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# SHOULD THE JUDICIARY HAVE A POWER TO REVIEW LEGISLATION THAT INFRINGES FUNDAMENTAL HUMAN RIGHTS?

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## ABSTRACT

This paper is an examination of the issue of whether the judiciary of New Zealand should be armed with a power to review legislation, that is contrary to fundamental human rights. It is not suggested that any of the previous or future governments will attempt to sweep away our basic rights. The problem, is one of Parliament having far too much power, thus enabling them to enact small erosions of our rights. This results from the doctrine of parliamentary sovereignty, and the absence of constitutional checks in the system. It is argued that the judiciary already have a limited indirect power to review legislation, through the methods of interpretation employed. These interpretation methods have gained a statutory basis under the New Zealand Bill of Rights Act 1990, and the significance of this will be discussed.

The major impediment to establishing a direct right for reviewing legislation, is the doctrine of parliamentary sovereignty. This is analysed in the New Zealand constitutional setting and the conclusion of this paper is that parliamentary sovereignty is not as absolute as it once was. This is illustrated through a comparison with other jurisdictions, and the factors which have caused such a changed perception. The judiciary are the logical choice to act as guardians of fundamental rights, and this is illustrated through a discussion identifying the reasons in favour and against this proposition. As an entrenched Bill of Rights has presently been vetoed in New Zealand, and there is no written constitution, the only alternative to make up for the absence of constitutional safeguards is to allow a common law right. The statements made by Sir Robin Cooke, commonly known as the "fundamentals" doctrine, may provide authority for this for when the need arises in New Zealand.


*The text of this paper (excluding contents page, footnotes, bibliography and annexures) comprises approximately 16,000 words.*

*Modern Anglo-American Constitutional theory is pre-occupied with one central problem. The problem consists in devising means for the protection and enhancement of individual human rights in a manner consistent with the democratic basis of our institutions.*[1]

# I INTRODUCTION

Recent times have seen a call for the establishment of fundamental human rights. In many countries the response has been the incorporation of a Bill of Rights as part of the written constitution. In New Zealand there is no written constitution, as such, although the New Zealand Bill of Rights Act 1990[2] was enacted to protect individual human rights. This is only an ordinary statute, and the result of this is that the New Zealand judiciary have not been given a statutory power to review legislation that is inconsistent with fundamental human rights.

There are standard judicial techniques used to interpret legislation so that it is consistent with the values of society, and Part II will examine these techniques. It is submitted that this is an indirect method for upholding legislation so it is consistent with our fundamental rights. However, it is a limited tool as Parliament can still expressly override such rights, and interpretations have to be within realistic limits. The Bill of Rights has given a statutory basis for taking these values into account, and Part III will discuss the Bill of Rights, and its significance for the judiciary in interpreting legislation.

It would be more logical for the judiciary to be able to directly review legislation. The biggest impediment in granting the judiciary this power, is parliamentary sovereignty, and a purpose of this paper is to examine whether this principle is still sound in the absolute sense. To determine this, Part IV will examine the constitutional situation in New Zealand, in which Parliament is said to be sovereign. Dicey postulated the "sovereignty of Parliament" doctrine many years ago, and the only limitation is the inability to bind future Parliaments. This sovereignty gives Parliament unlimited powers to make law. A much used example is that in "theory" Parliament could pass a law requiring that all blue-eyed babies be killed, or a law could be passed abolishing the monarchy.

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1 TRS Allen "Legislative Supremacy and the Rule of Law: Democracy and Constitutionalism" (1985) 44 CLJ 111.

2 Hereinafter referred to as the "Bill of Rights."

However, several writers have suggested that parliamentary sovereignty is not as absolute as one might believe. Part V will examine the extent of parliamentary sovereignty in other jurisdictions, and Part VI will discuss the suggestion that there is a changing perception regarding Parliament's unlimited law-making powers in New Zealand.

If it is accepted that Parliament is not absolutely sovereign, it is important to ask if the judiciary are able to undertake this function. Part VII will discuss the reasons for and against the judiciary being guardians of our fundamental rights. If we accept these then the only possible alternative in New Zealand is to allow the judiciary to have a common law power.

Support may already be established for this power through the Fundamentals doctrine, postulated by Sir Robin Cooke in several obiter dicta statements between 1979 and 1986. His Honour commented that: "some common law rights presumably lie so deep that even Parliament could not override them."[3] The cases were supported by an extra-judicial statement, supporting the idea of the judiciary as guardian of these so called fundamental rights.[4] Part VIII will analyse this alleged common law power.

Part IX will conclude as to whether parliamentary sovereignty is an impediment to the judiciary in being able to review legislation, and will make some suggestions for protecting fundamental rights in New Zealand in the future.

## II STANDARD JUDICIAL TECHNIQUES FOR INTERPRETING LEGISLATION

Under the separation of powers doctrine, Parliament is said to legislate and the courts' role is to interpret and apply this legislation. It is well accepted that the courts' apply a "purposive" approach in interpreting provisions, which means the words are read in their fullest context, to ensure that the purpose of the legislation is achieved.[5] There are several techniques used by the judiciary to depart from the ordinary meaning of the words in a statute, so as to avoid unacceptable results.

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3 *Taylor* v *New Zealand Poultry Board* [1984] 1 NZLR 394, 398

4 R Cooke "Fundamentals" [1988] NZLJ 158, 165.

5 This is reflected in s 5(j) Acts Interpretation Act 1924.

These include: strained interpretations; substitution of words; the reading in of words or qualifications; and ignoring words.[6]

As regards legislation that impinges on fundamental rights, the courts can and will give a strained interpretation to minimise any infringements. The judges strive to ensure that an interpretation is given that upholds certain accepted values of our legal system. The interpretation of provisions is affected by values external to the statute, that create "presumptions" of interpretation, and could be termed a judicially created Bill of Rights. They do not stand still, and can adapt with changing times, and new ones can come into existence. This can be shown by the increased attention given to the principles of the Treaty of Waitangi and the law of Maori rights and interests.[7]

This method of interpretation is rationalised by arguing that these factors are guides to establishing parliamentary intent. The argument is that Parliament would not have intended to legislate in contradiction to these rights, hence an interpretation that is consistent with them is given. However, sometimes these factors cut directly across the parliamentary purpose.[8]

These values have been held to include: liberty, freedom of property, the right to a fair hearing and access to the courts, the presumption against retrospectivity, and privacy, to name just a few. Some recent cases illustrate these values being incorporated into the interpretation of legislation.[9] The liberty of the subject is a strong value, and legislation has been construed narrowly so this value is infringed as little as possible. Thus, if a penalty is extraordinarily harsh, the judges tend to find loopholes in the legislation to avoid convictions.[10] Furthermore, limitations have been placed on provisions allowing the police to search and obtain information from arrested persons.[11] In *Perkins* v *Police* [12] it was stated:

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6 For a discussion of this and examples see J F Burrows *Statute Law in New Zealand* (Butterworths, Wellington, 1992) 150-158.

7 In *Huakina Development Trust* v *Waikato Valley Authority* [1987] 2 NZLR 188, a statute which made no direct reference to treaty or Maori issues was read to require such a reference.

8 Above n 6, 159.

9 These examples are taken from above n 6, 160-164.

10 See *R* v *Munks* [1964] 1 QB 304.

11 See *Moulton* v *Police* [1980] 1 NZLR 443; *Perkins* v *Police* [1988] 1 NZLR 257.

12 Above n 11, 261.

> The police must be ever conscious of the limits upon their statutory powers and the courts must preserve the balance which was the aim of the legislation so that personal freedom, privacy and dignity are not infringed beyond the extent prescribed in the greater public interest.

Another value is the right to a fair hearing, and the rules of natural justice have not been found to be easily excluded by a statute determining administrative tribunal procedures.[13] Furthermore, "privative clauses" that attempt to disallow tribunal decisions to be reviewed by a court, have received very narrow constructions.[14] Privacy has often been an important factor in construing a statute, and protection of this value has resulted in strict constructions. For example, in Acts conferring official powers of search and questioning.[15]

Another presumption is that Parliament does not intend to legislate contrary to principles and obligations of international law. This allows scope for construing provisions so they are in accord with international fundamental rights of which there is a developing jurisprudence, even though the legislation is not enacted to directly give effect to these rights and obligations.[16]

These values have lead to: artificial constructions of the text in an Act;[17] narrow constructions of general words;[18] reading in of implied qualifications to absolute statutory provisions;[19] and the upholding of common law rules alongside an Act.[20]

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13 See *Welgas Holdings Ltd* v *Commerce Commission* [1990] 1 NZLR 484.

14 See *New Zealand Waterside Workers' Federation Industrial Association of Workers* v *Frazer* [1924] NZLR 689; *New Zealand Engineering Union* v *Court of Arbitration* [1976] 2 NZLR 283.

15 See *Moulton,* above n 11; *R* v *Doe* (1985) 1 CRNZ 506; *R* v *La Hood* [1989] 3 NZLR 616; *New Zealand Stock Exchange* v *Commissioner of Inland Revenue* [1990] 2 NZLR 120.

16 See *Police* v *Hicks* [1974] 1 NZLR 763, 766; *Van Gorkom* v *Attorney-General* [1977] 1 NZLR 535, 542-543; *Department of Labour* v *Latailakepa* [1982] 1 NZLR 632, 635-636; *Commissioner of Inland Revenue* v *JFP Energy Incorporated* (1990) 12 NZTC 7176, 7179.

17 For example in *Frazer,* above n 14.

18 For example in *Moulton,* above n 11.

19 For example in *Ex Parte Connor* [1981] QB 758.

20 For example in *Perkins,* above n 11.

The courts are attempting to give effect to the parliamentary purpose as well as protecting the citizen from excesses of power. As Gallen J said, a judge to some extent stands between Parliament and the citizen and has obligations to both.[21] Keir and Lawson stated:[22]

> The judges seem to have in their minds an ideal constitution, comprising those fundamental rules of common law which seem essential to the liberties of the subject and the proper Government of the country ... they do not override the statute, but are treated, as it were, as implied terms of the statute.

It has been stated that judges are "finishers, refiners and polishers" of legislation,[23] and they exercise "quality control" over it.[24] Thus, "context" includes giving effect to the values underlying the statute and the values of wider society. It is submitted that interpreting statutes so as to give effect to wider values of society, is similar to reviewing legislation which contradicts these values. It is just an indirect way of doing so. However, there is a limitation as provisions can only be legitimately interpreted to accord, as far as possible, with these values, and the interpretation must be realistic. Parliament can still enact legislation expressly overriding these rights.

The Bill of Rights contains an express provision that statutes will, where possible, be interpreted consistently with the rights contained in the Bill. This is recognition in statutory form of the influence of values in interpretation of provisions. Many of the rights are similar to the judge-made Bill of Rights used prior to the enactment of this statute.

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21 See New Zealand Law Commission *Legislation and its Interpretation - Preliminary Paper No 8* (Wellington, 1988) 146. This consideration gave the Law Commission reason to consider whether a modernised version of s 5(j) Acts Interpretation Act 1924 ought to make express reference to these values. See New Zealand Law Commission *A New Interpretation Act - Report No 17* (Wellington, 1990) 24-31.

22 D L Keir & F H Lawson *Cases in Constitutional law* (5ed, Clarendon Press, Oxford, 1967) 11.

23 *Corcoraft Ltd* v *Pan American Airways Inc* [1969] 1 QB 616, 658.

24 G Morris et al *Laying Down the Law* (2ed, Butterworths, Sydney, 1988) 103.

## III New Zealand Bill of Rights Act 1990

The Bill of Rights Act is significant in four respects. Firstly, the interpretation of the sections is a further illustration of how the judiciary can lessen the effect of impinging legislation by interpreting it to be consistent with the rights upheld in the Bill of Rights. Secondly, it represents an attempt to create a statutory power for the judiciary to review legislation. Thirdly, it will operate as a constraining influence on proposed legislation put before Parliament. Finally it will provide grounds for the opposition and the public to criticise both proposed and existing legislation.[25]

### *A Background*

The Bill of Rights was enacted in July 1990. This was the result of a White Paper introduced in 1985 by Geoffery Palmer, the policy being that the New Zealand system of government was in need of improvement, given the small Parliament and the absence of a second house. It was intended to have a dual role. Firstly, new limits would be placed on the powers of government, and secondly it was to play an educative role for the public, so they can measure government's performance against set standards. An awareness of our basic rights, coupled with a desire to uphold them, is an essential weapon in our armoury against a powerful government.

The proposed Bill was to be entrenched, to make it supreme law.[26] The reasons given in the White Paper for such a measure included: the extensive powers of Parliament and government combined with the limited controls on these powers;[27] the danger of erosion of our rights, albeit small erosions over time; the growing and very extensive role of the state; implementation of New Zealand's international

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25 B V Harris "The Constitutional Base" in H Gold (ed) *New Zealand Politics in Perspective* (3ed, Longman Paul Ltd, Auckland, 1992) 56, 72-73.

26 This would mean it could not be repealed or altered by an ordinary Act passed by a simple majority. This would require 75% of the Members of Parliament or a majority at an electors referendum.

27 The powers of government are large, and a general election is a blunt instrument which cannot give judgement on particular issues. See *A Bill of Rights for New Zealand: A White Paper* [1985] AJHR Vol 1 A.6, 27 para 4.7.

obligations;[28] the danger in waiting for the flood before we build the dam; and because of the examples of other countries.

The White Paper acknowledged that no Parliament we are likely to have in the future is going to attempt to sweep away basic rights. For example, it is quite absurd to state that Parliament will contemplate an Act declaring all blue eyed babies must be murdered. The problem lies in the continual danger of the executive making small erosions of these rights. Each step makes the next one easier. The need of implementing an array of policies has given way to personal rights and freedoms.[29]

This measure would have instituted a radical constitutional change in allowing judicial review of legislation, and an increased political role for the senior members of the judiciary. It would have been a direct attack on parliamentary sovereignty. This role was to be granted to the judiciary in recognition of the fact that:[30]

> The role of the courts in modern society is a changing role ... It is for the judiciary to ensure that the powers of the executive and the legislature are contained within their respective spheres and that the rights of the citizen are not overborne by the powers of the state.

The purpose is to establish a legal safeguard to be administered in conjunction with the existing safeguards. It was believed that there was a "political market" for such a document.[31] However, it was seen as essential that there be a public consensus before such a measure was introduced. That consensus was not to happen. Four hundred and thirty-one submissions were received, and the proposal that there be judicial review of Acts of Parliament was unacceptable to many people.[32]

Some caveats need to be made to this statement. Firstly, on a reading of the submissions it seems that many of the people opposed to entrenchment, were

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28 Such as our ratification of the International Covenant on Civil and Political Rights in 1972.

29 Above n 27, 27 para 4.8-4.10.

30 Sir Ronald Davison "The Role of the Courts in Modern Society" (1979) 4 OLR 277.

31 G Palmer *New Zealand's Constitution in Crisis* (John McIndoe Ltd, Dunedin, 1992) 52-53.

32 For the arguments for and against an entrenched Bill of Rights see Appendix 1.

adamantly opposed to a Bill of Rights at all. Seemingly only one third of the total submissions mentioned the "power given to the judiciary" as a reason for opposing the proposal. One submission stated that: "the power should not be shifted from 'Parliamentarians elected to Judiciary appointed' thus depriving John Citizen of his democratic voting right which can change a government every three years."[33] Such a statement can be analysed in light of the conclusion of the National Council of Women who observed that:[34]

> A small but not insubstantial number of replies were of doubtful value because of evident ignorance of how the New Zealand system of government works beyond the legislature. This was particularly, but not exclusively, in relationship to the proposed function of the courts; many seem unaware of the whole field of administrative law. We consider that before effective consent can be given to the Bill of Rights, steps must be taken to educate the electorate on the processes of government.

Another illustration was the New Zealand Law Society's opposition to the Bill of Rights. Given that a poll of its members revealed that only 6 per cent believed they had a comprehensive understanding of the Bill, this leads one to believe that an important reason influencing opposition was a lack of understanding of our system. If lawyers had not familiarised themselves with such an important document, one does wonder about the extent of the knowledge of others who forwarded submissions.

Because of this opposition the Justice and Law Reform Committee,[35] recommended that the Bill of Rights only be enacted as an ordinary statute. Moreover they commented that the community as a whole has a limited knowledge of fundamental human rights issues and the protection they deserve, and a limited understanding of the role for the judiciary. The policy behind the resulting ordinary statute is that it will (and does) provide some necessary checks and balances, and it performs an educative function. This is obviously something that the public of New Zealand will only benefit from.

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33 *Submissions on a Bill of Rights for New Zealand: A White Paper* [1985] vol 4, 339W.

34 *Interim Report of the Justice and Law Reform Committee on the Inquiry into the White Paper - A Bill of Rights for New Zealand* [1986] AJHR vol X 1.8A, 22.

35 *Final Report of the Justice and Law Reform Committee on a White Paper: A Bill of Rights for New Zealand* [1988] AJHR vol XVII 1.8C.

Parliamentary sovereignty is enshrined in the Act, as section 4 means that inconsistent legislation must nevertheless prevail thereby preventing the judiciary from having a power to review legislation. In the future there may be support for an amendment to the Act to give it status as an entrenched document, although this will depend on how the judiciary has acted, and are perceived to have acted, under the present Bill of Rights.

### *B Practical Effects*

The more important question to ask is what practical effect has the Bill of Rights had. To some, the heart of the Bill of Rights was destroyed when it was deprived of constitutional status as superior law. They forecasted that it would not have any practical effect. It is fair to say that they have been proven wrong. The manner in which the judiciary have interpreted this piece of legislation shows that it will be important. As Palmer states,[36] it sends a message to government that certain kinds of laws should not be enacted.

The combined effect of a purposive approach[37] giving full effect to the spirit of the contained rights, a principle of effectiveness that entails giving full measure to human rights guarantees, and the recognition of the relevance of international materials in this area,[38] has given another tool to the judiciary to review legislation in an indirect manner. This therfore gives them a powerful role as a protector of human rights, notwithstanding that the constitutional document they are interpreting is not superior law, and upholds parliamentary sovereignty.

#### *1 Interaction of Sections 4, 5 and 6.*

The operational provisions contained within the Bill of Rights are sections 4, 5 and 6. An analysis of these sections and appropriate cases will illustrate the extent of

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36 Above n 31, 58.

37 *Palmer* v *Superintendent of Auckland Maximum Security Prison* [1991] 3 NZLR 315, 321, per Wylie J. The Court of Appeal took the first opportunity to confirm such an approach in *Flickinger* v *Crown Colony of Hong Kong* [1991] 1 NZLR 439, 440. Subsequent cases have all confirmed this generous interpretation which will involve a broad inquiry examining the values underlying the rights.

38 A Shaw and A Butler "The New Zealand Bill of Rights Comes Alive (I)" [1991] NZLJ 400.

the practical power encapsulated. Firstly, it is necessary to set out the three provisions.

> **4. Other enactments not affected** - No court shall, in relation to any enactment (whether passed or made before or after the commencement of the 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.

It is submitted that there are two techniques the judiciary have adopted in applying these sections to statutes to give themselves maximum powers. Firstly, the approach taken to sections 4, 5 and 6 that allows section 4 to be considered only in limited situations. Secondly, the adoption of interpretations that fit with the Bill of Rights, even if this means going against the previous interpretation of a section or statute. The problem with the judiciary determining such issues as applicability of a Bill of Rights, or whether a statute infringes a fundamental human right, is inevitably the diversity of approaches favoured by different personalities in the judiciary. The case law under the Bill of Rights is by no means an exception.

The most important cases on how to interpret the interaction between sections 4, 5 and 6 are *Ministry of Transport* v *Noort* ; *Police* v *Curran* ,[39] two cases involving the right to a lawyer in breath and blood alcohol investigations. The lower court applied section 4 meaning that sections 58A, 58B and 58C of the Transport Act 1952 were determined to be inconsistent with the Bill of Rights, and they were to prevail. In the Court of Appeal there was unanimity as to the result, although the five judges were split three ways as to the reasoning, as they foresaw differences in

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39 [1990-1992] 1 NZBORR 97.

the role of section 5.[40] This is understandable given the difficult wording of the sections, which states that section 5 "is subject to section 4."

Cooke P held that section 5 is only concerned with limits on rights, and was irrelevant when the court is dealing with a statute as section 4 prevails.[41] His Honour used his own assessment to limit the right and as there was no inconsistency between the Transport Act 1952 and the limited rights it was not necessary to apply section 4, 5 or 6. This analysis has been described as a "rather original approach." It affords section 4 more authority than it ought to have, while giving an extremely limited and primarily negative role to section 5.[42]

Gault J also believed section 5 was irrelevant for issues concerning statutes, but his reasoning was that it is not the courts' function to determine whether a limitation is reasonable or not.[43] Therefore a right or freedom will be read down under section 6 so it can be given effect to, consistently with the other enactment. For these two judges the courts' role is fixed by sections 4 and 6. Although, both acknowledge that it would not be permissible to invoke section 4 without first exhausting the possibility of reconciling the statutes under section 6. With respect, these does seem something inherently wrong with an approach that requires that section 5, the Bill of Rights' own statement on the reasonableness criteria, be ignored in favour of a judge's personal assessment as to the limits.[44]

The majority did assign a role to section 5 in analysing an infringement provided for by a statute. Richardson J (McKay J concurring) treated section 5 as an abridging provision. The first inquiry is whether there is a justified limitation prescribed by law. Thereafter section 6 will only apply if the limitations imposed are unreasonable in terms of section 5, and section 4 will only apply if the enactment

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40 The result was that suspects should be told of a right to telephone a lawyer. Although Gault J, the dissenting judge, would have dismissed the case as they had not established that they were not told of a right to a lawyer. However, in obiter dicta he appears to agree with the other judges.

41 Above n 39, 143-145. Although it is relevant in common law issues, and when the Attorney General is performing his function under s 7.

42 See J Elkind "On the Limited applicability of Section 4, Bill of Rights Act" [1993] NZLJ 111, 114.

43 Above n 39, 176-177.

44 See P Rishworth & S Optician "Two Comments on *Ministry of Transport* v *Noort*" [1992] NZRLR 189, 196.

and the right cannot be read consistently, even following the modification of the right.[45] In other words section 4 only falls for consideration when following the application of sections 5 and 6 there is a necessary inconsistency between the Bill of Rights and the other enactment. The approach of Hardie Boys J is similar, although he employs section 6 first in order to ascertain whether the enactment and the rights in their entirety can be read consistently. If this is impossible, section 5 is used to read down the right, so it can be read consistently. Failing this, section 4 must prevail.

The consensus among the commentators is that the majority judges articulated the correct approach.[46] Some of the other cases have followed a similar approach, by emphasising section 6 instead of section 4. This type of technique that focuses on section 6 is a method that has been and can be used to limit the effect of legislation so that it reflects consistently with our fundamental human rights.

However, not all the judiciary have followed this approach, and some have been much quicker to find a section of another piece of legislation as inconsistent with the Bill of Rights.[47] Alternatively section 4 has been applied, instead of first considering sections 5 and 6.[48] A further approach has been to recognise that section 4 only excludes a right or freedom where "on no reasonable interpretation of

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45 Above n 39, 158-159. The advantage of this approach is that it gives full effect to s 5, allowing it to be used for the purpose for which it was intended.

46 See B Forbes "The New Zealand Bill of Rights Act 1990: Does it have Force or Effect" Unpublished, Legal Writing Requirment, VUW, 1992, 13; P Rishworth and S Optician above n 44, 195; J Elkind above n 42, 111; F M Brookfield "Constitutional Law" [1992] NZRLR 231, 237-240.

47 For example in *R* v *Waddel* [1992] BCL 139, Thomas J held that ss 18(2) and (3) of the Misuse of Drugs Act 1975 prevailed over s 23(1)(b) of the Bill of Rights. On analysis there is nothing in s 23(1)(b) of the Bill of Rights which impliedly repeals or revokes ss 18(2) or (3) of the Misuse of Drugs Act 1975, and therefore the better approach would have been to apply ss 5 and 6 and find a limitation on s 18.

48 For example in *New Zealand Underwater Association Incorporation* v *The Auckland Regional Council* [1992] BCL 237, the Planning Tribunal held that the long title of the Water and Soil Conservation Act 1967 prevailed over s 20 of the Bill of Rights. Another example is *R* v *Hoy* Unreported, 6 December 1991, Court of Appeal, CA 315/91, 7 where an argument was advanced that s 23(4) of the Bill of Rights allowed the defendant to refrain from making any statement to the collector of customs, and to be informed of that right. Hardie Boys J cited s 4 and stated "[t]hat section is a complete answer to counsel's submissions."

the other enactment could there be any room for the right or freedom in any form, qualified or otherwise."[49] If the right passes this test (whether qualified or not) then section 6 comes into play, and a consistent interpretation with the Bill of Rights is applied. Then, section 5 is used to strike a balance between the objectives underlying the rights and freedoms with the objectives of the other enactments.[50]

It is submitted that if sections 4, 5 and 6 are applied as Richardson J proposed, the potential of the Bill of Rights is very strong. If sections 5 and 6 are applied as they ought to be, then the application of section 4 will hardly ever arise.[51] Elkind believes that section 4 should only arise on occasions in which the Bill of Rights is clearly inconsistent with earlier legislation. With respect, this misses the point. The combination of sections 4, 5 and 6 means there is nothing stopping Parliament from passing inconsistent legislation. It can be argued that Parliament would not have intended to enact an inconsistent meaning, but this argument only works if a consistent interpretation can be found.

### *2 Section 6*

The importance of section 6 is recognised by Rishworth, who comments:[52]

> In *Noort*, for example, Gallen J commenced his analysis with ss 4 and 5. Section 6 is mentioned only in passing, and in a part of the judgment which comes after his conclusion has been reached. In *Curran*, Doogue J quoted section 6 but noted that no submissions were made upon it by counsel; his judgment focuses on s 4 and mentions s 5 only to say that its "relevance ... for the case ... is not immediately apparent."

This is where the task of the judiciary becomes important, because if they cannot find a consistent meaning with the Bill of Rights, then the inconsistent legislation

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49 This was developed in *Herewini* v *Ministry of Transport* [1993] 2 NZLR 747, 765 where Fisher J followed Hardie Boys J in *Noort* and also built on the view of Rishworth in "Applying the New Zealand Bill of Rights Act 1990 to Statutes: The Right to a Lawyer in Breath and Blood Alcohol Cases" [1991] NZRLR 337, and Rishworth above n 44.

50 Section 6 is the "bridging" section instead of s 5. Brookfield submits that in the end it is doubtful whether the result would be any different. See F M Brookfield "Constitutional Law" [1993] NZRLR 278, 288-290.

51 Above n 42, 111.

52 See Rishworth, above n 49, 339.

overrides. The important question is how far the judiciary are willing to strain an interpretation to find it consistent. As discussed above, "reading down" general words is a time-honoured construction technique, particularly when the statute concerned is impinging on individual rights or freedoms.[53] Much will depend on the statutory context, the "value" of the right in issue and judicial willingness to uphold the Bill of Rights.[54]

Section 6 is not triggered by ambiguity alone. It extends to any enactment that is capable of being interpreted in more than one way. Burrows[55] suggests a number of ways in which a court can interpret statutory provisions to render them consistent with the Bill of Rights. These techniques include: giving a consistent meaning where the words of an enactment are ambiguous; reading down general language in statutes;[56] giving a liberal and extensive interpretation to provisions so as to comply with the Bill of Rights; where enactments use open-ended expressions like "reasonable," using the Bill of Rights to prescribe the content of reasonableness; the "reading in" of qualifications on statutory powers may sometimes by required; and reading words in a secondary sense, rather than in their primary sense.

An analysis of the cases will show just how the courts have played their role. In the first Bill of Rights case to be heard, *Flickinger* v *Crown Colony of Hong Kong*[57] section 66 of the Judicature Act 1908 was discussed in relation to an application for a writ of habeas corpus. For 90 years this section had been interpreted so that it did not confer a right of appeal in a criminal matter. Moreover the interpretation Flickinger put forward had been specifically rejected in earlier cases.[58] The court adopted this changed interpretation based on section 6 of the Bill of Rights. Although this was obiter in that the court found nothing had occurred on the facts, contrary to the Bill of Rights, it is a radical step to take.

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53 Above n 6, 339.

54 P A Joseph *Constitutional and Administrative Law in New Zealand* (Law Book Co Ltd, Sydney, 1993) 867.

55 Above n 6, 339-341.

56 In recognition that the various rights in the Bill of Rights have been declared fundamental by Parliament, and therefore ought to be treated as such.

57 [1991] 1 NZLR 439.

58 *R* v *Clarke* [1985] 2 NZLR 212, had confirmed the long standing rule, that an appeal did not lie under which is now s 66 of the Judicature Act 1908, in a criminal matter.

Support for this change can be found in other cases that have adopted the same approach regarding section 66.[59]

*R* v *Phillips* [60] points against such an approach. Although it was possible to construe section 6(6) Misuse of Drugs Act 1975 consistent with the right contained in section 25 of the Bill of Rights, even if only just, it was held that the clear but (arguably) infringing meaning was to be adopted.[61] Otherwise a strained and unnatural interpretation would be adopted, which the court is not justified in giving.

There have been many cases in which section 6 has been applied.[62] However, there have also been cases that have applied section 4, in recognition that the courts have no power to declare enactments invalid.[63] The differences highlight the variety of approaches being taken by the judiciary members. It is submitted that if the courts use this tool properly it will become very important. This entails firstly testing a provision against the criteria in section 5,[64] and then, if it is found there is

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59 *O'Connor* v *R* Unreported, 16 November 1990, Court of Appeal, CA 305/90, "assumed without deciding" that the Bill of Rights had that effect, and *Callaghan* v *Superintendent Mt Eden Prison* [1992] 1 NZLR 541 left the point open.

60 [1991] 3 NZLR 175.

61 Rishworth argues that if the court had applied s 5, they could have concluded that s 6(6) was not inconsistent with the Bill of Rights. The reverse onus for a burden of proof where a person has to prove they are not suppliers of drugs, operates only after a certain minimum weight of drugs has been found in their possession. This may be reasonable under the *Oakes* test (a Canadian test on s 5 which the courts have expressed a preference for). See P Rishworth "Applying the New Zealand Bill of Rights Act 1990: The First Fifteen Months" in *Essays on the New Zealand Bill of Rights Act 1990* (Legal Research Foundation, Auckland, 1992) 24.

62 For example in *R* v *Rangi* [1992] 1 NZLR 385, the section was neutral on the question of who should prove "reasonable excuse." It was held that the Bill of Rights required the burden to be placed on the prosecution. *Re M* [1992] 1 NZLR 29 held that "public interest" for the purposes of the detention sections of the Mental Health Act 1969, should be interpreted in light of the Bill of Rights.

63 For example *Salisbury* v *McAloon* Unreported, 7 January 1991, High Court, Nelson Registry, CP 62/90, where it was held that the Bill of Rights did not justify the court ignoring or rewriting in some way the detailed procedure provided for by the Summary Proceeding Act 1957. See also *Re S* [1992] 1 NZLR 363.

64 This is important as otherwise the rights may be seen as absolute, and then it will be much easier to find statutes that are inconsistent with the rights contained in the Bill of Rights.

still an infringement, an interpretation consistent with the Bill of Rights can be looked for. Failing this, section 4 will apply.[65]

### *3 Section 7*

The other significant feature of the Bill of Rights, is that it also provides a restraint on the law-making powers of Parliament through section 7, which states:

> **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.

If this section was used so that legislation which infringed fundamental human rights would never be passed, this would be a strong argument for not giving the judiciary a power to review legislation. However, it does not work this way. Although it is a formal disincentive against Parliament legislating in derogation of the Bill of Rights, Parliament can still pass legislation that infringes these rights. Although it will have to be done with conscious knowledge that it will be brought to the attention of the public and the opposition.

There has been a debate whether the reporting function under section 7 shall take account of the limiting effect of section 5. Unfortunately this is another issue in which the Court of Appeal in *Noort* were split on. A majority of the commentators support Richardson J's approach which means that the reporting obligation only arises when there is a prima facie infringement which is not a reasonable and

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65 The same analysis can be applied to situations where a statute confers discretionary power in a form showing Parliament intended rights to be infringed. The question for the court is whether it is a necessary inference from the statute that Parliament intended the discretion to be used in this way. See Rishworth, above n 61, 27-28.

justified limit under section 5.[66] Otherwise the House will be deluged with section 7 reports, accompanied by explanations of section 5 excuses.

In practise the Attorney-General has adopted this approach. There is value in elevating a section 7 report so that Parliament views it as a strong disincentive to enact legislation that will require such action. Ultimately somebody has to determine what is and is not a justifiable limitation, and the present procedure gives responsibility to Departments who have the expertise to be able to independently adjudicate upon limitations on absolute rights.

An interim procedure was put in place by the Attorney-General for scrutinising all legislation.[67] In brief, Bills are scrutinised by the Department of Justice, unless the Bill is being promoted by them and then it is referred to the Crown Law Office. Initially all draft legislation is forwarded to the Department of Justice before it is presented to the Cabinet Legislation Committee, and after it is so presented. Hence, some redrafting occurs at this stage of the process. Bills are then introduced into the House and if an inconsistency is detected by an examining officer, this shall be reported to the Attorney-General and Parliamentary Counsel, with a draft report for the Attorney-General to present to the House.[68]

Some examples of legislation in which a section 7 report has played a part in changing legalisation, illustrate the practical effect of this provision. Firstly, in late 1990 the Minister of Justice was determining the form for legislation bringing in

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66 See Burrows, above n 6, 871-872; J McGrath "The Bill of Rights and the Legislative Process" in *The New Zealand Bill of Rights Act 1990* (Legal Research Foundation, Auckland, 1992) 102-103; Rishworth "How does the Bill of Rights Act Work" [1992] NZRLR 189, 198. Although Fitzgerald in "Section 7 of the New Zealand Bill of Rights Act 1990: A Very Practical power or a Well-Intentioned Nonsense" (1992) 22 VUWLR 136-169, favours the approach of Cooke P, which allows s 7 reports without reference to s 5, as it is preferable for the legislature to apply s 5 in the public arena, with an opportunity for public input.

67 Memorandum "Monitoring Bills for Compliance with the New Zealand Bill of Rights Act 1990" from Attorney-General to all Ministers and Chief Executive, 9 April 1991. This has not been amended and continues to apply: Personal Correspondence to Writer, Paul East Attorney-General, 15 August 1994.

68 This is the procedure for government Bills. Non-government Bills are scrutinised by the Department of Justice immediately following introduction and then the same procedure is followed to relay the results to the Attorney-General.

new restrictions on the grant of bail. The proposal was for the courts to refuse bail to any person charged with a "specified offence" (certain violent crimes) who has two or more previous convictions for such an offence. This, it was argued, contravened section 24(b) of the Bill of Rights because of the substantial restriction and the curtailment of the courts' discretion. If the provision had been introduced, a section 7 report would definitely have been required. The Minister of Justice was not prepared to introduce this knowing that a report would be given, and therefore the provision (now section 318 Crimes Act 1961) was amended to be consistent with the Bill of Rights.

The Transport Safety Bill, now the Transport Amendment Act (No 3) 1992, which permits random breath testing of motorists, was the first case where the Attorney-General gave a section 7 report concerning government sponsored legislation. The report concluded that clause 17 was inconsistent with sections 21 and 22 of the Bill of Rights. The reasoning being that the evidence was inconclusive in establishing a clear link between stopping motorists and the underlying road safety objective. Hence, it is inconsistent with the Bill of Rights, and is not saved by section 5.

The House of Representatives passed this Bill despite the report, due to several opinions that the random testing provision did not contravene the Bill of Rights.[69] There has been a debate on whether this provision does violate the Bill of Rights. Elkind[70] supports the Attorney-General's report and Rishworth[71] does not, because he believes that the legislative goal was manifestly important while the intrusion of individual liberty was relatively slight, and that Parliament is entitled to believe that random breath testing will reduce deaths.[72]

It is beyond the extent of this paper to enter into the debate of the merits of this Act. The point is simply illustrative of the fact that as Parliament is the ultimate judge, they can still enact legislation which has been given a section 7 report. Although it has been argued that the legislation:[73]

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69 See J Elkind "Random Breath Testing, the Bill of Rights and the International Covenant" [1993] NZRLR 335, 337.

70 Above n 69, 335.

71 P Rishworth "Random Breath Testing: A Brief Response" [1993] NZRLR 341.

72 Above n 71, 342.

73 Above n 54, 874.

> Must assume a high level of political significance before most Ministers would entertain promoting legalisation in the face of the Attorney-General's report. The Minister would want to weigh carefully the merits of the legislation against any political cost in defending it.

There have been two other government measures that have attracted a section 7 report. Firstly, the Films, Videos and Publications Classification Bill, contained a clause that made it an offence for any person to possess an "objectionable" publication. This, the report stated was inconsistent with section 26(1) of the Bill of Rights, which states that no one shall be liable for an offence, if it was not an offence at the time it occurred. This measure was enacted anyway. Secondly, the Children Young Persons & Their Families Amendment Bill, contained a provision on "mandatory reporting" of child abuse, and the report held this was inconsistent with section 14 of the Bill of Rights, which provides for the freedom of expression. Although this reporting requirement has been removed from the legislation, the main reason for this is the inability of the system to cope, rather than because of the section 7 report.[74]

Parliament is the ultimate judge as a section 7 report can and has been ignored. There may be political costs involved in ignoring such a report, but how much will these compensate for the injustice afforded to people? The Attorney-General points out that there is a need for sufficient time to vet a draft bill, as issues need to be identified and addressed at the earliest opportunity.[75]

Another weakenss in the section 7 process is the absence of post-introduction scrutiny procedures. Section 7, as it stands, applies to what is done at the time the Bill is introduced. This may bear little relation to the Bill in its final form. McGrath states: "It would be a matter of concern if a practice emerged whereby changes to

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74 Information from Personal Correspondence, above n 67. There has also been two reports by the Attorney-General in relation to non-governmental measures, that have caused parts of legislation to be withdrawn. In the Napier City Council (Control of Skateboards) Empowering Bill the Select Committee recommended the Bill should not proceed for reasons including non-compliance with s 23 of the Bill of Rights. In the Kumeru District Agricultural and Horticultural Society Bill the Select Committee omitted a clause once the Attorney-General pointed out that it infringed s 27(a) of the Bill of Rights.

75 Information from Personal Correspondence, above n 67.

the Bill of Rights Act protections were to be made at stages subsequent to introduction."[76]

Other weaknesses include the possibility that human rights issues will be missed completely, or the absence of a section 7 report will remove any misgivings about the possibility of an infringement.[77] In defence of the process, Burrows argues that Paul East's stand on the Transport Safety Bill may establish a constitutional convention for future Attorney-Generals, through his unqualified acceptance of the duty to report on Bills.[78]

### *C Conclusion*

The courts have embraced "the spirit" of the Bill of Rights and its powers. A recent Court of Appeal case has highlighted that the judiciary regards the Bill of Rights as an important document that they can use.[79] Our ordinary statute Bill of Rights is another mechanism for applying the techniques of "interpreting legislation." The problem of using this indirect technique is that there are limitations. Firstly, the diversity of approaches in applying the operational provisions means that section 4 can come into play too quickly. Secondly, section 6 interpretations must not be strained. Thirdly, section 7 reports may be a significant restraint, but they can by overridden. In the end Parliament can still enact legislation inconsistent with fundamental rights.

The Bill of Rights is a positive step in erecting formal barriers to Parliament's law-making powers, in that it has made it more difficult for the rights contained to be displaced by the "ordinary legislative process." However, parliamentary sovereignty still reigns supreme. The Bill of Rights is clearly a beneficial constitutional reform, but the question is whether it goes far enough.

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76 See McGrath above n 66, 104.

77 See Fitzgerald above n 66, 143.

78 Above n 6, 873-874.

79 For the first time compensation was awarded for a breach of a rights. The absence of a remedies provision was not an impediment to the courts ability to "develop the possibilities of judicial remedy." See *Baigent* v *Attorney-General* Unreported, Court of Appeal, CA 207/ 93.

# IV THE NEW ZEALAND CONSTITUTIONAL SITUATION

To examine the wider question of whether a direct power should be implemented, the New Zealand constitutional situation needs to be examined, because the most forceful impediment to an enactment of a direct power for reviewing legislation, is parliamentary sovereignty. It is only once we examine this doctrine, that we can determine further questions of why we need an ability to review legislation, and whether the judiciary should be the ultimate check on Parliament.

## *A The Constitution Act 1986*

In New Zealand we have no single comprehensive written document that contains the ground rules by which government is conducted. The closest we have is the Constitution Act 1986, which preserves the essence of Westminster Government and provides a basic guide to the composition and powers of the institutions.[80] However, it is a fragmented document as much of the detail is found elsewhere. Furthermore, it is not superior law, as it is an ordinary statute.[81] At face value the Act gives no formal limitations on the laws Parliament can make. Section 15(1) provides: "**Power of Parliament to make Laws** - (1) The Parliament of New Zealand continues to have full power to make laws."

There are no guarantees regarding fundamental rights and liberties, so laws that are repressive and unjust can be passed by Parliament. Sir Geoffery Palmer believes that the only checks are political. He states that: "Parliament could pass a law requiring all blue-eyed babies to be murdered. It has not done so. It would be wrong to do so. But in theory it can do so." [82]

Harris has described the New Zealand Constitution as having four special characteristics.[83] Firstly it has "missing elements" in that there is no comprehensive written constitution, no entrenched Bill of Rights and no second legislative chamber. Secondly, the Constitution can easily be altered by Parliament. Thirdly, it is of a relatively unsystematic nature as there are a variety of sources, many

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80 See G Palmer *Unbridled Power* (2ed, Oxford University Press, Auckland, 1987) 3.

81 See above n 31, 29.

82 Above n 31, 50.

83 B V Harris "The Constitutional Basis" in H Gold (ed), above n 25, 75-76.

aspects are inherited from Britain, and it was developed in an unplanned and spontaneous manner. Lastly, there is a difference between the constitutional position in law and the operation in reality. The consequence is that the Constitution is not easily understood.

### *B Parliamentary Sovereignty*

#### *1 History*

The development of the modern views of sovereignty began with Hobbes, who stated that a sovereign's powers are indivisible.[84] Professor Dicey took this idea of absolute sovereignty and located it in Parliament. Thereafter, English constitutional theory received into New Zealand holds that Parliament is sovereign and can legislate on any topic, because there are no fundamental laws under parliamentary sovereignty. The justification behind parliamentary sovereignty is that the people elected Parliament, therefore its supremacy means, in effect, the sovereignty of the people.[85] There is only one limitation on Parliament's legal power; it cannot bind its successors.

The flipside of this is that the judiciary have to obey and apply what the legislature enact. Theoretically the doctrine of sovereignty is a common law principle. It derives from obiter dicta of judges and writings of jurists. This means it is a common law rule. There are some commentators who disagree with this statement, for example Winterton argues that the assertion that "[p]arliamentary sovereignty is a result of the law declared by the courts" is simply historically inaccurate.[86] He argues that parliamentary sovereignty was established in fact by Parliament, after a long struggle, and not by the courts.

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84 T Hobbes "Leviathan: or, the Matter, Forme and Power of a Commonwealth, Ecclesiastical and Civil" (Basil Blackwell, Oxford, 1957) 213.

85 See G Winterton "The British Grundnorm: Parliamentary Supremacy Re-examined" (1976) 92 LQR 590, 596.

86 G Winterton "Parliamentary Supremacy and the Judiciary" (1981) 92 LQR 265, 273.

There are a number of commentators who support the principle being a common law doctrine.[87] This does not mean it is an ordinary rule of common law, it is in a class of its own as it is the ultimate political fact upon which the whole system of legislation hangs.[88] Every legal system has to have certain ultimate principles upon which all others are derived.[89]

### *2 Legal basis of New Zealand sovereignty*

New Zealand operates under a single set of government institutions, so there is no sharing of sovereignty, as with countries that have a federal division. A unitary state like New Zealand, which has no entrenched laws and no entrenched Bill of Rights is the perfect example of legislative supremacy.[90] Section 15 of the Constitution Act 1986 means an enactment by Parliament is the highest source of law. There is nothing preventing the passing of a law that is totally repugnant to fundamental human rights, and all the courts are permitted to do is apply this latest expression of the will of Parliament.

### *3 Do we need limitations?*

Sir Owen Woodhouse postulates that the sanction against such abuse of power does not lie with the courts, but with public opinion. He states: "The true sanction which ensures continuation [of the supremacy of law] is public opinion."[91] This is true given the dominance of the government and the absence of other safeguards. However, is this enough? Ultimately the Government can be voted out, but surely this comes too late.[92] For example, if Parliament passes an Act which defies

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87 For example, Sir Owen Dixon "The Common Law as an Ultimate Constitutional Foundation" [1957] 31 ALJ 240; HWR Wade "The Basis of Legal Sovereignty" [1955] CLJ 172; TRS Allan "The Limits of Parliamentary Sovereignty" [1985] PL 612.

88 See Wade, above n 87, 187-188.

89 See Dixon, above n 87, 242.

90 In other countries the norm is to have a written constitution embodied in a formal document and protected as a kind of fundamental law against amendment by simple majority in the legislature.

91 O Woodhouse *Government Under the Law* (NZ Council for Civil Liberties, Price Milburn and Co Ltd, Wellington, 1979) 11.

92 Furthermore, the strength of this check is dependent on the ability of the electoral system to translate the will of the people. See M Chen "Remedying New Zealand's Constitution in Crisis: Is MMP Part of the Answer?" (1993) NZLJ 22, 23.

fundamental human rights, by the time the responsible Government is voted out, the rights have already been violated. Furthermore, with absolute powers Parliament can radically amend electoral laws, which may prevent them being voted out.[93] Should we not have a protection that stops this law operating before any breach is made? Many argue that this simply raises an academic argument. The mere possibility that Parliament might attempt to overrule fundamental rights does not mean they will do it.

There are two counter arguments to this. Firstly, powers are not lost by defining them.[94] By stating that Parliament cannot pass these laws does not result in Parliament being powerless; it merely lays down the ultimate limits. Parliament in New Zealand only consists of a single chamber, which means checks that other countries have are lacking. Furthermore, reality shows Parliament is under pressure in passing legislation and frequently is limited in its time to examine the background reasons for the legislation. An English Queen's Counsel summed up the danger in this way:[95]

> During some future period of social tension the sacrifice by Parliament to populism might be the freedom of speech of an unpopular political group; perhaps an increase in violent crimes might stimulate widespread support for the removal of restraints in police powers, or a relaxation of the procedural guarantees for the fair trial of the accused, or more primitive punishment for the convicted.

In reality some kind of constitutional check is needed as our constitutional arrangements mean that the executive has a large share of the power, at the expense of Parliament.[96]

Secondly, an analogy can be made with fire insurance: "The protection is not normally needed, when it is the need arises very suddenly."[97] The mere presence of safeguards to which people can appeal in a future time of crisis, would act as a

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93 Above n 91, 11.

94 Above n 91, 11.

95 A statement made by A Lester, discussed in O Woodhouse *Government Under the Law,* above n 91, 15.

96 This may not be so true under MMP. See discussion below part VI B.

97 A comment by Sir Owen Woodhouse, discussed in P A Joseph & G R Walker "A Theory of Constitutional Change" (1987) 7 Oxford Journal of Legal Studies 155, 165.

sensible limitation upon the executive. Perhaps one of the most fundamental principles in our constitutional system is now in question, in that we require some degree of separation of functions that cannot Parliament cannot upset. New Zealand has been the classic reactive state by uncritical adherence to parliamentary sovereignty. Perhaps it is time we put some limitations in place.

### *C Attacks on Dicey*

As one commentator describes it, we are: "brainwashed ... in [our] professional infancy ... by the dogma of legislative supremacy."[98] Walker[99] states that although there have been obiter dicta that support Dicey's theory of absolute sovereignty, there have been no decisions that have upheld this doctrine in a case where the statute in question made a clear attack on a fundamental constitutional principle. Moreover, there have been some notable decisions in conflict with the doctrine. Dicey did not demonstrate that Parliament was omnipotent, he just stated it was. In fact, Walker describes Dicey's theory as: "like some huge, ugly Victorian monument that dominates the legal and constitutional landscape and exerts a hypnotic effect on legal perception."[100]

In defence of Dicey, he did recognise that there are restraints on Parliament implementing such a law, namely convention, morality, and good faith. However, this misses the point. We should also have a legal restraint as a backstop for denying the enforceability of legislation that overrides human rights, if Parliament chooses to ignore all these other constraints.

There has been something of a controversy concerning the Grundnorm behind the Diceyan hypothesis. Professors Allot[101] and Marshall[102] have both criticised

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98 HWR Wade *Constitutional Fundamentals* (Stevens, London, 1980) 68.

99 G Walker "Dicey's Dubious Dogma of Parliamentary Sovereignty: A Recent Fray with Freedom of Religion (1985) 59 ALJ 276, 276-277.

100 Above n 99, 283.

101 His views about Dicey's theory is that they "fly in the face of 1000 years of talk about fundamental law by Kings, judges, political men and commentators" See P Allot "The Courts and Parliament: Who Whom?" (1979) 38 CLJ 79, 114.

102 He argued that the position established for Parliament in the seventeenth century was one merely of supremacy relative to that of other organs of government, not of legislative omnipotence as such. This is supported by cases such as *Bonham's Case* 8 Co Rep 113b; 77 ER 646, and *R* v *Love* (1651) 5 St Tr 43, 172.

Dicey's theory, and even Blackstone[103] was not willing to state that parliamentary sovereignty was the same as omnipotence. Some believe that sovereignty has become a serious obstacle to constitutional development and that it was never clearly and formally or democratically made part of the constitution.[104]

There are both theoretical and practical objections to absolute sovereignty.[105] The practical objections are the feeling of abhorrence which people have to the notion that the legislature, even if democratically elected, can enact monstrous legislation that is still lawful. Theoretically the doctrine of sovereignty is a common law principle, so arguably it is itself subject to common law elaboration. As Rishworth notes, this idea developed by the judges that Parliament may pass any law it likes, was not referring to laws that are fundamentally unjust.[106] If Parliament cannot abolish itself or control its successors, why stop at these limitations?

There are two issues to address here. Firstly, is it possible for parliamentary sovereignty to be subject to common law elaboration? Judicial obedience to statues, as stated above, is not based on the authority of statute. It reflects a judicial choice based on an understanding of what political morality demands. This so called "grundnorm" lies in the ambit of the judiciary. As Salmond stated, it is always for the courts in the last resort, to say what is a valid Act of Parliament, and this is not determined by a rule of law made by authority outside the courts, it is a political fact.[107]

The boundaries of sovereignty should be determined considering the prevailing moral and political values we accept as fundamental. The doctrine of sovereignty is grounded in the community's political morality, and this is based on "representative democracy," because this is most likely to secure certain fundamental standards of civilised government. Therefore if a Parliament enacts a statute, which undermines the democratic basis of our institutions, it cannot be said that it derives validity from

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103 Discussed in above n 99, 278.

104 Above n 99, 284.

105 See *Builders' Labourers Federation* v *Minister Industrial Relations* (1986) 7 NSWLR 372, 402.

106 P Rishworth "Civil Liberties" in H Gold (ed), above n 25, 143 at 149

107 See Wade, above n 87, 189.

the enactment process. Political morality would direct the judiciary towards resistance rather than obedience.[108]

Some examples will illustrate. If, Parliament enacted legislation abolishing the monarchy or establishing one-party government, or a dictatorship, this would attack the fundamentals of democracy, and it is submitted that it cannot be valid. If Parliament tried to enforce it, the courts could theoretically strike it down, as it would derive no authority from the doctrine of sovereignty. Similarly the same process of reasoning would apply to legislation requiring that all blue-eyed babies be killed, or that all religious minorities be suppressed.

The second issue to consider is whether it should be Parliament who undertakes any elaboration of the doctrine. Can the rule of common law that states the courts will enforce statutes itself be altered by a statute?[109] Salmond answers this question by stating:[110]

> But whence comes the rule that Acts of Parliament have the force of law? This is legally ultimate ... it is the law because it is the law, and for no other reason that it is possible for the law itself to take notice of. No statute can confer this power upon Parliament for this would be to assume and act on the very power that is to be conferred.

The rule is above and beyond the reach of statute, for the very reason that it is itself the source of the authority of statute.

A question posed by Wade, is whether there must be a legal break with the past (such as a revolution) before the traditional doctrine of sovereignty can be changed.[111] Dispelling with a constitutional fundamental could very well in itself create a revolution. It is preferable to have a change in doctrine undertaken by the judiciary, that is available to prevent this from happening. Therefore there is, at least in theory, authority for the judiciary to review infringing legislation. This is based on the origins of parliamentary sovereignty.

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108 See Allan, above n 87, 622 –623.

109 See Wade, above n 87, 186.

110 G Williams *Jurisprudence* (10ed, Sweet & Maxwell, London, 1947) 155.

111 Above n 98, 44.

## V THE EXTENT OF PARLIAMENTARY SOVEREIGNTY IN OTHER JURISDICTIONS

The defiance against absolute sovereignty of Parliament is illustrated by the jurisdictions that have empowered the judiciary to determine human rights issues. This is done through the supremacy of the Constitution, which is tantamount to a restriction on sovereignty for the benefit of the individual. There has been a move away from Parliament having complete and absolute law making powers concerning human rights. A primary function of the judiciary in any country that has a proper Constitution, in which no one organ has unlimited power and there is legal machinery to prevent violation, is to adjudicate on the constitutionality of Acts.[112]

### *A United States*

The United States is a constitutional democracy, as their written constitution is supreme law. It is well settled that the courts have an inherent authority to strike down statutes that transcend the limits imposed by the federal and state Constitution.[113] The very purpose of the Constitution is to prevent experimentation with fundamental rights. The first 10 amendments to the Federal Constitution are, in themselves, a Bill of Rights that aims to protect citizens against infringement.[114] The judiciary have considered issues that, in New Zealand would be considered political and could only be resolved by Parliament. Consequently, the United States Supreme Court has been called the "world's first human rights tribunal" because of the crucial role played by them in determining the agenda of human rights.[115]

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112 Above n 98, 98.

113 *American Jurisprudence 2d* (2ed, Lawyers Co-operative Publishing Co, New York, 1979) vol 16 S 150.

114 These rights include: freedom of religion, speech and assembly; freedom to keep and bear arms; freedom from unreasonable search and seizure; guarantees of procedural laws such as due process of law; rights in a criminal prosecution such as the availability of defence counsel, a speedy trial; right of trial by jury; and guarantees against excessive and cruel punishment.

115 M Kirby "The Role of the Judge in Advancing Human Rights by Reference to International Human Rights Norms" (1988) 62 ALJ 514 , 516.

### *B Canada*

The Canadians enacted the Charter of Rights and Freedoms in 1982, which is supreme law, in that judges can strike down legislation inconsistent with the rights contained in the Charter.[116] Many of the concepts, like those of the European Convention and of other Commonwealth Constitutions, share their origin in the American Bill of Rights. The result is that the judiciary adjudicate upon and uphold fundamental rights. The only exception is section 33 which explicitly confers on Parliament and the provincial legislatures the power to enact laws notwithstanding certain provision of the Charter. Three requirements must be satisfied to ensure that the legislative decision to enact an override clause is taken with full knowledge of the facts, thereby encouraging public discussion of the issues. Such a clause can only remain for a maximum of five years, but it can be re-enacted. This power has been used sparingly by the legislature.[117]

### *C Britain*

The concept of parliamentary sovereignty is much stronger in Britain, in comparison with countries that have an entrenched constitution and/or an enshrined Bill of Rights, because Britain has neither.[118] There are no "fundamental rights" in the strict sense, as legislative supremacy means there are no legal limits on Parliament.[119] Lord Reid summarised the position quite clearly:[120]

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116 These rights include: fundamental freedoms (eg) of religion, expression and association; democratic rights (eg) right to vote; mobility rights (eg) to reside in any province; legal rights (eg) search and seizure; criminal proceedings; treatment or punishment; equality rights; minority language educational rights; rights of the aboriginal people (eg) affirmation of existing and aboriginal treaty rights.

117 See L Zine *Constitutional Change in the Commonwealth* (Cambridge University Press, Cambridge, 1991) 71. The reason section 33 was adopted was because most of the provinces would not have agreed to the Charter without it.

118 It is interesting to note that the most famous declarations of individual rights are ultimately traceable to inspiration drawn from English constitutional sources, such as: The Magna Carta (1215); Declaration of Bill of Rights (1689); Petition of Right (1928) and from legal and philosophical treatises on fundamental law and so called natural law.

119 O Hood Phillips *Constitutional and Administrative Law* (7ed, Sweet & Maxwell, London, 1987) 39.

120 *Pickin* v *British Railways Board* [1974] AC 765, 782.

> In earlier times many learned lawyers seem to have believed that an Act of Parliament could be disregarded in so far as it was contrary to the law of God or the law of nature or natural justice, but since the supremacy of Parliament was finally demonstrated by the Revolution of 1688 any such idea has become obsolete.

This proposition is questioned by Mann who asks whether a statute depriving Jews of their British nationality, or prohibiting marriages between Christians and non-Christians, or dissolving marriages between blacks and whites, would really be upheld. He makes reference to a case where four Law Lords held that a similar German statute should be condemned as "so grave an infringement of human rights that the courts of this country ought to refuse to recognise it as a law at all."[121]

Although Britain does not have a written Bill of Rights as such,[122] they are obliged to follow their international commitments that guarantee human rights and fundamental laws. There is a strong movement both inside and outside the Commonwealth to define these. The jurisprudence and case law on the European Convention on Human Rights is used in developing the law, even though it is not incorporated domestically.[123] However, this is only an aid to interpreting ambiguities.

The United Kingdom is also a party to the European Communities Act 1972, and in *R* v *Secretary of State for Transport, ex parte Factortame Ltd* [124] it was held that any Act passed by Parliament since the European Communities Act, must be read as subject to directly enforceable rights arising under community law. This means a United Kingdom court can suspend the application of an Act if it is incompatible

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121 *Oppenheimer* v *Cattermole* [1976] AC 249, 278.

122 There is some support for a Bill of Rights and written constitution. For example, a Bill of Rights has been passed by the House of Lords twice, but rejected by the House of Commons.

123 J Laws "Is the High Court the Guardian of Fundamental Constitutional Rights" [1993] PL 59, 61-62.

124 [1991] 3 All ER 769. The case involved the Merchant Shipping Act 1988 which was enacted in order to stop "quota hopping" whereby the United Kingdom's fishing quotas were being plundered by fishing vessels flying the British flag but lacking any genuine connection with the United Kingdom. The legislation enacted strict rules governing British fishing vessels which barred 95 such vessels which were Spanish controlled. It was argued that it was unlawful discrimination on the grounds of nationality, contrary to European Community Law.

with European Community law.[125] This case appears to have laid rest to any lingering doubts regarding the acceptance by the British courts, of the supremacy of community law.

A more recent decision[126] has reaffirmed this by holding that a statute passed by Parliament regarding employment was invalid as it was indirect discrimination against women, which was in violation with European Community law. A comment on the case stated:[127]

> Suprising though the result may appear to those not yet aware of the extent of the changes which community law has brought to our legal system, in the light of the *Factortame* decisions ... the outcome here was not really in doubt. United Kingdom courts can use judicial proceedings to strike down Acts of Parliament on the grounds of incompatibility.

Although the courts have not yet decided whether Parliament can expressly override community law, it is argued that the price to pay for such action would be to end the United Kingdom's membership in the European Economic Community.[128]

The *Factortame* decision has significance in New Zealand[129] for what it said about the nature of the law-making powers of the United Kingdom Parliament, in that it is the courts that determine the nature of this power at any particular time. The principles determining law-making powers are not unalterable, as they are capable of changing from time to time.[130] However, there is relatively strong support in the United Kingdom for the benefits of European Economic Community membership, even at the cost of restraining the law-making competence of Parliament.[131]

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125 Editorial "Angling for Supremacy' [1990] NLJ 877.

126 *R* v *Secretary of State for Employment, ex parte Equal Opportunities Commission and Another* Unreported, 8 March 1994, House of Lords.

127 B Napier 'Victory for Part-time Workers" [1994] NLJ 396.

128 B V Harris "Parliamentary Sovereignty and Interim Injunctions: *Factortame* and New Zealand" (1992) 15 NZULR 55, 79.

129 Above n 128, 64.

130 Harris, above n 128, points out that this approach is similar to Sir Robin Cooke's doctrine. See below part VIII.

131 Above n 128, 79.

Outsiders see Britain, in practical terms, as having something in the nature of a Bill of Rights that is interpreted and applied by foreigners.[132] However, it is now beginning to be understood that a written constitution that is respected, provides valuable safeguards which in Britain are completely lacking. This is the reason why there is some support for a Bill of Rights, or a written constitution that would follow the standards set by the European Convention on Human Rights.

### *D Australia*

Australia does not have a written Bill of Rights, although it does have a written constitution, throughout which human rights are scattered. The legislative powers are diminished to the extent provided by the constitution. As no Bill of Rights is contained within the constitution, the judges do not have the power to strike down legislation contrary to human rights. However, there have been attempts to infer in the Constitution a fully fledged Bill of Rights, as implied rights.[133] Murphy J took this to the extreme as he did not relate these rights to any specific provision in the Constitution. Other judges have implied limitations based on the words "peace, welfare and good Government,"[134] although the High Court has held that this does not confer a power to strike down legislation if it does not promote or secure the peace, order or good Government.[135]

## VI A CHANGING PERCEPTION OF THE LAW-MAKING POWERS OF PARLIAMENT IN NEW ZEALAND?

Has New Zealand society become amenable to a change in the law making powers of Parliament, and a lessening of the hold of parliamentary sovereignty? Given the restrictions of the Bill of Rights, the other possibility for a restriction on the law making powers of Parliament is for the judiciary to claim a power at common law. Any change from the Diceyan model to a recognition of a common law limitation is

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132 Above n 117, 71.

133 See discussion below part VII D.

134 Parliaments of the Australian states are far more restricted in their legislative power than the New Zealand Parliament.

135 *Union Steamship Co of Australia Pty Ltd* v *King* (1988) 82 ALR 43.

possible as it is the courts who ultimately decide what "full power to make laws," as contained in section 15 Constitution Act 1986, actually means.[136]

### *A Factors Influencing a Change in Perception*[137]

It is argued that aspects of New Zealand's political and social history over the last twenty years have made the perception of the law-making powers of Parliament amenable to change.

(a) New Zealand is no longer a homogenous society as it is rapidly becoming more diversified and pluralistic regarding issues of religion, culture, race and wealth. Consequently there exists a greater recognition of the need to protect the rights of minorities. As one Court of Appeal judge remarked in the 1980's: "It is a matter of everyday observation that New Zealand society has become more vocal, factional and discordant. There is a scepticism about established institutions."[138] There is a good argument that the protection of the democratic nature of our parliamentary institutions does not work for minority rights, as the "democratic nature" consists of the majority rule. It is argued that it is the courts who protect these groups who cannot gain access to the political process.[139]

(b) A related factor is the rapidly growing recognition of Maori rights, where the Treaty of Waitangi has now achieved a prominent place in the New Zealand Constitution through express recognition of it's principles in statutes,[140] the Waitangi Tribunal decisions, and recognition of customary rights.[141]

(c) The Muldoon administration between 1975 and 1984 posed challenges to constitutional principles. Economic demands of the 1970's signalled the end of

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136 See B V Harris "A Changing Perception of the Law-making Powers of Parliament" (1988) NZLJ 394.

137 These factors have been drawn from Harris, above n 135, and P A Joseph & G R Walker, above n 97.

138 *Donselaar* v *Donselaar* [1982] 1 NZLR 97, 106 per Cooke J.

139 See W Sadurski "Last Among Equals: Minorities and Australian Judge Made Law" (1989) 63 ALJ 474.

140 For example the s 9 State Owned Enterprises Act 1986.

141 *Te Weehi* v *Regional Fisheries Officer* [1986] 1 NZLR 680.

consensus politics,[142] and government by regulation under the Economic Stabilisation Act 1948 became the norm. Calls for restraints upon the executive were heard from academics, lawyers, judges, the Ombudsman and some politicians. The courts in general proved unable to respond as their options were, in reality, limited by the doctrines of precedent and parliamentary sovereignty.[143] What is more, they were limited by the absence of a constitution, Bill of Rights or common law precedent right to justify greater judicial intervention.[144]

This era involved a number of controversies such as: the unlawful suspension of the operation of a statute by the Prime Minister;[145] random street checks by Auckland police to enforce deportation orders under the Immigration Act 1964;[146] the para-military police operation to evict land protesters from Bastion Point; the enactment of the Development (Clyde dam) Empowering Act 1982, overturning a court decision and granting a right to build a dam; the Citizenship (Western Samoa) Act 1982, which removed New Zealand citizenship from Samoans; and the Security Intelligence Service Amendment Act 1977 which created new powers for the interception of private communications.

The Editor of the New Zealand Listener warned:[147]

> The present Government has been frequently criticised for passing laws to restrict the individual freedoms of New Zealanders ... Public rage and Parliamentary disruption about disappearing freedoms are dramatic, largely ineffectual ... It's time to hold public meetings which will urgently explore ways of permanently preserving our present liberties.

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142 NZ grappled with increased energy costs from OPEC; record inflation; loss of primary sector export markets; high international debt servicing; and unemployment.

143 For example in *Fitzgerald* v *Muldoon* [1976] 2 NZLR 615 the Chief Justice condemned extra-Parliamentary law making, but effectively allowed the government six months to pass the proposed superannuation legislation. In *Ashby* v *Minister of Immigration* [1981] 1 NZLR 222 the High Court rejected an application to overturn the Minister's decision to grant entry permits to the South African rugby team in 1981.

144 Although in *Fitzgerald* v *Muldoon* , above n 143, the courts resorted to the Bill of Rights 1688.

145 *Fitzgerald* v *Muldoon* above n 143.

146 Nowhere under the Act is there authority for police to demand evidence of a person's identity of authority to enter or remain in New Zealand in the absence of good cause to suspect an offence against the Act.

147 Editorial, "A Bill of Rights" *New Zealand Listener*, 25 November 1978.

What is to say that a future government would not enact similar legislation? Perhaps if it Parliament understood that breaches of human rights could be overruled by the judiciary, they would not be so quick to overrule court decisions to achieve the desired outcome.

The dilemma for the courts did not disappear with the demise of the Muldoon Government. Under the new Labour Government, radical reforms ensured that administrative and economic power was increasingly passed to outside agencies, and the state became less accountable. The Leader of the Opposition, Jim Bolger claimed they had: "ridden roughshod over citizen's rights."[148] As the political system is inadequate for imposing sufficient restraint, the burden must surely fall on the courts. However, "the doctrine of parliamentary sovereignty dictates a hands-off approach."[149]

(d) There are other pieces of legislation, outside the Muldoon era, which can be cited as examples that would not have survived scrutiny if the judiciary had a power to review legislation.[150] These include several older pieces of legislation[151] and wartime legislation.[152] In more recent times, the Waterfront Strike Emergency Regulations, made pursuant to the Public Safety Conservation Act 1932, prohibited freedom of speech concerning the strike. Although this Act is now repealed it provided an unfettered power to govern New Zealand by regulation. The Whangarei Refinery Expansion Project Disputes Act 1984, gave power to the police regarding an industrial dispute, that ran contrary to the guarantee of freedom of expression and assembly. It was an offence, punishable by imprisonment, to fail to comply with a police direction. Furthermore, section 17 Police Offences Amendment Act 1951 left it to the judgment of the Police Officer to determine the creation of criminal picketing.

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148 Quoted in A McRobie "Electoral System Operations" in H Gold (ed), above n 25, 452 at 458.

149 J Kelsey *Rolling Back the State: Privatisation of Power in Aotearoa/New Zealand* (Bridget Williams Books, Wellington, 1993) 194.

150 These are taken from Palmer above n 31, and K Keith "The Bill of Rights: Reply to a Criticism" [1985] NZLJ 270.

151 Such as the Maori Prisoners Act 1880 and the Tohunga Suppression Act 1907.

152 Although we must remember the period of time, a survey of emergency legislation showed that Parliament has not been particularly effective in protecting individual liberties. See Palmer, above n 31, 67.

Although it is unlikely that Parliament will sweep away our rights, it is the small erosions we have to concern ourselves with. Examples of these are expressed by Professor Keith. They include the huge number of powers to enter and search premises. Although some may be justified, others are very broad and do not contain adequate safeguards. There are many reverse onus provisions on the books, most of which are justifiable as the relevant matter falls within the defendant's knowledge. However, section 299 of the Customs Act 1966 is of very wide scope. It is difficult to conjure up a reason justifying a reverse onus in a prosecution for assaulting a Customs Officer.

(d) The courts have played a part in establishing an environment that allows for a change in perception. Firstly, they have developed a unique common law for New Zealand, which paves the way for recognising that the law-making powers of the New Zealand Parliament are different from the English Parliament. As Harris noted : "It will be much easier for the courts to interpret the law making powers of Parliament to be less than supreme and subject to some substantive limits."[153] Secondly, the broad range of factors now considered in interpreting and applying legislation has contributed to this change.[154]

(e) There have been calls over the years by particular groups and individuals for formal restraints upon the law-making powers of Parliament. The Bill of Rights discussion and Sir Robin Cooke's doctrine can both be seen as a part of this. However, it is arguable whether this is a widespread concern throughout the community, as it seems there are a number of groups and individuals advocating that it would be sensible to have such restraints, rather than public opinion demanding it.[155]

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153 Above n 136, 395.

154 Such as Hansard; ratified International Conventions; social and economic concerns; review of general legislative approach. See I Richardson "The Role of the Judges as Policy Makers" (1985) 15 VUWLR 46.

155 The best example of this is the public reaction in relation to the Bill of Rights.

### *B Effects under the Mixed Member Proportional System of Government*[156]

The biggest problem with parliamentary sovereignty is a powerful executive that dominates Parliament. As a former Member of Parliament stated:[157]

> In the final analysis, it seems that a political system has evolved in New Zealand which is termed 'Parliamentary democracy' but which involves control of its vital functions by an increasingly powerful executive ... Legislative pressure at all levels can be used by the executive and the bureaucracy to stifle effective opposition from within or outside Parliament.

The question is how this will change under MMP, the system of electoral law that was voted in a referendum in 1993 and will commence in 1996.[158] Will this new system act as a check on Parliament so that additional checks by the judiciary are not needed?

Presently, the overlap of membership between executive and Parliament, combined with the lack of other constitutional checks results in: "a dangerously centralised concentration of power in the cabinet."[159] This consequently permits Cabinet to push through almost any law.[160] In other words, too much can be changed too quickly, with limited public input. According to Chen: "MMP will redistribute power away from Cabinet towards Parliament, minor parties and the public ... This will strengthen checks on Cabinet and may bring its 'elective dictatorship' to an end."[161] There will be an increased likelihood of coalition governments or minority

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156 Hereinafter referred to as "MMP".

157 See above n 97, 164.

158 In the 1993 election a very high percentage of voters voted for minor parties and in the accompanying electoral referendum, a majority (54%) voted in favour of MMP and the ending of two-party dominance. See R Mulgan *Politics in NZ* (Auckland University Press, Auckland, 1994) 261.

159 P J Downey "Constitutional Arrangements" [1990] NZLJ 341.

160 Above n 92, 23. Our system means that legislative approval may come from a narrow majority within one minority segment of one party, which has only minority support in the country. See A McRobie "Electoral System Operations" in H Gold (ed), above n 25, 452 at 458.

161 Above n 92, 23.

governments and this will, in turn, result in Cabinet having to consult and negotiate with minor parties whose support will be needed to pass legislation.

The increase in numbers of Members of Parliament will be more representative of the nation as a whole, as shown by the experience in other countries, as the parties try to achieve an overall balance of candidates, appealing to a range of voters. This will hopefully mean different viewpoints will be heard within Parliament in shaping policies and legislation.[162] Although, in New Zealand, the pool of people able and willing to become Members of Parliament will remain quite small.[163] One benefit will be the increase in numbers to staff select committees that scrutinise legislation, and the likely chance that committees will not have a government majority. Recommendations and criticism will be taken more seriously, because to ignore them will give "political ammunition" to the opponents that may be used in breaking down the government's majority.[164]

Furthermore, under the First Past the Post system, the public's ability to vote out the government (the ultimate sanction) may only put the other major party into power. Whereas under MMP the public will, can be translated more clearly, and minor parties will have a greater chance to win seats.

On the other hand, Sir Geoffery Palmer has argued that MMP will not change our system of Government as radically as people expect.[165] Although Cabinet's grip on the legislative process will weaken, and the accountability of the executive will increase, he believes Cabinet will survive and National and Labour are still likely to be the major actors.[166]

There will be many aspects of the system that will not be affected by MMP and proportional representation. For example we will still have a "Westminister"

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162 P Harris & E McLeay "The Legislature" in G R Hawke (ed) *Changing Politics? The Electoral Referendum* (Institute of Political Studies, Wellington, 1993) 103

163 G R Hawke "Direct or Indirect Decisions: MP's True and Effective Police" in G R Hawke, above n 162, 145 at 163.

164 Above n 161, 127.

165 "MMP and the Changing Face of Public Accountability" *The Independent* , Wellington, New Zealand, 22 April 1994, 14.

166 Palmer believes that abolishing the monarchy would bring far more "profound and radical constitutional changes" and will probably involve a written constitution being established which will give the judiciary political power to strike down legislation. See above n 165.

system, with no simple mechanism for controlling members of Parliament. The government may be less accountable, as coalitions will involve bargaining over policy options after the election, and therefore there will be uncertainty as to the politics that will be followed.[167] Other constitutional changes are needed, as electoral reform is only one aspect of our constitutional arrangements. As Capill argues: "electoral reform is one way accountability can be put back into our legal system."[168]

The problem in relying on MMP as a substantial safeguard is the ignorance of the public. Recent surveys show there is an alarming lack of awareness about how MMP works. The result is that "voters could choose a government entirely different from their real wishes."[169] For example 70 per cent of the population are unaware that it is the party vote alone that determines the overall parliamentary representation under MMP.[170]

What the actual effects of MMP will be involves speculation. If executive power is curtailed, then this is a strong argument against giving the judiciary a power to protect our rights. However, if in reality MMP does not curtail executive power and act as a constitutional check, this is an argument in favour of a judicial power. The greater degree of consultation which coalition governments will generate is positive, however a government supported by a majority may still exercise considerable power.[171]

### *C Conclusion*

Joseph and Walker argue that:[172]

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167 A McRobie "The Electoral Referendum: Issues and Options" in A McRobie (ed) *Taking it to the People? The New Zealand Electoral Referendum Debate* (Hazard Press, Christchurch, 1993) 24, 36.

168 G Capill "A Check on MP's Power" in McRobie (ed), above n 167, 140.

169 See "Kiwi's Still in Dark Over MMP" *The Dominion* , Wellington, New Zealand, 14 September 1994, 1.

170 See "Voters Still Don't Understand MMP" *The Dominion* , Wellington, New Zealand, 14 September 1992, 12.

171 See Mulgan, above n 158, 194.

172 Above n 97, 169.

> New Zealand's legislative authority was acquired ... progressively, without incident, from a superior authority. Thus, once New Zealand acceded to legal independence from Britain, was there any necessity to assume the shackles of English sovereignty theory - of immutable, illimitable and perpetual powers of law-making? After all, legislative authority is an abstraction, capable of redefinition and therefore circumscription.

The factors discussed above show that New Zealand is amenable to change, although this has to be judged considering the changes that will come from MMP. We are an independent country which means we can break from the shackles of sovereignty, if this is what is wanted and needed. It is argued that a "mature Parliament would not insist upon the continued assertion of its fantastical absolute powers at the expense of individual justice."[173]

## VII SHOULD THE JUDICIARY BE THE GUARDIAN OF HUMAN RIGHTS?

New Zealand is in an era of human rights both nationally and internationally, and in the national context there has been considerable movement in the human rights field. As well as the enactment of the Bill of Rights Act in 1990, recently we have enacted the Human Rights Act 1993, of which the long title states:

> An Act to consolidate and amend the Race Relations Act 1971 and the Human Rights Commission Act 1977 and to provide better protection of human rights in New Zealand in general accordance with United Nations Convenants or Convention on Human Rights.

The calls for these documents show that: "the New Zealand Parliament is no longer seen as the sure and constant guardian of the citizen's rights."[174] If we accept that parliamentary sovereignty is not as absolute as it once was, the most obvious choice for a check on Parliament is the judiciary. Do we want the judiciary to become the guardian of our human rights?

### *A Arguments Against*

(a) Judges are unelected and giving them this power will have political implications, and may result in appointments to the judiciary becoming political.

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173 A Lester "Fundamental Rights: The United Kingdom Isolated" [1984] PL 46, 71.

174 J Caldwell "Judicial Sovereignty - A New View" [1984] NZLJ 356, 358.

This would defeat the purpose of the judiciary being the guardians as it would be essential that they remain independent. However, given New Zealand's history, it seems unlikely this will happen. In response to this argument, Lord Hailsham's response is:[175]

> They are under the curious illusion that the Judges are not already in Politics .. If they [the judges] assume jurisdiction they are in politics; if they decline jurisdiction they are in politics. All they can hope is to be impartial.

Judges are already immersed in policy and politics. To keep out of politics, the judiciary would be confined to only adopting literal interpretations of Acts.[176]

(b) There will be considerable uncertainty in the law, if the judges are given the ability to review legislation. This argument is weak as it would be likely that judges would only use this power very sparingly. The situation can be compared with Canada, where the judges only strike down legislation when it is absolutely necessary. The existence of such a power is more likely to encourage Parliament to enact legislation that will not be criticised by the judiciary, as having their legislation struck down periodically for failing to comply with human rights, will certainly entail political costs.

(c) The sanction rests with public opinion, not with the courts. The ultimate sanction for Parliament overriding fundamental human rights is for the public to vote them out.[177] This will always remain a check with our three year term of Parliament which allows the public to express their opinion. However, this sanction only occurs after the breaches have occurred and realistically given the political situation in New Zealand, the other parties that can be voted in may not be a favourable alternative.[178] The constitutional convention should be safe in the care of public opinion and the ballot box, but realistically this control is too broad by itself to ensure that individuals and minorities receive justice.[179]

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175 See above n 98, 97.

176 Above n 98, 97.

177 See above part II B3.

178 Especially given the dominance of the National and Labour parties in New Zealand. However, this may change under MMP.

179 R A Quentin-Baxter "Themes of Constitutional Development: The Need for a Favourable Climate of Discussion" (1985) 15 VUWLR 12, 22.

(d) Judges are not necessarily reflective of society in their views and attitudes. They are not representative of society in the same sense as politicians, and generally judges come from similar social and economic groups. This point was discussed by Sir Ivor Richardson[180] who conceded that the judiciary was not physically representative of the race, gender, age or socio-economic composition of society. Nevertheless he stated[181]

> Those of use who sit as appellate judges are well aware of the importance of trying to keep abreast of changing pressures within our society so as to be able to reflect current community aspirations in the value judgments we are called on to make.

His Honour recognised the importance of continual legal education and the goal of striving towards the appointment of more women, minority group members and younger people to the bench.

(e) We are giving too much power to executive-appointed judges, who are not directly accountable to the public, as they do not have to put their acceptability to the test of re-election.[182] Courts are assuming power to override the apparent wishes of the current elected majority in Parliament, and the result is the court usurping Parliament in manifesting the will of the people.[183] Furthermore, the judiciary do not have to justify their decisions in a public debate. This can be viewed as a positive argument, in that the judiciary do not need to make decisions based on a fear of not pleasing the majority of people.

In Canada one lawyer has argued that giving judges wide Charter powers is a bad idea, as the judges became activists. They can strike down laws they do not like and accordingly they have been "using this power to tear away crucial elements of our social fabric."[184] The problem is a wider one concerning the process of appointment to the judiciary, as it is the personality of the judges that will determine what will be done with this power.

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180 "Judges as Lawmakers in the 1990s" (1986) 11 MLR 35.

181 Above n 180, 41.

182 ILM Richardson "The Role of Judges as Policy Makers" (1985) 15 VUWLR 46, 50.

183 Above n 128, 65.

184 R Martin "A Bad Idea to Give Judges Wide Charter Powers" (1987) NZLJ 136.

### *B Arguments For*

(a) Most laypersons already regard the judiciary as the ultimate protector of their rights.[185] The question is whether the people would be satisfied with taking this power further and allowing the courts to adjudicate on whether an Act of Parliament should not be recognised because it infringes a fundamental right. This is a debateable point given the reaction to an entrenched Bill of Rights in New Zealand. However, it is obvious that judges today are activists and are showing considerable ability and maturity in areas such as judicial review, that gives us confidence in their ability to act as protector of our rights. Arguably, parliamentary politics is more concerned primarily with expediency, while the legal system (and the judiciary) is concerned with justice.[186]

(b) Our system is one of checks and balances, and no institution should have absolute power. As Sir Robin Cooke states:[187]

> Whether guaranteed rights are really fundamental - able to be overridden only by a special Parliament majority or a referendum - does not depend on legal logic. It depends on a value judgment by the Courts, based on their view of the will of the people.

His Honour believes that the court should have responsibility for determining and giving effect to the "social contract." As Harris points out the underlying question is:[188]

> Whether the people of New Zealand have consented to Parliament having unlimited law-making powers, or rather have they intended that the law-making power vested in Parliament should be constrained by the Courts' isolation and enforcement of fundamental common law rights?

The problem is that there has never been a direct opportunity for the people of New Zealand to express their consent or lack of it, as to the form of the legislative

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185 Above n 174, 359. According to Caldwell this means they would be expected to applaud Sir Robin Cooke's remarks regarding fundamentals, discussed below, part VIII A.

186 J Hodder "Judges: Their Political Role" in Gold (ed), above n 25, 410 at 420.

187 R Cooke "Bill of Rights: Safeguard Against Unbridle Power" (1984) 112 Council Brief 4.

188 Above n 136, 396.

powers of Parliament. Sir Robin Cooke assumes the court can determine the will of the people, and this requires substantive constraints on Parliament. Arguably, this is only based on hypothetical consent as distinct from actual consent.[189] It is this reason why critics have been attracted, as they are not content with: "hypothetical consent overriding the expressed legislative will of the democratically elected Parliament."[190]

(c) Our ratification of a large number of international human rights conventions shows our commitment to such ideals. We have dispersed with an Upper House and we are without the umbrella of the European Convention on Human Rights and its accompanying machinery, that means English law will respect such standards of a Bill of Rights, even though their law does not itself incorporate these standards.[191]

(d) In a democracy the judges are a bulwark between individual rights and the power of the executive,[192] whether we like it or not. If we do not allow the judiciary to become an effective check on the executive, who else is there to play the role? They are the only obvious constitutional check on power, and generally they are held in high social regard. To exempt Parliament from such a legal check grants them dictational powers. Those opposed to giving the judiciary any extra powers, because they realise that judicial power can be abused, have to remember that ultimately the government can just re-enact legislation that the courts have struck down, and the ultimate sanction is removal of a judge from office. It is the fact of them having this power that is important, not so much the exercise of it, because this is what will act as a check on Parliament enacting such legislation in the first place.

(e) There are greater dangers than the judiciary becoming "guardians of rights," such as the devious reasoning judges are driven to, to evade injustice. They can invent imaginary restrictions and read them into the legislation consistent with our rights, or they can ignore sections or put glosses on them. This involves the same conflict between the judiciary and the legislature.[193]

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189 Because the people of New Zealand have not expressly given their view.

190 Above n 136, 397.

191 R Nicholson "The Judiciary: The Guardian of the People" (1993) NZLJ 441.

192 T Eichelbaum "Judicial Independence - Fact or Fiction" (1993) NZLJ 90.

193 Above n 98, 98.

It is submitted that the judiciary are fit for the task of being the guardians of human rights. One only has to compare the Canadian situation, in that once their Charter was enacted the judiciary rose to the occasion. This was also reflective of the personalties on the judiciary, but these judges have now set a precedent for others to follow.[194] There is no reason why the same could not happen in New Zealand, albeit with a common law power.

## VIII FUNDAMENTALS

During the Muldoon era a majority of the judiciary remained conservative, traditional and reluctant to interfere in "the proper conduct of Government."[195] Joseph and Walker[196] recognise that there are several reasons why judges defer to constitutional authority: the moral authority of the legislature (the democratic ideal); historical tradition (common law doctrine); or belief in the institutional superiority of legislature over courts (the integrity of the parliamentary law-making process). Sir Robin Cooke has seemingly endured doubts as to whether these reasons are good enough, the result being several dicta and an extra-judicial statement in support of a potential constitutional role for the common law. This was a direct attack on parliamentary sovereignty.

### *A Sir Robin Cooke's Obiter Dicta*

Judicial invalidation of Acts of Parliament can be traced back to 1609, when Coke CJ observed that:[197]

> It appears in our books, that in many cases, the common law will controul Acts of Parliament and sometimes adjudge them to be utterly void: for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it, and adjudge such Act to be void.

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194 Above n 117, 65-67.

195 Above n 149, 194.

196 Above n 97, 171.

197 *Bonham's Case* (1609) 77 ER 646, 652.

There was some support from later cases,[198] and although it did recede into the background in England "strictly speaking it has never been overruled".[199] Although not a New Zealand precedent, it is part of the common law of England, and section 5 Imperial Laws Application Act 1988, means it is part of New Zealand law.

Sir Robin Cooke, in a series of obiter dicta, has revised this principle by surmising that some rights go so deep as to be immune to Acts of Parliament. These dicta have been described by one commentator as: "amongst the most breath-taking dicta ever propounded by a New Zealand judge."[200]

In *L* v *M* Cooke J (as he was then) stated:[201]

> It would be a strong and strange step for Parliament to attempt to confer on a body other than the Courts power to determine conclusively whether or not actions in the courts are barred. There is even room for doubt whether it is self-evident that Parliament could constitutionally do so.

Then in *Brader* v *Ministry of Transport*: [202]

> It may be added that the recognition by the common law of the supremacy of Parliament can hardly be regarded as given on the footing that Parliament would abdicate its function. It is not to be supposed that by the 1948 Act the New Zealand Parliament meant to abandon the entire field of the economy to the executive.

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198 Such as *Day* v *Savadge* (1614) Hobart 86; 80 ER 235 and *Lord Sheffield* v *Ratchliffe* (1615) Hobart 334, 336; 88 ER 1592, 1602.

199 Above n 99, 280.

200 Above n 174, 357.

201 [1979] 2 NZLR 519, 527. This case involved an action against a gynaecologist for negligence in an unsuccessful operation to prevent further pregnancy. The issue that raised this comment was whether the Accident Compensation Commission had exclusive jurisdiction extending beyond the question of cover.

202 [1981] 1 NZLR 73, 78. This comment was made in the contest of determining whether a regulation made under the Economic Stabilisation Act 1948, regarding carless days, was ultra vires.

Following on in 1982 in *New Zealand Drivers Association* v *New Zealand Road Carriers* a majority of the Court of Appeal stated that:[203]

> Indeed we have reservations as to the extent to which in New Zealand even an Act of Parliament can take away the rights of citizens to the ordinary Courts of law for the determination of their rights.

In slightly stronger language, Cooke J in *Fraser* v *State Services Commission* stipulated that:[204]

> This is perhaps a reminder that it is arguable that some common law rights may go so deep that even Parliament cannot be accepted by the courts to have destroyed them.

The position was made quite clear in *Taylor* v *New Zealand Poultry Board* when His Honour stated:[205]

> I do not think that literal compulsion by torture for instance, would be within the lawful powers of Parliament. Some common law rights presumably lie so deep that even Parliament could not override them.

Furthermore, in *Keenan* v *Attorney-General* Cooke P said:[206]

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203 [1982] 1 NZLR 374, 390. This case involved determining whether a regulation relating to a dispute of interest not being determined under the Arbitration court, through a wage free regulation, was ultra vires.

204 [1984] 1 NZLR 116, 121. This case concerned the appeal regarding a dismissal from the public Service, and whether the Commission should have used the procedures in s 58 State Services Act 1962 to enable the officer to answer new allegations. This statement was made in the context of a discussion on natural justice, but Cooke J noted that the case could not concern a determination of whether there are some common law rights this important.

205 [1984] 1 NZLR 394, 398. The issue was of the scope of the privilege against self incrimination in the context of determining whether the Poultry Board Act 1980 authorised the making of regulations which created an offence of refusing or failing to answer inquiries put to a person by an authorised officer of the Poultry Board.

206 [1986] 1 NZLR 241, 244. This case involved the power of the police to insist on the giving of fingerprints by persons in custody.

> A duty to answer questions by a police or other officer is usually only imposed by express enactment and is never in this country enforceable by literal physical compulsion. This subject is discussed in *Taylor* v *New Zealand Poultry Board* [1984] 1 NZLR 394, 398-406.

A High Court judge adopted this analysis in *Bradley* v *Attorney-General* [207] in determining to whom natural justice applied. It was held that the: "clear implication from [Fraser] ... is that natural justice does now apply if it can be said that the decision will have no important adverse effect on the person seeking to have it reviewed." Smellie J seems to be supporting natural justice as a "common law right."[208]

In summary, Sir Robin Cooke has transformed a constitutional convention into a judicially enforceable rule of law, which takes us back to the times of Coke, albeit in obiter statements. If this approach is adopted, it would mean the court would be able to recognise the will of the people as providing cause for upholding an entrenched Bill of Rights.[209] The statements lend support to the theory that the court (at least certain judges) will not recognise an Act or provision that overrides fundamental common law rights.

The scope of the dicta was not limited to fundamental moral principles. For example, although torture is morally repugnant, some may argue that statutes that purport to authorise dismissal without a hearing, or removal of citizen's rights to ordinary courts of law are not equal infringements of fundamental common law rights. The problem with the doctrine is in defining which rights are to be protected.

### *B Extra Judicial Statement*

During the late 1980's observations offered by Sir Robin Cooke in case law were supplemented by extra-judicial statements. These were often claimed to be purely

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207 [1988] 2 NZLR 454.

208 Above n 207, 467 per Smellie J. Here a former naval officer was applying for a review of the exercise of certain allegedly statutory powers of decision making resulting in him being downgraded.

209 Above n 136, 65.

personal, and: "not clothed with the authority of the judicial gown,"[210] although on other occasions he spoke from his position as President of the Court of Appeal. One such occasion was his "Fundamentals" statement.[211]

In the context of discussion of 'the fundamental question' he referred to a series of cases in determining the question: "What is the function of the courts in relation to Acts of Parliament?" His Honour concluded that: "it is the duty of the Courts, their constitutional role, to ascertain the democratic will of the people as expressed in Acts of Parliament."[212] This statement is qualified by a submission that there are two: "complementary and lawfully unalterable principles: the operation of a democratic legislature and the operation of independent courts."[213] His Honour accepted that Parliament has a constitutional role to lay down policy, and the courts must uphold and respect this. However, there are limits on legislative power.

If Parliament attempts to significantly undermine either of these unalterable principles, then it is the responsibility of the judiciary to say so, and furthermore it is suggested that if the judgments are then disregarded, it would be the duty of the judge to resign. Alternatively they could publicly acknowledge that they will depart from their judicial oath and serve a state that is now not entitled to be called a free democracy.

Although the ultimate issue of whether an Act is ineffective was never raised, it is admitted that it was "not clear" that if Parliament had gone further the courts should have recognised it as valid. Several possible Acts of Parliament are cited which to Sir Robin Cooke illustrate "that the concept of a free democracy must carry with it *some* limitation."[214] The conclusion is that: "one may have to accept that working

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210 R Cooke "Introduction" [1990] NZULR 1, 2.

211 Above n 4. Cooke P noted in another such statement "Fairness" (1989) 19 VUWLR 421 that such "extra-judicial disquisition had become almost a conventional obligation." He expressed some reservations about it, but decided that awareness of the dangers will help prevent them.

212 Above n 4, 163.

213 Above n 4, 164.

214 The examples are if an Act purporting to strip Jewish people of their citizenship and their property; or to disenfranchise women; to require the courts, to receive in evidence any statement appearing to be a confession of a crime, whether or not obtained by compulsion.

out truly fundamental rights and duties is ultimately an inescapable judicial responsibility."

### *C Analysis*

Sir Robin Cooke is submitting that there are **legal** (as well as political) limits to the "sovereignty of Parliament." There has been a substantial amount of criticism against this theory, even apart from the usual commentators.[215] Kirby P in *Building Employees and Builders' Labourers Federation of New South Wales* v *Minister for Industrial Relations and Another* [216] stated that this appeal to natural law and to a principle higher than parliamentary sovereignty is not consistent with current constitutional theory in Australia.[217] In support of this Kirby P recognised that:[218]

> Such extra-constitutional notions must be viewed with reservation not only because they lack the legitimacy that attaches to the enactments ultimately sanctioned by the people. But also because, once allowed, there is no logical limit to their ambit. They thereby undermine a rule of law and invite the only effective substitute viz the rule of power.

Political realities and a loyalty for "elected democracy" led to a rejection of a notion of fundamental rights, that Parliament cannot destroy. Kirby P is quite content with the protection from the democratic nature of our parliamentary institutions, and the fact that parliamentary sovereignty is subject to the rule of law. His Honour further recognised the problem of defining what these common law rights are.

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215 Including G Winterton "Extra-Constitutional Notions in Australian Constitution Law" (1986) 16 FLR and Dugdale in a review of *Judicial Review of Administrative Action in the 1980's: Problems and Prospects*" [1987] NZLJ 124, 125.

216 (1986) 7 NSWLR 372. This case involved a challenge to the cancellation of the registration of an industrial union made pursuant to an Act. The union claimed it was entitled to a hearing, which was rejected. While an appeal was pending the Parliament passed an Act "to remove doubts" regarding the validating of the cancellation. This was challenged on the ground that it had a right to pursue its judicial proceeding with which Parliament could not interfere.

217 Reference is made to *Pickin* v *British Railways Board* , see above n 119; and *Duport Steels Ltd* v *Sirs* [1980] 1 WLR 142, which rejected such a notion.

218 Above n 216, 405.

Zines[219] agrees that legislative restrictions not based on a specific provision are highly dangerous and uncertain. In the drafting of constitutional provisions and Acts there is room for consideration of the issues, and guidelines can be provided for. An open-ended power is inviting judges to determine matters based on their own political philosophies. She poses the question: "who can override the judges?" This reasoning is arguably more appropriate for the Australian Constitution which has a bicameral legislature, and affords greater protection compared to New Zealand's unicameral legislature.

It is argued that Sir Robin Cooke: "is advocating revolution by mounting an open challenge to the doctrine of absolute parliamentary sovereignty."[220] It is seen as a concern that the President of the Court of Appeal (which for most New Zealand litigants is realistically their court of last resort) is expressing such constitutional views that are subversive of parliamentary sovereignty, which is argued to be a doctrine that the judicial office must uphold. The judgments do not provide any analysis or reasoning in relation to the conclusions. Furthermore, it is argued that it would be undemocratic to allow the judiciary to override parliamentary sovereignty. However, it is just as undemocratic to pass an oppressive Act. It is an accepted constitutional convention that Parliament should not use its omnipotent law-making powers in an 'oppressive way.'[221]

A further criticism is that these "judicial asides," will only lead to a re-examination of the ultimate legal principles.[222] This may not be so much of a criticism if we view this re-examination as one of reconciling the checking system in that the courts and Parliament are seen as complementary, as one providing a check on the other, and any potential abuse of power is reduced.

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219 Above n 117.

220 Professor Smillie in MB Taggart (edited) *Judicial Review of Administrative Action in the 1980's: Problems and Prospects* (Oxford University Press, Auckland, 1986).

221 Above n 136, 394.

222 As Salmond stated: "there must be some self-existent rule(s) on which all the others hang ... otherwise the investigation of the sources of law would lead to infinity." JW Salmond *The First Principles of Jurisprudence* (Stevens & Haynes, London, 1893) 220-222, discussed in A Frame "Fundamental Rights in the Realm of New Zealand: Theory and Practice" (1992) 22 VUWLR Monograph 4, 85.

In defence of the doctrine, it is likely that judicial intervention would occur only when justice demands it. The ultimate sanction if the judges went too far, so as to lend truth to the statement "there is no logical limit to their ambit," is that Parliament has the power to remove the 'offending' judges for misbehaviour or incapacity to discharge their office.[223]

In practise, restraint has been shown in exercising these asserted powers, and no New Zealand judge has contemplated invalidating a statute for such a reason as this. Arguably, this is reflective of reality as Parliament has never overstepped the mark to such an extent as to require the implementation of such measures. Although one only has to look at some of the measures discussed above to refute this statement. As Caldwell postulates:[224]

> It may well be that some later generations of New Zealanders living under the yoke of an elected tyranny will be grateful that a Court of Appeal Judge who lived in a time of peace and relative freedom had the strength of character to provide the basis for nullifying an Act of Parliament.

One must question the "sanctity of statues" given that a good amount of judicial legislation occurs under the name of "interpretation."[225]

### *D Implied Constitutional Rights in Australia*

Support for Sir Robin Cooke's common law rights is found in Australia where there has been an alleged "new" tendency of the courts to enhance the protection of fundamental freedoms and rights by constitutional implications. Although Australia does have a written constitution, and therefore differs from New Zealand, it is significant that the Commonwealth Constitution does not contain a Bill of Rights.

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223 Section 23 Constitution Act 1986.

224 Above n 174, 358.

225 As discussed above part II.

Murphy J has extrapolated from the Australian Constitution an implied Bill of Rights.[226] On two occasions His Honour has invoked these rights for invalidating legislation.[227] In *McGraw-Hinds (Australia) Pty Ltd* v *Smith* he stated: "some implications arise from considerations of the text; others arise from the nature of the society which operates the constitution."[228] These cases were largely uncontroversial as it was regarded that the relevant implied constitutional guarantee (freedom of interstate communication) was embodied in an express constitutional provision.[229]

Winterton submits that the implied Bill of Rights is more likely to be: "based upon the unstated premise that certain fundamental rights and freedoms are part of the common law."[230] This "doctrine" according to Winterton is problematic, as the judges are assuming the role of the legislature. Given the reaction in Australia to a statutory Bill of Rights, an open-ended constitutional Bill of Rights is likely to be considered undemocratic. Moreover, such a doctrine can only be determined by the subjective opinion of the judges as to the content of these rights. Winterton poses the question: "would we not have a Murphy Bill of Rights, a Barwick Bill of Rights, ... and so on?"[231] The conclusion is that this implied Bill of Rights is not constitutional, in that it lacks an adequate constitutional foundation. It is in fact extra-constitutional.

In *BLF* v *Minister for Industrial Relations* [232] a majority of the judges also rejected a fundamental common law principle capable of overriding Parliament. Although, Street CJ thought that the New South Wales Parliament may be bound by such a notion through section 5 Constitution Act 1902 (NSW) which affirms "peace,

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226 These rights have included the freedom of speech, assembly, communication and travel through the commonwealth; freedom from slavery, serfdom, cruel and unusual punishment, and arbitrary discrimination on the ground of sex; and freedom for fully competent adults from subjection to guardianship. See Winterton, above n 215, 228 (n 42).

227 *McGraw-Hinds (Australia) Pty Ltd* v *Smith* (1979) 144 CLR 633; *Miller* v *TCN Channel Nine Pty Ltd* (1986) 67 ALR 321.

228 Above n 227, 668.

229 Section 92 which concerns the freedom of trade within the Commonwealth.

230 Above n 215, 229.

231 Above n 215, 234.

232 Above n 216.

welfare and good Government."[233] In *Union Steamship Company of Australia Pty Ltd* v *King* [234] it was held that this does not confer power to strike down legislation if it does not promote or secure the peace, order or good government. However, they left open the question of the common law rights doctrine.

In two recent cases the courts have protected fundamental rights through "constitutional implications." In *Australian Capital Television Pty Ltd* v *Commonwealth of Australia (No 2)*[235] four judges relied on a constitutional implication guaranteeing the freedom of political expression, to determine the case. Mason CJ stated:[236]

> In deciding an issue of proportionality in the context of the incidental scope of a substantive legislative power the court must take account of and scrutinise with great anxiety the adverse impact, if any, of the impugned law on such a fundamental freedom as freedom of expression.

In *Nationwide News Pty Ltd* v *Wills,*[237] a case delivered on the same day, a majority held that the law regulating political broadcasting was invalid. All except Dawson J used a constitutional implication of freedom of communication. The constitution was viewed as bringing into existence a system of representative government, and freedom of communication is essential to the efficacy of this. Several days after these judgments Toohey J, gave a paper, and essentially

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233 Murphy J had drawn a similar conclusion from this phase in ss 51 and 52 Commonwealth Constitution in *Sillery* v *R* (1981) 35 ALR 227, 234. Two of the other judges took a contrary view, Kirby P (p 406) and Mahoney JA (p 413), and Glass JA left the question open (p 407).

234 (1988) 166 CLR 1.

235 (1992) 108 ALR 577. This case concerned the validity of a s 299 of the Industrial Relations Act 1988, which purported to forbid use of written or oral word calculated to bring into disrepute the Industrial Relations Commissioner or any member of the Commission.

236 Above n 235, 693.

237 (1992) 108 ALR 681. The issue concerned with was whether Part IIID of the Broadcasting Act 1942, should be invalidated. It was designed to establish a regulatory regime for the broadcasting of political advertisements. The prohibition applied to the publishing of advertisements of "a political matter" and publishing matter on behalf of a government during an election period. "Freetime" could be allocated in accordance with regulations in relation to each election.

concluded that some principles are fundamental, and it is the role of the judiciary to give effect to these principles within the rule of law, even if there is no express embodiment of the liberty in question, to prevent a misuse of legislative power.[238]

The controversy that followed these suggestions of a "judicially created" Bill of Rights brought comment that perhaps judges should undergo judicial confirmation (as in the United States) before appointment.[239] Lee argues that this move is not sudden in that recent decisions give evidence of growing activism with the judiciary in an attempt to elevate the importance of fundamental rights.[240]

In determining whether this doctrine contradicts parliamentary sovereignty in Australia, it must be noted that a 1988 referendum for extending and strengthening the guarantees in the Constitution was defeated, although it was submitted that the campaign for the referendum was surrounded by distortion and political grandstanding.[241] Furthermore, a recent survey shows a majority of Australians prefer the judiciary as opposed to Parliament as guardian of their basic rights.[242] In applying this analysis to New Zealand, regard must be paid to the constitutional nature of Australia. Acceptance of fundamental human rights by implication in the constitution is one thing, and commands more constitutional authority than Sir Robin Cooke's suggestions in the New Zealand context.

Lord Denning also supports Sir Robin Cooke.[243] In discussing this issue he cited Lord Acton's expression, that: "Power tends to corrupt and absolute power corrupts absolutely," and posed the question "Is it not possible that Parliament may

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238 J Toohey "A Government of Laws, and not of Men?" in Conference Papers *Constitutional Change in the 1990's*, Darwin, 4-6 October, 1992.

239 See H P Lee "The Austalian High Court and Implied Fundamental Guarantees" [1993] PL 606, 616.

240 See above n 239, 623. Some people are more concerned with the degree of power to imply into the Constitution, rather than the idea of judges reading implications into the constitution.

241 See H P Lee "Reforming the Australian Constitution: the Frozen Continent Refuses to Thaw" [1988] PL 535.

242 Above n 239, 621.

243 Lord Denning "Misuse of Power" (1981) 55 ALJ 720.

misuse it's power?"[244] He reminds us that the party who has gained the greatest seats can enact any legislation it likes. Then he states:[245]

> The longer I am in the law - and the more statutes I have to interpret - the more I think the Judges [in England] ought to have a power of judicial review of legislation similar to that in the United States: whereby the judges can set aside statutes which are contrary to our unwritten constitution - in that they are repugnant to reason or to fundamentals.

Borrowing from Professor Wade he cites some applicable examples: if Parliament was to legislate to establish one-part government, or a dictatorship, or attack any fundamental of democracy, and he adds, if Parliament abolished the two-chamber system. This, Lord Denning submits, is why we should have a system of checks and balances.

## IX CONCLUSION

It is submitted that the theory of "absolute" parliamentary sovereignty, is flawed in the New Zealand constitutional setting. There are some existing safeguards that have been identified, such as: political fears; the moral effect of the Bill of Rights; scrutiny of legislation; and international commitments. However, none of these can stop Parliament enacting erosions of fundamental rights, if it chooses to do so. New Zealand lacks the proper constitutional checks to allow Parliament to have unlimited power to enact laws. It is time that these safeguards be reassessed, to protect fundamental human rights.

This challenge against the legislature corresponds with the vastly increased checks that the judiciary of other countries have imposed upon Parliament. As Wade stated: "it is time that we took the trouble to discover how to provide ourselves with the legal mechanisms which virtually all other comparable countries have."[246]

There is no perfect way of reconciling democratic theory with the protection of human rights. One may have to accept the possibility of tyranny by the majority, or power in an executive appointed judiciary to override the democratically elected

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244 Above n 243, 723.

245 Above n 243, 723.

246 Above n 98, 43.

legislature.[247] It should not be a question of choosing one over another, rather both Parliament and the courts should act as checks on each other, thus upholding a separation of powers.

Some may argue New Zealand needs a written constitution, or an entrenched Bill of Rights, which indicates in black and white the role of the judiciary, rather than an unspecified power.[248] However, the reality is that we do not have these. Is this any reason to leave Parliament with absolute sovereign powers, with reliance on checks such as the ballot box, and the morality and good faith of the politicians?

It is not suggested that New Zealand has a bad record in relation to overriding human rights. It is the small erosions and the rights of minorities that need to be protected. Furthermore, the suggestion of limits on Parliament is in itself a means of protection. It acts as a detriment and encourages Parliament to scrutinise all legislation carefully, so as not to be put in a position of the judiciary having to review legislation, which can only have political costs.

Without a written constitutional document, the only way the judiciary can have a power to review legislation, is as a common law power, as suggested by Sir Robin Cooke. A study of parliamentary sovereignty shows that legislation impinging on our rights would not be valid, therefore the judiciary are justified in not upholding it. Sir Robin Cooke has laid the foundation for such a common law right, and it is submitted that in the present constitutional situation, it is just as valid for the judiciary to use this power, as it is invalid for Parliament to pass such legislation which requires this power to be used. The difficulty with the doctrine, is that is seems to be reserved for cases so extreme that they are unlikely to happen.[249] It is submitted that such a power should be used when Parliament enacts a provision which overrides a fundamental right, albeit only a small erosion.

Some people may not agree with the judiciary having a power to judge the constitutionality of Acts. However, in reality they are achieving a similar result through interpreting provisions to accord with the values in society. In particular through interpreting provisions so they are consistent with our present Bill of Rights. This is limited as interpretations can only be given to accord with values in

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247 Above n 136, 397.

248 Above n 98, 99.

249 See P Rishworth "Civil Liberties" in H Gold (ed) above n 25, 143 at 149.

society, if they are realistic. Furthermore, Parliament can expressly override the rights if it so chooses. This is why a common law power should be available in New Zealand.

Instead of arguing this is "unconstitutional" or "undemocratic" it is argued the focus should be on improving the process of appointments to the judiciary. After all, whether a judiciary is willing and able to stand up and be the guardians of fundamental human rights, will depend on the personalties within the judiciary itself.

# APPENDIX 1 - ARGUMENTS FOR AND AGAINST AN ENTRENCHED BILL OF RIGHTS

## ARGUMENTS AGAINST

1. Power is given to the judiciary who are unrepresentative of society, unelected and unaccountable, and consequently political appointments to the bench will result, and there will be a decline in public perception.

2. The Bill of Rights is to be enforced through the judicial process to which there is unequal access, especially for the poorer people who are most likely to have their rights infringed.

3. Uncertainty would result because some Acts would be repugnant to the Bill of Rights and it could not easily be predicted what the laws would be.

4. There would be an increased volume of litigation and the accompanying delays.

5. An Upper House would be a better check and balance.

6. It would be premature to adopt a Bill of Rights, as it is not necessary because there are no threats to human rights and, furthermore more time is needed in order to study the implications.

7. The Bill of Rights would create a hierarchy of rights and it would emphasise individual not collective, rights.

8. It would freeze constitutional development and would not allow for future social change.

## ARGUMENTS FOR

1. New Zealand entertains a lack of constitutional safeguards (such as no written constitution, a smaller Parliament, no second chamber, and a small executive which has increasingly acted in important matters) and the Bill of Rights would be a check on the executive.

2. There would be protection for minority and disadvantaged groups, which democratic elections do not and cannot protect.

3. There would be an educative effect, and awareness about human rights would be raised amongst New Zealanders.

4. It would provide a bulwark against an erosion of rights.

5. A Bill of Rights advances New Zealand's compliance with its international obligations to respect human rights, especially the International Covenant on Civil and Political Rights.

**The Proponents Also Addressed The Arguments Against**

1. Although the Bill of Rights entails a transfer of power to the judiciary the judges already exercise control over Parliament. For example, in judicial review, and they are involved in decisions that have political implications.

2. The argument that it is undemocratic ignores the fact that democracy needs to accommodate minority viewpoints, which a Bill of Rights will. Secondly the Bill of Rights will give New Zealanders confidence and power to affect the actions of government.

3. Political appointments are unlikely given the New Zealand tradition against this.

4. As regards uncertainty, the Bill of Rights is more precise in spelling out particular rights, and interpretative principles will be developed to allow predictability.

5. Rights may be adequately protected, but this overlooks that given a parliamentary majority, the government of the day is legislative omnipotent.

6. As to freezing constitutional developments, overseas experience is that interpretation of such instruments has developed with the times.

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