physical actions, written words causing disorder or offence (etc) would be outside the ambit of the section. "Within the hearing of", which precedes section 4(1)(b) and (c), gives weight to this contention.

The arguments for a restricted interpretation of "behaves" are also several and persuasive.

It may be that the ordinary usage and dictionary meanings of "behaves" are very broad but for our purposes "behaves" must be read within its statutory context — this narrows the word to actions alone. Sections 4(1)(b) and (c) clearly relate to words alone, if section 4(1)(a) were also to cover words then section 4(1)(b) and (c) would be redundant. It cannot be Parliament's intention to stockpile similar provisions which overlap, in the hope that the defendant's behaviour will come within one of them.

Although the marginal note, according to the Acts Interpretation Act 1924, section 5(g), "shall not be deemed to be part of such Act" this does not mean it cannot be used as an aid in interpretation of a section. The marginal note before section 4 is "Behaviour *or* Language" which suggests that behaviour does not include words, otherwise behaviour alone would be sufficient as a description of the section.

Within the old section 3D, it can be argued that the adjectives attached to words and actions were not interchangeable but distinct. Disorderly and offensive described actions alone while "threatening and insulting" words alone. This grouping of adjectives has been carried over into section 4. And in addition to this the actions and words offences have been physically separated into section 4(1)(b) and (c) to cover words, and section 4(1)(a) to deal with actions.

What of the argument that written words must be included in section 4(1)(a) "behaves" because paragraphs (b) and (c) only relate to *spoken* words? It would seem strange that the drafters, having gone to the trouble of separating out very specifically the different offences in section 4, would place written words with physical actions when they belong more suitably with spoken words or in a paragraph of their own.

A more persuasive argument may be the following. If one interprets section 4(1)(b) and (c) only to include spoken words because of "within the hearing of" then to be consistent, subsections (2) and (3) must also be given that restricted reading. Thus whereas in subsection (1), it could be argued that written words were included in section 4(1)(a) "behaves" — there is no such "general" term for *written* obscenities to be caught in subsections (2) and (3). That spoken obscenities and not written ones should be covered by the section seems unlikely given the demonstrator's propensity for writing on placards.

Therefore it is the author's conclusion that although a new form of section 3D was considered for several years to remove the ambiguous nature of the word "behaves" good arguments can still be made on the form of the new provision for each view. Thus the uncertainty is prolonged.

IX. THE PROTESTER: HOW FAR CAN ACTION BE TAKEN BEFORE IT IS CRIMINALIZED?

> No-one can seriously question the fact that some few protesters have broken the rules and in doing so have sorely tried the collective patience of the community. However the freedom to dissent is not a liberty gratuitously afforded by the majority, and to be withdrawn by it at will. It is rather the keystone of our system of government — remove it and the whole must fall.[56]

It is contended that section 3D was used by the courts in a manner far too readily encroaching upon freedom of expression. The judgments of the leading cases have failed generally to grasp what *effective* protest means.

In Australia some attempt has been made in the case law to differentiate between sincere political protest and abusive or threatening conduct. In *Ball* v. *McIntyre*,[57] Kerr J. held that a youth's action of standing on King George's statue with a placard saying "I will not fight in Viet-Nam" would be tolerated by the reasonable Australian. This was because the action would be seen as a sincere gesture of political belief.

In *Worcester* v. *Smith*,[58] O'Bryan J. held that offensive behaviour did not extend to the peaceful statement, either verbally or in writing, of political views. In that case the defendant had held a placard saying "Stop Yank intervention in Korea".

Although the New Zealand cases are full of statements purporting to uphold the right to freedom of expression, protest and dissent, the bulk of actual decisions

56 J. Pope "Politicians, Policemen and Protesters" [1972] N.Z.L.J. 289.
57 [1966] V.L.R. 243, 245.
58 [1951] V.L.R. 316.

seems at variance with the right to strong and effective expression of one's views.

In *Melser* v. *Police*[59] Turner J. said that the conduct of the demonstrators may not have been disorderly if it had not included chaining themselves to the pillars of Parliament, at that place and time. But it is submitted that the protesters chaining themselves to Parliament's pillars while Vice-President Agnew walked past was an essential part of their symbolic protest. If they had chosen a tree down the road their actions would have had much less significance, and would not have made the same impact on the state visitor, had he seen them at all!

In the case of *Wainwright and Butler* v. *Police*[60] the judge was able to say "the decision in no way restricts the right of the appellants or of like minded persons to hold their views or express them publicly". He then added that if protesters "press on people present a point of view however sincerely held, which they know would be annoying to most and offensive to many" then that is disorderly behaviour.

It is suggested that this position, as Professor K. J. Keith puts it, is rather hypocritical: "to tell protesters that they can protest until they are on the point of persuading those affected to re-examine their position and that there they must stop."[61]

The approach of some of the judges in American cases concerning freedom of expression makes incisive comment on the way protest behaviour should be treated by the law.

In the case of *Terminello* v. *Chicago*[62] Mr Justice Douglas said of a case where the defendant was charged with "disorderly conduct" for criticizing racial and political groups amongst a turbulent and angry crowd:[63]

> . . . a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute . . . is nevertheless protected against censorship or punishment, *unless shown likely to produce a clear and present danger of serious substantive evil that rises far above public inconvenience or annoyance or unrest.*

Some of the broadness of section 3D may have been cut down by interpreting section 4 as providing separate provisions for words and action, as has already been discussed, but if this interpretation were not to be adopted protest behaviour is as vulnerable as ever it was under section 3D. Even with the distinction existing between an action provision in section 4(1)(a) and the other provisions dealing with words alone, the terms used by the legislature are not specific enough.

59 Supra n.35 at 445.
60 [1968] N.Z.L.R. 100, 101.
61 Keith, supra n.3 at 63.
62 69 Sup. Ct. 894; 377 U.S.1, 93 L. Ed. 11131 (1949).
63 Idem. Emphasis added.

While subsection (3) says the court is to have regard to all the material circumstances, this only applies to indecent or obscene words; and is not specific enough to ensure that judges will make a distinction between the rabble-rouser and sincere protester. While the case law has said that whether conduct amounts to an offence is a matter of degree according to all the circumstances,[64] no distinct difference in treatment of the defendants who are politically motivated has been noticeable.

In the case of *Armstrong* v. *Moon*,[65] where the defendant was charged with blasphemy, the judge argued that a distinction should be made between . . . "argumentative statements made in good faith in the course of serious controversy and mere contumelious abuse where the purpose is not to convince but to assault". The writer submits that this is the stance the legislature should have taken when it had the opportunity to recast section 3D. But instead section 4's "behaves in an offensive or disorderly manner" would seem to cover the protester who has come up against a hostile audience equally as much as it can the football hooligan or pub-crawler.

In the case of *O'Dea* v. *Police* we have seen that the judge acquitted the defendant because the audience were protesters and were unlikely to be offended by his conduct. But what if some of those present supported the British Army's occupation of Northern Ireland? If one focuses not so much on the demonstrator's action but on the effect in any given situation, which is dependent on the disposition of the audience, then the law is not proscribing the behaviour per se, but audience reaction.

The language offences in section 4 also perpetuate the situation whereby attempts to impart information, beliefs, or to persuade are lumped together with abusive and threatening statements. As has been discussed already in the context of the Statutes Revision Committee report, "insulting" may well be applied to a situation where a demonstrator verbally attacks a person or institution which a member of the public holds dear.

X. CONCLUSION

It is through Parliament giving recognition to the rights of protesters to challenge and offend the beliefs of others that society benefits. Old prejudices and misconceptions can only be swept aside when they come up against conflicting views. If there is no law which safeguards the right to strongly challenge and persuade then the very mischief which the legislature has given too much weight to in section 4, may arise.[66] If expression of belief is thwarted by the justice system,

64 *Melser* v. *Police* supra n.35, Turner J. at 444.

65 (1895) 13 N.Z.L.R. 517.

66 *De Jonge* v. *Oregon* 57 Sup. Ct. 255; 299 US 353, 81. L. Ed. 278 (1937). Hughes C J. at 1437: "The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that the government may be responsive to the will of the people and that changes if desired, may be obtained by peaceful means".

protesters may lose faith in the democratic institutions and channels through which they have in the past sought to express themselves.

Article 19 of the Universal Declaration of Human Rights states "Everyone has the right to freedom of opinion and expression. This right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers".

The writer has sought to establish that this freedom is one which the legislature and the judiciary should hold dear. It is her submission that section 4 does not encourage the judiciary to substantially adopt the view of freedom outlined in Article 19.

It is submitted that a means by which section 4 can be salvaged is to read down its broad phrase "behaves in a disorderly or offensive manner" by reference to the Universal Declaration, and to the Covenant on Civil and Political Rights. In that way the potential use of section 4(1)(a), in particular, as a vehicle for retrospective law-making, for majoritarian rule, for the prolongation of uncertainty, and therefore for the destruction of effective protest, will be curtailed.

Perhaps the failure is larger than that of one provision — it may extend to our constitutional system. The New Zealand report to the International Committee on Civil and Political Rights pointed to the "fundamental common law precepts giving protection to individual rights in the courts", to the statute law, and to a "fully independent judiciary" as "the means for protecting and securing civil and political rights in New Zealand".[67] We have seen the ill-fitting nature of Common Law principles used in order to interpret the broad language used in the Summary Offences Act. Neither the Common Law precepts such as the "right-thinking man" nor the statutory law has protected civil and political rights sufficiently. As for our "independent judiciary" this has also been compromised through the broad language and lack of definition, particularly in section 4 of the Summary Offences Act, because the judiciary have become law-makers as well as law-appliers in a codified area of law.

67 Supra n.15 at 2.