TOwards abolition of privy council appeals:
The judicial committee and the bill of rights

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I. Introduction

The right of appeal to the Privy Council from New Zealand is unnecessary and unresponsive to our national way of life and demeaning of our sovereignty. The advantages of a second-tier appeal cannot justify a court of last resort as inaccessible and innately paternalistic towards its charges as the Judicial Committee. This is a dispassionate view of an institution steeped in history and mystique, writ large in New Zealand's remaining constitutional links with Britain. The affection New Zealand has shown this venerable institution would explain why suggestions to end Privy Council appeals have met with now familiar cliches lauding their Lordships' Board. The issue is either not one to excite much political or constitutional interest or is too sacred for critical examination. It was extraordinary that, when our court structure was last reviewed in 1978, the Royal Commission's terms of reference did not allow for review of the Judicial Committee, the highest in our hierarchy of courts.

But a justiciable Bill of Rights may invite a more critical attitude. Will the Privy Council be accessible for appeals under an operative Bill of Rights? Will the Privy Council uphold “self-imposed” constitutional entrenchment? Will it assist the development of a “higher-law” jurisprudence appropriate to New Zealand? Answers to these questions support the case for severing this historical link. In advocating this, no opinion is expressed on the utility of entrenching rights and freedoms under a constitutional Bill of Rights beyond to acknowledge the opportunity it presents to rationalise our judicial system.

* The writer gratefully acknowledges the additional references provided by Professor Ken Keith, of the Victoria University of Wellington, who read an earlier draft of this article.


3 See the draft New Zealand Bill of Rights presented to the House of Representatives by leave of the Minister of Justice, The Rt. Hon. Geoffrey Palmer, on 3 April 1985. The Minister has announced that the draft bill will be formally introduced into Parliament in 1986.

4 See Article 28 of the draft Bill of Rights.
II. SUMMARY OF ARGUMENTS

Notwithstanding the omission of the Privy Council from the terms of reference of the Royal Commission on the Courts, the New Zealand Law Society presented to the Royal Commission the basic arguments for and against Privy Council appeals from a unitary State.\(^5\) Advanced were the following arguments for retaining the appeal:

(i) The right of appeal to the Judicial Committee means that the highest calibre of legal expertise is available to litigants at no cost to the New Zealand taxpayer. The United Kingdom by reason of its population has a larger reservoir of judicial talent.

(ii) The Privy Council acts as a check on the Court of Appeal. The right of further appeal has a significant effect on the quality of judgments of that Court.

(iii) The physical separation of the Privy Council from New Zealand gives it a greater measure of detachment than a local court. New Zealand is a small nation with a small population and it is impossible for its judges to be divorced from local influences.

(iv) The appeal to the Privy Council is essential to maintain a two-tier appellate system. A second right of appeal is necessary to ensure that, following the determinations of fact in the High Court, the legal argument has the opportunity to develop and mature. This facilitates the process by which legal argument is crystallised and refined to the essential issues.

The Law Society documented the following arguments for abolishing the right of appeal:

(i) An appeal to a court in the United Kingdom is inconsistent with our national identity.

(ii) Expense to the litigant is considerable.

(iii) An objective of the judicial system is to resolve disputes equitably and expeditiously. But because the law is, at best, uncertain, a certain proportion of appeals will always be allowed whenever there is a further right of appeal. Consequently the function of the legal system must be not so much to obtain the "right" answer as to bring about a final determination of disputes. This can be done both equitably and expeditiously within New Zealand.

(iv) The Privy Council lacks sufficient knowledge and expertise of local conditions and legislation peculiar to New Zealand.

(v) English jurisprudence will be influenced by the United Kingdom's membership of the European Economic Community and will become less relevant to New Zealand.

(vi) Fewer countries are retaining the right of appeal and it is doubtful that the Judicial Committee will continue to exist.

It is not proposed to deal individually with these arguments for and against Privy Council appeals. A question anticipated by the Government White Paper, *A Bill of Rights for New Zealand* (hereafter "the White Paper")\(^6\), is how the Bill of Rights will affect the equation until now supporting the right of appeal from New Zealand courts.

III. THE WHITE PAPER AND THE PRIVY COUNCIL

The White Paper states that:

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\(^6\) Commentary on the draft Bill of Rights, *supra*, note 3.
The introduction of the Bill of Rights will make it necessary to decide whether the Judicial Committee of the Privy Council should be the final authority in cases that come before the courts under the Bill. The draft Bill contains no provision relating to this.7

The White Paper proposes that the decision of the Court of Appeal ought to be final in litigation involving the Bill of Rights.8 It identifies two sorts of issue that would be expected to fall for determination by appeal to the Privy Council:

(i) whether New Zealand statutes in restriction of the rights and freedoms guaranteed are, in terms of Article 3 of the draft Bill, “demonstrably justified in a free and democratic society”; and

(ii) whether the New Zealand Parliament can, by simple majority of the House of Representatives, override the protections given by the Bill of Rights.

The White Paper addresses the utility of Privy Council appeals with respect to (i) but not (ii). The role of the Privy Council with respect to (ii) will be considered in Part VIII, below. With respect to (i) the White Paper proposes that judges from outside New Zealand should not be entrusted with the final authority to make the type of determination contemplated by Article 3.9 This proposal is supported in Part VI, below. However the White Paper recognises that if New Zealand is to end appeals to the Privy Council, then it must devise some acceptable alternative to the current second-tier appeal.10 This may be seen as presenting an obstacle given the lack of an obvious successor to the Privy Council and the difficulty of devising an alternative second-tier appeal from within New Zealand’s judicial hierarchy. However the inherent inaccessibility of the Privy Council shows this “obstacle” to be more apparent than real.

IV. INACCESSIBILITY

A primary objective of the legal system is that the courts must be readily accessible to the public, that recourse to them must not be unduly expensive.11 Yet from the establishment of our legal system in 1840 until 1932, only 104 appeals went to the Privy Council (5 of which were heard as one consolidated appeal), yielding an average of approximately 1.1 appeals per year.12 Recent New Zealand Law Reports indicate that the number of appeals has not increased significantly. For the period 1958-1973, 20 appeals went from New Zealand giving an average of 1.3 appeals per year.13 The later period 1975-1984 yielded 19 appeals giving an annual average of 1.9 appeals. These are, at best, modest increases given today’s efficient air travel and the prospect that we are becoming an increasingly litigious society. This reveals the inherent inaccessibility of the Judicial Committee: where elsewhere in the world would a court of last instance hear less than two appeals per year?

The kindest construction for the lack of appeals has come from Mr W. D. Baragwanath Q.C.:

8 Ibid., para. 8.8.
9 Ibid., paras. 8.10-13.
10 Ibid., paras. 8.7 and 8.15.
11 See the submissions of the New Zealand Law Society to the Royal Commission on the Courts, supra, note 2, at 131.
12 All Privy Council appeals from New Zealand from 1840-1932 are collated in the one volume (1840-1932) NZPCC. For further statistics, see the Hon. Mr Justice Haslam, supra, note 1, at 544.
There is the more important fact that every decision of the Court of Appeal which for whatever reason has not gone on further appeal to Downing Street potentially could have done so. The fact that a small proportion only of Court of Appeal judgments are [sic] taken further despite the availability of the further appeal adds greatly to the public confidence in the Court of Appeal.14

With respect, whether there can be drawn any correlation between the public standing of our Court of Appeal and the paucity of Privy Council appeals is questionable. Mr Baragwanath himself acknowledges in the first sentence (above) that there may be more than one reason for not appealing a Court of Appeal decision. These reasons are not difficult to discern.

Criminal appeals from the Court of Appeal can proceed only with the special leave of the Privy Council15 and traditionally it has been reluctant to intervene in the administration of criminal justice in countries retaining the right of appeal. In the Board’s Practice Statement of 193216 Viscount Dunedin stated, “[t]heir Lordships have repeated ad nauseam . . . that they do not sit as a Court of Criminal Appeal. For them to interfere with a criminal sentence there must be something so irregular or so outrageous as to shake the very basis of justice”. Although this latter statement may possibly be stronger than the authorities warrant,17 in practice leave to appeal will be granted only if a point of law of importance is raised and the grounds for appeal suggest that substantial injustice may have been done.

Such appeals then are rare, and successful appeals are almost unknown. The only modern example from New Zealand is R v Nakla.18 Yet much of the litigation involving the Bill of Rights will arise in criminal cases. Articles 15-18 of the draft Bill directly concern the administration of criminal justice. In addition a number of statutory offences in New Zealand may become the subject of challenge under the Bill of Rights in criminal cases as constituting unreasonable restrictions on the guarantees contained in Articles 5-14.

Leave to appeal in civil cases poses a lesser problem. Unless statute takes away the right, an appeal lies from any judgment of the Court of Appeal or, if this is refused, the special leave of the Privy Council. If the matter in dispute involves more than $5000, leave to appeal is a formality and the Court of Appeal is required to grant it.19 If the matter in dispute involves less than $5000, leave will be granted only if the appeal raises a question which ought to be submitted to the Privy Council “by reason of its great general or public importance, or otherwise”.20 Expense to litigants computing in the $10,000s is a further reason for lack of Privy Council appeals. One of the cardinal objects of a Bill of Rights is to extend the State’s judicial power over the matters contained in the

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14 Supra, note 1, at 418-419.
15 R v Kaitamaki [1981] 1 NZLR 527 (CA). Cf. Woolworths v Wynne [1952] NZLR 496 (CA) in which it was held that an Act enabling the Supreme Court to grant leave to appeal was not invalid, though it could not oblige the Judicial Committee to hear the appeal.
16 (1932) 48 TLR 300. For the situations generally in which the Privy Council will entertain granting special leave to appeal in criminal cases, see Sir Kenneth Roberts-Wray, Commonwealth and Colonial Law (1966), at 439 et seq.
17 See e.g., R v Nakla [1975] 1 NZLR 393.
18 Ibid.
19 See the Privy Council (Judicial Committee) Rules Notice 1973 (S.R. 1973/181) declaring to be a regulation for the purposes of the Regulations Act 1936 the New Zealand (Appeals to the Privy Council) Order 1910 (as amended by the New Zealand (Appeals to the Privy Council) (Amendment) Order 1972) made pursuant to s.1 of the Judicial Committee Act 1844 (Imp.).
20 Ibid.
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Bill of Rights. But in practice only the Crown, substantial corporations and wealthy individual litigants who stand to recoup or lose substantial sums will be able to underwrite the costs involved in Privy Council appeals.\(^{21}\) The financial burden is doubly onerous where the would-be appellant must seek the special leave of the Board since this requires sending local counsel to London or briefing the English bar, only to have to repeat the process to argue the appeal should leave be granted. Sir Garfield Barwick, Chief Justice of Australia who served on the Judicial Committee on several occasions, described this as "a very heavy process", an arrangement he thought "not . . . to be . . . very sensible".\(^{22}\) Sir Garfield also disapproved of the practice of successful litigants being coerced into discounting their judgments in the intermediate appellate court under threat of a defendant exercising the final right of appeal to the Board. Sir Garfield thought the right of appeal in these circumstances to be "a disturbance rather than a benefit".\(^{23}\)

The reality is that for most litigants the Court of Appeal is the court of last resort. Unlike the governmental bodies, institutions and agencies that will be subject to the Bill of Rights, the individual (for whom the Bill of Rights is intended) does not enjoy the financial backing of the State. At present there is no legal aid for appeals to the Privy Council in criminal cases.\(^{24}\) Under the Legal Aid Act 1969 the litigant of modest means may qualify for limited assistance in civil cases. This Act empowers a grant of legal aid to a respondent (judgment in whose favour is being appealed to the Privy Council), or to an appellant where the Attorney-General certifies that a question of law of exceptional public importance is involved and that the grant of aid is desirable in the public interest. However only persons whose disposable income is less than $2000 per year (or such greater amount as a District Legal Aid Committee may approve) are eligible for assistance and, in either case, it is available not as of right but upon the approval of the Minister of Justice or certificate of the Attorney-General.\(^{25}\)

Increased state legal aid for Privy Council appeals would alleviate the problem. But this may impose an unacceptable burden on the New Zealand taxpayer. It is instructive that the Report of the Royal Commission on the Courts listed second among its seven criteria for reform "economic feasibility".\(^{26}\) The Royal Commission reflected that the court structure must be economically feasible for there are necessary limits on expenditure. The financial burden on the State through increased legal aid would be compounded by a constitutional Bill of Rights since this expands the grounds for litigation resulting in comparably more appeals to higher courts. This endorses the point that to retain Privy Council appeals under the Bill of Rights would not be to extend the State's judicial power for the final appeal to the majority of citizens.

V. STARE DECISIS IN THE COURT OF APPEAL

The Judicial Committee seem to exacerbate the problems associated with a court of last instance as inaccessible as the Privy Council. In *Attorney-
General of St Christopher, Nevis and Anguilla v Reynolds\(^{27}\) the Privy Council unilaterally declared Commonwealth appellate courts to be subject to the inflexible rule of stare decisis applying to the English Court of Appeal established in Young v Bristol Aeroplane Co. Ltd.\(^{28}\) Attorney-General v Reynolds was an appeal from the Court of Appeal of the West Indies Associated States Supreme Court. The Court of Appeal held on the basis that it was bound by two of its own earlier decisions. Their Lordships allowed the appeal but held that the Court of Appeal was right in holding itself to be bound by its own earlier decisions: none of the exceptions to the rule in Young were applicable and that was the rule intermediate Commonwealth courts should apply. Although these pronouncements were obiter and of persuasive authority only, they were nonetheless couched as an injunction to the Commonwealth courts\(^{29}\) to regard themselves as imperatively bound by their own decisions save for the three exceptions in Young.

The reason given for insisting on such a strict rule is that if the Court of Appeal were free to overrule its previous decisions simply because it thought them wrong or inappropriate, there would be risk of excessive uncertainty and inconsistency in the law. Such freedom in the Court of Appeal is unnecessary because undue restriction on the development of the law is avoided by the court of last resort (meaning the House of Lords and the Judicial Committee) having the power to overrule itself and lower courts.\(^{30}\) It is also for this reason that the rule in Young is universally accepted as inappropriate in courts of last resort. Consider therefore what our Court of Appeal observed forty years ago in Re Rayner:\(^{31}\)

The Court of Appeal in New Zealand occupies a position in the judicial hierarchy which differs materially from that of the Court of Appeal in England. Owing to the expense and delay entailed in an appeal to the Privy Council, in general only a wealthy person can take the risk of the heavy costs . . . and the number of appeals is small. It consequently follows that the Court of Appeal is in effect, in nearly all cases, the final court in New Zealand.

To impose the strictures of Young on inter alia the New Zealand Court of Appeal is to ignore these realities showing an inflated perception of the Board’s limited appellate function. If as their Lordships asserted\(^{32}\) it was theirs alone to correct any error of law that may have crept into any decision of a Commonwealth appellate court, then we would need to question the ability of our law to develop or simply of our courts to correct themselves. There is an implacable logic to the view of Isaacs J. in Australian Agricultural Co. Ltd v Federated Engine Drivers’ and Firemen’s Association of Australia\(^{33}\)

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28 [1944] KB 718.
29 “So long as there is an Appeal from a Court of Appeal to their Lordships’ Board or to the House of Lords, the Court of Appeal should follow its own decisions on a point of law and leave it to the final appellate tribunal to correct any error in law which may have crept into any previous decision of the Court of Appeal. . . . No doubt [the opinion of their Lordships’ Board] would be treated with great respect. . . .”; supra, note 27, at 185-186 per Lord Salmon delivering the opinion of the Board.
31 Re Rayner, Daniel v Rayner [1948] NZLR 455, at 484 per Fair J.
32 Supra, note 29.
33 (1913) 17 CLR 261 (HCA), at 278. For similar sentiments, see Duncan v Queensland (1916) 22 CLR 556 (HCA), at 582 per Griffiths CJ. See also Piro v W. Foster & Co Ltd. (1943)
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when he said of the High Court of Australia when it was subject to review by the Privy Council, "[i]t is not . . . better that the Court should be persistently wrong than that it should be ultimately right". With less than two Privy Council appeals on average per year from New Zealand, this view is as apposite to the Court of Appeal today as it was to the High Court of Australia in 1913. A New Zealand Bill of Rights will effect major constitutional change placing even greater premium on the need for flexibility in the Court of Appeal. Since it is unthinkable that the Court of Appeal would seek undue restrictions on our legal development, it is not likely to recant on the freedom it has affirmed to overrule its own previous decisions. Nonetheless the excessive paternalism exhibited in Reynolds invites critical scrutiny of the appeal to their Lordships’ Board.

VI. JUDICIAL REVIEW UNDER THE BILL OF RIGHTS

(a) The “Article 3” determination

Guarantees in a Bill of Rights are statements of the on-going conflicts between the individual and the State; they are not, in terms, the resolution of them. This is made explicit by Article 3 of the draft bill which reads:

3. Justified limitations The rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as may be demonstrably justified in a free and democratic society.

Whether laws in restriction of the rights and freedoms guaranteed are to be struck down or upheld as valid will be for the courts to determine. As the White Paper observes, this will require them to make important value judgments with considerable consequences. Consequently this section is concerned to show that decisions under Article 3 ought not to be made by judges who lack intimate knowledge of New Zealand and its people and social conditions. This does not necessitate accounting for the possible judicial approaches to the court’s function under Article 3, of which at least four were adumbrated by Professor J.A. Smillie in [1985] N.Z.L.J. 276. The following only concerns which of two courts, the Judicial Committee or the Court of Appeal, is better qualified to be the final authority on judicial review under a Bill of Rights.

(b) Social philosophies and legal values

The social philosophies and scale of legal values appraised by judges adjudicating under Article 3 will be a pervasive influence on the Bill of Rights. It is therefore significant that Sir Thaddeus McCarthy upon his retirement in 1976 as President of the Court of Appeal should reserve for mention “. . . the difficulties of their Lordships in understanding the backgrounds

68 CLR 313 in which the High Court overruled its own previous decision in Bourke v Butterfield & Lewis Ltd (1926) 38 CLR 354. Since the High Court is now the final authority on the interpretation of the constitution, it doubtless has the power to reconsider its previous decisions interpreting that instrument without fetter by reference to the rule in Young v Bristol Aeroplane Co Ltd, supra, note 28. 34 See e.g., R v Loughlin [1982] 1 NZLR 236, at 238 per Cooke J. (noted infra, corresponding to note 88). For earlier vacillations of the New Zealand Court of Appeal on whether it should follow Young’s case (supra, note 28), see Re Rhodes, Barton v Moorhouse [1933] NZLR 1348; Re Rayner, Daniel v Rayner, supra, note 31; Preston v Preston [1955] NZLR 1251; Re Manson decd., Public Trustee v Commissioner of Inland Revenue [1964] NZLR 257. 35 See generally J.A.G. Griffiths, “The Political Constitution” (1979) 42 MLR 1. 36 Para. 8.10.
to New Zealand cases, our social philosophies, our ways of life generally, sometimes even our language". He believed it was only a matter of time before New Zealand would abolish the right of appeal. Sir Thaddeus's 13 years in the Court of Appeal (having also sat for a period on two occasions in the Judicial Committee) qualified him to observe the effect of that right upon the development of New Zealand law:

[T]here is what I think is the most important aspect of all — the heart of the matter — and that is the inhibitions which, in my experience of over 13 years in this Court, this right of appeal to the Board places on the capacity of this Court to develop our case law in a way which best suits New Zealand and the New Zealand way of life. This effect is strikingly apparent when the Board deals with statutes which have no counterparts in England and around which settled practices have developed over a period of years. But it is by no means confined to these . . .

These reflections raise two points. One, the proposed Bill of Rights will be a paramount constitutional statute falling beyond the traditional parameters of English jurisprudence — it will have no counterpart in English law. Settled practices will develop around it. And two, the guarantees contained in the Bill of Rights are couched without regard to specific limitations, yet it is trite law that none of our individual freedoms is absolute. Sir Thaddeus himself made this abundantly clear from the bench. It would follow even in the absence of an express limitation provision such as Article 3 that the content and parameters of the rights and freedoms contained in the Bill of Rights must be fixed according to case law, "in a way which best suits New Zealand and the New Zealand way of life". Brief regard should therefore be had to what the judicial function entails when upholding rights and delineating individual freedoms.

In Melser v Police (an appeal against conviction for disorderly behavior under s.3D of the former Police Offences Act 1927) McCarthy J. observed that the court in applying s.3D was there pronouncing upon "democratic rights of expression of opinion [c.f., Articles 6 and 7 of the draft Bill] and of protest against political decisions [c.f., Articles 6, 7 and 9]". His Honour continued that:

The task of the law is to define the limitations which our society, for its social health, puts on [individual] freedoms. Sometimes the law defines with precision the boundaries of these limitations; often the definition is stated only in very general terms [e.g. as with the

37 [1976] NZLJ 376, at 380. These reflections weighed with Sir Thaddeus in Finnigan and Recordon v New Zealand Rugby Football Union (Inc), unreported, CA 66/85, 19 December 1985, as a reason for declining the NZRFU leave to appeal to the Judicial Committee against the Court of Appeal decision granting standing to challenge the proposed 1985 South African rugby tour (judgment 21 June 1985). As to access to the courts, under what circumstances and subject to what conditions, Sir Thaddeus said these "... are not solely legal questions but ones in which the historical background, the racial make-up, and the trends in social aims and cultural perspectives of the particular country should be given great weight. ... It would be wrong for us to expect the Judicial Committee ... to be able to bring to the evaluation of those considerations the same backgrounds and awareness of this country's current social thinking as a New Zealand Court should be able to do". See also McMullin J. Cooke, Somers and Richardson JJ. held it to be irrelevant that the issue may be a domestic one involving "New Zealand" factors of which the Privy Council may or may not be apprised.

38 Ibid., at 380. Sir Thaddeus expanded upon these views before the Royal Commission on the Courts, para. 273.


40 Supra, note 38.

41 Supra, note 39.

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guarantees in the draft Bill]. In these latter cases, the courts must lay down the boundaries themselves bearing in mind that freedoms are of different qualities and values and that the higher and more important should not be unduly restricted in favour of lower or less important ones.43

This is judicial imprimatur to the fact that there are no value-free rights in a democracy. However, the hierarchy or scale of legal values observed by McCarthy J. is even more prominent where the battle for legal recognition of the competing interests is fought in terms of fundamental rights enshrined in “higher law”. Questions concerning the validity of statutes and common law rules per se do not arise under a flexible constitution: under a Bill of Rights these are threshold questions calling upon courts to weigh the policy and social consequences of rules of law against the philosophical justifications underpinning the individual rights and freedoms guaranteed. The legislature having made the political decision to entrench these rights and freedoms, the courts must make the qualitative judgments about them.

For this reason one must agree with the White Paper that the proper determination of the issues that will arise under Article 3 will demand an understanding of the priority New Zealanders attach to different and often competing values.44 This is not to imply that a community consensus on this “priority” can always be gleaned. With many social and political issues, society is clearly divided between conflicting sets of values. The basic structure of the draft Bill of Rights itself represents an uncertain compromise between the classical liberal and the socialist views of freedom and democracy.45 But accepting the pluralism inherent in developed societies, judicial solutions ought to appeal to autochthonous and not foreign conceptions of freedom and democracy based on one’s own social philosophies and values. Though seldom overtly identified, our social philosophies and values are a reflection of many things — our conception of equality through national economic and social planning, our bi-culturalism, even our original pioneer circumstance.

Our social philosophies and values are not British carbon-copies despite our constitutional and historical links with Britain. This will become more apparent and our constitutional and historical links more distant the longer Britain remains aligned to Europe as a member of the EEC. The European concept of “general principles of law” presents a quite different approach to fundamental rights and freedoms and methods of interpretation; general principles of law are a separate source of fundamental rights and freedoms under Community law derived from EEC Treaty provisions and national legal systems of member States.46 Britain’s commitment qua member of the Community to the supremacy of Community law will in time condition the approach and methods of interpretation of English courts and eventually the Law Lords in rights adjudication. To that extent, it is an unjustifiable risk that Privy Council appeals may become a mechanism to visit upon the Bill of Rights an admixture of British and peculiarly European ideas.

(c) The utilitarian calculation

Once having fixed the constitutional “worth” of the rights and freedoms

43 ibid., emphasis added.
44 para 8.12.
and their relationships *inter se* (and indeed their relationships with other individual or community interests beyond the constitutional protection of the Bill of Rights), courts under Article 3 must make “a utilitarian calculation as to where the balance of public welfare lies between unrestricted enjoyment of the guaranteed freedoms and any particular limitations on them”.

In short, do the benefits of unrestricted enjoyment in terms of overall public welfare exceed its costs?

This question will enjoin courts to take account of the sociology of New Zealand. It will necessitate a broadening of the categories of admissible evidence and the concept of judicial notice. But for these socio-legal functions, judicial expertise is no substitute for an intimate knowledge of New Zealand’s economic and social structures and sense of position in the world. This knowledge their Lordships manifestly lack. How many Law Lords could claim any personal understanding of New Zealand? With the notable exception of Lord Scarman who was guest at the 19th Triennial Conference of the New Zealand Law Society held at Rotorua, 24-28 April 1984, few indeed would have ever visited this country. The possibility was raised as recently as 1972 by the late Sir Richard Wild of an itinerant Judicial Committee sitting in the capitals of the Commonwealth assisted by local judges qualified to sit on the Board. At least this would have given life to the legal theory that the Judicial Committee is without location, a fiction that “[t]he Sovereign is everywhere throughout the Empire in the contemplation of the law.”

Ironically the Privy Council itself would seem to prefer the integrity of local judges for deciding whether restrictions on the guarantees in the Bill of Rights are “demonstrably justified in a free and democratic society”. The Privy Council interpreting Bills of Rights from Commonwealth countries possessing Westminster constitutions has eschewed the “austerity of tabulated legalism” found in other contexts of statutory interpretation. In *Minister of Home Affairs v Fisher* Lord Wilberforce delivering the opinion of the Board called upon courts to treat a constitutional document guaranteeing fundamental rights and freedoms as “sui generis”:

... calling for principles of interpretation of its own, suitable to its character ... without necessary acceptance of all the presumptions that are relevant to legislation of private law.

Lord Diplock in *Attorney-General of the Gambia v Momodou Jobe* called for Bills of Rights to be given “a generous and purposive construction”, as with Lord Wilberforce in *Fisher* adding that “[r]espect must be paid ... to the traditions and usages which have given meaning to the language [in which the rights and freedoms are guaranteed]”.

These *dicta* vent the socio-legal function of courts applying Bills of Rights. Part of that function is to evaluate the raft of economic, sociological and

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47 J.A. Smillie, *supra*, note 45, at 278.
49 Discussion on the Hon. Mr Justice Haslam’s paper, *supra*, note 1, at 554.
50 *Hull v McKenna* [1926] Ir. R. 402, at 404. Hence there can be no constitutional objection to the Judicial Committee sitting in any of the countries retaining the right of appeal.
51 [1979] 3 All ER 21.
52 Ibid., at 26.
53 [1981] 3 All ER 21, at 26. See also *Thornhill v Attorney-General of Trinidad and Tobago* [1981] AC 61, per Lord Diplock; *Robinson v R* [1985] 2 All ER 594 (P.C.), at 605 per Lords Scarman and Edmund-Davies (dissenting).
54 *Supra*, note 51.
other expert evidence comprising (in American jurisprudence) the "Brandeis brief" — the technique of bringing before the court as evidence statistical data, legislative practice and history, scientific discussions and departmental reports relevant to judicial review determinations. The Brandeis brief acquired its name from counsel before the American Supreme Court in *Muller v Oregon* 203 US 412 (1908). For discussion of the Brandeis brief, see Jaconelli, supra, note 48, at 195 et seq.


56 Ibid., at 49.

57 Ibid., at 49.

58 Cf, the Judicial Committee's reluctance in *Reid v Reid* [1982] 1 NZLR 147, at 153, to intervene in "... a matter of discretion in which the Court appealed from is much more favourably placed than Their Lordships to consider the relevant local considerations". See also *R v McDonald* [1983] NZLR 252 (PC), at 256.


60 Ibid., at 320 (emphasis added).
nature can discharge this type of onus, of establishing a rational connection between the restraint and the public interest pursued or sought to be protected. In one Canadian Supreme Court decision cited by Professor Keith the Court lamented the lack of extrinsic evidence adduced to justify the restraint under the equivalent of our Article 3: the Supreme Court would have desired more than the production of a single report of a committee set up by the Province of Ontario to study professional organisations in Ontario and the findings of a commission of inquiry to which the report alluded. Second, the freedom of association guarantee in Article 10 is specified to include the right to form and join trade unions “consistently with legislative measures enacted to encourage orderly industrial relations”. Again only evidence of a statistical, economic, social or, indeed, historical nature could assist an inquiry whether statutory measures encourage orderly industrial relations. And third, issues arising under Article 4 giving fundamental status to the Treaty of Waitangi could not be resolved than by reference to historical and sociological material. That much is acknowledged by the White Paper. For example, “[t]he application of the Treaty’s principles must be considered in the light of the whole ambience — social, economic and so on — at the time the question arises.”

And quoting the Waitangi Tribunal in its Motunui Report: “A Maori approach to the Treaty would imply that its wairua or spirit is something more than a literal construction of the actual words used can provide. The spirit of the Treaty transcends the sum total of its component written words and puts narrow or literal interpretations out of place.”

Ascertainment of the Treaty would prove problematic for a New Zealand Court. Yet more fundamental is whether New Zealand is willing to entrust the Treaty to an external authority understanding little about its historical or social significance.

VII. IS ENGLISH LAW PREFERABLE TO NEW ZEALAND LAW?

It is of interest to observe recent examples where the Court of Appeal has taken a distinctively New Zealand approach in cases involving criminal and evidential questions (even if this has meant departing from House of Lords authority) and to then consider the attitude of the Privy Council in Hart v O'Connor and Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd.

In Busby v Thorn EMI Video Programmes Ltd Cooke J. in the Court of Appeal cited Police v Lavalle and R v Loughlin to illustrate, as the law on entrapment stands in New Zealand, the wider judicial control over prosecutions than is accepted in England under the House of Lords decision in R v Sang. Unlike the position established in Lavalle and affirmed in

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62 Para. 10.42.
63 Para. 10.44.
64 Quere whether the Judicial Committee would relish jurisdiction over the Treaty; cf, their Lordsships' reluctance in Reid v Reid, supra, note 58.
65 [1985] 3 WLR 214.
68 [1979] 1 NZLR 45.
69 [1982] 1 NZLR 236.
70 [1980] AC 402. Three 1985 Court of Appeal decisions confirm the discretion in New Zealand
Loughlin, their Lordships in Sang would not be persuaded that a trial judge has a residual discretion to strike out evidence of crime unfairly or illegally obtained prior to the commission of an offence. Further cases cited as showing a wider judicial control over criminal trials in New Zealand were Police v Hall,71 R v Hartley72 and Taylor v Attorney-General73. Cooke J. noted that this last-mentioned decision established a jurisdiction to prohibit the disclosure of names of witnesses “apparently wider” than the House of Lords were prepared to accept in Attorney-General v Leveller Magazines Ltd.74 Notwithstanding the Leveller Magazines case, the Court of Appeal subsequently affirmed the authority of Taylor’s case in Broadcasting Corporation of New Zealand v Attorney-General.75

The leading illustration of a distinctively New Zealand development of the law of evidence is Jorgensen v New Media (Auckland) Ltd76 in which the Court of Appeal unanimously declined to follow the controversial House of Lords decision in Hollington v F. Hewthorn & Co. Ltd.77 The Court of Appeal decision was given in advance of statutory reform in England that in civil proceedings a criminal conviction was admissible evidence of the fact of guilt. A further illustration is R v Uljee.78 Here the Court of Appeal held that the privilege of confidential communication between solicitor and client prevented a policeman testifying to an admission overheard from a solicitor-client communication. This decision was entered notwithstanding the long-standing authority established by the English Court of Appeal in Calcraft v Guest,79 a decision thought still to represent the law in England.

A more recent departure from House of Lords authority was in Bushy’s case80 itself, wherein the Court of Appeal declined to follow their Lordships’ decision in Rank Film Distributors Ltd v Video Information Centre.81 In Rank Film Distributors Ltd the House of Lords upheld the privilege against self-incrimination in civil proceedings where information and documents sought by an Anton Piller order would tend to incriminate the defendant. In Bushy’s case, however, the Court of Appeal held that such information could be obtained under Anton Piller orders provided it would not be made admissible in criminal proceedings for an offence related to the subject-matter of the action in which the order was made.

House of Lords' decisions, while not strictly binding on New Zealand courts, are accepted as being of the highest persuasive authority.82 As in the above

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71 [1976] 2 NZLR 678
73 [1975] 2 NZLR 675.
75 [1982] 1 NZLR 120.
77 [1943] KB 587.
80 Supra, note 67. See also Fletcher Timber Ltd v Attorney-General [1984] 1 NZLR 290; Brightwell v Accident Compensation Commission [1985] 1 NZLR 132.
82 See Bognuda v Upton and Shearer Ltd [1972] NZLR 741 (CA), at 757; North Island Wholesale
cases, only after weighty consideration will the Court of Appeal not follow the House of Lords on a matter of English law of relevance to New Zealand. Yet in Hart v O'Connor83 and Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd84 the Judicial Committee pronounced that where matters of English law are involved it will consider itself imperatively bound to follow a House of Lords decision which covers the point in issue. “The Judicial Committee”, said Lord Scarman delivering the opinion of the Board in Tai Hing, “is not the final authority for the determination of English law. That is the responsibility of the House of Lords in its judicial capacity”.85 Lord Scarman cited as an illustration of “the principle in operation”:

... the recent New Zealand appeal Hart v O'Connor [1985] 3 W.L.R. 214, in which the Board reversed a very learned judgment of the New Zealand Court of Appeal as to the contractual capacity of a mentally disabled person, holding that because English law applied, the duty of the New Zealand Court of Appeal was not to depart from what the Board was satisfied was the settled principle of that law.86

This appears to recant on the doctrine apparently accepted by the Board in Australian Consolidated Press Ltd v Uren87 that the common law in relation to primarily domestic matters can develop along different lines in different countries, at least so far as such developments are not founded upon “faulty reasoning or misconception”. Consider therefore the proviso the Court of Appeal added in Loughlin, that “Lavalle should be regarded as continuing to state the law of this country [notwithstanding the House of Lords decision in Sang], unless and until a change is made on any such reconsideration by this Court or by a decision of the Privy Council in a New Zealand case”.88 Were the Board to now consider that matter, following Tai Hing and Hart v O'Connor the only question for their Lordships would be whether English law should or should not govern the law of entrapment. And since there is no apparent reason why English law should not apply, their Lordships would presumably hold themselves bound to follow the decision in Sang. It may be thought that the possibility of such an appeal is slight owing to the Privy Council’s reluctance to grant special leave to appeal in criminal cases. But recent law reports have shown the Privy Council more inclined to intervene in criminal cases where the grounds for appeal allege a denial of constitutional right under a Bill of Rights.89

Apart from effectively changing the rules of stare decisis in New Zealand, the pronouncements in Tai Hing and Hart v O'Connor impute that, for purposes of New Zealand, English law (e.g. Sang) is inherently preferable to New Zealand law (e.g. Lavalle). In other words, whether sitting in the House of Lords or on the Board, their Lordships know what is best for

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83 Supra, note 65.  
84 Supra, note 66.  
85 Ibid., at 331.  
86 Ibid.  
87 [1969] AC 590, at 642-644; cf, Broome v Cassell & Co [1972] AC 1027, at 1067-68. See Mr Justice Cooke, supra, note 67, at 297 and 303: “One takes it to be no longer rationally arguable that there is only one common law ... unity and uniformity as goals are largely obsolete”  
88 Supra, note 69, at 238 per Cooke J delivering judgment of the court.  
89 Bell v Director of Public Prosecutions of Jamaica [1985] 2 All ER 585 (PC); Robinson v R [1985] 2 All ER 594 (PC).
New Zealand even if our own judges disagree. Two replies suffice. First, rights adjudication under a Bill of Rights seldom entails necessarily “right” answers in the strict legal sense: it is predominantly “value-dependent”, the decision of the court resting more on social policy or judicial philosophy than “legal” analysis. Second, English judges do not have a monopoly on wisdom, and it has never been a reason for retaining Privy Council appeals that New Zealand lacks the necessary legal talent to administer its legal system without their Lordships’ patronage. Sir Thaddeus McCarthy upon his retirement as President of the Court of Appeal entertained “no doubt at all” that New Zealand has the legal talent to make the necessary judicial recruitments without need for an overseas court of last resort. This was a view Sir Thaddeus said was shared also by his two predecessors in office, Sir Alfred North and Sir Alexander Turner.90

VIII. ENTRENCHMENT AND THE PRIVY COUNCIL

A question that would befall the Privy Council under the Bill of Rights is whether the New Zealand Parliament can legally bind itself to the special procedures of law-making contained in Article 28 of the draft Bill. Essentially there are three reasons why this question should not be left to English judges. These concern the role of constitutional discourse; the likely inhibitions resulting from the effect the ruling would have on English constitutional doctrine; and the subjugation of New Zealand’s constitutional autarky.

(a) Constitutional discourse

It is not correct that New Zealand must await benign revolution to negotiate the change from continuing to self-embracing sovereignty.91 Whilst this transition cannot be achieved by routine political gesture, the constitution does not slumber because it is not experiencing revolutionary upheaval. Simply to point to the traumatic events which, in other States, have led to the adoption of a new constitution or Bill of Rights does not account for the quieter forms of constitutional change.

One method of discerning quieter forms of evolutionary change is to monitor changes in constitutional discourse over given periods of time. By “constitutional discourse” is meant the totality of statements of what the constitution is or ought to be: constitutional meaning is dependent on an “interpretive community”92 of officials, judges, the Attorney-General and parliamentarians versed in constitutional matters, lawyers and constitutional commentators whose utterances comprise the largest part of authoritative discourse on the constitution. A changed constitutional discourse is held hence to signify prescriptive constitutional change.

The Bill of Rights, if adopted, may be the culmination of an emergent “rights discourse” in New Zealand from the 1960s. Characterised by concern for citizen’s rights and distrust of omnicompetent legislative power, this evolving discourse is embodied in the growing constitutional concerns of

officials, lawyers and commentators since the 1960's; it is now also embodied in the judgments and other writings of two of New Zealand's senior judges, Sir Owen Woodhouse and Sir Robin Cooke. In the 1979 J. C. Beaglehole Memorial Lecture, "Government under the Law", Sir Owen called for legal definition of the conventional restraints on legislative power through adoption of a written constitution and Bill of Rights. Sir Owen advocated this as a form of constitutional insurance against an abuse of parliamentary power. Sir Robin Cooke has been the foremost protagonist from the bench of the rights discourse through his questioning, in five Court of Appeal decisions since 1979, whether even Parliament has power to override fundamental common law rights embedded in the legal system. In the 1984 F. S. Dethridge Memorial Address, "Practicalities of a Bill of Rights", Sir Robin extrapolated beyond inalienable common law rights to also advocate a constitutionally entrenched Bill of Rights. Sir Robin's reflections encapsulate the retreat from parliamentary sovereignty questioning even the authority of Parliament itself:

If ever a Government indifferent at heart to basic rights were to hold office in this country, it could force through, possibly even in a matter of hours and by the barest of majorities, legislation opposed to basic principles of justice. Orthodox theory in the past has been that the Courts could not intervene. I am not so sure; the authority of Parliament itself — 'supremacy' as it is often called — ultimately turns on judicial recognition.

Judicial recognition of parliamentary authority is accorded as part of the entire discourse on the constitution — of what the constitution is or ought to be. But a constitutional discourse is by definition parochial, not international. Since the Judicial Committee is not privy to what is perceived and being said about the constitution, it is not placed to interpret the fact of constitutional change in New Zealand. "Whether guaranteed rights are really fundamental", Sir Robin reminded us in his 1984 address, "does not depend upon legal logic. It depends on a value judgment by the courts, based on their view of the will of the people." Sir Robin accordingly stressed the importance of giving the proposed Bill of Rights "practical sanctity", of doing all that is necessary to bring about a consensus for the entrenchment of rights. Whether the Bill of Rights attains this "sanctity" through consensus is not something their Lordships could accord judicial notice through observation and experience, beyond the vagaries of hearsay.

(b) English doctrine and the "much-visited" question
Since 1947 New Zealand has been unimpeded by any Imperial restriction, substantive or procedural, on its powers of constitutional amendment. This

93 For a compendium of constitutional issues since 1975, see W.C. Hodge, "Civil Rights in New Zealand: Recent Developments" in New Zealand and the World: Essays in Honour of Wolfgang Rosenberg (W. E. Willmott ed.), 98, at 99-100.
96 Ibid.
97 Ibid. See also the White Paper, para. 7.18.
98 See respectively the New Zealand Constitution Act 1852 15 & 16 Vict., c 72, s.32 establishing the General Assembly and s.53 (as amended by the New Zealand Constitution Amendment Act 1973, s.2) conferring legislative authority; the Statute of Westminster Adoption Act 1947 adopting the Statute of Westminster 1931 22 & 23 Geo. V, c 4 into New Zealand law; the
absence of rigidity places New Zealand in the same position as the United Kingdom for purposes of the much-visited question: can a sovereign Parliament successfully bind itself to constitutional entrenchment through self-imposed "manner and form"?

This is a question of English law their Lordships have yet to decide. The Privy Council has upheld the efficacy of entrenchment in appeals from New South Wales in 1932 and Ceylon in 1965 but in neither case was the Board faced with self-imposed entrenchment of a sovereign Parliament. In *Manuel v Attorney-General* the English Court of Appeal gave judicial recognition to the two schools of thought on parliamentary sovereignty but held that its decision did not require it to make any ruling on the sovereignty of the United Kingdom Parliament. The question is whether the Judicial Committee would not feel constrained from upholding the special procedures of law-making under Article 28 of the draft Bill of rights owing to the constitutional similarities between the two countries. With the dual membership of the Judicial Committee and the House of Lords, would their Lordships in pronouncing upon Article 28 not also, in effect, be making an authoritative pronouncement on United Kingdom parliamentary supremacy? The stakes are too high to allow judicial recognition of parliamentary authority in New Zealand to be subverted by the politics of judicial decision-making in the United Kingdom.

(c) Constitutional autarky

The effect of the right of appeal on New Zealand’s sovereignty is discussed below. However the point should be made that questions of constitutional importance to this country should be decided by New Zealand judges according to our wants. To leave the ultimate question of judicial recognition of parliamentary authority — as would certainly arise under the Bill of Rights — to English judges is demeaning of New Zealand’s constitutional autarky.

The efficacy of entrenchment under the Bill of Rights could quite simply be put beyond doubt by availing ourselves of the request and consent procedure under s.4 of the Statute of Westminster 1931 (Imp). Pursuant to this procedure, New Zealand could avoid the question of self-imposed constitutional entrenchment by having the United Kingdom Parliament enact the Bill of Rights for us just as Britain enacted the Canada Act 1982 (containing the Canadian Charter of Rights and Freedoms) for Canada. Canada had little option but to prevail upon request and consent owing to Imperial restrictions on Canada’s powers of constitutional amendment under the British North America Act 1867. New Zealand, however, does have a choice given the absence of any Imperial impediment to constitutional legislation in this country. The fact that New Zealand does not propose a similar course as Canada, whilst this would guarantee constitutional primacy to the Bill of Rights, is that it would compromise our constitutional independence and


99 *Trethowan v Attorney-General* [1932] AC 526.
1 *Bribery Commissioner v Ranasinghe* [1965] AC 172.
2 [1982] 3 ALL ER 822.
3 See *Manuel v Attorney-General*, *ibid.*
national sovereignty. If that is sufficient reason not to pray in aid the United Kingdom Parliament, then it is sufficient reason not to surrender the ultimate constitutional question affecting this country to United Kingdom judges.

IX. CONSTITUTIONAL ANACHRONISM AND NATIONAL SOVEREIGNTY

The extant right of appeal to the Privy Council is an anachronism superfluous to New Zealand's needs. This proposition stands irrespective of a Bill of Rights. The raison d'être of the prerogative on which Privy Council appeals were founded (now given statutory form under the Judicial Committee Acts of 1833 and 1844) was described in *R v Bertrand* as "... the inherent prerogative right and, on all proper occasions, the duty of the King in council to exercise an appellate jurisdiction, with a view not only to ensure ... the due administration of justice in the individual case, but also to preserve the due course of procedure generally". Lord Normand writing in 1950 observed that it was necessary in the infancy of the Colonies that their courts should be subject to review by a tribunal "... for which the supremacy of law, the incorruptibility and impartiality of the judges and their independence of the executive were principles firmly established by ancient tradition".

The chief task of the Judicial Committee was to establish these principles in new territories, 'to preserve in them the due course of procedure generally' until it became part of their tradition.

Incorruptibility, impartiality and judicial independence are such foregone qualities of the New Zealand judiciary that there seldom arises the need to affirm them. Robson states that judicial independence in New Zealand was acquired even before their Lordships' derisory judgment in *Wallis v Solicitor-General* in 1903 accusing the Court of Appeal of subservience to the executive. Following the historic Protest of Bench and Bar led by Sir Robert Stout, then Chief Justice of New Zealand (who had not himself been party to the judgment reversed by the Privy Council), a *Times* leading article took issue: "[Privy Council] judgments might be a little duller but they might not be less sound if the utmost attention were given to the susceptibilities of courts which are as independent as our own and resent as keenly as ours what they think to be grave charges".

This historical account reveals that the administration of justice in New Zealand has long overtaken the above rationale for Privy Council appeals.

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4 See now cl. 14(2) of the draft Constitution Bill (to be formally introduced in 1986) to abolish the residual power of the United Kingdom Parliament to legislate pursuant to request and consent. See the commentary in Reports of an Officials Committee, *Constitutional Reform*, Department of Justice, February 1986, paras. 2.1 to 2.13.
5 (1867) LR IPC 520.
7 Ibid.
8 Ibid.
10 [1903] AC 173. Robson, *ibid.*, at 27, comments that "... some of the findings and remarks in the judgment of the Privy Council [in *Wallis*] make curious reading and would not have been made by any lawyer with a working knowledge of New Zealand conditions and caselaw". The Privy Council displayed a lack of knowledge of early New Zealand legislation, a misconception as to the educational system then in force, spoke of the Treaty of Waitangi as a law, and in the course of judgment overlooked the Rules of Procedure applying in New Zealand.
11 Appendix (1840-1932) NZPCC 730.
12 Quoted, *supra*, note 6, at 7.
Towards Abolition of Privy Council Appeals

Larger developments have overtaken a further rationale suggested by Viscount Haldane, for twelve years a Law Lord in the Privy Council, speaking extrajudicially in 1921. Haldane believed “the real work of the Committee [to be] that of assisting in holding the Empire together”. But the Empire was even then, he observed, “a disappearing body”. The right of appeal indubitably carries the notion that the Court of Appeal is in some indeterminate way in continuing need of their Lordships’ beneficence and guidance. As a former Attorney-General, Dr Martyn Finlay, observed in 1974, “[t]o say that there is need for a further appeal . . . is to imply that our Courts administer an inferior brand of justice . . . or that [their] judicial determinations fall short of total acceptability”. From an historical perspective, the right of appeal may even imply that “the due administration of justice [and] the due course of procedure generally” would be imperilled if not for the Judicial Committee. Such a proposition would be utterly derogatory of New Zealand’s constitutional maturity.

Also the actual form and forum for the promulgation of Privy Council decisions may detract from New Zealand’s constitutional self-image. A decision of the Judicial Committee is not in form a judicial decree but advice tendered to Her Majesty to be promulgated by Order in Council — “the very voice of executive authority”. Pursuant to an Order in Council made under the Judicial Committee Act 1844 (U.K.), every decision of the Judicial Committee promulgated by Order in Council is to be “executed by all Courts in like manner as any original Judgment of the Court appealed from should or might have been executed”. Her Majesty when receiving the advice of her Privy Councillors and making the Order in Council is not visibly performing a constitutional function as the Queen in right of New Zealand: qua “Elizabeth the Second, by the Grace of God Queen of New Zealand and Her Other Realms and Territories, Head of the Commonwealth, Defender of the Faith”.

The whole constitutional mechanism underpinning Privy Council appeals, indeed the Judicial Committee itself, is a vestige of Empire pre-dating the concept of a divisible Crown. For these reasons, the continuing right of appeal is contrary to the spirit of the Royal Titles Act 1974 redefining Her Majesty’s royal style and titles to accord primacy to her designation as Queen of New Zealand rather than on her status as Queen of the United Kingdom.

XI. IN LIEU OF THE PRIVY COUNCIL

Those who would retain the Privy Council return to the difficulties of substituting an alternative second-tier appellate court. The primary alternatives

13 “The Work for the Empire of the Judicial Committee of the Privy Council” (1921-23) 1 CLJ 143, at 154.
14 Ibid.
16 See supra, text, corresponding to note 7.
17 Sir George Rankin, “The Judicial Committee of the Privy Council” (1939-41) 7 CLJ 2, at 3.
18 Rule 27 of Order in Council Regulating Appeals to [Her] Majesty in Council from the Court of Appeal and from the High Court of New Zealand 1910; see supra, note 19.
19 Royal Titles Act 1974.
20 See NZPD, Vol 389 (1974), at 1-2 per The Rt. Hon. Norman Kirk. Cf the Seal of New Zealand Act 1977 also elevating New Zealand’s constitutional status. By virtue of s.3 of the 1977 Act all public instruments henceforth are to be sealed with the one official seal, the Seal of New Zealand, rather than with the Great Seal of the United Kingdom or one of the signets or the cachet.
are a supra-national appellate court with a regional designation; a peripatetic Commonwealth supreme court representative in membership of the countries within its jurisdiction; a second-tier New Zealand Court of Appeal; or in lieu of the second-tier appeal a horizontally restructured Court of Appeal. None but the last-mentioned of these alternatives is recommended. The assumption that the second-tier appeal is indispensable to the due administration of justice is, on examination, unfounded in unitary States unencumbered by any plurality of legal systems.

(a) A supra-national or peripatetic Commonwealth court

A supreme Imperial court of appeal to rationalise the appellate jurisdictions of the Privy Council and the House of Lords was first debated during the consolidation of the superior courts in the 1870s. A similar proposal was again debated at the Commonwealth and Empire Law Conference at Sydney in 1965 under the chairmanship of the then Lord Chancellor, Lord Gardiner. This was for a supreme peripatetic Commonwealth court of appeal to succeed the appellate jurisdictions of the Privy Council and the House of Lords with a membership to include local judges when sitting from the Commonwealth. This proposal was welcomed by some of the smaller Commonwealth countries which still used the Privy Council but was rejected by those Commonwealth jurisdictions which had either already freed themselves from the Privy Council or where dissatisfaction with the existing right of appeal was widespread. Apart from the insuperable difficulties associated with an itinerant court with a changing membership, a formidable obstacle itself was the need to win United Kingdom approval to abolish the appellate jurisdiction of the Lords and to accept for herself the new Commonwealth court as the final court of appeal from British courts. Robson writing two years after the Sydney Conference concluded that the chances of a truly Commonwealth court seemed "somewhat dim". He wondered "... if attempts to revive the declining Judicial Committee of the Privy Council or to create a substitute for it have not come much too late"

Excluding Mr Justic Kirby's proposal for a trans-Tasman commercial court in the context of the Closer Economic Relations bi-lateral accord, little consideration has been given to an Australasian or South Pacific judicial body. The logistical problems of travel, cultural diversity and a changing judicial membership may be less in the case of a regional supra-national court, yet any judicial body ascendant over new Zealand courts would require a surrender of sovereignty unpalatable to New Zealand. Moreover the benefits to be had from a supra-national or peripatetic Commonwealth court simply

23 It is understood that the (then) New Zealand Attorney-General, Mr Hanan, welcomed the proposal: Robson, ibid.; [1983] NZLJ 306.
24 Ibid.
25 Idem.
to preserve second-tier appeals are far from self-evident: the justification for the second appeal from New Zealand is considered below.

(b) A second-tier New Zealand Court of Appeal

Little consideration need be given to a second New Zealand Court of Appeal. Not only would the increased accessibility of a second local appellate court unduly duplicate appeals and undermine the finality of litigation, but any beneficial effect second-tier appeals may ultimately have could be retained through a horizontally restructured Court of Appeal.

(c) A strengthened New Zealand Court of Appeal

(i) Quaere the second appeal

Consider the two perhaps primary justifications for Privy Council appeals. These are, first, that the final right of appeal is necessary to ensure that, following the determinations of fact at first instance, the legal argument has the opportunity to develop and mature. And, second, that the Privy Council is better placed than an intermediate appellate court (such as the Court of Appeal) to perform a general supervisory function for laying down of guidelines for the development of legal principles by local courts.

If the first proposition is correct, then the New Zealand legal process would need to be deficient. The number of Privy Council appeals since the inception of our judicial system is too infinitesimal for the Judicial Committee to have played any appreciable role in the process by which legal argument in New Zealand is crystallised and refined to the essential issues. Also for the same reason (subject to occasional exceptions such as Hart v O'Connor) the Judicial Committee operating from Downing Street is too remote to assert a continuing supervisory jurisdiction over judicial developments in this country.

This throws into question the justification for second-tier appeals in the unitary State. Most often the legal argument is honed to the essential issues by the grounds for appeal from the decision at first instance reducing the second appeal to a mere reconsideration of the legal points taken. And it is far from axiomatic why the Privy Council rather than the Court of Appeal should know what is best for New Zealand legal development. Delving further, we find that the British Parliament actually abolished the second appeal to the House of Lords for a period in the 1870s without any misgiving for the quality of British justice.

The Judicature Bill introduced into the British Parliament in 1873 followed the recommendations in the First Report of the Royal Commission on the Judicature published in 1869. The Bill envisaged a Supreme Court comprising a High Court and a Court of Appeal. All appeals from England were to be heard by this latter court: double appeals were to be abolished by ending appeals to the House of Lords entirely. In lieu of the second appeal, the Bill provided that if a case were of sufficient importance or difficulty it might be transferred from an ordinary division of three judges of the Court of Appeal to be heard by a larger or full court.

The architect of the reform, Gladstone’s Lord Chancellor, Lord Selborne, later observed that the abolition of House of Lords’ appeals had the support of Bench and Bar. The Times and The Economist also staunchly supported it. The only initial resistance came from a small group of “backwoods peers”

27 Supra, note 65.
28 See generally Stevens, supra, note 21; also B. Abel-Smith and R. Stevens, Lawyers and the Courts (1967), at 47-51.
29 Lord Selborne, 3 Memorials Personal and Political 1865-95 (1896-98), at 308.
whose chief concern was the privileges of the House of Lords and the traditional rights of the hereditary peers. The bill proceeded through Parliament with "remarkable bi-partisan support" to receive the Royal Assent on 7 August 1873. But before it came into force on 1 November 1874 Gladstone was defeated at the polls and replaced by Disraeli. Disraeli's "emotional urge to appease the vested interests in the Conservative Party" proved instrumental in the restoration of the House of Lords in 1876 as the final appellate court from the three jurisdictions.

The Judicature Act 1873, abolishing the Lords' appeal from English courts, never became operative. Conservative opposition hardened when Selborne's successor, Lord Cairns, moved to complete Selborne's reform by foreclosing appeals to the Lords from Scotland and Ireland also. The withdrawing of these final appellate functions was seen to be a general weakening of the Lords' powers and an attack on the hereditary system itself. "However laudable the reforms", observed one legal historian, "they ran up against overriding political expediency, which required that the appellate system be used to prop up the declining prestige of the hereditary branch of the legislature". A Bill was passed into law in 1874 postponing the coming into force of the 1873 Act until 1 November 1875. In August 1875 the operation of the 1873 Act was further postponed to November 1876 finally enabling legislation to be passed in August 1876 restoring the judicial House of Lords, establishing it as a court separate from the legislative branch. With this, double appeals in Britain were revived as a quirk of politics and personalities without any higher constitutional justification.

(ii) Blueprint for reform

The Judicature Act 1873 contained the original blueprint for a strengthened single-instance Court of Appeal. It envisaged a three division Court of Appeal. The First Division was to be the senior division composed of five judges as opposed to three in the other two divisions, with a right of rehearing by the First Division in certain instances. The creation of a senior division was in large part to hear appeals from Ireland and Scotland, though the right of rehearing from the other divisions in English cases did preserve something of a limited second appeal.

A preferable reform would avoid the implication of a contrived two-tier appeal system (through a right of full rehearing) under the mantle of a single-instance Court of Appeal. The following offers a blue-print for reform. The permanent membership of the Court of Appeal would be increased to eight judges (nine if the Chief Justice were to remain ex officio member). This would permit two divisions composed of three judges each to sit concurrently or for a full court of five judges in cases of considerable or exceptional public importance to sit concurrently with a division of three. Two divisions of the Court would enhance judicial specialise within it, relieve pressure of workload and release more time for consideration of important or complex legal points. With a permanent membership of eight, a full court of seven judges could be convened if thought desirable in any case of

30 Stevens, supra, note 21, at 354.
31 Ibid.
32 Ibid., at 362.
33 Ibid., at 343. See also at 368-9.
34 Ibid.
35 For a modern proposal for a strengthened English Court of Appeal in lieu of the double appeal to the House of Lords, see L. Blom-Cooper and G. Drewry, Final Appeal (1972), at 407 et seq.
exceptional public importance (for example, in litigation involving the validity of legislation under the Bill of Rights). Furthermore, a complement of eight permanent judges would alleviate the problem when members of the Court currently take sabbatical leave, are given leave of absence to conduct commissions of inquiry, or are otherwise absent because of illness or similar cause. Except where a full court of five judges were sitting concurrently with a division of three, at least one member of the Court would always be free of courtroom duties. But ordinarily two members at any time would not be sitting since full court sittings of seven would be comparatively rare. The actual membership of the divisions could be rotated as needs require.

The trial judge in each case would certify (with or without application of the parties) whether a case was of sufficient importance to merit an appeal to a full court. If the judge did not consider that a full court hearing was justified, it would be open to counsel representing either party (or an amicus curiae) to apply to the court (a division of three) for a full court to be convened. Should it become apparent during the hearing of an appeal that a full court should have been convened (for example, where it transpires that legislation might be in contravention of the Bill of Rights), then the Court of Appeal should have the discretion to reconvene itself as a full court. In that event, the costs of both parties in the Court of Appeal up to the time that reargument was ordered would be met out of public funds.

Decisions of the full court would be binding on the Court of Appeal as ordinarily constituted by three judges, and the full court could overrule previous decisions of the latter. The full court would be free to depart from its own previous decisions though it would be expected to exercise the same degree of restraint currently exercised by our existing Court of Appeal.36 Subject to the due expedition of appeals, it might be desirable that a court of seven be convened if there were a likelihood that the Court of Appeal might be asked to overrule an earlier decision of the full court.

A permanent membership of the new Court of Appeal would be essential to guarantee the status of a court of last resort; the current administrative practice of resorting to High Court judges to supplement the Court of Appeal’s membership would discontinue. To increase the permanent membership of the Court and to desist from making temporary recruitments from the High Court Bench were both matters advocated by the New Zealand Law Society in its submissions to the Royal Commission on the Courts.37 The Society observed the significant increase in the Court of Appeal’s workload justifying an increased membership and the fact that decisions handed down by judges appointed because of their particular qualification to be appellate judges would be more authoritative. The one exception entertained to the rule that High Court judges should not be assigned to the Court of Appeal was in respect of criminal appeals where experience at first instance in criminal matters might justify the occasional presence of a High Court judge.

**XII. CONCLUSION**

While the Bill of Rights narrows the focus on Privy Council appeals, the question to retain or abolish the right of appeal is not one that can sensibly distinguish between general litigation and litigation under the Bill of Rights.

36 See e.g., McFarlane v Sharp [1972] NZLR 838 (CA) declining to overrule its previous long-standing decision in Barnett and Grant v Campbell (1902) 21 NZLR 484.

37 “First Submissions by the New Zealand law Society to the Royal Commission on the Courts — Part II” [1977] NZLJ 150.
As the White Paper observes, a question involving the Bill of Rights could arise in any criminal case and in many civil cases, either as a principal or as a secondary issue.\textsuperscript{38} Such questions could well be inextricably interwoven with other legal issues. Thus it is not an option to end Privy Council appeals where the interpretation of the Bill of Rights is in question, while leaving extant the appeal in other cases.

One argument is that there is no higher calibre of judge in the common law world than their Lordships and it is a reason for retaining Privy Council appeals that we can avail ourselves of their expertise without cost to the New Zealand taxpayer. However, this misses the mark on two counts. Firstly, it fails to recognise that indefinable part of a judge's qualification which is his intimate knowledge of the society in which he presides and upon whose members and institutions he sits in judgment. The Bill of Rights, if adopted, will demonstrate even greater need for judicial interpretations that accord with New Zealand's social philosophies and public law needs. The credentials for such interpretations cannot be acquired from Downing Street.

Secondly, the judiciary is the third, putatively the "least dangerous",\textsuperscript{39} branch of government. Recognition of this constitutional status of the judiciary does not (despite the inference of one lawyer recently)\textsuperscript{40} imply that the judges are or ought thereby to be subservient to the executive; constitutional government historically and factually encompasses all three estates of the realm — the executive, the legislature and the judiciary. For this reason it is misplaced to propose judicial expertise from abroad as a reason for retaining Privy Council appeals. New Zealand does not seek the assistance of the English, the Irish or the Scots in the other branches of government. Why then in the judiciary? We do not recruit British Cabinet Ministers or Members of Parliament, we do not now even look to Britain for New Zealand Governors-General. Even the Sovereign has a separate designation in her own right as Queen of New Zealand.\textsuperscript{41} With respect, this is why Sir Alec Haslam was wrong in drawing the equation between judicial and scientific and technological expertise as a crucial ground for retaining Privy Council appeals.\textsuperscript{42} Ironically his primary tests, "utility" and "efficiency" in the legal system,\textsuperscript{43} are satisfied only through New Zealand's autochthonous legal processes, the final right of appeal to London being a luxury few can afford. Sir Alec's preoccupation with their Lordships' expertise, for him, even justified "any implied detraction from dignity in seeking advice from abroad".\textsuperscript{44} Such deference denying New Zealand's constitutional maturity, frankly, is atavistic and it should be said so. If there is need for a watching brief on judicial developments in the Court of Appeal, then that can be aptly carried out by the Law Reform Commission, a continuously functioning body with power to investigate and review on its own motion and to recommend remedial measures to Parliament.

Lord Normand in his review of the Judicial Committee in 1950 observed

\textsuperscript{38} Para. 8.14.
\textsuperscript{39} Cf. Bickel, \textit{The Least Dangerous Branch} (1962). The Minister of Justice, The Rt. Hon. Geoffrey Palmer, has repeatedly promoted judicial review under the proposed Bill of Rights by reference to the judiciary as "the least dangerous" branch.
\textsuperscript{40} G. Chapman, "A Bill of Wrongs" [1985] NZLJ 226.
\textsuperscript{41} Royal Titles Act 1974.
\textsuperscript{42} \textit{Supra}, note 1, at 574.
\textsuperscript{43} \textit{Ibid}.
\textsuperscript{44} \textit{Ibid}.
that the continuance or abolition of the appeal in those territories which had reached full political development "is a question of convenience and not one of fundamental importance". New Zealand's full political status was no longer an issue even as Lord Normand was writing. Not, then, being of "fundamental importance", is it not now convenient to "patriate" New Zealand's legal processes leaving their Lordships to instruct elsewhere on the unity of the common law?

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45 Supra, note 6, at 5.