THE BILL OF RIGHTS AS FUNDAMENTAL LAW IN THE LIGHT OF THE CANADIAN EXPERIENCE

Professor F.M. Brookfield B.A. LL.B.D.Phil
Faculty of Law, University of Auckland

I BACKGROUND : THE SUPREME PARLIAMENT AND FUNDAMENTAL LAW

Article 1 of the draft New Zealand Bill of Rights[1] ("the Bill" or "the New Zealand Bill") declares the Bill to be "the supreme law of New Zealand", giving it a like primacy to that declared in s 52 (1) of the Constitution of Canada of that Constitution as a whole, including the Canadian Charter of Rights and Freedoms ("the Canadian Charter").[2] The first paragraph of the preamble to the Bill recites that "New Zealand is a democratic society based on the rule of law and on principles of freedom, equality and the dignity and worth of the human person". The single paragraph of the preamble to the Canadian Charter recites that "Canada is founded upon principles that recognize the supremacy of God and the Rule of Law". The latter formula corresponds to both parts of Bracton's famous dictum that the King "ought to be under God and under the law"[3]; and the Canadian Constitution now sets the authority of Canadian federal and provincial government within those limits. This acknowledgment of limits set by natural or fundamental law will represent the convictions of some and be largely rhetorical to others. The New Zealand Bill, determinedly secular, drops the first part of Bracton's dictum but affirms the second. Perhaps the omission would be an honest, and therefore a laudable, one in a basic constitutional document for a largely secular society.[4] But one inclined to relate natural or fundamental law to a Western theological and philosophical background need not be dismayed. The conception of natural law has long been (so to speak) secularized and a modern restatement of the natural law position by a distinguished Roman Catholic scholar has been made without religious presuppositions.[5] Further the Human Rights declarations, including the International Covenant on Civil and Political Rights (the New Zealand ratification of which is recorded in the second preambulatory recital to the Bill) is in terms that must necessarily command the widest range of support, of the non-religious humanist and secularist as of the theist. To try to speak with meaning of fundamental (or natural) law in the context of the present paper is not then necessarily to affirm a particular ideological or philosophical position; rather it is to make an affirmation consistent with several such positions. Nor is it necessarily to express faith in a system of ideal law which renders void the positive laws of the state when the latter conflict with the former. "Fundamental law" is sufficiently defined here to include the principles upon which the fundamental rights of a citizen in a free and

democratic society are based[6]; and which, in particular, whether in substance or in mode of interpretation affect a judge's acceptance or application of legislative and executive acts of government.

Of course in the New Zealand Bill, as in the Canadian Charter, fundamental law to a considerable extent becomes the supreme positive law of the state, replacing to an important extent the will of parliament. But the controlling or guiding role of fundamental law remains; and should, for example, the Bill be "lawfully" amended in accordance with Article 28 to authorise the imposition of torture, the question whether fundamental law has a determinative role would arise: that is, could a judge properly refuse to give effect to the amendment?

That question, adapted, could of course be asked in relation to the present sovereign New Zealand legislature. And the orthodox answer to it is well known: the judge may exploit every ambiguity in the legislation and, presuming that parliament could not intend anything so morally outrageous, strain to avoid the conclusion that the legislation is indeed intended to authorise torture. But if the conclusion is unavoidable, the judge must proceed to it however reluctantly or resign office, "unconstitutional" though the legislation may be. In Lord Reid's words, (though written in a very different context)[7]:

> It is often said that it would be unconstitutional for the United Kingdom Parliament to do certain things, meaning that the moral, political and other reasons against doing them are so strong that most people would regard it as highly improper if Parliament did these things. But that does not mean that it is beyond the power of Parliament to do such things. If Parliament chose to do any of them the courts could not hold the Act of Parliament invalid.

The point is well illustrated in an indirect way by the view taken by the majority of the House of Lords in Oppenheimer v Cattermole[8] of the Nazi decree of November 1941, by which Jewish emigres lost both German citizenship and also property. One of the majority, Lord Cross of Chelsea, said[9]:

> 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.

But had such a decree been made by an enactment of the United Kingdom Parliament the principles of morality and public policy which Lord Cross

here invokes would on the orthodox view have had to yield to the unique principle on which the court's duty to obey Parliament is based: "unique" in the exact sense that it always prevails over all other legal principles.

The doctrine of the sovereignty of Parliament which thus relegates the principles of fundamental law to a subordinate role has borne the hallmark of orthodoxy at least since the last century. There is the oft quoted dictum of Willes J. in Lee v Bude and Torrington Railway[10]:

> It was once said that if an Act of Parliament were to create a man judge in his own cause, 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....

And the earlier view of Coke CJ. in Bonham's[11] Case which asserted a power of judicial review of acts of parliament, though it survived into the eighteenth century to influence the founders of the American republic and to find positive expression in the powers of review assumed by the courts under the United States Constitution - was long thought obsolete. It has of course now been revived in a celebrated series of dicta of Cooke J, one of which I quote from Taylor v New Zealand Poultry Board[12]:

> 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.

And his Honour in others of the dicta has suggested similar limitations on the power of parliament to exclude the audi alteram partem rule,[13] to abdicate its law making function to the executive,[14] to give to any tribunal other than the courts the function of determining whether actions in the courts are barred,[15] or to take away the rights of citizens to resort to the ordinary courts for the determination of their rights.[16]

Possibly some at least of the dicta may be explained merely as an assertion of a strong rule or presumption of interpretation, and that explanation may be given generally also of the extreme reluctance of courts to interpret privative clauses so that they are indeed effective to exclude jurisdiction, a reluctance most authoritatively shown by the House of Lords in Anisminic v Foreign Compensation Commission[17]. But again the Anisminic case too has been interpreted recently as setting a substantive limit to

the powers of Parliament, by Professor G. de Q. Walker,[18] in a recent article discussing Grace Bible Church v Reedman.[19] Walker (who does not appear to be aware of the Cooke dicta) regards the orthodox broad assertion of parliamentary supremacy (unlimited by common law principles) of the South Australian Full Court in the Grace Bible Church case as wrong. He protests against the long established, uncritical acceptance of Dicey's dogmatic views, finding a common law limitation of parliamentary power not only in relation to the excluding of the courts' jurisdiction but the preservation of democratic government also. (Nevertheless Walker accepts as correct the decision of the South Australian court that there is no common law freedom of religion beyond the power of parliament to abridge).[20]

And on the latter limitation one may refer also to the Canadian doctrine of an "implied bill of rights", slightly developed as it was, which found some support in dicta from the judges in the Supreme Court of Canada. Clearest is the dictum of Abbott J. in Switzman v Elbling[21] to the effect that, the Canadian Constitution being declared in the preamble to the British North America Act to be similar in principle to that of the United Kingdom, the right of public debate and discussion was beyond abridgement not only by the provincial legislatures, but the Canadian parliament also.

In what is I fear an overlong introduction, I have tried to establish that at least some of the principles of fundamental law may after all prove to be beyond the power of parliament to abridge (even if this suggestion is to anticipate what to some could only be a revolutionary assertion of the courts' jurisdiction). But after the centuries of generally deferring to the will of parliament, the courts are now, to say the least, most unlikely to carry what I may call without disrespect the Coke-Cooke views so far as to spell out a detailed common law bill of rights that will limit the supremacy of parliament. If we are not to trust the sovereign legislature for the long distance future (and I believe we should not), the task remains to translate the fundamental law into the supreme positive law of the state, as has been done in Canada and as is proposed in part in the draft New Zealand Bill. But one should bear in mind that in any event fundamental law remains as a conceivable check, albeit in extraordinary circumstances, whether on the supreme General Assembly (if the existing order continues) or on amendment to the Bill which might say change Article 20 to permit the imposition of torture.

II PROPOSED NEW ZEALAND BILL OF RIGHTS OF 1963 AND THE CANADIAN BILL OF 1960

How, without actually translating fundamental law into supreme law, could one strengthen the role of fundamental law in our legal system? I ask the question because some such attempt was indeed proposed in the move for a New Zealand Bill of Rights in 1963[22] and because the Canadian Bill of Rights of 1960[23] shows a continuing attempt to do this which, despite the Charter which in many respects supersedes it, is more significant than some allow. The proposed New Zealand Bill of 1963 could indeed have been only a tool of interpretation and was not likely to have been an effective one. It has recently been described as a "carbon copy" of the Canadian Bill of 1960. Well the two are very similar indeed, in declaring existing rights and freedoms. But, with respect, they are dissimilar on one important point: the proposed New Zealand Bill of 1960 lacked the provision which, in the Canadian Bill enabled the Supreme Court of Canada in R v Drybones[24] to declare that federal legislation that could not be construed or applied consistently with the Bill was inoperative, in the absence of an express declaration that the legislation was to operate notwithstanding it.[25] And the Court indicated then and has repeatedly indicated since that this new jurisdiction to hold federal statutes inoperative applies to those enacted after the Bill as to those enacted before.[26] It is true that the Supreme Court has held a legislative provision inoperative only once, and that in Drybone's case in a statute enacted before 1960. But the correct view of the Canadian Bill is that it modifies the doctrine of the supremacy of the Canadian Parliament in the way just stated, altering the rules of law making so that the Bill controls the operation (not merely interpretation) of federal statutes whenever passed.[27] Recently Estey J, delivering the judgment of the Supreme Court of Canada in Law Society of Upper Canada v Skapinker[28] described the Canadian Bill (in comparing with the Charter) as "a statute of . . . extraordinary nature" and more fully thus[29]:

> It was designed and adopted to perform a more fundamental role than ordinary statutes in this country. It is, however, not a part of the Constitution of the country. It stands, perhaps, somewhere between a statute and a constitutional instrument. Nevertheless, it attracted the principles of interpretation developed by the courts in the constitutional process of interpreting and applying the Constitution itself.

One may add that the proposed New Zealand Bill of 1963, had it in the

relevant respect indeed copied the Canadian Bill and had New Zealand courts been prepared to follow R v Drybones, would have had a similar status that was not merely interpretative and would have enabled New Zealand courts to hold conflicting legislation inoperative. It would not then have been as weak a reed as is often assumed.

In the cases that came after R v Drybones a majority of judges in the Supreme Court emasculated the Canadian Bill of Rights by treating it not only as merely declaratory of existing rights and freedoms but also by means of the doctrine of valid federal objectives, which in its dominant form left the Bill little scope either to render apparently conflicting legislation inoperative[30] or to have a strong interpretative function. Nevertheless a strong minority in the Court were ready to make the Bill more effective and to take up the more active role to which the majority judgments in Drybones pointed.[31] In effect that more active role is now firmly and clearly laid down for the Canadian judiciary under the Charter of Rights, under which fundamental rights are not merely declared or recognized but guaranteed. It is understandable that the proposed New Zealand Bill is modelled on the Canadian Charter rather than on the Canadian Bill (even with the formula that gave the latter some teeth).
For New Zealand judges as for the Canadian, the judicial task of protecting fundamental rights needs to be more clearly indicated than it was in the Canadian Bill (let alone in the purely interpretative measure proposed in this country in 1963).

III THE PROPOSED NEW ZEALAND BILL AND THE CANADIAN CHARTER

The proposal then is to follow the Canadians in translating fundamental law (or rather part of it), at present on the orthodox view so vulnerable to the legislation of a supreme Parliament, into supreme law which will limit the powers of Parliament. We turn now (i) to compare the possible means of enacting the New Zealand Bill with that used for the Canadian Charter; (ii) to compare some of the notable differences in the degree of protection given to fundamental rights; and (iii) to consider, in the light of some principal Canadian decisions, the likely impact of the New Zealand Bill in some specific areas.

(1) Comparisons of means of enactment

The Canadian Charter is part of the Constitution entrenched in Canadian law by the Canada Act 1982 (UK) by which the Constitution was at last patriated and the United Kingdom Parliament brought to an end its residual legislative power over the country. One could perhaps argue that for certainty the New Zealand Bill should (on request under s.4 of the Statute of Westminster 1931) be enacted by a statute of the United Kingdom Parliament by way of an amendment to the New Zealand Constitution (Amendment) Act 1947 (UK). This would, so it may be argued, leave the Bill of Rights securely in place as supreme law which the General Assembly could not amend in the future except in accordance with Article 28. Elsewhere I have tried to show in detail that beyond any reasonable doubt the power of constitutional amendment conferred on the General Assembly by the 1947 Act of the United Kingdom Parliament suffices to achieve that end.[32] I draw strong support for that proposition from the established view of the Supreme Court of Canada of the nature of the Bill of Rights of 1960. For if the Canadian Parliament, within the confines of its legislative powers under the British North America Act, could pass a statute of that extraordinary nature, there is no reason why the New Zealand General Assembly cannot under its fullest powers of constitutional amendment do what the United Kingdom Parliament could have done for New Zealand: entrench as supreme law a constitutional instrument like the proposed Bill of Rights.

If nevertheless there were doubt the device suggested by H.W.R. Wade, of asking the Judges formally to switch their allegiance to the new constitutional order which the Bill would in part bring about, could be adopted.[33] But I should not myself prefer, or think it necessary, to urge that suggestion.

(2) Some differences between the Bill and the Charter

(i) It has already been noted that the Charter is part of the Constitution of Canada declared by s 52 (1) of the latter to be "the supreme law" of that country. By contrast, the New Zealand Bill (alone) is to be "the supreme law" of this country under Article 1.

New Zealand's unitary constitution will remain outside the supreme law whereas inevitably the federal constitution of Canada is made part of the supreme law. This difference may not be a desirable one, even if the unitary-federal distinction affords a basis for it. The New Zealand Bill should, it is suggested, be the precursor of a written constitution of which it will form a part; or at least it should be followed by constitutional amendments under the power conferred by the New Zealand Constitution (Amendment) Act 1947 (UK) which would at least doubly entrench the sections of the Electoral Act 1956, at present weakly protected by s 189 of that Act, and also secure the separation of powers to the extent that an "unconstitutional" piece of legislation such as the Clutha Development (Clyde Dam) Empowering Act 1982 would actually be void.[34]

Further, there should be constitutional amendments to secure the jurisdiction of the High Court and Court of Appeal, which at present rest on the Judicature Act 1908, a statute subject to the ordinary processes of repeal and amendment.

(ii) The Canadian Charter is subject to the amending procedure applicable to the Constitution as a whole set out in Part V of the latter. In that respect the protection to the New Zealand Bill given by Article 28 is comparable. But the New Zealand Bill is stronger in so far as it does not permit any overriding by legislation; although Article 3 authorises "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". This follows s.1 of the Canadian Charter; but the Charter also, in s.33 allows limited legislative overriding by federal or provincial Acts which by express declaration exclude certain sections of the Charter. Under s.33 (3) there is a five year limitation on any such exclusion; but (with the like time limit) the exclusion may be renewed (see s.33 (4) and (5)). Undoubtedly, as with similar provisions in the Canadian Bill of Rights, a convention against overriding is expected to develop. (Nevertheless the Quebec legislature has by one Act purported to amend all legislation in force at the time the Charter was proclaimed to make it operate notwithstanding the Charter and the attempt has so far been upheld).[35]

(3) Some of the Charter cases : implications for the New Zealand Bill

In a paper presented just over a year ago a Canadian scholar described the treatment then so far given to the Charter as one of "conservative moderation".[36] And he also said[37]:

> After two years living with the Charter of Rights the only safe thing to say is that it has not turned out to be nearly as bad as its opponents thought it might nor nearly as great as its promoters said it would be.

The Charter has continued to be cited, in numerous cases: the Western Charter Digest 1983 refers to between 250 and 300 reported and unreported cases in Western Canada alone, in which it was cited for the period from 17 April 1982 when the Canada Act came into force. The reported cases in all are far too numerous to attempt any kind of general review within a brief compass. But the reports available in Auckland of the few cases which have reached the Supreme Court of Canada and of some of those in Federal and provincial appeal courts give some guidance to what one could expect if the New Zealand Bill were to become law and the highly persuasive Canadian authorities be accepted here. The "conservative moderation" ascribed to the Canadian judges might be expected of New Zealand judges also. One may say too that the fear of some that in general Canadian judges would find in s.1 of the Charter a convenient way out for excessively deferring to the legislative judgment as to what limits may reasonably be imposed on the guaranteed rights and freedoms has been largely unjustified; and in regard to the corresponding Article 3 need not be expected in New Zealand either if our Bill becomes law. Of course, on these points of comparison, it might be supposed that being accustomed to decide issues of distribution of legislative authority and of validity of legislation under a federal constitution might make Canadian judges at least initially more adept at giving effect to the Charter than New Zealand judges would be in relation to the Bill. But Diceyan deference to the legislature was strong in Canada as it has been in New Zealand and was apparently responsible for much of the judicial reluctance to give much effect to the somewhat equivocal Bill of 1960.[38] There is good reason to suppose that, within the limits of conservative moderation now achieved in Canada in relation to the Charter, New Zealand judges also would begin to shed Diceyan habits and accustom themselves to a new dimension of judicial review.

General Approach. In Hunter v Southam[39] Dickson J.,[40] giving the judgment of the Supreme Court of Canada, accepted as appropriate in construing the Charter Lord Wilberforce's words dealing with the Bermudian Constitution, in Minister of Home Affairs v Fisher.[41] A constitution is a document, Lord Wilberforce had said (in giving the judgment of the Privy Council), "sui generis, calling for principles of interpretation of its own, suitable to its character". Further, as such, a constitution incorporating a Bill of Rights calls for "a generous interpretation avoiding what has been called 'the austerity of tabulated legalism' suitable to give individuals the full measure of the fundamental rights and freedoms referred to".

Dickson J. added[42]:

> Such a broad, purposive analysis, which interprets specific provisions of a constitutional document in the light of its larger objects, is also consonant with the classical principles of American constitutional construction enunciated by Chief Justice Marshall in M'Culloch v State of Maryland (1819), 17 U.S. (4 Wheaton) 316. It is, as well, the approach I intend to take in the present case.
>
> I begin with the obvious. The Canadian Charter of Rights and Freedoms is a purposive document. Its purpose is to guarantee and to protect, within the limits of reason, the enjoyment of the rights and freedoms it enshrines. It is intended to constrain governmental action inconsistent with those rights and freedoms; it is not in itself an authorization for governmental action.

There should be no doubt that a similar general approach would be favoured by New Zealand Courts, as it was recently by the Western Samoan Court of Appeal (Cooke P., Mills and Keith JJ.) in Attorney-General v Saipa'ia Olomalu[43] where the passage from Lord Wilberforce's judgment containing the words emphasised above was cited.

We turn now to one specific freedom as to which some clear guidance from the Supreme Court of Canada is already available.

Freedom from unreasonable search and seizure. Article 19 of the New Zealand Bill is fuller that s.8 of the Canadian Charter which corresponds to it, but to the effect that Article 19 is more not less emphatic in securing this freedom. What Dickson J. said of s.8 is applicable also to Article 19[44]:

> [A]n assessment of the constitutionality of a search and seizure, or of a statute authorizing a search or seizure, must focus on its "reasonable" or "unreasonable" impact on the subject of the search or the seizure, and not simply on its rationality in furthering some valid government objective.

And Dickson J., after considering the limited property-based interests protected by the principle in Entick v Carrington,[45] concluded that those protected by s.8 are wider. The section "guarantees a broad and general right to be secure from unreasonable search and seizure".[46] At least as broad and general a right is explicit in the fuller terms of Article 19.

Here again the purposive approach of Dickson J. may be adopted. The purpose of preventing unjustified searches before they happen (rather than determining afterwards whether they ought to have occurred) is achieved by "a system of prior authorization".[47] In particular, "where it is feasible to obtain prior authorization, . . . such authorization is a precondition for a valid search and seizure".[48] Authorisation need not be by a judge but must be by an impartial person "at a minimum . . . capable of acting judicially".[49]

It appears, from the development of this doctrine in the Ontario Court of Appeal in R v Noble,[50] that a statute authorising warrantless searches is in breach of s.8 unless it is limited in its terms to emergency circumstances where "it is not feasible to obtain a warrant".[51]

In delivering the judgment of the Court in that case, Martin J.A. reviewed some legislative provisions authorising the equivalent of general warrants or warrantless searches in other Commonwealth jurisdictions, referring to both s.216 of the Customs Act 1966 (NZ)[52] (an example of the former) and s.18 of the Misuse of Drugs Act 1975 (NZ)[53] (of course an example of the latter). On the persuasive authority of the judgment in R v Noble both New Zealand provisions would be inconsistent with Article 19 and therefore of no effect, unless they could be saved by Article 3, corresponding to s.1 of the Charter. We return to that point below.

The reasonable limits on guaranteed rights and freedoms: s.1 (Charter) and Article 3 (New Zealand Bill). How does a court determine whether restrictions on guaranteed rights and freedoms are within "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society"?

So far mainly general guidance on that point is available from the Supreme Court of Canada. Dickson J. in Hunter v Southam said[54]:

> The phrase "demonstrably justified" puts the onus of justifying a limitation on a right or freedom set out in the Charter on the party seeking to limit. [It was not necessary however in the case before the Court to consider the relationship between s.1 and s.8].. . . I leave to another day the difficult question of the relationship between those two sections and, more particularly, what further balancing of interests, if any, may be contemplated by s.1, beyond that envisaged by s.8.

The words I have emphasised indicate the possibility that no further balancing may be permissible. So indeed, having found statutory provisions so far as they authorise a warrantless search to be unreasonable and in contravention of s.8, Martin J.A. in R v Noble remarked (obiter, with his emphasis)[55]:

> I would have great difficulty in concluding that the legislation is justifiable under s.1 as a reasonable limit prescribed by law that can be demonstrably justified in a free and democratic society.

The suggestion by S.A. Cohen[56] that, in effect, whenever the test of reasonableness (or other such qualifying concept) appears in the provision protecting a particular right or freedom, no further assessment of reasonableness is intended under s.1 (or Article 3), is attractive. In the New Zealand Bill this would apply, as well as to Article 19, to Articles 16 (d) and 20 (1) and perhaps to Articles 14 and 15 (1) and others.

It would follow of course that neither s.216 of the Customs Act 1966 nor s.18 of the Misuse of Drugs Act 1975 would be saved by Article 3.

But where there is no qualifying concept of reasonableness built into the statement of a guaranteed right, limitation must be possible under s.1 or Article 3. Apart from the general guidance from their judgment in Hunter v Southam, we have from the Supreme Court of Canada the implied intimation in Law Society of Upper Canada v Skapinker[57] that a reasonably substantial case must be made to discharge the onus under s.1; and the clear distinction between limits permitted by s.1 and exceptions under the legislative overriding permitted by s.33,made by that Court in Attorney-General of Quebec v Quebec Association of Protestant Boards.[58]

The New Zealand Bill has no article corresponding to s.33 but the distinction is still important. Article 3 does not authorise exceptions to the guaranteed rights, either absolute or in respect of which the courts should defer to the legislature on say some presumption of reasonableness. That of course would be quite inconsistent with the general position as to onus now made plain in Hunter v Southam.

On one point at least the application of s.1 of the Charter should soon be authoritatively known. In R v Oakes[59] the Ontario Court of Appeal held that the provision reversing the onus of proof in s.8 of the Narcotic Control Act was inoperative both by virtue of s.2 (f) of the Bill of Rights of 1960 and also the essentially identical 11 (d) of the Charter guaranteeing the presumption of innocence. Under the provision in question, possession of a narcotic required the accused to prove it was not possessed for the purpose of trafficking. The lack of rational connexion between the proved fact (possession) and the presumed fact (possession for sale), there being no minimum quantity laid down to establish such a connexion, was held to render the provision arbitrary and not jusfified under s.1. The matter remains for determination on appeal by the Supreme Court of Canada. Inevitably in New Zealand the reverse onus provisions in s.6 (6) of the Misuse of Drugs Act 1975 come to mind. Clearly contrary to Article 17 (b), would they be saved by Article 3? The answer presumably is that they would, if the minimum quantities of drugs specified to reverse the onus establish the rational connexion found lacking by the Ontario Court of Appeal in R v Oakes.[60]

Generally the Canadian developments may encourage one to expect that the strengthening of civil liberties by guarantees in the New Zealand Bill would not be cancelled out by Article 3. For example, it must be strongly arguable that the New Zealand law of seditious intention under s.81 of the Crimes Act 1961 goes beyond the reasonable limits permitted by s.1, more especially as the common law limitation (long recognized in Canada),[61] that there must be an incitement to actual violence or public disorder, does not apply in New Zealand.[62] Further, the Melser[63] test of the "right thinking person" in disorderly behaviour cases under s.4 of the Summary Offences Act 1981 is arguably far too wide a limit on the freedom of expression guaranteed in Article 7 to come within s.1. One may suggest that the general vague protection of the right thinking person's sensibilities, no likelihood of actual breach of the peace being necessarily present, is not a reasonable limit in a free and democratic society.[64]

More certainly, the type of bylaw which authorises a territorial authority or its officers arbitrarily to refuse a permit for a public meeting or a procession, upheld by the Full Court in Hazeldon v McAra,[65] would contravene Article 9 and could scarcely be saved by Article 1.

The right to life : the disputed limits of fundamental law. Section 7 of the Charter provides:

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

Both the substance and the arrangement are somewhat different in the New Zealand Bill, in, among other things, that the right to life in Article 14 is not so affirmatively proclaimed as in s.7 of the Charter, and liberty of the person is implied from the specific rights set forth in Article 15. I do not wish to pursue the differences further here but merely to discuss briefly two cases on s.7 which show how the supreme law constituted by a basic instrument such as a Charter or Bill of Rights may fall short of embodying what to some but not others are matters of fundamental or natural law. In Borowski v Attorney-General of Canada and Minister of Finance,[66] Matheson J., in the Saskatchewan Court of Queens Bench, held that a foetus is not within the term "everyone" in s.7 of the Charter. In this the Judge applied a decision of the Ontario High Court under the Canadian Bill of Rights, Dehler v Ottawa Civic Hospital[67] (affirmed by the Ontario Court of Appeal and leave to appeal to the Supreme Court of Canada refused). In essence the issue had been determined under the Canadian Bill in Morgentaler v R[68] (where the purpose of the litigation had been not, as in the Dehler and Borowski cases, to contest the legislature's restricted recognition of abortion but to contest some of the legislative restrictions on it). The law is clear that, whether under the Canadian Bill or the Charter, there is no justiciable issue as to foetal rights. The balancing of those rights with those of the expectant mother has been left to the legislature. The New Zealand law under the Bill is likely to be no different.

In R v Operation Dismantle[69] organisations opposed to the Canadian government's policy of permitting the testing of United States Cruise missiles in Canada invoked s.7 of the Charter in seeking an injunction to

prevent the testing. The Crown's application, to have the statement of claim struck out as disclosing no cause of action, failed at first instance but succeeded in the Federal Court of Appeal.

The prospects of the plaintiffs' appeal to the Supereme Court of Canada cannot be accounted good. But they have had a measure of success in that the majority of the appeal judges held action taken under the prerogative to be subject to the Charter, the prerogative being "within the authority of Parliament" for the purpose of s.32 (1) in that it is subject to that authority. A similar conclusion would certainly be reached under Article 2 of the New Zealand Bill.

However, on the main point, s.7 of the Charter was held, in fully reasoned judgments, not to protect the right to life from alleged endangering under Canadian government policy. Such a matter was, not surprisingly, thought to be non-justiciable. Further, the respondents had been unable to point to the principles of "fundamental justice" which were being violated.

Again a similar conclusion would be reached under Article 14 which, being less positively couched than s.7 of the Charter, would avail challengers of government policy even less, if a New Zealand government were to resume co-operation with the United States in the matter of visits by nuclear ships.

IV CONCLUSION

The purpose of this paper has been to relate the proposed New Zealand Bill of Rights to both the existing supremacy of Parliament, which the enactment of the Bill would modify, and principles of fundamental law which in the Bill would become part of the supreme law of the land. In particular we have to some extent seen, in the light of cases decided in Canada on the Charter, how the New Zealand Bill, having translated some fundamental legal principles into supreme law, might operate. Recourse to the Canadian comparisons has been very far from exhaustive of the enormous and continuously growing amount of case law decided on the Charter; though I have relied where relevant on the Supreme Court of Canada whose unifying and authoritative role will be of the highest persuasive importance to New Zealand courts if the Bill becomes law.[70]

only parts of the Bill have been commented on. In particular, I have not mentioned the important recognition of the Treaty of Waitangi by Article 4 (corresonding to s.25 of the Charter), which remains to be dealt with at another time.

It will be clear that I am generally in favour of the Bill but I have not thought this paper necessarily the place for even a brief discussion of pros and cons. However, I cannot end the paper without saying a little more on the merits. First, I do not think the transitional problems in which the judiciary would have to accustom themselves to a greatly increased role of judicial review would be serious. After all the Canadian judiciary appear to be coping. Secondly, the expected "moderate conservatism" on the part of the judges in dealing with the Bill should provide the further weight for libertarian principles which our present constitutional order with its supreme or sovereign Parliament badly lacks. The balance should be tilted in the direction of personal freedoms. Further, the special values needed in our multi-racial society need strengthening; the Bill of Rights would do this also, in my view.

On the role of a Bill of Rights in effectively protecting constitutional values one would refer of course to the long experience of the United States (which of course, as it is doing in Canada, would also provide some guidance in New Zealand). But to be brief and specific on the matter, I take a passage from the judgment of Windeyer J. in Crowe v Graham,[71] where, in a prosecution under New South Wales indecent publications legislation, the High Court of Australia reversed a decision of the New South Wales Supreme Court (Court of Appeal), which had been in favour of the defendants. Windeyer J. said:[72]

> The majority in the Supreme Court thought that some question of the liberty of the individual was involved in the case.. . . I think, with respect, that their Honours were wrong in invoking considerations of "private liberty as a basic right and need of modern man" as an aid for the interpretation of a statute of the Parliament of New South Wales dealing with obscenity and indecency. And I think too that their references in this connexion to judgments delivered in courts of the United States were only remotely relevant. I say that for three reasons.

> First, in America the courts were concerned either with the scope of the First Amendment that "Congress shall make no law abridging the freedom of speech, or of the press", or with the scope of the Due Process Clause of the Fourteenth Amendment. No such problem confronts those who must construe and apply the law of New South Wales.. . .

The point is plain (whatever the merits in the particular case may have been). The New Zealand Bill of Rights would introduce a proper weighting for the guaranteed rights and freedoms. The conservative moderation expected of the judges would ensure that the weighting is effective, without involving them in an activist role that would depart too abruptly from tradition.

FOOTNOTES

1. See A Bill of Rights for New Zealand Government White Paper 1985 A.6. (bibliography at 119-123).

2. See Canada Act 1982 (U.K.). The text of the Charter is in Appendix I to the White Paper (n.1 above).

3. "Rex . . . debet esse . . . sub Deo et lege". Quoted recently by Street C.J., in Connor v. Sankey [1976] 2 N.S.W.R. 570, 600.

4. The Queen however remains "Defender of the Faith": Royal Titles Act 1974, s.2.

5. J.M. Finnis Natural Law and Natural Rights (1980).

6. The definition, rough and ready and even circular as it may be, will have to do for present purposes. It is intended to include (i) principles of substantive as well as procedural fairness; (ii) some principles of representative and democratic government; (iii) the principle of the proper separation of the judicial from the other branches of government; and (iv) the principle of proper recognition of differing values and interests in a pluralist society.

7. Madzimbamuto v. Lardner-Burke [1969] 1 A.C. 645, 723.

8. [1976] A.C. 249.

9. At 278.

10. (1871) L.R. 6 C.P. 576, 582.

11. (1609) 8 Co. Rep. 113b, 118a; 77 E.R. 646, 652. The controversy as to what exactly Coke C.J. meant cannot be touched on here.

12. [1984] 1 N.Z.L.R. 394, 398. For discussion of the dicta, see Caldwell [1984] N.Z.L.J. 357 and Keith (1985) 14 V.U.W.L. Rev. 29, 33-34.

13. Fraser v. State Services Commission [1984] 1 N.Z.L.R. 116, 121.

14. Brader v. Ministry of Transport [1981] 1 N.Z.L.R. 73, 78.

15. L. v. M. [1979] 2 N.Z.L.R. 519, 527.

16. New Zealand Drivers Association v. New Zealand Road Carriers [1982] 1 N.Z.L.R. 374, 390. The dictum is in the joint judgment of Cooke, McMullin and Ongley JJ.

17. [1969] 2 A.C. 147.

18. "Dicey's Dubious Dogma of Parliamentary Sovereignty : a Recent Fray with Freedom of Religion" (1985) 59 A.L.J. 276, 281.

19. (1984) 36 S.A.S.R. 376.

20. 59 A.L.J. at 283.

21. (1957) 7 D.L.R. (2d) 337, 371. Other dicta lending some support are noted by D.J. Arbess (1983) 21 Osgoode Hall L.J. 113, 115.

22. For the text see McBride The New Zealand Civil Rights Handbook (1980) 596 et seq.

23. Revised Statutes of Canada 1970, Appendix III. See W. Tarnopolsky The Canadian Bill of Rights (2d ed. 1975).

24. (1970) 9 D.L.R. (3d) 473.

25. For the recent comment referred to, see W.C. Hodge "A Bill of Rights for New Zealand? Mark II" [1985] N.Z. Recent Law 176 (where the 1963 controversy is usefully recalled). The direction in s.2 of the Canadian Bill that every law of Canada is to be construed and applied so as not to infringe the recognised rights and freedoms includes vital words, the equivalent of which was missing in the corresponding clause 3 of the proposed New Zealand Bill of 1963: "unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the Canadian Bill of Rights". Cf s.33 (1) of the Charter.

26. In Drybone's case the implication is reasonably clear in the judgment of Ritchie J., 9 D.L.R. (3d) at 485. Representative dicta of Laskin C.J.C. (e.g. in Curr v. R. (1972) 26 D.L.R. (3d) 603, 609) in later cases are among indications that put the point beyond doubt. See B. Hovius (1982) 28 McGill L.J. 31, 34.

27. See e.g. Gold (1980) 18 Osgoode Hall L.J. 336, 357.

28. [1984] 1 S.C.R. 357, 365; (1984) 9 D.L.R. (4th) 161, 167.

29. At 366; 168.

30. See A.G. v. Lavell (1973) 38 D.L.R. (3d) 481; R. v. Burnshine (1974) 44 D.L.R. (3d) 584; MacKay v. R. (1980) 114 D.L.R. (3d) 393.

31. See minority judgments in the cases cited in n.30. See also R v. Shelley (1981) 123 D.L.R. (3d) 748 where the hitherto minority view, so to speak, became that of the majority.

32. Brookfield "Parliamentary Supremacy and Constitutional Entrenchment" (1984) 5 Otago L.Rev. 603.

33. Wade Constitutional Fundamentals (1980) 37-38.

34. See Brookfield "High Courts, High Dam, High Policy" [1983] N.Z. Recent Law 62.

35. Alliance des Professeurs de Montreal v. A.G. of Quebec (1983) 5 D.L.R. (4th) 157.

36. Peter H. Russell, June 1984, quoted by R. Hahn [1985] Public Law 530, 531.

37. Idem.

38. As with the Diceyan understanding of "equality before the law" favoured by majorities in the Supreme Court. See Beauregard v. R. (1981) 130 D.L.R. (3d) 433, 442-443.

39. (1984) 11 D.L.R. (4th) 641, 650.

40. Now Chief Justice of Canada.

41. [1980] A.C. 319, 328, 329.

42. 11 D.L.R. (4th) at 650.

43. 26 August 1982; now reported (1984) 14 V.U.W.L.Rev. 275.

44. 11 D.L.R. (4th) at 650. Emphasis added.

45. (1765) 19 State Tr. 1029, 1066.

46. 11 D.L.R. (4th) at 651.

47. At 653.

48. Idem.

49. At 654.

50. (1984) 48 O.R. (2d) 643.

51. See at 664-665.

52. At 655.

53. At 656.

54. 11 D.L.R. (4th) at 660.

55. 48 O.R. (2d) at 667-668.

56. (1984) 16 Ottawa L.J. 97,110.

57. [1984] 1 S.C.R. at 383-384; 9 D.L.R. (4th) at 181-182.

58. (1984) 10 D.L.R. (4th) 321, 338.

59. (1983) 145 D.L.R. (3d) 123.

60. Cf. Ong Ah Chuan v. Public Prosecutor [1981] A.C. 648, 673-674.

61. R. v. Boucher [1950] 1 D.L.R. 657; [1951] 2 D.L.R. 369.

62. Wallace-Johnson v. R. [1940] A.C. 231. Cf. Burns v. Ransley (1949) 79 C.L.R. 101 and R.v. Sharkey (1949) 79 C.L.R. 121.

63. Melser v. Police [1967] N.Z.L.R. 437.

64. Applied to speech, s.4 (1)(a) of the Summary Proceedings Act 1981, like the old s.3D of the Police Offences Act 1927, appears in conflict with Article 7. For two cases where what was substantially speech earned disorderly or offensive behaviour convictions, see Derbyshire v. Police [1967] N.Z.L.R. 391 (symbolic speech) and Wainwright v. Police [1968] N.Z.L.R. 101.

65. [1948] N.Z.L.R. 1087. See also McGill v. Garbutt (1886) N.Z.L.R. 5 S.C. 73.

66. (1983) 4 D.L.R. (4th) 112.

67. (1979) 101 D.L.R. (3d) 686.

68. (1975) 53 D.L.R. (3d) 161.

69. (1983) 3 D.L.R. (4th) 193.

70. Whether the right to strike is protected by the freedom of association (s.2 (d): Article 10 (1)) remains for the Supreme Court soon to decide. The Federal Court of Appeal in Public Service Alliance v. The Queen (1984) 11 D.L.R. (4th) 387 held it was not so protected (leave to appeal since granted). Also on appeal to the Supreme Court is Re Reynolds and A.G. of British Columbia (1984) 11 D.L.R. (4th) 380 (on voting rights of class of convicted persons on probation) (s.3: Article 5).

71. (1968) 121 C.L.R. 375.

72. At 398-399.