Diluting Dicey

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> I think and hope that I shall never see such time, and my sight is too dim and my prospect too short to foresee it; but such foreseeing men may likewise foresee this with the rest, – that if force prevail above lawful regiment, how easy it will be to procur an act of Parliament to pass according to the humour and bent of the State, to sweep away all these perpetuities which are already slandered and discredited.[1]

Introduction

It has become obvious over the last two centuries, with the increasing control of the Legislature by the executive, that the British constitution no longer provides the checks and balances which Blackstone saw as so necessary for the protection of the liberty of the individual.[2] The fusion of legislative and executive power is even more complete in New Zealand, where there is no Upper House, and where the cabinet dominates the majority party in the House of Representatives. The result of this phenomenon, in conjunction with the doctrine of parliamentary sovereignty, is to make citizens more vulnerable than many may think to the arbitrary will of the government. As Lord Scarman has put it:[3]

> So long as English law is unable in any circumstances to challenge a statute, it is, in dangerous and difficult times, at the mercy of the oppressive and discriminatory statute.

The spectre of a Legislature interfering with important historical liberties

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1 Bacon, *Works* Vol 7, 512.
2 *Bl Comm* (15th ed) Vol 1, 50.
3 Scarman, *English Law – The New Dimension* (1974) 18.

of the subject has led to a renewed interest in constitutional guarantees of basic rights. Canada has recently adopted its Charter of Rights and Freedoms; in the United Kingdom the issue has become more significant as a result of that country's entry into the European Community and the special procedures involved in the European Convention on Human Rights.

In New Zealand the topic has been resurrected by Minister of Justice Geoffrey Palmer, whose department issued a white paper in 1985 on the possibility of adopting a Bill of Rights. Those in favour of New Zealand adopting a Bill of Rights as fundamental law will have been disappointed with the results of that initiative. A much weakened "Bill of Rights" has been introduced into Parliament. If enacted it will not give the courts power to declare ultra vires those Acts in conflict with its provisions, as it will effect no limitation on the law-making powers of the Legislature. It is to be a guide to construction of statutes but little more. Sir Robin Cooke has rather optimistically referred to it as a case of *reculer pour mieux sauter*.[4]

In the face of political inertia, members of the Court of Appeal have been adopting a solution of their own. This has primarily been the work of the President Sir Robin Cooke, who has suggested in a number of obiter statements and extra-judicial speeches that even in the absence of a Bill of Rights, the legislative competence of Parliament may be limited. These limitations would be found in the common law. In *Taylor v New Zealand Poultry Board* Cooke P advances the obiter opinion that:[5]

> 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.

For lawyers raised in the Diceyan tradition, such dicta amount to heresy. However, it is hoped this paper will demonstrate that the concept of fundamental law runs through our legal tradition, and that the doctrine of parliamentary sovereignty is a relatively new principle. It is submitted that the revival of the concept of fundamental law rights by Cooke P should be seen as an attempt to redress an imbalance in the constitution. The answer to the

4 "Fundamentals" [1988] NZLJ 158, 159.

5 [NZLJ] 1 NZLR 294, 298. For a helpful summary of the cases and dicta see Caldwell, "Judicial Sovereignty: A New View" [1984] NZLJ 357. The obiter statements of Cooke P may be found as follows: *L v M* [1979] 2 NZLR 519, 527; *New Zealand Drivers Association v New Zealand Road Carriers* [1982] 1 NZLR 374, 390; *Fraser v State Services Commission* [1984] 1 NZLR 116, 121, referring to *Chief Constable of North Wales Police v Evans* [1982] 3 All ER 141, 144 per Lord Hailsham; *Keenan v A-G* [1986] 1 NZLR 241, 244. In the recent case *R v Cann* (Court of Appeal. 18 November 1988 (CA 317/88). McMullin, Bisson, Barker JJ) the Court considered the effect of the Inland Revenue Department Amendment Act (No 2) 1988 which was enacted to settle any issues arising as to admissibility of evidence in the criminal prosecution of Cann. The Court did not reject submissions that this enactment was an arbitrary interference with the course of a criminal trial as being contrary to the doctrine of parliamentary sovereignty. It seemed to be accepted that the Court could consider the merits of this submission. For the most recent extra-judicial comments by Cooke P see supra at note 4.

question "what is a statute?" can and should involve more than "the will of the Sovereign". A doctrine of fundamental common law rights would restrict that arbitrary will.

The concept of fundamental common law rights raises problems of both a jurisprudential and practical nature. In the last section of this paper a theoretical basis for the limitations proposed by Sir Robin Cooke will be outlined. Finally, in conclusion, we will canvass some of the practical problems inherent in this approach.

A Historical Perspective

In this part, two important elements in the development of the idea of fundamental law will be discussed: first the medieval notion that law was declared rather than made, and second the presumption that the Sovereign was bound by law.

By the early seventeenth century, the medieval period of English history was rapidly drawing to a close. In the struggle between Parliament and the Crown these two elements combined with natural law theory as fundamental law, invoked by both sides to justify their respective positions. After the Revolution in 1688, the idea that Parliament's competence was limited by fundamental law continued to appear, particularly in times of political stress, but recourse to fundamental law as a legal doctrine declined. The concept came to bear its ripest fruit transplanted in American soil, but events turned out differently in England. There the popularity of fundamental common law rights among lawyers gave way to an acceptance of the Hobbesian doctrine of sovereignty and the views of positivist writers such as Bentham, Austin and finally Professor Dicey. By the late nineteenth century, these new doctrines had been fully accepted in the courts.

Law is Declared

The key to an understanding of fundamental law in medieval England is the realisation that in the centuries following the conquest and until the end of the Tudor reign English society was feudal. This had important consequences. The monarch was not absolute, as some have argued;[6] nor was there any modern concept of nationhood in which the State has a corporate identity of its own. William Holdsworth tells us that "[t]he legal and political ideas and institutions of the Middle Ages were founded ultimately on a belief in the existence of absolute rights guarded by a supreme law."[7] Medieval government made no clear distinction between legislative, executive and judicial acts.

6 Gneist, *Constitutional History* (1891) Vol 1, 292.

7 Holdsworth, "Central Courts of Law and Representative Assemblies in the 16th Century" (1912) 12 Colombia Law Review 1.

For example, Baker points out that "a statute represented the terms of a decision upon a complaint for petition; a decision of the highest authority in the land, but not different in kind from decisions by inferior branches of the *Curia Regis*."[8] Thus even "legislation" was the product of a court. The essential nature of law emanating from a court is that it is declared, not made. An examination of the Rolls of the English Parliament shows, as Jenks notes, that:[9]

> [T]he great bulk of the petitions which are presented during the first 200 years of its existence, are complaints of the breach of old customs, or requests for the confirmation of new customs which evil-disposed persons will not observe. These petitions, as we know, were the basis of the parliamentary legislation of that period. What is this but to say that the parliament was a law declaring, rather than a law making body?

What emerges is that law was thought of as a sea of custom, the principles of which were to be discovered. This notion of law has influenced judicial thinking even into the twentieth century. But what distinguishes the Middle Ages is that this body of custom was the only true source of law. It is not surprising therefore, that over time the body of common law should come to be seen as fundamental and unchanging; indeed, unchangeable.

It is possible to take this analysis too far. It is not accurate to say that the common law and custom never changed during the feudal period. Far from it. As Professor Plucknett observed, the common law even in Edward I's day, was:[10]

> [A] living and changing organism, deriving its binding force from the fact that king and people willingly accepted it, until such time as they should change it. We must remember too that change was easy and might be effected in very informal ways.

With the benefit of hindsight it is easy to point to new departures, innovation and general progress in the common law system. But in reality change was incremental and uneven. If the idea that judges merely "find" law has died hard as late as the twentieth century, how much more solid and unchanging must the common law have appeared before the seventeenth century, when legislation as we know it was so exceptional?

A further point to be made in this respect is that even where there were conscious changes made in the law, judges and legislative authorities alike would deliberately conceal the new departure by means of a fiction. So important was it to appear to be following ancient custom, rather than creating new law, that even until the early seventeenth century enactments of Parliament were described in constitutional theory as judgments. While law did undoubtedly change, adapt and develop, it was thought that change was undesirable, and was to be concealed wherever possible.

By the end of the sixteenth century it was clearly accepted that the common

8 Baker, *An Introduction to English Legal History* (2nd ed) 178.
9 Jenks, *Law & Politics in the Middle Ages* (2nd ed) 44.
10 Plucknett, *The Legislation of Edward I* (1947) 15.

law could be changed by statute. But certain fundamental common law rules remained. Holdsworth comments:[11]

> There was still a large medieval element in men's conceptions about law and politics; and this element would certainly have led them to deny the proposition that there were no limits to the things which could be effected by a statute. Many would have doubted the competence of Parliament to pass a law which contravened those fundamental moral rules which seemed to be a part of that law of nature which natural reason teaches all mankind.

The King is Subject to Law

Another key concept underlying fundamental law is that expressed by Bracton. The king is subject to the law: "*Ipse autem Rex, no debet esse sub homine sed sub Deo et sub lege, quaere lex facit regem.*"[12]

It is a mistake to attribute this idea to Bracton. In fact the concept is derived from an earlier time. Indeed, Magna Carta was extracted from King John some 40 years before Bracton was writing. Magna Carta, in turn, was understood to embody the ancient liberties of the barons – liberties which the king could not take away.

The idea of *rex sub lege* is directly related to the essential element of medieval law, that law is to be discovered, not made. It followed from the latter principle that the law was seen to be independent of the king. Holdsworth writes:[13]

> Bracton therefore conceived of the king and his servants as ruling according to a law which bound all the members of the kingdom, high and low, alike.... In no branch of the law have Roman doctrines been more decisively rejected. In no branch of the law have the older ideas as to the nature of the law more signally triumphed.

It is in this context that Magna Carta looms so large in the constitutional history of England.

One must be careful when discussing Magna Carta not to claim for it more than it really was. In fact, Magna Carta secured special privileges to a limited class of persons, which to a certain extent disadvantaged most English subjects.[14] This is not to deprecate the traditional interpretation of Magna Carta that has come down to us, for its importance lies in what it has since come to mean:[15]

> What [King John] granted was his pledge to keep the law in the future in the given particular. And that is the permanent contribution which Magna Carta made to the development of the constitution: the introduction of the rule of law as a fundamental principle underlying all special conflicts between King and nation at any later date, and the establishment of the principle that the King must keep the existing law and may be compelled to do so if he refuses.

11 *History of English Law* (2nd ed) Vol 2, 366.
12 Bracton f 5b.
13 Supra at note 11, at 198-199.
14 See, for example, Lyon, *A Constitutional And Legal History of Medieval England* (2nd ed) 321.
15 Adams, *Council and Court in Anglo-Norman England* (1926) 254.

That the King should be subject to law continued to be a cherished value in the constitutional structure, and indeed we have inherited a large part of this doctrine in the concept of the rule of law. One of the most famous expositions of the principle is found in Sir John Fortescue's *De Laudibus*, where he compares the civilian *dominium regale* with the English *regimen politicum et regale*.[16] While the will of the ruler is law in civilian countries, the King in England is constrained by the *politicum* – the political or ethical element in the constitution.[17] It was not until the seventeenth century that politicians and lawyers were able to develop and to a certain extent deploy new methods of controlling the law-making functions of the sovereign, whether the King or the King in Parliament.

Before discussing the events of the seventeenth century, however, we must first note the impact that natural law theory had already made on the common law.

Natural Law

It is the alliance of the older concept of unchanging fundamental common law with the law of reason which, in the seventeenth century, gives rise to a more developed doctrine of fundamental common law rights. Natural law is often seen as a product of the Enlightenment, the "Age of Reason". But in fact natural law theories had become prevalent in English ecclesiastical circles from the time of the Norman invasion. The early champion of the doctrine in England was John of Salisbury (c 1115-80), a diplomat, secretary to Beckett and Bishop of Chartres. In his work *Policraticus* he asserted that there "are certain precepts of the law which have perpetual necessity, having the force of law among all nations and which absolutely cannot be broken."[18]

Had the law of nature remained the province of ecclesiastical jurisprudence alone, its influence on the events of the sixteenth to eighteenth centuries would have been insignificant. But this was not to be the case.[19] In Fortescue's time, we begin to see the inclusion of the law of nature as a principle source of English law: "All human laws are either law of nature, customs or statutes, which are also called constitutions."[20] Yet the idea of natural law determining the limits of law from other sources was not articulated. We must look later in time to the work of Christopher St German for this develop-

16 Fortescue, *De Landibus Legum Angliae* (circa 1470) cc 35, 36.

17 Ibid.

18 Quoted in Corwin, "The Higher Law Background of American Constitutional Law" (1928) 42 Harv L Rev 149, 164.

19 The law of reason gradually found its way into the common law. The process was slow, however, for canonists were not popular amongst English laymen. In politics they were associated with the attempt to limit the authority of the monarchy for the benefit of foreigners, and their spiritual courts interfered in common life.

20 Fortescue, supra at note 16, at c 15.

ment:[21]

> And bycause it is wryten in the herte/therefore it may not be put away/ne it is never chaungeable by no dyversitie of place ne tyme, but ought to be observed everwhere and among all men, for natural rights are immutable. . . . And therefore agaynst this law prescripcyon statute nor custom may not prevale/and yf any be brought in agaynst it they be no prescripcyons statutes nor costomes/ but thyngis voyd and agaynst iustice.

From St German's day, the law of reason or nature entered the mainstream of legal thought. It was treated as a source of the common law, and represented the immutable part of that law. In 1604 the Speaker of Parliament described the laws of England to James I as follows:[22]

> The laws whereby the ark of this government hath ere been steered, are of three kinds; 1st, the Common Law, grounded or drawn from the Law of God, the Law of Reason, and the Law of Nature, not mutable; the 2nd, the positive law, founded, changed and altered by and through the occasions and policies of times; the 3rd, Customs and Usages, practised and allowed with time's approbation, without known beginnings.

So by the beginning of the seventeenth century, the older medieval concepts about the nature of law, its independence from the King, and its essential immutability joined with a newer and potent concept of natural law, or the law of reason, which was seen also to be immutable. These philosophical ideas were to play a central role in the struggles of the seventeenth century, and were to be enlisted in support of all sides including the judiciary, the King and the Parliamentarians. It was during this period that discussion of fundamental and immutable common law rights loomed largest in English legal history. Of necessity, comment will be restricted to what, in the writer's view, are the more important points.

Fundamental Law in the Seventeenth Century

Dr Bonham's Case

The key figure in the seventeenth century fundamental law debate was Sir Edward Coke. His most important contribution is to be found in the celebrated case of *Dr Bonham*.[23] The case was decided on an action brought by Dr Bonham against the President and Censors of the College of Physicians for false imprisonment. The College was authorised to fine any physician practising in the City of London who had not first received the College's authorisation. Dr Bonham's insistence on practising without admission to the College ended finally in his imprisonment. In the course of his judgment Coke CJ stated:[24]

21 St German, *Doctor and Student* (Selden Society ed) Vol 1, c ii.

22 *Parliamentary History* Vol 1, 1046.

23 8 Co Rep 114; 77 ER 647. Among other significant cases, see in particular *Prohibitions del Roy* ((1607) 12 Co Rep 63; 77 ER 1342), where Coke CJ specifically invokes Bracton (supra at note 12) in support of the proposition that the King is subject to the law.

24 Ibid, 118a; 652.

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

Controversy plagues *Dr Bonham's* case. English historians in particular are inclined to downplay its significance.[25] Professor Thorne is of the view that *Dr Bonham's* case is to be seen simply as an example of orthodox statutory interpretation. He says:[26]

> The belief that Coke in *Bonham's* case was invoking the doctrine that there were superior principles of right and justice which Acts of Parliament might not contravene, is widely held. . . . [W]e believe that some light may be thrown upon the problem by approaching it from the private law rather than the constitutional law side, and we suggest that to some extent at least, later doctrines of natural law have been reflected backward upon Coke's statement, giving it a content it did not in fact have.

American historians, on the other hand, see in *Bonham's* case the origins of judicial review. For example, Professor Corwin of Princeton University writes:[27]

> Coke was not asserting simply a rule of statutory construction. . . . [A]s we have seen, Coke was enforcing a rule of higher law deemed by him to be binding on Parliament and the ordinary courts alike.

The truth may be somewhere in between the two positions. The English interpretation properly demonstrates that the authorities relied upon by Coke CJ in the judgment do not in fact support the proposition and, to this extent, Coke CJ's dictum is an innovation. The English analysis also properly emphasises that the dictum in *Bonham's* case was pronounced in the context of the ordinary construction of a statute. Professor Thorne demonstrates that Coke CJ was simply refusing to follow a statute which he thought was absurd on its face. He concludes from this fact that Coke CJ did not visualise the statute as being void because of a conflict between it and common law, natural law, or higher law.[28]

We cannot agree with Thorne's final proposition that *Bonham's* case did not involve any appeal at all to higher fundamental law, and to that extent the American approach provides an appropriate balance. Coke CJ must have been aware that this was no ordinary repugnancy in a statute. It was not physically impossible to be performed. What made the statute repugnant was its breach of the basic common law rule that *aliquis non debet esse judex in propria causa*.[29] This is a moral repugnancy, impossible to be performed only because it is against reason. So Coke CJ is elevating the maxim that one can-

25 See, for example, Allen, *Law in the Making* (7th ed) 449.
26 Thorne, "Dr. Bonham's Case" (1938) 54 LQR 543, 545.
27 Supra at note 18, at 372.
28 Supra at note 26. See also Gough, *Fundamental Law in English Constitutional History* (2nd ed) 32-40; Holdsworth, supra at note 11, at 369-370.
29 *Co Lit* 141a.

not be judge in one's own cause into an unalterable rule, and of course any statute which collides with this principle must give way to it. An appeal to fundamental law is therefore necessary to Coke CJ's argument.

Further evidence to support this interpretation can be found in the words of Coke's arch rival, the Lord Chancellor Ellesmere. Lord Ellesmere clearly understood that Coke was placing legal fetters on Parliament. *Bonham's* case, Lord Ellesmere says,[30]

> derogateth much from the wisdome and power of the parliament, that when the three estates ... have spent their Labours in makeing a law, then shall 3 Judges on the bench distroy and frustrate all their points because the Act agreeth not in their particular sence with Common right and reason, whereby he advanceth the reason of a particular Court above the Judgement of all the Realme.

MAGNA CARTA

The dictum in *Bonham's* case was not repeated in the *Institutes*. However we find that the *Institutes* developed another area of fundamental law, this time closely related to Magna Carta. The impact of Magna Carta on English legal history enters a new phase with its treatment by Coke. One could say that Coke reinvented Magna Carta. He took a feudal pact which had fallen into disuse, and from it created a document which gave rights to the nation rather than to a class. In his central discussion of Magna Carta, he says:[31]

> This Parliamentary Charter hath divers appellations in the Law. Here it is called Magna Carta, not for the length or largenesse of it ... but it is called the Great Charter in respect of the great weightinesse and weighty greatnesse of the matter contained in it in few words, being the fountain of all the fundamentall lawes of the Realme, and therefore it may truely be said of it, that it is *magnum in parvo*. ... And by the Statute of 42.E.3.ca.3 if any Statute be made against either of these Charters [i.e. Magna Carta or Charter of the Forests] it shall be voide.

Fundamental Law is Deployed

In earlier, more peaceful, times reference to fundamental rights was rare.

30 "Observations Upon Lord Coke's Reports" (1615) in Knafla, *Law and Politics in Jacobean England: The Tracts of Lord Chancellor Ellesmere* (1977) 306-307. Lord Ellesmere was not the only person to react to *Bonham's* case. Sir Henry Hobart, Chief Justice of the Common Pleas from 1613, was a staunch upholder of Coke's view of the common law, and its ability to control Acts of Parliament. This fact is attested to by his judgments in two cases: *Day v Savadge* ((1615) Hob 85; 80 ER 235) and *Sheffeild v Ratcliffe* ((1615) Hob 334; 80 ER 475). It may seem strange that, despite the importance of *Bonham's* case, its reasoning does not appear in political debate up to the period of the Long Parliament. Writers like Thorne would see in this fact more proof that the case does not rely on fundamental law. But the reason may well be political. The primary contest of the period was between Parliament and the Stuart Kings. In this context the common lawyers perceived Parliament to be upholding the fundamental laws of the realm against Stuart despotism. Parliamentarians and lawyers were therefore allies, and it was this alliance which ultimately made the removal of Charles I possible. Thus it should not appear strange that *Bonham's* case created little interest outside the legal fraternity itself. Parliamentary legislation was not seen as the likely perverter of the ancient liberties of the subject.

31 *Co Inst* Vol 1, 81.

But in the seventeenth century such references multiplied dramatically in the face of a perceived imbalance in the constitution, attributed to James I. With Parliament on the defensive, it is the Parliamentarians who deploy fundamental law first.

The case of the five knights is one example amongst many.[32] The five knights refused to contribute to a forced loan imposed by the King upon the populace, and were imprisoned "by special command of the King". The five knights lost their case in court.[33] The great indignation at the outcome of the case was ventilated in Parliament. Magna Carta became the focus of the debate, and its famous clause – *nullus liber homo*, etc[34] – was expounded by Coke to mean that no free man should be imprisoned except by "due process of law". The consequence of the debate was that a proposal was framed, asking the King to declare, *inter alia*:[35]

> That according to Magna Carta and the Statutes aforenamed, and also according to the most ancient Customs and Laws of this Land, every free subject of this realm hath a fundamental propriety in his goods, and a fundamental liberty of his person.

After the execution of Charles I fundamental law was instead claimed in aid against a Legislature running rampant. With the King gone, attention now came to be focused on the perceived breaches of fundamental law by the Long Parliament. These attacks came at first from Royalists. One such was the Welsh Judge David Jenkins, who was imprisoned in the Tower by the Long Parliament. In his *Discourse Touching the Inconveniences of a Long-Continued Parliament* (which was indeed inconvenient for the Judge), Jenkins states:[36]

> When an act of parliament is against common right or reason, or repugnant, or impossible to be performed, the common law shall control it, and adjudge this act to be void: they are the words of the law.

This is of course a restatement of Coke CJ's words in *Bonham's* case, which in this period was making its first appearance as a matter of constitutional importance.

It was not only Royalists who opposed the Long Parliament for subverting the fundamental laws. Other political groups, such as the Levellers, also relied on fundamental law to support their claims.[37]

32 *Darnel's Case* 3 St Tr 1.

33 That result was not surprising, given that Crewe CJ, who had refused to admit the legality of the loan, had been punished by dismissal from office.

34 "No freeman should be taken or imprisoned, or disseised, or exiled, or outlawed, or anyways destroyed; nor would the King go against him or send on him, unless by the lawful judgment of his peers or by the law of the land." From Walker, *The Oxford Companion to Law* (1980) 796.

35 Cited in Gough, supra at note 28, at 63.

36 (1647). Cited in Gough, supra at note 28, at 103.

37 See especially the works of John Lilburne: "Thus Royalist and Leveller agreed in erecting Coke's famous words into a doctrine of fundamental law, to confront the assumption of arbitrary power by the Long Parliament." Cited in Gough, supra at note 28, at 111.

References to fundamental laws, rights and liberties continued unabated after the establishment of the Commonwealth. Indeed, they received judicial treatment. In *R v Love* Keble J states:[38]

> Whatsoever is not consonant to the law of God in Scripture, or to right reason which is maintained by Scripture, whatsoever is in England, be it Acts of Parliament, customs, or any judicial acts of the Court, it is not the law of England, but the error of the party which did pronounce it; and you, or any man else at the bar, may so plead it.

The return to the pre-Civil War constitution brought with it a feeling that the ancient fundamentals were to be restored. On 1 May 1660 the House of Lords resolved: "according to the ancient and fundamental laws of this kingdom the government is and ought to be by King, Lords and Commons."[39] The treatment of fundamental law in the Restoration period continued as if the Interregnum had never happened. In *Thomas v Sorrell*,[40] Chief Justice Vaughan employed reasoning which was almost identical to that of Coke J in *Bonham's* case. *Thomas v Sorrell* concerned the extent of the King's jurisdiction to dispense with laws. It was accepted that the King could dispense with most laws which were *malum prohibitum*, but could not dispense with laws which were *malum in se*: "[f]or a law which a man cannot obey, nor act according to it, is void, and no law: and it is impossible to obey contradictions, or act according to them."[41]

The concept of *malum in se* presupposes the existence of a law which is not man-made; a law which is immutable, notwithstanding conflicting statutes. Such a conflict renders the offending statute "impossible to be performed". For the same reason, Coke CJ had held that the College of Physicians could not be judge in its own cause, despite the contrary words in the Letters Patent and the statute.

Frequent use of fundamental law was made by early Whig politicians to support the Exclusion Bill and other Whig programmes. The belief that statutes contrary to Magna Carta were void continued.[42] Nevertheless, fundamental law could be called in aid of the King as much as it could for the opposition. In the famous case of *Godden v Hales*[43] the King won a decisive battle (although it contributed to his ultimate loss in the war) when the Judges of the King's Bench held that:[44]

> [T]he Kings of England were absolute Sovereigns; that the laws were the King's laws; that the King had a power to dispense with any of the laws of Government as he saw necessary for it; that he was sole judge of that necessity; [and] that no Act of Parliament could take

38 (1653) 5 St Tr 43, 172. See also *Streater's* case (1653) 5 St Tr 366.

39 *Lords Journal* Vol 11, 8.

40 (1674) Vaughan 330; 124 ER 1095.

41 Ibid, 337; 1102.

42 Shaftesbury, for example, supported his application for bail after being imprisoned in the Tower by Order of the House of Lords on this basis. Reported in Christie, *The Life of Shaftesbury* (1871) Vol 2, Appendix 6, XCV. Cited in Gough, supra at note 28, at 144-145.

43 (1686) 2 Show KB 475; 89 ER 1050.

44 Ibid, 478; 1051.

away that power. . . .

Since the courts were obviously not prepared to support the Whig view of the constitution, fundamental law came to be used as a justification for rebellion. The right to rebel thus resumed its status as a lawful step in securing adherence to the perceived fundamentals, just as the barons had explicitly negotiated a right to rebel with King John in Magna Carta over three hundred years before. This time, however, the right to rebel was based on natural law. John Locke wrote that:[45]

> There still remains in the People a Supream power to remove or alter the Legislative, when they find the Legislative act contrary to the trust imposed in them.

The idea of fundamental law shifted in the decade leading up to the Revolution from a strictly legal doctrine to a doctrine which describes the limits of the obligation to obey the sovereign or the positive law. Thus denuded of practical legal significance within an established constitutional framework, fundamental law over the next 150 years slowly bowed out of legal discourse, giving way to the new positivist theory of the nineteenth century. But, as we shall see, fundamental law continued to be invoked up to the end of the eighteenth century.

The Bill of Rights[46] demonstrated that the victors in the Revolution had sought to protect, not to change, the fundamentals of the constitution. The framers of that document felt that they were simply declaring common law that already existed and would continue to exist. The Preamble to the Bill reads:[47]

> And thereupon the said Lords Spirituall and Temporal, and Commons . . . do in the first place (as their auncestors in like cases have usually done) for the vindicating and asserting their auncient rights and liberties, declare. . . .

The idea that certain rights and liberties are immutable continued to pervade constitutional writing. The great conservative, Burke, extolled the virtues of the Declaration of Rights thus:[48]

> In the 1st of William and Mary in the famous statute, called the Declaration of Right, the two houses utter not a syllable of 'a right to frame a government for themselves.' You will see that their whole care was to secure the religion, laws, and liberties, that had long been possessed, and had been lately endangered. . . . You will observe that from Magna Carta to the Declaration of Right, it has been the uniform policy of our constitution to claim and assert our liberties, as an *entailed inheritance* derived to us from our forefathers, and to be transmitted to our posterity; as an estate specially belonging to the people of this kingdom without any reference whatever to any other more general or prior right.

The last time that *Dr Bonham's* case was cited with approval in a court of

45 *Second Treatise* para 149.
46 1 Will & Mary sess 2 c 2 (1689).
47 Ibid.
48 Burke, *Reflections on the Revolution in France* (Penguin ed) 118ff.

law was in *City of London v Wood*[49] – a decision of Lord Chief Justice Holt. In the course of his judgment, the Chief Justice stated:[50]

> And what My Lord Coke says in *Dr Bonham's case* in his 8 Co. is far from any extravagancy, for it is a very reasonable and true saying, that if an Act of Parliament should ordain that the same person should be party and Judge . . . it would be a void Act of Parliament; for it is impossible that one should be Judge and party, for the Judge is to determine between party and party, or between the Government and the party; and an Act of Parliament can do no wrong, though it may do several things that look pretty odd. . . . An Act of Parliament may not make adultery lawful, that is, it cannot make it lawful for A. to lie with the wife of B. but it may make the wife of A. to be the wife of B. and dissolve her marriage with A.

The strain between pre-Revolution natural law theory and the fact of post-revolution parliamentary supremacy is evident in this peculiar passage. For in the same sentence, Holt CJ asserted that an Act of Parliament can do no wrong, and yet that there were some things which Parliament could not do. Professor Plucknett laments that:[51]

> In the course of the fourteen folio pages this judgment occupies, then, Lord Holt wavers helplessly between two incompatible opinions. . . . Such is the sad state of wreckage to which Lord Coke's stately theory had been reduced after the successive hurricanes of the Great Rebellion and the Glorious Revolution.

The Decline of Fundamental Law

With the political storms behind, fundamental law decreased in importance. As political and legal requirements for a vital natural law theory receded, the way became clear for a rationalisation. This eventually took the form of a fully developed theory of parliamentary sovereignty in the context of positivist doctrine. Such a result, however, was not inevitable, and fundamental law and the control of Parliament continued to appear in political debate. An interesting example is the debate surrounding the Stamp Act 1765 and the Declaratory Act 1766, which concerned the right of Parliament to tax the colonists in America without representation. Especially interesting is the speech by Lord Camden, a Chief Justice on the Declaratory Bill. When the Bill came up for debate, Lord Camden slated it as being:[52]

> Illegal, absolutely illegal, contrary to the fundamental laws of nature, contrary to the fundamental laws of this constitution . . . a constitution grounded on the eternal and immutable laws of nature; a constitution whose foundation and centre is liberty.

It should be remembered that these words were uttered, not in a court of law, but during a hotly contested political debate. Even so, it is surely significant that a judge of such great stature should proclaim the fundamental rights of the American colonists against statute law. It is not adequate to dismiss the

49 (1710) 12 Mod 669; 88 ER 1592.
50 Ibid, 687-688; 1602.
51 "Bonham's Case and Judicial Review" (1926) 40 Harv L Rev 30, 55-56.
52 *Parliamentary History* Vol 16, 178. Cited in Gough, supra at note 28, at 194.

comments, as Gough does,[53] as resulting from a confusion between legal and moral rights. That criticism can only be made out if the concept of parliamentary sovereignty is fully accepted. Lord Camden – like all fundamental law proponents – would have rejected the complete separation of law and morals that the positivist commentator brings to bear upon an analysis of pre-nineteenth century legal thought.

While fundamental law was growing in strength in the American colonies during the tense period leading to the Revolution, the doctrine continued to dwindle in stature in England. It found only weak expression in Blackstone. The will of God was, according to Blackstone, the law of nature.[54] That will is discernible by human beings through the application of reason, with which God has endowed us.[55] Blackstone went to state:[56]

> For the principal aim of society is to protect individuals in the enjoyment of those absolute rights, which were vested in them by the immutable laws of nature. . . . Hence it follows that the first and primary end of human laws is to maintain and regulate these *absolute* rights of individuals.

Despite his apparent support for fundamental rights, Blackstone contradicted himself by claiming also that the power of the Legislature cannot be contained:[57]

> [I]f the parliament will positively enact a thing to be done which is unreasonable, I know of no power in the ordinary forms of the constitution, that is vested with authority to control it: and the examples usually alleged in support of this sense of the rule do none of them prove, that where the main object of a statute is unreasonable, the judges are at liberty to reject it; for that were to set the judicial power above that of the legislature, which would be subversive of all government.

In the same passage, Blackstone referred to *Bonham's* case in support of his proposition that if an Act, because of its general wording, caused some collateral unreasonableness, then the courts would interpret the statute to avoid the unreasonableness. For example, where a statute gave a person the power to try all cases arising within a particular jurisdiction, the statute would not be construed so as to allow that person to try cases in which he is a party. *Bonham's* case now stood for nothing more than a rule of interpretation when finding the true intention of the Legislature.

The clearest denunciation of fundamental law doctrine came from Jeremy Bentham, the most important source of positivist legal thought. In 1776 Bentham published his *Fragment on Government* in which he set out to demonstrate some of the "capital blemishes" of Blackstone's *Commentaries*.[58] Bentham denied that there are any legal limitations on the Legislature's com-

53 Ibid, 195
54 Supra at note 2, at 38.
55 Ibid, 39.
56 Ibid, 124.
57 Ibid, 91.
58 Bentham, *A Fragment on Government (1776) Preface, para 4.*

petence to make laws.[59] Moreover even if it were true that there were such limitations, as many claim, Bentham argues that the rules as to which law is to be void and which is not are too ill-defined and unworkable; and that too much power would then be in the hands of judges who are not democratically answerable to the electors.[60] As for natural law:[61]

> 'Natural rights' is simple nonsense: natural and imprescriptable rights, rhetorical nonsense – nonsense upon stilts.

The doctrine of positivism and parliamentary sovereignty were by then inextricably linked. The courts adopted the philosophical tenor of the times: in 1871 we have a categorical denial of Coke's principle in *Lee v Bude and Torrington Junction Railway*.[62] The appellant sought to avoid the effect of a private Act of Parliament on the grounds he had not been notified that the Act was to affect his private property interests, and that the Act was to that extent inapplicable to him. Mr Justice Willes rejected the argument, and said:[63]

> I would observe as to these Acts of Parliament, they are the law of this land; and we do not sit here as a court of appeal from parliament. It was once said – I think in Hobart – that, if an Act of Parliament were to create a man judge in his own case, the Court might disregard it. That dictum, however, stands as a warning, rather than an authority to be followed. We sit here as servants of the Queen and the legislature. Are we to act as regents over what is done by parliament with the consent of the Queen, lords and commons? I deny that any such authority exists. . . . The proceedings here are judicial, not autocratic, which they would be if we could make laws instead of administering them.[64]

The work of Dicey at the end of the nineteenth century fortified the relationship between the courts and the Legislature, and since that time it has been to all intents and purposes impossible to deny the validity of an enactment for some substantive reason.[65]

Thus the idea of fundamental law independent of the Legislature seems to have come to an end. Were it not for the Second World War and the subsequent renewal of interest in the "inalienable rights" of human beings *qua* human beings, this may have been the end of the story. But, as we have noted, the Court of Appeal in New Zealand now seems to be moving toward a recognition of fundamental rights, guaranteed to citizens by the common law and enforced by the courts. We shall turn now to discuss some of its theoretical implications.

59 Ibid, chapter 4, para 27.
60 Ibid, paras 28-31.
61 "A Critical Examination of the Declaration of Rights" in *The Works of Jeremy Bentham* (Bowring ed) Vol 2, 501.
62 (1871) LR 6 CP 576.
63 Ibid, 582.
64 See also *Grand Junction Canal Co v Dimes* (1849) 12 Beav 63, 77; 50 ER 984, 989 and *Mersey Docks Trustees v Gibbs* (1866) LR 1 HL 93.
65 See *British Railways Board v Pickin* [1974] AC 765 (HL).

Diluting Dicey

What is the relevance of the history briefly summarised in the preceding pages? Our present constitutional makeup is the product of three separate influences of which history is one, the other two being positive law and constitutional theory (derived from the mixture of sovereignty theory and legal positivism). In this writer's view, the historical limb of constitutional law demonstrates the overwhelming and distorting effect that the latter two influences have had on the interpretation of the constitution and on the concept of fundamental rights.

History has left us with a rich legacy. Two themes are particularly evident: law declared and the limitation of the legal power of the sovereign. These themes are related to each other and reflect different aspects of an overarching concept that some law, because of its fundamental content, is beyond the power of the law-maker to change. These are the "fundamentals" of the constitution.

This idea frequently finds expression in the phrase "the rule of law". The meaning Dicey gave to this phrase (a matter which will be adverted to below) is but a pale shadow of the grand concept with which it is more commonly associated. As is to be expected, Winston Churchill has put it better than anyone else. Discussing Magna Carta, he writes:[66]

> If the thirteenth-century magnates understood little and cared less for the popular liberties or Parliamentary democracy, they had all the same laid hold of a principle which was to be of prime importance for the future development of English society and English institutions. Throughout the document it is implied that here is a law which is above the King and which even he must not break. This reaffirmation of a supreme law and its expression in a general charter is the great work of Magna Carta; and this alone justifies the respect in which men have held it. . . .
>
> Now for the first time the King himself is bound by the law. The root principle was destined to survive across the generations and rise paramount long after the feudal background of 1215 had faded in the past. The Charter became in the process of time an enduring witness that the power of the Crown was not absolute.
>
> The facts embodied in it and the circumstances giving rise to them were buried or misunderstood. The underlying idea of the sovereignty of law, long existent in feudal custom, was raised by it into a doctrine for the national State. And when in subsequent ages the State, swollen with its own authority, has attempted to ride roughshod over the rights or liberties of the subject it is to this doctrine that appeal has again and again been made, and never, as yet, without success.

What has happened to this legacy in the case of lawyers? Our long-standing ideas about the constitution and fundamental rights have been distorted, principally by the relatively recent notions of sovereignty and by positivism. Dicey's *Law of the Constitution* demonstrates this point. The work revolves around three headings: the sovereignty of Parliament, the rule of law, and the conventions of the constitution. Only the first two are relevant to our present

66 Churchill, *A History of the English Speaking Peoples* (1956) Vol 1, 201-202.

enquiry. As to parliamentary sovereignty, Dicey says:[67]

> The principle of parliamentary sovereignty means neither more nor less than this, namely, that Parliament thus defined has, under the English constitution, the right to make or unmake any law whatever; and, further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of the Parliament.

Dicey attempts to prove the proposition that Parliament is omnicompetent by referring to a variety of far-reaching statutes, by dismissing three possible limitations (morality, the Prerogative, and the binding of following Parliaments), and by invoking a passage of Blackstone. The proof is scarcely convincing. In Simpson's words:[68]

> Dicey announced that it was the law that Parliament was omnicompetent, explained what this meant, and never devoted so much as a line to fulfilling the promise he made to demonstrate that this was so.

When he turned to the rule of law, Dicey identified it as three distinct concepts. The first is that no man is punishable except for a breach of the law established in the ordinary legal manner before the ordinary courts of the land. The second is that every man, whatever his rank or condition, is subject to the ordinary law of the realm and is amenable to the jurisdiction of the ordinary tribunals. The third and final meaning of "the rule of law" is that the general principles of the constitution have come about as the result of judicial decisions determining the rights of private persons in particular cases brought before the courts; rather than, as in many foreign constitutions, that the security given to individuals results from the general principles of the constitution.

What threadbare imitations these doctrines are of the rule of law embodied in Magna Carta, and of the fundamentals of the constitution enunciated in the Bill of Rights. Dicey also succeeded in removing from the constitution the *politicum* which Sir John Fortescue had extolled as the great virtue of the English constitution. On the role of the electorate, he says:[69]

> [W]e may assert that the arrangements of the constitution are now such as to ensure that the will of the electors shall by regular and constitutional means always in the end assert itself as the predominant influence in the country. But this is a political, not a legal fact. The electors in the end can enforce their will. But the courts take no notice of the will of the electors. The judges know nothing about any will of the people except in so far as that will is expressed by an Act of Parliament.

Dicey asks none of the big questions about the source of Parliament's authority and it is perhaps this aspect of his work which appeals most to lawyers. Commenting on the passage cited above, Allott suggests:[70]

> This is the moment at which Dicey wins lawyers to his side, by seeming to offer at long last a simple, self-contained, non-metaphysical, lawyers' theory of the constitution. Warmed by the

67 *Introduction to the Study of the Law of the Constitution* (9th ed) 39-40.

68 "The Common Law and Legal Theory" in Simpson (ed), *Oxford Essays in Jurisprudence* (2nd series) 77, 96.

69 Ibid, 73-74.

70 Allott, "The Courts and Parliament: Who Whom?" [1979] CLJ 79, 111.

> general democratic benevolence of his class and his period and by his own faith in the power of public opinion, . . . he managed to give the impression that there was nothing very new or surprising about what he was saying.

The dangers inherent in the sovereignty of Parliament, when combined with the idea that law should not be confused with what *ought to be law*, are plain. If Parliament has the power to make a legally binding command, no matter what the subject matter of that command, then it is possible that a direct conflict will arise between the duty to obey the law and the moral duty not to obey wicked laws. This conundrum was resolved during the age of liberalism by the social contract. If the sovereign failed to protect the people in the enjoyment of their basic liberties, then it breached its contract with its subjects, and the oppressive "law" could not be binding. In prior times, reliance was placed on unchanging common law, or on Magna Carta, a true covenant between the sovereign and the subject.

These ideas were swept away and replaced with nothing but a naive faith that Parliament would not interfere with important rights. The potential inherent in sovereignty theory and positivism for great evil was amply demonstrated by the Nazi rise to power in Germany. In the seventy-five years before the Nazi regime positivism achieved a standing in that country such as it has enjoyed in no other. Lon Fuller has described the particular fascination with which German legal scholars took hold of positivism.[71]

> The German lawyer was therefore peculiarly prepared to accept as "law" anything that called itself by that name, was printed at government expense, and seemed to come "von oben herab". . . . Hitler did not come to power by a violent revolution. He was Chancellor before he became the Leader. The exploitation of legal forms started cautiously and became bolder as power was consolidated. The first attacks on the established order were on ramparts which, if they were manned by anyone, were manned by lawyers and judges. These ramparts fell almost without a struggle.

After the War German courts were required to deal with the legal problems that arose out of Nazi legislation. Fuller discusses one case which was the subject of debate between himself and Professor Hart.

A German soldier was imprisoned after his wife reported him for expressing disapproval of the Nazi regime. After the War, the wife was tried for having procured the imprisonment of her husband. Her defence rested on two especially obnoxious Nazi statutes which had made it a crime to make statements such as her husband had made.[72]

The court rejected her defence, holding that the statutes were so evil that they could not be considered law. In the words of the court, the statutes were "contrary to the sound conscience and sense of justice of all decent human beings." Hart criticised the court for its approach, and would have preferred the court to let the woman go unpunished.[73] He argued that the court failed to

71 Fuller, "Positivism and Fidelity to Law" (1958) 71 Harv L Rev 631, 657-660.

72 A sentence of death was never carried out.

73 "Positivism and the Separation of Law and Morals" (1958) 71 Harv L Rev 593, 618-620.

recognise a dilemma of a sort which would have been immediately apparent to Bentham or Austin, and instead simply ran away from the problem.

This criticism is, in the writer's view, unsound. As Fuller explains:[74]

> So far as the courts are concerned, matters certainly would not have been helped if, instead of saying, "This is not law" they had said "This is law but it is so evil we will refuse to apply it." Surely moral confusion reaches it height when a court refuses to apply something it admits to be law, and Professor Hart does not recommend any such "facing of the true issue" by the courts themselves. He would have preferred a retroactive statute.

Our own judges have adopted an identical approach to Nazi laws as did their colleagues in Germany after the War. In private international law, the courts will not recognise nor give effect to foreign laws which, as to their subject matter, appear to be utterly evil. *Oppenheimer v Cattermole*[75] was a case where the House of Lords was called upon to deal with Nazi laws depriving Jews of their German citizenship. These laws were at issue because of the unclear application of double taxation laws to Jews of German origin in Britain. The House of Lords refused to recognise the Nazi statutes as law. Lord Cross of Chelsea stated:[76]

> [W]hat we are concerned with here is legislation which takes away without compensation from a section of the citizen body singled out on racial grounds all their property on which the state passing the legislation can lay its hands on and, in addition, deprives them of their citizenship. To my mind a law of this sort constitutes so grave an infringement of human rights that the courts of this country ought to refuse to recognise it as a law at all.

It is surely ironic that constitutional dogma of the type propounded by Dicey should result in our courts considering themselves bound to apply a law passed in our own country but able to declare it invalid if passed in another.[77]

The positivist completely separates the moral basis of the legal system from the morality of laws. An immoral law may nevertheless be a valid law. But a civilised system of law ought to reject the notion that there is no relationship between political morality and the validity of laws declared. The role of the constitution is to protect the values it serves. Undiluted, Diceyan theory gives the law-maker the legal power to destroy everything which a constitution protects.

Even the positivist must acknowledge a non-legal, moral concept. What Hart calls the "rule of recognition"[78] must itself correspond with concepts which are not directed by analysis. Thus, Hart identifies elements of natural law as a minimum legal content that all legal systems must have.[79] On this view, the rule of recognition is legally ultimate – it cannot come from any

74 Supra at note 71, at 655.
75 [1976] AC 249.
76 Ibid, 278. See also at 263 per Lord Hailsham of St Marylebone; at 265 per Lord Hodson; at 283 per Lord Salmon.
77 See also the comments of Cooke P, supra at note 4.
78 Hart, supra at note 73, at 603; *The Concept of Law* (1961) 97ff.
79 Ibid, 189ff.

legal source. It is simply the case that the courts accord the force of law to certain documents which go through a given procedure in Parliament. One way of treating this rule is to say that it is merely a political fact, which cannot be changed except by "revolution". Professor Wade takes this view in his influential article "The Basis of Legal Sovereignty":[80]

> The rule of judicial obedience is in one sense a rule of common law, but in another sense – which applies to no other rule of common law – it is the ultimate *political* fact upon which the whole system of legislation hangs.

The issue of fundamental law is also the issue of whether the substantive base of the rule of recognition is to be included in, or excluded from, the ambit of the common law. In this writer's view, the political fact must also be a legal fact, for the very reason that the courts habitually apply it.[81] This is the legal source for a doctrine of fundamental rights. If it is a common law rule which gives validity to Acts of Parliament, then it is within the control of the courts to define what is a "law". The rule of recognition can accommodate not only the requirement that a valid statute must pass three readings in Parliament and receive the Royal Assent, but also that such "Acts" not be destructive of the shared political morality that underlies the constitution. Allan has discussed this type of approach:[82]

> The legal doctrine of legislative supremacy articulates the courts' commitment to the current British scheme of parliamentary democracy. It ensures the effective expression of the political will of the electorate through the medium of its parliamentary representatives. If some conception of the nature and dimensions of the relevant political community provides the framework for the operation of the doctrine, equally some conception of democracy must provide its substantive political content. In other words, the courts' continuing adherence to the legal doctrine of sovereignty must entail commitment to some irreducible, minimum concept of the democratic principle. . . . A parliamentary enactment whose effect would be the destruction of any recognisable form of democracy . . . could not consistently be applied by the courts as law. Judicial obedience to the statute in such (extreme and unlikely) circumstances could not coherently be justified in terms of the doctrine of parliamentary sovereignty since the statute would plainly undermine the fundamental principle which the doctrine serves to protect.

From such a starting position it would not be hard to flesh out the central core of fundamentals with those principles that are the most important elements of our democratic system of government. This is not, it should be stressed, an appeal to mere majoritarianism. Such is not the true end of democracy.[83] It is an appeal to the respect which ought to be accorded to certain basic rights that each individual has in a free and democratic society.

The courts would thereby be required to reassess their position in the constitutional structure, by discarding the comforting doctrines of Dicey, and

80 [1955] CLJ 172, 188; See also Hart, supra at note 78, at 97ff.

81 See Sir Owen Dixon, "The Common Law As An Ultimate Constitutional Foundation" (1957) 32 ALJ 240.

82 "The Limits of Parliamentary Sovereignty" [1985] Public Law 614, 620-621.

83 See Cooke P, supra at note 4, at 159, on the protection of minority rights: ". . . a belief that democracy equals majority rule is quite widespread and difficult to dispel."

by re-establishing their historic role within the body politic. In the past, the courts have relied upon the political fact of the Glorious Revolution and have acquiesced in the aggregation of power in the hands of the Legislature. But there is little historical support for the interpretation that the courts have placed upon the Revolution. The Glorious Revolution took place against the backdrop of what the Parliamentarians saw as violations of constitutional fundamentals, and the object of the Revolution was to restore them. It was a conservative revolution. In the words of Macaulay:[84]

> It was a revolution strictly defensive and had prescription and legitimacy on its side. . . . Our parliamentary institutions were in full vigour. The main principles of our government were excellent. They were not, indeed, formally and exactly set forth in a single written instrument: but they were to be found scattered over our ancient and noble statutes; and, what was of far greater moment, they had been engraven on the hearts of Englishmen during four hundred years. . . . A realm in which these were the fundamental laws stood in no need of a new constitution.

Conclusion

A brief review of fundamental law puts Cooke P's dicta and extra-judicial statements in the context of 800 years of legal thought. The conclusion that one is forced to is that what Sir Robin is proposing is hardly revolutionary. Nevertheless, this kind of activism has not met with universal approval. One suspects that it was just the kind of dicta referred to herein which caused one leading practitioner to state, with characteristic style:[85]

> In New Zealand today, however, the judicial lions discontented with their position under the throne, claim the right to leap up onto and prance about upon the seat of government and to jostle aside that seat's rightful occupants.

It must be conceded that a doctrine of fundamental rights raises a number of formidable problems. The first relates to the proposed content and degree of such rights. It is easy to identify the basic principles of democratic rule. But how is that principle to be applied? Does it prevent the Parliament from extending its own lifetime in peace? If not, in wartime? It has done so in the past. Should convicted prisoners have the right to vote? One can appreciate immediately that beyond the very straightforward cases, it is hard to categorise rights as "absolute" or "inalienable". Nevertheless, the process of identifying these rights, and their ambit, need not be done without guidance. Some important principles are already enshrined in legislation: Magna Carta; the Bill of Rights; the Habeas Corpus Acts; the Petition of Right; the Act of Settlement; the Statute of Westminster and the Electoral Act are instances. Many of these instruments declare rights which in the framers' view already existed, and mention has been made in that regard of Magna Carta and the Bill of Rights. Other sources are the various international instruments affect-

84 *History of England From the Accession of James II* (Firth ed) Vol 3, 1306ff.
85 Dugdale [1988] NZLJ 445.

ing human rights, and the experience of the United States with its Bill of Rights (which itself strongly reflects the English origins of American constitutional law). There is now also the Canadian Charter of Rights and Freedoms, currently having a major impact on the legal system in that country.

The problem of degree should not be an insurmountable hurdle; at least the process would involve a proper weighing up of alternatives in the light of certain fundamental principles. That little would definitely be an improvement over the current position, in which inherited wisdom denies the courts any right to enquire into such issues.

Another problem raised by common law fundamental rights is one of relevance. Consider the political circumstances which are likely to prevail at a time when the court thinks it appropriate to intervene and declare an Act of Parliament void. The environment in which Parliament would make such serious inroads into individual freedoms would be so extreme that it is unlikely that the legal system itself would have any significant effect. If Parliament is prepared to trample on basic rights, it will not brook opposition from powerless courts. However, it is submitted that the development of a common law doctrine as envisaged by Cooke P would at least create a legal and political climate in which such circumstances are less likely to occur. This is precisely the argument raised by Lon Fuller when referring to Nazi Germany. No legal system can protect a citizen indefinitely against sustained attack from the executive or Legislature. But it can provide resistance at the crucial early stages, before a political situation deteriorates into a matter of simple force; and it can foster a way of thinking about the constitution – the relationship between the organs of government, and their collective relationship with the individual – which makes such turmoil less likely. That is as much as lawyers can promise.

Finally, the doctrine rests on an idea of "shared political morality", and in the long term that is perhaps its greatest weakness. Unlike a written Bill of Rights, fundamental common law rights do not provide a central philosophical rallying point for each and every citizen. Furthermore, they are based on a uniquely English idea of the law and the constitution. Whether New Zealanders can be said to share a common political morality in the light of our social, racial or ethnic mix is an open question, and one perhaps better left to the sociologist.

Nevertheless, if a country is to be successful, and if it is to enjoy an effective legal system, there must be some agreement as to the basic political principles which underlie government. Parliament has failed to produce a Bill of Rights that would establish such fundamentals. Lawyers and the courts have had centuries of experience in dealing with fundamental rights. Perhaps the renewed interest in this area, sparked by Sir Robin Cooke, will lead to a re-evaluation of the role of the courts in protecting the individual against the State, and herald a return to a more traditional balance in the constitution.

Allott writes:[86]

> If there is one thread which runs through the whole turbulent history of British constitutional development, it is the belief that we are the servants of fundamental constitutional rules which were there before us and will be there after we are gone. From the days when the King's subjects demanded respect for 'the laws of King Edward (the Confessor)', through the centuries in which legendary superiority attached to such acts as Magna Carta, the Petition of Right, the Bill of Rights, the idea of 'our ancient rights and liberties' has determined the form of our endlessly progressive/conservative constitutional change.

This should continue to be so.

86 Allott, supra at note 70, at 114.