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ASPECTS OF THE FAMILY PROTECTION ACT.

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LEGAL WRITING.

INTRODUCTION.

In this paper the writer hopes for a time to escape the confines of reality, and the volumes of case law, and look, albeit briefly, at the jurisprudence of a legal institution, the Family Protection Act 1955. The writer endeavours to show, not the intricacies of the way the system has operated, but a living working law institution. That aim raises the first large problem: with the aid of what structural analysis is it best to look at the institution?

The essay will deal with normative structures, and sociological structures; this is not to preclude other schemes as being usable, or even better, but to say that these are the two commonest structures, and that canvassing any others would be a prohibitively long task.

Having attempted to solve that question another devolves: in the face of the requirements of the analytical structure adopted how does the Family Protection Act bear up?

The general idea of the concepts of the act, and the assumption and precepts on which it rests is necessary however, before any such reasearch can begin, and that will be the first part of the paper.

THE FAMILY PROTECTION SYSTEM: AIMS, PRECEPTS, ASSUMPTIONS.

AIM:

Basically the aim of the system is simple and it is embodied in the statute in S4(1). That is,that where "adequate provision is not available from his (the testator's) estate for the proper maintenance and support thereafter of the persons by whom or on whose behalf application may be made under this Act as aforesaid, the Court may, at its discretion on application so made, order that such provision as the Court thinks fit shall be made out of the estate of the deceased for all or any of those persons".

This aim has been considered as quite a radical change to the ideals of the common law that there should be testamentary freedom, although historical studies do not in fact show this. (1) But it is true to say that this system is quite different from the civil law system (operating by fixed portions), which is very predominant in the law world today.

A question arises as to how far the aim should be construed. Originally it seems the legislation is only intended to correct what have been called "flagrant moral abuses" (2), but there is no doubt that the Courts have seen fit to extend their powers beyond this point (3), (4).

ASSUMPTIONS:

S3. "Blood is thicker than water". The Legislature has assumed that the family is still the basic unit in society, and that thus the family should be the protected group. This has been overshadowed in some cases (5) where the social situations have been complex and the family ralationships immaterial. It seems that as the rules of intestacy became fairer to widows and dependants the erstwhile advantages of freedom of testacy i.e. the power to provide for dependants, vanished and became seen as disadvantages since they led to possible disinheritance.

S4. That the courts should use discretion in decision making. The whole concept of discretion and justice is one which will be discussed later, for prima facie in a normative analysis justice may not be discretionery.

S5, 13. That the system has in reality very little to do with the duty of a testator to maintain and provide in some way for dependents after his death. Moral turpitude may disentitle a claimant, while most types of benefits remain payable even if a substantial annuity or lump award is obtained, but on the other hand S7, by requiring a pro rata ademption of the entire estate, seems to raise the testator's original moral duty again.

S11, 11a. That the Court should enter into reasons for disinheriting or inadequately providing in order to give as much effect to a testator's wishes as is possible. Freedom of testacy is preserved to some degree. Detectable, in addition, is a desire to anchor decisions on facts, to conform to public morality unfettered by procedural rules, thus guarding against arbitrariness.

Remedial. The whole act is intended to be remedial of possible situations, which would otherwise simply become the state's responsibility. But this is not to say that the state revokes responsibility; the welfare state is too well established for that, merely that the legislature saw the family unit as too important to be threatened by cantankerous selfishness on the part of a testator. As aforementioned the remedy may not be aimed at economics but at morals, the maintenance of the family as a unit for societal benefit overshadows the maintenance of persons by the welfare system.

PRECEPT:

That the Court will act, with normal processes altered only by the express terms of the act, to see that a form of social engineering by discretion is carried out in accordance with the assumptions mentioned above, and most particularly with that mentioned first, that blood is thicker than water.

THE FAMILY PROTECTION ACT AS A NORMATIVE SYSTEM.

The normative system is based not on what does happen but on what ought

to happen, the factors directing that postulated behaviour are called norms. Norms are thus objective. They contain a prescriptive course of behaviour and the sanctions which attach if that behaviour is not fulfilled. Strictly there are no casual connections between the style of the breach and the type of sanction invoked. This is a view which aims at the essentials (law properly - so - called to Austinians) of the Family Protection system. Kelsen calls the basic norm or essential a "grundnorm"; this provides a base which is efficacious to the proper functioning of all other norms; they will fit, sanctionable behaviour will not. Kelsen says "efficacy means that the norms are actually obeyed and actually enforced". In using the term "grundnorm" the writer does not intend to accept the ramifications of Kelsen's pure law theory, but rather to express the idea of essentiality, of basicity; to mean the norm upon which others which make up the institution are based.

Normative structures are intended to be definitional of the institution to which they are applied, though to the writer merely defining the rules which guide an institution is hardly definitive of its role, despite the fact that it may operate according to those guiding precepts. For this reason while systems of rules are deduced no institutions appear from them. On this basis alone the author finds difficulty in reasonably interpreting what is obviously an institution rather than a body of regulations.

But is there some way to find the institution in a system of rules? Although the system may apparently consist only of rules, those rules do have some essence of morality contained within them which gives a shadow of an institution, otherwise one could not state the assumptions gleaned by reading the act. Unfortunately the pure theory concept of a defining norm does not and cannot include any moral ideas since moral ideas are subjective, but as will be seen later it appears impossible to remove this from the norm and leave the norm whole. The institution might be further fleshed out in the normative analysis by the addition of the principles (other norms) by which the system of rules is controlled and in accordance with which it runs.

But the Family Protection system may be described at least in part normatively, if one accepts that a <u>workable</u> norm in this area must contain an ultimate moral judgement, here on the part of the legislature ostensibly on society's behalf. The idea of the grundnorm of the Family Protection system would fit this. The purpose of the institution has been, to the Courts at least, fairly consistent, although, as already noticed, whether that particular purpose was the one originally envisaged is a moot point. The writer submits that value judgements must be allowed

into norms, despite the obvious objective/subjective clash, to allow any fruitful study of the Family Protection sustem. Kelsen and the other pure law theorists attempted to exclude value judgements from norms, but it is difficult to get away from the obvious point that the Family Protection system is in fact based on a series of assumptions, the most important of which, the writer submits, is that already mentioned, that blood is thicker than water. That the family unit is important in society and will remain so. But Kelsen's criticism of subjectiveness in pure law thinking is most valid in a situation such as this where the failure of the value judgement would entail the failure of the grundnorm and the hierarchy of norms and the system. If a legal system fails by virtue of human misjudgement, then it is hardly a pure scientific discipline which is empirically ascertainable. Do we thus have to look deeper to the whole legal system to find a grundnorm?

The search, in the writer's opinion, is inutile for even at the point in law where all that can be said is that norms will obeyed, the grundnorm falls into the same difficulty, that people will simply decide to follow another. At the level of personal sovereignty, law thus becomes uncertain, and no legal system consistently applicable to society or even a class thereof can be discovered. If it were said that the concept of a grundnorm contained the notion that it is obeyed, what happens to all the precedents and established behavioural patterns when a grundnorm is overthrown, is it simply to be assumed that society was mistaken in following the overthrown idea?

Even more damaging is a case such as MABZIMBAMUTO v LARDNER-BURKE (6), where a decision had to be made as to the legal nature of a nation's government. Is the de facto government the sovereign body or is the de jure? Where does a grundnorm such as "the sovereign will be recognised" stand in a case such as that? The decision must rest on the value judgement of the observer just as it did in that case. Obviously the grundnorm is in fact no more than a rule of thumb. The normative system, established to give law scientific certaintly, rests, in reality, even at this most basic level on the attitudes of the law makers. This is simply evidenced by the divergent opinions of the Law Lords in Mabzimbamuto. The author does not take seriously any argument to the effect that some of the Law Lords saw the grundnorm and that some did not. The idea lacks reality; the Law Lords have mistaken the law before, and admit the possibility of this happening in the future. Should a majority be vested with Godlike intuition by virtue of being the majority? The decision here furthermore, appeared not, in any way, to affect the actual situation in Rhodesia, it was simply ignored. So if we say "the grundnorm was elucidated by the Lords", we must contrast that with, "but the situation did not change". The idea that the grundnorm is essential is thus destroyed, unless we can say that the grundnorm rests

in fact rather than in theory in this case. But now the "ought" supported by the Lords' decision is replaced by the "is" of actuality. The basis of the normative system is lost.

A norm should not be challenged and disobeyed even if seen as morally invalid since it is still normatively valid and may only be altered normatively. Moral criticism is only subjective and thus theoretically open to doubts which the norm, an objective rule, is not. This illustrates another weakness in the analysis. No account may be taken of the winds of change until in fact they have blown the norm away, and replaced it with another. This would appear to weaken any structure developed on a normative basis, for structural alteration under these circumstances would be very difficult, and very sudden.

So the possibility of a useful analysis consisting of a code of rules separated from practicality and existing in their own right is slight. Perhaps to say that institutional rules are for conduct rather than of conduct is the argument in a nutshell.

THE VALIDITY OF LAW AS A SOCIAL ENGINEER IN A NORMATIVE ANALYSIS.

It is a core conception that law achieves order in society, thus law's potential value as a social engineer is huge. On the other hand, it is a cliche to say that one cannot leglislate for morals. Certainly in a pure normative system morals can not be a part of a norm, though they may grow from its operation. The question thus arises as to whether this type of social engineering is a moral activity. In one major way it appears not to be - the people to whom the moral lesson should be taught are ex hypothesi dead. It is a moral injustice which is being remedied so as to maintain the social cohesion of family units, rather than a moral lapse punished. Normatively this fits. The institution is purposive, designed to aid or remedy. Rules of conduct are established (by the courts) for their utility in producing an end in accordance with the grundnorm (this may be seen in S4 (1) of the Act) - and a remedial action in aid of a family unit is in accordance with the assumptions already made. It is thus submitted that the Family Protection institution may be seen as an instrument for ordering society on moral terms not for morally reconstructing it in the sense of providing a continuous lesson to testators, though of course that effect may arise. Moral retribution is not the aim e.g. where an application is allowed against an intestate estate no possible moral statement is made, yet society benefits.

The concept of validity may give rise to some difficulty. In a normative structure the grundnorm is the ultimate source of validity. If the heirarchy of norms is truly based on the grundnorm then all norms will be valid since they lead more

and more precisely to the efficacy in goal achievement required by the grundnorm. So a valid rule applied by a legal system following norms of correct process will lead to a valid and efficacious conclusion. As far as this analysis goes it is undoubtedly correct. But in the writer's opinion it is ineffective in the social context. It can only be recognised that the normative concept of validity in law is sterile, and indeed it is not intended to be otherwise. Nevertheless in searching out an analytic system for an institution it is of little use on its own. The courts have well established procedures to attempt to ensure the validity of decisions; the appeal procedure, court traditions, the principle of disinterestedness, the opinions of the legal community etc; yet complaints of bias, inefficiency and malfunction are unfortunately common. The reason? The activities of human applicators in the system. In other words there is a large measure of distinction between validity and applicability. A normative analysis will usually not recognise this distinction since moral invalidity has no effect on normative validity as has already been seen. Morals in this context are simply value judgements, and value judgements are not catered for within the normative system as normally postulated. Where they are included, the writer submits that in fact the value of the normative system, certainty, is lost, the result being an emasculated grid suitable for neither a normative analysis nor for a sociological.

In defence of a normative analysis it may be said that the norm attempts to give a guide to human behaviour; this could be called the "ought" function. On the basis of the "ought" function the courts may decide whether an action (here by a testator in a will) was foolish or otherwise, and as to whether the consequences following would be desirable or not. This aligns with the assumptions already referred to of obeying the testator wherever possible, but in general reinforcing the family by redistribution.

Change in a normative system is allowed by the extension of new permissions since not all possible situations may be predicted. Thus in a way a norm may be seen as a social change factor which gives social meaning to existing behaviour rather than creating it. The norm may simply impose a group of rules to govern an existing situation as it may be seen as doing in this institution. When the norm of freedom of testacy was blown away and legislatively replaced, at least to some extent, a new rule pattern was established for the distribution of testamentary income and capital. It could have been a complex set, governing all types of situations with patterned answers (such as legitim [fixed portion] systems of many civil law jurisdictions); or it might be as here, a simple extension of discretion to the courts to solve problems as they see fit; with no direction from anywhere except for existing norms governing discretion and the court's own social sympathies. This

leads on to the next section.

DISCRETION AND JUSTICE IN A NORMATIVE SYSTEM.

There is a general desire for justice in a community even though none in that community ~~adn~~ can adequately describe what justice is. The concept of justice implies that rules of conduct will not be made arbitrarily, but in accordance with rules of conduct already established in the legal system. So in some ways justice will always bear some resemblance to an existing social norm which is considered a just one.

Since it is unjust to treat equally those who are unequal, justice's application must be controlled to produce the goal required. In the Family Protection system, in lieu of a set of rules giving these control patterns, discretion has been introduced. But is discretion compatible with justice? At first sight apparently not. Discretion would appear to contain within it the arbitrary and perhaps biased aspects, studiously avoided by the justice seeker. However in fact the writer submits that the two concepts are mutually acceptable. Discretion gives the court the power to follow a rule which is applicable but which is beyond the set of alternatives allowed. As has already been mentioned, normatively it is impossible to predict all possible situations; by restrictive rules the court may be forced to act more unjustly more often than by a system admitting some flexibility. That this situation was desired is shown by S5 and 13 of the Act. The discretionary choices made by the judicary will often be, because of the nature of the court system based on patterned behaviour (the precedent system) or upon the application of policy considerations. Where two policies compete the court is in some difficulty, and so is the concept of justice. But being bound by a prescriptive rule is superior in terms only of certainty for rarely are two situations the same. Discretion must be relied upon to choose where shadowy concepts such as justice and policy intervene.

CONCLUSION.

While the writer would not entirely exclude a normative approach to an institution as being useless, it would be fair to say that its sterility makes the study of a living institution rather less fecund than it should be. Furthermore the internal consistency of the whole theory is open to some doubt. On the one hand a value-free system is envisaged, while on the other in a human organisation that a basic value is held by society would appear to be the fundamental reason for allowing the institution to develop in the first place.

The writer had assumed (before actually writing anything) that where social engineering is required, a normatively based system, where all rules lead

securely to the anticipated goal, would be the best. It had seemed axiomatic that certainty and equality of consideration would demand this. However, having discussed the normative system, and having found that the Act is not fundamentally normative, the writer submits that the legislature wished to achieve a solution in a better way. So we turn now to a sociological view of the institution.

A SOCIOLOGICAL ANALYSIS.

Pound postulates that the law is aimed to give a maximum satisfaction of wants, and that as such a functional attitude is important. The law is judged on a purely concrete basis for its availity to extend the goals for which it is desired to be used, in reference to its social utility. He says that "legal order (is) an engineering task of achieving practical results with a minimum of frustration and waste". (7)

This sets the scene for sociological approach to the Family Protection system; for that approach requires a study of the "is" rather than the "ought" already referred to. The decisions which must be made in connection with the institution are made by people who can refer to a social base themselves, rather than in accordance with a rule of conduct based, not upon conduct at all, but upon logic.

So the approach is sociological, it deals with people within and without the institution; it deals with the social interest in family protection from an irresponsible, foolish or unlucky testator; it deals with the values which support the system; it deals with the adjustment of losses.

Individual rules for conduct in each case come out of the facts, and upon these rules norms or human activity are applied to aid decision. The institution's law is thus distilled out of an interplay of social forces and circumstances, previous decisions and judge's personalities. Since there are few norms laid down here the facts of each case are more important.

Summers (8) would call this institution a public benefit conferring one, due to the failure or possible failure of the private arrangement. The writer intends to ascertain what public benefit is conferred.

The answer to that question of course, decides how ~~true~~ the institution bears up, for as has already been illustrated, to say how a system ought to be operated, when in essence it is operating in an entirely different way is of little use to a society evaluating it.

SOCIAL FUNCTION IN A SOCIOLOGICAL ANALYSIS.

Sociological analysis sees law as purposive, aimed at a goal, not the "ought" goal of normative studies but a practical goal. Laws are established for their

utility, and are retained for their success. If successful, laws are instrumental in changing situations which fail to be governed, though probably not attitudes as has already been discussed. Thus a social policy may be legally effected.

The goals for which the law is promulgated should be deducible by the decision makers, definable in terms of what is required to satisfy them, and definable in terms of the class which is to be satisfied by them. The Family Protection Act meets these three criteria which allow effect to be given to social policy. Sections of the Act suffice to show this: Goal - S4; satisficing terms - Ss4,5,6,7,8,11,11A, and 12; and the satisfied class Ss3,6,9,13,15.

Raz presents a useful analysis of the social functions of law. He believes that there are two types of social function in law, the direct function which arises out of the obedience to, and the application of law, and the indirect which arises out of the operation of the direct and which concerns attitudes, behaviour, value support or denial, etc.. In effect the psychological response to a reality. The indirect function is thus dependant on the direct for its existence. He further divides "direct" up into 'primary' and 'secondary'.

Primary functions are; firstly: preventing undesirable and securing desirable behaviour - criminal law sanctions, prohibitions etc. This classification could fit the institution in that a single act of undesirable behaviour may be converted to desirable. This is tortuous, Raz is really thinking in terms of sanctions, and because of the availability of other more suitable classifications the writer submits that this is not an adequate investigatory tool.

The second is providing facilities for private arrangements. Again this is not really suitable, it is to do with the process rather than the goal of the system (since it is by the process of overturning such arrangements that the goal is served). The courts recognise their power to override such arrangements. While will making power is unaffected the courts may alter the will to give effect to a judicial concept of adequacy of maintenance, that is probably out of line with the testator's. Private arrangements such as contracts and other legal relationships give a right to acquisition, and must also give a right to dispose of the property. Private arrangements thus provide a major part of the testacy problem. The law governs private arrangements in terms of their desirability, and this is exactly what this system does; dispositions and acquisitions are limited in society's interest, individual choice is restricted.

The third primary function is the provision of services and the redistribution of goods. The service provided by the act has already been submitted as the aim of the act. If the system did not provide maintenance where deserved

then the act would have no justification for its existence. The legislature in passing the laws to regulate this institution thus did so with the provision of this service in mind; it was rational and purposive behaviour leading to a concrete goal. The redistribution of goods is the obvious codicil to the goal thus established, and this is clearly required as the method of aim achievement. It is a completely distinguishable area of the institution. Here the content of the system may be seen as reflecting the needs of society.

Finally, the settling of unregulated or partly regulated disputes. The institution also serves this function in allowing court discretion in deciding upon what are adequate oriteria for provision to be ordered. Of course the function could be served also by the provision of a set of rules. That the leglislature did otherwise is an illustration of its feeling that a pragmatic solution to testatory problems was not to be found in set rules. The problem being a human one was various in its difficulties, and the importance of flexibility was an original assumption of the Act.

Raz's secondary functions consist of what the writer submits are lubricatory devices; rules of change and rules of application. All law institutions, and particularly ones based on statute have such rules, frequently traditional, governed by precedent, changing with social mores. The Family Protection system has them, and it is these rules which allow the system to remain flexible and thus adequate in the way that other statutes have not. The other major reason for this effect is the social base of the judges and the discretionary powers which they have.

There are also the indirect social functions, the ones that are served by the direct. In providing facilities to see the direct functions are executed, ~~i.e.~~ the direct social goal is achieved. By achieving that goal, the indirect goal is also accomplished, that is, that family units are protected from rash, irresponsible and deluded behaviour, or necessities are provided in the event of financial difficulty consequent upon death. Of course the indirect functions come to more than this. With every successful case the systems esteem is raised in the public eye, the state revenues may be lightened of an extra welfare burden, or a judge may gain satisfaction from his job.

The sociological function of the institution may be seen as directing men to perform those actions which are considered necessary to the attainment of common good and as prohibiting or remedying those which deny this. The law puts into legal terms an obligation mitigatable by circumstances, arising originally out of what the leglislature saw as a moral obligation to maintain social unity. Thus

Raz's direct and indirect social functions are, the writer submits, best explained and illustrated in terms of an ability to provide services, in distribution of goods, and in providing avenues of private arrangement reparation (9).

SOCIAL JUSTICE AND THE SOCIOLOGICAL APPROACH.

The concept of social justice consists of a claim by a man upon another to conform to the rules for conduct and allocation. By allocation it is meant that by distribution according to need or desert the job of the institution in securing social justice is done. Allocation by desert entails a notion that men are responsible for their actions, and that allocations are made in accordance with actions. This is provided for in the act by Ss5 and 11 and implied by the limiting words of S4 "adequate maintenance". In deciding upon an allocation the court must see that the claimant has an upholdable case for an award, the settlement must be fair in regard to circumstances such as, size of estate, the claimant's financial position, other claimants, work done to build up the estate etc. Claims may fail because the claimant's moral standing is impugned.

Allocation according to need may replace desert in some circumstances So in some cases restrictions on the use of the money are imposed, (10), and as need changes the court has the jurisdiction to vary the award under S12. Flexibility also allows the court to award money, as it is needed, by annuity or lump sum. However a practical feature of most estates today is that after duties and expenses have been paid, and future inflation accounted for, most estates are too small to provide anything but a meagre income. The welfare system will still bear a major portion of the burden of maintenance; thus it is submitted that allocation according to need should not be overstressed.

The concept of social justice also gives rise to an idea of special relationships, whereby a member of a family has a prior call on the family advantages. This is often a matter of individual justice, and that is the usual form undertaken by the court. As already mentioned, the institution does not attempt to morally reconstruct society, merely to remedy, on a moral basis, an individual case. Social justice is only achieveable because of a general feeling in society that irrational or inconsistent behaviour is open to criticism, and to public judgement and rectrification.

CONCLUSION:

The sociological approach, it is submitted, is, of the two looked at, by far the more adequate and suitable for ascertaining the effect of the

institution on the society in which it is based. This involves, not that laws govern man, but that the laws relating to the way man governs himself are important. A normative theory appears, (though spuriously it has been discovered), to have the advantage of being a logical set of deductions from a valid grundnorm to establish a basis for study. But the analysis breaks down, not only because of internal inconsistencies, though these lessen acredibility, but because the theory simply is illelevant to life. It is a study of the semantics of law, of words and meanings. On the other hand, the sociological approach allows consultation of value systems and scientific data, which prove often the nonlogical and unreasoned behaviour of humans. The institution is one which is an example of human action and activity to the sociologist and should be seen also as such by the lawyer.

The author does not entirely dismiss the normative analysis. Without some ideas of what rules are, just when and why rules are valid, and the nature of obligation, the legal system would not be able to exist at all. A system must have some internal coherence and despite its own difficulties the normative analysis may serve to fill this role. It is submitted that the sociological view of everything would lead only to the discovery of individuals, who would be, as it were, worlds within a world. What is right to one may be wrong to others, and yet strength of numbers or intensity of feeling has also proved mistaken before (11). Life might well be poor, brutish and short, to echo Hobbes, in these circumstances. At least under a normative analysis the basic assumption, that the majority (or their elected representatives) are sovereign (even if not morally justified) in the enunciation of law, may be made, and rules may be further deduced to form the skeleton of legal system. It matters not that the original assumption was incorrect; that, the individual should be sovereign not the majority; for that concept is expedient and workable, and the benefits achieved by an individual from a working society balance the wrong suffered. The normative approach i.e. the acceptance of some basic creed such as sovereignty in the majority is thus a necessary corrollary to acceptance of the social contract, just as a skeleton is essential for a human body. To take the analogy further, for a mind to exist no skeleton is needed, but for a mind to affect humans it is, communication is necessary. The mind controls and influences the physical. Without a mind the body is useless, but without a body the mind is ineffective. In looking at the system it is submitted that a sociological view should be taken, but always remembering that without the normative there would be nothing to look at.

It remains to the writer then to look at the system sociologically, assuming, reasonably it is suggested, that the system is normatively based. The assumption may be made because the institution had its genesis in a legal system, and is administered by, and has become a part, of it.

To decide whether or not the system is sociologically useful, one question must be answered. It has already been referred to. That question is, is the system effectively conferring public benefit?

THE FAMILY AND THE INSTITUTION.

In S3 of the Act the family circle is chosen as the only group from which claimants may come, thus being a member of the testator's family is a sine qua non for any application and further at least prima facie evidence of moral duty on the part of the testator under the special relationship already referred to. The family is to be left without interference if that is possible. The burden of maintenance may remain on the testator after death just as it did during his lifetime, He is obliged to continue his duties of parenthood and marriage. Since the family is so important it is granted an extraordinary favour by the leglislature. The policy of the courts is normally aimed against any repairing of mistaken execution of legal documents, but often the power to alter wills operates with just this effect in this institution.

Ironic however, in regard to this concern for the family, is the availability of loopholes in the statute which oust the jurisdiction of the court. Inter vivos disposition, land (immovables) outside New Zealand, and movables if the testator lives outside New Zealand are not touched as a part of the estate. The writer supposes that if a testator goes to such trouble to avoid the operation of the Act that the family is already in difficulties, but if, on the other hand, the avoidance is by mischance or as a result of ignorance the loopholes are irreconciliable with the purpose of the Act, and the mistakes, remedied by the Act elsewhere, will remain to deny protection. Further it is noticeable in this Act that all children, the spouse, etc, are individually qualified to apply for maintenance. However a weakness arises where children are minors for guardians must apply on their behalf. In the case of a unwilling guardian the child may be unprotected, although the Court has residual authority to include parties, S4 (2) and (4), or grant extensions of time S9 (1).

In an institution aimed at protection it is odd that such weaknesses remain. Perhaps it has been found that in fact they do not operate harshly, nevertheless they remain to trap the unwary or disadvantage the deserving in some

situations, and should, for that, be rectified.

THE FAMILY AND THE SOCIOLOGICALLY VIEWED INSTITUTION.

The reason for making a will is seen in society as being to assure the wellbeing of the family. This Act emphasizes the intimate emotional qualities of family life. Interference with this may mean insecurity and uncertainty and this institution contemplates unfettered freedom of testacy as dangerous in this regard.

The family might be described as a maintenance group in that they are maintained physically by a member or by members, that they maintain emotionally each other, and that they maintain institutions outside themselves by patronage or membership. There is thus a complex economic pattern formed which usually involves a definite division of labour and interest within the group, and mutual interaction which allows the family to be an independant and in many ways a self-supporting entity. This pattern involves duties, roles are to be played. Although things may be changing a common pattern may be seen - father provides financial support - mother supports this with housework and child care duties. This relationship entails duties on both sides. Mother may play her roles at the expense to herself of a career, or boredom and fatigue, and the same applies to father. With the death of the actors the roles are not abolished, they must be filled, differently, but nevertheless filled. Income or capital received by an estate is the only practical method of doing this, albeit its ineffectiveness to replace the actor. In view of this, no argument may be presented to reasonably allow a testator to renege on continuing his past duties, at the expense of those who supported him. He might be seen as morally estopped from doing so. If such actions were allowed society would bear the cost. The economic view is important, but is lessened in its standing where an estate is too small to provide adequate maintenance, as most are. The welfare system will still bear much of the cost of the death of a breadwinner, and in fact in most cases under this Act that this will happen anyway is ensured by S13. Obviously economics are not the only, or even, the major, raison d'etre of the institution. Income redistribution is now basically the government's job not the family's.

The writer's opinion is that social reasons exist to justify the institution, and that in supplying these needs the institution confers a public benefit, is thus efficacious and sociologically successful.

Modern urban industrialised society has spawned the nuclear family as has already been noted. Each family attains a degree of independence hitherto unknown in society. Society is too big, too advanced to allow services to be provided interfamily any more and instead separate institutions are provided. There is thus no need for whole groups of families to be connected for service production. Work-places are institutionalised to produce efficiency, community businesses or enterprises are rare, emotional needs are servable within the family, and service institutions are official, impersonal, and in a way, anciliary to actual living. Functions are separated. Families are subject to little direct interference, are able to make autonomous decisions, in short, have large measures of independence which in turn create dependence within. The more a family isolates itself the more parents, husband, wife and children tend to have an intimately integrated system. In the light of an assumption that this facet of society will not change, a supportive system is required in the event of disaster to ensure at least some possibility of a continuence in this state. The Family Protection system does this.

The nuclear family has been seen to intensify personal and emotional involvement within a family. A sense of family continuity should thus be conserved if possible; this concerns an ongoing relationship parents and children. There is a general sense of responsibility from both parties for the other, although with aging the type of responsibility changes. For example, when children are infants a parent's responsibility is for guidance, maintenance and protection; but as children become adults these same duties devolve upon them in respect of their old parents and their own children.

Families serve their own needs by a process of reciprocity and exchange. The needs of families are various, and of different types, and the way that these tasks are equalised is by reciprocal actions being exchanged. In this way the expectation of some inherited reward is often the reciprocal exchange stimulus to the doing of services for older members of the group. The economic aspects of inheritance have already been discussed and their lessening importance noted, but gaining is the symbolic importance of inheritance in recognition of work done, and services rendered. That this is so is illustrated by cases where the sum of the estate or award was less than the cost of the action. So in maintaining family continuity a sense of order, desert and identification may also be maintained. The reason for testacy, in a time when intestacy rules provide distribution which corresponds to most wills actually written, would appear to be a desire to maintain this family intimacy and identification. Acceptance of the reciprocity/exchange situation gives the individual a place, he may participate in group freely.

The provisions of the act help to reinforce this. Families may be perpetuated in time as long as reciprocal and exchange processes remain in action. The importance of reciprocity may be seen clearly in this gift-giving area.

In giving a gift the donor is making a judgement (in a will a final and eternal judgement) and giving an identity to the donee. The donee thus becomes what another sees him/her as, in society's eyes. Obviously the will as a final gift has enormous potential in this regard since an identity is given to a person intimately known, a comment is made upon the donee's ability as an exchange partner (i.e. a good/bad husband/wife). Furthermore if, as under the system of testamentary freedom, no outside body can dispassionately judge the situation, then the donee is forced to accept the donor's judgement and the identity becomes fixed. As will be seen later the courts have been prepared often, to cast doubts on the donor so as to reestablish a favourable identity for the donee. The living are placed before the dead for the obvious reason that donees must continue as members of society without the stigma of an unfair disposition. As Levi-Strauss has said "goods are not only economic commodities but vehicles and instruments for realities of another order; influence, power, sympathy, status, emotion" (12). In the Family Protection Act we may see the "fair and just father" as safeguarding social standing and assets rather than the possession of goods.

Obviously there will be cases where despite a decision on the part of a potential donor that the donee has not been a good exchange partner the court will grant relief. Perhaps the status of the donee is maintained by public ignorance of how a gift was obtained and by its obstensible possession. Family protection reports appear not to be publicly noted in the press.

The gift can thus be seen as a token of reward or award. It may be in recognition of status or in recognition of achievement, in the Family Protection institution it appears to act efficiently as both. To the world at large the gift objectifies past social relationships with the donor. Reciprocity is distributive justice; within a family relationship one may see a balance of debts. In a will the balance of debts may be seen to be equalised for eternity, a type of family continuity is preserved. The lack of a willable commodity appears to make little difference to actions under the act, obviously the sentimental component is the most important. Social rankings are maintained, and strengthened by allocation according to perceived worth.

Another side of the coin is, of course, atonement for sins done during the lifetime. This is an aspect much stressed by the courts, as will be

seen later.

The principle of reciprocity seems to preclude the normative analysis as well. Reciprocity depends in a large measure on the freedom of choice given the testator. Honesty is important at least inter partes, and the courts seek to carry out this function. But normatism implies a strictness in the field where gifts may be given. The testator would have to follow a norm of testacy, institutionally approved. The gift is expected, not seen as defining any position in the family, a chose-in-action rather than an expectancy.

To test the idea of reciprocity within the family circle the writer took a brief survey of 12 cases spread over the unrelated years 1954, 1956, and 1962 (13).

The intention of the survey was to establish which of "need" and "status maintenance" was considered the more important by the courts in their decision. By "status maintenance" is meant those factors such as continuity and the balance of debts as have already been discussed.

Seven of the cases were brought by widows, all were successful, (a,b,c,d,e,h,m). (One case although brought on behalf of the children of the deceased is for the purpose of our aims better classified as falling into the widows' group (c)).

Five were brought by siblings; four by daughters (f,g,k,j), one by a son (i). The action by the son was the only failure.

Of the seven widows' cases, five of the marriages had been unsuccessful (a,c,d,e,h). In four of these cases (a,c,d and e) the court laid the blame for the unhappiness on the dead husband and gave relief despite the obvious breakdown in affection. In each of these cases the wife's ability as a housewife and as a childrearer was not denigrated. The wife, as a result of playing an apparently successful role as a wife, was benefited. This, considering the unsuccessful nature of the real marriage, is misleading, and is submitted to be designed to give the widow a status in widowhood which she lacked in marriage. Two of these cases are especially interesting in this regard since in neither did the wife play all of the commonly assumed wifely roles, such as sex, housework and cooking, companionship, and keeping in touch with relations. The sum contribution in one case was bringing up children apart from the husband (d), in the second the contribution seems to have been the fact of being married alone, since the parties very quickly parted (c). Yet the wives were accorded paramount consideration. In the second of these cases furthermore the husband had assumed

de facto relations with another woman and had had children. Even admitting that the husbands were in fact to blame, the position of the wives in these five cases appears to be tenuous - the services rendered by wives in general were not provided, i.e. there was no exchange, yet the courts decided that they deserved better. The institution of marriage may be seen as being protected in the court's tendancy to consider that illtreatment during the testator's life merited better on his death. The other woman who had been a de facto wife was little considered, though she had been the better exchange partner. Social justice, as far as the de jure wife was concerned, was seen to be done. Her social status was increased since her deceased husband was blamed for the failure of the marriage and since her wifely abilities were not challenged. She was seen to deserve and need the income. Typical kinds of statements are those such as; she reared the family (d), she had in no way offended (c), that she was entitled to an income sufficient to allow her to live in "such state of life as is appropriate to her status as the widow of a wealthy farmer who treated her very badly in his lifetime" (e).

So a wife is portrayed to the world in general as a good exchange partner, one who deserved favourable treatment, one who deserves to maintain her status. In the fifth case of an unhappy marriage, the court did not attribute the blame for the breakdown in the marriage at all, (h), indeed the morals of the whole event were studiously avoided by the court which concentrated on economic aspects. The estate was small but had been built up in some degree by the wife, who also was in relatively needy circumstances. The result; the court gave a nominal gift to be paid in limited conditions, the tenor being, for economic need only. The widow's status as being a widow was not boosted since the gift was small and the judgement less than effusive on her behalf.

In the two cases of happy marriages (b,m), the points were taken early that; (1) the wife was a good exchange partner "there is no suggestion that she is not a capable and responsible person, and it appears that she may be relied upon to maintain the property as a family home" (b). The widow "had been an altogether deserving wife who had assisted her husband greatly" (m).
(2) That the lack of suitable provision was not a reflection on the wife in any way, in one case the will was not altered although the intention was present (b), and in the other the testator miscalculated the amount needed for adequate support (m). The court appeared to function to alter the position to one which both the husbands had in fact desired, but had mechanically failed to achieve. It is submitted that the wife's self esteem would have been in some degree restored in the official recognition of her deserving qualities, after having been badly

treated in the will, and her social status as a good exchange partner retained in the same way. The burden of the failure in the will was quite clearly taken from the wife's shoulders.

Though need was introduced as an important factor in all the cases in only one was it the major factor (h). In the other six the deserving (or inoffensive as compared with the deceased) nature of the wife was stressed and, is submitted, was the major feature of each decision.

The sibling cases. Four cases were brought by daughters. (f,g,j,k). Three of these were cases in which the daughter and father had been separated for years, (f,g,j) but the blame for this state of affairs was cast at the feet of the testator rather than of the daughter. The daughter in one case was considered too young to be able to see her father herself (f) and in another the testator's failure to make any efforts to see his child was regarded as a salient feature of the case. "(I)t does not seem that any blame for the lack of association can be attributed to the daughter" (j). In both of these cases though in fact the father/child relationship was entirely absent the daughter benefited. She was thus exonerated for her failure to play any part in the exchange roles which would have been normally expected of her. In the other two cases (g,k) the daughter's actual role-play achievements were stressed; in one she was a dutiful daughter (g) and in the other a nurse in her father's old age, in fact the inference was that she had sacrificed herself to his needs and deserved reward (k). The reciprocal duties were balanced by the court. This was most noticeable in the later case (k) where it was specifically held that the daughter had no need but that she deserved something since she was the testator's only child and in recognition of her service.

It was stated early in this paper that the importance of blood ties was a basic assumption of the Act. This is illustrated in three of the five sibling cases (f,i,k), where the point was specifically made. The courts found it difficult to disinherit children in favour of strangers even when the strangers had had far more to do with the testator, and in terms of need in one case were far more deserving (f). In the case of the son (i) where the application was refused, the court went so far as to say, "had the testator in the present case left to a stranger or strangers ..... I would have thought there was considerable force in a contention that the plaintiff had a claim upon the testator's bounty".

The writer submits that the courts have concerned themselves in a large degree with the equalisation of reciprocity debts and with the maintenance of social status. The sociological perspective it is submitted shows the

Family Protection Act in a clear light as conferring a public benefit (assuming as does the writer that status maintenance and balancing debts are beneficial).

Most actions under the system are brought by widows or children, though the act does not provide that this should be so. There is no doubt in the writer's mind that there are two major reasons for this. The first is the greater emotional stake in a family held by a wife. Her role in bringing up (and being confined with) the family, and closer connection with the family home mean that a large part of her life is involved in family. Her reward, the reciprocal arrangement, may often be possible only upon the death of her husband; here the marriage is finally seen as what it was worth to the participants. Methods of correcting mistakes or unfairnesses are thus essential. Secondly, support is usually undertaken by the husband, the wife is thus unused to working, perhaps she will have no skills, and certainly as she ages jobs will be harder to get. Interim support is often necessary. This also applies to children who may be too young to work, or still being educated, provision if possible should also be made in these areas.

Inheritance may be seen as buttressing the activities of a society-wide support system providing a release from both the moral and possibly physical commitments of other members of the family. Legal, emotional, and moral obligations may be escaped if a testator provides adequately for these in his will, they may otherwise be foisted upon unwilling or inadequately prepared members of the family.

Thus far it may seem that freedom of testacy is of no use in society at all. But the act makes no attempt to abolish the freedom, but merely attaches strings to be utilised if necessary. Why? One reason is that the system is not used excessively. Obviously the freedom is not causing too much difficulty, and since most problems are curable the freedom might just as well r emain. The second reason is that freedom of testacy is an accommodation mechanism. It functions to meet, not only the family continuity situation already discussed above, but also the demands of the social value of freedom, of democracy, and of rationality. Freedom (like justice) is only relative, it must be dispensed in the context of values, normative demands and social reality. Thus it must be responsibly exercised, and a balance must be established between the right to give, and another's right to receive an inheritance. Democracy too requires a degree of responsibly exercised personal freedom. In the case of a rational decision to disinherit for good cause, why should this not be at least possible? The less democratic idea of fixed portions takes no account of individual situations and acts blindly. Justice can not afford to be blind in this area. Testamentary freedom must be exercised

rationally. In practice the real use of this freedom is in the hands of the rich since it is they who may provide for dependants and give other outside gifts. There is no reason why, when a family is satisfied, the estate funds should not be disposed of as the testator wishes; it is rational that this should happen.

Testamentary freedom is useful in society since it takes note of voluntary kin relationships, social and geographical mobility and multilineal descent patterns. Society today gives a freedom to a testator to choose among people as beneficaries. Indeed beneficaries must be named in wills. In a multilineal situation there are many possible takers on both the husband's side and the wife's side. Freedom of testacy allows a choice to be made among such possible takers. Similarly job, social, and geographical mobility means that families may grow apart, even close relatives may be virtual strangers, freedom of testacy allows the exclusion of such people from benefit.

Freedom of testacy thus allows society's requirements for family protection to be met when strings are attached, and also allows the freedoms and values to be held by society to be realised when the family is protected; its continuing operation is essential.

CONCLUSION.

The writer anticipates that the conclusion is clear. The institution looked at sociologically is largely successful in carrying out what the author believes was its intended purpose, that of maintaining fairness and family continuity.

FINIS.

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FOOTNOTES.

I). See Inglis " Family Law" 2 ed. at p.284.

2). See Inglis (supra) at p.284.

3). Compare the result based on "need" in ALLARDICE v ALLARDICE (I9I0) 29 N.Z.L.R. 959 with....

4). that based on justice in RE HARRISON [I962] N.Z.L.R. 6. Note however, Inglis' (supra) qualification at p.292.

5). PACKER v DORRINGTON [I94I] G.L.R. 337, (adultery acted to disentitle the wife.)

6). [I969] I A.C. 645.

7). See Lloyd "Introduction to Jurisprudence" 2 ed. P.25I, and generally Pp. 24I-244, 246-252.

8). R.S. Summers, "The Technique Element in law", 59 California Law Review 733.

9). The scheme of analysis used in the preceeding section is one developed by Joseph Raz in an article in "Oxford Essays in Jurisprudence" edited by A.W.B. Simpson, 2nd series, called "On the Functions of Law". The article was found generally useful in this area.

I0). RE FLETCHER [I92I] N.Z.L.R. 649.

II). See de Tocqueville, "Democracy in America" or take the example of Nazi Germany.

I2). Claude Levi- Strauss in "Sociological Theory" by Coser and Rosenberg at p.76.

I3). Henceforth in the text the cases used will be referred to by the alphabetical nomenclature listed hereunder. The names are irrelevant in the text as it stands, and are included only for reference purposes.

a) Re Williamson [I954] N.Z.L.R. 288.
b) Re Thomas [I954] N.Z.L.R. 302.
c) Re Bevan [I954] N.Z.L.R. II08.
d) Re Lawford [I954] N.Z.L.R. II42.
e) Re Short [I954] N.Z.L.R. II49.
f) Re Buffalora [I956] N.Z.L.R. I0I7.
g) Re Yarrell [I956] N.Z.L.R. 739.
h) Re Wilson [I956] N.Z.L.R. 373.
i) Re Baker [I962] N.Z.L.R. 758.
j) Re Shrimpton [I962] N.Z.L.R. I000.
k) Re Harrison [I962] N.Z.L.R. 6.
l) Re Pribecevich [I962] N.Z.L.R. 747.

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5). PACKER v DORRINGTON [1941] G.L.R. 337, (adultery acted to disentitle the wife.)

6). [1969] I A.C. 645.

7). See Lloyd "Introduction to Jurisprudence" 2 ed. P.251, and generally Pp. 241-244, 246-252.

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f) Re Buffalora [1956] N.Z.L.R. 1017.
g) Re Yarrell [1956] N.Z.L.R. 739.
h) Re Wilson [1956] N.Z.L.R. 373.
i) Re Baker [1962] N.Z.L.R. 758.
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