Fundamental Rights in the Realm of New Zealand: theory and practice

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I INTRODUCTION

As may be known to the distinguished participants at this Symposium, the "Realm of New Zealand" is a constitutional concept encompassing the three autonomous legal systems of New Zealand, the Cook Islands, and Niue. The Cook Islands and Niue are States associated with New Zealand, sharing the Queen in right of New Zealand as Head of State, but enjoying exclusive and exhaustive legislative competence in matters both internal and external.[1] My purpose in this paper will be to consider the treatment of "fundamental rights" in each of the three jurisdictions. By "fundamental rights" I will mean rights which a particular jurisdiction regards as sufficiently important to make their displacement by ordinary legislative processes difficult or impossible. The techniques for achieving this result can range from creating presumptions of statutory interpretation in favour of certain rights, to empowering courts to strike down legislative measures which offend them.

In preparation for examining the approaches to the fundamental rights question in each of the three jurisdictions, three preliminary questions will be considered. First, the opposition between the conceptions of law as an *instrument* of the State on the one hand, and as a *check* on State power on the other, must be addressed. Secondly, the disconcertingly haphazard manner in which fundamental rights have been strewn about the common law world since World War II calls for attention. Thirdly, and of particular

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1 The background in relation to the Cook Islands is fully discussed in A Frame "The External Affairs and Defence of the Cook Islands - the 'Riddiford Clause' Considered," (1987) 20 VUWLR 141. The nuances of the constitutional link are not always fully appreciated by observers. Although "the Queen in right of New Zealand" is designated as having responsibilities for external affairs and defence, the real issue relates to the current state of convention as to which Ministers (New Zealand or Cook Islands or Niuean) advise the Queen in Right of New Zealand on the matters in question. The careful student of current practice will, the writer believes, discover that the convention concerning the Cook Islands has developed very substantially and that concerning Niue much less.

relevance in the Pacific, is the difficult question of whether, and if so when, general norms thought to have universal validity can properly prevail over local custom.

II THE "PROBLEM OF THE STATE"

In the thirteenth century, the English writer, Bracton, pointed to the dependence of kingly authority upon law:

> Therefore let the King render to the law what the law renders to him, that is dominion and power, for he is no King if his will rules and not the law.

Sir John Salmond, 500 years later, could describe statute law as merely:[2]

> [T]he formulation of the principles in accordance with which the state intends to fulfil its function of administering justice.

Or Salmond again, defining the State:[3]

> A corporate body whose function is the maintenance of right by might.

The central problem of the State may be expressed at one level as a logical difficulty: how can the State be both the *source* of law, and its bounded *creature*? That tension is found also in the opposition of these two maxims.

(a) *Fiat justitia ruat coelum* ... (Let justice be done even if the world collapses); and

(b) *Salus populi suprema lex* ... (The well-being of the people is the supreme law).

The first is a prescription for action which no sane statesman could unequivocally or blindly adopt. The second would install expediency as an overriding justification of state power in a manner which no sane citizen could admit without reservation. Modern political history presents three resolutions to this tension.

First, the elevation of "state necessity" (or "raison d'etat," as it is often termed) into an independent and superior morality. That is the tradition of Machiavelli, of Stalin and Hitler. The theoretician of this approach was Hegel who wrote:[4]

> The State is the Divine idea as it exists on earth ... The State is the march of God through the world ... The State is the actually existing, realised moral life.

Variants of this approach replace the "State" by "Party" and even "Race".

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2 JW Salmond *Jurisprudence* (1 ed, Stevens & Haynes, London, 1902) 190-1.

3 JW Salmond *The First Principles of Jurisprudence* (Stevens & Haynes, London, 1893) 118.

4 Quoted in K Popper *The Open Society and Its Enemies* (Routledge & Kegan Paul, 1945) Vol 2, 30.

Secondly, a maintenance of the theoretical supremacy of law over "state necessity", whilst treating necessary departures from the doctrine as exceptional aberrations to be regretted and submitted to electoral verdict. This has, by and large, been the common law tradition: it is exemplified in Scrutton LJ's dictum in *Ronnfeldt* v *Phillips* that "a war could not be carried on according to the principles of Magna Charta."[5]

Thirdly, the development of a doctrine of auto-limitation of power by which the State shackles its own freedom of action. This has been the tradition of entrenching fundamental rights and directing Courts to supervise their enforcement against both executive and legislative branches of government.

We might term these the "statist," the "pragmatic," and the "supreme law" approaches respectively.

III THE RISE OF THE SUPREME LAW APPROACH

It is hardly surprising that, in the aftermath of a World War against fascism, the hopes of the world set firmly against the statist approach, which had brought oppression and devastation on an unprecedented scale, and towards the promise of supra-national codes of fundamental rights. But not all Governments shared this enthusiasm. In a remarkable essay, Anthony Lester has traced the reluctant manner in which the British Government accepted the European Convention on Human Rights in 1950, the delaying tactics deliberately followed in respect of attempts to formulate a Covenant on Human Rights at the United Nations, and the casual manner in which fundamental rights were subsequently inserted, in "supreme law" form, in the independence constitutions of the new Commonwealth.[6] Lester comments:[7]

> The Parliament of Westminster has thus exported the fundamental rights and freedoms of the Convention to the new Commonwealth on a scale without parallel in the rest of the world ... With hindsight, it is ironical to compare the Colonial Office's original hostility towards the Convention with its later use of the same Convention as the model for constitution-making in the new Commonwealth.

The British acceptance of the European Convention on Human Rights in 1950 left the British Government free to reflect the Convention standards as it thought proper in United Kingdom law. In 1965, the further crucial step was taken of accepting the compulsory jurisdiction of the European Court of Human Rights. Again, this

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5 (1918) 35 TLR 46, 47.

6 A Lester "Fundamental Rights: The United Kingdom Isolated?" [1984] Public Law 46. The essay is a revised version of the 1983 FA Mann Lecture.

7 Above n 6, 56-57.

momentous step appears to have been taken without reference to Cabinet. Lester observes:[8]

> Thus was the substance, if not the form, of parliamentary sovereignty over fundamental rights transferred from London to Strasbourg, not with a roar but with a whisper.

A second source for new Commonwealth fundamental rights provisions has been the Canadian Bill of Rights of 1960. That measure, since replaced by the fully-fledged Charter of 1982, permitted express derogations by the legislature and was also found to be somewhat ambivalent on the role of the Courts when faced with legislation which could not be interpreted so as not to infringe fundamental rights. The 1960 Canadian Bill provided the model for some Caribbean independence constitutions - but with variations which clarified the power of the courts to strike down offending legislation. The present writer was privileged to teach at the University of the West Indies for a period in the 1970s, and heard experienced leaders comment on the irresistible momentum to adopt the standard fundamental rights provisions in the run-up to independence. The political parties contending for leadership of the new states could not modify, or seek to adapt, the standard models lest their opponents accuse them of "backsliding" on fundamental rights.[9]

IV CULTURAL RELATIVISM AND FUNDAMENTAL RIGHTS

It is sometimes said that fundamental rights provisions in Pacific constitutions, whether derived from European or Canadian models, or from the United Nations International Covenant on Civil and Political Rights of 1966, necessarily involve an inappropriate and illegitimate displacement of local customary norms by alien principles. Although I agree that the danger exists of inappropriate applications of culture-specific norms, there is also the danger of conflating and confusing the conclusion that ethical evaluations are specific to the culture in which they arise with a conclusion that no cross-cultural, universal rights can, or should, be formulated. As Alison Renteln has pointed out in her useful 1988 article:[10]

> Since relativism does not imply tolerance, moral criticism remains a viable option for the relativist ... Relativism is compatible with the existence of cross-cultural universals.

Indeed, total tolerance of *all* values is *itself* a culture-specific attitude and, as a prescription, is self-refuting.

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8 Above n 6, 61.

9 The "West Indian jurisprudence" on fundamental rights provisions in constitutions is, in fact, an extremely valuable source, particularly for small states. Not only have a wide range of issues been traversed in judgments reported in the West Indian Reports (WIR), but also, the supervisory function of the Privy Council in London has provided a unifying influence of a high standard.

10 A Renteln "Relativism and the Search for Human Rights" (1988) 90 American Anthropologist 56.

A helpful survey of attempts to harmonise human rights in the Pacific region with customary concepts was presented by Professor Angelo to the recent Pacific Islands Law Officers' Meeting in New Zealand.[11]

It is now proposed to discuss the position of "fundamental rights" in each of my three chosen jurisdictions.

V NIUE

Perhaps alone among self-governing jurisdictions in the Pacific, Niue does not have fundamental rights provisions in its Constitution.[12] The original document, enacted by the New Zealand Parliament in 1974 contained none, and the recent report of the Constitution Review Committee of the Niue Assembly did not recommend the adoption of any such provisions. The Committee reported that:[13]

> there was not widespread support for such a proposal when fundamental rights and freedoms were raised by a former Committee. The Committee further notes that many fundamental rights and freedoms are protected by the existing rule of law. Some Pacific countries which do have fundamental rights and freedoms are still coming to grips with the practical effect of those provisions, and the Committee considers that Niue would be well advised to adopt a "wait and see" stance so as to learn from the experience of others in this field.

The Committee recommended that the question be addressed again in a future review.

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11 Professor Angelo borrowed his title from the well-known work of the Attorney-General of Papua New Guinea: B Narokobi *Lo Bilong Yumi Yet: Law and Custom in Melanesia* 1989. Professor Angelo's survey refers in particular to the work of LAWASIA on a draft Pacific Charter of Human Rights (see Appendix 1 to this volume).

12 The Niue Constitution Act 1974 (NZ), s4, declared that the Constitution set out in English and Niuean in the Schedule to the Act "shall be the supreme law of Niue". The draughtsman of the Constitution was the highly respected jurist, RQ Quentin-Baxter, who worked in close communication with Niuean leaders.

13 *Report to the Niue Assembly of the Constitution Review Committee* (Alofi, September 1991). The Constitution Review Committee was appointed by the Niue Assembly and had a membership of Cabinet Ministers, Members of the Assembly, and prominent citizens. The present writer was privileged to have served as Special Counsel to the Committee.

In reporting to the Assembly, the Chairman of the Committee, Mr Robert Rex Jr, explained that the Committee:[14]

> concluded that it was important to establish the process required for change to our Constitution and to create confidence in the minds of the people that they truly control their Constitution, before seeking to make changes which might be controversial.

However, notwithstanding Niuean caution at the prospect of entrenching fundamental rights, there are at least three ways in which, to recall my initial definition, certain rights are made "difficult to displace". First, it must be noted that the provisions of Magna Carta (1215) and the Bill of Rights (1688) apply as part of the law of Niue. This is achieved by the combined effect of section 672 of the Niue Act 1966 (NZ), which applies the law of England existing in 1840, and article 71 of the Constitution of Niue, which continues the existing law after Constitution day. The significance of this conclusion is that the celebrated clause 39 of Magna Carta (guaranteeing due process), will apply as part of the law of Niue.

Secondly, the common law presumptions against statutory interpretations which would offend certain principles will, in practice, mean that only clear legislative language will outflank the presumptions. In particular, there is a presumption that the legislature intends to conform to international obligations.[15]

In that regard, Niue is bound by New Zealand's ratification of the International Covenant on Civil and Political Rights. The present writer considers that New Zealand's acceptance of the Optional Protocol, enabling individual complaints to the Human Rights Committee under the Covenant, does not extend to or engage the Cook Islands or Niue.[16]

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14 Address by the Chairman of the Constitution Review Committee to the Niue Assembly, 25 September 1991. Printed in *Report on Proceedings of the Constitution Review Committee and of the Niue Assembly* (Alofi, September 1991). The Chairman's reference is to the fact that *any* change to the Constitution of Niue is required to be submitted to referendum of the people, in addition to requiring a special majority in the Assembly. It remains to be seen how any Bill which the Assembly may approve will fare in such a referendum.

15 As Diplock LJ put the matter in *Salomon* v *Commissioners of Customs and Excise* [1967] 2 QB 116:

> Parliament does not intend to act in breach of international law ... if one of the meanings which can reasonably be ascribed to the legislation is consonant with the treaty obligations and another or others are not, the meaning which is consonant is to be preferred.

16 New Zealand's ratification of the Covenant itself, on 28 December 1978, engaged the two associated States because, at that time, New Zealand treaty action applied to the entire Realm unless the associated States were specifically excluded. However, by the time of New Zealand's acceptance of the Optional Protocol (by deposit of instrument on 26 May 1989 having effect on 26 August 1989) New Zealand had lodged with the Secretary General of the United Nations its Declaration dated 10 November 1988 which notified that thenceforth New Zealand treaty action would not engage the Cook

VI COOK ISLANDS

The Constitution of the Cook Islands as originally enacted in 1964[17] contained no systematic formulation of fundamental rights, although article 40 did restrict the legislative power as to compulsory taking of property. However, the opportunity was taken in the wide-ranging Constitution Amendment No 9 in 1981 to include articles 64 and 65[18] which adapted the Canadian Bill of Rights (1960) in several ways. The

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Islands or Niue unless the action is taken "expressly on behalf of the Cook Islands or Niue." The acceptance of the Optional Protocol does not comply with that requirement.

17 Cook Islands Constitution Act 1964 (NZ).

18 Constitution Amendment (No 9) Act 1980 (Cook Islands). The Amendment came into force on 5 June 1981, a date which will be seen to be significant in the light of the Cook Islands Court of Appeal decision in *Clarke* v *Karika* [1985] LRC(Const) 732, see below. Articles 64 and 65 provide as follows:

64. *Fundamental human rights and freedoms* - (1) It is hereby recognised and declared that in the Cook Islands there exist and shall continue to exist, without discrimination by reason of race, national origin, colour, religion, opinion, belief, or sex, the following fundamental human rights and freedoms:

(a) The right of the individual to life, liberty, and security of the person, and the right not to be deprived thereof except in accordance with law:

(b) The right of the individual to equality before the law and to the protection of the law:

(c) The right of the individual to own property, and the right not to be deprived thereof except in accordance with law:

Provided that nothing in this paragraph or in Article 40 of this Constitution shall be construed as limiting the power of Parliament to prohibit or restrict by Act the alienation of Native land (as defined in section 2(1) of the Cook Islands Act 1915 of the Parliament of New Zealand):

(d) Freedom of thought, conscience, and religion:

(e) Freedom of speech and expression:

(f) Freedom of peaceful assembly and association.

(2) It is hereby recognised and declared that every person has duties to others, and accordingly is subject in the exercise of his rights and freedoms to such limitations as are imposed, by any enactment or rule of law for the time being in force, for protecting the rights and freedoms of others or in the interests of public safety, order or morals, the general welfare, or the security of the Cook Islands.

65. *Construction of law* - (1) Subject to subclause (2) of this Article and to subclause (2) of Article 64 hereof, every enactment shall be so construed and applied as not to abrogate, abridge, or infringe or to authorise the abrogation, abridgement, or infringement of any of the rights or freedoms recognised and declared by subclause (1) of Article 64 hereof, and in particular no enactment shall be construed or applied so as to-

(a) Authorise or effect the arbitrary detention, imprisonment, or exile of any person; or

draughtsman, the late Dr JF Northey (Dean of the Faculty of Law at Auckland University), included some minor variations in the formulation of the rights provided, and deleted the power to derogate by express legislative declaration but added a general saving of laws:

> ... for protecting the rights and freedoms of others or in the interests of public safety, order, or morals, the general welfare, or the security of the Cook Islands (Art 64(2))

In the case *Clarke* v *Karika*,[19] the Court of Appeal of the Cook Islands authoritatively set out the salient features of the new articles. These points were established:

(a) Article 65, was found to be a rule of construction only, which could be overborne by sufficiently clear words in an enactment.

(b) Article 64, however, was an absolute limitation on legislative power:

> if an enactment passed after 5 June 1981 can be shown to violate any of the constitutional human rights and freedoms set out in article 64, the Court will have jurisdiction to declare it to that extent inoperative.

(c) The protection of article 64(2) could not be secured from the mere fact that a derogation from the fundamental rights was effected by Act of Parliament. The Act must, unless passed as a Constitutional Amendment, itself comply with the fundamental rights.

In general, the enactment of the fundamental rights provisions has focussed the attention of legislators and their advisers upon the potential for constitutional challenge to legislation.[20] Secondly, it provided impetus for the Cook Islands to make its own report to the Human Rights Committee of the UN as required by the International Covenant on Civil and Political Rights.[21] Generally, the occasion enabled Cook Islands Ministers and officials to gain an overview of the state of Cook Islands law in relation to the Covenant. One matter which drew the attention of the Committee was the Religious Organisations Restriction Act 1975 (Cook Islands). That Act limits to four the number of religious organisations which may be established in the Cook Islands, although the Minister of Justice has a discretion to approve the establishment of other religions on application. The Cook Islands Report suggested that the effect of the *Karika* judgment might be that although the Act could not be struck down (because it

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> (b) Impose or authorise the imposition on any person of cruel and unusual treatment or punishment ...

19 [1985] LRC (Const) 732.

20 The writer is personally aware of several occasions when legal advisers to successive Cook Islands Governments have advised against legislation in the form originally proposed on grounds of probable conflict with the fundamental rights articles.

21 The Hon Norman George, Minister of Foreign Affairs of the Cook Islands, presented a Report on 28 March 1985 and was questioned by the Committee on 29 March (see CCPR/C/SR 582).

antedated article 64), the Court would (under article 65) require the Minister to exercise the discretion in favour of an applicant religion unless it were *demonstrated* that the establishment of the religion would be contrary to the interests of public safety, order or morals, the general welfare, or in the security of the Cook Islands. Such an approach would, it is suggested, be a legitimate use of the rule of construction.[22]

Of the three jurisdiction considered in this Paper, the Cook Islands alone provides a judicial power to strike down legislation which infringes the fundamental rights provisions. Of course, use of the procedure for Constitutional amendment - requiring a two-thirds majority in Parliament and a mandatory delay of three months - will immunise legislation against judicial attack.[23]

VII NEW ZEALAND

The passage into law of the New Zealand Bill of Rights Act 1990[24] marks the end, for the moment, of the debate about the creation of a "supreme law type" of Bill of Rights in New Zealand.[25] Section 4 of the Bill explicitly withholds from the Courts the power to strike down, or render inoperative, any enactment "by reason only that the provision is inconsistent with any provision of this Bill of Rights."[26]

The leading New Zealand cartoonist, Mr Tom Scott, made this comment in the *Evening Post*, a Wellington daily newspaper, of 24 August 1990 on the modification of

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22 The Hon Norman George explained to the Committee that:

> The Act had been passed because of the frequency of visits to the territory by evangelists of obscure religious sects whose influence on the people had been a source of concern ... However, he would convey the Committee's concerns to his Government with a view to recommending that the Act be repealed (CCPR/C/SR 582, para 47).

23 Article 41 of the Constitution of the Cook Islands.

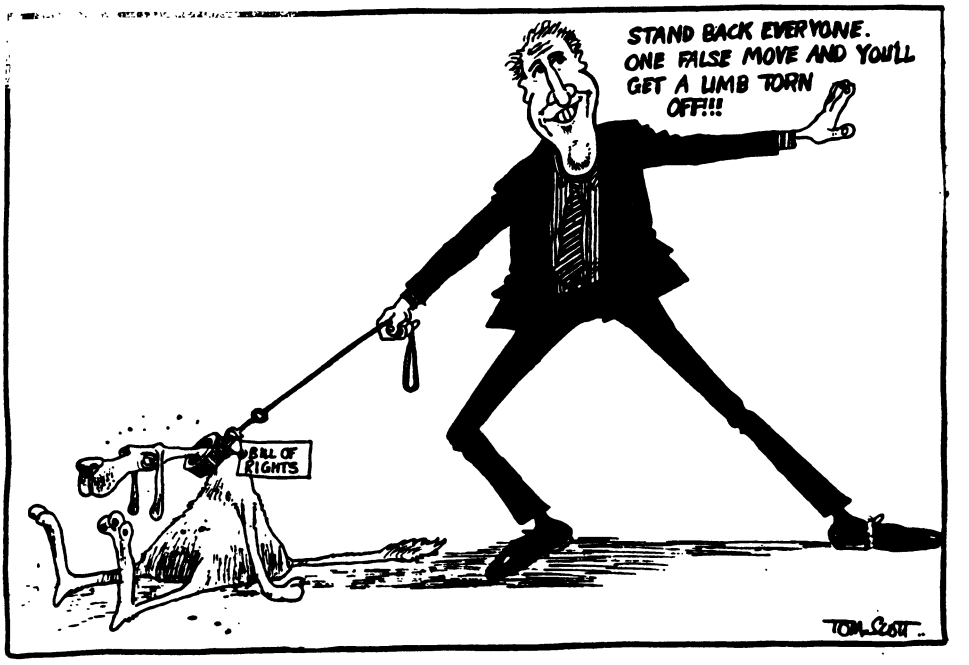
24 New Zealand Bill of Rights Act 1990. It came into force on 25 September 1990.

25 The present round of which began with the publication in 1985 of the Government's White Paper, *A Bill of Rights for New Zealand* (Govt Print, Wellington, 1985).

26 In reporting the Bill back to Parliament, the Chairman of the Select Committee stated:

> The Committee felt that it was important to include that measure ... in order to allay the fears still expressed by some that the Bill would be in the nature of overriding legislation ... (NZ Parliamentary debates Vol 509, 1990: 2800).

the fully-fledged, judicially supervised Bill of Rights originally proposed by the then Prime Minister, now Professor Sir Geoffrey Palmer:



However, it is by no means clear that the Bill will be as inoffensive as the cartoon suggests. First, section 7 places a duty upon the Attorney-General to scrutinise all Bills and to:

> 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.

This is likely to become a significant constraint on legislative policy and drafting. To say that Parliament can *theoretically* have its way is to ignore the political price levied against the sponsors of a Bill certified to be inconsistent with fundamental rights declared in the Bill of Rights. Professor Palmer, when Prime Minister, stated in Parliament:[27]

> The Bill of Rights will put obstacles in the way of the Executive when it is *framing* its legislative proposals. It will provide standards by which legislation must be measured, and it will provide criteria that must be followed ... That is novel to our system of government and will be extraordinarily helpful and beneficial in ensuring

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27 NZ Parliamentary debates Vol 509, 1990: 3761.

> that legislation conforms to basic principles, important standards, and real legal tests.

Secondly, the Courts have already shown that the direction in section 6 of the Act that:

> [w]herever 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

will propel them to interpretations bolder than those possible under common law presumptions for statutory interpretation. In *Flickinger* v *Crown Colony of Hong Kong*, the President of the Court of Appeal, Sir Robin Cooke, emphasised that the new Act may have changed the meaning of some existing New Zealand statute law. His Honour commented that the Bill of rights:[28]

> is to be construed generously in the manner recommended by the Privy Council in *Minister of Home Affairs* v *Fisher* [1980] AC 319, 328-329, a manner described by Lord Wilberforce ... as "suitable to give to individuals the full measure of the fundamental right and freedoms referred to."

Another Judge has recently hinted at powers which Courts might find implicitly granted. Wylie J, in *Palmer* v *Superintendent Auckland Maximum Security Prison* observed:[29]

> It is to be noted that the New Zealand Bill of Rights Act 1990, while identifying a number of important rights, contains no provision expressly dealing with the remedies which may be granted for breach of those rights. It may well be that the Bill of Rights Act itself impliedly empowered the Courts to grant whatever remedies may be appropriate to safeguard the rights therein.

The conclusion must be that, to recall my definition of "fundamental rights" it is made more difficult (perhaps much more difficult) for the rights designated in the Act to be displaced by "ordinary legislative process."

Finally, a comment is appropriate on the fundamental rights selected for inclusion in the New Zealand Act. The source has been the International Covenant on Civil and Political Rights of 1966. A notable omission from the Covenant and the New Zealand Act are "property rights."[30]

I could not pass from my account without noting a further strand, of wholly judicial manufacture, in the developing web of fundamental rights in New Zealand. The

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28 [1991] 1 NZLR 439, 440.

29 [1991] 3 NZLR 315, 318.

30 I have discussed the issue of "property" as a fundamental right in my paper at the PILOM meeting in Wellington in October of this year. See "Property: Some Pacific Reflections" (this volume).

distinguished and learned President of the New Zealand Court of Appeal, Sir Robin Cooke, has made observations both judicial and extrajudicial which hint that there are legal (as well as political) limits to the "sovereignty of Parliament", as Albert Venn Dicey understood that concept. In *New Zealand Drivers' Association* v *New Zealand Road Carriers* his Honour observed:[31]

> 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 resort to the ordinary Courts of law for determination of their rights.

And again, in *Taylor* v *New Zealand Poultry Board*[32] his Honour said that "some common law rights presumably lie so deep that even Parliament could not override them."

It is impossible to say where these judicial asides might lead, if not to a re-examination of what Sir John Salmond termed (ahead of Kelsen and his "Grundnorm") "ultimate legal principles." Salmond pointed out that the rule that Acts of Parliament have the force of law could not itself be based on an Act of Parliament "for this would be to assume and act on the very power that is to be conferred". Therefore:[33]

> There must be some self-existent rule or rules, on which all the others hang; some rule or rules without legally recognised source, cause or origin, being, so far as mere legal theory goes, self-caused and self-existent; otherwise an investigation of the sources of law would lead to infinity.

Those who would re-examine "ultimate legal principles" must realise that analytical jurisprudence has then reached the limit of its field. Beyond lies the realm of political fact. As Salmond put it: "Constitutional law follows hard upon the heels of constitutional fact."[34]

VIII CONCLUSION

I hope that the interplay between the preliminary reflections and the account of fundamental rights provisions in our three jurisdictions will provide a basis for thinking about and discussing the role of such provisions in our part of the world. Beyond that, I would suggest only one general conclusion concerning the proper scope of fundamental rights provisions.

The perception that promised rights solemnly granted in the constitution are, in practice, regularly denied has a corrosive effect on the morale of the people. It breeds cynicism within society at all levels. Therefore, great care needs to be taken that the

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31 [1982] 1 NZLR 374, 390.

32 [1984] 1 NZLR 394.

33 Salmond (1893), above n 3. For the discussion of "ultimate legal principles," see above n 3, 220-222.

34 JW Salmond *Jurisprudence* (12 ed, Sweet & Maxwell, London, 1966) 85.

coinage of fundamental rights is not debased to the level of political rhetoric and propaganda. For this reason, I am personally against the inclusion of the so-called "social rights" among fundamental rights provisions. The achievement of universal education, of wide employment possibilities, of good health and housing, are without doubt most important objectives of the State. However, these will not be attained by attempting to give them the status of fundamental rights. What constitutional guarantees can be asked to do is to provide a *process* within which those goals can be pursued vigorously and openly.