

RIGHTS DISCOURSE: ARE WE ALL IN THIS ALONE?

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I Introduction

This essay on rights discourse is intended as a theoretical introduction to the still-contested question of whether individual rights and freedoms ought to be constitutionally entrenched, beyond the reach and whims of passing legislatures. Canada and New Zealand are introduced as contrasting examples. It introduces different concepts of rights in liberal political theory and competing notions of communitarianism, which claim to more fully describe the reality of our individual lives. The former, particularly in its Kantian image of "rights as trumps", is a powerful theme in contemporary political discourse but not determinative in, for example, New Zealand. Whether resistance to this characteristically Modern self-image is due to lingering affection for some contested notion of community or simply to the realpolitik of constitutional reform is impossible to decisively say, but the intention here is to articulate some of the underlying conceptual issues. The aspiration is to inform arguments about the place of rights in the Western liberal democracies generally, and in particular to the (arguably) unfinished business of rights-driven constitutional reform in New Zealand. To that end this essay will canvass arguments which continue to swirl around current privileged images of rights-holding individuals and their relations with the state and with fellow citizens.

II Background

Human rights regimes are traditionally thought of as creations of legislatures, and with good reason. There has never been a distinct category of "common law human rights". One can, however, struggle to read one in via some terminological gymnastics and wishful thinking.

At its most general the enterprise might begin with the notion that as law's subjects we are permitted to do all that is not expressly forbidden by law. We may incur some kinds of social disapprobation for wearing odd clothes, committing adultery and so on but will not normally be held to legal account. There remains considerable freedom, though only "rights" in the fragile sense of awaiting the whim of the legislature.

The Rule of Law is a little more direct and specific in endowing us with rights to equal protection of the law and equal treatment before it. It claims to protect us from the exercise of arbitrary power in declaiming the rule of law, not of men - though note that the gendered term "men" already raises controversy. Other systemic questions present themselves. For example, the Rule of Law

presupposes some "fixed" conception of what the law is in order to impose it neutrally, yet even those only passingly familiar with law would acknowledge its indeterminacy. It is not just malleable in its application by fallible judges, but indeterminate at its core. There is a discretion in its application that inevitably arises from the indeterminacy of both "facts" and of "laws" competing rules and precedents, quite apart from the predilections of individual judges. It is trite theory to invoke the claim of the Realists, Critical Legal Scholars, Feminist Legal Scholars and so on that something other than "law" must be operating in the exercise of that discretion. How dark an image one wants to paint of that exercise of discretion will depend of course on one's politics, which of course is the whole point. Similarly we shall see with legislated rights and freedoms, whether constitutionally entrenched or not, that there are no guarantees that individual's "rights" will be honoured. As well, there are problematic questions of access, constrained as it is by ignorance and scarce resources. So claims of equal treatment under the rule of law must be contested - different judges will interpret and apply ambiguous law differently in different cases and before different parties, notwithstanding the fiction of legalism and its image of neutral judges mechanically applying predetermined legal rules toward some inevitable and single correct legal outcome.

Of course in the practices of the modern regulatory state the claim is also weakened. The modern state's intrusive regulatory apparatus, even in claiming to deliver on liberal promises of reasonable equality of opportunity, also promises the prospect of arbitrary decision making under the guise of its myriad schemes and rules of social welfare at the mercy of fairly broad bureaucratic discretion. That vulnerability extends not only to the substantive socio-economic rights provided (though decreasingly so) by the modern welfare state, but also to the minimal procedural rights which lie at the heart of the rule of law. They reflect principles of Natural Justice in the form of *audi alteram partem* (the right of both sides to hearing) and *nemo debet esse iudex in propria causa* (the rule against judicial bias). Such principles are assumed to be implicit in judicial proceedings and have traditionally constituted grounds for complaint against administrative bodies.

Another implied source of protection for at least procedural protections comes from the principle of Separation of Powers. The separation may be formally prescribed in constitutional documents as in Australia and the United States, or take the form of mere convention, as in Canada, New Zealand and England. The idea is that the erection of walls, or at least veils, between the legislature, executive and judiciary will offer some protection from unduly concentrated loci of law enactment, interpretation and enforcement. Again, it is a minimalist protection compromised by, for example, the modern administrative state with its delegation of regulatory and judicial powers to administrative bodies and its increasing subordination of the legislature to the executive.

Finally, and most significantly, there are occasional judicial hints of a deeply embedded, even quasi-"constitutional", body of common law human rights. Such an example would be the comment from a leading New Zealand jurist that some common law rights might "lie so deep that not even Parliament could override them".^[1] The implication is of some kind of "natural law" rights, though such claims will always raise standard questions of just what rights are included, who identifies and articulates them and more general questions of their status in modern, positivist law states.

For the primary constraint on any alleged common law rights is their susceptibility to legislative override. In the absence of constitutional constraints, sovereign Parliaments may legislate to constrain or eliminate what we take to be fundamental rights and freedoms. Whether or not that is

tolerable in a given society will depend upon its ideological perspective as to the relationship between the state and its citizens. One such ideology is liberalism.

III. Liberal Rights Theory

Liberalism is the dominant ideology of social organisation in the Western industrial democracies,[2] and paradigmatically in North America. Its values and normative assumptions dominate our social existence.[3] In the terminology of one theorist, it is a deep structure theory,[4] permeating all the frameworks of our institutional and social existences.

As an ordering principle for social and political life, liberalism focuses on the individual citizen rather than community. If individuals are free, the theory goes, to organize and pursue their personal life projects according to their own visions of the good life, their own values, their own route to maximum utility, then society as a whole will achieve the collective good, that is to say maximum communal welfare. Aggregate welfare is simply the arithmetic sum of individual welfares, and can be maximised only by allowing, in fact nurturing, optimal conditions for the individual pursuit of welfare, individually perceived. The individual is thus the unit of supreme social welfare. Note, however, that in this form of "utilitarian" liberalism the motivation is the optimisation of community welfare. Community welfare is the end point as much as individual freedom, though they are assumed to be mutually reinforcing. Note also that it suggests a negative conception of individual freedom vis-a-vis the state and community, in that those relations are characterised by freedom from coercion. It suggests not so much a positive endowment of rights as a negative freedom from intrusion.

Thus we see liberal economics mediated through the practices of individualist market relations in capitalism. The role of the economy is to produce those goods and services which individuals, exercising choice as free agents, decide they want in their pursuit of self-interest - at least in theory, though in practice consumer demand is of course in significant part a variable to be manipulated rather than a given to which producers must respond. With individuals exercising their free agency in personal consumption choices, and with producers responding to them, we have the image of a "free market" economy that seems to fit nicely with liberal political theory. The system is idealised as embodying allocative efficiency, wherein producers who best satisfy individual consumption choices will prosper (that is to say maximise their own utility through profits), and the result will be prosperity and wealth-maximisation. The role of the state may vary - from a more intrusive one of intervenor and regulator to more fully realise the free market promise, as in Keynesian economics, to a more restricted, minimalist role in neo-classical economics. At the micro level, note that this liberal economics is said to spawn economic actors variously characterised in such terms as "acquisitive/possessive individualism"[5] and "hedonistic atomism".[6]

Freedom of economic relations reflects freedom in political relations. Liberal political theory postulates a model of the individual as an unencumbered political agent invested with certain inalienable rights, and as a freely contracting economic agent bearing indefeasible property rights, pursuing inward-looking visions of the good life. That vision plays out in society as a market economy and social and political organisations which prize the individual, if necessary at the expense of

community. The legal regimes of Contract and Property law are examples. The economic freedom of capitalism seems to reflect and complement the political freedom of liberal democracy (although in fact neither is contingent upon the other).

Note, however, that the reality of social and political life often belies liberal theory, in that we exhibit profoundly communal behaviour both as individuals[7] and in collectives, such as families, neighbourhoods, religious groups, clubs, societies, schools, workplaces and so on. There has also arguably been a move toward a more pluralist form of liberalism, to the extent that some proclaim the death of liberal government at the hands of special interest groups.[8] On the other hand, that pluralist spin on liberalism might be seen as a more sophisticated form of liberalism as common-interest groups - empowered political agents - strive to assert their interests. As well the state, riding on a wave of Keynesian economic theory, became increasingly intrusive - not just in macro-economic manipulation of demand but in wide-ranging re-distributive policies,[9] notwithstanding later strains of economic rationalism which tempered them. Thus from both the state and its citizens come indications of a compromised, or at least a modified, liberalism.

But notwithstanding some contrary behaviours, we are in our social, economic and political relations imbued with classical liberal ideology - inclined to see ourselves as individuals preceding community, or as community writ small in interest group liberalism. That is not to say that we cannot and do not care for community - in the minutiae of our social and cultural lives, and in the practices of our governments, we clearly do. But the liberal ideal is reified, the abstract ideal made real, in the deepest senses in which we think of ourselves and "other". It continues to permeate our consciousness and inform our behaviour.

In its contemporary (sometimes called Kantian or deontological) form liberalism has shifted the emphasis away from utilitarian notions of maximum community welfare and toward notions of individual welfare as an end in itself - not merely a contribution to aggregate welfare. The individual exists and is defined prior to community rather than being constituted by it. Individuals are not merely the communal manifestation of utility maximisers - a medium through which collective welfare can be optimised - but rather are self-realising ends in themselves. There is respect for the inherent dignity of persons. It therefore follows that they might usefully be endowed with individual rights that precede and transcend community/the state - rights which reside in the individual qua individual rather than in a community-situated individual. Within a framework of such rights individuals will be relatively free to pursue their own notions of the good life, unconstrained by preferred or imposed notions of the good from community and / or the state.

Note that this notion of the individual as sovereign is clearly not a universal or timeless one, but can be seen as reflecting defining characteristics of Modernism. Detailed discussion of liberalism as a political embodiment of the Modern temperament is beyond our scope here, but its provenance must include notions of humans as autonomous, rational, freely choosing and self-defining subjects - the bedrock characteristics of the Cartesian ego.[10] If humans are self-animated by reason then received notions of the good life from church or state must give way to personal conceptions of the good life and the conditions for achieving it. Kantian liberalism goes to those conditions.

If we accept a general view of the preceding (Medieval) period as one of acceptance of received truths through the Christian church then we can contrast the Modern era, from the early seventeenth century, as one of a human (rather than God) centred quest for truth. Not only do we

see a scientific revolution based on empirical method but as well a philosophical revolution celebrating the faculty of reason. Descartes' doubting subject spawns the image of modern humanity as independent, self-defining, self-aware - our modern self-conception as rational, autonomous subjects.[11] Kant may have displaced our confidence in seeking objective knowledge of external "reality" but he also placed us at the centre of a self-ordered universe[12] - again a celebration of our capacity for self-determination. Thus does the Kantian form of liberalism celebrate individual humans as sovereign and free to pursue their own self-defined notions of the good life? Indeed, Modernity takes as given the notion of a free and rational subject who pre-exists social and political organisation.[13] Thus, for example, does (liberal) Law assume rational, autonomous, equally endowed legal subjects entering into contracts, behaving tortiously toward each other, falling afoul of criminal law, and so on?

Another overlaying geographic factor may be a particular affinity for the image of equally endowed (at least in terms of rights and freedoms), self-driven individuals defining their own place in the New World. Lacking a feudal and rigidly hierarchical past, it may be that "the reality of atomistic social freedom ... is instinctive to the American mind".[14] A similar temperament might well motivate other newly colonized states such as Canada, Australia and New Zealand, though of course they lack the revolutionary impetus of the United States.

Thus, whatever scepticism we may harbour at this modernist image of individuals making rational,[15] personal judgments it is surely an image - indeed a deep structure - which permeates our life ways and one that finds a fairly faithful rendering in the liberal ideology of politics, law, economics and, as we shall see, social life itself.

IV. Rights Controversies

Even within the Western industrial democracies, with their attendant deep structures of modernism and liberal political theory, there is controversy about the veneration of individual rights. For example, one might see an internal contradiction in the state's claim to a neutral stance with respect to ends, or more particularly to individual conceptions of the good life. The commitment to a neutral framework can itself be seen as a privileged value. The intent may be to promote tolerance and freedom (on the grounds that values are relative and lack a secure foundation for choosing among them) but tolerance and freedom are themselves values. They can hardly be defended on the same grounds, namely that no values can be defended![16] As well, there is conflict within the Kantian liberal tradition as to what rights and arrangements are necessary to realise a neutral framework. Some (egalitarian) liberals support a welfare state model which guarantees certain social and economic rights such as education, health care, welfare payments, perhaps a healthful environment, etc. Without such basic life goods the good life can be no more than an unrealisable dream for many. Re-distributive policies are necessary (though not intrinsically neutral!). Other (libertarian) liberals would reject such re-distributive policies in favour of market forces - the transition we have seen in many liberal democracies at the end of the twentieth century. But these are arguments over means, not ends.

The heart of the rights controversies rather lies in contested notions of the nature of the individual's relations with others and the shaping effect of those relations. The liberal vision, it is said, precludes a full and adequate recognition of the claims of citizenship and community on the individual.[17] We are born into and live in communities, we are shaped by them and we share certain common purposes. We are not, as Kantian liberalism suggests, all in this alone. The individual of the Kantian liberals is by definition an independent, freely choosing self - it is the ability to choose which necessitates the priority of the individual right over the communal good. A framework of guaranteed rights must be in place for there to be authentic choice.

But are we freely choosing in the sense of cool, detached evaluators of some a priori range of possibilities from inside some pre-social shell? Communitarians would say otherwise. If we are significantly/substantially defined by the communities which we inhabit - families, cities, causes, tribes, nations, vocational groups, clubs, classes, and so on - then we must surely inherit from them some (most?) of their values and aspirations. In a teleological sense we are situated within them and motivated by them - pulled by their gravitational force. We are substantially constituted by them (though, say liberals, we are more than them). The extent to which we are embedded in our community may vary across societies and time, but embedded we are. Thus Socrates felt obliged to accept his death as dictated by his fellow citizens rather than flee as he might have; Plato saw justice as driven by the common good and warned against the divisiveness of pluralism and diversity, and Aristotle saw the natural or perfect end of humans in the political associations of the city-states. Individual liberty did not, and does not, necessarily trump civic virtue.

The endowments of community are not given freely. They assume a sense of mutual obligation, of reciprocity. One's right to participate in community and draw sustenance from it is balanced by the obligation to contribute one's measure to it. The language of rights sits with a language of responsibility. We cannot, say communitarians, live on rights alone. That is not to say that communitarians are cross-dressing utilitarian liberals in seeking to maximise overall social utility. Rather they simply want the rights discourse to articulate and acknowledge the constitutive role of local community in shaping and nurturing individual lives. The Kantian liberal image is in that sense a distortion, even a caricature of the lived reality of social life. The thrust then is really more ontological - a more complete picture of the nature of being qua being - rather than teleological in the sense of being driven by aspirations to some maximised communal utility as is utilitarian liberalism.

But, say the communitarians, the Kantian liberal image is more than just a distorted image; rather it is a self-referential and self-realising model for generating alienated, disconnected individuals whose single-minded pursuit of selfish desires undermines and perverts the values and traditions of the communities which nurture them.[18] It is therefore more than mere quibbling about accurate descriptions of social reality. It is about normative conceptions of how to live, for each conception of individual and community prescribes a kind of social existence which will tend to be self-fulfilling.

Thus, say communitarians, who we are, the choices available to us and the choices we make, are significantly mirrors of our communities. So the unencumbered self of Kantian liberalism is in conflict with the situated self of communitarianism. So too then are notions of individual rights and community goods. The differences are not merely academic - communitarians might more readily ban pornographic books than would liberals, but might more readily regulate plant closings to

moderate the disruptive effects on local communities of a radical market economy.[19] Similarly, at a national political level, communitarians might favour a more protectionist economy as a buffer against the de-stabilising effects of globalisation. So the differences may well matter, and any society contemplating the place and status of individual rights would do well to consider its place on this continuum. Of course communitarians still face the intractable problem of identifying just what are the common purposes and values which are characteristic of a given community and, given that they will often be contested between and even within communities, who is to decide what they are.

This kind of social/cultural introspection is difficult to provoke and articulate, but may well seep through in the intuitive responses of a populace to (for example) constitutional reform. But does one therefore seek some kind of popular consensus - notoriously difficult to achieve since these are contested notions - or does one trust to one's elected representatives to accurately interpret the felt sense of community (or lack of it) in the particular society? Or, indeed, since they are contested notions is it more prudent to opt for individual rights and freedoms and leave it to individuals to live out their choices and their loyalty to various communities in making those choices? Or can we fully realize our potentials without acknowledging and honouring our community attachments - by failing to do so do we risk seeing them wither?

The ability to articulate community values and purposes becomes increasingly difficult with size. Families, causes and clubs produce a more defined and coherent set of values and purposes than do bureaucracies; intermediate forms of association - town meetings, school boards, local government - increasingly lack the participatory element of truly engaged citizens. Thus authentic communities probably need to be of limited size to nurture distinctive, self-defining and self-sustaining cultures. The gradual erosion in the political status and self-sufficiency of towns and cities vis- a-vis central governments would therefore have undermined community cultures. States, provinces and central governments and "big business" are so removed from the influence of individual citizens as to be self- defining.[20] They may have their own values and purposes but these may well be those of a disembodied corporate self rather than of the community of citizens. They are monolithic yet disconnected from individuals and community writ small. They articulate not so much an overarching framework of authentic shared values as a lowest common denominator of pre-communal "rights" that tend to isolate rather than connect individuals, for the shared goals will be bureaucratic and commercial rather than social. An exception might be religious affiliations, whose communal values and purposes may reach deeply into the spiritual and social lives of individuals and local congregations. But the steady decline of Christianity in the liberal democracies arguably makes the point - just another example of the decline in voluntary associations, though driven as well by the contradictory images of Modernity and its characteristic celebration of autonomous, self-directed individuals impelled by reason rather than faith.

In response the Kantian liberal would argue that these "large" forms of association - or at least those representing the state -do guarantee rights and do not attempt to guide the good, leaving individuals free to choose their communal affiliations at whatever level they desire. Their distance from individuals is their saving grace, for the slightness of their gravitational force leaves individual choice relatively unmarred. Communitarians would want them to reflect the good - the values and aspirations - of the community. As to non-state communities such as corporate employers, the Kantian liberal might shrink at their coercive aspects - shared goals linked to commercial success and personal career aspirations inescapably rooted in competition with one's fellows. Of course the

retort would be that in an ideal liberal world one would choose one's employer according to the degree of one's fit with its corporate culture, but that would be to deny the reality of pressing individual economic needs and limited choice. Most of us work to live, not live to work. The workplace imposes its own fatal constraints on individual choice - in working hours and conditions, the content and direction of one's labour, dress, conduct and so on. How real is individual choice among competing conceptions of the good life in this world of tight regulation of most of one's waking hours? Ironically, it is this world that (this particular form of) liberalism has delivered.

Interestingly, notions of political "left" and "right" become confused. The commitment of liberal economics to free markets suggests a "hands-off" approach to business. But what of intrusions into community culture? One might argue that the relentless promotion of materialist values in marketing is itself advocacy of a particular (materialist) notion of the good life that the freely choosing individual could live without (though ideally it might be said to just represent one more choice to the autonomous individual). Communitarians might prefer to promote, even guide, such intrusions so long as they accord with communal values. In the instance of a plant closing they might well actively intrude into commercial environment to mitigate the negative effects of lay-offs on community. But more generally they must deal with the argument that these business "values" don't merely reflect community values but rather shape them - they have a dilemma similar to that of the liberals, for both community values and individual notions of the good life are malleable and manipulable.

Of course we inhabit multiple communities, and societies exhibit contradictory notions of community at different levels. As individuals we are born and raised in families, and perhaps religions, grow up in neighbourhoods, towns and cities, join clubs and causes and vote (occasionally) in elections. Our values, purposes and interests change as we move through and between communities and we may come to disavow some previously embraced. Again, a liberal response would be that only maximum individual freedom of choice can sit coherently with these shifting and evolving allegiances. Indeed, they say, those freedoms - for example, of speech, association, religion, political association, and so on - are a prerequisite for the playing out of communal values writ small in individual lives. Even if we were wholly constituted by community our allegiances are fluid and choice (within the context of those guaranteed freedoms) is always to be exercised. In community writ large in the form of the state those values can become rigid and exclusive. Totalitarianism threatens. Any values endorsed by the state should be minimal and permissive in a Rawlsian sense. Thus only the liberal position leaves us free to live out whatever associational values we choose, or indeed are encumbered with.

Not so say communitarians. We are arguably most vulnerable to the mass politics of totalitarianism when we are not grounded in traditions, when we lack coherent values and purposes in some critical mass. With Kantian liberalism comes the spectre of isolated, dislocated, rootless selves without connection to others or to common values and purposes. Rights discourse, which at its best is about aspirations to human dignity and freedoms, risks descent into rights babble about "insistent, unending desires ...a legitimization of individual and group egoism ...vacuous, hard-edged and inflexible".[21] Again, we are more than this say communitarians, but that something more is lost in this liberal conception. Indeed this conception is itself a particular notion of the good life and in promoting the liberal state the state itself is not merely reflecting but creating the wider culture. It is

our lack of connection - of community - which leaves us most vulnerable to the state. Divided we are conquered.

That societies vary in the strength of their various communities is no doubt obvious but sometimes still surprising. Societies differ in the strength and relations between social groups which range through nuclear family to extended kinship groups to neighbourhoods to friendship networks to a variety of intermediate forms of more formal association (clubs, churches, schools, work, unions, and so on) to various manifestations of the state itself.[22] Thus do we construct "crisscrossing networks of associations and relationships that constitute the fine grain of society". [23] They reflect the need for connection with others, but must also manifest the tension with personal self-interest which is inevitably compromised in order to nurture those connections. To the extent to which they do so, and in so doing reflect an "internalized sense of reciprocal obligation",[24] they give the lie to the fearful image of alienated individuals meticulously calibrating and asserting their self-interest under the cloak of liberal rights and freedoms. We may be sceptical of the state's intrusions into our self-chosen life paths but still receptive to relations of trust and mutual obligation in many forms of voluntary association that lie between us and the state.

These communitarian sentiments might be characterised as echoes of the ethical models of Plato and Aristotle - the notion that ethics, as the study of the characteristics of a virtuous life, might be articulated through the study of human behaviours. Those behaviours indicated a proclivity to gather in social and political associations, and the ideal end - indeed true happiness - for the virtuous person lay in those associations. The common good transcended individual preferences and desires - indeed, in Plato's vision, diversity and pluralism are undesirable and compromise the social cohesion which is a necessary pre-condition for the common good to emerge.[25] Thus, community trumps the individual. Law, far from underwriting individual rights and freedoms as in the liberal state, must rather dictate, and where necessary, compel the conditions necessary for Plato's idealised republic.[26] Here then is the spectre of totalitarianism which communitarian positions must address.

So where does all this leave us? We might characterise present inclinations to privilege individual rights and freedoms as at least bearable if not entirely satisfactory. Arguably the notion of special protection of individual rights and freedoms against the state - read not as community but as the bureaucratic apparatus of government - are a necessary pre-condition for individuals to choose their own life ways, including participation in the communities with which they voluntarily choose to associate and identify. Individual rights and freedoms obviously include the freedom to choose membership or abstinence from the many forms of community available. Those choices must surely reflect in turn the influence of community on individual choice itself, but absent some seemingly unrealistic notion of a pre-communal self utterly divorced from and unaffected by social context, it seems that the influences of a plethora of communities and the gravitational forces they exert cannot be simply ignored. Those forces will pull individuals within and between many forms of community - in social life, in religious pursuit, in the workplace, in political life, and so on - and the individual must arguably be free to make at least those (restricted) choices. The communitarian ethos may not get adequate respect in current political discourses, but nonetheless plays out in the realities of social life, even in Kantian liberal states like America.[27]

However, excessive gravitational forces of particular communities may narrow the range of choice in that they may bind individuals so completely as to effectively constrain them from even considering other communities. Indeed one aspect of "community" is the exclusion of other communities and individuals - for example, communities of family or religious sect. Communities are defined by membership - who is "in" and who is excluded - and vary dramatically in their accessibility to new members. But fantasies and caricatures of extreme individualism and totalitarian communities are not helpful in explaining the complex reality of life in liberal democracies. We are (at least) not (yet) chaotic, atomistic societies of unbounded individual desires and wants, unencumbered by community attachments and the obligations they imply. Nor are we merely undifferentiated reflections of the particular communities that happen to shape us and suffocate any stirrings of individuality which might remain or even pre-exist the rigid conformity of the communally situated self. We are (relatively) free but do not (yet) wholly "roam at large in a land of strangers", [28] devoid of obligations to others.

Similar arguments might apply in economic life, where liberalism might be taken to recommend a free market economy and liberal law seen as underwriting it in the structures of, for example, contract law. Again, however, the reality of commercial relationships is reliance on trust and a sense of mutual obligation rather than the fine print of meticulously drafted contracts, even where they exist. Again, in political life constitutions and bills of rights themselves are not entirely of the language of self-interested individualism but rather seek to balance individual and community needs and aspirations and thus to "domesticate" the lone rights-bearer, [29] acknowledging individuals as "essentially social beings, situated within relationships." [30]

V. Are Bills of Rights Important?

On the one hand they are of little significance, nor do they offer much real protection. But on the other hand, they are fundamental to a healthy society, both in protecting precious freedoms and in articulating aspirations. on the one hand, they have little educational effect on the public consciousness, and remain the intellectual plaything of unelected and unaccountable judges. on the other hand, they represent a discourse that permeates our self-image as individuals and communities, and significantly shape our life ways. on the one hand, their articulation produces alienation and division. on the other hand, their silence leaves a vacuum to be filled by the repressive and suffocating tendrils of community and the state. They are rarely if ever voted in by consensus, yet they express some of our deepest yearnings. They expel us from the very communities that form and nurture us, yet they permit of the joyous freedom of authentic choice and to participate in a diversity of communities. They are nothing and they are everything.

Let us look at the arguments, with occasional reference to two recent examples of rights experience - Canada and New Zealand. Formal Bills of Rights were enacted in Canada (initially) in 1960 and New Zealand in 1990, though neither was entrenched in their respective constitutions. Prior to those enactments civil liberties were protected, if that is the right word, by principles of English constitutional law. [31] There was and is a balancing of notions of the Rule of Law and of Parliamentary supremacy. On the one hand, the Rule of Law permits any act not expressly

prohibited by law; on the other hand Parliamentary supremacy mandates an absolute power to legislate in virtually any area, including civil liberties. That power is subject in a very limited way by the restrictive interpretative principles of Courts; for example, a presumption in favour of legislative interpretations which are least restrictive of fundamental rights. However, those principles can only be applied in the presence of ambiguity and can at best "merely temper the extremities of Parliamentary supremacy".[32] Unless of course the Parliament is constrained by a constitution that includes, for example, entrenched rights and freedoms for citizens. Canada later enacted a constitutionally entrenched Charter of Rights and Freedoms in 1982.[33] New Zealand declined to do so.

VI. Arguments against Bills of Rights

Even where a strong, constitutionally entrenched bill of rights is enacted it can never be an absolute guarantee of protection. The "sovereignty of laws and of rights ...is sustainable only in conditions of civic virtue",[34] that is to say, they will hold sway in those conditions in which they are least needed since civic virtue can be relied upon[35] . Despotic governments will always find ways to abrogate rights, especially where there is little public enthusiasm or a strong culture of rights awareness.[36] But it is not only governments of whom we must beware - Courts too, to whom we look for ultimate protection against the state, may abrogate what we may take to be fundamental rights, even where they are endorsed by the state. In the nineteenth and early twentieth centuries the American Supreme Court, for example, was seen as employing rigid judicial interpretation of the Bill of Rights to block important reform legislation.[37]

Obviously different rights and different emphases on rights will wax and wane in different societies at different times, and Courts will not always be sensitive to these social currents. Courts may be characterised as "conservative" or "activist" depending on whether they are seen to lag or lead public sentiment but in both cases they will by definition be "out of sync" with the bills of rights they are applying. Indeed, given the complexity and subjectivity of rights arguments they might be expected to frequently diverge from public sentiment. There is of course a popular argument that it is not in any case the task of the Courts to reflect public sentiment, but rather to interpret and apply "the law" in some kind of legally sanctified vacuum in which public sentiment is irrelevant or at least not significant. The risk is of a certain rigidity in Supreme Court decisions (whether "conservative" or "activist") which once made are not (like legislative enactments) easily unmade. They require a change in judicial attitudes, possible but slow, or a constitutional amendment (by design difficult to achieve). Having said that, there is also an argument that by and large judicial attitudes are unlikely to differ dramatically from those of the political culture since they will largely draw on a common pool of candidates and indeed politicians will play an important role in the selection of judges.[38]

Another argument would be that the formal entrenchment of certain selected (and often merely procedural) rights will have the effect of downgrading other arguably more important rights - for example, formal procedural rights to free speech, religion, aspects of criminal justice and so on may derogate from substantive rights to material welfare, to work freely chosen, to a clean and healthy environment, access to cultural life and so on which some consider more important[39] - indeed

without which mere procedural rights are rendered meaningless - but which tend not to be included in bills of rights. As well, the mere existence of a bill of rights may lessen the urgency for the practice of the rights - arguably the case for African Americans since the civil rights movement of the 1960's, which has apparently not successfully transformed the social reality of private and systemic discrimination. An oppressed minority, having failed to translate formal negative political rights (against discrimination) into substantive equality in terms of social reality, may then be seen as even more "inferior" for having failed to do so, notwithstanding that the substantive discrimination they face in the private sphere remains untouched by a bill of rights. Indeed the nature of liberal society, with its emphasis on equality of opportunity but not of outcomes, will inevitably produce significant inequalities which will severely constrain life choices and chances.[40]

Note, however, that in the area of substantive life style rights there is at least a theoretical danger of the state endorsing or privileging certain notions of the good life, a role which is inimical to the core notion of individuals themselves making that calculation. Of course, there is also the practical problem that the granting of such rights implies a correlative duty on the part of the state, which many/most states simply cannot afford. Limiting articulated rights to the procedural therefore preserves the image of the state as merely providing a reasonably level playing field - an equally protected space for each individual.

Yet another important reservation about rights is that they may become a sword rather than a shield - wielded and brandished as weapons in some alienating struggle against one's fellow citizens and the state. As we saw earlier in the discussion above, this is the fear of many critics of the (particularly American) obsession with rights. Thus the "absoluteness" of rights talk in America is said to "downgrade rights into the mere expression of unbounded desires and wants" and further to induce "a near-silence concerning responsibility...".[41] Recall the image of isolated and probably alienated individuals meticulously calibrating their self interest behind a wall of rights. The wall is constructed and reinforced by constitutionally entrenched rights, with Courts supplying the mortar. Our only obligation toward others is to respect their similar rights - to avoid the active infliction of harm. Otherwise we "roam at large in a land of strangers".[42] The message becomes: "we are all in this alone". We become not merely indifferent to interconnectedness with other individuals and society but actually destructive of it through unrealistic expectations, heightened social conflict and an inhibited dialogue toward consensus.[43] Even if not totalising, the rights discourse can compromise and even erase communal fabrics as its language begins to shape us and eventually to dominate. We may not only lose the habits of association but even the language in which to express them. As we have seen, however, these are not inevitable outcomes for there is a continuum of collective versus individual rights along which a society may choose to locate. Arguably the American rights discourse is toward a more extreme individualist location whilst other societies have articulated different visions.[44]

Still another argument canvassed above is that the entrenchment of rights in a constitution inappropriately empowers unelected judges and so undermines the democratic system itself. This appeared to be an important factor in the hostility toward a proposal for an entrenched bill of rights in New Zealand, notwithstanding the absence of other traditional checks and balances within the institutional context - it is, for example, a unitary state with no Upper House of review. In fact, as we shall see below, this objection can be turned on its head to become the very *raison d'être* for entrenched rights and freedoms.

Finally there are other concerns which are difficult to demonstrate but which are raised as risks with respect to bills of rights and of empowering the judiciary through constitutionally entrenched bills. The necessarily broad language of a bill of rights may result in considerable uncertainty as to the law, though this will diminish as the rights jurisprudence evolves. Public ignorance of the new rights regime, and of course inadequate resources, may inhibit equal access - fears have been expressed in the Canadian context of, for example, an undue and inappropriate influence by corporations on Charter jurisprudence.[45] There is bound to be an increase in litigation and possibly longer delays in the Courts.[46] That seems a likely but expected outcome at least in the short term, but arguably a welcome consequence of heightened awareness and a robust rights discourse. There is a risk of developing a hierarchy of rights wherein those in the original bill of rights are privileged and become rigidified at the expense of other possibly evolving rights (such as those to a minimum living standard, or a healthful environment). Of course that seems a poor excuse for declining to articulate any rights at all - one must have some faith in future generations to re-define the rights regime, whether through an amending formula or the courts. Similarly, the argument that such constitutional reform would lead to a stagnation of constitutional development is absurd - does one refuse to reform a presently rigid constitution for fear that the reform will then rigidify the constitution! The emphasis on individual rights at the expense of the collective is, as we saw earlier, a powerful critique. As mentioned, care must be taken in the rights debate to capture as nearly as possible the values and traditions of the society and to locate the articulated rights and freedoms appropriately on the continuum of individualism versus collective. Difficult as that process may be it must also be an extremely valuable one in an intelligent and reflective society. The degree of difficulty should be reflected in the value of the outcome, and failure to articulate an outcome would itself be an indictment of the society.

In any or all of these instances a constitutionally entrenched bill of rights is vulnerable to misapplication and distortion, and may not only be ineffective but actually damaging. There are many, and sometimes persuasive, arguments against entrenched rights, and contrary arguments in support will have to be compelling. Some will take the form of refutations of the negative position but others will need to be more positive, even inspirational.

VII. Arguments in Favour of Bills of Rights

The most powerful of the "negative" arguments for an entrenched bill of rights goes directly to the entrenchment itself. In placing the rights largely beyond the reach of elected legislatures and in the hands of judges the qualification to majoritarian rule is not an unfortunate by-product but rather is the very point. The normative force of a bill of rights derives from its provision of a platform from which various interest groups - individual citizens, labour unions, women, aboriginal and ethnic groups, and so on - can launch moral claims.[47] But by definition the interests of the majority, both in society at large and (relatedly) in the legislature, may be inimical to those of individuals and minority groups. A "democratic" majority can also be a tyrannical one for the criminally accused, for racial and religious minorities, for political dissidents, and so on.[48] Democracy can not only be a blunt instrument that may be wielded clumsily but it may also be wielded inappropriately to crush legitimate dissent. If the liberal promise of conditions for individual self-realisation is to be observed,

and if the (majoritarian) state is to be restrained from endorsing, or worse enforcing, certain notions of the good life, then the state must be restrained by some form of counter-majoritarian checks and balances. Courts represent such a balancing constraint - though it does not follow that they are the best one, for judges are not necessarily the most appropriate actors for this role.[49] Note also that one safeguard against perceived judicial activism (or conservatism) is an express concession to Parliamentary sovereignty, for example in the kind of legislative override provided in Canada's Charter of Rights and Freedoms.[50]

But essentially the notion of judicial review of democratically elected legislatures boils down to the simple notion of applying the rule of law to the activities of governments themselves. The urgency for such review may vary with the institutional arrangements and political and legal traditions of the society - New Zealand, for example, arguably has urgent need in the context of its overwhelmingly powerful Parliament but less need in terms of its historical record. Canada had limited need in terms of both, which may help explain why its entrenched Charter of Rights and Freedoms provides for significant constraints on judicial review.[51] As a counter to the "anti-democratic" argument one might also draw attention to the limitations of democracy itself as practised in the so-called Western liberal democracies. Modern practices of democracy have arguably descended into ritualised elections of largely undifferentiated parties dominated by special interests and "sold" through media manipulation. In states operating on the Westminster system there is in effect a post-election dictatorship of the elected government, dominated by the cabinet - with party loyalty rigidly enforced there is little constraint on executive government. New Zealand provides an extreme example.

The most powerful "positive" argument for an entrenched bill of rights is its "nation building" aspect. A bill of rights can and ought to be a manifesto for the kind of society a citizenry sees itself as being and aspiring to be, an idealised image of first principles and the conditions it sees as important for aspirations to the good life, a statement of "this is who we are and what we believe". It can become a unifying national symbol for a country's political, cultural and social life, a codification of fundamental values which informs and nurtures civic cohesion.[52] It must of course be acknowledged that whatever conceptions of these defining values are put forward they are bound to be contested, therefore difficult to achieve and at risk of becoming exclusionary. But at least there will be a common foundation of citizenship wherein all are placed in equal relation with respect to the state.[53]

There is also of course circularity here, since the articulated rights and values will become self-reinforcing and will in turn shape legal and constitutional discourse as well as public sentiment. That may be dangerous - care must be taken not to be seduced by passing rights fads and moral issues that may not be enduring,[54] particularly as their resolution rests with appellate Courts whose decisions can be fairly rigid and difficult (though not impossible) to change. On the other hand one of the virtues of a bill of rights is its educative function. It can be expected to engender informed discussion and debate on the role of rights, the role of the state, the nature of individual relations, and so on. There will be a heightened public consciousness of rights and values and ideally a continuing process of evolution and re-assessment which will both follow and lead court decisions. The hope is that rights discourse will ensure that society itself, as distinct from negative images of the state, will become an ongoing subject of political and legal discourse.[55] Communitarians will argue an inherent contradiction here - that rights envisioned as a catalyst for nation-building will in

fact prove divisive and will tend to atomise us as social creatures rather than bind us. One response of course is that it is not the assertion of a right that is divisive but rather the original right-infringing act. In any event in both Canada and New Zealand the articulated rights are subject to such "reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society".[56] That constraint may be interpreted with the temper of the times, for example with evolving notions individual and community.

Another powerful argument for entrenching a bill of rights is of course that alluded to above - to act as a brake on the legislative powers of government. The nature of contemporary Western societies and their modes of government suggest an important role for an entrenched bill of rights. One such argument goes to the traditional separation of powers between the legislature, the executive and the judiciary. In the Western industrial democracies the executive is said to have assumed growing power and to assert considerable and even controlling power over the legislature - New Zealand is such an example.[57] Similarly, with an increasingly intrusive administrative state there is a corresponding risk of capricious administration of substantive state policy, typically by bureaucrats operating under delegated powers far removed from Parliament itself. In such a scenario a judiciary empowered to review legislative acts, at least in this area of individual rights and freedoms, can serve as an important and even critical restraint on concentrated power in the other branches of government. Indeed in federations such as Canada and Australia it has long done so in respect of division of power conflicts between central and regional governments. Concerns about concentrations of power will be increasingly relevant where other institutional safeguards, such as an Upper House of review, are of limited influence or even absent. Again, New Zealand is such a case.

An unrelated argument going to cultural contexts focuses on the increasingly heterogeneous nature of modern societies and the inability of traditional institutions like custom and religion to forge a common identity and set of values. With increasingly fewer shared referents of custom, religion, history or even ethnicity it becomes increasingly difficult to identify a lowest common denominator of political language intelligible to all.[58] As individual interests become increasingly diverse the legitimacy of majoritarian governments becomes increasingly problematic.[59] Law is not necessarily the important ordering system for those values, but with common values harder to identify law and its enforcement mechanisms are arguably now more universal and highly developed than other traditional forms.[60] Law is increasingly seen as a source of legitimacy. That will be true not only of its positivist manifestations but also of its silences, which themselves can take on unintended meanings.[61] Rights and freedoms not articulated may well not be honoured. Silence too may be self-fulfilling. In New Zealand, for example, this point has always been critical in relation to its indigenous peoples, but is increasingly true also of its growing non- Anglo Saxon population.[62] Of course the general point of rights discourse as a dialogue of shared fundamental values takes us back to the earlier notion of nation building. Cultural diversity makes it both more difficult and more important.

The international human rights context is also an important impetus for a robust domestic rights regime.[63] Examples of international conventions commonly ratified are the Universal Declaration of Human Rights 1948, the International Convention on the Elimination of all Forms of Racial Discrimination 1966, and the International Covenant on Civil and Political Rights 1966. After World War II there evolved an increasingly universal language of rights based on notions of pre-political

rights rather than positivist notions of rights as a grant from the state.[64] Most of the new constitutions allowed for some measure of review over legislative and executive action,[65] though the rights were not usually absolute.[66] Most of these post-war constitutions have included a basic inventory of social and individual rights,[67] that is to say a more balanced combination of individualistic and collectivist values than that of, for example, the American Bill of Rights.[68]

Finally, there is a straightforward argument that entrenchment of democratic processes of government is necessary - both process writ large in broad participatory rights such as freedom of opinion, expression, assembly and association, and process writ small in terms of procedural fairness in decisions affecting individual interests. The democratic system arguably needs protection against abuse by its own agents. Of course, as noted earlier, there is no ultimate protection - even here a "tyrannical" majority may be imposing its own privileged notions of rights and freedoms, or more generally its own perceptions of the conditions necessary for individual pursuit of the good life, on present and future minorities (or even majorities), subject only to later amendment by similarly tyrannical majorities (of, say, 75 per cent).

VIII. Conclusions

The debate about rights properly continues. The fundamentals of the debate are fairly clear. The Western liberal democracies are called that for a reason - liberalism is indeed their formative ideology. Its focus is on the relationship between the individual and the state, historically driven by utilitarian notions of maximum community welfare and more recently by a privileged status for the individual qua individual. The rights and freedoms needed by individuals to be free to choose and pursue their own life paths had some protection in common law, are given enhanced protection in legislative enactments and most fully in constitutionally entrenched bills of rights.

The protections can never be absolute, nor arguably should they be. Their centrality in modern industrial societies is contested and their outcomes under critical scrutiny, not least by communitarians. But they remain privileged in modern legal discourse, both as a pre-condition for modernist images of the good life and as a framework for articulating the aspirations of modern democratic states and their relations with citizens. They are meant to both protect us and to free us, though both claims are contested.

They are most fully realised in constitutionally entrenched rights documents such as the 1982 Canadian Charter of Rights and Freedoms and the American Bill of Rights, and found more recently in more compromised forms in the 1990 New Zealand Bill of Rights Act and the 1998 United Kingdom Human Rights Act. Whatever their merit those enactments exert a gravitational pull on our self-image as individuals and citizens. We internalise their values and act them out in political, economic and social life. We become them, though we are unsure if we are more than them, for they define the conditions for a minimal self but not a maximum self. But that is beyond their aspiration, which is merely to locate us as individuals in conditions which offer at least the possibility of some more fully realized self, whether it be through community or through some more completely articulated, pre-social self.

1. Cooke J in *Taylor v New Zealand Poultry Board* [1984] 1 NZLR 394 at 398 (CA) - for further references and comment see P Joseph *Constitutional and Administrative Law in New Zealand* (Sydney, Law Book Company, 1993) at 189 (n 131). See also F Brookfield "Parliament, the Treaty and Freedom: millennial hopes and speculations" (1994) *New Zealand Law Journal* 462 at 466-467.
2. Much of the following characterisation of liberalism is re-stated from an earlier article - see G. Leane "Rethinking Environment, Law and Society" (1997) 12 *Canadian Journal of Law and Society* 193 at 207-210.
3. See, for example, R Unger, *Knowledge and Politics* (New York, Free Press, 1975), p 8: "... though liberal theory is only an aspect of modern philosophy, it is an aspect distinguished by both the degree of its influence and the insight it conveys into the form of social life with which it was associated. All other tendencies have defined themselves by contrast to it; so it offers the vantage point from which to grasp the entire condition of modern thought"; and at 118: "Liberalism ... is also a type of consciousness that represents and prescribes a kind of social existence ... it overruns the boundaries of the realm of ideas and lays roots in an entire form of culture and social organisation ... it is a deep structure of thought". See also, for example, T Axworthy, "Liberalism and Equality" in *Equality and Judicial Neutrality* (Toronto, Carswell, S Martin, K Mahoney eds., 1987), p 43; M Simon, "Introduction to Hegel and Legal Theory Symposium" (1989) 10 *Cardozo Law Review* 847; R Stewart, "Regulations in a Liberal State: The Role of Non-commodity Values" (1983) 92 *Yale Law Journal* 1537; I McNeil, "Bureaucracy, Liberalism and Community - American Style" (1984-85) 79 *Northwestern University Law Review* 900.
4. See R Unger, *Social Theory: Its Situation and Its Task* (Cambridge: Cambridge University Press, 1987), p 88: deep structure theory is "[t]he attempt to distinguish in every historical circumstance a formative context, structure, or framework from the routine activities this context helps to reproduce."
5. S Presser, "Some Realism About Orphism or The Critical Legal Studies Movement and the New Great Chain of Being: An English Legal Academic's Guide to the Current State of American Law" (1984-85) 79 *Northwestern University Law Review* 869 at 892, 899.
6. I Macneill, "Bureaucracy, Liberalism and Community - American Style" (1984-85) 79 *Northwestern University Law Review* 900 at 919.
7. See generally, for example, F Fukuyama, *Trust: The Social Virtues and the Creation of Prosperity* (London, Hamish Hamilton, 1995).
8. See, for example, T Lowi, *The End of Liberalism: The Second Republic of the United States* (New York, Norton, 2 ed, 1979), p 22: "... pluralism [was] the intellectual core of the new liberalism which would eventually replace capitalism as the public philosophy ... the new public philosophy, interest-group liberalism, is the amalgam of capitalism, statism, and pluralism"; and at 36: "... the zeal of pluralism for the group and its belief in a natural harmony of group competition tended to break down the very ethic of government by reducing the essential conception of government to nothing more than another set of mere interest groups".
9. For example, one study suggested that more than 48% of the American federal budget is devoted to direct income transfers: P Schuk, "Regulation, Non-Market Values, and the Administrative State" (1983) 92 *Yale Law Journal* 1592 at 1605.

10. For a general discussion of the provenance and characteristics of the Modern world view see, for example, R Tarnas *The Passion of the Western Mind: Understanding the Ideas That Have Shaped Our World View* (New York, Ballantine Books, 1993), Part V.
11. See, for example, op cit n 10, at ch V.
12. Op cit n 10, at 341-350.
13. See, for example, M Glendon *Rights Talk: the impoverishment of political discourse* (New York, Free Press, 1991), p 10 as to this relation of liberalism to modernity. Note that the first of the two great moments in the history of human rights occurred during the coincidence of revolutionary upheaval in eighteenth century America and France and the burgeoning modern temperament. (The other moment came after the horrors of World War II in a wave of constitution-making and international movements, for example in the 1948 United Nations Universal Declaration of Human Rights).
14. L Hartz, *The Liberal Tradition in America: An Interpretation of American Political Thought Since The Revolution* (New York, Harcourt Brace, 1955), p 5-6.
15. See, for example, op cit n 10 at ch VI re the impact of Freud, Marx and Darwin and the implicit undermining of human reason as an ordering principle for human existence.
16. M Sandel, *Liberalism and Its Critics* (Oxford, Blackwell, 1984), p 1.
17. Ibid at 5.
18. For a rather stronger critique see, for example, M.Boochkin *From Urbanization to Cities: Toward a New Politics of Citizenship* (London, Cassell, 1995), p 220: "[T]he acquisitive individual constitutes a social malignancy that threatens to destructure and undermine not only social bonds but also the natural world"
19. Op cit n 16, at 6.
20. For an articulate rendering of this point see, for example, E Durkheim *The Division of Labor in Society* (quoted in F.Fukuyama, *Trust: The Social Virtues and the Creation of Prosperity* (London, Hamish Hamilton, 1995) (frontispiece): "A society composed of an infinite number of unorganised individuals, that a hypertrophied State is forced to oppress and contain, constitutes a veritable monstrosity ...Moreover, the State is too remote from individuals; its relations with them too external and intermittent to penetrate deeply into individual consciences and socialize them within. .A nation can be maintained only if, between the State and the individual, there is interposed a whole series of secondary groups near enough to the individuals to attract them strongly in their sphere of action and drag them, in this way, into the general torrent of social life ..." See also op cit n 13, at 119 - intermediate forms of association have been eroded by the combined effects of "urbanization, industrialization, bureaucracy, geographic mobility, mass culture and centralization of political power". As well the market economy arguably reorients people away from ends and toward means (especially money and power).
21. Op cit n 13, at 10.
22. See generally (and for an empirical survey) F Fukuyama, *Trust: The Social Virtues and the Creation of Prosperity* (Hamish Hamilton, London, 1995).
23. Op cit n 13, at 115.
24. Op cit n 22, at 196.
25. See, for example, W Morrison, *Jurisprudence: from the Greeks to post-modernism* (London, Cavendish, 1997), p 34.

26. Thus (Plato's Republic, 519c-520, quoted in Morrison, *ibid* at 34-35): "The object of ...legislation is ...the welfare of ...the society as a whole, and it uses persuasion or compulsion to unite all citizens and make them share together the benefits which each individually can confer on the community; and its purpose in fostering this attitude is not to leave everyone to please himself, but to make each man a link in the unity of the whole." (emphasis added).
27. See, for example, *op cit* n 22, at 50-1, characterizing America as historically demonstrating a proclivity for a "dense and complex network of voluntary organizations", albeit one that has experienced some erosion in recent generations and that might be seen as living off its previously accumulated fund of social capital. Of course it is this latter aspect that communitarians are anxious to redress.
28. *Op cit* n 13, at 77.
29. See, for example, *op cit* n 13, at 39-40, noting for example that German property and inheritance rights also impose duties and "should also serve the public weal"; see also (at 71) the acknowledgement of the "right to the free development on one's personality" (Article 2 of the 1949 German Basic Law) and (at footnote 92) the ruling of the West German Constitutional Court that "the concept of man in the Basic Law is not that of an isolated, sovereign individual; rather, the Basic Law resolves the conflict between the individual and the community by relating and binding the citizen to the community, but without detracting from his individuality" (emphasis added). Note also, for example, that even a "strong" bill of rights like the 1982 Canadian Charter of Rights and Freedoms avoids making rights absolute and subjects them (in s1) to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society".
30. *Op cit* n 13, at 74.
31. This was explicitly recognized in the 1960 Canadian Bill of Rights, which described the rights as existing before and continuing after the Bill, though this unfortunately had the consequence of encouraging the Courts to read the rights in a correspondingly narrow context, that is to say "frozen" as at 1960 (see, for example, W Tarnopolsky, "The Historical and Constitutional Context of the Proposed Canadian Charter of Rights and Freedoms" (1981) 44 *Law and Contemporary Problems* (#3) 169 at 173).
32. *Op cit* n 31, at 171-173.
33. Constitution Act, 1982: Schedule B to Canada Act, 1982 (UK), Part I.
34. A. Sharp "An Historical and Philosophical Perspective on the Proposal for a Bill of Rights for New Zealand" in *A Bill of Rights for New Zealand* (Legal Research Foundation Inc., Seminar, 16.8.1985) at 46.
35. Note similarly the well known quote from Judge Learned Hand: "Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it; no constitution, no law, no court can even do much to help it. While it lies there it needs no constitution, no law, no court to save it" (quoted in *op cit* n 13, at 143). Of course the obvious response is that ongoing argument about, and consciousness of, rights and freedoms will more likely preserve hopes and aspirations toward liberty. Strong bills of rights can serve both normative and educative purposes to that end.
36. *Ibid*.
37. See, for example, K Klare, "Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941" (1978) 62 *Minnesota Law Review* 265; see also

R.McMurtry "The Search for a Constitutional Accord - A Personal Memoir" (1982-3) 8 Queen's Law Journal (#1-2) 28 at 57.

38. For example, the controversial invocation of the War Measures Act by the Trudeau government in response to the 1970 October Crisis in Canada (triggered by terrorist acts by Quebec separatists) might well have been found to be "reasonable" and "demonstrably justified in a free and democratic society" under s1 of the later Charter of Rights and Freedoms (see P.Russell, "The Political Purposes of the Canadian Charter of Rights and Freedoms" (1983) 61 Canadian Bar Review 30 at 51).
39. See, for example, the 1948 Universal Declaration of Human Rights, which includes not only basic rights to life, liberty and justice but also certain economic and social rights.
40. Most obviously through inheritance - seemingly irreconcilable with liberal aspirations to a level playing field - but also in respect of inter vivos transfers of wealth and of course the socio- economic milieu of the family in which one is raised.
41. Op cit n 13, at 45; see also at 173 re American rights speech as "...characterized by self-expression and the pursuit of self-gratification, rather than by self-reliance and the cultivation of self- discipline". The wants of a people "...whose desires are unformed by the experience of participating in a culture larger than themselves" become "formless and unspecifiable" [quoting Christopher Lasch at footnote 5].
42. Ibid at 77.
43. Ibid at 14.
44. For example, the 1977 Soviet constitution subordinates rights of free speech, assembly and religious worship to "the interests of the working peoples and for the purpose of strengthening the socialist system" (A.Sharp "An Historical and Philosophical Perspective on the Proposal for a Bill of Rights for New Zealand" in A Bill of Rights for New Zealand (Legal Research Foundation Inc., Seminar, 16.8.1985) 3 at 4. To a lesser degree the German Basic Law attempts to reconcile individual personal development with interests and rights of others, the constitutional order and the moral code (see, for example, op cit n 13, at 71). Article 29 of the 1948 UN Universal Declaration of Human Rights includes a language of responsibility and duty, for example in the statement that "[e]veryone has duties to the community" and that rights and freedoms are limited "for the purposes of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society". The Canadian Charter of Rights and Freedoms (at s1) subjects the articulated rights and freedoms to "...reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society".
45. See, for example, A Petter, "The Politics of the Charter" (1986) 8 Supreme Court Law Review 473, and particularly at 490-493.
46. In Canada, for example, in the early years of the Charter there were approximately 500 Charter cases reaching the Courts each year, though over 90% related to criminally accused under ss7-14 (P.Russell, "Canada's Charter of Rights and Freedoms: A Political Report" (1988) Public Law [385] at 385-6).
47. See, for example, Tran Luan Vu N "The Canadian Charter of Rights and Freedoms: Justification, Methods, and Limits of a Multicultural Interpretation" (1996) 28 Columbia Human Rights Law Review 33 at 52.

48. The fear is of "the irrational forces that sometimes dominate public opinion and influence the State. The same forces turn revolutions into dictatorships, patriotism into chauvinism and democracy into tyranny of the majority". (J.Elkind "Bill of Rights Auckland Seminar commentaries" (Oct 1985), New Zealand Law Journal 230 at 230).
49. Indeed many liberal democracies have opted not for judicial review but rather for a tribunal dealing with mainly constitutional issues (see, for example, op cit n 13, at 161). For the purposes of this paper, however, we will accept the existing institutional structure and the role of Courts, leaving aside arguments as to whether some other form of constitutional adjudicative forum would be better suited than judges.
50. The reference is to s33, which allows for federal or provincial legislatures to declare an Act operative notwithstanding the provisions of s2 (Fundamental Freedoms) or ss 7-15 (Legal and Equality Rights) of the Charter for a renewable period of 5 years. It was a late inclusion reluctantly conceded by Prime Minister Trudeau in order to win the agreement of the provinces (P Hogg, Constitutional Law of Canada (Toronto, Carswell, 2 ed, 1985), p 692). Its merits are controversial but at least one commentator asserts that "...by permitting legislative review of judicial review the override clause removes much of the anti-democratic sting from judicial activism ...[and] we should give credit to the cunning of the legislative override in section 33, which affords political leaders disgruntled with judicial decisions a more civilised remedy than court-bashing or court-packing" (P Russell "Canada's Charter of Rights and Freedoms: A Political Report" (1988) Public Law 385 at 389, 399).
51. The reference here is to Charter s1, which subjects the articulated rights and freedoms to such "...reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society" and s33, which allows for federal or provincial legislatures to declare an Act operative notwithstanding the provisions of s2 (Fundamental Freedoms) and ss 7-15 (Legal and Equality Rights).
52. Op cit n 47, at 50-51.
53. Though note that even this can be controversial, for example in precluding notions of special status for Quebec in Canada or for Maori in New Zealand.
54. 3 See, for example, E McWhinney, "The Canadian Charter of Rights and Freedoms: The Lessons of Comparative Jurisprudence" (1983) 61 Canadian Bar Review 55 at 60, warning that we must beware of "...the jelling, as timeless absolutes of constitutional law, of temporary public fads or preferences, usually of a moral character, that happen to be current at the particular moment of constitutional drafting".
55. Op cit n 13, at 117.
56. See the 1982 Canadian Charter of Rights and Freedoms s2, and the 1990 New Zealand Bill of Rights Act s5.
57. See, for example, G.Palmer Unbridled Power: An Interpretation of New Zealand's Constitution and Government (Auckland, Oxford University Press, 2 ed, 1987), p 219-220: "The Executive almost invariably controls the House ...[and] through Parliament, has very wide powers to take away our most precious rights and freedoms".
58. Op cit n 13, at 172.
59. D Williams "Some Operational Aspects of the Bill of Rights" in A Bill of Rights for New Zealand (Legal Research Foundation Seminar, 16.8.1985) 77 at 84.
60. See, for example, op cit n 13, at 87: Law may become "the principal carrier of those few moral understandings that are widely shared by our diverse citizenry".

61. Ibid.
62. See, for example, G Palmer, M Palmer *Bridled Power: New Zealand Government under MMP* (Auckland, Oxford University Press, 3 ed, 1997), p 267.
63. The (non-entrenched) New Zealand Bill of Rights Act 1990, for example, explicitly declares in the Long Title that it is an Act "to affirm New Zealand's commitment to the International Covenant on Civil and Political Rights". Similarly, the Long Title to the New Zealand Human Rights Act 1993 declares that it is "...to provide better protection of Human Rights in New Zealand in general accordance with United Nations Covenants or Conventions on Human Rights".
64. Op cit n 13, at 38.
65. Though not necessarily judicial review, as in the United States or Canada, but rather some form of specialist tribunal dealing with constitutional issues (ibid at 161).
66. Op cit n 13, at 38.
67. Op cit n 13, at 161: the broad categories of rights include "human dignity, personal freedom and protections against arbitrariness, active political rights, especially freedom of voting, equality before the law, and society's responsibility for the social and economic conditions of its members". They often draw on notions of both modern social democracy and elements of classical and biblical notions of man, society and law, with individual rights linked to notions of responsibility and fraternity.
68. Ibid