AN HISTORICAL AND PHILOSOPHICAL PERSPECTIVE ON THE PROPOSAL FOR A BILL OF RIGHTS FOR NEW ZEALAND

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I

The White paper, A Bill of Rights for New Zealand, sets down, explicates and justifies a proposed Bill of Rights as supreme law for New Zealand. As the White Paper explains, it is the policy of the current Labour government to entrench the Bill into our constitution in 1986. But the government intends the Bill to be `durable´ not so much by virtue of its being entrenched into law by a majority party but, more fundamentally, by virtue of its popular and non-partisan support. Accordingly the White Paper addresses itself to finding and forming a `general consensus´ on its introduction.[1] The Americans remarked on 4 July 1776 that a `decent respect to the opinions of mankind´ required them to give their reasons for their Declaration of Independence.[2] Of course, unlike the Americans, our government does not propose to `dissolve the political bands´ that tie us to an imperial power nor to declare that governments `derive their just powers from the consent of the governed´ nor that they are

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1. A Bill of Rights for New Zealand. A White Paper. Presented to the House of Representatives by Leave by the Hon. Geoffrey Palmer Minister of Justice (Government Printer, 1985) [Henceforth, WP], pp.5, 23.

2. S.E. Morison, Sources and documents illustrating the American revolution 1764-1788 (2ed. Oxford, 1953), p.157.

absolutely bound to preserve individuals ``unalienable rights´. It has in mind something less far-reaching. But the Bill, if it were passed, would certainly introduce great changes in our style of political and constitutional thought and practice. It would Americanise them, both for better and for worse. It is no less than should be expected therefore that the White Paper does in fact display that same required respect for its audience as did the Declaration of Independence. No less is its audience required to take it very seriously and to treat it with respect; and if, for reasons of space, I seem at times to fail to do these things I would have it understood that this is because of my lack of capacity not out of ill-will or lack of gratitude to its authors for their industry, intelligence and public concern.

It is observable that: (1) the arguments in the White Paper are exclusively in the language of modern liberal-democratic law and politics, and that the Bill itself expresses almost without contradiction the conclusions of that form of thought. But that: (2) the precise content of the Bill - the range of rights it excludes as well as includes - is shaped and modified by a clear and present consciousness that what it sets down must accord with the consensus of the nation. These two sets of facts about the White Paper and the Bill are not, I think, disputed. Nor, in my view, would it be reasonable to dispute them as a good general description of their contents.[3] Certainly Hon Geoffrey Palmer,

3. With some exceptions specified in Sections II and IV below.

Minister of Justice and the chief architect of the Bill, described his essay in constitutional reform in two ways which suggest the aptness of my own two-part description. He described it, firstly, as an attempt to express the `essence of our constitutional and political system - the essence, that is, of the relations between the individual and the state'. And he described it secondly as an exercise in setting down what it is that `New Zealanders have in common with each other, not...what divides them'.[4]

This paper, written from the point of view of an historian (of ideas) and of a philosopher, is devoted mainly to achieving and setting down an understanding of these two sets of facts. Philosophers, as you will know, characteristically insist on not understanding the obvious; historians equally characteristically simply record it; I shall try to combine their virtues and avoid their vices. My hope is that at least this proceeding will provide a useful introduction to our discussion of the Bill today. Section II below, on what it means to call the Bill `liberal' and `democratic', will provide an overview of most of what is in it. Section III is on the dialectical importance - as well as the more obvious political importance - of the appeal for consensus. It examines some of the issues raised by the contradictory bases of legitimacy that are being claimed for the Bill and shows how they compare with other historic claims made for Bills of Rights and similar documents; and it is designed to

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4. WP, p.7

highlight the historical and cultural contingency of the very concept of `rights´ as well as the ways in which rights claims have been justified in the past.

More ambitiously but not always so obviously and certainly not so fully and systematically, my intention is to induce in others some of my own scepticism as to the wisdom of attempting to set down as supreme law what in my view are sometimes dangerously vague and contradictory intuitions as to constitutional and political rectitude. I do not dispute that laws will always be somewhat vague and that there will be hard cases and that therefore there must be discretion. Nor do I dispute that judges are the best people to exercise it in the normal run of the legal process. But I cannot see the attractions of elevating our vague and contradictory intuitions of central values into supreme law and by that action at once empowering judges to be the guardians of our civic morality and at the same time rendering them liable to the furious assaults of those who disapprove of their judgements. One of the strengths of the Bill lies in the care, caution and precision with which the content of the particular `rights-packages´[5] are specified. But the public at large will not appreciate this, especially in regard to the civil rights. They will see these as having greater scope and force than they are in fact given in the Bill, and they will insist on regarding as inalienable and very

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5. Joel Feinberg´s usefully suggestive phrase, in his Social philosophy (Englewood Cliffs, 1973), p.70.

general moral rights what are in fact conceived by the authors of the Bill to be carefully specified and overridable constitutional rights. If anyone needs convincing of this they should be invited to consider the vulgar reaction to the All Black Tour injunction case and the language of inalienable rights used by opponents of the current law on union membership.[6] Even, therefore, in conditions where judicial discretion is in fact severely limited, the judges will be perceived as final moral and political arbiters: the public will see the rights as very general and inalienable even though the judges will not.

The language of rights is not of course the only way to talk about morals and politics. It is indeed most at home in the practice of law.[7] And this is why the most powerful argument for the Bill - that it would provide a text and the occasion for the education of our children in civility[8] - while it is one for which I have some sympathy seems to me nevertheless to present some dangers. The argument proposes that we teach `fundamental rights and freedoms´ as our basic text in political life. But I think we have more urgent tasks here and that the teaching of the language of rights, which is often inimical to talk about duties and to the reasoned discussion of what it would

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6. On union membership, see my `The "principle" of voluntary unionism in New Zealand political debate, 1983-85´, forthcoming in Political Studies, July 1986.

7. See H.L.A. Hart, `Are there any natural rights?´, Philosophical review, 64 (1955), pp.175-91.

8. WP, pp.5, 63.

be best, overall, to do in the circumstances, actually poses a serious threat to the balance of discussion in our society. We are frightened of the `political´ because it means to us interest-group and party argument which we wish to avoid in our schools, and so we have made few serious attempts to teach politics there. We are unwilling to talk sensibly of the moral necessity of political authority and of individuals being obliged without their own consent to other individuals and groups - because that would be thought to threaten personal liberties and individual self-development. We find it hard to deal with merit and excellence except in a few obvious fields; our public ideology is predominantly individualistic and egalitarian. It is, as the French say, incivist, and its intellectual expression is the adoption of the language of `basic´ and `equal´ rights and disrespect for the concrete and differing tasks and interests of our people - not to mention disrespect for the concrete facts of social and economic life. We do not respect state servants or politicians much, because few of us have the slightest clue what they do. Like the Americans we believe, demonstrably wrongly, that justice can be done only in the market-place.[9] I will not continue. You will forgive me for speaking in this way about our failure to educate New Zealanders in civility if you reflect that these sentiments are no more (or less) high-minded and idealistic than those of the authors of the White Paper and that it is just that they are those of a political scientist and not of lawyers.

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9. Robert Lane, `Market and political justice´, Paper delivered to the NZ Political Studies Association, Auckland, May 1985.

They are rather republican than legalistic. It seems to me we have plenty of equal-rights-talk already and would be better to teach civic virtue.

But I will not have time to argue all that here, though some of it will emerge in the course of sections II and III. In my last section, Section IV, I will instead very briefly discuss some of the controverted propositions in the Bill and the White Paper: the proposition that the rights to liberty and against invidious discrimination contained in it are rather formal than substantive, the argument that the right to freedom of association should not be (and logically cannot be) limited in the way it is in the Bill, and the argument for the inclusion of more `group rights´ in it. I will begin that section with a rather more extended discussion of the proposal that a `right to property´ ought to be included in the Bill. This is more extended because the philosophical points to be made in that respect will illuminate what I have to say about the other matters. This narrower focus will enable me more fully to discharge my obligation as an historian concerned to note where the detailed controversies as a matter of fact are. It will in addition perhaps add to the credibility of the slightly polemical remarks I have already made but cannot more fully develop.

Introductory remarks disposed of, I want first to show more fully in what respects it is correct to talk as I have of the proposal as being liberal-democratic and legalistic in language and in result.

It is a liberal exercise in that it assumes that the two basic components of the state are on the one hand the government and its agents equipped with legal powers and on the other hand legal persons (mainly but not exclusively natural persons) each of whom (or which) is separate from the others and has separate and equal rights.[10] The limited conception of politics appropriate to this view is that it is that set of activities constituted by governmental powers on the one hand and personal rights on the other. Political relationships are depicted as to do with the relations between governments and equal persons. The government must treat all persons equally and impartially as regards their rights; and persons may claim their rights from governments which are duty-bound to recognise them.[11] This limitation placed on the scope of the Bill by its authors is made clear in the White Paper when they argue that it cannot include `major economic, social and cultural rights´ because those rights

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10. The White Paper uses slightly different language: `State´ for government and its agents, `persons´ for others.

11. For a full development of these themes, see Sir Ernest Barker, The principles of social and political theory (1951 ed). Barker´s views are very close, one would guess, to those of the authors of the White Paper.

express `substantive values, especially in the economic area´,[12] and where it is argued that the `fundamental procedural rights´ (to vote, to regular elections, to speak, to assemble and to associate) can be seen `as value free in a substantive sense´ because `they do not attempt to freeze into a particular constitutional status particular substantive economic and social policies´.[13] The politics of competing differential interests, in which the government acts - or does not act - so as to benefit some at the expense of others, are not appropriate to a Bill of Rights which must treat every person in the same way. It is not that the authors of the White paper deny the importance of the politics of competing differential interest, just that that is not a proper subject of the Bill. They would `leave to the unfolding of [the] constitutional and legal system the selection and resolution of debates in society about substantive values´ and not attempt to `capture (or more accurately to impose) a temporarily popular view of policy´ in supreme law.[14]

Their sentiment that social and economic rights should not be included in our Bill of Rights is classically liberal. It is a sentiment defended well - though in a different way - in the best liberal critiques of the two United Nations Covenants of

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12. WP, p.23.

13. WP, p.28.

14. WP, p.23.

1966 which attempt to give legal force to the Universal Declaration of Human Rights of 1948.[15] Maurice Cranston, for instance, has largely convincingly argued that many of the so-called `human rights´ contained in the International Covenant on Economic, Social and Cultural Rights(1966) are not `human rights´ at all. If they were, they would have to be seen as rights which all humans (solely by virtue of being human) could claim from their governments and which governments must, as a duty, recognise and act to realise. But they cannot possibly be seen that way. At best, he argues, the substance of the rights in the Covenant are benefits that some people ought to enjoy when propitious social, political and economic circumstances allow. This is the case in regard to such `rights´ as the right to `self-determination´, the right to work that is freely chosen and accepted, the rights to fair wages, a decent living, safe and healthy working conditions, the rights to establish trade union organisations and to strike, the rights to protection and assistance of the family, to education, to health, to adequate food, clothing and housing, to cultural life and the benefits of scientific progress. These `economic´ and `social´ rights even include - to Cranston´s tight-lipped amusement - the right to paid holidays! At most, according to Cranston and others, these are only `manifesto rights´. They cannot be `rights´(properly defined) because when a right-holder has `rights´ then other persons have duties correlative to those rights, duties which

15. The Covenants and the Declaration are conveniently printed in Maurice Cranston, What are human rights? (London, 1963) and The United Kingdom Committee for Human Rights Year, Human rights (1967).

require the right-giver to provide the substance of the right. But duties imply abilities, and obviously not all governments have the ability to provide those things. And so the argument concludes that such rights are not only not `strict´ or `claim´ rights at all but that to call them `human rights´ is to devalue those rights which really are human rights and which moreover can be delivered with some certainty and certainly at a compassable expense.[16]

But the authors of the White Paper it will be recalled, justify the exclusion of `social´ and `economic´ rights not so much on the ground of the impossibilty of the government´s delivering them, but on the grounds that such rights as are made supreme law should be compatible with the maximum liberty of persons to create their own futures for themselves. The proposals are liberal not only on the negative ground that they largely exclude those rights that socialists in the nineteenth-century and especially since the Universal Declaration of Human Rights have wanted included in Human Rights documents,[17] but because of the positive stress they place on the importance of

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16. Cranston, Chap.8. Cf. D.D.Raphael, `Human rights, old and new´, in (ed) Raphael, Political theory and the rights of man (London, 1967), pp.54-67, for a development and critique of Cranston´s views, and cf. Sir Leslie Scarman, Centenary celebration lecture to the University of London, 13 October 1976, for a judicial traversing of the ground.

17. Raphael, in Raphael, pp.60-67; Alice Erh-Soon Tay, `Marxism, socialism and human rights´ and J.G.Starke, `Human rights and international law´ in (eds) Eugene Kamenka and Alice Erh-Soon Tay, Human rights(London, 1978) pp.104-112 and pp.113-131.

persons being as free as possible from the legal power of the goverment and its agencies, and their stress on the view that persons should be left as free as possible to act as they see fit in `private´ (as it were) groups and to associate with others as equals and on grounds of personal choice.[18] The White Paper echoes the view of Professor Minogue that those Human Rights which are justifiable lay down only the `rules of the game´. They are resources which provide the `space´ each person needs for the 'game of life´ and are compatible with a wide range of forms of organised human activity, `from the communitarian settlements of nineteenth-century America to the kibbutzim of modern Israel´.[19] Such rights of persons against their governments and to activity unregulated by governments are the recurring themes of the White Paper and the Bill, as they are of International Covenant on Civil and Political Rights(1966) to which New Zealand is a signatory - as it is to the Covenant on Economic, Social and Cultural Rights. The pedigree of these sentiments in English, French and north American liberal thought will not need insisting on here. Nor for the moment is it

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18. It is, historically speaking, the `old liberalism´ of J.S.Mill, not the `new liberalism´ of T.H.Green, L.T.Hobhouse and of most New Zealand thought until recently. The `new liberalism´ places more stress on the freedom of individuals `to´ act to attain their purposes; and when it speaks of `freedom from´ constraints, it places much more emphasis on freedom from real social and economic constraints and not so much on merely legal ones. Cf. L.T.Hobhouse, Liberalism (1911; repr.Oxford, 1964); R.B.Lyon, `The principles of New Zealand political thinking in the late nineteenth century´, Auckland, PhD thesis (1982).

19. `Natural rights, ideology and the game of life´, in Kamenka and Erh-Soon Tay, pp.13-35.

necessary to distinguish the disparate origins of liberal doctrine in detailed custom law on the one hand and in the abstractions of the natural lawyers and philosophers on the other. It is however worth illustrating this overall liberal trend from the Bill, especially in view of what I shall say later of the incoherence and vagueness of the doctrines it contains.

The preamble states it to be desirable to `affirm the human rights and fundamental liberties of all the people of New Zealand without discrimination´ and it asserts the `principles of freedom, equality and the dignity and worth of the human person´; section 2 specifies that the `rights´ and `freedoms´ that persons shall be given under the Bill will obtain against not only the three parts of government (said to be the legislative, executive and judicial arms) but also against the activities of authorized agents of the government. Sections 6 through 11 specify the `civil rights´ of freedom of thought, conscience and religion together with their practical correlatives: freedom of expression; freedom of worship, observance, practice and teaching (of religion); freedom of peaceful assembly; freedom of association; and freedom of movement. Section 12 ensures equality of rights by outlawing discrimination on grounds of `colour, race, ethnic or national origins, sex, or religious or ethical belief´. Sections 14 through 20 are much less abstract. They entail to our descendents in supreme law the customary (and currently statutory) inheritance of ancient Anglo-American liberties, immunities and rights in regard of criminal justice. They specify the rights to life, to liberty of person, the rights

on arrest and following criminal charge, rights against unreasonable search and seizure, against torture and cruel treatment and rights to minimum standards of criminal justice. They are expressed in terms drawn from Magna Carta, the Canadian Bill of Rights and from the United Nations documents on `civil and political rights´ originating in the corridors and meeting halls of the United Nations.

But the proposals are a `democratic´ as well as a `liberal´ exercise. In his Introduction, Mr Palmer speaks of our society as being `democratic´ (as well as `multicultural´) and explains that the `fundamental rights and freedoms´ that the Bill contains are vital to its preservation. The preamble to the Bill speaks of New Zealand as a `democratic´ society as well as one which values equal individual liberty, and part of the proposed legal force of this preambular description emerges in Section 5 in which adults are guaranteed equal suffrage in periodic elections by secret ballot. They may elect representatives to govern them and in addition are each qualified to stand for election themselves and share rule if chosen. Thus the adjective `democratic´ in the preamble would in the light of section 5 appear to refer to a form of representative government. But the other, equally important point of the description of New Zealand as a `democratic society´ emerges in Section 3, which states: `The rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic state´. The

point is that personal liberty, and the individual rights which protect it, may be overridden on `democratic´ grounds. (I find it impossible to guess what `free´ as a modifier of `society´ means here: unless it indicates that rights can be overridden only for the sake of rights to liberty.)

That almost all governments in the contempory world call themselves `democratic´ yet that many of these do not share the liberal respect for individual liberty or even see the state as fundamentally a collection of individuals[20] gives particular point and poignancy to the White Paper´s naturally inconclusive talk of the necessity of `balancing´ the requirements of individual freedom and of democratic government. It is clear that the principles of liberty and democracy can and do conflict. Indeed, on a libertarian analysis, any governmental action, notably the making of any law, abridges liberty. Paraphrasing Hobbes, law and liberty are stark opposites.[21] And this is true whether the government is `democratic´ or not. Laws that lay prohibitions and requirements on people just do abridge the liberty they had before the laws were made. They now cannot do what they could lawfully do before. It is also clear that both `liberty´ and `democracy´ are what philosophers have come to call `essentially contested concepts´. History and reason show that

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20. See for brilliant expositions of this point: C.B.Macpherson, The real world of democracy (Oxford, 1966 and many reprints); John Dunn, Western political theory in the face of the future (Cambridge, 1979).

21. Leviathan (1651), chap.14.

this is so because it is not only hard to see exactly what the words refer to but that the criteria of reference pitched upon by anyone using them - whatever those criteria might be - secrete important decisions of value.[22] Communist states, one party states and participatory communes, for instance, all describe their very different constitutions and activities as `democratic´. And in New Zealand we disagree as to what is and what is not `democratic´. For instance in a recent study of the debate on `compulsory´ versus `voluntary´ unionism, I found that some claimed it to be `undemocratic´ that they should be forced to join a trade union they did not wish to; others however found it `undemocratic´ of the objectors to refuse, because the votes of the majority in their industry, trade or profession had voted that membership should be obligatory.[23] Nevertheless - and bearing in mind the multitude of attitudes, values, institutions, actions and so on that have been and can be called `democratic´ - the document is a `democratic´ one. It is because it says it is.

Finally, the exercise is a legalistic one, though its supporters would call it `constitutionalist´. (Both descriptions are what Bentham called `question-begging appellatives´; they have the same descriptive reference, but value differently that

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22. On `essentially contested concepts´, see William E. Connolly, The terms of political discourse (2ed., 1983), esp. chaps. 1 and 4.

23. Sharp, `The "principle" of voluntary unionism in New Zealand political debate, 1983-85´, op.cit.

which is referred to.)[24] It is legalistic in that it is an attempt to fix the relations between legal persons and governmental agencies in a valid supreme law which distributes rights, duties, immunities, disabilities, powers and liabilities and to afford protection to those `rights´ (as we may generically call them) by way of legal remedies for their breach. Section 1 and Sections 21 through 28 state this clearly in envisaging the contents of the Bill as `supreme law´, and in providing mechanisms for the application of the `principles´ of `natural justice´ as well as what is in the Bill, in cases between the person and the state. The liberal and democratic sections already mentioned are included so that they will have the force not only of law, but of supreme law, and so are the other sections not yet discussed. When, moreover, the justifications for the particular sections are presented, they are more often than not legal ones. For example, the White Paper gives some consideration to the contentious paragraph 2 of Article 10, the paragraph which limits freedom of association by allowing for the possibility of compulsory membership of Trade Unions where `legislative measures [are] enacted to ensure effective trade union representation and to encourage orderly industrial relations´. Justifying the paragraph, it speaks of how it does not breach the provisions of two United Nations Covenants (and our reservations entered to them when we ratified them in 1978). It also quotes a Canadian case under their Bill of Rights and a

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24. Jeremy Bentham, Book of fallacies, in (ed) John Bowring, Collected works (11 vols., Edinburgh, 1838-43), II, pp.375-487.

case from the European Court of Human Rights to show that paragraph 2 is not contra-implied by paragraph 1: `Everyone has the right of freedom of association´.[25]

Whatever else may be thought in this particular case of the recourse to law as a mode of argument, over-all the authors´ intent may fairly be construed as that of expressing the conception that political activity and especially the activities of governors ought to be bound by the rule of law. Historically, commentators who have approved of this conception have expressed their belief in `the rule of laws and not of men´, have stressed the dependence of the power of rulers on the law by which they rule and have voiced their suspicion of sovereignty or `unbridled power´. They have also thought, like John Locke, that individual liberty is the fruit of law: ` For law...ill deserves the name of confinement which hedges us in only from bogs and precipices´.[26] The lawyers present here will not need to be reminded of the antiquity of that sentiment among their own profession. It is in Cicero, Bracton, Coke and in Blackstone. It is also in Mr Palmer and has long been an article of faith with lawyers in general, no doubt as a consequence both of their training and their material interests in the acceptance of the doctrine. They speak most happily the language of antecedent rights, duties, liberties, obligations, precedents and laws binding or permitting persons´ actions - including those of

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25. WP, pp.82-84.

26. Second Treatise (1689), sect.57. Cf. sects.23, 58.

governments. By contrast, one may like to think of the language of politicians, people in business and other interest or cultural groups when they are discussing and deciding what to do: they talk as much of what is best to be done, what is in the national interest, what should be changed for reasons of common welfare, of group or individual profit. They often talk with a view to changing rather than preserving the existing structure of legal obligations and permissions.[27] (Mr Palmer himself spoke this language most effectively during the parliamentary debates on union membership.) The Bill of Rights, to point the contrast, talks the language of the law and of lawyers. It describes these most common forms of political and social activity as `the unfolding operation of the constitutional and political system´.

A thorough-going legal conservative, like Sir Matthew Hale, Edmund Burke, Friedrich Karl von Savigny or Professor Dicey, would of course see, and want to see, the totality of social relations `unfolding´ this way, `after the pattern of nature´ as Burke used to put it.[28] So would the greatest of living conservatives, Sir Michael Oakeshott. And they also would see that while legal systems are very ancient and persistent, the

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27. A technical elaboration of the two different modes of argument may be found in Virginia Held, `Justification, legal and moral´, Ethics, 86(1975-76), pp.1-16. A polemic against misplaced legalism is in Judith Shklar, Legalism (Cambridge, Mass., 1964).

28. On Hale and Burke, see J.G.A.Pocock, `Burke and the ancient constitution´, Historical Journal, 3 (1960), pp.125-43; on Savigny, Peter Stein, Legal evolution: the story of an idea (Cambridge, 1980), chap.3. Cf. A.V.Dicey, The law of the constitution (5ed.1897), Introduction and Chaps 14 and 15.

substance of particular laws changes with the flow of time and exigency. But the authors of this Bill want to abstract from this unfolding process one set of components. They want to make them `durable´as well as making them law. Their legalism is not at all a legal conservatism. It is a legal-rationalism in which certain parts of the whole are abstracted on liberal and democratic criteria.[29] It does not need spelling out that it is is not however a hard-edged legal rationalism because it allows for conflict between various rights and between those and `democratic´ values and state necessities. And, as will next emerge, it will allow `consensus´ to modify, even perhaps transcend - in the case of the proposal to adopt the Treaty of Waitangi as Section 4 of the Bill - those values.

III

In his Introduction to the White Paper Mr Palmer makes it clear that the introduction of the Bill `cannot be hurried´, that its exact content has not yet been decided - `nothing is set in concrete´ - and that there `needs to emerge a general consensus among the public before progress on the issue can be made´. And he explains the necessity of entrenching the Bill as reflecting the need for it to be `above alteration by a simple majority in Parliament´, for it to be `durable´. Provision is therefore made that it may be altered or repealed only by a 75% majority in the

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29. See Oakeshott´s, `Rationalism in politics´ in his collection of the same name, Cambridge, 1962.

House or by a majority in a referendum of electors; and as the White Paper explains, such changes would probably require `some sort of agreement between(sic) the major political parties'. In addition the White Paper speaks about the desirability of consensus on the matter of introducing the Treaty of Waitangi: `the consensus that is necessary if we are to have an effective Bill of Rights must embrace the Maori also'. On this issue though, the consensus is not to be national: `it is for the Maori themselves to indicate if they want the Treaty of Waitangi to be dealt with in a Bill of Rights and in what way'. Already, it is reported, some kind of Maori consensus seems to be emerging as a result of hui held at Waitangi and Turangawaewae.[30]

Clearly search for consensus is typical of the Labour Government's policy over a wide range of issues. There is no doubt either that such a search is a matter of political prudence. Support for the policy by opposition parties and major interest groups would make the passage of the Bill much easier and its future more assured. It may however be observed that a future government, faced with repealing a Bill it had rejected in opposition, would find it hard to repeal by a simple majority. Perhaps for this reason the major interest groups and opposition parties have been equivocal in their reactions to the proposal, though in so far as it rehearses agreed platitudes, they support it. They spoke, at the International Commission of Jurists' Seminar in Wellington on 10 May this year, of support `in

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30. WP, pp.5-7, 23, 35, 59. Cf. Bill, sect.28.

principle´ (FOL), of the need for further study before a proper reaction could be shaped (National Party), of serious doubts about the Bill´s stress on individual rights(Maori and trade union interests), of general support but concern about missing rights (Social Credit, NZ Party). Not much policy development seems to have occurred in these quarters since: the Social Credit (now Democratic) Party could not find time to discuss it - though it was on the agenda - at its annual conference in May; it took until July for the National Party to set up a caucus committee to study the issue; `Maoridom´ has not yet spoken with one voice and is due to gather at a hui further to discuss it earlier in the same week as this conference. Though influential legal opinion has moved from opposition to the Bill proposed in 1963,[31] the legal profession, while clearly interested in the question is also deeply divided, and media and public interest have not been great. Mr Palmer himself spoke ruefully at the Jurists´ Seminar of how correspondence with him on the issue of homsexual law reform greatly outweighed what he was getting on the Bill. It was, as he correctly noted on that occasion, probably too abstract an issue to grip the public imagination. The Bill has typically been raised as a weighty issue by opponents of the government when they have wished to argue (wrongly but understandably) a contradication between the government´s support both of it and of `compulsory unionism´.[32]

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31. Cf. the papers of Sir Robin Cooke and Sir Guy Powles at the Jurists´ Commission conference, 10 May 1985.

32. Sharp, `The "principle" of voluntary unionism´.

What then is to be made of the idea that consensus is necessary in conditions where if it emerges it will likely be among a directive minority of the society centered in legal and political circles mostly in Wellington, and a consensus rather characterised by public acquiesence than enthusiasm? Taking a view both long (historical) and deep (philosophical), I would say that consensus is necessary as the most important of a number of unsatisfactory legitimating devices that are pressed into service because the legislators have no faith in what was thought to legitimate the great historical charters of rights: custom and practice on the one hand and fundamental natural rights and natural law on the other.

It must first be said that the Bill is an instrument principally designed to protect the citizen against the government and its agencies, and that it is this recurring instrumentalist argument which is actually the most important one for the Bill and the one on which it ought to stand or fall in the end. Modern constitutionalism is an instrumentalist ideology and the most appropriate questions to ask of it are to do with whether the detailed proposals suggested will do what they set out to do. But the case for the Bill is also argued on other, mainly non-instrumentalist grounds, which the authors of the White paper clearly take to be attractive. My view is that they are contradictory and incoherent and that the appeal to consensus operates to reconcile them as well as they can be.

The Bill, it is explained, is designed to protect the `fundamental rights and freedoms of New Zealanders´. In doing so it would build on our `strong and diverse´ heritage, and the text `accordingly runs back to the great guarantees, in the Magna Carta of 1215 and the Bill of Rights of 1689´ and is constructed to `emphasise our nation´s origins by recognising and protecting the rights of the Maori under the Treaty of Waitangi´. It is also said of the Bill that it `draws...on the wider experience and conscience of the international community...put into binding Covenants...especially in the International Covenants on Human Rights´, as worked out in detail in Commonwealth Bills of Rights, `particularly ... in Canada´.[33] But if these are reasons for adopting the Bill, they are not immediately persuasive.

They are not persuasive firstly, because our `strong and diverse heritage´ is a very complicated and contradictory thing and points in no obvious direction at all. It includes not only the English experience of great charters but the French and American. It does so inevitably given the United Nations documents which clearly build on them and which we hold to be a ground of judgement and action in regard to our Bill. History has it that the Universal Declaration was originally to be entitled, in eighteenth-century parlance and echoing the title of Tom Paine´s famous book, a Declaration of the `Rights of Man´. Mrs Roosevelt, chairing the Commission charged with drawing up the Declaration is said to have changed her mind about the title

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33. WP, p.21.

when faced with the delegate of `some benighted country´. `I assume´, he suavely remarked, `that when we speak of the rights of man, we mean what we say. My government of course, could not agree to extend these rights to women´.[34] Neverthless, while there are certainly different nuances to the phrases `the rights of man´ and `human rights´, both capture the essential assertion that humans have rights simply by virtue of being human and nothing else. If this is so, the appeal is not to custom and legal practice but to the truths of natural right which transcend all custom and practice, and indeed provide the measure for them. And it is an appeal not to detailed knowledge of the law, gained by long study, but to self-evident moral truth, often alleged to be discovered in consensus humani generis.

This is clearly evident in the rationalist tradition of France and America. The Americans, led by Virginia in 1776 and imitated in turn by the French during their revolution which began in 1789, spoke far otherwise of their Bills of Rights and great charters. They grounded them not in precedent but in natural right, and they discovered many of the rights they declared not in inherited custom but by the light of reason. The Virginian Bill, which provided the model for other states´ Bills and for the Declaration of Independence itself, proclaimed that `all men by nature are equally free and independent and have certain inherent rights, of which, when they enter into society,

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34. Raphael in Raphael, p.54.

they cannot by any compact deprive or divest their posterity'. They have the rights to life, liberty and `the means of acquiring and possessing property, and pursuing and obtaining happiness and safety'. They have, i.e., what the Declaration of Independence spoke of as `unalienable rights'. They are said to have moreover, what mainstream English constitutional thought found difficult to describe let alone advocate[35] - a `constitutive' power: the right to set up and deconstitute governments of whatever form they might choose to the end that their `happiness and safety' might be obtained. The Virginia Bill, like the others - and notably like the Federal Bill of Rights (the first ten amendments to the constitution, added in 1791) - then went on to list its series of customary rights in addition to the `natural' ones so declared. But the basis in natural right, or the `rights of man' was clear.[36] The French Declaration of the Rights of Man and the Citizen (1789) and its refinements in the next decade, followed the same pattern.[37] They proclaimed natural, `inalienable' rights, and, as the White Paper notes,[38] were accordingly derided by Jeremy Bentham both as `natural' and as `inalienable'.

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35. Julian Franklin, John Locke and the theory of sovereignty (London, 1978).

36. Morison, pp.149-51, 157-60, 163-64 (Pennsylvania), 363-67.

37. See the comparison of the French Bill of 1789 with the Virginian in R.R.Palmer, The age of democratic revolution (1959), vol.1, App.IV. The French Bills of 1789, 1791, 1793 (and 1848) are usefully in the appendix of D.G.Ritchie, Natural rights (eds.1894 etc. Latest ed.1952). Ritchie also contains the best summary history of the French and American Bills and of the idea of a `law of nature'.

38. WP, p.22 - though the spelling of `stilts' is wrong and Bentham's point only half taken I think.

The English tradition on the other hand is unequivocally opposed to any talk of natural rights. Magna Carta and its numerous `confirmations´, the Petition of Right (1628) and the Bill of Rights all claimed to be nothing more than statements of what was already law, of what the English already enjoyed by custom, or, as Burke put it, by `entailed inheritance´. Though in fact it did change the law and though it has recently been shown that the document was framed in accord with revolutionary motives, the Bill of Rights talks of `vindicating and asserting...auncient rights and liberties´ rather than of superseding or changing them.[39] When, throughout the seventeenth and eighteenth centuries, the English spoke of `fundamental´ law - or rights, or properties, or privileges and so on, they could mean almost anything at all, more or less provided that what they talked of was locatable in the historical record.[40] Even when the English made their revolution of 1642-1660, they continually tried to do so in the name of existing custom and law,[41] and scholars now accept that Locke´s famous Second Treatise, long celebrated as an attempt to justify the Glorious Revolution of 1689 on grounds of the `natural rights´ of the people, was neither written for that occasion nor read by his

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39. W.C. Costin and J. Steven Watson, The law and working of the constitution 1660-1914 (1961), I, p.69. The authoritative study of the genesis of the Bill of Rights is Lois G. Schwoerer, The Declaration of Rights, 1689 (Baltimore, 1981)

40. J.W. Gough, Fundamental law in English constitutional history (Oxford, 1955).

41. See Andrew Sharp, Political ideas of the English civil wars, 1641-49 (London and NY, 1983), Introduction.

contemporaries until more than a decade later. And when he was read, he was read more for his conservative doctrine of property rights than for the radical revoluntionary implications of his natural law doctrines.[42]

Whatever else may be said there are clearly two very different traditions of perceiving the grounds of the great charters of rights, and accordingly two very different ways of getting to know what the contents of `rights´ are: the one calling on the legal scholarship of a Coke or a Selden, the other on the philosophy of natural law and natural right in either its scholarly or vulgar forms. And our Bill is grounded on both traditions and is defended as such in the White Paper. It is said to express and guarantee what is already law in New Zealand, and at various places the point is made that the `fundamental rights (or values) and freedoms´ of which it speaks are those of `New Zealanders´.[43] Yet a `reaffirmation and careful extension of basic freedoms´ is talked of´,[44] the White paper also seems not to doubt that there are some rights that all human beings ought to be accorded, and the appeal to Human Rights is perhaps

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42. See eg. Richard Ashcraft, `Revolutionary politics and Locke´s Two Treatises of Government´, Political Theory 8, iv (1980), pp.429-85; Martin P. Thompson, `The reception of Locke´s Two Treatises of Government 1690-1705´, Political Studies, 24, ii (1976), pp.184-91; John Dunn, `The politics of Locke in England and America in the eighteenth century´, in (ed) John W.Yolton, Locke studies (Cambridge, 1969), pp.45-80.

43. WP, pp.5, 21, 51.

44. WP, p.23.

not entirely an appeal to the authority of the United Nations but to some independent standard of required human behaviour.[45]

In respect of great charters, then, our traditions and the White Paper speak equivocally on their justifying grounds. And the great charters, naturally enough - but I do not have time to go into this here - differ as to what exactly the content of human rights (or good custom) is. But according to the White Paper there is even more to our `strong and diverse heritage´ than this. The Preamble to the Bill records the fact of the `Maori people´ being `tangata whenua o Aotearoa´ and that these people `entered in 1840 into a solemn compact with the Crown, known as Te Tiriti o Waitangi´ in 1840. It states it to be `desirable to recognise and affirm the Treaty as part of the supreme law of New Zealand´. The Treaty, the White Paper argues, ought to become part of our law and indeed be honoured as `one of its foundations´. This will take into account `our own special characteristics, special values and special institutions´.[46] It will `give legitimacy to the Pakeha, not as a conqueror or interloper, but as a New Zealander, part of a new tangata whenua´. The point is that the Treaty should be operated in its `spirit and true intent´. The incorporation of the Treaty will `not put the clock back to 1840 or any other date´ the White Paper argues on the strength of a Waitangi Tribunal judgment. As

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45. WP, pp.21,25,63,79,88,107.

46. WP, pp.35-39.

the Tribunal affirmed, `it was not intended as a finite contract but as a foundation for a developing social contract´ and as the White Paper assures its readers, its incorporation `will not require the reopening of past transactions or disturb in any way lawfully aquired rights and interests´ - though the Tribunal will be enabled to `reopen and examine past grievances´. Now I am not an expert in the matters at issue, but it seems to me that such statements paper over - and maybe rightly - an awful lot of cracks. In European terms, at least until the elaboration of the idea of `aboriginal rights´, being tangata whenua would have brought with it claims to property and authority grounded among other things on first occupation, occupation in the absence of clear title, labour, conquest, accession and descent - in some kind of mixture. And these, like any other claims could be overridden by similar ones though in ways never made entirely clear by the jurists.[47] But if, as I believe it does, contemporary Maori consciouness infers more (and differently) from that original and lasting status than Europeans traditionally have, then we are mixing Maori and Pakeha modes of regarding the nature and grounds of authority and property. And moreover, what the original Maori signatories (if they can be spoken of as a group) understood by the words of the variously-worded Treaty, what conception they had of being bound for the future by signing a written document, and how therefore their

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47. Classically in the literature from Grotius, De jure belli ac pacis (1625) to David Hume, A Treatise of human nature (1739), Book 3, Sect 3. Recent reflections on the matter are mentioned and discussed in Lawrence C. Becker, Property: cases, concepts, critiques (1984), sects. 2 and 3.

descendants stand in relation to that treaty are justifiably matters of scholarly doubt[48] and judicial spiritualising interpretation,[49] not to mention political controversy. Liberal and democratic shibboleths do not work well in this territory. To add complications from the Pakeha side, if `aboriginal rights´ are to be recognised - rights i.e., which predate treaties and are not always abridgeable by them - then clearly we would need to think a lot more about the morality and the legal and existential possibility of `reparation for past wrongs´ in the way the descendants of the European settlers in Canada and the U.S.A now are.[50]

You will understand that I raise these matters here only by way of further illustrating the controversial and contradictory ingredients of our `rich and diverse heritage´. It (though `it´ may be begging the question) points in no obvious direction at all.

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48. Cf.D.F McKenzie, `The sociology of a text: orality, literacy and print in early New Zealand´, The Library, sixth series, 6, iv(1984), pp.333-65.

49. See the report of the Waitangi Tribunal on the Waitara fishing grounds, March 1983, conveniently in (eds) Stephen Levine and Raj Vasil, Maori political perspectives (Auckland, 1985), App.3, esp.pp.191-96. This is the Motonui report quoted in WP, pp.37-38.

50. See Michael McDonald, `Aborginal Rights´, in (eds) William R. Shea and John King-Farlow, Contemporary Issues in Political Philosophy (N.Y., 1976), pp.27-48; cf.eg., Becker, loc.cit; David Lyons, `The new Indian claims and the original rights to land´, Social Theory and Practice, 4, iii(1977), pp.249-72; Christopher Morris, `Existential limits to the rectification of past wrongs´, American Philosphical Quarterly, 21, ii(1984), pp.175-82; and various articles since 1980 in the journal Philosophy and Public Affairs.

It should now be added that the `experience and conscience´ of the `international community´ provides even less by way of a clear and unambiguous teaching about the existence, grounds and content of rights. There is no point in labouring the (anyway mistaken) point that the denial of rights proves their non-existence. But it needs to be said that currently as well as historically, large parts of humanity do not and have not conceived of `rights´, let alone `human rights´, the way we conceive of them at all. And yet it would be wrong to dismiss these parts of humanity as moral barbarians who simply think that might is right.

It is one thing to have a concept of the unique dignity and worth of each human: it is quite another to express it in the disassociative and legalistic conception of rights. The Judaic, Christian and Muslim religious traditions have in common the idea of the unique value of each human creature, as a creature of their maker-God. But the idea of this giving equal `rights´ to individuals came late and with considerable intellectual and moral difficulty to Christian Europe, via fourteenth century controveries on clerical poverty couched in the awkward Roman law terms of `ius´, `dominium´ and `proprietas´. And the language was not fully accepted until the eighteenth century.[51] Like early modern Christians, contemporary Catholic, Jewish, Eastern

51. Cf. The rather different interpretations in Richard Tuck, Natural rights theories: their origin and development (Cambridge, 1979) and in the works of Michel Villey, listed in Tuck, pp.7-8n.

Orthodox and - most of all - Muslim thinkers, still find it difficult to think of, let alone defend the `rights´ of individuals against one another and against the state: their tendency is to think of the duties that persons owe one to another and that the state owes to them.[52] And if there is a tendency in Muslim thought to restrict what rights they can conceive of to the faithful, in traditional Hindu thought the duties that people have (they have no rights) are a function of their caste where the caste system is based on the `assumption that there are fundamental and unchangeable differences in the status and nature of human beings´. Indeed traditional Hinduism has no clear place in its cosmology for a conception of human dignity. Nor has Buddhist social thought. Insistent on the reality of an indivisible flow and connection of things it resists abstractions of persons, groups and powers from that whole.[53] Without doubt these views express an important part of the `conscience and experience´ of the international community. So too do the views of those, especially in Africa and Asia, and not least in New Zealand, whose inheritance or preference it is to live in societies where not rights of equal individuals but

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52. Cf. Jack Donnelly, `Human rights and human dignity: an analytical critique of non-western conceptions of human rights´, American Political Science Review, 76(1982), pp.303-316; and the articles by Harakas, Langan, Polish, and Hassan in the Journal of Ecumenical Studies, 19, iii (1982).

53. Ralph Buultjens quoted by Donnelly, p.309. Cf. The articles by Mitra and Inada in Journal Ecumenical Studies, op.cit; and R. Pannikar, `Is the notion of human rights a western concept?´, Diogenes, 120(1982), pp.75-102.

differentiated obligations to the community are stressed.[54] There is in addition, among the world community, a strong socialist bloc the `conscience and experience´ of which suggests the fundamental importance of social, economic and cultural rights and the positive danger of the rights to personal liberty which play so important a role in our Bill.[55] The Soviet Constitution of 1977 subordinates the rights to free speech, demonstration and religious worship to the `interests of the working people and for the purpose of strengthening the socialist system´. Rights are `inseparable from the performance of citizens of their duties´, and their equivalent to our Bill of Rights is a chapter called `The Basic Rights, Freedoms and Duties of Citizens of the USSR´. Rights, in that view, as in all those recorded in this paragraph, if they exist at all, are not self-evidently the possessions of persons; at most they are derivatives of the duties that governments and persons have. They could never seem natural or of universal applicability; rather they appear as artificial constructions, even the peculiar product of western capitalism and industrialisation.

These considerations about our own heritage and about the moral example of other nations throw doubt on the prima facie persuasivesness of the non-instrumentalist justifications for

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54. Cf.Donnelly, op.cit., and, throughout, for Maori examples, Levine and Vasil.

55. See the record of their views in Alice Erh-Soon Tay, `Marxism, socialism and human rights´ and J.G.Starke, `Human rights and international law´, in Kamenka and Ehr-Soon Tay, pp.104-12, pp.113-31.

our adopting a Bill of Rights. And, leaving aside the ordinary difficulties of assessing the detailed effect of the Bill as an instrument to a desired future for us, obvious difficulties lie in the way of our taking the experience of other times and other places as likely models of our development. Does not the history of constitutionalism in the Commonwealth rather suggest as much the futility of paper constitutions as their real value? Is it not in consequence of a particular and debatable historical comparison that Canada can be seen to be like us? These, like the questions I have raised more fully, may be the quibbles of a philosopher and historian. But sub specie aeternitatis they are real and they cast fatal doubt on the obvious appeal of the arguments. This leads me to conclude that the doubts can be silenced only by the voice of consensus; and the voice of consensus, while it is not the voice of truth, is certainly a device for the construction of legitimacy. This is why the gaining of consensus is crucial. It will not indeed be a consensus humani generis. But a consensus among ourselves would provide at once the Ariadne thread to guide us through time and a statement of current choice as to where we stand. It is thus the basis of legitimacy for the Bill. It will be needed not only as a matter of brute political fact to cause it to happen, but to make it seem right. The consensus will record a choice as to our identity as a nation in the world and a choice as to what we are to make of the existence, grounds and content of `rights´. Our heritage and the experience and conscience of the nations speak far too ambiguously in regard to whether we should have a Bill of Rights or not for it to be otherwise.

By now it will be clear that conceptions as to how collections of rights might be justified are contingent on time and place, as is the very concept of `rights´ itself. I will now turn to examine some of the particular rights packages that are proposed in the White Paper and the Bill - and some which, it is lamented by critics, are not. In doing so I will continue to develop my theme of contingency in stressing the variability of the contents of rights-packages through time. I will also make some remarks on the dangers of rights-talk - dangers that are consequent on its tending to a superficial generality which masks the real particulars at issue.

Mr Bob Jones and others have argued that the Bill ought to contain a right to `property´. They follow tradition in this. Indeed they follow the English as well as the French and American traditions, even though the former were based on natural right and the latter on positive right or `propriety´. Voltaire remarked: `Liberty and propriety voilà la devise des Anglais´.[56] Our proponents of the `right to property´ also follow, as Professor Ritchie would have been the first to note, the framers of the Constitution of Kansas(1857). The seventh article of the Kansas constitution reads: `The right of property is before and higher than any constitutional sanction, and the right of an owner of a slave to such a slave and its (sic)

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56. Ritchie, p.15n.

increase is the same and as inviolable as the right of the owner of any property whatever'.[57] No-one thinks in New Zealand that the right to property should extend to a right in slaves of course: but some of the problems raised by any blanket `right to property' are suggested by the Kansas claim. If we are to say that there is to be such a right we need to know what things can be property. Can slaves, wives, the heavens and intellectual creations be `property'?[58] We also need to know what proprietorial rights are: the right of use? the right of use to destruction? the right to control? to manage? to alienate? the right to income? or to capital? or to security of possession?[59] We might further ask - and we do, in view of Maori notions of ownership - if all property rights include the right to exclude others from use and enjoyment, or whether there may be inclusive rights to property which guarantee the common use of goods.[60] We might also wish to know the legal and moral grounds which specify valid accession to things. And finally, we might wish to know the grounds, moral and legal, on which the property rights of persons might be overridden - as it is specified in every statement of rights that I have seen. In brief there is no

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57. Ritchie, p.264, and cf. chap 13 for other historical information as to the content of the right.

58. On the last, cf. Legal Research Foundation Inc., Seminar, Intellectual property law in New Zealand and Australia (Auckland, 1985).

59. Cf.Becker, op.cit., Ritchie, chap 13; and A.M.Honore, `Ownership', chap.5 in (ed) A.G.Guest, Oxford essays in jurisprudence (first series, London, 1961)

60. A theme especially developed by C.B.Macpherson, Property: mainstream and critical positions (Oxford, 1978).

one thing that constitutes the `right to property´: in any particular society it is a package of complexly-related components ; and it is a package the contents of which varies hugely from place to place according to the `unfolding´ of the practical life of the nations concerned and their ways of thinking. It may be conceived of as that which one is free to use - within limits - as one wishes; it may on the other hand be something which one is obliged to use in prescribed ways which leave no freedom of choice in the manner of its disposal or use at all.[61] In reporting these things from the works of historians and philosophers I am not of course telling lawyers anything they do not already know and could not illustrate and amplify very easily out of their own experiences. The blanket claim to a right to `property´ simply obscures the detailed claims as to the distribution of (to use Professor Hohfeld´s terminology)[62] strict rights, powers, immunities, liberties, duties, obligations, liabilities and disabilities that are really at issue. And, besides obscuring the real issues, it also makes it impossible to conceive of a justification of what is being claimed. For if we do not know what the claim is, how can we possibly set about justifying it? Hence the air of irrelevence that continually characterises the justifications of the right to property

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61. For an indication of the history of the idea and practice of `property´, cf. Alan Ryan, Property (Oxford, 1984); and Richard Schlatter, Private property: the history of an idea (London, 1951, 1973).

62. Hohfeld is recently and interestingly discussed in Thomas D. Perry, `A paradigm of philosophy: Hohfeld on legal rights´, American Philosophical Quarterly, 14, i(1977), pp.41-50.

suggested by such as Professor Manning as well as by the New Zealand party.[63]

The authors of the White Paper and the Bill are clearly aware of the danger of leaving rights too unspecified. The legalism of their work provides evidence of that in the careful modulation and limitation of the `basic liberal freedoms´ it proposes (in the light of Canadian, European and United Nations´ drafting and judicial experience).[64] But this raises the issue of what happens when careful drafting runs counter to the intuitions of the public. It may well come to do so in regard to any of those `basic liberal freedoms´ of expression, religion, assembly and movement. And it clearly already has in regard of the paragraph limiting the right to freedom of association. Here the result has been the outraged appeal to the self-evident truth that there is a right to freedom of association, and that if there is, there is also a right to disassociation.[65] But, as is usual in the proposed Bill, the right is just not a blanket right, and it just does not contain what its challengers want it to contain. `Rights´, despite the `logic´ which the Human Rights Commission and its sources see in the doctrine, do not (conceptually) necessarily come in pairs: a positive right to association, for instance, entailing the `negative right´ to

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63. Manning´s views are in The New Zealand Times, 7 July 1985, p.6.

64. WP, pp.79-80, 81, 82, 82-84, 84-85.

65. Sharp, `The "principle" of voluntary unionism´.

disassociation.[66] Not all rights are, as Professor Hart put it, `discretionary powers´: they are rather entitlements of very varied kinds.[67] There is the `right to education´ here, and it is compulsory. Locke, and many Catholics still, believe in a `right to life´. But that does not entail being free not to exercise that right. The Australians have a duty-right to vote: they may not be impeded from voting; but they must do it. We may therefore (so far as the concept of a right informs us) have a non-discretionary right to association in unions. It may be objected that the right at issue is a right to liberty (or Hohfeldian liberty-right) and that this alters, by specifying more closely, the case. Mostly, it is true, liberties or freedoms entail the liberty of the right-holder. But `liberty´ and `freedom´ are relational terms and their applications cannot be understood in the absence of specifications as to what agent is to be free from what hindrances to carry out what activities.[68] And it is a respectable traditional position that the freedom to associate is only the freedom of the right-holder from government prohibition on association.[69]

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66. Human Rights Commission, Membership of unions and the right to free association (1985), pp.10-11.

67. Famously in `Bentham on legal rights´ in A.W.B. Simpson (ed), Oxford essays in jurisprudence (London, 1973). But contrast the (correct) view of Alan R.White, Rights (Oxford, 1984), Chap.5. esp.

68. Connolly, op.cit, chap.4, discusses the recent philosophical literature.

69. Cf. Ritchie, chap.9.

What ought to be emerging very clearly by now is that the content of `rights´ and the conceptual structure of the relationship between `rights´ on the one hand and `liberties´, `obligations´, `powers´ and so on on the other are open-textured. The details may be filled in in many ways. Even the most obvious conceptual - and therefore seemingly content-neutral truths about rights - can be shown to be contingent on free decision. And moreover it can be shown that these free decisions are entirely substantive, and that they express a very clear view as to what forms of life are worth having and what not. In the case of the limitation to the right of free association the relevent substantive decision is to do with the role one thinks unions ought to play in our national life, and that substantive, `policy´ decision will guide one´s view as to whether it ought to include a right to disassociation or not. And to assert a blanket right to freedom of speech is certainly to express the `fundamental values´ of some New Zealanders: but it is equally to deny the value of many traditional marae `procedures´ governing speaking precedence and exclusion - procedures that clearly manifest the concrete and substantive decisions of many Maori. The substantiveness of the decisions that inform Section 12 on freedom from invidious discrimination may be demonstrated too. That liberty has all the appearances of a procedural one, neutral between ways of life. But the issues of whether people should be treated differently on grounds of colour, race, sex, ethnic or cultural origins, and religious or ethical belief were once very live and substantive - not at all `value neutral´. Nor of course were the rights of `due process´ now thought to be merely

procedural and value-neutral. The `policy´ that provided the justification of these procedures expressing the idea of `equality before the law´ was that of dismantling the ancient, hierarchical distinctions on which Europe was founded. Procedural rights are built on the decently-buried remains of substantive issues. Do we regard as merely procedural matters the questions as to whether there should be discrimination on grounds of age or sexual preference? We obviously do not. But we could, if the consensus allowed, in the way we allowed women equal right to the vote.

When Professor Hohfeld´s students listened to his mounting complexities about `rights´ with increasing anxiety they are said to have got up a petition to have him removed from his Chair. Bearing this horrid example in mind I will hasten to a close, I hope not too elliptically in my desire to make an end. The point is that nothing in regard to rights is simple, and a fortiori, nothing is self-evident. The rights we have or might have, we ought to have if having them can be shown to benefit the nation. They are matters of policy. And our judgements as to what will benefit us will vary from time to time and according to our understandings of the way the social organism actually works to the benefit of some and the disbenefit of others. The problems about rights are problems of detail. There is no conceptual necessity that we should not have rights to work and strike and to demand succour from the state in times of trouble. Not all rights are rights to liberty: `rights of recipience´ are perfectly genuine rights. There is no reason - on `human

rights' grounds - why the Maori may not claim,[70] on the basis of being a signatory to the Treaty of Waitangi, to be a separate iwi, and therefore to be entitled to the `cultural' right of `self-determination'. There is no reason to think that rights should be inalienable as there is no reason to think that they may not be forfeited. Finally, as to the rights of corporations constructed by voluntary association: there is no reason in the nature of `rights' why these artificial persons should not have rights. Nor is there any reason why involuntary corporations (i.e. cultural groups) should not have them. But, and in regard to the incorporation of the Treaty and in the light of American developments, it ought to be noted that if `group' rights are recognised then to a degree one is pre-empting the choices of future generations. One is entrenching separate identities and foreshadowing great difficulties in specifying criteria by which it may be decided just who inherits group-specific identity and the rights that go with it.[71]

I would conclude by saying the obvious: that I am sceptical about rights-talk because of its tendency to create blanket-thinking in the public mind. Nevertheless I do not doubt that the issues to which the White Paper and the Bill are addressed are important ones. Nor am I so much of an otherworldly academic

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70. As they have. Cf. Professor Winiata's paper at the Commission of Jurists' Conference, and - one of its bases - the decisions of the hui at Ngaruawahia, Sept. 1984, printed in Levine and Vasil, pp.183-85.

71. Cf. Nathan Glazer, `Individual rights against group rights', in Kamenka and Ehr-Soon Tay, pp.87-103.

to think it is not worth trying to address the problems and to alleviate them in our generation and for some time into the future. So it seems to me - for I do not deny the White Paper's claim the the executive could do with some controlling - that the most important `constitutional reforms' we could put in train would be to equip our MPs better to carry out their duties by providing them with more and better administrative and research assistance and by reforming the organisation and proceedings of Parliament. We might also instate Maori as an official language. Moves in these directions are being made and are to be welcomed. In such improved conditions the executive arm would get a more democratically-responsive and a more powerful and alert a master. The content of the law and the rights of New Zealanders would develop and change in response to the perceptions and desires of the electorate; and the judges would be free to do what they are trained to do and best at. No doubt the sovereignty of flesh and blood is a risky thing to live with: but the sovereignty of law and of rights is a myth, and it is a myth sustainable only in conditions of civic virtue. And civic virtue and knowledge would more likely be corrupted than fostered were we to have a Bill of Rights. Bills of Rights are full, as Bentham noted, of `hasty generalisation'.[72] Ours is not, but it will encourage that vice among the population.

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72. (ed) Bikhu Parekh, Bentham's political thought (London, 1973), p.260.