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**TO WRITE THE RIGHT TO PROPERTY;
THE RIGHT TO PROPERTY IN NEW
ZEALAND AND ITS POSSIBLE INCLUSION
IN THE NEW ZEALAND BILL OF RIGHTS
ACT 1990**

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*Te Whare Wānanga
o te Ūpoko o te Ika a Māui*



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ABSTRACT

This paper looks at the differing sources of the right to property in New Zealand. Protection of the right to property exists at common law, under the Magna Carta and under the Public Works Act 1981. It does not exist under sections 21 or 27 of the New Zealand Bill of Rights Act 1990. To bring in such protection would be outside the original intention of these sections. There may, however, be limited procedural protection under section 27 of the New Zealand Bill of Rights Act 1990. These adequately protect non-legislative actions that interfere with private property. However this paper will argue that this protection is inadequate when dealing with legislative actions. This is because of the role of parliamentary supremacy and the ease at which statutes can override the right. This can be done less explicitly and with less scrutiny than would occur if the right was contained in the New Zealand Bill of Rights Act 1990. By looking at international documents and comparative constitutions it is possible to consider whether the right should be included in the Bill of Rights and how to best frame such a right. The paper argues that it is appropriate for the right to property to be included in the Bill of Rights. This is because it is a fundamental right, it is possible for it to be in written form, and it fits with the original aims and purposes of the Bill of Rights. The paper then provides a possible formulation of the right that could be included in the Bill of Rights. It then discusses how this formula uses a negative framing, and the phrases "just terms", "public purpose", "enjoyment of their property" and "due process of law".

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I INTRODUCTION

Property plays an important part in modern capitalist society. It has been important enough to be considered as directly related to the ethical development of a person.¹ Something of such importance should be protected by the rules within our society. In many ways a large number of the rules, such as theft and trespass, protect one's property from the interference of other individuals. The rules that set out how the government may deal with one's private property are not so clear. There is currently limited recognition of the fundamental role of property.

This paper will critically examine how the right to property exists in New Zealand, especially with the individual's relationship with the State. It will consider whether the current legal protection of private property from the State is adequate. It will also consider alternative forms of protection. In doing this it will consider whether the right should be contained within the New Zealand Bill of Rights Act 1990.

II WHAT IS A RIGHT TO PROPERTY?

Before considering what "the right to property" is, one must first understand what property is.

A The "Layman's" Definition

Property is often considered to be "a thing". This is reflected in the initial definition given by the Concise Oxford Dictionary; "something owned; a possession."² This view of property is inadequate. It does not address the

¹ See Jeremy Waldron *The Right to Private Property* (Clarendon Press, Oxford, 1988) 3; Gregory S Alexander *Competing Visions of Property in American Legal Thought 1776 - 1970* (University of Chicago Press, Chicago, 1997) 145.

² Della Thompson (ed) *The Concise Oxford Dictionary of Current English* (9 ed, Clarendon Press, Oxford, 1995) 1097.

range of relationships that exist between people and things.³ The thing itself is not property, but should be described as the object of proprietary rights.⁴

B Bundle of Rights Theory

Within the law "property" is now accepted as a person's relationship with a thing. The most common⁵ way to conceptualise this relationship is as a "bundle of rights."⁶ This bundle contains the rights to possess, use, consume, destroy, manage, give, lend and sell.⁷ The rights of receiving income, being secure and maintaining quiet enjoyment are sometimes added to this list.⁸ Property has been assumed to be a bundle of rights in a number of New Zealand cases, within a range of contexts.⁹

The "bundle of rights" theory refers to the degree of control that a person may exercise over things. The theory recognises the important role of control over use of an object,¹⁰ but also acknowledges that there are legitimate reasons why control can be limited. It reflects the ability of people to use or sell objects. It recognises creations, like easements, covenants and leases, which have been created by the legal world to reflect the complex relationships that have been developed to represent the relationship between people and "things".¹¹ The "bundle of rights" theory also effectively reflects

³ Such as leases, full ownership (including possession, title and control) as well as things that are commonly owned or not "owned" at all.

⁴ *McCaughy v Commissioner of Stamp Duties* (1945) 46 NSW 192, 201 per Jordan CJ, with reference to *In re Earnshaw Wall* [1885] 3 CH 156.

⁵ Michael A Heller "The Boundaries of Private Property" (1999) 108 Yale LJ 1163, 1191.

⁶ *Yanner v Eaton* (1999) 166 ALR 258 para 17 (HCA) Gleeson CJ, Gaudron, Kirby and Hayne JJ; *Minister for the Army v Dalziel* (1944) 68 CLR 261, 285 Rich J.

⁷ JE Penner *The Idea of Property in Law* (Clarendon Press, Oxford, 1997) 2. It should be noted that Penner does not strictly follow this theory, but focuses on "exclusive use".

⁸ Craig Anthony Arnold "The Reconstitution of Property: Property as a Web of Interests" (2002) 26 Harv Envtl LR 281, 285 with reference to AM Honoré "Ownership" in AG Guest (ed) *Oxford Essays on Jurisprudence* (Oxford University Press, London, 1961) 107, 113-24.

⁹ *Dahya v Dahya* [1991] 2 NZLR 150; *Rabadan v Gale* [1996] 3 NZLR 220; *Millns v Borck* [1986] 1 NZLR 302; *Re Marshall (Deceased) & Commissioner of Inland Revenue v Public Trustee* [1965] NZLR 851. The same idea is also used in the USA decision of *Penn Central Transportation Co v New York City* 438 US 104, 130-131 (Brennan J for the Court).

¹⁰ JE Penner *The Idea of Property in Law* (Clarendon Press, Oxford, 1997); *Yanner v Eaton* (1999) 166 ALR 258 para 21 (HCA) Gleeson CJ, Gaudron, Kirby and Hayne JJ.

¹¹ See 2 Blackstone *20.

the relationship that people can have with intangible objects that are considered to be property.

The theory also reflects the inter-personal relationships that exist.¹² By creating rights, there are automatically duties upon other people in society towards your property (for example not to enter your land or damage your things).¹³

The theory also concentrates on the "thingness"¹⁴ of property. Inevitably the law must reflect the view that the object itself is important. The bundle of rights theory does this by concentrating on the relationship that a person has with the thing.

C How This Paper Will Define Property

Throughout this paper property will be treated as a bundle of rights. This best reflects the complex nature of property in the 21st century. The idea of the bundle of rights reflects both the relationship between the person and the object (i.e. use of the object) and the person and other people in society (i.e. as one person uses/possesses the object other people cannot use it). It also reflects the "thingness" of property, and the need for there to be an object of the right.

III THE RIGHT IN INTERNATIONAL DOCUMENTS

International documents and the practices of other countries are important when considering New Zealand law. They offer a comparison of whether the protection New Zealand has is of a high standard, and what legal

¹² JE Penner "The "Bundle of Rights" Picture of Property" (1996) 43 UCLA L Rev 711, 724-734, with reference to Wesley N Hohfeld *Fundamental Legal Conceptions As Applied In Judicial Reasoning And Other Legal Essays* (Walter W. Cook ed 1923) 65-114.

¹³ This is reflected in Penner's theory where there is a need for an *in re* or thing before there can be property. Penner's view is that duties created by an *in re* are not personal, but reflect the thing itself. It is irrelevant who the owner of a particular thing is, the duty not to destroy it is the same. JE Penner *The Idea of Property in Law* (Clarendon Press, Oxford, 1997) 23-24.

¹⁴ Craig Anthony Arnold "The Reconstitution of Property: Property as a Web of Interests" (2002) 26 Harv Envtl LR 281, 335.

protection should be adopted in New Zealand. In this situation they also help in understanding what "the right to property" protects. They, along with the constitutions of other countries help to show how the right can be protected in different ways, and can help decide what protection is most suitable for New Zealand.

International documents, to which New Zealand is a party, play an important role in our legal system. There is a general principle that statutes should not infringe our international obligations.¹⁵ However, the application of this principle varies depending on the status of the treaty. Where the treaty is incorporated into law, the answer is clear.¹⁶ However when treaties are not incorporated questions arise as to how explicit a statute that is in conflict with a treaty needs to be in order to supersede the international obligation.¹⁷ The general view is that it needs to be reasonably clear to overrule such an international obligation. International documents to which New Zealand is a party must be considered whenever an executive decision is made.¹⁸

A Universal Declaration on Human Rights

Article 17 of the Universal Declaration of Human Rights (UDHR) contains a right to property. It states:

- (1) Everyone has the right to own property alone as well as in association with others.
- (2) No one shall be arbitrarily deprived of his property.

New Zealand is a party to the UDHR.¹⁹ It has not been incorporated within New Zealand law and therefore its status is unclear.²⁰ Its place in New Zealand law is weakened further because it is the predecessor to the

¹⁵ Legislation Advisory Committee *Guidelines on Process and Content of Legislation 2001 edition* <www.justice.govt.nz/lac/pubs/2001/legislative_guide_2000/checklist.html> (last accessed 17 July 2003) 3.1.2 point #16.

¹⁶ *Ashby v Minister of Immigration* [1981] 1 NZLR 222.

¹⁷ The problem is very much like that faced when looking at fundamental common law rules. See Part V B Other Restrictions.

¹⁸ *Tavita v Minister of Immigration* [1994] 2 NZLR 257.

¹⁹ Ministry of Foreign Affairs, Human Rights Division <www.mft.govt.nz/foreign/humanrights/overview.html> (last accessed 22 September 2003)

international covenant for the protection of civil and political rights (ICCPR) which has (at least partially) been incorporated into New Zealand law.²¹ The UDHR therefore plays a limited role in New Zealand law, offering little protection to property.

Article 17 is framed in very broadly. It has both a positive and a negative branch. Sub-article one is framed in the positive, giving everyone the ability to own property. It is unclear whether this means that everyone must have property or whether it is limited to everyone being able to have property. It is not generally accepted that everyone must have property, therefore such vague wordings should be avoided. The negatively worded sub-article two better reflects the restriction on governmental power usually associated with the right. Its aim is to prevent the taking of property without reason. Because the UDHR is a broad, guiding document, it is not very detailed. Any written protection of the right to property that is included in a country's constitution needs to be clearer than this guiding instrument. This is because any domestic right should suit local conditions and be easily enforceable, rather than aiming to be a sweeping guideline applicable around the world.

B ICCPR

The ICCPR contains no provision that protects a person's right to property. It is partially incorporated into New Zealand law via the Long Title of the New Zealand Bill of Rights Act 1990 (the Bill of Rights). The incorporation of this Treaty lowers the significance of the unincorporated UDHR which protects similar rights. Because the ICCPR did not include the right to property it may be a sign that the right to property is not greatly important.

²⁰ See Part V B Other Restrictions.

²¹ The New Zealand Bill of Rights Act 1990 Long Title.

C *The European Convention on Human Rights*

The right to property is contained in Protocol 1, Article 1 of the ECHR. It is phrased in the positive, and guarantees everyone peaceful enjoyment of their possessions. It makes express reference to non-deprivation except in the public interest subject to the conditions provided for by law and by the general principles of international law.

In *Sporrong and Lonnroth v Sweden*²² the Court stated that Protocol 1 sets out three rules regarding the rights to property. The first is the principle of peaceful enjoyment of property. The second covers deprivation of possessions and subjects it to certain conditions. The third rule recognises that states are entitled to control the use of property in accordance with the general interest, by enforcing such laws as they deem necessary for that purpose. These can be further summarised to cover the ideas of proportionality, expropriation and regulation or limitations.

(a) Proportionality

In *Lithgow and Others v United Kingdom*,²³ the principles set out in *Sporrong* were applied by the European Court of Human Rights. The court's view was that proportionality needed a fair balance to be struck between the interests of the community and the rights of the individual. While compensation will almost always be an implicit condition within this balance, but there is no guarantee of compensation with every infringement.²⁴ Other relevant considerations include predictable national developments, and the general economic nature of the transaction. If a deprivation meets this balancing test, it will not contravene the Convention.

²² *Sporrong and Lonnroth v Sweden* (1983) 5 EHRR 35 para 61 (Eur Ct HR).

²³ *Lithgow and Others v United Kingdom* (1986) 8 EHRR 329 (Eur Ct HR).

²⁴ *Lithgow and Others v United Kingdom* (1986) 8 EHRR 329 para 121-122 (Eur Ct HR). Lack of payment will often go towards showing that the interference was disproportionate.

(b) Expropriation

In *Sporrong* it was deemed that although there was no full expropriation the right was still breached.²⁵ The positive nature of the right means that expropriation is not required for the right to be enforceable. This effectively spreads the application of the right more widely than constitutions drafted negatively, that often require the action of actual deprivation or expropriation before they are enforceable.

(c) Regulation/Limitations

This rule recognises that the State may control the use of property and impose taxes on property without compensating the property owner. However, as in most other jurisdictions, the court has recognised that there is often a fine line between permissible regulation and regulation that is in effect a deprivation.

The second and third rules above are considered to be standard for deprivation/expropriation clauses.²⁶ They are concerned with the right to peaceful enjoyment of property and should be construed in the light of the general rule contained in the first principle.²⁷ There is a wide margin of appreciation allowed by the Strasbourg Court when applying this article. This is because of the "particular dangers of interference in social and economic decisions of elected governments".²⁸

IV CONSTITUTIONS IN FOREIGN JURISDICTIONS

In considering both whether the protection that we currently have is adequate, and the best way for New Zealand to frame a right to property, it is appropriate to make comparisons with other countries. New Zealand has a

²⁵ The case involved prohibitions that were placed on the use and control of property.

²⁶ Andre Van der Walt *Constitutional Property Clauses: A Comparative Analysis* (Juta & Co Ltd, Cape Town, 1999) 999.

²⁷ *James and others v United Kingdom* (1986) 8 EHRR 213 (Eur Ct HR).

history of using other countries' experiences and phrases when forming its statutes.²⁹

A Canada

1 The Canadian Bill of Rights³⁰

The Canadian Bill of Rights contains a provision that directly protects property. Section 1(a) provides:

1. It is hereby recognised and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely,

(a) the right of the individual to life, liberty, security of the person and *enjoyment of property* and the right not to be deprived thereof except by the *due process of law*. (Emphasis added)

This unentrenched section is still in force despite the enactment of the Charter of Rights. Very few cases deal with the section. It is viewed as "a relatively feeble and underemployed right."³¹ This is because the courts have been reluctant to invalidate laws in conflict with it, it is not entrenched, and its application is limited to federal laws and individuals.³² This is reflected in *Manitoba Fisheries Ltd v The Queen*³³ where property rights were discussed with reference to the common law, not the Canadian Bill of Rights.³⁴ Little

²⁸ Andre Van der Walt *Constitutional Property Clauses: A Comparative Analysis* (Juta & Co Ltd, Cape Town, 1999).

²⁹ For example much of the Bill of Rights was based on other country's constitutional documents. This is demonstrated in the White Paper where most articles have comparisons with other countries.

³⁰ The Canadian Bill of Rights SC 1960 c 44 reprinted in RSC 1985 appendix III. (Canadian Bill of Rights).

³¹ Richard W Bauman "Property Rights in the Canadian Constitutional Context" (1992) 8 SAJHR 344, 350.

³² Andre Van der Walt *Constitutional Property Clauses: A Comparative Analysis* (Juta & Co Ltd, Cape Town, 1999) 86; Richard W Bauman "Property Rights in the Canadian Constitutional Context" (1992) 8 SAJHR 344, 350.

³³ *Manitoba Fisheries Ltd v The Queen* (1978) 88 DLR 3d. 462.

³⁴ Andre Van der Walt *Constitutional Property Clauses: A Comparative Analysis* (Juta & Co Ltd, Cape Town, 1999) 90. The discussion related to the difference between expropriation and regulation.

thought was therefore given to the section, even before the introduction of the Charter.

The section is framed in the negative, as a person's "right not to be deprived [of their enjoyment of property] except by due process of law". This is very close to a "classic formulation" of a property clause. It is only possible to be deprived of property if proper process has been followed. The clause is more similar to the US due process clause³⁵ than the takings clause.³⁶ It lacks specific mention of expropriation or compensation. This creates an impression of procedural safeguards only, and not a guarantee of compensation.³⁷ However it is possible that the guarantee ensures substantive justice. It could then be argued that due process requires compensation.

The applicability of the Canadian Bill of Rights is limited. The lack of case law on point makes it hard to discern the meaning of the section. With the enactment of the entrenched Canadian Charter in 1982, however, there is an indication that Canada, who we modelled our Bill of Rights on, considered that the right to property was not appropriate or important enough to include in an entrenched constitutional document. The right's exclusion, though, may reflect the perception that enforcing such a right when it is entrenched is difficult. There was also a strong belief that the common law protection was adequate.³⁸ These are useful comparisons when considering whether the right to property should be contained in our Bill of Rights, especially when considering the sufficiency of the common law. The ineffectiveness of the provision in the Canadian Bill of Rights is an important consideration for New Zealand. The Canadians thought that the common law protection was sufficient. It is not so useful if considering how New Zealand should frame such a right, as it is hard to see the implications of the way that it is phrased.

³⁵ US Constitution, amendment XIV.

³⁶ US Constitution, amendment V.

³⁷ Andre Van der Walt *Constitutional Property Clauses: A Comparative Analysis* (Juta & Co Ltd, Cape Town, 1999) 88.

³⁸ *Manitoba Fisheries Ltd v The Queen* (1978) 88 DLR 3d. 462.

The entrenched Charter of Rights and Freedoms is supreme law. It contains no section that directly protects property. Peter Hogg's view is that "the Charter omission of property rights from the list of protected rights is certainly significant."⁴⁰ Despite the admission that there was no specific reference to "property rights" in the Charter, *The Queen v Fisherman's Wharf Ltd*⁴¹ decided that section 7 extended to the right not to be deprived of property.⁴² This decision was heavily criticised in *Re Workers' Compensation Board of Nova Scotia v Coastal Rentals Ltd*.⁴³ *Attorney-General of Quebec v Irwin Toy Limited*⁴⁴ makes it clear that section 7 of the Charter does not protect property, and that property cannot enter into the sphere of protection by the back door.⁴⁵

B South Africa

The right to property is an express right contained in section 25 of the Constitution of the Republic of South Africa 1996. The section aims to balance individual and community rights. It is a comparatively detailed provision. It specifically deals with the South African issues of rebuilding and land reforms.

³⁹ Canadian Charter of Rights and Freedoms, Part I of the Constitution Act 1982 (Canada Act 1982 (UK), sch B).

⁴⁰ Peter W Hogg *Canada Act Annotated* (Carswell, Toronto, 1982) 28.

⁴¹ *The Queen v Fisherman's Wharf Ltd* (1982) 135 DLR (3d) 307, 315-316.

⁴² This section is very similar to the New Zealand Bill of Rights Act 1990 s 21.

⁴³ *Re Workers' Compensation Board of Nova Scotia v Coastal Rentals Ltd* (1983) 12 DLR (4th) 564 (NSSC). The decision was described as "aggressive" and as containing "intellectual leaps".

⁴⁴ *Attorney-General of Quebec v Irwin Toy Limited* (1989) 1 SCR 927; Andre Van der Walt *Constitutional Property Clauses: A Comparative Analysis* (Juta & Co Ltd, Cape Town, 1999) 87.

⁴⁵ Andre Van der Walt *Constitutional Property Clauses: A Comparative Analysis* (Juta & Co Ltd, Cape Town, 1999) 89. It is said to be one of the only conclusions about the property clause in Canadian law that seems certain. This is of relevance to the attempts in New Zealand to use sections 21 and 27 of Bill of Rights Act 1990 as sections protecting property. See Part VII New Zealand Bill of Rights Act 1990.

1 *The General Clause*

The general clause of the South African Constitution has a negative formulation.⁴⁶ South Africans cannot claim protection under this section unless their property has been expropriated, or if they have been deprived of it. The corresponding clause in the 1993 temporary constitution was drafted as a positive or "umbrella" right. It allowed every person to acquire, hold and dispose of rights in property.⁴⁷

2 *Expropriation and Deprivation*

Under section 25(1) no one may be deprived of property except in terms of law of general application and no law may permit arbitrary deprivation of property. Under section 25(2) the government may expropriate property only if it is for a public purpose or in the public interest, and if there is compensation.⁴⁸

3 *Compensation*

The statute is explicit as to what should be considered when deciding if the compensation offered is appropriate.⁴⁹ The compensation must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances.⁵⁰ This reflects the principle of proportionality, balance between the public interest and the individual.

⁴⁶ Constitution of the Republic of South Africa 1996 s 25(1) describes the right "not to be deprived of" property.

⁴⁷ Constitution of the Republic of South Africa 1996 s 28(1). "Every person shall have the right to acquire and hold rights in property and, to the extent that the nature of the right permits, to dispose of such rights."

⁴⁸ Compensation needs to be agreed to by those affected or decided by/approved by the court. Constitution of the Republic of South Africa 1996 s 25(2)(b).

⁴⁹ Constitution of the Republic of South Africa 1996 s 25(3).

⁵⁰ This is a consideration of both the amount and method or manner of payment.

A list of possible circumstances for the court to consider is also included.⁵¹ These include the current use of the property, the history of the acquisition and use of the property, the market value of the property, the extent of direct State investment and subsidy in the acquisition and the beneficial capital improvement of the property, and the purpose of the expropriation. These specific considerations are in addition to the general principle of proportionality set out above.

4 *Land reform issues*

One of the problems faced in South Africa in 1996 was achieving a balance between protecting property rights (and the economic security and confidence this ensures) and allowing future governments to attempt to redistribute land so as to correct the racial skew that existed in property.⁵²

The final balance was achieved in section 25(4)(a) of the Constitution of the Republic of South Africa 1996. This specifically states that the nation's commitment to land reform is in the public interest. This means that where land is expropriated for land reform, there is automatically a valid public interest within section 25(2).

Section 25(8) further clarifies this position. This is a difficult section as it states that no provision in section 25 can stop the legislature from taking action to achieve land reform, in order to redress past racial discrimination, as long as section 36 is complied with. This implies that the government can deviate from the equitable and compensation principles in the rest of section 25 in cases of land reform, and instead only comply with section 36.

Section 36 is the general limitations clause of the South African Bill of Rights. If a right has been infringed but the State can demonstrate that the

⁵¹ Constitution of the Republic of South Africa 1996 s 25(3)(a)-(e).

⁵² This was particularly important, as power is often proportionate to land ownership.

criteria in section 36 are satisfied, the Bill of Rights is not breached. The Constitutional Court considered section 36 to represent proportionality.⁵³

If property is expropriated and no compensation is paid, but the action can be justified under section 36(1), then it is valid. The section 36 criteria are that if a law of general application is acceptable if it has limited the right for reasons that can be considered reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.⁵⁴ Many of the criteria that justify the limitation of the right have already been internalised within section 25. The explicit references in section 25 must be considered as extensions, qualifications, and further explications of this general limitation provision.⁵⁵ Therefore the additional statements on land reforms are in the document merely for clarity.

C United States

The Constitution of the United States of America contains two sections that relate to the right to property. These are the fifth amendment and the fourteenth amendment.

1 The Fifth Amendment

The fifth amendment looks at whether the taking is for a public purpose, absent that, the taking is void.⁵⁶ It is known as the "takings clause".

There are two kinds of takings; physical invasion (where the government appropriates or occupies private property) and regulatory (where

⁵³ This is based on the Canadian decision *R v Oakes* (1986) 26 DLR 4th 200. The change in language that occurred to section 36 from 1993 to 1996 reflected a close alignment with the decision in *R v Oakes. S v Manamela and Another (Director-General of Justice Intervening)* 2000 (5) BCLR 491 (CC).

⁵⁴ Constitution of the Republic of South Africa 1996 s 36(1). This is very similar to section 5 of the New Zealand Bill of Rights Act 1990.

⁵⁵ Andre Van der Walt *Constitutional Property Clauses: A Comparative Analysis* (Juta & Co Ltd, Cape Town, 1999) 358.

⁵⁶ James L Oakes "Property Rights' in Constitutional Analysis Today" (1981) 56 Wash L Rev 583, 603.

the government implements regulations that restrict use and affect the value of the property⁵⁷). The court has found the former easier to deal with as it is always clear when a Government agency physically invades and takes over a tract of land (in whole or in part) then compensation must be paid to the property owner.⁵⁸ Challenges to regulatory actions are much more difficult, requiring the court to weigh up the competing interests involved in each situation. This has led to confused case law, as it is not clear from the outset whether the intervention is a taking.⁵⁹ It has however led to the use of a "proportionality" consideration and a balancing test similar to that of other countries. Considerations include⁶⁰ the advancement of legitimate State interests and the character of the governmental action, the economic impact on the claimant⁶¹ and whether these have led to the claimant being singled out.

2 *The Fourteenth Amendment*

The fourteenth amendment is the "due process" clause. It is negatively worded. The clause ensures that when property is taken the process that is used is appropriate.

D Australia

Section 51 (xxxix) of the Australian Constitution deals with governmental powers relating to property. It expressly provides that the Commonwealth Parliament has power to make laws regarding the acquisition

⁵⁷ "The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognised as a taking." *Pennsylvania Coal Co v Mahon* 260 US 393, 415 (1922) Holmes J.

⁵⁸ Susan E Spokes "Florida Rock Industries Inc v United States: Tipping the scales in favour of Private Property Rights at the Public's Expense" (1995) 47 MLR 501, 504. Property holders are compensated even if the invasion is de minimus.

⁵⁹ This is a major part of the recent jurisprudence of this clause. Cases such as *Lucas v South Carolina Coastal Council* 505 US 1003 have dealt with the issue extensively. This is an extremely interesting and complex series of cases however space restrictions have meant that they have not been thoroughly discussed.

⁶⁰ Susan E Spokes "Florida Rock Industries Inc v United States: Tipping the scales in favour of Private Property Rights at the Public's Expense" (1995) 47 MLR 501, 505.

⁶¹ This includes the extent to which the regulation has interfered with distinct investment-backed expectations.

of property. Property can be acquired on just terms from any person (or State) for any purpose in respect of which Parliament has power to make any laws.⁶²

Though framed as granting a positive power on Parliament, it is essentially framed in the negative.⁶³ It does not give citizens an express right to hold their property. It operates by having a restrictive effect on other constitutional powers of the Commonwealth Parliament, by requiring just terms whenever there is compulsory acquisition.⁶⁴ The section does not apply to the non-legislature.⁶⁵ Although the clause is drafted as a negative clause, the effect of the clause is said to be the same as would have occurred if it had been drafted as a "right to property."⁶⁶

I Just Terms

This part of the section protects the citizens as it fetters the powers of Parliament. What are "just terms" are considered in light of reasonableness and fairness in the situation.⁶⁷

Generally the terms of acquisition are, within reason, matters for legislative judgment and discretion.⁶⁸ However the terms need to actually be just. Parliament is bound by the terms of the Constitution and the courts are

⁶² It refers only to the ability of the Commonwealth to make laws, leaving open Executive action and the use of prerogative powers. Under prerogative power there are still restrictions such as in times and for use in an emergency, and that there be payment of compensation. RW Baker "The Compulsory Acquisition Powers of the Commonwealth" in Hon Else-Mitchell (ed) *Essays on the Australian Constitution* (2 ed, The Law Book Company of Australasia Pty Ltd, Melbourne 1961) 194.

⁶³ Andre Van der Walt *Constitutional Property Clauses: A Comparative Analysis* (Juta & Co Ltd, Cape Town, 1999) 40.

⁶⁴ RW Baker "The Compulsory Acquisition Powers of the Commonwealth" in Hon Else-Mitchell (ed) *Essays on the Australian Constitution* (2 ed, The Law Book Company of Australasia Pty Ltd, Melbourne 1961) 197. One unusual aspect of this is that valid laws made under this section must also be laws with respect to some other Commonwealth legislative power. *Bank of New South Wales v The Commonwealth of Australia* (1948) 76 CLR 1, 300-301.

⁶⁵ The state's regulatory power or police power is not subject to guarantee of compensation. *Mutual Pools & Staff Pty Limited v The Commonwealth of Australia* (1994) 179 CLR 155, 171 Mason CJ Deane and Gaudron JJ.

⁶⁶ *WH Blakely & Co Pty Ltd v The Commonwealth* (1953) 87 CLR 501, 521.

⁶⁷ Tom Allen *The Right to Property in Commonwealth Constitutions* (Cambridge University Press, Cambridge, 2000) 64.

⁶⁸ *Minister for the Army v Dalziel* (1944) 68 CLR 261, 291 Starke J.

there to make sure that the Constitution is followed. The court is willing to assess whether the terms are just, with Parliament's view on whether the terms are just being only one matter to be considered.⁶⁹ It does not matter if the court thinks the terms could be fairer.⁷⁰ The court also has regard to the interests of the community. The fact that land is not being used (or not being put to its best use) is irrelevant. Also irrelevant is any diminution in value that might arise from the purposes that the land might be put, and any loss of profit that may have occurred if sold in another way. Also excluded is the prospective loss of income upon re-investment of capital.⁷¹ This is part of the process of spreading the cost across the community.⁷²

If just terms are not provided, then the attempted acquisition is not only null and void but also unlawful. It could render the Commonwealth liable in trespass or conversion.⁷³

There is no formal limitations clause within section 51 (xxxix). This has led to the use of the phrase "just terms" acting as an internal limitation provision. It is through this that the idea of reasonableness and proportionality is brought into being. This is especially through an investigation into whether the "means justify the ends" or whether the action is just incidental to operating another power.⁷⁴

⁶⁹ *Australian Apple & Pear Marketing Board v Tonking* (1941) 66 CLR 77, 104 Rich J. *Andrews v Howell* (1941) 65 CLR 255 states that it is not part of the judicial function, this is not negated by *Tonking* case and *Poultons Case* (1953) 89 CLR 540.

⁷⁰ RW Baker "The Compulsory Acquisition Powers of the Commonwealth" in Hon Else-Mitchell (ed) *Essays on the Australian Constitution* (2 ed, The Law Book Company of Australasia Pty Ltd, Melbourne 1961) 205.

⁷¹ Tom Allen *The Right to Property in Commonwealth Constitutions* (Cambridge University Press, Cambridge, 2000) 196.

⁷² RW Baker "The Compulsory Acquisition Powers of the Commonwealth" in Hon Else-Mitchell (ed) *Essays on the Australian Constitution* (2 ed, The Law Book Company of Australasia Pty Ltd, Melbourne, 1961) 206.

⁷³ *Minister for the Army v Dalziel* (1944) 68 CLR 261, 306.

⁷⁴ *Mutual Pools & Staff Pty Limited v The Commonwealth of Australia* (1994) 179 CLR 155, 179 Brennan J. This shows that the section is not an absolute rule and the legitimacy of the legislature's actions is questioned. Andre Van der Walt *Constitutional Property Clauses: A Comparative Analysis* (Juta & Co Ltd, Cape Town, 1999) 71.

V *PARLIAMENTARY SUPREMACY*

Parliamentary supremacy plays a very important part in the New Zealand legal system. It means that Parliament has the power to pass any law that it sees fit and that the courts are unable to strike down legislation. Because of this it is hard to control, by non-electoral means, the actions of the legislature, even if they are in contravention of other important principles. Despite this there are a number of ways that to a certain extent parliamentary supremacy can be limited. This can be through the Bill of Rights, fundamental principles of the common law, international treaty obligations or statutes that place obligations or restrictions on how the legislature may act. This section will look into how effective these tools are in limiting the power of the legislature.

A *The New Zealand Bill of Rights Act 1990*

The Bill of Rights is aimed at curbing State powers and actions in relation to citizens. Parliament should not legislate in contravention of the rights contained in the Bill of Rights. However due to parliamentary sovereignty, reinforced by section 4 of the Bill of Rights, they can do so. The court has adopted an approach to deal with situations where a statute that is in conflict with the Bill of Rights.⁷⁵ This is a five-step process.⁷⁶ The first step is identifying different interpretations of the words used, which are properly open. If only one meaning is open, it must be applied. If there is more than one the court must follow section 6 and decide which meaning least limits the right. The third step is to identify the extent, if any, to which that meaning limits the right. The fourth step is to consider whether this limitation is demonstrably justified in a free and democratic society, within section 5. The court will then make an indication as to whether this is so.⁷⁷ This makes it

⁷⁵ *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 (CA).

⁷⁶ *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9, 16-17 para 17-19 (CA).

⁷⁷ This idea of a "judicial declaration of inconsistency" is contentious. See Andrew S Butler "Judicial Indications of Inconsistency -- A New Weapon in the Bill of Rights Armoury?" [2000] NZ Law Review 43.

clear to everyone whether the court thinks that the statute is "acceptable" or not. If it is not justified the court must still apply the meaning due to section 4. It means that the court will only apply the statute in a way that offends the right if it is absolutely necessary.

B Other Restrictions

It is possible for fundamental principles of the common law, international treaties and some other documents to also impact on parliamentary supremacy. The general rule is that statutes will be read consistently with such rules. However if the statute contains clear, express words, the court must apply them. It is currently unclear how explicit such statutes must be. This is based on the principle of legality, which "means that parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process."⁷⁸ The idea put forward is that when fundamental rights are being removed express language or necessary implication is required.⁷⁹ *Wells v Newfoundland*⁸⁰ states that there needs to be an explicit statement that the principle is being overturned, before fundamental principles of the common law can be overturned by the passing of a statute. This is supported by the Legislative Advisory Committee, which states that there needs to be explicit statutory wording to override a right.⁸¹ However *Claydon v Attorney General*⁸² held that it was sufficient that Parliament made it obvious that they intended to overturn the plaintiffs' rights.⁸³

⁷⁸ *R v Secretary of State for the Home Department, ex parte Simms and another*, above, 131 Lord Hoffman.

⁷⁹ *R v Secretary of State for the Home Department, ex parte Simms and another*, above, 131 Lord Hoffman.

⁸⁰ *Wells v Newfoundland* [1999] 3 SCR 199.

⁸¹ *Legislation Advisory Committee Guidelines on Process and Content of Legislation 2001 edition* <www.justice.govt.nz/lac/pubs/2001/legislative_guide_2000/checklist.html> (last accessed 17 July 2003) Chapter 3 "Introduction" and Chapter 3 Part 1.

⁸² *Claydon v Attorney-General* [2002] 1 NZLR 130 (HC) Goddard J.

⁸³ This case dealt specifically with government actions discharging property rights without compensation. It can, however, be easily distinguished from other situations involving

Under these principles it is unclear how specific Parliament needs to be to overturn a protected right. If they are explicit the answer is clear and the court, unless the breach is considered to be of such importance that the court will act to strike it down,⁸⁴ will have to apply it. Due to *Claydon* it may mean that Parliament will attempt to, or inadvertently, override rights without being entirely specific. This would mean that the rights are not adequately protected as they could be overturned easily.

VI SOURCES OF THE RIGHT IN NEW ZEALAND

A The Public Works Act

The Public Works Act 1981 (PWA) requires compensation for the expropriation of property for the purposes of public works. Its application is limited to land used for public works (government or local work that the crown is authorised to do).⁸⁵ The PWA sets out procedural requirements that need to be met when taking land. There are separate requirements for acquisitions and land taken by agreement. In addition to the PWA's procedural protections, section 23 requires takings to be reasonably necessary. There are also specific criteria that set out how compensation is to be determined. It is possible to object to any compensation or valuation,⁸⁶ as well as the taking itself.⁸⁷

property because the rights were of a personal nature as they were under an employment contract.

⁸⁴ This will only happen in the strongest of cases. See Cooke J's view that "some common law rights presumably lie so deep that even Parliament could not override them." *Taylor v New Zealand Poultry Board* [1984] 1 NZLR 394, 398 (CA) Cooke J; "Fundamentals" [1988] NZLJ 158 and the 1984 Dethridge Memorial address to the Maritime Law Association of Australia and New Zealand "Practicalities of Bill of Rights".

⁸⁵ Public Works Act 1981 s 2. "Local work" means a work constructed or intended to be constructed by or under the control of a local authority, or for the time being under the control of a local authority: "Government work" means a work or an intended work that is to be constructed, undertaken, established, managed, operated, or maintained by or under the control of the Crown or any Minister of the Crown for any public purpose; and includes land held or to be acquired for the purposes of the Conservation Act 1987 or any of the Acts specified in Schedule 1 to that Act (except land to which section 9A of the Foreshore and Seabed Endowment Revesting Act 1991 applies), even where the purpose of holding or acquiring the land is to ensure that it remains in an undeveloped state.

⁸⁶ Complaints are made to the Valuation Tribunal. Public Works Act 1981 s 59 and Part 5.

⁸⁷ To the Environment Court. Public Works Act 1981 s 24.

A major limitation of the PWA is its limited applicability. It applies only to the actions of the executive or local governments. Due to parliamentary supremacy it is possible for the legislature to override the PWA.⁸⁸ The other limitations are that it applies only to land being used for public works. Apart from these limitations the protection is appropriate. It covers the money being paid, whether there is an appropriate reason for the taking, and also contains procedural protections.

B *The Magna Carta*

Under section 3(1) and the First Schedule of the Imperial Laws Application Act 1988, Ch 29 of the Magna Carta is still in force in New Zealand. The text of this is:⁸⁹

29 Imprisonment, etc contrary to law. Administration of justice - NO freeman shall be taken or imprisoned, *or be disseised of his freehold, or liberties, or free customs, or be outlawed, or exiled, or any other wise destroyed; nor will we not pass upon him, nor condemn him but by lawful judgment of his peers, or by the law of the land.* We will sell to no man, we will not deny or defer to any man either justice or right. (Emphasis added)

This potentially protects the right to property through the phrase "no freeman shall be ... disseised of his freehold ... but by ... the law of the land."

1 *The Case Law*

*Russell v Minister of Lands*⁹⁰ involved questions of compensation for the taking of land. It held that it could not "be presumed that the Legislature intended to force such a bargain as would be advantageous to the Government, but unfair to the owner of the land."⁹¹ To do so would be to

⁸⁸ This is based on the principle that the current Parliament cannot bind future Parliaments.

⁸⁹ Ch 29 (1297) 25 Edw 1 (Magna Carta).

⁹⁰ *Russell v Minister of Lands* (1898) 17 NZLR 241 (SC).

⁹¹ *Russell v Minister of Lands*, above, 250 Pennefather J for the Court.

violate the c29 of the Magna Carta.⁹² This means that where a statute takes property it would be a breach of the Magna Carta if adequate compensation was not paid.

In *Cooper v Attorney-General*⁹³ Baragwanath J stated that our constitutional safeguard of property is Ch 29 of the Magna Carta, but because subsequent statutes are the "law of the land" they override protection offered by the Magna Carta. Therefore whenever a statute authorises the taking of property, the Magna Carta does not protect property rights. Where there is no specific law authorising such conduct, however, it would breach of the Magna Carta.

In *Westco Lagan v Attorney-General*⁹⁴ Westco Lagan (WCL) argued that the cancellation of, what they believed to be, a contract by legislation without compensation was an "expropriation of property rights otherwise than in accordance with the law of the land."⁹⁵ WCL argued that the departure from law was the breach of sections 21, 27(1) and 27(3) of the Bill of Rights. McGechan J viewed the Magna Carta as having its place in criminal due process and was not "much minded to view it as some early Public Works Act compensation statute."⁹⁶ He felt that he was not in a position to decide that "disseised of his freehold" included the unusual situation of abolition of contractual rights to supply goods without compensation. While he considered *Russell v Minister of Lands* and *Cooper v Attorney-General* he was "reluctant to treat Baragwanath J's passing and general reference to "property rights" as a considered finding that all property rights of any nature whatsoever are covered by Magna Carta c 29."⁹⁷ His view was that "freehold" applied only to land, and that without more thorough analysis could not extend it to cover other forms of property.

⁹² *Russell v Minister of Lands*, above, 250 Pennefather J for the Court.

⁹³ *Cooper v Attorney-General* [1996] 3 NZLR 480 (HC) Baragwanath J.

⁹⁴ *Westco Lagan v Attorney General* [2001] 1 NZLR 40 (HC) McGechan J.

⁹⁵ *Westco Lagan v Attorney General*, above, 50 para 35.

⁹⁶ *Westco Lagan v Attorney General*, above, 51 para 42.

The Magna Carta is a possible form of protection for property rights in the New Zealand legal system. However it does have a number of drawbacks.

The first limitation is the term "freehold". McGechan J limited this term to freehold interests in land, despite comments made by Baragwanath J that it should apply to a range of property. I believe that McGechan's view is incorrect. While the Magna Carta should not be given a meaning that was not intended, it is acceptable to interpret Acts in line with "circumstances as they arise".⁹⁸ This allows older Acts to still be applicable as society changes,⁹⁹ if the developments are "within the mischief that the Act was meant to cure."¹⁰⁰ Extending the interpretation of property from land to the "bundle of rights" definition is possible under this analysis. The mischief, the Crown using its power to take property, is just as applicable under the wider definition of property. This approach also follows the purposive approach to interpretation. The purpose of constricting powers of the crown with regards to criminal process and the taking of property is the same under either definition of property.¹⁰¹ While, under current case law, it seems unclear whether the term freehold refers only to land, it is possible for the definition to be extended. If this were to occur this limitation would disappear.

The other limitation is the reference to "but by the law of the land". This means that the Magna Carta does not protect property taken through a statute. This means that whenever property is taken the statute must be clear that there is a taking without compensation.¹⁰² While this does increase awareness of the effect of the statute and requires clarity from legislatures, it

⁹⁷ *Westco Lagan v Attorney General* [2001] 1 NZLR 40, 51 para 39 (HC) McGechan J.

⁹⁸ Interpretation Act 1999 s 6.

⁹⁹ John Burrows and John Fogarty "Statutory Interpretation" NZLS Seminar April 2001, 30.

¹⁰⁰ John Burrows and John Fogarty "Statutory Interpretation" NZLS Seminar April 2001, 30.

¹⁰¹ "William Penn summarised the Magna Carta thus: 'first. It asserts Englishmen to be free; that's liberty. Secondly, they that have free-holds, that's Property.'" Gerald Gaus "Property, Rights and Freedom" in Ellen Frankel Paul, Fred D Miller Jr and Jeffrey Paul (eds) *Property Rights* (Cambridge University Press, Place, Year) 209.

¹⁰² There are, however, issues as to exactly how explicit the statute must be, as the decision in *Claydon* implies that the statute only needs to make it clear. See Part V B Other Restrictions.

does not prevent such takings, require compensation or a valid reason for the action. There is, however, greater political accountability because the government is saying outright that they are taking someone's property, and are therefore open to the resulting criticism. Clarity also means that takings cannot "slip through" by accident.

The Magna Carta does protect takings of property that are not done through a statute. There is protection from actions by the executive.

C The Common Law

There is a common law principle that property will not be expropriated without adequate compensation. *Attorney General v De Keyser's Royal Hotel Ltd*¹⁰³ sets out the common law rule in favour of compensation, which can only be ousted by explicit statutory provision.¹⁰⁴ The principle of "without an explicit statutory provision" is a difficult one. There has been disagreement within New Zealand as to how explicit such provisions need to be.¹⁰⁵ The general principle is that they need to be quite clear to overturn such principles. The common law rule applies to non-legislative actions and legislation that is silent on the matter. This means that compensation is presumed when there is executive action.

The Legislative Advisory Council (LAC) has compiled a checklist for legislative drafters. Part of this checklist deals with the relationship between statutes and other recognised rights. The LAC notes that the court "can be faced with a difficult task when it is not clear whether the statute intended to deprive a person of the common law recognised right".¹⁰⁶ One of the listed

¹⁰³ *Attorney General v De Keyser's Royal Hotel Ltd* [1920] AC 508 (HL)

¹⁰⁴ See also Tom Allen "Commonwealth Constitutions and the Right Not to be Deprived of Property" (1993) 42 Intl & Comp LQ 523. *Attorney General v De Keyser's Royal Hotel Ltd* was applied in *Manitoba Fisheries Ltd v The Queen* (1978) 88 DLR 3d. 462 in a discussion as to whether a regulation amounted to an expropriation.

¹⁰⁵ See discussion in Part V B Other Restrictions.

¹⁰⁶ Legislation Advisory Committee *Guidelines on Process and Content of Legislation 2001 edition* <www.justice.govt.nz/lac/pubs/2001/legislative_guide_2000/checklist.html> (last accessed 17 July 2003) Chapter 3 "Introduction" and Chapter 3 Part 1.

rights is that "property will not be expropriated without full compensation."¹⁰⁷ The guidelines state: "where legislation would constitute a taking of property and it is not intended that compensation will be paid, the legislation should make this quite clear."¹⁰⁸ This means legislation needs to specifically say that compensation will not be given. This applies to "vested rights"¹⁰⁹ so covers more than just land.

VII NEW ZEALAND BILL OF RIGHTS ACT 1990

A number of overseas countries have included protection of the right to property in their written, constitutional documents. Although New Zealand does not have a written constitution, the New Zealand Bill of Rights Act 1990 protects many of the rights usually contained in such documents. The Bill of Rights does not explicitly protect property, however, it has been argued that sections 27 and 21 protect private property.

A Section 27(1)

It has been argued that section 27(1) of the Bill of Rights protects property. The section is in "Part II Civil and Political Rights" under the immediate heading "Search, Arrest and Detention". It states¹¹⁰

27. Right to Justice – (1) Every person has the right to the observance of the principles of natural justice by any tribunal or other public authority which has the power to make a determination in respect of that person's rights, obligations, or interests protected or recognised by law.

¹⁰⁷ Legislation Advisory Committee *Guidelines on Process and Content of Legislation 2001 edition*, above, 3.1.2 point #11. To support this position the guidelines cite *Cooper v Attorney General* [1996] 3 NZLR 480 (HC) Baragwanath J and *Wells v Newfoundland* [1999] 3 SCR 199.

¹⁰⁸ Legislation Advisory Committee *Guidelines on Process and Content of Legislation 2001 edition*, above, 3.2.3 "Guidelines". It also states that consideration should be given to whether compensation should be paid to those affected.

¹⁰⁹ Legislation Advisory Committee *Guidelines on Process and Content of Legislation 2001 edition*, above, Chapter 3 Part 2 "Have vested rights been altered?" and 3.2.1 "the question is whether or not legislation removing property rights should also provide for compensation for the loss of such rights."

¹¹⁰ The New Zealand Bill of Rights Act 1990, s27 (1).

The arguments surrounding the section are both procedural and substantive.

1 Procedural Protection

The procedural element has been argued on the basis that decisions about taking property are "determinations in respect of that person's rights." Therefore some form of consultation with the affected person needs to occur before a decision is made.¹¹¹ In *Lumber Specialties v Hodgson*¹¹² the plaintiffs asserted that the Ministers are public authorities who "have the power to make a determination with respect to their rights, obligations, or interests, ... and that they did so unlawfully."¹¹³ They also argued that legitimate expectations to continue beech logging and to consultation before changes were made existed. The breach of these, it was argued, lead to a breach of natural justice. The arguments raised by the plaintiffs in *Lumber Specialties* were summarised by Hammond J as section 27 requiring the plaintiffs to be consulted and their interests considered.¹¹⁴ Hammond J dismissed the application of section 27 of the Bill of Rights "on the basis advanced in this case."¹¹⁵

His view was that the defendants were assessing whether high government policy should be given effect to.¹¹⁶ In situations of "high political policy, individual interests necessarily come into conflict with the whole."¹¹⁷ Hammond J's view was that courts should not be involved in assessments of high public policy issues.¹¹⁸ Thus in cases involving high political policy the courts are not willing to consider whether an individual's rights have been considered during the decision making process. The effect of the *Lumber*

¹¹¹ This was the argument raised by *Lumber Specialties*. *Lumber Specialties v Hodgson* [2000] 2 NZLR 347, 373 para 166-167 (HC) Hammond J.

¹¹² *Lumber Specialties v Hodgson* [2000] 2 NZLR 347 (HC) Hammond J.

¹¹³ *Lumber Specialties v Hodgson*, above, 373 para 166.

¹¹⁴ *Lumber Specialties v Hodgson*, above, 374 para 179.

¹¹⁵ *Lumber Specialties v Hodgson*, above, 375 para 185.

¹¹⁶ If individuated concerns had to be considered a large exercise in re-evaluation would be needed. If this was to occur, it would not just be these plaintiffs individual concerns that would be of importance but those of many individuals.

¹¹⁷ *Lumber Specialties v Hodgson*, above, 375 para 183.

¹¹⁸ *Lumber Specialties v Hodgson*, above, 375 para 184, citing *Wellington City Council v Woolworths New Zealand Ltd (No 2)* [1996] 2 NZLR 537, 546 (CA) Cooke P.

Specialties decision is that people who are effected face the burden of the decision, rather than society as a whole, who often benefit from the decision. Other countries offer compensation for such breaches, a consultation requirement is a comparatively lower standard to be reached. However, it can be argued that it is difficult to determine who should be consulted or considered, and also which views should be followed.

Section 27 has its origins in Article 21(1) of the White Paper. The focus of Article 21 is procedural protection.¹¹⁹ As procedural protection does not apply to the legislature, legislation is not within the ambit of section 27.¹²⁰ Section 27 could apply in situations where legislation is not used to take the property. In such situations a hearing or consultation may be required. The commentary to Article 21 specifically states that it is for the court to decide which rights deserve this protection.¹²¹ It is currently unclear whether the right to property is one of those rights. *Lumber Specialties* is decided on the basis of high policy rather than whether property is one of these rights.¹²² It should be possible therefore, in cases of executive action, that this protection may be available under this heading. *Lumber Specialties* is correct in saying that where a class generally is affected the right does not apply. The commentary to Article 21 states that the right is not envisioned to be applicable when a class generally is affected.¹²³

2 Substantive Protection

(a) Case law

The substantive argument is that when the right is being interfered with, natural justice may in fact require that the action does not occur, or that

¹¹⁹ Hon Geoffrey Palmer Minister of Justice "A Bill of Rights for New Zealand – A White Paper" [1984-85] I AJHR A6 110 para 10.168.

¹²⁰ *Westco Lagan v Attorney General* [2001] 1 NZLR 40, 53 para 50 (HC) McGechan J.

¹²¹ Hon Geoffrey Palmer Minister of Justice "A Bill of Rights for New Zealand – A White Paper" [1984-85] I AJHR A6 110 para 10.171.

¹²²
¹²³ Hon Geoffrey Palmer Minister of Justice "A Bill of Rights for New Zealand – A White Paper" [1984-85] I AJHR A6 110 para 10.169.

some form of compensation be offered.¹²⁴ This is essentially an argument of takings or expropriation without compensation.¹²⁵ In *Lumber Specialties* Hammond J records a possible argument regarding section 27 not raised by the plaintiffs.¹²⁶ This was that in substance the plaintiff's arguments were "takings" arguments, and that the Government's change to a well established policy interfered with established property or contractual rights.¹²⁷ He describes this as being a substantive, rather than procedural, right under section 27. He refers to the United States Constitution and its provision that no property is to be taken without just compensation.¹²⁸ It was not possible for him to further consider this, as it was not raised in the pleadings.¹²⁹

Hammond J appears neutral on whether such clauses are a good idea. However raising the argument outside of what was pleaded suggests he thinks that such a right should exist. It also suggests that he believes that the right may be present within section 27.¹³⁰ However, Hammond J's comments about the substantive rights under section 27 of the Bill of Rights are obiter.¹³¹

In *Westco Lagan v Attorney-General* WCL argued that a Bill the government was in the process of enacting expropriated their property, without compensation, and therefore breached sections 21,¹³² 27(1) and 27(3) of the Bill of Rights Act. WCL submitted that it is a principle of natural justice, reinforced by international recognition and the Magna Carta c 29,¹³³ that the crown cannot, and Parliament should not remove property rights in

¹²⁴ *Lumber Specialties v Hodgson* [2000] 2 NZLR 347, 373-374 para 170-171 (HC) Hammond J.

¹²⁵ *Lumber Specialties v Hodgson*, above, 374 para 172 and 178; *Westco Lagan v Attorney General* [2001] 1 NZLR 40, 52 para 49 (HC) McGechan J.

¹²⁶ *Lumber Specialties v Hodgson*, above, 373 para 170. Hammond specifically confirmed with counsel that the course of argument was not being run.

¹²⁷ For these purposes it seems to be assumed that such contractual rights are in fact "property", although many academics argue that this is not always so.

¹²⁸ *Lumber Specialties v Hodgson*, above, 373 para 172, with reference to the fifth and fourteenth amendments.

¹²⁹ *Lumber Specialties v Hodgson*, above, 373 para 170.

¹³⁰ This is despite the fact that he refers to his idea as "an interesting question". *Lumber Specialties v Hodgson*, above, 374 para 177.

¹³¹ They were not raised in pleadings, so were put to one side. *Lumber Specialties v Hodgson*, above, 374 para 177.

¹³² See Part VII C Section 21.

¹³³ See Part VI B The Magna Carta.

the public interest without compensation.¹³⁴ The Attorney-General submitted that natural justice does not apply to the legislature¹³⁵ and that it does not extend to the deprivation of property.

McGechan J concluded that the breach could not fall under section 27(1) or natural justice. His reasoning was that section 27 (and 21) must be read as part of and within the context of its headings, and the rest of that part of the Bill of Rights. He reasoned, appropriately, that property rights do not fit within the context of "search arrest and detention." While the section must be read broadly and purposively to promote the rights conferred this is taking it too far.¹³⁶ As McGechan J reasoned "there are conceptual differences between rights to fair hearing and unbiased determinations on the one hand, and rights to compensation for expropriation on the other."¹³⁷ This supports the intrinsic unlikelihood of any intention to create an indirect compensation provision.¹³⁸ I agree with this analysis. The use of headings and context is an accepted part of the statutory interpretation process. It is supported by the view taken in Canada that such rights should not be slipped in via the back door.¹³⁹

In *Cooper v Attorney-General*¹⁴⁰ Baragwanath J decided that section 28ZGA of the Fisheries Act removed a substantive right but that it was unnecessary to respond to the submission that Parliament had no power to do this. His view was that the Bill of Rights Act "does not refer to property

¹³⁴ It was admitted that this goes beyond the usual meaning of natural justice, but WCL argued that its categories are not closed. *Westco Lagan v Attorney General* [2001] 1 NZLR 40, 52 para 49 (HC) McGechan J. This was done with reference to *Re Erebus Royal Commission* [1983] NZLR 662.

¹³⁵ *Westco Lagan v Attorney General* [2001] 1 NZLR 40, 53 para 50 (HC) McGechan J. *Wells v Newfoundland* [1999] 3 SCR 199, 223 Major J.

¹³⁶ *Westco Lagan v Attorney General*, above, 54 & 55 para 58, 61 & 63. McGechan J described the move as a "journey through space".

¹³⁷ *Westco Lagan v Attorney General*, above, 54 para 61.

¹³⁸ *Westco Lagan v Attorney General*, above, 54 para 61. The argument relating to creating an indirect compensation provision was also made with reference to section 21 at para 58.

¹³⁹ *Attorney-General of Quebec v Irwin Toy Limited* (1989) 1 SCR 927; Andre Van der Walt *Constitutional Property Clauses: A Comparative Analysis* (Juta & Co Ltd, Cape Town, 1999) 87. See Part IV A Canada.

¹⁴⁰ *Cooper v Attorney-General* [1996] 3 NZLR 480 (HC) Baragwanath J.

interests” and therefore “we have no protection of property rights equivalent to the US Fifth Amendment”.¹⁴¹

(b) *Conclusions about the case law*

The view of McGechan J is supported by reference to Hansard and the Select Committee Reports on the Bill of Rights White Paper. Although there is no mention of extrinsic materials in the Interpretation Act 1999¹⁴² it is widely accepted that Hansard can be used, in any situation,¹⁴³ to help interpret legislation.¹⁴⁴ Reference has also been made to explanatory notes, to amendments of bills and to the proceedings of select committees.¹⁴⁵ Instructions to drafters, cabinet papers and departmental advice to a minister have expressly been excluded.¹⁴⁶ This use usually relates to the purpose of the legislation in question, but is sometimes more specific than this.¹⁴⁷ However use of Hansard is supporting evidence only and thus not considered determinative.¹⁴⁸

Statements were made in Hansard that indicate social and economic rights were not intended to be included.¹⁴⁹ They also state that the right to

¹⁴¹ *Cooper v Attorney-General*, above, 483.

¹⁴² The Law Commission Report on the matter felt that the Courts were already applying the correct standards when using extrinsic aides so there was no need to legislate. John Burrows and John Fogarty “Statutory Interpretation” NZLS Seminar April 2001, 19-20.

¹⁴³ The original approach was that recourse would only occur if the meaning was not crystal clear in itself *Pepper v Hart* [1993] AC 593, 640. Now Hansard may be used in any situation; *Brewer v R* [1994] 2 NZLR 229, 234; John Burrows and John Fogarty “Statutory Interpretation” NZLS Seminar April 2001, 19. An exception applies in the situation of determining the scope of a power conferred by an Act of Parliament; *R v Secretary of State for the Environment, ex parte Spath Holme Ltd* [2001] 1 All ER 195. There was dissent on this point by Lord Cooke, saying that Hansard should be able to be used all the time; *R v Secretary of State for the Environment, ex parte Spath Holme Ltd*, above, 400 Lord Cooke.

¹⁴⁴ *Pepper (Inspector of Taxes) v Hart* [1993] AC 593 referred to in *Cooper v Attorney-General* [1996] 3 NZLR 480, 495 (HC) Baragwanath J. This was first applied in New Zealand in *Marac Life Assurance Ltd v Commissioner of Inland Revenue* [1986] 1 NZLR 576, 587 (CA) Cooke P; where Cooke P said it would be unduly technical not to permit resort to Hansard.

¹⁴⁵ John Burrows and John Fogarty “Statutory Interpretation” NZLS Seminar April 2001, 17.

¹⁴⁶ John Burrows and John Fogarty “Statutory Interpretation” NZLS Seminar April 2001, 19.

¹⁴⁷ John Burrows and John Fogarty “Statutory Interpretation” NZLS Seminar April 2001, 17.

¹⁴⁸ John Burrows and John Fogarty “Statutory Interpretation” NZLS Seminar April 2001, 18.

¹⁴⁹ Rt Hon Geoffrey Palmer (10 October 1989) 502 NZPD 13040. This statement was made on introducing the Bill. Under the rules of statutory interpretation this gives a good idea of parliamentary purpose; See also Richard Northey (10 October 1989) 502 NZPD 13052.

property is not contained in the Bill of Rights.¹⁵⁰ While these comments were not made by the Minister to show the policy behind the Bill, as is the normal use of Hansard to decipher parliamentary intent, the governing party never raised a rebuttal to the accusations about the lack of property rights any of the times that it was raised.

The final report on the White Paper comments on the lack of the inclusion of fundamental social and economic rights (including the right to property). The committee thought that such rights would be easier to include than before, as the previous justification of difficulties in the judiciary enforcing them (due to allocation of resources issues¹⁵¹) no longer existed. In Appendix A the Committee suggests that some of these rights be included.¹⁵² This shows that the Committee thought that the White Paper, and the Bill introduced to the house, did not include protection for social and economic rights, specifically that of property.

The arguments based on Hansard and the Select Committee clearly show that the legislature did not intend for the Bill of Rights to include a protection of the right to property. As such the Act should not try to be read in such a way as to "sneak through the back door" such a right.

¹⁵⁰ Warren Kyd (14 August 1990) 510 NZPD 3452. "I refer to some glaring defects in the Bill. ... No view is taken on rights of property. Every well-drawn constitution, such as that of the United States, and the United Nations Bill of Rights, provides for rights of property, but that matter is not mentioned in the legislation." Mr Lee (14 August 1990) 510 NZPD 347 "There is no reference in the Bill to property rights. New Zealand is still, I hope, a property-owning democracy – one that should be proud to be a property-owning democracy. However, it seems that even that is not now regarded as sacrosanct. Recent comments made by Labour Party members have suggested that these should now be some diminution of the importance of a property-owning democracy. It is not hard to realise where such a thought would have originated. It is also that the countries in which those thoughts are dominant are now going back to a property-owning philosophy."

¹⁵¹ Richard Northey (10 October 1989) 502 NZPD 13052; thinks though still hard to enforce. Mr Graham also agrees with this statement (10 October 1989) 502 NZPD 13052.

¹⁵² Justice and Law Reform Select Committee "Final Report of the Justice and Law Reform Select Committee on a White Paper on a Bill of Rights for New Zealand" [1987-90] XVII AJHR I8C 10. The committee recommended that there be a clause in the Bill saying "The right to own property and the right not to be deprived of private property for public use without just compensation".

In 1997 the ACT Party introduced the New Zealand Bill of Rights (Property Rights) Amendment Bill.¹⁵³ The basis for its introduction was that under the current Bill of Rights there was no protection of private property. This is demonstrated by the comments made on its second reading by Owen Jennings. "The bringing of this Bill to the floor of the House seeks to rectify a glaring omission from the New Zealand Bill of Rights Act passed by this House in 1990."¹⁵⁴ This demonstrates that many thought that the Bill of Rights did not contain a clause protecting private property rights. However just because a few members of Parliament did not think that the right was included in the Bill of Rights does not mean that it is not included. The Amendment was not read a second time due to lack of support in the house.¹⁵⁵

B Section 27(3)

Section 27(3) was raised as a ground in *Westco Lagan v Attorney-General*.¹⁵⁶ Section 27(3) states:

(3) Every person has the right to bring civil proceedings against, and to defend civil proceedings brought by, the Crown, and to have those proceedings heard, according to law, in the same way as civil proceedings between individuals.

WCL submitted that section 27(3) aimed to ensure that the "Crown was no better than any other litigant",¹⁵⁷ and that the proposed legislation breached this as it "moved the goal posts".¹⁵⁸ McGechan J concluded, however, that section 27(3) was irrelevant, as the issue at hand was not crown procedure in litigation, but substantive rights.¹⁵⁹ The legislature has the

¹⁵³ New Zealand Bill of Rights (Property Rights) Amendment Bill 1997, no 80-1.

¹⁵⁴ Owen Jennings (25 February 1998) 565 NZPD 6794. Owen Jennings moved that the Bill be read a second time.

¹⁵⁵ (25 February 1998) 565 NZPD 6809. Ayes = 9 (ACT and United) all others were against.

¹⁵⁶ *Westco Lagan v Attorney General* [2001] 1 NZLR 40 (HC) McGechan J.

¹⁵⁷ *Westco Lagan v Attorney General*, above, 53 para 52.

¹⁵⁸ *Westco Lagan v Attorney General*, above, 53 para 52.

¹⁵⁹ *Westco Lagan v Attorney General*, above, 49 para 31. There is also discussion of the applicability of section 21 of Bill of Rights Act at paras 45, 46, and 56-59. See Part VII C Section 21. Section 27 "is aimed at procedures which govern the assertion or denial of rights in the course of Court or equivalent proceedings; and is not aimed at the creation of other rights in themselves." *Westco Lagan v Attorney General*, above, 55 para 63.

ability to place the Crown in a better position, as section 27(3) does not restrict the power of the legislature to decide what substantive rights the Crown has. It merely directs that the Crown shall have no procedural advantage in any proceedings to enforce rights if such rights exist.¹⁶⁰ I agree with McGechan J's conclusions. The final sentence of section 27(3) makes it clear that the aim is that when the Crown is involved the procedure is the same as when there are two individuals. This view is supported by the White Paper commentary of article 21(3). It states that the aim of article 21(3) is to give¹⁶¹

constitutional status to the core principle that the individual should be able to bring legal proceedings against the Government, and more generally to engage in civil litigation with it, without the government enjoying any *procedural* or jurisdictional privileges. (Emphasis added)

Although McGechan J does not find that section 27 (or section 21) will be breached by the passing of The Forest (West Coast Accord) Bill 2000, he implies that in principle it is inappropriate for the legislature to pass such an Act. He refers the high likelihood of such clauses being changed before becoming an Act,¹⁶² due to their draconian nature.¹⁶³ He also refers to Courts usually being unwilling to allow the expropriation of property in such a way,¹⁶⁴ and states that the international norms are undeniable in their own right.¹⁶⁵

C Section 21

Section 21 of the Bill of Rights Act states:

¹⁶⁰ *Westco Lagan v Attorney General* [2001] 1 NZLR 40, 55 para 63 (HC) McGechan J.

¹⁶¹ Hon Geoffrey Palmer Minister of Justice "A Bill of Rights for New Zealand – A White Paper" [1984-85] 1 AJHR A6 111, 10.176. The article was aimed at not altering the principle that was already reflected in the Crown Proceedings Act 1950. Hon Geoffrey Palmer Minister of Justice "A Bill of Rights for New Zealand – A White Paper" [1984-85] 1 AJHR A6 111 10.176 and 10.177.

¹⁶² Although this did not actually occur here. Its likelihood is now much higher due to MMP.

¹⁶³ McGechan actually describes the clause as being draconian. *Westco Lagan v Attorney General*, above, 48 para 24.

¹⁶⁴ *Westco Lagan v Attorney General*, above 55 para 61.

21. Unreasonable search and seizure - Everyone has the right to be secure against unreasonable search or seizure, whether of the person, property, or correspondence or otherwise.

It has been argued that the phrase "unreasonable...seizure ... of ... property" applies to deprivations of property.

In *Westco Lagan Ltd v Attorney-General*¹⁶⁶ WCL raised this argument, based on a strict reading of the phrase. McGechan J states that the strict reading of section 21 could apply to an "uncompensated legislative annihilation of contractual rights."¹⁶⁷ First, he accepts that, annihilation can be seizure.¹⁶⁸ He then accepts that contractual rights are intangible property, and that intangible property could fall under section 21.

However, McGechan J concluded that section 21 should not be read strictly. He looks at the headings within the Act, the context of the associated sections, the marginal notes and the legislative intent.¹⁶⁹ He concludes that the focus of the section is "plainly on prosecution and judicial process",¹⁷⁰ and that it would be "distinctly odd" to have within these a section dealing with takings without compensation. He argues, and I agree, that there is no fit with the surrounding sections, the headings or the marginal notes. This increases the likelihood that it was not Parliament's intent that section 21 be a takings section. McGechan J argues that he has not ignored the "strongly expansionist" tide flowing at present at appellate level in relation to application of the Bill of Rights."¹⁷¹ Instead he argues that there is a difference between "thinking and wishful thinking"¹⁷² and that it would not be

¹⁶⁵ *Westco Lagan v Attorney General* [2001] 1 NZLR 40, 54 para 61 (HC) McGechan J.

¹⁶⁶ *Westco Lagan v Attorney General*, [2001] 1 NZLR 40 (HC) McGechan J.

¹⁶⁷ *Westco Lagan v Attorney General*, above, 53 para 57.

¹⁶⁸ This is because the Bill of Rights requires a large liberal interpretation. While seizure does not normally encompass destroying, it is a possible interpretation. This is especially so as the impact on the former possessor is the same whether the item has been destroyed or taken.

¹⁶⁹ These are all valid considerations when interpreting a statute under the Interpretation Act 1999 s5(3). McGechan J's argument is supported by the ideas of using the scheme of the Act to help interpretation, and of not reading sections in isolation. John Burrows and John Fogarty "Statutory Interpretation" NZLS Seminar April 2001 13-14.

¹⁷⁰ *Westco Lagan v Attorney General*, above, 54 Para 58.

¹⁷¹ *Westco Lagan v Attorney General*, above, 54 para 59.

¹⁷² *Westco Lagan v Attorney General*, above, 54 para 59.

intellectually honest to expand section 21 in the manner sought. This conclusion is in line with Canadian decisions on a similar point.¹⁷³

The comparative article in the White Paper supports his approach. The focus of Article 19 is search and seizure within the context of evidence gathering. The commentary draws parallels with *Entice v Carrington*¹⁷⁴ which is about *invasions* of property, not parliamentary takings. The focus on evidence gathering is also shown by the discussions on the protection of privacy and the need for search warrants.¹⁷⁵ This is also shown by the article's comparison with the US Fourth Amendment (search and seizure), rather than the Fifth Amendment (takings).¹⁷⁶

VIII IS THIS ADEQUATE PROTECTION?

Private property, to a certain extent, is protected by the law in New Zealand today. There is limited protection with the common law and the Magna Carta. This protection is impeded by parliamentary supremacy. There is no protection contained in the Bill of Rights.

A *New Zealand Bill of Rights Act 1990*

The Bill of Rights also offers inadequate protection. Section 27 only allows procedural protection. Procedural standards do not apply to the legislature, thus the Bill of Rights cannot prevent enactments that enable the taking of property. Also it has not been decided whether this protection from executive actions actually extends to the right to property. Substantive protection was correctly ruled out in *Westco Lagan v Attorney-General*.¹⁷⁷

¹⁷³ *Attorney-General of Quebec v Irwin Toy Limited* (1989) 1 SCR 927. See Part IV A Canada.

¹⁷⁴ *Entick v Carrington* (1765) 19 State Tr 1029. Hon Geoffrey Palmer Minister of Justice "A Bill of Rights for New Zealand – A White Paper" [1984-85] I AJHR A6 paras 10.145-10.146.

¹⁷⁵ Hon Geoffrey Palmer Minister of Justice "A Bill of Rights for New Zealand – A White Paper" [1984-85] I AJHR A6 103 para 10.144.

¹⁷⁶ Hon Geoffrey Palmer Minister of Justice "A Bill of Rights for New Zealand – A White Paper" [1984-85] I AJHR A6 105 para 10.151.

¹⁷⁷ See Part VII A 2 (b) Conclusions about the case law.

B Other Protections

The protection offered by the Magna Carta is inadequate because of parliamentary supremacy and the phrase "but by the law of the land. Any statute that necessarily implies that the right has been overridden can remove the protection. This makes it too easy for parliament to remove property rights without directly facing the fact that this is what they are doing. The protection is also inadequate because of the reference to "freehold". Under the interpretation of McGechan J in *Westco Lagan v Attorney-General* this would not include all forms of property. If this interpretation was looked at again, however, it should be widened, removing this inadequacy.

The protection under the common law is also inadequate. A statute that is not explicit can also override it. The protection offered by the PWA is good. It covers all the important elements found in comparative constitutions. This includes a detailed list of what to consider when offering compensation. However its protection is inadequate as it only applies to land being taken for public works, and it is even easier for another statute to override it as it is a totally ordinary statute.

While elections are a check on Parliament's actions, they are a blunt instrument. Voting is not issue by issue, but on many issues, and only every three years. It allows small abuses to keep occurring, constantly pushing the boundaries of what is acceptable. Elections therefore only prevent large abuses, or a large number of abuses. Elections also provide no redress for affected individuals.

There is protection for non-legislative actions and actions not done under Acts. These actions can be treated as either breaches of the common law presumption in favour of compensation, or as breaches of c 29 of the Magna Carta. The PWA also applies to such actions.

IX SHOULD THE RIGHT BE IN THE BILL OF RIGHTS?

The author submits that it is important to consider whether the Bill of Rights should contain a written protection of property, similar to that contained in other jurisdictions. To be considered within the Bill of Rights it needs to both fit with the initial purpose and aims of the Bill of Rights. The right needs to be considered fundamental, able to be put in written form and be consistent with the rest of the Bill of Rights.

A *Is It a Fundamental Right?*

I think that the right to property is fundamental. However the question is not straightforward. Some argue that it is fundamental, others argue that it is an economic or social right and is therefore not fundamental.

1 *Arguments against it being fundamental*

The rights non-inclusion in the Bill of Rights is an indication of the view at that time that it was not fundamental. This is also demonstrated by the failed attempt to include it in the Bill of Rights in 1997. The right was also not considered important enough to be in the ICCPR,¹⁷⁸ the original ECHR or the Canadian Charter.¹⁷⁹

Another indication is the view that people's acceptance of the right may depend on the type of economic or governmental policies in place. The right to property is less acceptable in a laissez-faire economy than a system

¹⁷⁸ One of the reasons why it was not included in this document, however, was due to the jurisdiction of the ICCPR and its extension to foreign nationals living within a country's territory. At this time a number of countries were wishing to return land from foreigners back to the original owners who were citizens. If the ICCPR contained a property clause then redistributions would not have been possible.

¹⁷⁹ It could also be because of the difficulties in defining the right and controversies involved in some aspects of how it is defined. Alberto M Aronovitz "Individual Patrimonial Rights Under the European Human Rights system – Some Reflections on the Concepts of Possession and Dispossession of Property" (1997) 25 Intl J Legal Info 87, 91.

with high government regulation.¹⁸⁰ As government policies on this change over time depending on the views of voters, then the public's acceptance of intervention can also change. Due to the changing nature of views towards the right, it is inappropriate to freeze for the future such values merely because it is important today.¹⁸¹ However, this should not affect whether the right exists at all. This argument is better used as a consideration when balancing between the public and individual interests involved.

The view that property is not a fundamental right is put forward in *Cooper v Attorney General* where it is said that:¹⁸²

No New Zealand authority supports the proposition that property rights are of such fundamental importance as to prevent Parliament from removing them by legislation which it considers to be required in the public interest.

However the view that I am advocating is that few rights are so absolute, meaning that this should not be used as a reason against inclusion. It is possible for a right to be fundamental without being absolute. This is especially so in New Zealand where section 5 of the Bill of Rights makes it clear that no right is considered absolute, but that they can all be subject to limits.

2 *Arguments that it is fundamental*

Locke considered property to be an attribute of a man's personality.¹⁸³ If that is so it is of the same importance as the other rights that relate to the person, and should be given the same protection. This view is supported by

¹⁸⁰ James L Oakes "Property Rights' in Constitutional Analysis Today" (1981) 56 Wash L Rev 583, 583 with reference to Justice Felix Frankfurter (1956) 19 "Of Law and Men".

¹⁸¹ This was a concern raised with the enactment of the Bill of Rights. Hon DAM Graham (25 February 1998) 565 NZPD 6796 with reference to Justice and Law Reform Select Committee "Final Report of the Justice and Law Reform Select Committee on a White Paper on a Bill of Rights for New Zealand." [1987-90] XVII AJHR I8C 28 para 4.14. This was also raised in the debates on the Amendment Bill by Tony Ryall who stated that property rights are something that there is no broad national consensus on. Hon Tony Ryall (25 February 1998) 565 NZPD 6801.

¹⁸² *Cooper v Attorney-General* [1996] 3 NZLR 480, 495 (HC) Baragwanath J.

¹⁸³ James L Oakes "Property Rights' in Constitutional Analysis Today" (1981) 56 Wash L Rev 583, 584.

the idea that for the other rights to be truly effective there needs to be an effective right to property. For example the right to freedom of speech is useless if there is no right to a printing press.

Property is pervasive within our legal system. New Zealand has a strong tradition of individual ownership. There are a lot of rules involving property such as theft, nuisance, trespass and other torts. Something so pervasive within society and the legal system should be fundamental. It seems wrong that the position is so different between the State and individuals. Individuals cannot trespass or commit theft but Parliament can. Something is needed to ensure that there is equality in this area.

The fundamental nature of the right was demonstrated by the description given to the failed Bill of Rights in 1963. It contained what Hon Ralph Hanan described as "the six basic freedoms.... [including] the right of the individual to own property and the right not to be deprived thereof except in accordance with law."¹⁸⁴ This was also demonstrated by the Select Committee view of the White Paper, that after entrenchment had been removed, rights that may have been difficult for judges to enforce but were none the less of great importance should be included in the Bill. They argued that "[social and economic] rights are obviously as important to New Zealanders as the civil and political rights ... and a number of submissions recommended their inclusion."¹⁸⁵ They specifically included the right to property in their proposed changes. There was also repeated mention on the passing of the Bill of Rights by the opposition about such an important right not being included.¹⁸⁶

Another argument that shows that the right is fundamental is its position within the fundamental part of our common law and its protection in the Magna Carta. It is also described as fundamental by the LAC guidelines.

¹⁸⁴ Mr Graham, (14 August 1990) 510 NZPD 3464.

¹⁸⁵ Justice and Law Reform Select Committee "Final Report of the Justice and Law Reform Select Committee on a White Paper on a Bill of Rights for New Zealand." [1987-90] XVII AJHR I8C 4.

¹⁸⁶ Warren Kyd (14 August 1990) 510 NZPD 3452; Mr Lee (14 August 1990) 510 NZPD 347.

The US case of *Lynch v Household Finance Corp*¹⁸⁷ treated the right to property as a personal right.¹⁸⁸ However there is no indication that this has been followed in New Zealand, or how widely accepted it is within the US. This is especially so given that the takings jurisprudence has gone through cycles over the last 150 years.¹⁸⁹ There have been changes from being harsh on the State, to lenient on takings to being strict on them again.

B Should It Be In Written Form?

It needs to be considered whether the right needs to be put into written form. Currently the right appears under the common law and the Magna Carta, however this protection is inadequate.¹⁹⁰ The question then is will a written form of the right included in our Bill of Rights provide better protection?

I Against writing it down

The main argument against writing it down is that it is a lot of trouble and expense when the result is likely to be similar to the current position.¹⁹¹ This is especially because section 4 of the Bill of Rights does allow explicit statutes to override the rightist contains. This is added to by section 28 of the Bill of Rights, which states that non-inclusion in the Bill of Rights does not mean that a right is not important. At the time the Bill of Rights was passed there were concerns about putting some rights on a pedestal and giving them more importance than others. While this is not something that we should aim to do, it is apparent that because the courts have adopted more rigorous

¹⁸⁷ *Lynch v Household Finance Corp* 405 US 538.

¹⁸⁸ Viewed favourably in James L Oakes "Property Rights' in Constitutional Analysis Today" (1981) 56 Wash LR 583, 597 and also in Hamish Hancock "Economic Rights as Civil Rights" [1998] NZLJ 221.

¹⁸⁹ James L Oakes "Property Rights' in Constitutional Analysis Today" (1981) 56 Wash LR 583.

¹⁹⁰ See Part VII B Other Protections.

¹⁹¹ Mr Graham (10 Oct 1989) 502 NZPD 13043. This was also reflected in debate on the Amendment Act Hon DAM Graham (25 February 1998) 565 NZPD 6796. This view is supported by Hon Tony Ryall (25 February 1998) 565 NZPD 6801.

checking procedures under the Bill of Rights, the rights contained in it have achieved some higher standing.¹⁹² This is especially so if the court can consider whether the limitation is demonstrably justified in a free and democratic society, and if it is not, can indicate this opinion.¹⁹³

It should be recognised, however, that "constitutions are just one social instrument protecting economic, political and social rights."¹⁹⁴ Other forms of control such as "instilled civic virtues that enhance the value of reputation, good behaviour, tolerance etc act as powerful devices to insure that individual rights are respected".¹⁹⁵ This is especially so in New Zealand where there is no formal written constitution and much of the constitution is contained in the common law or constitutional conventions.

Another argument against writing down such a right is that it may be considered to be an economic or social right. It has been argued that there is a "need to be careful not to constitutionalise economic rights in such a way that the courts start to involve themselves in questions of economic policy."¹⁹⁶ This argument can however be overcome by phrasing the right in such a way that the court is not involved in making policy or distributive decisions but only checks on the way that the State takes land.

2 *For writing it down*

The original Bill of Rights reaffirmed rights already in place.¹⁹⁷ The opposition at the time argued that it did not make sense to put into writing something already present in our legal system.¹⁹⁸ Their argument was that the

¹⁹² Especially with the possibility of gaining judicial declarations of incompatibility.

¹⁹³ See Part V A The New Zealand Bill of Rights Act 1990.

¹⁹⁴ Thomas E Borcharding "Commentary on the Schumiatcher Paper" (1988) 1 CJLT 209, 214.

¹⁹⁵ Thomas E Borcharding "Commentary on the Schumiatcher Paper" (1988) 1 CJLT 209, 215.

¹⁹⁶ Hon Tony Ryall (25 February 1998) 565 NZPD 6801.

¹⁹⁷ The New Zealand Bill of Rights Act 1990 Long Title; Hon Geoffrey Palmer Minister of Justice "A Bill of Rights for New Zealand - A White Paper"[1984-85] 1 AJHR A6 21 para 3.1.

¹⁹⁸ Mr Graham (10 October 1989) 502 NZPD 13043. "I should have thought that most of those rights were well known in common law, and that there is not much to be gained by

jurisprudence had to start again, and that this would lead to uncertainty. This argument did not stand in 1990 and should not now. If something is important this is not a reason against codifying the right.

Including the right in the Bill of Rights increases the educative effect. The written form of a right is a lot more accessible and easier to understand than case law. The action of passing the amendment will help raise public awareness and knowledge on the issue. These arguments were also raised, and accepted, during the passing of the Bill of Rights.

Since the passing of the Bill of Rights there has been more judicial scrutiny of Acts and actions that are in violation of the rights contained in the Bill of Rights. This is despite the fact that these were rights that already played an important part of our legal system before the passing of the Bill. Accordingly the placing of the right to property within the Bill of Rights would bring greater scrutiny on the Acts and actions of the State with regards to property. While it may be argued that this is a breach of the doctrine of parliamentary supremacy, it is not. Section 4 of the Bill of Rights clearly states this. However the Bill of Rights reinforces the judges' ability to consider the statute or action in terms of the Bill of Rights, and also brings public attention to issues that arise. This is especially so under the process that the courts have adopted when looking at statutes.¹⁹⁹ It also means that there will be extra consideration when statutes are going through the legislative process, as the Attorney-General needs to make a report on any inconsistencies.²⁰⁰ This places greater political onus on parliament as they are directly aware of any breaches that are occurring.

During the discussions on the Bill of Rights it was argued that the right to property (and other more social or economic rights) should be contained

putting them in this document." See also Mr RJS Munro (10 October 1989) 502 NZPD 13055 "We oppose the idea of replacing well-defined rights by ill-defined ones."

¹⁹⁹ *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 (CA). See Part V A The New Zealand Bill of Rights Act 1990.

²⁰⁰ New Zealand Bill of Rights Act 1990 s 7.

within the Bill of Rights so as to have a complete list of rights.²⁰¹ This was supported by the view of the select committee that the right should be included, once the problem of enforcement disappeared when it was decided that the Bill of Rights should not be entrenched.²⁰²

C Aims and Purposes

The inclusion of the right to property is in line with some of the aims and purposes of the original Bill of Rights. If the right is framed in the negative then the aim of curbing State power when dealing with individuals will be met. However if property is considered to be an economic or social right this requirement will not be met. This is because the protection of such rights was not an aim of the Bill of Rights. Another aim of the Bill of Rights was to educate people about their rights. This would occur if any right was included in the Bill of Rights. The aim of meeting New Zealand's obligations under the ICCPR would not be met by including the right in the Bill of Rights, because it is not contained in the ICCPR.

X HOW SHOULD IT BE PHRASED?

The general theme that has emerged from other countries' attempts to constitutionalise the right to property is that there are two ways to frame such a right. It can be framed negatively, in terms of limiting actions the State can take in regard to private property. If framing the right negatively it places a restriction on what would normally be a State's "legal right to deal as it thinks fit with anything and everything within its territory."²⁰³ If it is framed positively it gives someone a protected right to their property. It acts as a barrier, preventing governmental intervention.

²⁰¹ Richard Northey (14 August 1990) 510 NZPD 3464.

²⁰² Justice and Law Reform Select Committee "Final Report of the Justice and Law Reform Select Committee on a White Paper on a Bill of Rights for New Zealand." [1987-90] XVII AJHR I8C 4.

²⁰³ *Minister for the Army v Dalziel* (1944) 68 CLR 261, 284 Rich J.

The form that the right takes needs to reflect both the fact that we are all both independent individuals and part of the social whole.²⁰⁴ This is reflected in a number of countries where there is a need for a public purpose before any “taking” of property is valid. The principle is that whenever a taking occurs a balance between these competing interests is met.

11A Right to the enjoyment of property

- (1) Every person shall be able to acquire property.
- (2) No one is to be deprived of the enjoyment of their property except by reason of a public purpose, on just terms, and by due process of law.

A Subsection 1 - Acquiring Property

In subsection (1) there is a clear statement that everyone should be able to acquire property. The intention with this section is that the usual grounds for discrimination (such as race, religion, sex, age) should not stop someone from acquiring property. It is not aimed to be a “positive” right to property. It is not a positive right as it does not say that everyone can have property, more that the opportunity exists for everyone.

B Subsection 2 - Deprivations

This section acts as a barrier between the State and property owners. It guarantees that once an individual owns property they can enjoy it without State interference. It is framed in the negative as it does not guarantee one property but limits the State’s ability to interfere with property. If the State wishes to curtail one’s enjoyment of property they may do so only if certain conditions are met. This negative framing fits with the rest of the Bill of Rights as it also acts as a limit on the State’s powers in respect of the individual.

²⁰⁴ Our role in the social whole allows for policies involving the spreading of wealth and ensuring that there is property in the future (ie conservation issues).

1 *Public purpose*

This is the first part of the balancing test. It is closely linked with the “just terms” requirement and any section 5 analysis.²⁰⁵ Society accepts that, with certain limits, some interference is acceptable, and indeed necessary. Interference with property will only be tolerated where there is a genuine reason for the interference to occur. It means takings, without a valid reason, should not occur. It requires the State to justify actions that encroach on people’s private property. It does not stop the State from continuing with projects involving zoning, the environment or other changes as long as there is a public purpose. It merely requires that a public purpose such as these exists. If the right was framed in the positive then it would be impossible for the government to take any action that affected private property.

The public purpose requirement is aimed at both accountability and the prevention of arbitrary takings. By needing to show public purpose, the government needs a reason for taking the property. The courts, while they should not be looking in depth at policies, can ensure that a policy does in fact exist. This ensures that before the taking occurs the government will need to have clearly thought about the policies involved, and the reason why they are taking the property. They will know that if they do not do so they will face the scrutiny of the court. It should prevent arbitrary takings, as the purpose must be legitimate.

2 *Just terms*

The phrase “just terms” covers a lot of the issues involved in State interference in private property without being too wordy. These include, but are not limited to, the public interest, compensation, and process. In Australia the phrase has been applied very broadly and includes such ideas as the public interest, compensation, the process, and timing.²⁰⁶

²⁰⁵ See Part V A The New Zealand Bill of Rights Act 1990.

The phrase "just terms" allows a balance to occur between the individual and the State. The terms of any taking need to ensure that the individual is not bearing the burden for the whole. "Just terms" ensures that where the public benefits, the public take on some of the burden. This can often occur simply by the use of compensation for property that is taken.

The phrase "just terms" includes, but is not limited to a requirement of compensation. Just terms of an acquisition must include such things as the timing of the acquisition and any notice that is given before the "taking" will occur. This is important as it also limits the power of the State to interfere in our property and stops any inherent advantage the State has.

The reference to "just terms" covers the concept of proportionality. This involves the balancing of the public interest, with the considerations of individuals. The balance should involve whether the means fit the ends, timing, chances to make submissions and other terms of the taking. This test is used under the ECHR and in Australia. If there is a public interest but the action of "taking" the property is excessive compared to the end, then it would be harder for the terms of the "taking" to be just.

This idea is also expressed in section 5 of the New Zealand Bill of Rights Act 1990. This section requires any limitations on rights to be demonstrably justified in a free and democratic society.²⁰⁷ The test involved with this is essentially one of proportionality and considering whether the means fit the ends.²⁰⁸

A sledgehammer should not be used to crack a nut. The means used must also have a rational relationship with the objective, and in achieving the objective there must be as little interference as possible with the right or freedom affected.

²⁰⁶ See Part IV D 1 Just terms

²⁰⁷ See Part V A The New Zealand Bill of Rights Act 1990.

²⁰⁸ *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9, 16-17 para 18 (CA).

It may be considered repetitive to include the second balancing test. However it should be included for certainty, and especially to ensure that compensation is part of the process. It is not as repetitive as the South African Constitution, but is clear enough as to what should be considered.

A reference to just terms, rather than just a due process requirement, is necessary for two reasons. One is that there is no explicit compensation section within the Bill of Rights Act. This means that there is not an inherent right to receive money if an action is taken under the Bill of Rights. While the court has decided that compensation is available in some situations,²⁰⁹ without the reference to "just terms" I am not sure that this would occur as often as it would with the phrase in the section. However in situations where there is no question of the plaintiff having acted illegally (as was the situation in *Baigent*) there is probably more chance of receiving compensation.²¹⁰

The idea of "just" terms rather than "full and fair" terms is important for a number of reasons. The first is that "just terms" is much wider and allows a balancing test to occur. Full compensation may not actually reflect the social need that is being put in place.²¹¹ The other is that compensation for grievances under the Treaty of Waitangi (the Treaty) do not represent the full value of property that was taken. It would therefore be unfair for modern day takings to receive full compensation.

The phrase "just terms" is a good one as it covers a lot of ideas, without being too wordy. The New Zealand Bill of Rights Act is not a very

²⁰⁹ *Simpson v Attorney General (Baigent's Case)* [1994] 3 NZLR 667 (CA).

²¹⁰ There seems to be a reluctance to offer damages as a remedy in Bill of Rights cases. This is largely because often those who make use of the Bill of Rights complain about police action when they have already been suspected of a crime. They tend to be thought of less favourably than those who "have done nothing wrong". This general attitude was reflected in *Baigent's Case* and Hammond J's comments about the Bill of Rights being used by "bleary eyed drunk drivers and their lawyers;" *Lumber Specialties v Hodgson* [2000] 2 NZLR 347, 373 para 169 (HC) Hammond J.

²¹¹ For example there may be a regulation preventing me from polluting my own land, which is a regulation that affects my right to property. Under some jurisdictions this level of regulation may be a reason to give compensation, however the public good in this situation is large (saving the earth for future generations) so the balance towards giving compensation would be less than if the public good was smaller, or the regulation covered more than just that aspect of a persons control over their property.

wordy Act. However by using this one simple phrase it ensures that particular aspects of the balancing process will occur, even if they would have occurred anyway under section 5. It is added for clarity. Small phrases such as this have been adequate in other countries for developing such balancing tests.²¹²

3 *Due process of law*

This has been added to ensure that the State follows a proper process when expropriating property. It is primarily aimed at the executive. It has been added for clarity also. This is because of the uncertainty as to whether property is protected under s27 of the Bill of Rights. It also acts as an additional safeguard if the courts do not include procedural protection within the scope of "just terms".

D *The Level of Judicial Involvement*

It may be argued that under this process there is too much court involvement, breaching the principle of the separation of powers. The main concern is the courts actions in considering whether the purpose that the State is aiming to achieve is a good one or not. It needs to be remembered, however, that this occurs under the section 5 proportionality test with all of the other rights included in the Bill of Rights. In Australia a similar issue was considered. The court's view was that whether Parliament thought something was "just" was an important consideration, but not the only consideration.²¹³ This showed a reluctance of the court to always substitute its decisions for those of other branches. However as the court can list factors that need to be considered when deciding on "just terms", it would be possible for courts to check that those factors were considered. As considerations are often concrete things like valuations, rather than subjective ideals, it is easier for the courts to impose such decisions on other branches.²¹⁴

²¹² This has occurred in the ECHR and Australia. See Part III C the European Convention on Human Rights; and Part IV D 1 Just terms.

²¹³ *Australian Apple & Pear Marketing Board v Tonking* (1941) 66 CLR 77, 104 Rich J. See Part IV D 1 Just terms.

²¹⁴ This is similar to the role played by the courts in judicial review.

If the right is phrased in the positive the courts will become involved in questions of the allocation of resources (this is more so if the document is entrenched). This is a question of "high policy" and is something that the courts in New Zealand have, for good reason, been hesitant to look into. It would, therefore, not be appropriate for the courts to decide how property should be allocated and whether a particular person's property is sufficient for their needs. This idea is backed by the large differences in opinion as to how property should be allocated. It is easier for the courts to consider whether an action of the State infringes the rules set out in the Act.

It may also be argued that there is a breach of parliamentary supremacy. Eventually, however, section 4 of the Bill of Rights will mean that any statute that is explicit enough will be able to trump the Bill of Rights. Also, the court has already been considering whether compensation is adequate under the PWA.

E Ideas Not Included

While there is no definition of property or property rights within the section, this issue can easily be solved by looking at current case law assuming property to be a bundle of rights.²¹⁵ There is also no express mention of the difficult problem that has been faced repetitively overseas, with regards to the distinction between a mere regulation and regulations that are deemed takings. There is a lot of jurisprudence on this matter and it is a problem in many jurisdictions. However, due to time and space constraints, this issue has not been considered in any depth. To be certain on this problem any property rights clause that is drafted would need to consider this issue, and deal with it appropriately.

²¹⁵ *Dahya v Dahya* [1991] 2 NZLR 150; *Rabadan v Gale* [1996] 3 NZLR 220; *Millns v Borck* [1986] 1 NZLR 302; *Re Marshall (Deceased) & Commissioner of Inland Revenue v Public Trustee* [1965] NZLR 851. The same idea is also used in the USA in *Penn Central Transportation Co v New York City* 438 US 04, 130-131.

XI CONCLUSION

The New Zealand Bill of Rights Act, despite several attempts to prove otherwise, does not currently protect a person's right to property. The right to does, however, exist under the common law and the Magna Carta. The control on, especially parliamentary action, through these is very limited. Also while the common law is an important messenger the need to have a clear document and also the educative etc role that the Bill of Rights plays are reasons for the right needing to be included within the Bill. While there are many reasons pointing against inclusion, I feel that to make a clear point, and so that everyone understands how much importance the right has in New Zealand it should be included within the Bill of Rights. Inclusion will reflect the fundamental role of property within our western, liberal, capitalist democracy.

Inclusion will lead to certainty in the law.

If the right was to be included within the Bill of Rights Act, it should be negatively framed, restricting the power of the State to interfere with the property of individuals. A balance needs to be achieved between the public good and the rights of the individual. To achieve that balance the reference to just terms and public purpose within the section that I have drafted will attempt to solve this problem.

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XIII APPENDIX B – RELEVANT STATUTORY PROVISIONS

A New Zealand Bill of Rights Act 1990

4. Other enactments not affected

No court shall, in relation to any enactment (whether passed or made before or after the commencement of this Bill of Rights),-

(a) Hold any provision of the enactment to be impliedly repealed or revoked, or to be in any way invalid or ineffective; or

(b) Decline to apply any provision of the enactment-
by reason only that the provision is inconsistent with any provision of this Bill of Rights.

5. Justified limitations-

Subject to section 4 of this Bill of Rights, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

6. Interpretation consistent with Bill of Rights to be preferred-

Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.

7. Attorney-General to report to Parliament where Bill appears to be inconsistent with Bill of Rights-

Where any Bill is introduced into the House of Representatives, the Attorney-General shall,-

(a) In the case of a Government Bill, on the introduction of that Bill; or

(b) In any other case, as soon as practicable after the introduction of the Bill,-

bring to the attention of the House of Representatives any provision in the Bill that appears to be inconsistent with any of the rights and freedoms contained in this Bill of Rights.

21. Unreasonable search and seizure –

Everyone has the right to be secure against unreasonable search or seizure, whether of the person, property, or correspondence or otherwise.

27. Right to Justice -

(1) Every person has the right to the observance of the principles of natural justice by any tribunal or other public authority which has the power to make a determination in respect of that person's rights, obligations, or interests protected or recognised by law.

(3) Every person has the right to bring civil proceedings against, and to defend civil proceedings brought by, the Crown, and to have those proceedings heard, according to law, in the same way as civil proceedings between individuals.

28. Other rights and freedoms not affected-

An existing right or freedom shall not be held to be abrogated or restricted by reason only that the right or freedom is not included in this Bill of Rights or is included only in part.

B Universal Declaration on Human Rights

Article 17

Everyone has the right to own property alone as well as in association with others.

No one shall be arbitrarily deprived of his property.

C The European Convention on Human Rights

Protocol 1, Article 1

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public

interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

D Canada

1 The Canadian Bill of Rights

1. It is hereby recognised and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely,

(a) the right of the individual to life, liberty, security of the person and enjoyment of property and the right not to be deprived thereof except by the due process of law.

2 The Canadian Charter of Rights

Legal Rights: Life, Liberty And Security Of Person.

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

E The Constitution of the Republic of South Africa 1996

25. (1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.

(2) Property may be expropriated only in terms of law of general application

for a public purpose or in the public interest; and subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.

(3) The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including

the current use of the property;

the history of the acquisition and use of the property;

the market value of the property;

the extent of direct State investment and subsidy in the acquisition and beneficial capital improvement of the property; and

the purpose of the expropriation.

(4) For the purposes of this section the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources; and property is not limited to land.

(5) The State must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.

(6) A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.

(7) A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.

(8) No provision of this section may impede the State from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36(1).

(9) Parliament must enact the legislation referred to in subsection (6).

36. (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including

- the nature of the right;
- the importance of the purpose of the limitation;
- the nature and extent of the limitation;
- the relation between the limitation and its purpose; and
- less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

F United States of America

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

G Australian Constitution

Section 51


AS 701
VUW
ADD
1982
2005

The Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the commonwealth with respect to-

the acquisition of property on just terms from any State or person for any purpose in respect of which Parliament has power to make laws.

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